BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 79-1729

HAROLD WEISBERG,

Plaintiff-Appellant

v.

CENTRAL INTELLIGENCE AGENCY, ET AL.,

Defendants-Appellees

On Appeal from the United States District Court for the District of Columbia, Hon. John Lewis Smith, Jr., Judge

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HAROLD WEISBERG,	:	
	:	
Plaintiff-Appellant	:	
	:	
v.	:	Case No. 79-1729
	:	
	:	
CENTRAL INTELLIGENCE AGENCY, ET AL.,	:	
	:	
	:	
Defendants-Appellees	:	

CERTIFICATE REQUIRED BY RULE 8(c) OF THE GENERAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned, counsel of record for Harold Weisberg, certifies that the following listed parties appeared below: Harold Weisberg, the Central Intelligence Agency, and the National Security Agency. There were no amici.

These representations are made in order that Judges of this Court, inter alia, may evaluate possible disqualifications or recusal.

JAMES H. LESAR

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BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF ISSUES

1. Whether the Central Intelligence Agency made an adequate, good-faith search for records responsive to plaintiff's Freedom of Information Act request.

2. Whether materials withheld under 50 U.S.C. § 403(d)(3), allegedly to protect intelligence sources and methods from un-

authorized disclosure, are exempt under 5 U.S.C. § 552(b)(3) where they are not properly classified pursuant to Executive order.

3. Whether summary judgment was properly granted where Central Intelligence Agency records which were referred to originating, nonparty agency were not produced.

4. Whether there were genuine issues of material fact in dispute which precluded summary judgment.

5. Whether CIA Affidavits were adequate to support an award of summary judgment in its favor.*

REFERENCES TO PARTIES AND RULINGS

The opinion of the District Court (Judge John Lewis Smith, Jr.) was filed on January 4, 1979, and entered on January 5, 1979. It is reproduced in the Appendix at)

The order granting defendants' motion for summary judgment was filed on January 4, 1979, and entered on January 5, 1979. (Appendix,)

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*This case was not previously before this Court. Counsel is unaware of any cases presently pending in this Court, or that may be presented to the Court in the future, which are related to this case.

The District Court's order denying plaintiff's motion for reconsideration was filed on February 1, 1979, and entered on April 2, 1979. (Appendix)

The parties to this litigation are Harold Weisberg (plaintiff), the Central Intelligence Agency (defendant), and the National Security Agency (defendant).

STATUTES AND REGULATIONS

Relevant provisions of the Freedom of Information Act, 5 U.S.C. § 552; 18 U.S.C. § 798; and 50 U.S.C. §§ 402, 403(d)(3) and 403g are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Administrative Proceedings

By letter dated June 11, 1976 plaintiff Harold Weisberg ("Weisberg") made a Freedom of Information Act request of the Central Intelligence Agency ("CIA") for:

> 1. All records pertaining to Dr. Martin Luther King, Jr.
>
> 2. All records pertaining to the assassination of Dr. Martin Luther King, Jr.
>
> 3. All records pertaining to James Earl Ray, under whatever name or alias.
>
> 4. All records on any alleged or suspected accomplice or associate in the assassination of Dr. Martin Luther King, Jr.

5. All collections of published materials on the assassination of Dr. Martin Luther King, Jr.

6. All analyses, commentaries, reports, or investigations on or in any way pertaining to any published materials on the assassination of Dr. Martin Luther King, Jr. or the authors of said materials.

7. All records, letters, cables, memorandums, routing slips, photographs, tape recordings, receipts, sketches, computer printouts or any other form of data pertaining to or in any way relevant to the foregoing requests for information, regardless of source or origin.

(App.)

By letter dated June 11, 1976, the CIA's Information and Privacy Coordinator, Mr. Gene F. Wilson, wrote Weisberg's counsel that he would arrange for a search of CIA files and would "be in further communication with you once the search has been completed and any records found reviewed for releasability under the Act." (App.)

