REPLY BRIEF AND CROSS-APPELLEE'S BRIEF FOR WEISBERG

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 82-1229

HAROLD WEISBERG,

APPELLANT/CROSS-APPELLEE

v.

U.S. DEPARTMENT OF JUSTICE,

APPELLEE/CROSS-APPELLANT

AND CONSOLIDATED NOS. 82-1274,
83-1722 and 83-1746

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Page 4, 1st graf, is quote correct?

14, footnote, "roberry."

18, line 4, "written" belongs before "two-thirds" because 2/3 book is not published.

30, 1st line, I think "and fact" should be inserted (at least in your thinking and for oral arguments, after "law." Line 5 I think you intended 'not" after "has been." However, I can recall two instances of provided privacy waivers that the FBI did ignore in this litigation, Susan Wadsworth and Matt Herron.

32, third line up, "conclusino."

45, line 9: most are post-amending requests.

50, line 11, does quote close after first word?"

64, fnote 33, line 10, "aruge" for argue.

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v.

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REPLY BRIEF AND CROSS-APPELLEE'S BRIEF FOR WEISBERG

STATEMENT OF ISSUES*

1. Was the District Court's finding that plaintiff "substantially prevailed" in this litigation within the meaning 5 U.S.C. § 552(a)(4)(E) clearly erroneous?

2. Did the District Court abuse its discretion in awarding plaintiff attorney's fee and costs pursuant to 5 U.S.C. § 552(a)(4)(E)?

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*This supplements the statement of issues set forth in Weisberg's opening brief as appellant.

COUNTERSTATEMENT OF THE CASE*

I. BACKGROUND

A. The Requester

This case arises under the Freedom of Information Act "FOIA" or "the Act"), 5 U.S.C. § 552. The requester, Mr. Harold Weisberg ("Weisberg"), seeks records pertaining to the assassination of Dr. Martin Luther King, Jr.

Weisberg has had a long and varied career as investigator, journalist, intelligence analyst and author. He has had a great deal of experience investigating political violence. In the late 1930s, as an employee of the Senate Labor and Education Committee, he investigated labor violence in Harlan County and Laurel County, Kentucky. In connection with his work for this committee or through his writing, Weisberg has worked with the FBI and several divisions of the Department of Justice. March 23, 1976 Weisberg Affidavit, ¶4. [R. 10] On one occasion the Department of Justice borrowed him for four months when an aide to the Assistant Attorney General of the Criminal Division selected him to act as an expert on duces tecum subpoenas in the Mary Helen case. This case involved the indictment of over 60 Harlan County coal operators and deputized gun thugs. [R. 29 at p. 144]

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*This section supplements the Statement of the Case in Weisberg's opening brief. Although a conscientious effort has been made to avoid repetition, some overlap is inevitable. Additionally, the facts have been organized differently in some parts to stress different aspects of the case.

During World War II, Weisberg served as an intelligence analyst for the Office of Strategic Services ("OSS"). As his first job there, he was asked to handle the case of four OSS employees who were thought by the chief of OSS, General William S. Donovan, to have been wrongly convicted. Working from records that had been ignored, largely the lawyers' records, Weisberg succeeded in establishing that they had been framed by the Washington military police. Six weeks after Weisberg undertook the assignment, the OSS employees were freed. [R. 29 at 145-146, 204]

In another case, Weisberg was given a 48-hour deadline to produce proof why ships that had been seized were being held as enemy ships. He succeeded by producing, in one afternoon, records that had been ignored by other Government employees. Id. at 147.

In 1940 Weisberg gave the FBI records on an extremist right-wing plot to overthrow President Franklin D. Roosevelt.[2/] [R. 168, Exh. 2 at 19]

On several occasions Weisberg worked for the White House. He provided President Roosevelt with some of the material he used in a fireside chat on Nazi penetration in Chile and plans for a Nazi putsch. [R. 29 at 147] His last job with OSS before he got a military discharge was to start writing the secret intelligence history of the OSS. [R. 29 at 206]

2/ The FBI turned Weisberg's materials on the "Silvershirts" and the Chief of Staff, Mahlin Craig, over to the Criminal Division of the Department of Justice. Although records obtained by Weisberg under the Privacy Act show that the Department returned these records, of which there are no copies, to the FBI, the FBI says it cannot find them.

