Even my typist is poor and typist usually fussed [illegible]
Sometimes incorrectly. He may file write

TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG, Appellant/Cross-Appellee,	Case No. 82-1229 and
v.	Consolidated Nos. 82-1274, 83-1722, 83-1764
U. S. DEPARTMENT OF JUSTICE, Appellee/Cross-Appellant.	

Washington, D. C.
May 8, 1984

Pages 1 thru 63

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v.	:	Case No. 82-1229
U. S. DEPARTMENT OF JUSTICE, Appellee/Cross-Appellant	:	and Consolidated Nos. 82-1274, 83-1722,83-1764

Washington, D.C.

Friday,
May 8, 1984

The above-described matter came on for hearing, pursuant to notice,

Before:

The Honorable Circuit Judge Mikva
The Honorable Circuit Judge Bork
The Honorable Circuit Judge Starr

Appearances:

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P R O C E E D I N G S

ORAL ARGUMENT OF JAMES H. LESAR, ESQ.

ON BEHALF OF HAROLD WEISBERG

MR. LESAR: Judge Mikva and members of the panel, I am James H. Lesar, representing Mr. Weisberg.

Before we begin, Your Honors, I have been asked to advise the Court that Counsel plan to proceed in the following fashion:

I have allotted 20 minutes to my opening presentation and I wil reserve 15 minutes for my reply and Cross-Appellee presentation.

The Government will reserve 25 minutes for its opening and respond with 10 minutes.

Is that suitable with the Court?

THE COURT: Yes. I will ask, though, that the Government limit its 10 minutes to its cross-appeal.

[Inaudible.]

MR. LESAR: All right. Thank you, Your Honor.

I would like to begin just briefly with an overview of this case, which is a Freedom of Information Act case for records pertaining to the assassination of Dr. King and some related matters.

The case grows out of requests originally submitted by Mr. Weisberg in 1969 -- requests made shortly after James Earl Ray entered a plea of guilty to the assassination

of Dr. King. Those requests were for such matters as ballistics evidence, crime scene photographs, evidence that persuaded the FBI that James Earl Ray acted alone and evidence that the FBI had provided other writers.

Those requests were never acknowledged.

In 1975, Mr. Weisberg submitted two new requests, reduplicating in part and expanding upon the 1969 request.

Seven and a half months after the first request was made, the April 15, 1969 request, Weisberg brought suit on it. Three days later, the Deputy Attorney General advised his counsel in a letter that the FBI would be releasing some materials. He said, as stated in the letter, that the Department might not have any crime scene photographs and that, since James Earl Ray was the only suspect, only photographs or sketches of James Earl Ray would be provided.

The following day, the FBI released 78 pages of documents and 18 photographs. There were no crime scene photographs among the materials and no photographs or sketches of suspects other than James Earl Ray.

Thereafter, Weisberg demanded or filed a new, more extensive and detailed request of December 23rd, 1975. He amended his complaint and in the ensuing eight years of litigation --

THE COURT: You mean he amended his request and then filed the complaint, do you not?

MR. LESAR: Pardon?

THE COURT: He amended his complaint and then filed the request, did he not?

MR. LESAR: No, he made his request and then the following day amended the complaint.

THE COURT: [Inaudible.] pretty close to contemporaneous, then?

MR. LESAR: Yes. That is correct.

After eight years of litigation, some of the materials that Weisberg obtained were, one, crime scene photographs that initially had been denied him which were located after a search of the Memphis field office and after the FBI had claimed exemptions of those materials-- claimed that they were not -- that some of them were not agency records and that issue was brought to this Court and litigated and on remand, the Government provided 107 allegedly copyrighted crime scene photographs.

It also provided other crime scene photographs throughout the litigation. It also provided thereafter photographs and sketches of suspects other than James Earl Ray.

It provided 20,000 pages, approximately, of FBI field office records, even though it had claimed throughout the first two years of litigation that the field offices would contain nothing that was not contained at FBI

headquarters.

Weisberg also obtained a complete fee waiver for all of the records at issue in this case, more than 50,000 pages and he obtained an important tickler file, the Long tickler file which the FBI first said did not exist, then claimed had been lost and eventually located on the basis of information provided by Weisberg himself.

This is not an all-inclusive list. This is just a sketch of some of the things that were obtained.

THE COURT: Is it true that no materials were released to him until after the trial?

MR. LESAR: That is correct. The matter is now before the Court on several issues. We have appealed with respect to the adequacy of the search, with respect to the validity of the court order upholding exemptions claims, some minor issues regarding the award of attorney fees and costs and a matter referred to as the consultancy agreement between Weisberg and the Department of Justice.

I will address first the search issues.

Before doing so, I would like to inform the Court that we are withdrawing some of the search issues. We are withdrawing the appeals as relates to the particularized searches for the Long tickler and the materials relating to a Mr. Harden and Raoul Estivel and we are limiting the appeal with respect to the Department of Justice components

to just two components, the Community Relations Service and the Office of Legal Counsel.

With respect to the DOJ components, there has been no attestation with respect to those two units of any search. We have specific reasons for believing that they contain materials --

THE COURT: Before you leave here --

MR. LESAR: Yes.

THE COURT: Am I correct that it was only under that privacy exemptions were ?

MR. LESAR: No, it comes up in another context, too, which I will get to later.

The two units that we now concentrate on of the Department of Justice were both listed by me in a letter which I wrote to the then-Government Attorney on September 17, 1977.

He had asked -- we had raised the issue of the Department not having searched components of the Department of Justice that they thought might have records.

I wrote him a letter explaining that we did not know all of the components that might have records but I listed several that we thought would and it included the Community Relations Service and we are particularly interested in that because there was an employee of that unit who was on assignment in Memphis at the time of the assassination

and he reportedly submitted a report on the assassination so we have asked and we continue to press our contention that there should be a search of that unit.

We have also requested the the Office of Legal Counsel be searched as we think that there are very likely records of interest pertaining to the King assassination in that office.

A second search issue concerns the specific items of the December 23rd, 1975 request.

Basically, there was never any search for the items of that request until the summer of 1977, when we entered into a stipulation with the Government in agreeing to forego a complete Vaughn upon their accomplishing certain things and they agreed to search certain items of that request where we provided privacy waivers or where the individual had died.

However, there are many items of that request which have nothing to do with individuals at all.

There is Item 18 of that request which is for records pertaining to the New Rebel Motel and the DeSoto Motel -- motels that James Earl Ray allegedly stayed at.

There is -- Item 6 is for a tape or a transcript of the radio logs of the Mamphis Police Department or the Shelby County Sherriffs' Office.

There are -- there is even one individual who is

listed in the request but is dead and yet no search has been made for records pertaining to him.

Now, with respect to some items of the request, there is a question that the Government has raised, although I think that it has not properly raised the issue in the Court below as to the Privacy Act or as to the B(6) or B(7)(c) exemptions under the Freedom of Information Act.

The Government did not brief the issue in the Court below. The Government did state that oral argument that the Privacy Act prohibited them from searching those files.

THE COURT: The search itself.

MR. LESAR: From the search itself.

Now, our position is, first of all, we do not know precisely what argument they are making under the Privacy Act. It has never been briefed.

The cases they cite, some of them go off on a B(7)(c) or B(6) tangent and there is one that does mention the Privacy Act -- a particular provision of the Privacy Act.

But we basically do not understand the argument and the fundamental point is, is that there is no attestation as to why they cannot do the search.

