

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

RECEIVED
MAY 15 1980
CLERK OF THE UNITED
STATES COURT OF APPEALS

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

MOTION FOR LEAVE TO SUPPLEMENT RECORD
WITH NEWLY DISCOVERED EVIDENCE

Comes now the appellant, Mr. Harold Weisberg, and moves the Court for leave to supplement the record on appeal with newly discovered evidence. The basis for this motion and the circumstances giving rise to it are described below.

STATEMENT OF FACTS

In November, 1975, appellant filed suit against the Department of Justice for its records on the assassination of Dr. Martin Luther King, Jr. and certain other matters. That suit, Weisberg v. U.S. Department of Justice, Civil Action No. 75-1996, is still active in District Court. During the course of processing its records on the assassination of Dr. King, the FBI referred certain documents to the CIA for a classification review of information

in them that had originated with the CIA. After years of waiting for the promised response from the CIA on these referrals, on April 9, 1980, Weisberg filed a motion for partial summary judgment with respect to ten FBI records that the FBI had listed as having been referred to the CIA. On May 7, 1980, the Department of Justice filed its Opposition to Weisberg's motion and a supporting affidavit of a CIA official, Gerald L. Liebenau.

The Liebenau Affidavit states that nine of the ten FBI referrals sought by Weisberg's motion for partial summary judgment "were dealt with" in Weisberg v. Central Intelligence Agency, et al., Civil Action No. 77-1997, which is the case involved in the present appeal. Actually, different copies of records on Dr. King's assassination are sought in the two suits. Civil Action No. 75-1996 seeks copies of FBI records, while Civil Action No. 77-1997 seeks CIA copies.

The Liebenau affidavit also states that available records not establish what disposition was made of the tenth FBI referral, which he describes as "an informal three-page biographic statement . . . apparently received by the FBI from the CIA on 17 April 1968." (See Exhibit 1 to attached affidavit of Harold Weisberg) This appears to establish incontrovertibly the fact that the CIA's copy of the document received by the FBI on 17 April 1968 was not accounted for by the Document Disposition Index which accompanied the Robert E. Owen affidavit filed in this case on May 26, 1978. The fact that this document was not

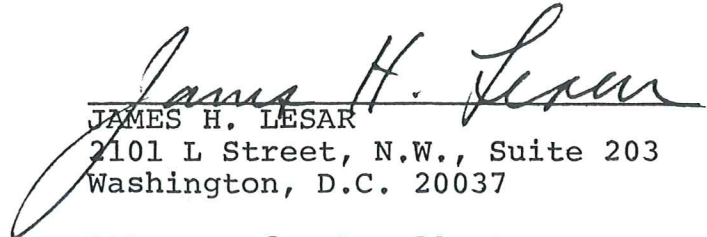
produced or accounted for in connection with this case obviously bears directly on the issue of the adequacy of the search made by the CIA.

After finishing, on May 13, 1980, a rough draft of an affidavit countering the Department's Opposition to his Motion for Partial Summary Judgment on the ten CIA referrals in Civil Action No. 75-1996, Weisberg began checking his voluminous records on the assassination of Dr. King to see if he could make a meaningful identification of any of the ten documents referred to in the Liebenau affidavit. The result of this checking was to establish the likelihood that the ^{FBI} has released in Civil Action No. 75-1996, with CIA approval, records which contain the same content as is present in documents which the CIA is withholding in toto in this case. Thus FBI MURKIN serial 2404 appears to disclose content that is contained in CIA Document No. 265, which is withheld in toto in this case. Obviously this bears directly on whether the CIA's claims of total exemption for Document No. 265 can properly be sustained.

CONCLUSION

Weisberg suggests that it would be appropriate for this Court to take cognizance of this newly discovered evidence and to use its powers under 28 U.S.C. § 2106 to remand this case to the District Court for further proceedings.