Since 1963, Weisberg has devoted himself fulltime to a study of political assassinations, specifically those of President John F. Kennedy and Dr. Martin Luther King, Jr. He is not, however, "in quest of a whodunit." Rather, he considers his work "a broad study of some of the basic institutions of our society, particularly those that provide our defenses in Justice." [R. 29 at 147]

In addition to being recognized by scholars as the leading authority on the assassination of President Kennedy,[3/] Weisberg is also an acknowledged authority on the assassination of Dr. King.[4/] His work as investigator for James Earl Ray's postconviction lawyers was largely responsible for obtaining Ray a two-week evidentiary hearing in 1974 on his federal petition for a writ of habeas corpus. June 30, 1976 Lesar Affidavit, ¶8. [R. 23]

B. Purposes of Lawsuit and Uses of Information Obtained

Plaintiff instituted this lawsuit to obtain materials for a book on the assassination of Dr. Martin Luther King, Jr.[5/] A principal objective of the lawsuit was to secure the release of

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3/ See Brief for Appellant/Cross-Appellee Weisberg ("First Weisberg Brief") at 5-6.

4/ The Department of Justice ("the Department" or "the Government") recognized Weisberg's expertise on the subject by hiring him as its consultant in this litigation. As Deputy Assistant Attorney General William G. Schaffer acknowledged at the May 24, 1978 status call: "He is clearly an expert in the subject matter. . . ." [R. 73 at 2]

5/ As of April, 1976, Weisberg had completed approximately two-thirds of this book, his second book on the assassination of Dr. King. He laid his draft aside to await the information to be released in this case. [R. 29 at 176] He plans to complete the book when this litigation has ended.

basic evidence of the crime and the FBI's investigation thereof.[6/]

In addition to publishing a book which he anticipates will "make available to the public much information which is not publicly known or, if public, has not been properly evaluated," Weisberg has arranged for the materials obtained through this lawsuit, as well as his extensive other files on the assassinations of President Kennedy and Dr. King, to become part of a university archive when he dies. Thus, they will become a permanent and public record available for use by students, scholars and the general public.[7/] August 10, 1976 Weisberg Affidavit, ¶¶5-6. [R. 27]

Some materials obtained from this lawsuit have already been deposited with that university. Duplicates of some of the records obtained from this litigation, including the entire files on the

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6/ Weisberg's second request, submitted December 23, 1975, also included other materials pertinent to the King assassination, such as FBI records on the Memphis Sanitation Workers and the Invaders. The Memphis Sanitation Workers engaged in the strike which brought Dr. King to Memphis originally. The Invaders were a group of young black radicals who precipitated the violence which led to Dr. King's return to Memphis on April 4, 1978, when he was shot. Weisberg provided leads to Newsday reporter Les Payne which resulted in his breaking the story that FBI informants actively participated in the rioting which caused King to return to Memphis. October 7, 1976 Weisberg Affidavit, ¶86. The Payne story on this appeared in the February 1, 1976 issue of Newsday. See attachment to Second Affidavit of James H. Lesar. [R. 23]

7/ Weisberg has purchased more than 50 file cabinets to hold these records, which are stored in the basement of his home. Although Weisberg himself is no longer able to work in the basement area for health reasons, he has installed extra lighting, a desk and a phone there so that students, scholars and members of the press may do so. All records are preserved exactly as he receives them. Extra copies of the more significant records are made and filed by subject. From this large file he provides information to others who request it, including the press. July 29, 1982 Weisberg Affidavit, ¶18. [R. 255]

Invaders and the Memphis Sanitation Workers Strike have been deposited with two colleges and are in use by their students. Indeed, a number of scholarly uses have already been made of the materials which Weisberg has made available. Some of the materials are used in seminars and teaching, and at least three "honors" papers have been based on these records. July 29, 1982 Weisberg Affidavit, ¶16. [R. 255]

Drawing on information obtained in this lawsuit, Weisberg has assisted the news media in their projects and stories on the King assassination. This includes the wire services and a number of large newspapers, some of which have their own syndicates and syndicated the information widely. These newspapers include the New York Times, the Washington Post, the St. Louis Post-Dispatch, and Newsday, which is the largest nonmetropolitan paper in the country. Id., ¶12.

