

RECEIVED
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CLERK OF THE UNITED STATES COURT OF APPEALS

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

HAROLD WEISBERG, :
 :
 Appellant, :
 :
 v. : Case No. 82-1072
 :
 U.S. DEPARTMENT OF JUSTICE, :
 ET AL., :
 :
 Appellees :

MOTION BY APPELLANT FOR LEAVE TO REFER TO DOCUMENT
OUTSIDE THE RECORD IN HIS REPLY BRIEF

Comes now the appellant, Mr. Harold Weisberg, and moves the Court for leave to refer in his Reply Brief to the attached March 27, 1980 memorandum by Mr. Quinlan J. Shea, Jr., formerly Director, Office of Privacy and Information Appeals, on the subject: "Freedom of Information Requests of Mr. Harold Weisberg."

The grounds for this motion are set forth below.

Preliminary Statement

This case arises out of a Freedom of Information Act suit for records pertaining to scientific tests conducted upon items of evidence in the assassination of President John F. Kennedy. Appellant Weisberg has sought release of some of the records at issue since May 23, 1966; and this case is now before this Court for the fourth time. At issue in the present appeal is whether the Federal Bureau

good faith

of Investigation ("the FBI") has conducted an adequate, good-faith search for the records sought.

Since passage of the Freedom of Information Act in 1966, appellant has filed numerous requests for records pertaining to the assassination of President John F. Kennedy and Dr. Martin Luther King, Jr. Most of these requests have been for records possessed by the FBI. Almost without exception, Weisberg has had to file suit to compel compliance with his requests. Indeed, under FBI Director J. Edgar Hoover, FBI personnel were directed not to acknowledge his requests. See Attachment 1, October 20, 1969 memorandum from Al Rosen to Cartha DeLoach. R. 53, Exh. 1.

The FBI's refusal to comply with Weisberg's requests became an issue in *Weisberg v. U.S. Department of Justice*, Civil Action No. 75-1996, a suit for records pertaining to the assassination of Dr. Martin Luther King, Jr.^{1/} At a three-day evidentiary hearing held in that case in September, 1976, Weisberg produced a list, not exhaustive, of twenty-five requests he had made which the Department of Justice and the FBI had ignored.

In 1977 these facts were brought to the attention of Congress. The Chairman of the Senate Subcommittee on Administrative Practice and Procedure stated that documents released to Weisberg "indicate an attitude regarding the Act that is, at a minimum, very disturb-

^{1/} The record of this action is now before this Court as a result of cross-appeals filed by the parties. (The cases are No. 82-1229 and No. 82-1274.)

ing. The FBI memorandum indicates that requests from Mr. Weisberg under the Act were totally ignored." See 1977 Oversight Hearings on Agency Implementation of the 1974 Amendments to the Freedom of Information Act held by the Senate Subcommittee on Administrative Practices and Procedures (hereafter "Oversight Hearings").

Mr. Quinlan J. Shea, Jr., then Director of the Office of Privacy and Information Appeals, told the Senate that he "will never be satisfied with the FBI's handling of [Weisberg's] FOIA requests," and Associate Attorney General William G. Schaffer testified that: "Mr. Weisberg does have reason to complain about the way he was treated in the past. We in the Civil Division are going to try to do something to straighten out all of these cases."

Despite these assurances, the official Subcommittee Report noted that as of January, 1979, Weisberg told its staff that the Department of Justice and the FBI had not begun to comply with his specific requests for information on the assassinations of President Kennedy and Dr. King. See Attachment 2, "Agency Implementation of the 1974 Amendments to the Freedom of Information Act, Report on Oversight Hearings by the Staff of the Subcommittee on Administrative Practices and Procedures, Committee on the Judiciary of the United States Senate, 95th Cong., 2d Sess. (Comm. Print 1980) at p. 71, n. 4.

On or about January 12, 1982, the Government filed an affidavit by FBI Special Agent John N. Rhillips in Mark A. Allen v. Fed-

eral Bureau of Investigation, et al., Civil Action No. 81-1206,^{2/}
 which contained as an attachment an unexpurgated copy of the above-
 referenced March 27, 1980 memorandum by Mr. Quinlan J. Shea, Jr.^{3/}

Although the Shea memorandum focuses upon the FBI's attempt to cut off the fee waiver for King and Kennedy assassination records which Mr. Shea granted in the aftermath of a court decision order a waiver for a portion of such records,^{4/} substantial portions of it address the adequacy of the FBI's search for records requested by Mr. Weisberg, the lack of good faith in searching for such records, and the violation of promises and representations made to Mr. Weisberg, the courts, and Congress. For example, regarding the question of searches made for documents requested by Weisberg, Mr. Shea states:

Although the Bureau has departed from its initial position in both the King and Kennedy cases (that the only relevant records are those filed by the FBI in the main files on those cases and/or the very principal "players"), it has done so very reluctantly and to a very limited factual extent. I am personally convinced that there are numerous additional records that are factually, logically and historically relevant to the King and Kennedy cases which have not yet been located and processed -- largely because the Bureau has "declined" to search for them.

