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Dear Jim, Re79-1700 (78-0249), DJ Motion to Publish Memorandum Opinion 6/14/80

It came in today's mail and I've read it once. With some despair, because it is clear that you do not understand what they are up to and by way of comment did no more than personalize, saying they want to be able to use it in your case. The only alternative is impossible, that you were not honest with me.

After this one reading - and I put it this way because it is possible that on re-reading and pondering I may see more - I am convinced that the only thing wrong with my spontaneous reaction is that it was too conservative. In turn that is because you did not reflect in our conversation what I see in this effort.

You fear strongly about this and you thus feel strongly about it so I will not do as I said I would. Do or do not do whatever you want, entirely on your own, and I will have no complaint and nothing to say until it is all over, however and whenever it ends.

I do suggest that you consider all possible alternatives, and after this reading I see others I will not now communicate to you. The reason is that I am hoping you can learn, as you refuse to, except in text-book ways. If there is a cost and if you really do learn something from it - I'll careful not to state what - I will regard it as well worth more than whatever the cost can be. I'm not concerned about costs to me.

I am not aware of the technicalities so I don't know how much time they have to try to do anything after the judgement is entered, so I'm not bothering to look up the time between then and the 10th, when the Motion was mailed to you. If there is a time limit and they have exceeded it I'd rush to oppose on that basis, dropping all else to do it.

There are two things about which I will be specific. They are not in this Motion but are from our conversation. One is your fear, which you have never faced and probably won't now. It was that I would antagonize the panel. With the MacKinnons and Robbs of this world our existence is all they need to be antagonized. That we use FOIA merely aggravates that. If the fear is justified, and in this case there can be disagreement, then one evaluates the fear against what might be accomplished.

There are many ways in which a lawyer can antagonize a judge. Have you really thought this through, broadly? Have you ever asked yourself what have I done or not done that could antagonize Judge A or Judge B?

The other is your fixations. I gave you a spontaneous reaction to the one specific you gave me, of many, and you never once changed your response. Do you think I didn't understand what you said? I did. You kept repeating the same thing over and over, and thus I just quit because you never once gave any thought to where I might be reaching to go.

Now I can see more clearly where to go and how to try to go there. As I told you, I won't and I won't tell you. I'll do nothing on my own. I won't even do as I said I would, draft a letter for your approval.

You are my dear friend. When I say something I know you don't want to hear it is not because of some invisible perversity but is because I believe it must be said, because you are holding a fine mind in captivity and defeat yourself by it, because at some point you will at least ask yourself question if not try to stand back and work out an evaluation.

Twelve years ago ,ast week I interviewed General Gavin, ad lib, about a book he'd written and I'd not even seen, because the man who was to do the interviewing didn't show up and the person from the program was a friend. (I must fine the tape for Dave.) After I threw a curve at which Gavin swung, he realized and responded - On JFK and the liquidation of the VN adventure. He quoted JFK as telling generals that we faced political problems and that they are not susceptible of military solution. And then asking what he could do to make his generals understand this. Please think about it. Best wishes,

Hal

bcc: All Jim told me is that they wanted the opinion published over the upholding of the withholding of FBI names. I said oh boy! vthey made a big mistake and gave him only one incredibly strong proof, one that proves they lied to this appeals court, to the district court and in other cases, including his own, on which I think he now has grounds to go back to that judge, Gesell, who reamed out one government lawyer and recused himself ffom that case over being lied to. This proof is in the FBI's affidavit in 1996, which I addressed in my response affidavit, and in an abundance of records I have.

All I had time to say is that I thought I shiuld yrite a letter in which I begin by explaining that I could not in good conscience ask Jim to continue to represent me in this case when I could not pay him and he would not recover his costs because —— and there he interruoted with his spontaneous reaction and I got no farthur.

Now that I have read the Motion I see claearly that it will be a virtual rewriting of FOIA, at the very least with regard to exemptions 1,2 andn7.

It will enable the government to stonewall every FOIA case, bleed every requ ester and his counsel, and immediately there will be a great dimunition in what is provided outside of litigation. There will be more forced to litigation by non-compliance.

Every source, even the city directory, would be a confidential source. What the legislative history rules out, sources other than human, become confidential sources, within the newly-ordained meaning of the Act.

Now having read this monstrosity and seeing what Jim did not begin to indicate there are many things I would do in the greatest possible haste, first of all speaking to counsel in the other case mentioned, Joan Baez's, even asking the court to appoint him as my counsel because Jim is overly-booked and I can't pay a lawyer.

His disposition was to do nothing when we spoke. When I said I'd write a letter he said he'd do it, so I asked with what time? I thought you don't have time for a ything. He said it wouldn't take that long, as he always says before he does n't get around to doing what he should. I just got him to get around to moving the reprocessing of the FBIHQ MURKIN records, which the judge had told him to do on 1/12/79!

His personalized reaction was in terms of his 78-2305 and in saying I would undercut him to the Court.