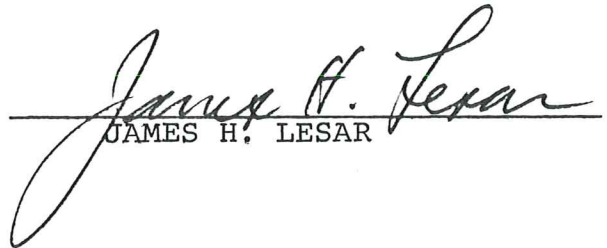
Respectfully submitted,



JAMES H. LESAR
2101 L Street, N.W., Suite 203
Washington, D.C. 20037
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of May, 1980,
hand-delivered a copy of the foregoing Motion for Leave to
Supplement the Record to the office of Ms. Margaret E. Clark,
Room 3547, U.S. Department of Justice, Washington, D.C. 20530.



JAMES H. LESAR

AFFIDAVIT

My name is Harold Weisberg. I reside at 7627 Old Receiver Road, Frederick, Maryland. I am the plaintiff/appellant in this instant cause.

1. In this affidavit I provide new information that came to my attention in the following manner: At about noon on May 13, 1980, I completed the rough draft of an affidavit in C.A. 75-1996, a long-drawn-out suit against the Department of Justice for information that includes the investigation of the assassination of Dr. Martin Luther King, Jr. That affidavit addresses an Opposition to my Motion for Partial Summary Judgment regarding ten FBI documents referred to the CIA and the attached April 30, 1980, affidavit of Gerald L. Liebenau, Information Review Officer of the CIA's Directorate of Operations, both exceptionally short, conclusory, evasive and factually incorrect; and a letter from Department counsel to my counsel, enclosing an unexpurgated version of an FBI record that had not been provided in a timely manner on discovery and should not have been expurgated. The content and lack of content in these documents and one particular evasiveness in the Liebenau affidavit (attached as Exhibit 1), relating to which he made an unfactual representation, excited my suspicions. At the first possible moment, I started what checking is possible when both the Opposition and the Liebenau affidavit are studied in their failure to make meaningful identification of any of the ten documents in question.

2. I was made additionally suspicious by this effort to incite prejudice by linking C.A. 75-1996 and this instant cause when they are not connected and the fact that this duplicates the same effort made in this instant cause. The Brief for Appellees states (page 20), "Moreover, the referrals made here avoided the possibility, inter alia, that appellant's request might be afforded different treatment by two different agencies, or inadvertently different treatments in different contexts, since the documents at issue are also subject to an independent FOIA request made by the appellant directly to the Bureau. Wood Affidavit, Paragraph 7 and Exhibit B thereto." The Wood affidavit also goes out of its way

to provide no meaningful identification for a much larger number of records, 65 in cited Paragraph 7, although all FBI records bear unique file and serial identification. The cited exhibit to the Wood affidavit is my different information request, limited to information pertaining to the FBI's political operations against Dr. King and his associates, what the FBI refers to as its Cointelpro operations.

3. While seeking to link the two separate cases in which I neither had nor conceived the objective stated in the Brief, Wood failed to attest that the FBI had complied with my 1978 request, his Exhibit B, and in fact, to this very moment, the FBI has not complied with that request.

4. However, despite their obfuscatory efforts and declared intent, to avoid the contingency imagined in the Brief, "different treatment by two different agencies," CIA and FBI have combined to do this, to disclose the withholding of information within the request in this instant cause, and to withhold knowledge of this from the courts - even after the Liebenau affidavit makes clear that the CIA has and had pertinent, nonexempt information and withheld it.

5. Although Liebenau deals with all ten documents in question, as is clear in his Paragraph 2, when he gets to one admittedly withheld, he suggests that only nine were referred to the CIA by the FBI. He states, "Nine of the ten documents retrieved (sic) from the FBI files were dealt with in plaintiff Weisberg's litigation with the CIA." He does not state these nine were provided and he does not state that the tenth also had been referred to the CIA by the FBI, on its initiative rather than "retrieved" from it by the CIA. Whatever he means by "dealt with" does not include identifying any document as referred by or in any way connected with the FBI, and there is no such identification or correlation in the CIA's Document Disposition Index or affidavits in this instant cause. By providing only nine CIA arbitrary numbers for these ten referred FBI records, Liebenau appears to seek to avoid admitting that the CIA deliberately avoided the tenth in its Document Disposition Index and to have certified compliance in this instant cause while knowing full well that it had not complied.