The nature of FBI files is such that if they searched names, first of all, it is not even sure that it would come within the description of a file on that person.

You may search the index under Percy Foreman and you come up under a "C" reference to Percy Foreman in a file that is a subject matter file, not a file on Percy Foreman per se.

And then you would clearly have to weigh that under the balancing under --

THE COURT: I do not understand what documents are filed here, in fact.

MR. LESAR: Well --

THE COURT: You got rid of the Hardin and Entravel ones, so what --

MR. LESAR: Yes.

THE COURT: So what documents are there as to which a privacy thing has been --

MR. LESAR: Well, if you look at the December 23rd request, which is reproduced at pages 37 and 38 -- actually, it goes on past that -- but on page 39 of the Appendix, there is a request for a large number of named individuals, for all tape recordings, logs, transcripts, notes of any kind reflecting any surveillance on those individuals.

Those individuals were all connected with the King assassination in some manner and it would be our position that if they -- if the Government did the search and located files on these individuals, then we would take the position that the public interest in the disclousres would

almost certainly outweigh the privacy interests involved.

THE COURT: But did the Government claim privacy as the sole basis for [inaudible]?

MR. LESAR: That is my understanding of their position, yes.

So we have a situation where the Government has, one, not really properly briefed the issues below and secondly, it has not made the search that is required before that it can make the claims that you have got to make to be able to support an exemption under either the Privacy Act or the Freedom of Information Act. It just has not looked at the materials.

Once it looks at it we do not even know whether they would qualify for threshold exemption under the Freedom of Information Act, for example.

They may not be investigatory materials. They may not be for law enforcement purposes. We do not know.

Another search issue relates to previously-processed records. Pursuant to stipulation, the FBI agreed in the summer of 1977 to process the field office records of seven FBI field offices. There was a provision in the stipulation that they would process those documents which had notations, even if the text of the document was duplicative of what was on file at headquarters.

We later learned that the FBI did not do this. As

a result of a review carried out by the Appeals Office head, Mr. Quinlan Shea, we learned that the FBI directive to the field offices instructed them to provide the documents -- to not provide the documents unless they contained a substantive, pertinent notation on them.

That was entirely different than the stipulation called for and Mr. Shea, in his review, came across some graphic examples of what was not provided us as a result of that. At the Joint Appendix at page 382, he provides a document which has a notation -- handwritten notation at the bottom of it, "Previously told LR," meaning Little Rock.

"Previously told LR to disregard. Mosely is a nut."

On another document, the notation reads, "Identify no action unless white Mustang," referring to the chase to the white Mustang or Mustangs that were involved in the crime.

Those are very important materials to anyone trying to evaluate the thoroughness and adequacy of the FBI investigation and the manner in which it was carried out.

They were denied to us because of a qualification in the instructions to the field offices that was not what we had agreed to in the stipulation.

A second reason in which we seek a reprocessing of the records is that we subsequently learned in another

case that, where the FBI was making claims that documents were being withheld from the field office because they had been previously processed at headquarters, that they were -- their method was defective and as a result, we ultimately established that some 2,369 pages of the Dallas Field Office that had originally been withheld as previously processed were in fact not previously processed, had not been provided from headquarters files for one reason or another -- we do not know what -- they had not been and they, in that case, were forced to give them to us.

Now, the same defect may exist in this case. We do not --

THE COURT: Do you have any evidence that they exist?

MR. LESAR: No, we have no way of verifying it. The way we were able to verify it in the other cases is that we got them to provide us with the cross-references and then we matched up the cross-references and we saw that where they were claiming previously processed, they had not, in fact, been provided.

But that has not been done in this case and the FBI affidavit which addresses it describes the method but it does not state that the method will not result in this same erroneous claim of previously processed.

THE COURT: But you were unable to show the judge

any specific flaws [inaudible.]

MR. LESAR: No, except that we assume that the FBI being what it is, the methodology in one case is generally the same as in another.

The presumption of regularity, I guess.

THE COURT: [Inaudible.] I think your presumption of regular is [inaudible.]

MR. LESAR: Well, the way that the FBI processed them. At least we have evidence in one case that they did it. We would be perfectly willing if the case were remanded and if there is going to be a reprocessing of the field office files, to devise some method by which we couldtest that claim.

If we are provided with cross-references for certain --

THE COURT: [Inaudible] but why did you not take that proposal for trial? The Government's position is that they have already done this for you. You are asking them to go through these documents a second time.

MR. LESAR: Well, we --

THE COURT: Without any showing that they have not, in fact, provided it.

MR. LESAR: Well, with respect to the first argument that we advance for reprocessing, there is a showing. The showing was made by Mr. Shea who adduced evidence that,

one, their instruction differed from the stipulation and two, that that instruction had, in fact, resulted in documents being withheld that had notations of the kind that are vital to us, so that we have made that showing with respect to the first ground.

THE COURT: That would not call for a total . That would call for a . There you were --

MR. LESAR: Right.

THE COURT: -- shows specific documents but --

MR. LESAR: Right, that's correct.

THE COURT: [Inaudible.] were not.

MR. LESAR: Right.

THE COURT: But has been added for general reprocessing which sounds like you are asking the Government to redo all of the search at its field offices.

MR. LESAR: Well, I would say that if they can provide the evidence to substantiate their claim, that is, that the way they did it is not resulting in wrongful claims of previously-processed being made, obviously, we would agree to that.

THE COURT: But they did make such an affidavit .

MR. LESAR: Their affidavit just says that, "We did it like this" and it does not say that this will not result in the wrongful withholding.

We have also appealed with respect to the exemption

claims.

The Court upheld all of the exemption claims as the result of on-sampling that was defective in numerous respects. It was defective, among other things, because the sampling did not include all of the exemption claims that were advanced by the Government to withhold excisions made on several thousand pages of documents.

The technique, which was a sampling of one out of every 200 documents, resulted in an inordinate sampling of minor and inconsequential claims.

THE COURT: Well, then you have got a second go-round [inaudible.]

MR. LESAR: The second go-round does not cure the defects. At the end of the second on-sampling, the same defect remained. There were still exemptions claims which had not been sampled at all.

There were relatively few -- only one or two or three examples of some exemption claims and on top of that, the FBI conceded that some of the exemption claims were wrong.

They conceded -- they released the material that had been withheld under B(1) -- and important material, at that. They released a couple of claims -- exemption 7 claims.

And then, Weisberg filed a lengthy counter-affidavit, taking each one of their exemption claims and showing

that it was either factually or legally incorrect.

They were claiming exemption 7(D) for the source of a newspaper -- not the FBI source, but the source of the L.A. Times.

They claimed exemption 7(B) and 7(C) for the Powell Powatt Brothers. One of the Powatt Brothers had been cited for contempt of Congress because he had refused to testify.

All of this information was public, yet they withheld their names.

They withheld, under 7(B) D the identity of a police informer who was very -- a central figure in the events in Memphis which led to the reopening of the investigation by Congress, Merrilly McCullough.

Mr. Shea, in 1978 or 1979, had promised that the McCullough file would be given to Weisberg. Eventually it was. But when the FBI came around to justify these excisions, they justified his -- the excision of his name, even though it is all public.

Now, the District Court itself conceded that the FBI's exemption claims were inconsistent and the District Court applied, I think, erroneous standards in trying to uphold those claims of exemptions.

It did not rule that they were exempt. In effect, it just said that the Plaintiff did not need them.