When I asked him about the money the appeals court ordered be repaid to me by DJ more than a half year ago he said/ He'd speak tothe government attorney again, for the umpeenth time. When I said the appeals court should know of that contempt, he said he'd first write the Associate AG. When I said how would that do more than play along with the delay, he said it had to be done first. Only when I asked if he could not send a carbon t the appeals court did he think maybe he could! And they ordered repayment long ago, well before the end of last year.

I told him a week ago that I had good information thatbthey are doing a number on me and at least in part in court and he cangtsee the possible correlation between this new effort and the refusal to pay what they owe me and then refuses to see that there are possibilities of turning it around by forgetting ehat is in the law books, forgetting what is not applicable to such a political situation. He has not yet learned how to fight a political case when most of his lawyering career has been political cases - almost all.

I am less certain but I believe if they get away woth this there is almost no record the FBI and CIA won't be able to wothhold under 7E, as "disclosing" an investigative method or technique.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1700
(C.A. No. 78-0249)

HAROLD WEISBERG, Appellant,

v.

WILLIAM H. WEBSTER, Director, Federal Bureau of Investigation, et al., Appellees.

MOTION TO PUBLISH MEMORANDUM OPINION

Appellees respectfully move this Court to publish its memorandum opinion of May 12, 1980.

This appeal concerned a request under the Freedom of Information Act (FOIA) for documents related to the processing of Federal Bureau of Investigation (FBI) records concerning the assassination of President John F. Kennedy. In response to appellant's request, the FBI released 2,581 pages of inventory worksheets utilized in the processing of those records and detailed the legal basis for the few excisions made. During the ensuing District Court proceedings initiated by appellant, appellees filed detailed affidavits addressing the complete nature of their response, the general reason for the excisions, and the legal basis for each exemption invoked. Specifically, Exemption 1 was invoked for material properly classified as "confidential." Exemption 2 was asserted solely to remove FBI informant file and symbol numbers to protect the informant program and the adminis-

tration of informants. Exemption 7 (C) was cited to support the withholding of information identifying third parties and the FBI agents who produced the worksheets, thereby protecting them against unwarranted invasions of privacy. Exemption 7 (D) was asserted to protect the identity of a confidential source and information furnished only by that source, and to remove the file and symbol numbers of FBI informants which could reveal their identities. Finally, Exemption 7 (E) was invoked to protect two investigative techniques so as to avoid impairing their future effectiveness. The District Court, in an unpublished opinion and order, upheld appellees' claims of exemption on the asserted bases, ruling in addition that Exemption 7 (D) covered any confidential source, be it an individual, an agency, a business or an institution. In a judgment filed on May 12, 1980, this Court affirmed "on the basis of the opinion of the District Court . . . ."

The decision of this Court provides important clarifications of the scope of Exemptions 1, 2, 7 (C), and 7 (D), and thus should be available in published form for the guidance of the District Court and for other courts and litigants across the country. In particular, this Court's ruling concerning Exemption 7 (D) made clear for the first time that an FBI informant's file and symbol numbers, as well as his identity, are exempt from disclosure under Exemption 7 (D). This same issue was argued before the United States Court of Appeals for the Second Circuit approximately one month ago in the case of Keeney v. FBI, No. 79-6267. It has

also been raised before this Court in two pending appeals: Baez v. Department of Justice, No. 79-1881, and Lesar v. Department of Justice, No. 79-2305.

This Court's holding that the privacy of third parties and the FBI agents producing worksheets is protected under Exemption 7 (C) also establishes a new and valuable precedent. Both this ruling and the determination that FBI file and symbol numbers are protected under Exemption 2 are dispositive of issues pending before this Court in Lesar v. Department of Justice, supra. Further, this Court's ruling concerning the confidential nature of material so classified, while seemingly obvious, would affect several pending cases, including the appeals in Baez v. Department of Justice, supra, and Lesar v. Department of Justice, supra.

It is thus evident that publication of this Court's memorandum[1/] would be of concrete assistance to the parties and the courts in pending and future litigation. District Courts could avoid allowing similar claims in the future, only to be reversed on appeal, and litigants would have some guidance in deciding whether to appeal from District Court rulings favorable to the Government. In either event, publication would serve the vital interests of the expeditious handling of FOIA cases, see 5 U.S.C. § 552 (a)(4)(D), and of judicial economy. We accordingly request

1/ Since the District Court did not publish its opinion and since this Court explicitly endorsed that opinion, the present judgment could be published in the Federal Reporter with the District Court opinion attached as an appendix, as in Parker v. FPC, 175 U.S. App. D.C. 280, 534 F.2d 977 (1976).

this Court to order that its memorandum opinion in the instant case be published.

Respectfully submitted,

CHARLES F.C. RUFF
United States Attorney

JOHN A. TERRY
Assistant United States Attorney

CONSTANCE L. BELFIORE
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing Motion has been mailed to counsel for appellant, James H. Lesar, Esquire, 910 16th Street, N.W., #500, Washington, D.C., 20006, this 10th day of June, 1980.

CONSTANCE L. BELFIORE
Assistant United States Attorney