6. Liebenau states untruthfully that "Available records do not establish what disposition was made of the tenth document." The records of this instant

cause are "available records" and they reflect the disposition: It is withheld.

7. Liebenau thus discloses that the CIA's Document Disposition Index is incomplete and undependable; that the CIA knew it withheld pertinent information and attested to the contrary; that it had this information from the FBI if for some reason it did not locate its own copies; and that even if this were not true, it knew it could replace any of its records it could not or did not locate from FBI copies. Liebenau eliminates any excuse for not providing or accounting for the withheld information when this case was before the district court because the FBI referrals were prior to the filing of the May 25, 1978, Owen affidavit and its attached Document Disposition Index.

8. Of this tenth document Liebenau states it "is currently being reviewed for possible release under FOIA to plaintiff Weisberg, who will be advised directly of the determinations." He does not state when, although there has been more than enough time for the processing of a withheld "informal three-page biographic statement" responsive to my June 11, 1976, request and 1977 litigation. And with oral argument scheduled before this court only three weeks after the date of his affidavit - when the brief record was already being processed - he does not state that he or the CIA had informed any court of having and not providing pertinent and withheld information and of having had it prior to the time of filing any affidavits attesting to compliance or explaining and justifying searches and compliance.

9. The Opposition is factually incorrect in stating that "CIA material may not be released by the FBI." The FBI has released such CIA material to me as well as that of a number of other agencies. This misstatement coincides with information that had been improperly withheld from the record, an unexpurgated copy of which I received with the Opposition. The obliterated information includes the FBI's own internal reporting that it would disclose the documents of another agency to me. This directly contradicts the Opposition.

10. This led me to review the voluminous records provided in C.A. 75-1996 for proof that, in fact, the FBI had provided CIA material to me. I found that under date of June 8, 1978, or only a fortnight after the CIA's Owen affidavit and attached undated Document Disposition Index, the FBI had sent me 17 documents

consisting of 35 pages of CIA material. However, the FBI provided no CIA identifications and the CIA withheld all FBI identifications. The FBI's file identifications appear on each and every record in its Central Records System. They consist of a multinumber case identification and a final number that is the serial number of the record within each case file. Both the Wood and Liebenau affidavits omit these existing, nonsecret numbers. Both substitute meaningless arbitrary numbers. Liebenau could have included the FBI numbers in his affidavit, which is less than a page and a half long, in a single line of typing. Not having positive identifications, which these FBI file numbers are, precludes unequivocal identification, but beyond reasonable doubt I have been able to make some correlations between the material withheld by the CIA in this instant cause and the same information disclosed by the FBI, with the CIA's approval and after referral to the CIA.

11. This was facilitated by the recently provided copies of FBI abstracts of the records in its 44-38861 file, captioned MURKIN, acronym for Murder of King. In these almost 7,000 abstracts, I isolated exactly 10 that are still withheld as referred to the CIA, although the referral and action on the referral are of years earlier.

12. FBI Serial 2404 (Exhibit 2) appears to be a paraphrase of the record to which the CIA applied the arbitrary number 265. The CIA withheld it in toto. Whether or not the exemptions claimed by the CIA are justified, what it authorized the FBI to disclose leaves no doubt at all that there is reasonably segregable, nonexempt information and that the CIA knew it when it withheld its No. 265 in toto.

13. The CIA's Document Disposition Index makes five claims to withhold under exemptions (b)(1), (b)(3) and (b)(6), does not represent that there is no reasonably segregable information, and describes the document as "concerned exclusively with one individual who was temporarily mistaken for Mr. James Ray because of physical appearance." This is the content of FBI Serial 2404, Exhibit 2. This subject matter is held by the Department of Justice not to be subject to withholding, although arbitrarily, capriciously and inconsistently it both disclosed and withheld names of suspects, of whom there were many.

14. Serial 2461 (Exhibit 3) appears to paraphrase the CIA's No. 280 (Exhibit 4). The CIA makes six claims to withhold under the same three exemptions, as information: "which would identify an intelligence source;" "confirming the existence of a CIA station in a named city abroad;" "identifying a CIA staff employee;" containing "cryptonyms;" "identifying CIA organizational components;" and would violate privacy. It does not represent that any of this information is secret or undisclosed and, in fact, the CIA itself has disclosed such information to me prior to making these claims in this instant cause.