Well, that is not a ground for withholding under

the Act and some of them, Plaintiff very well may need and certainly, the public is entitled to them in any event.

So the FBI is just -- has not been able to make its claim for exemptions and even the appeals head, who made a review of the file, felt very strongly that the FBI should put back material that had been inconsistently or wrongfully withheld, particularly under 7(C).

So we feel that the case has got to be remanded because you cannot uphold these claims of exemptions on this kind of a record.

The FBI in its-- the Government, in its brief, says that they cannot be required to -- they really dodge the issue of Weisberg's claims with respect to these exemptions.

Well, if they do, then there are disputed issues of material facts with respect to those issues and that cannot be decided on the summary judgment procedure.

The next issue I wish to discuss is the consultancy agreement.

THE COURT: You are on your rebuttal time, now.

MR. LESAR: All right. I would just, very briefly, say that at the conclusion of the processing, the FBI wrote Mr. Weisberg a letter saying that it would deal with his many complaints about their obliterations that they had made and other complaints that he had raised in his

correspondence with him.

They then would not do that and proposed, instead, that they hire him as their consultant to advise them on these wrongful excisions -- to provide them with a list of the matters about which he had complained and to explain why they should be released, or further action was required.

The Government then ultimately reneged on that agreement and it is Weisberg's contention that he is owed the money with respect to that, that there was a binding and in force contract --

THE COURT: It is undisputed that the contract that you allege was not reduced to writing.

MR. LESAR: That is correct.

THE COURT: Did Mr. Weisberg say he wanted it in writing because he did not have a contract?

MR. LESAR: He did not say that. He did at one point write a letter saying that he wanted it in writing with respect to the amount of which he was being paid because he had asked on several occasions and had received nothing back.

However, that same letter made it clear that his performance was not contingent upon it being reduced to writing and on January the 15th, 1978, I got a call from Lynne Zusman offering a specific rate of $75 an hour.

As a result of that Mr. Weisberg accepted that and --

THE COURT: How did he warrant that? How did he show his acceptance of that?

MR. LESAR: Well, he showed his acceptance because I told Lynne Zusman about it and then I --

THE COURT: That was oral communication between you and Ms. Zusman?

MR. LESAR: To that point. To that point.

Then, I wrote a letter to -- I had a conference with Lynne Zusman and I inquired about an interim pay agreement. She said, "Write a letter to Schaffer. Send a copy to me. And spell it out."

So I spelled it out. I put in there the hourly tate, the amount of time he had worked and there was no response at all for more than two weeks after that.

THE COURT: According to you, what was the rate of pay ?

MR. LESAR: $75 an hour.

THE COURT: The numbers went all the way from $30 to $100.

MR. LESAR: No, no, not $100.

THE COURT: [Inaudible.]

MR. LESAR: Pardon?

THE COURT: I thought at one point somebody asked, did Mr. Weisberg at one point ask for $100?

MR. LESAR: Oh, no. No, no. He never asked for

anything at all.

Early on, they specified the normal consultancy rate but did not say what it was. Then, there was no specific figure mentioned until Zusman's telephone call to me, which was $75.

THE COURT: Then at other times there was a figure of $30.

MR. LESAR: That was after the Government decided to contest the whole matter. Then they went into court and the Deputy Assistant Attorney General, William Schaffer, said that they would offer $30.

The Court said, "That is not enough. It should be up in the range of $50 or $60.

So, I will save further arguments for my rebuttal.

THE COURT: Mr. Koppel.

ORAL ARGUMENT OF JOHN S. KOPPEL, ESQ.

ON BEHALF OF U.S. DEPARTMENT OF JUSTICE

MR. KOPPEL: May it please the Court:

I am John Koppel from the Appellate staff of the Civil Division of the Department of Justice and I am representing the Appellee, Cross-Appellee, the Department of Justice, in this case.

There are several issues before the Court on these cross-appeals.

First, whether the Department of Justice properly

inspected its records and withheld only exempt material in this Freedom of Information Act case.

Second, whether the Plaintiff and the Department entered into a consultancy agreement.

And third, and in our view, most importantly, whether the District Court erred in awarding the Plaintiff approximately $94,000 in attorney's fees, including a 50 percent multiplier and approximately $14,500 in costs.

With respect --

THE COURT: We want you to -- we would like you to keep cross-appeals separate.

Do I understand you are also protesting the costs as well as the fees?

MR. KOPPEL: That is correct, YOur Honor.

With respect to the first issue, the Department of Justice conducted a thoroughly adequate search of its records and withheld only exempt material in this FOIA case that lasted roughly six years on the merits in the District Court.

As this Court has held recently in another of Plaintiff's cases, the test for the adequacy of a FOIA search is one of reasonableness.

Purely speculative claims about the existence of other documents are not enough to defeat a showing made through detailed affidavits, as in this case, that the search had been adequate.

Furthermore, the issue is not -- and I emphasize the word "not," whether any further documents might conceivably exist, but whether the Government has shown that its search was adequate.

The affidavits supplied by the Government in this case clearly satisfy that test.

With respect to the specific items that the Plaintiff has raised regarding the adequacy of the Government dearch, we have addressed all of these issues -- the specific issues -- fully in our brief.

Unless there are any questions --

THE COURT: I am troubled about how you claim privacy of law enforcement materials without looking at the file.

MR. KOPPEL: Your Honor, the FBI takes the position -- which has recently been upheld by the Seventh Circuit in the Antonelli -- that in a case involving -- in a case where individuals where a third party requests the records of other individuals and does not provide a privacy waiver from those individuals, the FBI will not provide those records and will not even search for those records unless there is a compelling public interest in the case.

And with respect to virtually all of these items, the individuals -- to the extent that the individuals are relevant at all to the assassination investigation, their

names appear in the MURKIN file, which was provided to the Plaintiff.

Moreover, most of these individuals -- many of these individuals -- well, Plaintiff has not demonstrated the kind of compelling public interest with respect to any of these individuals and it is not even clear what -- exactly what the Plaintiff wants with respect to them.

If we turn to page 39, we see a -- what is essentially a laundry list of names and the Plaintiff asks for "All tape recordings and all logs, transcripts, notes, reports, memoranda, et cetera regarding these individuals."

He goes on to say, "This is meant to include not only physical shadowing but mail coverage, mail interception, interception by any telephonic electronics or other means."

Now, it is clear, first of all, there is no way the FBI can conduct the kind of search that Plaintiff is seeking, because --

THE COURT: Now, whoa, whoa. You are mixing up apples and oranges.If it is an impossibility, that is something else. But it would very much [inaudible]

I was asking about questions about, I do not understand how you can say 7(C) applies to a document you have not looked at. Or a file you have not looked at.

MR. KOPPEL: Your Honor, in the absence --

THE COURT: I did not hear Antonelli to say that,

either. Antonelli continued to recognize that some balancing would have to be done.

MR. KOPPEL: That is correct, Your Honor.

Antonelli does recognize that balancing has to be done.

THE COURT: How can you balance something that [inaudible.] ?

MR. KOPPEL: Well, Your Honor --

THE COURT: You say "I have looked at it." And you say, "Huh, I just balanced it. What did you do, weigh it?"

MR. KOPPEL: Antonelli upholds that approach because Antonelli says that the Plaintiffs have to demonstrate that there is a public interest before the FBI will be forced to search its files under these circumstances.

Now, the -- we believe that the Antonelli decision is correct and it accurately reflects the position of the Department on this issue.

THE COURT: Because it is, I think, a major legal question, let me make sure I do understand your exact Department position.