(Emphasis in the original)

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- ^{2/} This action is now before this Court as Case No. 82-1529 as a result of an appeal taken by the Government.
- ^{3/} The unexpurgated copy is Attachment 3 to this motion. Pursuant to a Freedom of Information Act request, Weisberg had previously received a redacted copy from which the text was totally excised. See Attachment 4.
- ^{4/} Weisberg v. Griffin Bell, et al., Civil Action No. 77-2155.

For the reasons set forth below, Weisberg should be allowed to refer to the Shea memorandum, and to make arguments based upon it, even though it is not in the record of this case.

bad faith

ARGUMENT

In the instant case Weisberg has raised a question as to whether the FBI has conducted a good faith search for the records he seeks. Indeed, appellees' brief, in a section entitled "Weisberg's Allegations on Appeal Are Frivolous," goes so far as to assert that

[Weisberg] now relies solely on allegations of bad faith on the part of the FBI in his effort to require either 1) a new improved search for documents, or 2) "appropriate tests and examination of Kennedy assassination evidence...." Such allegations of FBI bad faith have previously been rejected by the trial court as not being supported by "an iota of evidence." Weisberg v. DOJ, 438 F. Supp. 492 (D.D.C. 1977). Nonetheless, they figure prominently in plaintiff's (sic) brief before this Court and must be addressed.

(Brief for Appellees, p. 22)

Again, in a later passage, appellees' assert:

Plaintiff (sic) has exhausted all efforts to find new information through cross-examining witnesses and falls back on frivolous claims of FBI bad faith.

(Brief for Appellees, p. 34)

The Shea memorandum provides very damaging evidence which directly contradicts the FBI's protestations that it has been handling Weisberg's requests in good faith. This information was not available to Weisberg at the time this case was in the trial

court, if only for the reason that the memorandum's contents were totally deleted from the copy provided him under FOIA. Such direct and unassailable evidence regarding the FBI's continuing recalcitrance in searching for records responsive to Weisberg's requests is not available from any other source.

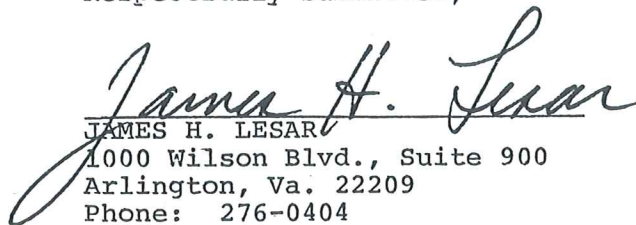
The Shea memorandum provides evidence from a high government official of an FBI attitude that is corrosive of the noble aims and objectives of the Freedom of Information Act. It is obvious that if an agency with the enormous resources of the FBI chooses and is allowed to proceed in bad faith, it can easily grind down most requesters who have the temerity to exercise their rights under the Act, thereby subverting the goal of open access to non-exempt government information. This is exactly what the FBI has been doing in this and other cases, as Weisberg has long charged. The Shea memorandum provides potent evidence of an attitude which can have no other result unless the courts confront the issue directly and refuse to tolerate either the attitude or the conduct it produces (conduct which in this very case has resulted in four unnecessary appeals to this Court).

Appellant is aware that it is not ordinarily proper for reference to be made in an appeal brief to materials outside the record. However, in this case he considers that there are strong policy reasons for allowing him to bring the Shea memorandum to the attention of the Court and to refer to it in his Reply Brief.

Appellees may well object to this motion on the grounds that they will have no opportunity to respond, other than at oral argu-

ment, to the arguments contained in appellant's Reply Brief. In anticipation of that objection, appellant states that he has no objection to the filing of a supplemental brief or memorandum by appellees regarding the Shea memorandum and its bearing on this case.

Respectfully submitted,


JAMES H. LESAR
1000 Wilson Blvd., Suite 900
Arlington, Va. 22209
Phone: 276-0404

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of June, 1982, mailed a copy of the foregoing Motion By Appellant for Leave to Refer to Document Outside the Record in his Reply Brief to Mr. William G. Cole, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.