15. While withholding identification of the city of Addis Ababa from me in this instant cause, the CIA authorized the FBI to disclose it in C.A. 75-1996. It is hardly a secret that the CIA had an Addis Ababa station.

16. If the cryptonym withheld identifies the King assassination case, withholding it does not protect any intelligence function in any way. However, disclosure of it could reveal a means of making unmade searches in this instant cause, by cryptonym, so it is withheld although the CIA disclosed countless such cryptonyms prior to and after this withholding. (No search by cryptonym is attested to.)

17. Examination of the record discloses that, although its disclosure was approved in mid-February, it was not disclosed for more than three months, and that there is unnecessary withholding even if the claims to exemption are all justified.

18. While the withholdings of FBI file numbers by the CIA and of CIA arbitrary numbers by the FBI precludes correlation of FBI MURKIN Serial 498 with any CIA record provided in part or withheld in toto, by authorizing disclosure of what the FBI sent me, the CIA revealed its operations in Santo Domingo. This directly contradicts its claims in this instant cause, as with its No. 265 above. (In fact, the CIA also disclosed its operations in the Dominican Republic in its No. 318.) Other reasonably segregable information is included, if this is one of the entirely withheld CIA records.

19. Each of the remaining MURKIN records included in these CIA referrals includes information I do not recall seeing in what the CIA provided and each has reasonably segregable information.

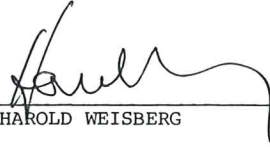
20. The first of the remaining four referrals, non-MURKIN records, discloses what the CIA claims it is precluded from disclosing by law, its operations. In that case its operation was in Washington, D. C., where such CIA activity is precluded by law. It is of a domestic-intelligence nature, "coverage of the conference" of private citizens who gathered at Georgetown University to commemorate the tenth anniversary of the assassination of President Kennedy.

21. In other litigation the Department of Justice disclosed some of the content of these CIA materials. It disclosed that Serial 3119 refers to "a Panamanian black" who "negotiated for a job in Alabama in 1964" with another person who "thinks" he "may be implicated" in the King assassination. Pertaining to Serial 3515, the Department disclosed that the "Italian Intelligence Service was advised of James Earl Ray, with his description," and was "requested to maintain watch." This information is not properly subject to any withholding, including the involvement of the CIA, its Italian station and operations, and the identifications of a number of cooperating Italian police and intelligence components, because it was disclosed by the FBI in other records prior to this instant cause and is freely accessible in the FBI's public reading room.

22. Supposedly the content of Serials 3119 and 3515 is within the records addressed by the Liebenau affidavit, but he saw to it that these two records also would be unidentifiable. However, although these two serials remain withheld by the FBI, the Department's disclosure of their content in other litigation establishes that, at the very least, they contain nonexempt reasonably segregable information.

23. My prior affidavits in this case state without contradiction or any refutation that the FBI and CIA operate a Catch-22 of reciprocal stonewalling and withholding. The current manifestation of this Catch-22, the CIA's Liebenau affidavit, hoists the CIA on its own petard. It discloses the existence of withheld pertinent information despite his efforts to obfuscate this. It discloses that there is no excuse for the CIA not to be able to locate any of the withheld information because it had been referred back by the FBI. The CIA did not notify the courts of its withholding. Liebenau also led to the identification of information the CIA withheld from me in this instant cause after it

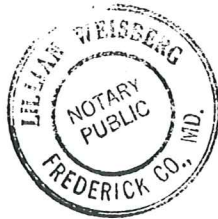
authorized the disclosure of the same information to me in other litigation.



HAROLD WEISBERG

FREDERICK COUNTY, MARYLAND

Before me this 14th day of May 1980 Deponent Harold Weisberg has appeared and signed this affidavit, first having sworn that the statements made therein are true.

My commission expires July 1, 1982.