MR. KOPPEL: Yes, sir.

THE COURT: I understand you to say that whenever you assert 7(C) objections -- that you are claiming a 7(C) exemption -- you [inaudible] unless and until the

Plaintiff does what --?

MR. KOPPEL: Your Honor, I emphasize that this case -- that this analysis applies only to third party requests, where an individual seeks the records of third parties.

Now, under those circumstances, it is the FBI's position that it does not have to search for the records of those individuals. It does not have to confirm or deny records pertaining to those individuals, absent either a privacy waiver from those individuals or a demonstration by the Plaintiffs that there is some sort of compelling balancing test, a compelling public interest justifying release.

THE COURT: How can they --

MR. KOPPEL: Justifying search. Excuse me, Your Honor.

THE COURT: [Inaudible.] You are confusing the terms, too. Obviously, there is a -- you know, when it comes to the release of that material, the FBI has a lot of presumptions -- the Government has a lot of presumptions in its favor, in the absence of the waiver of [inaudible.]

But when you are talking about the search itself, I still do not understand how you can expect the Plaintiff to show some great public interest about documents that you do not know about and that they do not know about.

MR. KOPPEL: Your Honor, the problem with the

Plaintiff's approach --

THE COURT: Let me give you a specific.

MR. KOPPEL: Yes, sir.

THE COURT: Suppose it turns out that one of the people they named has in fact been a defendant in a criminal trial and all of the information that is in that file were going to be made public.

Now, is there a 7(C) claim for that information?

MR. KOPPEL: Your Honor, to the extent that the information is already in the public domain, there remains the privacy consideration in that there is no reason -- no public interest to be served by requiring the Department to supply those records.

Moreover, the basic problem with the Plaintiff's analysis here is that there can be damage done to individuals simply by requiring the FBI to disclose the existence of files.

THE COURT: Well, when you are talking about disclosing, the point of disclosing is, you have great strength in the way of research.

MR. KOPPEL: Yes, Your Honor.

THE COURT: [Inaudible] on that and obviously, if you disclose, "Yes, we have a file on Mr. Lesar," that could be damaging to his privacy.

But you do not have -- we are not at the

disclosure level. We are talking about research.

How do you know that there is a privacy interest until you look at it? How do you know what the public interest and the balancing that the Court is supposed to go through is?

What you are really saying is, it seems to me, is that you are right, the Government has just discovered a way of short-circuiting a lot of Voyek litigation. Maybe that is to everybody's benefit, I do not know, but what you are saying is, you are just going to say "7(C) and that is all she wrote."

MR. KOPPEL: No, Your Honor.

THE COURT: Not this time?

MR. KOPPEL: Well --

THE COURT: How do we review --

MR. KOPPEL: If the Plaintiff satisfies the burden of demonstrating some sort of significant public interest with respect to these third party records --

THE COURT: Well, we do not know what we are talking about.

MR. KOPPEL: But, Your Honor -- Your Honor has recognized that there can be damage done to third parties --

THE COURT: By exposure.

MR. KOPPEL: But damage can also occur by the admission of the existence of files regarding those

individuals.

THE COURT: [Inaudible.]

MR. KOPPEL: Well, Your Honor, the Department takes the position that you show public interest there has to be -- well, there has to be some significant connection. In this case, there would have to be some significant connection or demonstrably significant connection between the individuals listed by the Plaintiff and the King assassination case.

We do not believe that the Plaintiff has satisfied that burden and there is no --

THE COURT: Was that done in the FOIA request?

MR. KOPPEL: That can be done through a showing in the District Court at a later stage, but initially, yes, it would be appropriate for the FOIA requester to indicate some sort of justification, some sort of reason for the --

THE COURT: Well, the public interest standard then becomes a kind of a relevancy standard in this case.

MR. KOPPEL: That is correct, Your Honor.

THE COURT: How do you determine the relevancy without looking at the facts?

THE COURT: Well, it is not relevancy as to document. That is to say, the standard is relevancy of the person to the matter. Is it not?

MR. KOPPEL: That is correct, Your Honor.

THE COURT: It is more than relevance. It is

demonstrably significant.

MR. KOPPEL: Your Honor, the --

THE COURT: This is not a relevancy standard under the Federal Rules governing discovery, for example.

That is a fairly stepped-up relevancy standard, would you not say?

MR. KOPPEL: Your Honor, in order to show the kind of public interest that justifies the imposition on the privacy of third parties, which is at issue here, we submit that the Plaintiff has to make some sort of showing that there is a meaningful public benefit to be derived from disclosure. We do not see --

THE COURT: I guess what is troubling me, Counsel, is that I am still not sure what you are really asking for is another boiler plate allegation boiler request or whether it is really something with real substance and I do not know which would worry me more.

We do [inaudible] requester said, "We believe that information in these files would show that there were additional people involved in the assassination besides Mr. Ray."

MR. KOPPEL: Your Honor, that would not -- I do not believe that that would satisfy the test because the Plaintiff has to demonstrate -- has to do more than make a mere allegation. Perhaps ths is a problem inherent in the

FOIA --

THE COURT: If you were to make an evidentiary -- if you were to lay out an evidentiary [inaudible] which would satisfy the standard of demonstrably significant nexus in the fruit of the case?

MR. KOPPEL: I don't want to --

THE COURT: The fruit of the nexus is involving the assassination and then, you, under your standard, would say that justifies a search.

MR. KOPPEL: The -- we are saying that requester should show some sort of -- should show a nexus which would lead a reasonable person to believe that there is some sort of -- that there is a public interest in providing records.

THE COURT: I propose something such as, "In documents I already have, this person's name appears as somebody who is involved in the matter."

MR. KOPPEL: That is correct.

THE COURT: [Inaudible.] Or something like that sort of thing.

MR. KOPPEL: That is correct, Your Honor, and a mere laundry list of the type that characterizes Plaintiff's second request is not sufficient to satisfy us.

THE COURT: What troubles me, Counsel, is, now, you are talking about disclosure. I share your concern that sometimes even what looks like an innocent disclosure can, in

fact, invade somebody's privacy.

I would be all for the government taking the proposition and the courts backing up the proposition about disclosure. What troubles me is that you are at a point where the government thinks that "We are not even going to look unless you prove the case first."

And that worries me.

First of all, I do not know how you can review that. Normally, when we review these questions as to whether or not they have made a prima facie case or whether they have shown some relevancy, there is an attempt [inaudible] in some of the documents.

But you do not know at this point whether or not these documents may, in fact, have some relationship to [inaudible.]

MR. KOPPEL: Your Honor, in this case, we do because, to the extent that these individuals are relevant to the King assassination investigation, their names appear in the the MURKIN file. What the Plaintiff is --

THE COURT: [Inaudible.]

MR. KOPPEL: Yes, Your Honor. What the Plaintiff is seeking is considerably more than just the relevant material on those individuals as it relates to the assassination investigation. The Plaintiff is asking for their files and for materials concerning their relationship with the

FBI, what the FBI -- possible FBI surveillance of them is.

THE COURT: [Inaudible.]

MR. KOPPEL: It is inconceivable that this could have any significant bearing on the King assassination investigation.

THE COURT: How do you know that none of the documents in that file have any bearing on the assassination? [inaudible] look at the files?

MR. KOPPEL: Your Honor, there has to be some limit, especially in a case like this -- a case in which the principal file, the MURKIN file, contained some 50,000 pages of material all by itself.