More than six months elapsed before Mr. Wilson again wrote Weisberg's counsel, this time to advise that the CIA was "unable to respond to your request as it now stands due to legal and regulatory restrictions on the release of personal information from official records." (November 30, 1976 letter from Mr. Gene F. Wilson to Mr. James H. Lesar. App.) Asserting that the CIA could proceed no further "until we are in receipt of notarized statements of release from Mrs. Coretta King and James Earl Ray, respectively," and citing an estimate that the search and copying charges required by the request "could approach $1000," he demanded

that Weisberg not only furnish privacy waivers by Mrs. King and James Earl Ray, but that he also remit a down payment of half of the amount of the estimated charges and state his willingness to pay the entire sum.

By letter dated December 3, 1976, Weisberg's counsel advised the CIA of his client's willingness to pay search and copying charges up to the estimated amount of $1000 and enclosed a check for $500 to cover the requested down payment. He also enclosed a copy of a privacy waiver by James Earl Ray with respect to Justice Department records on the assassination of Dr. King. Noting, however, that Weisberg's request undoubtedly comprised records not involving any proprer claim of privacy, he requested that the CIA proceed to make available any such records. (App.)

On December 27, 1976, Weisberg's counsel provided the CIA with a second privacy waiver by James Earl Ray, this one specifically directed at records in the possession of the CIA. Noting that the CIA had not responded to his letter of December 3rd, he solicited the CIA's assurance that it had begun to process Weisberg's request and would soon be making available those which did not require a privacy release by Mrs. King. He also requested that the documents be made available as they were processed, rather than waiting until all were reviewed before releasing any of them. (App.)

By letter dated January 13, 1977, the CIA informed Weisberg's counsel that it had received Ray's privacy waiver and had initiated

processing of "this portion of your request," and that "[u]pon receipt of the sworn waiver of Mrs. King, . . . we will then be able to proceed with all aspects of your FOIA request. (App.)

By letter dated April 26, 1977, the CIA released some materials responsive to Weisberg's request. This partial release consisted largely of newspaper clippings, although a number of CIA cables were also included. The CIA informed Weisberg of his right to appeal the claims of exemption it had asserted, but it went on to suggest that "it would seem to be more reasonable to await the complete results of our processing before you actually determine whether to do so." (App.)

B. Court Proceedings

For nearly seven months more, Weisberg awaited "the complete results" of the CIA's processing. On November 21, 1977, the CIA not having communicated further since its letter of April 26, 1977, Weisberg filed suit.

No sooner had Weisberg filed suit than his counsel received a letter from Mr. Norman Boardman, Chief, Policy Staff, National Security Agency ("NSA"), advising that on November 4, 1977, NSA had received a copy of Weisberg's June 11, 1976 FOIA request from the CIA. The CIA had sent it to the NSA, albeit none too quickly, because during its search it had come across records responsive to the request which had originated with NSA. (App.)

Because NSA denied access to these records in toto, Weisberg filed an amended complaint on December 5, 1977, adding NSA as a defendant.

On January 20, 1978, defendants filed their Answer. On April 3, 1978, Weisberg filed a motion under Vaughn v. Rosen to require a detailed justification, itemization, and indexing of withheld materials. On April 14, 1978, defendants filed an opposition to this motion in which they stated that by May 22, 1978, when their motion for summary judgment was due, they would be filing supporting affidavits which "will provide as detailed a justification for withholding the records at issue as is consistent with the Freedom of Information Act and national security." The District Court never acted upon the motion.

On May 26, 1978, defendants filed their motion for summary judgment. The motion asserted that 373 CIA documents responsive to the request had been located, of which 238 were released in their entirety. Of the 135 remaining, 104 were released with excisions and 31 were withheld in their entirety. The motion also asserted that the documents which had been released in April, 1977 had been reprocessed and "additional portions are now released as well." (Memorandum of Points and Authorities, p. 2) To justify its withholdings, the CIA invoked Exemptions 1, 3, and 6. The Exemption 3 statutes cited by the CIA were 50 U.S.C. § 403(d)(3) and § 403g.