NOTARY PUBLIC IN AND FOR
FREDERICK COUNTY, MARYLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 75-1996
)	
DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
)	

AFFIDAVIT

GERALD L. LIEBENAU, being first duly sworn, does hereby
depose and say:

1. I am the Information Review Officer for the Directorate of Operations (DO) of the Central Intelligence Agency (CIA). I am responsible for the review of DO documents which are the object of Freedom of Information Act (FOIA) litigation involving the CIA. I make the following statements based upon my knowledge, upon information made available to me in my official capacity and upon advice of the CIA Office of General Counsel.

2. The purpose of this affidavit is to advise plaintiff and the Court regarding CIA's FOIA determinations on ten documents. They are CIA-originated documents retrieved by the Federal Bureau of Investigation (FBI) from its records in response to plaintiff's FOIA request for documents on Martin Luther King, Jr. and James Earl Ray. During the same period, plaintiff Weisberg was also engaged in litigation with the CIA in this district (Weisberg v. CIA, Civil Action No. 77-1997) concerning the FOIA request for documents about the same two individuals in CIA records. Nine of the ten documents retrieved from the FBI files were dealt with in

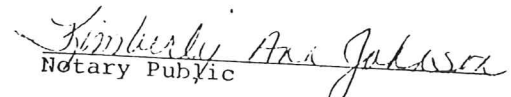
plaintiff Weisberg's litigation with CIA. They are discussed in the affidavit of Robert E. Owen of 25 May 1978 and identified in the Document Disposition Index which accompanied the affidavit as Document Nos. 224, 250, 251, 277, 279, 284, 285, 326 and 327.

3. Available records do not establish what disposition was made of the tenth document, an informal three-page biographic statement, stamped Secret, concerning one individual apparently received by the FBI from the CIA on 17 April 1968. The document is currently being reviewed for possible release under FOIA to plaintiff Weisberg, who will be advised directly of the determinations.


GERALD L. LIEBENAU

COMMONWEALTH OF VIRGINIA)
COUNTY OF FAIRFAX) ss.

Subscribed and sworn to before me this 20th day of April 1980.


Notary Public

My commission expires: June 14, 1983

Memorandum

Doc #12
Jed D

EXHIBIT 2

Mr. Tolson	_____
Mr. DeLoach	_____
Mr. Mohr	_____
Mr. Bishop	_____
Mr. Casper	_____
Mr. Callahan	_____
Mr. Conrad	_____
Mr. Felt	_____
Mr. Gale	_____
Mr. Rosen	_____
Mr. Sullivan	_____
Mr. Tavel	_____
Mr. Trotter	_____
Tele. Room	_____
Mr. Holmes	_____
Miss Gandy	_____

Mr. D. J. Brennan, Jr. *[Signature]*

DATE: April 17, 1968

S. J. Papich *[Signature]*

MURKIN

[Handwritten signature]

[redacted] Central Intelligence Agency (CIA),
furnished the following to the Liaison Agent on April 17, 1968:

A CIA source, characterized as being very reliable, advised that on or about April 15, 1968, an individual identifying himself as [redacted] a [redacted] called at the [redacted] office of the [redacted] and asked to be [redacted] as soon as possible. (It should be noted that reference is being made to the office of the [redacted] He was asked to furnish his local address in [redacted] and he refused to do so. He became very agitated and then left. So far he has not returned to the aforementioned office. CIA's source stated that [redacted] answers. the general description of the suspect in the instant case as reported in newspapers.

[redacted] volunteered information indicating that he applied for [redacted] in [redacted] California, on June 16, 1964, and that he registered as a member of the [redacted] in [redacted] on February 21, 1968. [redacted] and [redacted] he was born April 8, 1937, in Missouri (town not given). CIA's source described him as 5'10"; 155 pounds; brown hair, receding hairline on both sides; a scar, not prominent, about two and one half inches long across the center of his forehead. His most outstanding characteristic was his grin, described as "disconcerting and resembling a grimace."

[redacted] advised that this same information has been given to our Legat [redacted] CIA is checking through [redacted] sources in [redacted] to establish the whereabouts of [redacted] if this lead washes out, CIA would like to be advised.

ACTION: The above information is being directed to the attention of the Civil Rights Section of the General Investigative Division.