If the Plaintiff will be able to obtain the files or to force the FBI, even, to search for files of individuals, in effect, at his whims, merely be requesting them, then there will be a tremendous burden on the resources of the FBI which we do not believe the FOIA contemplates.

THE COURT: Absent showing connection [inaudible], is there any limitation upon upon [inaudible.]

I could hand you the Washington, D.C. telephone directory and say, "I want you to give me everything on all those names."

MR. KOPPEL: That is correct, Your Honor. There simply has to be some sort of public interest. There has to be a public interest demonstrated by the requester before the

FBI would have to undertake the kind of search that the Plaintiff seeks here.

THE COURT: Do you think the particular beyond the scope of the request? That does not involve the [inaudible.]

MR. KOPPEL: Well, I --

THE COURT: That is one of your alternative arguments and I understand [inaudible] but you obviously [inaudible] want to investigate the King assassination. Therefore, give us all your facts.

MR. KOPPEL: But, Your Honor, in Judge Bork's telephone book example, the individual -- the requester is free to select names at random from the phone book and say, "I request the files of these individuals."

THE COURT: Right. So you are saying, now -- maybe I read more into the Government's claim as to the [inaudible.] Antonelli is legitimate -- you are saying, "All they have to do is to show some causal nexus to the investigation"?

MR. KOPPEL: Well, in this case, yes, there would have to be some -- well, there would have to be some reason, some meaningful public interest.

THE COURT: [Inaudible.]

MR. KOPPEL: Well --

THE COURT: I do not know what that means. If you

tell me that they have to show a relationship to the request, it sounds like a very reasonable limitation.

MR. KOPPEL: Well, Your Honor, there is a problem with the formulation that you are suggesting, which is that it would enable the Plaintiff, on the basis of the 50,000 pages of the MURKIN file, to select countless individuals for searching by the FBI.

We believe that that is equally abusive and unwarranted under the Freedom of Information Act.

THE COURT: So, even if there were a nexus -- for example, if you had turned over the MURKIN files, the Plaintiff, then, would use rather tediously the MURKIN file and come up with a list of 300 names -- all of which he can demonstrate were derived from the files.

You would say, even though that is obviously a nexus between that individual and the investigation, unless it were a mistake with the names that appeared in there, that that still is not enough to justify a search, under your approach.

MR. KOPPEL: That is correct, Your Honor. The Plaintiff would have to show some reason to search.

THE COURT: Well, he just did.

MR. KOPPEL: Well, above and beyond the fact that the names appear in the MURKIN file.

THE COURT: Well, I suppose names may appear in

the MURKIN file that have nothing whatever to do with the investigation or with any suspicion of connection with the Freedom of Information Act.

MR. KOPPEL: Well, that is correct, Your Honor and our position is that it would be a tremendous imposition on the privacy of those individuals, as well as on the resources of the FBI to require a search to be made under those circumstances.

THE COURT: What is the privacy intrusion by a search? Obviously, it is an administrative burden.

MR. KOPPEL: Well, since the --

THE COURT: But what is the privacy --

MR. KOPPEL: Since by searching, the FBI would be admitting the existence.

THE COURT: Of the file on the person.

MR. KOPPEL: Of the file on the person, yes, Your Honor.

THE COURT: In order to make that jump, how did that ever get disclosed, that there is a file on the person? There is a significant privacy claim. You do not [inaudible.] legitimate

Traditionally, if you are claiming a [inaudible] exemption, [inaudible] names, you go look at those files, through them, and find that your estimate of the 7(C) exemption, you do not even acknowledge the existence of those files. You just say that "These matters are covered by'

7(C)," as you do here.

The difference, though, is, having searched, if the Court wants to verify your judgment, [inaudible.]

MR. KOPPEL: Well, Your Honor --

THE COURT: But you do not identify, "Yes, we have a file here."

MR. KOPPEL: Well, it appears to me that, under Your Honor's formulation, we would have to identify the existence of a file. Then perhaps this is really a matter of semantics, if we are saying --

THE COURT: [Inaudible.]

MR. KOPPEL: If we are saying that the FBI -- the Bureau has to search, it then can say, in lights of the events in 7(C) of the Freedom of Information Act, we can neither disclose nor deny the existence of the files.

THE COURT: It makes all the difference in the world when you have searched. First of all, you are then able to go through the balancing [inaudible] required.

And also,if the Court decides to responsibly test your judgment, you cannot review those items in camera.

MR. KOPPEL: But then, if the Court has documents to review in camera, then are we not conceding the existence of the files on the individuals on third parties?

THE COURT: [Inaudible] in camera is [inaudible]. We do not acknowledge the[inaudible] at all.

MR. KOPPEL: But if you are reviewing documents -- if the requester has identified individuals and the Court then reviews those and reviews documents, is not that an admission that there is a file with respect to those individuals?

THE COURT: Well, the claim of the Government is exactly the same as it is here, except that 7(C) [inaudible.]

The only difference is, you say, "We have searched our files and we claim, as to the matters requested, their privacy."

THE COURT: [Inaudible] bring in a trolley with all these covers and [Inaudible] can't see the names. [Inaudible]

And then the Court has to read everything [inaudible] you to read but now the Court is in the position you claim the FBI is in and I think at this point [inaudible.]

MR. KOPPEL: Well, Your Honor, there is no doubt about it. It is a very disturbing scenario.

THE COURT: Well, [inaudible.]

THE COURT: Well, is it your position, to come back to the facts of this case, of simply providing a list of the names without more will not do?

MR. KOPPEL: That is correct, Your Honor.

THE COURT: And that that is all that was done.

Is it your position that that is all that was done here? That there was no supplementation so as to demonstrate any nexus at all?

MR. KOPPEL: That is correct, Your Honor. There is no indication that these individuals have any meaningful role in the King assassination association.

THE COURT: Well, that is separate from the public interest claim that [inaudible] because I read your brief on the two claims that the Appellant has now abandoned.

[Inaudible.] I thought that the Government was offering alternative reasons for not making those files available.

One was that there had been no showing that there was any relevance [inaudible] of the request.

And the second was [inaudible] offering us [inaudible] have to show public interest first.

MR. KOPPEL: Well, Your Honor, I think that the two are certainly related, to a large extent.

THE COURT: Well, one would seem threshold, so I am not sure I understand what the position is.

Are you saying you must initially satisfy the threshold test of relevancy or nexus?

And then, if you satisfy that, then there is a public interest determination.

MR. KOPPEL: Yes, Your Honor. There is a two-step

process. The public interest has to -- under the Antonelli theme, public interest is involved at two places.

It is involved at the outset in order to require the agency to search initially and then, after the Agency -- if there is a showing of public interest, of sufficient public interest in the agency searches, there still has to be a determination that the public interest outweighs the privacy considerations with respect to the files that have been searched.

THE COURT: So what we have been discussing as the nexus or relevancy is actually an Executive Branch engraftment under its obligations, under the statute.

It does not derive from Antonelli. Is that what you are saying?

MR. KOPPEL: Your Honor, it derives --

THE COURT: In the employment of relevance. It is a commonsense requirement that you do not pick names out of the phone book or out of the air. You must demonstrate some relevancy. That is simply an Executive Branch engraftment.

MR. KOPPEL: Your Honor, it is not an Executive Branch engraftment. It is the logical result of the interaction between the Freedom of Information Act and the Privacy Act, as the Antonelli Court recognized.