The NSA asserted that it had 22 responsive documents and that all were totally immune from disclosure under Exemptions 1 and 3. (The NSA later boosted this number to 27, saying that by letter dated May 19, 1978, the CIA had referred another 5 documents to it.)

From the affidavit of Gene F. Wilson, filed in support of defendants' motion for summary judgment, Weisberg learned for the first time that the CIA had referred 64 documents to the FBI.

On June 29, 1978, Weisberg filed an opposition to defendants' motion for summary judgment. It was supported by a detailed affidavit by Weisberg himself. In addition, Weisberg's attorney submitted an affidavit made pursuant to Rule 56(f) of the Federal Rules of Civil Procedure which stated that plaintiff needed to engage in discovery in order to more effectively oppose defendants' summary judgment motion.

On July 19, 1978, defendants filed a reply memorandum in support of their motion for summary judgment. This was accompanied by several additional affidavits.

On September 13, 1978, argument of the motion for summary judgment was heard. Subsequently, both sides filed supplemental memoranda and affidavits.

On November 2, 1978, Weisberg noticed the depositions of four CIA officials for December 8, 1978. On December 5, 1978, defendants filed a motion to quash and for a protective order, asserting that the depositions were a "manifestly unwarranted burden on busy government officials." By stipulation, counsel for

the parties continued the depositions until the Court ruled on the motion to quash.

By order filed on December 6, 1978, the Court quashed the subpoenas and in part granted the motion for a protective order. The Court's order provided, however, that Weisberg could take discovery by means of interrogatories. Eight days later the Court vacated this order without explanation and issued a protective order barring all discovery by plaintiff "until such time as the court may otherwise order."

C. District Court's Opinion

On January 4, 1979, the District Court issued an opinion and filed an order granting summary judgment in favor of defendants. With respect to the issue of the adequacy of the search conducted by the CIA, the Court ruled that "[t]he CIA has met its burden in showing that all identifiable records pertaining to Dr. King and Mr. Ray have been located in this case." (App.) The Court also ruled that the CIA did not have to produce the documents which it had referred to the FBI. (App.)

With respect to the CIA's claim that its records were exempt under 5 U.S.C. § 552(b)(1) because they had been classified in the interest of national security, the Court made no ruling.[1/] In-

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1/ In a report to the Court filed on December 5, 1978, defendants called attention to the fact that a new Executive order governing classification, E.O. 12065, became effective on December 1, 1978, but they told the Court that it could disregard this because the documents were independently protected by Exemption 3.

stead, the Court ruled that on the basis of 50 U.S.C. §§ 403(d)(3) and 403g, they were protected by Exemption 3. Additionally, the Court upheld the CIA's claim that some of the information was properly withheld under Exemption 6.

ARGUMENT

I. THE CIA FAILED TO CONDUCT AN ADEQUATE, GOOD-FAITH SEARCH FOR RECORDS RESPONSIVE TO WEISBERG'S REQUEST

In National Cable Television Association v. F.C.C., 156 U.S. App.D.C. 91, 94, 479 F.2d 183, 186 (1973), this Court held that in order to prevail on a motion for summary judgment in a Freedom of Information Act lawsuit,

> the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.

In this case the CIA has not met that burden. The evidence of this is obvious and multifarious. It is also both undeniable and undenied.

The District Court, echoing the line taken by the CIA, found that "[t]he CIA has met its burden in showing that all identifiable records pertaining to Dr. King and Mr. Ray have been located in this case." (App.) Because Weisberg's FOIA request is not limited to records "pertaining to Dr. King and Mr. Ray," this finding is inadequate to support an award of summary judgment in the CIA's favor on the issue of the adequacy of the search.

identifiable as "filed in (obliterated, 'E' superimposed)" is uncontradicted. (See October 9, 1978 Weisberg Affidavit, ¶75) There are, in fact, a number of instances in which file locations have been excised in the records provided Weisberg. (See October 9, 1978 Weisberg Affidavit, ¶¶84, 90-91)