JAMES H. LESAR

Exhibit 1

Civil Action No. 75-226

UNITED STATES GOVERNMENT

Attachment 1

Memorandum

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

TO : Mr. DeLoach

DATE: October 20, 1969

FROM : A. Rosen

- 1 - Mr. DeLoach
- 1 - Mr. Rosen
- 1 - Mr. Malley
- 1 - Mr. McGowan
- 1 - Mr. McDonough
- 1 - Mr. Bishop
- 1 - Mr. W. C. Sullivan

SUBJECT: MURKIN

This is the case involving the murder of Martin Luther King, Jr.

Weisberg is apparently identical with Harold Weisberg an individual who has been most critical of the Bureau in the past.

Weisberg by letter in April, 1969, requested information on the King murder case for a forthcoming book. It was approved that his letter not be acknowledged. (100-35128)

Enclosures (2) *sent 10-21-69*

100-35128-5838

EJM:jmv
(8)

REC-62

CONTINUED - OVER

70 NOV 6 - 1969

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95TH CONGRESS }
2d Session

[COMMITTEE PRINT]

AGENCY IMPLEMENTATION OF THE 1974
AMENDMENTS TO THE FREEDOM OF
INFORMATION ACT

REPORT ON
OVERSIGHT HEARINGS

BY THE
STAFF OF THE
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE
AND PROCEDURE

OF THE
COMMITTEE ON THE JUDICIARY
OF THE
UNITED STATES SENATE



MARCH 1980

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1980

Inadequate Records Management and Filing Practices.—Improvement in agency records management practices and filing procedures can also help speed the response to FOIA requests and appeals. Although the FOIA regulations of the Central Intelligence Agency, for example, call for "the prompt and expeditious processing" of requests,⁶⁴ the CIA has informed the Subcommittee that it is unable to comply with the 10-and 20-day response times, in large part, because the agency has "no single centralized records system" or index to record its holdings.⁶⁵ Thus, it often takes the agency several days just to locate requested documents.⁶⁶ The CIA, or any other agency without a centralized records system, needs to reassess and improve its filing and records system in order to respond to requests for information more expeditiously.⁶⁷

Deliberate Dilatory Tactics.—The most questionable and objectionable causes of delay are those that stem from improper agency attitudes, including outright hostility to the FOIA, access to public information or the individual requester.⁶⁸ Where such attitudes exist, agency personnel can easily use delay "as a deliberate stalling tactic."⁶⁹ Hoping, for example, "that the passage of time will exhaust the requester's interest in documents that the agency is reluctant to produce,"⁷⁰ an agency may improperly delay any reply for a substantial period of time, only eventually to reject a request "for a reason that should have been apparent at the time it was received."⁷¹ Or the agency may not deny a request outright but deem it "inadequate for lack of specificity" or sufficient identifying information, "with the result that final action on the unpopular request is delayed while the requester attempts to reformulate it with more particularity."⁷²

It is difficult to determine precisely the extent to which the agencies and departments are employing deliberate, dilatory tactics to frustrate FOIA requests and appeals. At least one such case, however, was brought to the attention of the Subcommittee, and there well may be more.⁴

⁶⁴ See 32 C.F.R. § 1000.1(d); Hearings, p. 523.

⁶⁵ Hearings, p. 80; 1977 CIA Annual Report, p. 2, subcommittee files.

⁶⁶ *Id.*

⁶⁷ See also pp. 125-133, *infra*, on other CIA records management practices.

⁶⁸ See pp. 52-58, *supra*.

⁶⁹ Giannella, p. 14, note 8, *supra*, p. 244.

⁷⁰ *Id.*

⁷¹ *Id.*, citing Nader, "Freedom From Information: The Act and the Agencies," 8 *Harv. Civ. R.-Civ. Lib. L. Rev.* 1, 8 (1970).