Turning briefly -- well, very briefly to Plaintiff

exemption claims, we note that these are thoroughly discussed in our brief and Plaintiff, on the basis of two very minor errors in two Vaughn indices consisting of approximately 200 documents -- 240 documents -- is seeking to impeach the District Court's holdings that the Department was held on the exempt material and that simply will not suffice.

The consultancy agreement likewise is fully fleshed out in our brief. The District Court correctly held that the Department did not benefit from the Plaintiff's work, that vital terms of the proposed agreement were missing and that Plaintiff did not act reasonably in prematurely commencing work on the proposed consultancy.

Now, turning to what we regard as the heart of this case, the District Court plainly erred in awarding approximately $94,000 in fees, including a 50 percent multiplier and $14,500 in costs.

Now, the Plaintiffs did not substantially prevail in this case, since virtually all of the 50,000 pages that were released to him as the result of the processing of his enormous administrative request of December 23rd, 1975, were -- which he prematurely brought into court the following day -- were released through the administrative process.

THE COURT: Now, how do we know that?

MR. KOPPEL: Your Honor, you know that by the chronology in this case. You know that the documents were

released to the Plaintiff in '76 and '77. Plaintiff filed the administrative request in December, '75. At that --

THE COURT: Who has the burden of showing that documents were not released pursuant to your administrative process but were released because of the lawsuit?

MR. KOPPEL: Your Honor, the Plaintiff has to demonstrate that he has substantially prevailed in order to --

THE COURT: He has to prove that [inaudible] and he gave, you know, a chance --

MR. KOPPEL: That is correct, Your Honor.

THE COURT: -- to file an administrative process because he thought you filed a complaint at the same time.

MR. KOPPEL: That is correct, Your Honor. He filed an extremely burdensome request which then -- which took approximately two years to process, due to its --

THE COURT: [Inaudible.]

MR. KOPPEL: -- voluminous nature.

THE COURT: [Inaudible.] Would the burden go beyond him to show that the -- suppose you had waited the correct amount of time -- as I recall, ten days from the time of the request to file suit. And he had heard nothing during that ten-day period. Would the burden still have been his?

MR. KOPPEL: Your Honor, if he had heard nothing, which is not the case here, if he had waited the ten days,

we submit that this Court's Open America holding would come into play. In that case, he would be entitled to go into District Court.

However, the District Court would simply -- would retain jurisdiction. That would not mean that the documents he received resulted from the lawsuit, rather than the administrative request.

THE COURT: But the mere filing of the lawsuit does not shift the burden to --

MR. KOPPEL: That is correct, Your Honor. The mere filing of the lawsuit does not demonstrate causation and in this case, it is so clear that the Plaintiff received the 50,000 pages between -- in '76 and '77 as a result of the administrative processing of his request.

THE COURT: Well, you are saying that that is quite clear but you have a District Court determination to the contrary. Does not that come to us as a clearly erroneous standard?

So do not we have to conclude that the District Court clearly erred in finding that the production was [inaudible] traditional?

MR. KOPPEL: Your Honor, in this case, the District Court decision is not -- on substantially prevailed -- is not entitled to the usual deference that a factual or apparently factual holding like that would be entitled to,

since the District Court never gave the Government an opportunity to brief or discuss the substantially-prevailed holding.

Moreover, under this Court's holding in Spencer versus NLRB, the question of whether the Plaintiff has substantially prevailed must be subject to heightened scrutiny.

And furthermore, even under the clearly erroneous test, we submit the District Court's decision that Plaintiff substantially prevailed because he received 50,000 pages while the litigation was in court is clearly erroneous because the District Court ignored the chronology and ignored the factors which are set forth in our brief.

THE COURT: Would "substantially" apply in any event, something like "substantially prevailed" or a finding of causation? Those are not basic facts in the District Court's findings on the evidence. Those are conclusions.

MR. KOPPEL: That is correct, Your Honor. We submit that a legal standard of review is appropriate here for precisely those reasons.

This is a legal conclusion and the Spencer Court recognized that when it said that --

THE COURT: Now, causation is strictly a legal conclusion? It is not a mixed question of law and fact?

That the reason the documents were produced was because of the administrative process or the judicial process

that is strictly a legal determination?

MR. KOPPEL: Your Honor, it certainly -- it can be characterized either way. One could say that it is a mixed question, but this Court has recognized --

THE COURT: Well, one could say anything but is it not more principal to say that it is a mixture of law and fact?

MR. KOPPEL: Perhaps, Your Honor, and I believe this Court recognized that in Spencer, where it recognized that it need not --

THE COURT: [Inaudible] statute [inaudible] said about Spencer any of [inaudible.]

MR. KOPPEL: In a FOIA case? None comes to mind immediately. However, there is this Court -- the review of the substantially-prevailed issue has generally been a fairly searching one.

I can think of numerous cases -- although I cannot name them offhand -- in which this Court has reversed the District Court's decision that the Plaintiffs did not substantially prevail.

I believe the Church of Scientology case, among others, comes to mind. Furthermore, even assuming arguendo that Plaintiff has crossed the threshold of eligibility and we must apply the entitlement test, the four factor test of

public benefit, reasonable basis, nature of the interest and commercial benefit, it is quite clear, from the nature of the material that the Plaintiff received that this litigation, as opposed to the administrative request, did not benefit the public and the Government had a reasonable basis for all of its actions in the litigation.

Once again, we have thoroughly demonstrated, in the brief, that we did not stonewall it at any point. We acted in complete good faith in processing this enormous request of December 23rd, 1975 and we simply opposed the Plaintiff's repeated requests for what the District Court characterized as "mammoth and repetitious searches or reprocessing" as well as release of duplicative documents such as abstracts and indices.

Moreover, the consultancies, the alleged consultancy arrangements cannot serve as an indication of governmental bad faith when the District Court itself held that no such consultancy agreement was ever entered into.

THE COURT: [Inaudible.] that travel costs and long distance costs [inaudible] or other items of cost.

MR. KOPPEL: With respect to costs? Yes, we are only challenging -- we challenging the amounts of -- of course, if he did not substantially prevail, then he is not entitled to anything.

THE COURT: [Inaudible] those items?

MR. KOPPEL: Yes, if he is entitled to any costs, it is travel costs -- primarily travel and telephone costs, which we continue to maintain are excessive. Now --

THE COURT: Is it correct, also, that [inaudible.] How much of the time was there a [inaudible]

THE COURT: Was there a substantial amount of time here that was estimated?

MR. KOPPEL: Yes, Your Honor. I believe the first few years of the litigation were entirely estimated. The Plaintiff had to estimate. He did not have contemporaneous records for that period.

Moreover, we believe that the District Court's holding that Plaintiff spent only seven hours on unproductive matters out of approximately 800 hours on the merits is manifestly incorrect on its face and unreasonable on its face, especially in light of the fact that the Court itself recognized that it had denied many motions for repetitious searching and reprocessing.

THE COURT: Was any of the time spent on the componency question or claimed?

MR. KOPPEL: No. It was claimed, Your Honor, but the District Court did not award fees for that. This does not -- the 800 hours were routinely received .

THE COURT: [Inaudible.]

MR. KOPPEL: That was on the merits, yes, Your Honor.

THE COURT: Can we go back, just for a moment, to the administrative processes? What that yielded?

It is certainly true that the Plaintiff in this case aborted, if you will, the administrative process by filing the FOIA request -- the additional FOIA request for 28 items and then amending the complaint the very next day.