Further proof that the CIA did not make an adequate search is found in the fact that Weisberg put in the record copies of CIA documents that fall within the scope of his request but which were not produced by the CIA in response to the FOIA request at issue in this lawsuit. (See June 29, 1978 Affidavit of James H. Lesar, ¶4, Attachment 1. App. , ; and copy of CIA document found at Attachment 2 to Supplemental Opposition to Defendants' Motion for Summary Judgment. App.) Weisberg also swears that he has other relevant records which the CIA did not disclose and which in fact it has denied having. (See June 11, 1978 Weisberg Affidavit, ¶11)

The absence of kinds of records which presumably exist and the lack of records from components of the CIA which logically must have them are further indications that an adequate search was not made. As to the first, no computer printouts have been provided and what has been given Weisberg includes no studies of the possibility of foreign or communist involvement in the assassination of Dr. King, even though suspicions of this were rampant at the time he was killed and the CIA did make such studies in regard to the assassination of President John F. Kennedy. (See

October 9, 1978 Weisberg Affidavit, ¶¶97-106) As to the second, the CIA provided no affidavit from any component that handles Congressional liaison. The CIA was compelled to search for records pertaining to Dr. King's assassination so it could provide them to the House Select Committee on Assassinations. In an analogous situation, the FBI initially denied that there was any such thing as the "Long tickler" file on the King assassination. Finally, after Weisberg himself provided leads to the Department of Justice appeals unit, it was located in the hands of the FBI's congressional liaison people. (See January 12, 1979 Weisberg Affidavit, ¶¶14-15)

The affidavits submitted by the CIA are deficient in that they fail to state that a thorough search for all relevant records has been made. The CIA says that its search was limited to an index search under two names, Dr. Martin Luther King, Jr. and James Earl Ray. That this was deliberately inadequate is demonstrated by Item 6 of Weisberg's request, which asked for:

> All analyses, commentaries, reports or investigations on or in any way pertaining to any published materials on the assassination of Dr. Martin Luther King, Jr. or the authors of said materials. (Emphasis added)

Leaving aside the question of whether any search was made for records indexed under appropriate subject headings, it is evident that this item of the request at least required a search under the names of authors of published materials on the King assassination.

The CIA admits that no search was made under the name of authors, stating that this was not done "because plaintiff did not provide the names of any such authors or request documents relating to them." (Affidavit of Charles E. Savige, ¶9) A reading of Item 6 makes clear that Weisberg did request documents relating to such authors.

The Freedom of Information Act originally provided that an agency make documents available "on request for identifiable records made in accordance with published rules." The 1974 Amendments changed this to require that the request must be one which "reasonably describes" the records sought. 5 U.S.C. § 552(a)(3)(A). The legislative history shows that Congress intended that:

> A description of a requested document would be sufficient if it enables a professional employee of the agency who is familiar with the subject area of the request to locate the record with a reasonable amount of effort.

H.Rep. No. 93-876, 93d Cong., 2nd Sess. (1974), at 5-7.

The description provided by Weisberg's request was sufficient to enable knowledgeable employees of the CIA to locate records relating to authors of books and articles on Dr. King's assassination. The CIA has not asserted that this was outside its capabilities. One such author, Mr. Weisberg, was well-known to the CIA's employees who were knowledgeable in this area. In fact, the CIA's own records establish that it reviewed his book on Dr. King's assassination. (App.) Moreover, he was identified as the the author of a book on this subject in the complaint. Yet the

CIA did not provide records relating to him in response to this request.

Even if Weisberg's request were deficient in describing the records sought, the CIA still had an obligation not to let the matter rest there. When an agency receives a request which does not "reasonably describe" the records sought, "it should notify the requestor of the defect." Attorney General's Memorandum on the the 1974 Amendments to the Freedom of Information Act (1975) at 23. Indeed, the CIA's own records provide that where its Freedom of Information Coordinator has determined that an intended request fails to reasonably describe the records sought,

> he shall so inform the originator of the communication promptly, in writing, and he may offer to assist the originator in revising and perfecting the description of the records of interest.