⁷² *Id.*

⁴ See Hearings, pp. 133-141, 174-175, 941-942. One witness brought to the subcommittee's attention three internal FBI memoranda regarding an FOIA request submitted to the FBI in 1969 by Harold Welsberg. In the words of the witness, the memo, dated October 20, 1969, stated that Mr. Welsberg "...was a leading critic of the FBI's Warren Commission Report and various government law enforcement agencies. Referring to the request submitted by Mr. Welsberg, which sought information on the King murder case for use in a forthcoming book, the FBI memo conclude (d) that "It was approved that this letter not be acknowledged." Although it is now 8 years later, in my understanding that despite Mr. Welsberg's continuing efforts to obtain the requested information, it has never been received. In fact, Mr. Welsberg's attorney informs me that there are approximately 25 of Mr. Welsberg's FOIA requests which have never been answered, although some of this information has been generally released to the press. We hope the subcommittee will demand an explanation of these events from the FBI." *Id.*, pp. 174-175. The Subcommittee attempted to obtain such an explanation from FBI and Justice Department witnesses. Acknowledging that Mr. Welsberg had "reason to complain about the way he was treated in the past," the Department witness said the Civil Division was "going to try to straighten out" the matter. *Id.*, p. 140.

According to Mr. Welsberg, however, as of January 1979, neither the FBI nor the Department of Justice have begun to comply with his specific requests regarding both the King and Kennedy assassinations. In the King case, for example, Mr. Welsberg said the FBI "continues to make substitutes for my actual request" and has "deliberately misinterpreted" his requests. He also claimed Allen H. McCright, Chief, FOIA-Privacy Act Branch, FBI, continues not to respond to Welsberg's FOIA correspondence. Telephone interview, Jan. 22, 1978.



United States Department of Justice

OFFICE OF THE ASSOCIATE ATTORNEY GENERAL

WASHINGTON, D.C. 20530

MEMORANDUM

March 27, 1980

TO: Robert L. Saloschin, Director
Office of Information Law and Policy

FROM: *QJ* Quinlan J. Shea, Jr., Director
QJ Office of Privacy and Information Appeals

SUBJECT: Freedom of Information Requests of Mr. Harold Weisberg

Reference is made to Mr. Flanders' memorandum to you dated March 4, subject as above.

I have no strong objection to placing this subject on the agenda of the Freedom of Information Committee, although I see no real need to do so. I disagree with many of the assertions in Mr. Flanders' memorandum. I do not agree that the Bureau has searched adequately for "King" records within the scope of Mr. Weisberg's numerous requests. In fact, I am not sure that the Bureau has ever conducted a "search" at all, in the sense I (and, I believe, the FOIA) use that word. It is confusing two totally different matters -- the scope of his requests administratively and the scope of a single lawsuit which we claim is considerably narrower than his administrative requests. Not really touched on in Mr. Flanders' memorandum, but very much involved in this matter, is the issue of what are "duplicate" documents for purposes of the Freedom of Information Act. The Bureau has rejected -- still informally, but very emphatically -- the position I espouse (and with which you agreed in your informal comments on my earlier memorandum to you). Lastly, but very important, is the matter of the scope of the fee waiver granted to Mr. Weisberg. In my view (and as intended by me at the time it was granted), the waiver extends to all records about the King assassination, about the Bureau's investigation of the King assassination (not at all the same thing), about the "security investigation" on Dr. King, and about the

(2)

Bureau's dealings with and attitudes towards its "friends" and its "critics" as they relate to the King case. The key point is that it extends to records by virtue of their subjects and contents, to the extent they can be located with a reasonable effort -- and is not determined by where and how the Bureau has filed the records. Although the Bureau has departed from its initial position in both the King and Kennedy cases (that the only relevant records are those filed by the FBI in the main files on those cases and/or the very principal "players"), it has done so very reluctantly and to a very limited, factual extent. I am personally convinced that there are numerous additional records that are factually, logically and historically relevant to the King and Kennedy cases which have not yet been located and processed -- largely because the Bureau has "declined" to search for them.

It is perhaps unfortunate that Mr. Weisberg is the principal requester for King and Kennedy records. He has heaped so much vilification on the FBI and the Civil Division -- a considerable part of which has been inaccurate and some of which has been unfair -- that the processing of his efforts to obtain these records has almost become an "us" against "him" exercise. My view has always been that the two cases are too important to the recent history of this country for that attitude to have any permissible operation.