But how do you deal with the District Court's express finding in the May, I believe it was, '76 status hearing, that under the circumstances,and this is complex litigation that the District Court had before it, that under these circumstances, that was simply harmless and that, in fact, ample time had gone by and that now the litigation had supervened, as it were, to overtake this administrative process?

Was not there an express determination by the District Judge to that effect?

MR. KOPPEL: Well, Your Honor, that certainly furnishes no basis to question the FBI's good faith in the matter because the FBI complied with --

THE COURT: Well, I am not talking about good faith. I am going to the nexus between litigation.

MR. KOPPEL: Causation.

THE COURT: Yes. And the production of the

documents.

MR. KOPPEL: Your Honor --

THE COURT: Your position is, the documents were produced pursuant to the administrative process.

A difficulty with that is that the District Judge concluded to the contrary.

MR. KOPPEL: Your Honor, to the extent that the District Court did, indeed, conclude to the contrary, we would submit that her determination is clearly erroneous in view of the magnitude of the Plaintiff's requests.

The Plaintiff's request of December 23rd, 1975 and the timing of that request, that it is essential to note that that request was filed shortly after the FOIA Amendments, the '74 Amendments took effect, at a time when the FBI was inundated with FOIA requests and was only just in the process of becoming familiar with the amended statute and therefore, the FBI was unable to proceed with the speed with which it --

THE COURT: Well, what happened with this litigation? What did you do when they moved the Amendment in question? They did not amend this at once. This litigation had been going on for awhile. So they had to move to amend.

What did the Department say?

MR. KOPPEL: Well, Your Honor, I believe --

THE COURT: Did you oppose?

MR. KOPPEL: I believe they did amend, as a matter of right.

THE COURT: As a matter of right.

MR. KOPPEL: Yes, Your Honor.

THE COURT: I see.

THE COURT: I have forgotten what the District Court said. Did she give a reason for concluding that the litigation from these documents being mostly administrative process as reason that would not apply to any case in which there was both a request and litigation?

MR. KOPPEL: No, Your Honor. The District Court did not do that. In fact, the District Court simply concluded -- without any additional elaboration -- that Plaintiff had prevailed because he received 50,000 pages. That is the extent of the District Court's analysis on the question of substantially-prevailed.

Furthermore, turning briefly to --

THE COURT: You know, it seems like you are talking about the January 20th, 1983 order.

MR. KOPPEL: I believe it was the December --

THE COURT: [Inaudible.]

MR. KOPPEL: Well, the District Court held, on Dececember 1st, 1981, at the same time that she disposed of the case on the merits, that the Plaintiff had substantially prevailed, even though the government had not briefed that

issue, because the District Court had specifically deferred dealing with that issue, pending the conclusion of the case on the merits.

THE COURT: According to the [inaudible] you are saying you certainly can look at the [inaudible] and see what the [inaudible.]

THE COURT: Which date is that?

THE COURT: January 20th, 1983 the Memoranda of Opinion was filed at that point in which she even said that you acknowledged the Plaintiff had triggered a complete review of the [inaudible] file. .

MR. KOPPEL: Your Honor, we also -- we maintain that the District Court's statement in that regard is erroneous, that the District Court had misinterpreted the colloquy between itself and the U.S. Attorney in that case.

THE COURT: But she then said that it was apparent to the Court -- whether you agree with her or not -- it was apparent to the Court that Mr. Weisberg was instrumental in causing review of the investigation by the team.

Is that[inaudible] by the Office of [inaudible] Department of Justice definition.

MR. KOPPEL: Your Honor, even to the extent that that is true, Mr. Weisberg's alleged contributions in that regard would result from the administrative process and the administrative processing of his enormous request of

December 23rd, rather than from this litigation.

THE COURT: Incidentally, your theory is that the whirl began with the '74 amendments and the fact that there was no response to his original request that in '69 was simply irrelevant to our determination?

MR. KOPPEL: Yes, your Honor. We take the position that that has no bearing, that the '69 request -- which clearly, was not -- could not secure the release of documents under the original FOIA Act and, of course, holding, in the Weisberg case in 1973.

THE COURT: And also, no lawsuit was filed until after the effective date of --

MR. KOPPEL: Correct, Your Honor. This is a new request, which was brought after the effective date of the '74 amendment.

THE COURT: What do you say about the fact that it did at one point [inaudible.]

MR. KOPPEL: Yes, Your Honor.

THE COURT: How long a period was that? About a year or so?

MR. KOPPEL: Six months. Six to ten months, I would say. And that was an eminently reasonable position under the circumstances, since the Department contended that it had complied -- fully complied with the initial request of April, '75.

THE COURT: The Court of Appeals of this Court said it was not, that it [inaudible.]

MR. KOPPEL: Excuse me, Your Honor?

THE COURT: Weren't you reversed on that appeal?

MR. KOPPEL: No, Your Honor, that was not appealed. The District Court did not accept the mootness argument and at that time we did not pursue it.

Only the Kennedy -- only the Time/Life photographs went to this Court in 1978.

THE COURT: Yes. [Inaudible.]

THE COURT: Mr. Koppel, your time has expired but we will give you a minute or so for rebuttal on this question of attorneys' fees and costs.

MR. KOPPEL: Thank you, Your Honor.

THE COURT: How much time does Mr. Lesar have left?

THE CLERK: Seven minutes.

THE COURT: Mr. Lesar, you have seven minutes.

REBUTTAL ARGUMENT OF JAMES H. LESAR, ESQ.

MR. LESAR: Thank you.

First, just a brief rebuttal with respect to the privacy claims.

The -- I wish to point out to the Court that, although we did not feel that we were required to do so, that the District Court directed us to show the nexus

between the King assassination and the individuals on the December 23rd, 1975 request.

She made that order at the April 21, 1981 hearing on the number of motions.

We complied with that. Mr. Weisberg and I both filed rather lengthy affidavits detailing the connection between those individuals and the King assassination.

THE COURT: Do you recall, Counsel, where that is in the Joint Appendix?

MR. LESAR: Pardon?

THE COURT: Do you recall where those affidavits are in the Joint Appendix?

MR. LESAR: I do not believe they are in the Joint Appendix. They are found in the record at 212. They are April 30th, 1981, I believe.

With respect to the question of substantially prevailed, our position is that Mr. Weisberg did, indeed, substantially prevail.

First of all, he clearly substantially prevailed with respect to the April 15th, 1981 request and that consumed a major portion of the litigation time.

I think what needs to be looked at here is, what were the issues that were litigated? And whether or not he prevailed on those issues.

The major portion of the time was spent on the

issue of the crime scene photographs. He prevailed on that beyond any question, after an appeal to the Court.

He sought a fee waiver and he obtained a fee waiver for all records in this lawsuit responsive to both requests.

The Department of Justice initially took the position that it was not going to respond to that fee waiver request until after the conclusion of the litigation.

Well, there is causal connection -- nexus, right? They were not going to respond to it until after the processing was done.

If we had not obtained that (B) waiver, he would not have been able to purchase all of the records at issue in the case.

The District --

THE COURT: [Inaudible.] [Loud buzz.]

MR. LESAR: That is correct, Your Honor.

THE COURT: [Inaudible.]

MR. LESAR: The National Association of Concerned Vets case came down long after those hours were worked and I believe that --

THE COURT: [Inaudible.]

MR. LESAR: I am not sure. I thought that that was the amended position, that it held that, but I may be wrong on that.