32 C.F.R. § 1900.31(c)(2).

The CIA never notified Weisberg that it considered his request deficient. However, when Weisberg learned of the alleged reason for failing to search the names of authors for records relating to them, his counsel wrote the CIA a letter which named 12 authors of books and articles on the assassination of Dr. King. (October 3, 1978 letter from James H. Lesar to Mr. George Owens. App.) The CIA has never responded to this letter. This amply shows its bad faith in refusing to conduct the search required by Weisberg's request.

Finally, the CIA has stated that it is does not process "duplicate" copies of records where it recognizes them as such.

The CIA admitted to this after Weisberg pointed out that he had only been given a single copy of documents which themselves showed multiple distribution within the CIA. The Freedom of Information Act contains no exemption for "duplicate" copies. Even where one copy of a record is identical in all respects with another, it may still have value to a scholar. More importantly, what an agency considers "duplicates" often are not, particular to a scholar. For example, one copy of a record may contain notations, comments, or initials that are not on another. In a matter of historical interest such as with the records involved here, it is important that all copies of a record be obtained. Because the FOIA does not contain and exemption for "duplicates," the District Court could not properly grant summary judgment without first ascertaining that all copies in the CIA's possesion, or subject to its control, had been produced.

II. MATERIALS WITHHELD UNDER 50 U.S.C. § 403(d)(3) ARE NOT EXEMPT UNDER 5 U.S.C. § 552(b)(3) UNLESS PROPERLY CLASSIFIED PURSUANT TO EXECUTIVE ORDER

The Freedom of Information Act, 5 U.S.C. § 552(b), exempts from compulsory disclosure records that are:

> (3) specifically exempted from disclosure by statute . . ., provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld.

The CIA claims that numerous documents withheld in their entirety and excised portions of others are protected by Exemption 3. In making this assertion, the CIA relies upon 50 U.S.C. § 403(d)(3) and § 403g. The first of these provides that:

> the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.

The District Court upheld the CIA's Exemption 3 claims. In so doing, it ruled that the viability of the Exemption 3 claims based upon § 403(d)(3) was totally unrelated to the classified status of the records for which this exemption was claimed.

Weisberg contends, to the contrary, that information which is not properly classified pursuant to the applicable Executive order cannot be the subject of unauthorized disclosure within the meaning of the statute, and therefore is not exempt under a (b)(3) claim based upon this statute.

That Congress intended this to be the case is clearly spelled out in the legislative history to the 1974 Amendments. Thus the Conference Report which accompanied the bill which amended Exemption 1 states:

> Restricted Data (42 U.S.C. 2162), communication information (18 U.S.C. 798), and intelligence information (18 U.S.C. 798), and intelligence sources and methods (50 U.S.C. 403(d)(3) and (g), for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act. When such information is subjected to court review, the court should recognize that if such information is classified pursuant to one of the above statutes, it shall be exempted under this law. (Emphasis added)

Conference Report No. 93-1380, 93rd Cong., 2d Sess., at 12.

In a recent decision this Court noted that it has, on occasion, interpreted the CIA's Exemption 3 statute (50 U.S.C. §§ 403(d)(3), 403g(1976)) "narrowly, so as to make it in effect no broader than Exemption 1." Thomas E. Hayden and Jane S. Fonda v. National Security Agency, et al., (Nos. 78-1728 and 78-1729, decided October 29, 1978) (citations omitted), slip op. at 16.

In addition to the legislative history of the 1974 Amendments cited above, another consideration compels this result. If what constitutes "unauthorized disclosure" of intelligence sources and methods is not to be determined by reference to the applicable Executive order governing classification, then there is no standard for making such a determination. Accordingly, unless § 403(d)(3) is read in light of the applicable Executive order, it cannot qualify as an Exemption 3 statute because it then leaves withholding at the discretion of the Director of Central Intelligence and does not establish particular criteria for his decision to withhold.