- P:clb (4)
- Mr. McGowan (Long)
- Liaison
- Mr. Papich

REC 44-38861-2404

1963-1

[Handwritten signature]

UNITED STATES GOVERNMENT

Memorandum

Don 4
Jot D

Mr. W. C. Sullivan

DATE: 4/28/68

J. A. Sizoo

MURKIN

Handwritten signature

[redacted] Central Intelligence Agency (CIA), advised this date that [redacted] Germany, had advised the American Embassy, Addis Ababa, Ethiopia, that he believed he had seen an individual whom he thought to be Eric Starvo Galt at the [redacted] on the afternoon of 4/23/68. Because he thought the individual looked like Galt he made an effort to get some information concerning him. He found he was registered at the hotel as [redacted] the [redacted] did not know if [redacted] had registered at the hotel as an American. In conversation with [redacted] the [redacted] learned that [redacted] was employed by the [redacted] (address unknown) and was en route to [redacted]

Bufiles contain no references to [redacted] or the [redacted] CIA, was advised that Bufiles contain no references to [redacted] or [redacted]

ACTION:

None. For information. This is being referred to the General Investigative Division.

JHK:brr (8)

- 1 - Mr. Sullivan
- 1 - Mr. Rosen
- 1 - Mr. Sizoo
- 1 - Mr. G.C. Moore
- 1 - Mr. McGowan
- 1 - Mr. McDonough
- 1 - Mr. Kavanagh

REC-31 44-38861-2461

1-6061

ADVANCE COPY <input checked="" type="checkbox"/> ISSUED <input type="checkbox"/> SLOTTED <input type="checkbox"/>	REPRODUCTION OF THIS COPY IS PROHIBITED	1	2	3	4	5	6	7	8	9	10
INDEX: <input type="checkbox"/> YES <input type="checkbox"/> NO	CLASSIFY TO FILE NO. _____	PRECEDENCE									
CLASSIFY TO FILE NO. _____	CLASSIFY TO FILE NO. _____										
FILE <input type="checkbox"/> REF. TO _____	BRANCH <input type="checkbox"/>	GUEST COPY <input type="checkbox"/> SIG. _____									
COPY	INFO:	FILE _____									

281130Z APR 68 CITE [REDACTED]

IMMEDIATE DIRECTOR [REDACTED]

28 APR 68 11 59 35

APPROVED FOR RELEASE
Date 16 Feb 1978

- ON 28 APRIL [REDACTED], REPORTED THAT HE SAW MAN IN [REDACTED] 23 APRIL WHOM HE SAID HAS STRONG PHYSICAL RESEMBLANCE TO NEWSPAPER PHOTOGRAPHS OF ERIC STAVRO GALI, WANTED IN CONNECTION WITH MURDER OF MARTIN LUTHER KING. HE WAS SENT TO AMERICAN EMBASSY BY [REDACTED] AMBASSADOR TO WHOM HE FIRST RELATED HIS STORY.
- HE SAW THIS PERSON AT DESK OF [REDACTED] HOTEL IN [REDACTED] AFTERNOON OF 23 APRIL WHEN THEY WERE BOTH CHECKING OUT OF HOTEL. [REDACTED] WAS ACCIDENTLY GIVEN ACCOUNTING SLIP OF THE SUSPECT ON WHICH [REDACTED] NOTED FOLLOWING: NAME, [REDACTED] NOT CERTAIN WHETHER [REDACTED] REGISTERED AS AMERICAN CITIZEN.
- IN SHORT CONVERSATION WITH SUSPECT, [REDACTED] LEARNED THAT [REDACTED] WAS EMPLOYED BY [REDACTED] AND ENROUTE TO [REDACTED] I [REDACTED] UNDER A \$40,000 PER YEAR CONTRACT. HIS TOUR WILL BE EIGHTEEN MONTHS. [REDACTED] REPORTEDLY HAD ARRIVED RECENTLY FROM [REDACTED] VIA [REDACTED] ON [REDACTED] AIRLINES.
- [REDACTED] WILL BE IN [REDACTED] UNTIL THURSDAY 2 MAY IF THEN AN [REDACTED] NEED QUERY HIM FURTHER.

28