But at the time the hours were worked, records were not kept or were misplaced and so the only think I could do was go over and review each of the items and make an estimate as to how much time was spent on them.

THE COURT: [Inaudible.]

MR. LESAR: That is my recollection. Their only challenge was as to whether or not it was productively spent. But they did not challenge the amount of time.

And I think it is quite evident, if you look at them and see the nature of the pleadings and the amount of time, that the time was reasonable.

The District Court ruling with respect to the release of the 50,000 pages is amply supported in the record. The District Court reached that conclusion on the basis of evidence that showed that there had been a deliberate policy of not responding to Mr. Weisberg's request.

And that that policy extended past the amending of the Act, that he was not being treated as other requesters were treated.

The -- Weisberg submitted affidavits on this. He testified on this. His statements in that regard are uncontradicted. The Department of Justice admitted to the Congtess of the United States in hearings before a Committee of Congress that he, in fact, had been wrongly treated and they promised to do something about all of his requests that

had not been responded to and that still has not been done.

So, under the unique circumstances of this case, it seems to me quite clear that he substantially prevailed in this litigation.

There is no showing that anything would have been released to him except upon the filing of suit.

The fact that the claim was amended has no bearing on the issues, really, that were litigated and for which time is claimed.

We are claiming time with respect to the December 23rd request for litigating the fee waiver, for example.

Clearly, the litigation caused the "B" fee waiver to be granted.

It is true that, ultimately, the Department of Justice made that decision but they did so only after ignoring the request, not responding to the request at all for a period of seven months -- not even responding at all to the motion for a fee waiver filed November 30th, 1977.

They simply did not file a brief opposing it.

Then, they granted a partial reduction -- a 40 percent reduction.

We filed a new motion and then, months after that motion was filed and after Mr. Weisberg had won a victory on the fee waiver decision in another court pertaining to the Kennedy assassination documents, then the Department of

Justice granted a complete "B" waiver.

I submit that it is painfully clear, under those circumstances, that it was the litigation that caused the granting of the fee waiver.

With respect to the field office files, for example, the Government has made a new claim in its brief, not advanced below -- in its reply brief, not advanced below -- that the field office records -- that we should have made requests to the individual field offices for the records.

If you will look at page 569(M) of the -- 569(L) and 569(M) of the Appendix, you will see a memorandum dated March 25, 1976 from the legal counsel to Mr. Adams of the FBI and on the second page, it has a paragraph in parentheses that says that they are recommending that they are going to search the Memphis field office files for the photographs and other materials.

And then it says, "This would be an exception to the FOIPA's section's position that FBI headquarters searches alone constitutes sufficient compliance with respect to FOIA requests. However, this position is not considered tenable, given the facts in this case and to attempt to defend it in this litigation could very well result in a precedent-setting daverse decision on this point."

The issue was never argued or briefed by the Government in the Court below, for obvious reasons.

THE COURT: Your time has expired. I have one question. Judge Green allowed it 50 percent acceleration schedule?

MR. LESAR: Yes.

THE COURT: How do you square that allowance with the Supreme Court's decision in Blum v. Stenson?

MR. LESAR: Well, the Supreme Court decision in Blum v. Stenson does not really address the issue because it addresses the question of a quality enhancement and reserves for future decision the question of an enhancement due to the contingency or risk factor involved.

That leaves in place this Court's holding in Copeland v. Marshall.

And this Court has clearly held that the contingency is proper.

We properly documented and argued in our brief the nature of the contingency here. The magnitude of the risk was quite great. The law was unsettled at the time the complaint was filed. The magnitude of the undertaking was considerable, more than 1,000 hours have already been risked and there is, according to the Government's view, still no certainty, in fact, that we should get any attorney fees at all for this enormous undertaking.

In fact, the Government intends that, quite plainly, that we are not entitled to a farthing.

So, the risk is quite justified and under the precedent en banc in Copeland, should be upheld here.

THE COURT: What is your response to Mr. Koppel's statement to the effect that the issue of substantially prevailed was not, in fact, briefed?

MR. LESAR: Yes.

THE COURT: By the Government as well.

MR. LESAR: I thank you for bringing that up.

The Government chose not to brief it.

I think it has waived its substantially prevailed argument.

It is true that the Court -- that we initially moved to substantially -- for a ruling that we had substantially prevailed.

The Court deferred ruling on that and then, later, ruled that we had substantially prevailed.

The Government moved to reconsider that.

The Court denied it.

Then, when we moved for attorneys' fees, I briefed the issue all over again.

They declined to respond to that issue.

In fact, all of the arguments that they made regarding whether or not we substantially prevailed are not contained in their brief under "substantially prevailed."

Their brief, at page 2, says that "We are not

briefing this issue."

They did raise some of the factual claims, but they did it under the issue of, "Is he entitled to an award?" not, "Is he eligible for an award?"

They did not brief that issue and they chose not to brief it.

Thank you, Your Honors.

THE COURT: Mr. Koppel, I will give you a minute.

REBUTTAL ARGUMENT OF JOHN S. KOPPEL, ESQ.

MR. KOPPEL: Thank you, Your Honors.

With respect to Plaintiff's last statement, that the Department chose not to brief that issue, that is simply untrue.

The Department -- the District Court originally deferred briefing and decision of that issue until the end of the case on the merits. It then unexpectedly decided that issue without giving the Government an opportunity to brief it, in its decision, including the case on the merits.

Thereafter, the Government moved for reconsideration on that issue.

The Court denied that, denied the Government's motion and then the Government proceeded to brief and in subsequent briefs, the Government simply briefed the issue of entitlement -- the public benefit, the four factors test.

What Plaintiff did in his -- if the Plaintiff

chose to brief that issue again, the substantially prevailed issue, in his four-factor brief, that did not give the Government the right to challenge it at that point, since it had already been decided by the District Court and reconsideration had been denied.

Now, under the circumstances, it simply cannot be said that the Government waived its position on the substantially prevailed issue.

I notice that my red light is on so, in closing, I would just like to state that, while we do not dispute that he substantially prevailed with his small first request, the April 23rd request, because he got the Time/Life photos, as a result of them, we do challenge his entitlement to fees for that work, since we maintain that the Time/Life photos were already available to the public.

There was no benefit to the public and the Government behaved reasonably in withholding them until this Court -- or until Time/Life said that it did not want to become embroiled in this litigation.

Now, with respect to the fee waiver, there, too, we maintain that this is the result of the administrative process.

If anything, if it resulted from any litigation, it resulted from the Kennedy litigation, to which the Plaintiff alluded, in which Judge Desell had denied the -- had granted

a fee waiver.

It was at that point that the Department administratively decided to grant the fee waiver in this case.

It was not due to this litigation.

Moreover, we maintain that a fee waiver is not -- obtaining or securing a fee waiver is not sufficient to hold that the Plaintiff substantially prevailed.

Now, regarding the multiplier. Your Honor has already discussed that. It is our position that the Plaintiff must show extraordinary -- that the Supreme Court has held in Blum that the Plaintiff only gets a multiplier in an extraordinary case and we have shown in our supplemental brief that Plaintiff has shown no risk above and beyond -- that, first of all, Plaintiff did not achieve extraordinary results here and second of all, he did not show any risk above and beyond that normally attendant to every case.

In closing, I would urge the Court to hold that the District Court's decision awarding the Plaintiff approximately $110,000 in fees and costs must be reversed.

And if there are no further questions, I thank the Court.

THE COURT: All right, the case is submitted.

[Whereupon, the case was submitted.]