In Ray v. Turner, 190 U.S.App.D.C. 290, 322, 587 F.2d 1187, 1219, this Court observed that,

> . . . Section 403(d)(3)'s language of protecting 'intelligence sources and methods' is potentially quite expansive. To fulfill Congress' intent to close the loophole created in Robertson, courts must be particularly careful when scrutinizing claims of exemptions based on such expansive terms. A court's de novo determination that releasing contested material could in fact reasonably be expected to expose intelligence sources or methods is thus essential when an agency seeks to rely on Section 403(d)(3).

(Concurring opinion of Chief Judge Wright)

In this case the District Court did not make the careful de novo review called for by Ray v. Turner. It made no finding that release of the contested material could in fact reasonably be expected to expose intelligence sources and methods. It simply accepted the CIA's Exemption 3 claim at face value and conducted no inquiry whatsoever into its validity.

This error was particularly egregious because Weisberg made a showing that the CIA had withheld records from him, allegedly to protect "intelligence sources and methods," when in fact they contained no protectible intelligence sources and methods. (See Attachments 4 and 5 to June 29, 1978 Lesar Affidavit which contain the January 22 and January 27, 1964 Warren Commission Executive session transcripts which the CIA spuriously withheld for more than a decade on this grounds. App. -) Indeed, in Weisberg's FOIA cases, and at least one other, a clear pattern has developed. The CIA initially claims that the records sought are protected by both Exemptions 1 and 3. When the CIA loses in District Court or when it faces reversal by the Court of Appeals, it "declassifies" the information, forgets its Exemption 3 claims, and releases the records. This patttern makes it apparent that the CIA is simply using Exemption 3 as a means of stonewalling access to information it doesn't want released to persons it abhors. This is an abuse of the Freedom of Information Act and subverts the integrity of the courts. This Court should address this abuse in such a manner as to put an end to it forthwith.

III. CIA'S FAILURE TO PRODUCE RECORDS IT REFERRED TO FBI PRECLUDED SUMMARY JUDGMENT

During its processing of Weisberg's request, the CIA located 65 documents which originated with the FBI. (See May 26, 1978 Wilson Affidavit, ¶15)[2/] All but two of these were retained by the FBI for classification review. Weisberg first learned of these referrals after the Wilson affidavit was filed on May 26, 1978. This was more than a half year after he had filed suit against the CIA. The CIA insisted that it did not have to produce these records in connection with this lawsuit and the District Court ruled in its favor on this issue. To the best of Weisberg's knowledge, he has not yet received any of the 63 records which were said by the FBI to be undergoing classification review in July, 1978.[3/]

As noted above, in order to prevail on a motion for summary judgment in an FOIA lawsuit the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements. National Cable, supra, 156 U.S. App.D.C. at 94, 479 F.2d at 186.

2/ Although the Wilson Affidavit speaks of 64 referrals, the subsequent affidavit of FBI Agent Martin Wood says one more was received than Wilson said he was sending. (App.)

3/ In the past two years Weisberg has received over 200,000 pages of records on the assassinations of President Kennedy and Dr. King, most of them from the FBI. Given this volume of records and the numerous FOIA requests that are involved, it is possible that some of these referrals have been received but are not recognized or recalled as such.

The Freedom of Information Act makes no exception for "non-original records" in the possession of an agency, nor does it authorize a different procedural treatment for documents that originated with an agency other than the agency processing the records sought.

The requirements of the FOIA are plain. 5 U.S.C. § 552(a)(3) provides that,

> each agency upon any request for records which reasonably describes such records . . . shall make the records promptly available to any person.

5 U.S.C. 552(c) indicates in no uncertain terms that agencies may not impose any limitations on the availability of information other than those expressly provided by the Act, stating:

> This section does not authorize withholding of information or limit the availability of records to the public except as specifically stated in this section.

5 U.S.C. § 552(a)(6)(B)(iii) also provides that an agency may extend the time for responding to a request where:

> the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request . . . .