The problem I have is that, although I know that what the Bureau wants the Committee to approve would contradict or be inconsistent with promises made to Mr. Weisberg by Bureau and Department representatives, and to representations made in court, and to testimony before the Aboureszk Subcommittee, I do not have the time to carry out the extensive research that would be required for me adequately to represent Mr. Weisberg's interests before the Committee, in an effort to avoid the very real blot on the Department's Escutcheon which would result from the approval of the Bureau's position. Accordingly, if this matter is to be placed on the Committee's agenda, I strongly recommend that Mr. Weisberg and his lawyer, Jim Lesar, be invited to attend and participate in the discussions.

cc: Vincent Garvey, Esq.
Civil Division

Inspector Flanders
Federal Bureau of Investigation



United States Department of Justice
OFFICE OF THE ASSOCIATE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

MEMORANDUM

March 27, 1980

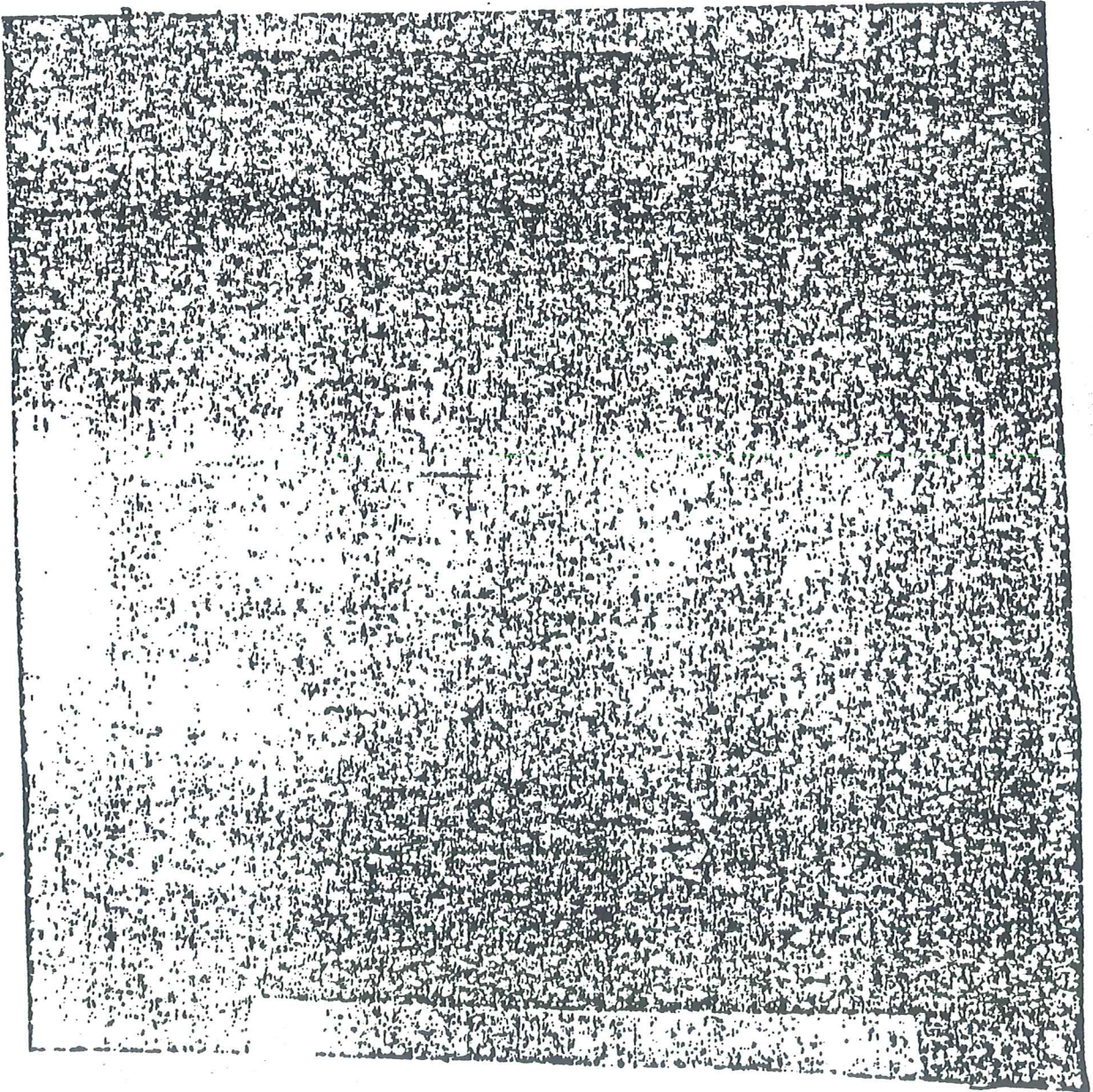
TO: Robert L. Saloschin, Director
Office of Information Law and Policy

FROM: *QJS* Quinlan J. Shea, Jr., Director
Office of Privacy and Information Appeals

SUBJECT: Freedom of Information Requests of Mr. Harold Weisberg

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(2)



cc: Vincent Garvey, Esq.
Civil Division