In view of these provisions it is evident that the proper method of handling the FBI referrals was to have conducted the consultation with "all practicable speed" and then to have responded to Weisberg in the context of this lawsuit. Any other method of proceeding inevitably delays access and drives up the cost of litigation. Where the backlog of FOIA requests is particularly large at the agency to which referrals are made, as it is in this case

with the FBI, the corrosive effect of this stonewalling tactic is especially great. The procedure insisted upon by the CIA in this case and sanctioned by the District Court is yet another instance of the CIA's bad faith in its litigation with Weisberg and its unceasing efforts to wear down FOIA litigants with obstructionist tactics. This Court should declare that FOIA does not allow this abuse.

IV. SUMMARY JUDGMENT WAS IMPROPER BECAUSE MATERIAL FACTS WERE IN DISPUTE

A motion for summary judgment is properly granted only when no material fact is genuinely ins dispute, and then only when the movant is entitled to prevail as a matter of law. Fed.R. Civ.P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Bouchard v. Washington, 168 U.S.App.D.C. 402, 405, 514 F.2d 824, 827 (1974); Nyhus Travel Management Corp., 151 U.S.App. D.C. 269, 271, 466 F.2d 440, 442 (1972). In assessing the motion, all "inferences to be drawn from the underlying facts contained in [the movant's] materials must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The movant must shoulder the burden of showing affirmatively the absence of any meaningful factual issue. Bloomgarden v. Coyer, 156 U.S.App.D.C. 109, 113-114, 479 F.2d 201, 206-207 (1973). That responsibility may not be relieved through adjudication since "[t]he court's func-

tion is limited to ascertaining whether any factual issue pertinent to the controversy exists [and] does not extend to the resolution of any such issue." Nyhus, supra, note 32, 151 U.S.App. D.C. at 271, 466 F.2d at 442.

The adequacy of the CIA's search for records responsive to the request has already been discussed in some detail above, in Part I of the Argument. The facts set forth there establish that there is a genuine factual dispute as to the adequacy of the CIA's search. This presents a triable issue of fact which precludes summary judgment. The Founding Church of Scientology of Washington, D.C., Inc. v. National Security Agency, et al. (No. 77-1975, decided May 15, 1979), slip op. at 27.

There are also factual issues with respect to the CIA's claims of exemption. For example, the CIA asserted Exemption 3 and 50 U.S.C. § 403g "to prevent detailed knowledge of CIA structure and procedure from being available as a tool for hostile penetration." (May 25, 1978 Owen Affidavit, ¶18) Weisberg has raised an issue of fact by controverting these claims. He claims that the CIA is withholding what is already public knowledge. As one proof of this he attaches copies of the CIA's organizational charts, which the CIA itself released to him, after first claiming that they were exempt from disclosure. (See June 11, 1978 Weisberg Affidavit, ¶17 and Attachment 4 thereto)

Another example of the CIA's absurd proclivity for wasting the taxpayers' money and frustrating FOIA requesters is found in the fact that the CIA has withheld the name of a city (it happens

to be Mexico City) under the claim that disclosing it would confirm the existence of a CIA station there, even though (a) the CIA had released this tidbit in its Kennedy assassination files (see June 11, 1978 Weisberg Affidavit, ¶33); (b) this fact is confirmed at pages 268-269 of The CIA and the Cult of Intelligence, a book published with formal CIA and court approval; and (c) this fact has also been confirmed to countless newspapers, writers, and Congressional committees for their public uses. (See October 9, 1978 Weisberg Affidavit, ¶¶6165) Similarly, the CIA has claimed Exemption 3 for a staff employee of its Domestic Contact Service, even though the Domestic Contact Service is overt, not covert. (See October 9, 1978 Weisberg Affidavit, ¶¶58-59)

The CIA also has a habit of withholding information that is already public under the guise that it is doing so to protect "intelligence sources and methods." For example,

> The CIA deceived and misled the Senate Select Committee on Intelligence into withholding known names on the spurious ground that its sources and methods had to be protected or could be endangered as a result. As a result, the report of the Senate . . . substitutes letters for names. Yet all these names were in the public domain, in long newspaper accounts in the Washington Post and many other newspapers and magazines and in the readily available and unclassified records in the National Archives. Mr. Nosenko is one such example. Another is Mr. Alvarado Ugarte. Another is Mr. Cubela ("Amlash").

In view of the showing made by Weisberg that the CIA, both in this case and elsewhere, claims exemptions for information that is already public knowledge, summary judgment was clearly inappropriate.

V. CIA AFFIDAVITS WERE NOT ADEQUATE TO SUPPORT AN AWARD OF SUMMARY JUDGMENT IN ITS FAVOR

The CIA's motion for summary judgment was supported by a confusing medley of affidavits, supplemental affidavits, and document disposition indexes keyed to letters of the alphabet. For the most part the CIA's many affidavits are conclusory and lack any credibility.

For example, with respect to Exemption 6, Mr. Owen swears that much of the information withheld "concerns or refers to individuals in a manner which is derrogatory or potentially embarrassing and which, in most instances, the CIA had no opportunity or reason to authenticate or verify." (May 25, 1978 Owen Affidavit, ¶20) He provides no examples of the type of information which he considers to be derrogatory or "potentially embarrassing." He also asserts that this exemption has been invoked for names of third parties--not to protect the privacy of Mrs. King or James Earl Ray, despite the early insistence on privacy waivers from them--and that "the public interest in these third parties is minimal." He does not eludicate the factors he weighed in considering the public interest, or whether he even gave any additional weight to the fact that these records involve matters of great historical interest.

Several documents have been withheld in their entirety under Exemption 6. The surrounding circumstances suggest that they are items of personal correspondence which the CIA illegally intercepted. With respect to these letters, which are withheld in

their entirety, Owen asserts that it is reasonable to assume that the parties would be offended by the "publication" of their correspondence" and that "there is no apparent public benefit to be derived by such a release." (Supplementary Document Disposition Index attached to Supplementary Affidavit of Robert E. Owen, describing Documents 295-297)

Contrary to these assertions, there would indeed seem to be a public interest involved in the release of the names of the correspondents if they were friends or associates of Dr. King and their mail was intercepted illegally by the CIA. The circumstances suggest that Mr. Owen did not weigh the public interest properly, but because of the conclusory nature of his comments, further inquiry is needed.

The CIA affidavits also lack credibility with regard to the Exemption 3 claims. Comparison of the two affidavits submitted by Mr. Gambino reveals disturbing inconsistencies. Thus with respect to S-11, the document from which the name of the Southern Christian Leadership Conference and its file number were originally excised, Mr. Gambino's May 26, 1978 affidavit cited three exemptions: (a) "information pertaining to intelligence sources and methods" (emphasis added); (b) "information identifying a CIA staff employee"; and (c) "information the release of which would constitute a clearly unwarranted invasion of personal privacy." In his supplemental affidavit he states, " . . . Document S-11 should be changed to read 'a. information pertaining to intelligence methods (b)(3).'"

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In short, Gambino eliminated the claim that information in S-11 was being withheld to protect an intelligence source. This undercuts his credibility. In addition, he employs peculiar language, speaking not of the dislcosure of "intelligence methods" but "information pertaining to intelligence methods." Whatever that phraseology may mean, it is not sufficient to support a finding that the information is exempt by virtue of 50 U.S.C. §403(d)(3) because it does not specifically assert that "intelligence methods" will be disclosed.

For the foregoing reasons, the affidavits submitted by the CIA are obviously deficient and cannot support an award of summary judgment in its favor.

CONCLUSION

The District Court erroneously granted summary judgment in favor of the CIA in the face of overwhelming evidence that the CIA had not conducted an adequate search for records responsive to the request. The District Court also wrongly accepted the CIA's affidavits at face value and incorrectly upheld the CIA's Exemption 3 claims without conducting any inquiry into the classification status of the withheld information. Moreover, the District Court granted summary judgment despite the fact that there were material factual issues in dispute which precluded it and despite the fact that the CIA had not produced the documents it had referred to the FBI for classification review.

For the foregoing reasons, the decision of the District Court should be reversed.

Respectfully submitted,

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