Because James Earl Ray and his family are from the St. Louis area, the Post-Dispatch has additional interest in this subject. Weisberg provided it with copies of many of the records he received, including entire files, and it reported the information extensively, including syndication to other newspapers. For example, records on Oliver Patterson, an FBI informer, made a series of four page-one stories in the Post-Dispatch and many papers in its syndicate. Id., ¶13.

Weisberg has provided information obtained under FOIA to the media even when he had reason to believe that he could not agree with what the media would produce (and did not). Id., ¶12.

Initially, he spent time with the staff of the House Select Committee on Assassinations ("HSCA" or "the Committee"), provided it with records and assisted it as much as he could. The Committee's published hearings include a 50-page analysis by Weisberg of some of its evidence. In preparing this analysis, Weisberg drew on information obtained in this litigation. Id., ¶13.

The FBI's own records reflect the fact that the FBI initially planned to restrict the Committee's access to King assassination records to its MURKIN[8/] Headquarters records only. Id. Subsequently, in January, 1978, the FBI did make available to the Committee at least some of the Memphis Field Office records provided to Weisberg in this action.[9/] (The FBI proposed that a similar procedure be followed with respect to Dallas and New Orleans Field

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8/ "MURKIN" is the FBI's acronym for its "Murder of Dr. King" investigation and files.

9/ FBI Headquarters document 62-117290-509X, dated January 18, 1978, reports that some 34 sections of the Memphis Field Office records on the assassination of Dr. King were delivered to representatives of the House Select Committee on Assassinations on January 13, 1978, more than three and one-half months after they were provided to Weisberg.

Office files pertaining to the assassination of President Kennedy which the Committee requested.) 10/

10/ Late in its proceedings (the Committee went out of existence when the 95th Congress expired on January 3, 1979), the HSCA inquired about obtaining all the FBI's Dallas and New Orleans Field Office files pertaining to the assassination of President Kennedy. A June 7, 1978 memorandum from the Director of the FBI to the Assistant Attorney General of the Criminal Division states that the FBI had suggested to the Committee that it first thoroughly digest the contents of preassassination field office records as compared to the FBI Headquarters ("FBIHQ") documents. After doing that, should the Committee "have further reservations about the type of information residing in Field Office files and not sent to FBIHQ, it might then consider requesting documents from the Dallas Field Office postassassination files for a very narrow time frame. If this fails to satisfy Committee requirements and if you concur, the Committee would then be offered a copy of the Freedom of Information Act release on the Dallas Field Office . . . files which will be produced in response to a pending request from Mr. Harold Weisberg." FBIHQ Document 62-117290-958. This document is on file in the FBI Reading Room and is Exhibit 14 to the May 5, 1983 affidavit of Mr. Harold Weisberg on file in the United States District Court for the District of Columbia Harold Weisberg v. William H. Webster, et al., and Harold Weisberg v. Federal Bureau of Investigation, et al., Civil Action Nos. 78-0322/0420. This Court may properly take judicial notice of this memorandum and the facts set forth therein.

II. INFORMATION OBTAINED AS A RESULT OF THIS LITIGATION

Some of the information obtained as a result of this litigation had been sought by Weisberg prior to the amending of the Freedom of Information Act in 1974. Just two weeks after James Earl Ray pled guilty to the assassination of Dr. King, Weisberg requested that the FBI provide him with information on the Ray case so he could include it in his book on the King murder. He noted that another writer, Clay Blair, Jr., author of The Strange Case of James Earl Ray, had thanked the FBI for the information it had given him. He asked that he be provided this same information,

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11/ The Department states in its opening brief that: "Plaintiff initially requested information regarding the King assassination in 1969. At that time, however, the information was unavailable under the broad law enforcement exemption, which was amended in 1974." Government's Brief at 2, n. 1.

This is not correct. Prior to this Court's decision in Weisberg v. Department of Justice, 160 U.S.App.D.C. 71, 489 F.2d 1195(1973)(en banc), cert. den., 416 U.S. 933 (1974) ("Weisberg I"), there was no blanket prohibition barring access to such materials under the Freedom of Information Act, as is evident from the fact that Weisberg I reversed the original panel decision denying the FBI such protection under Exemption 7. Indeed, shortly before the Weisberg I decision, the FBI lost an attempt to gain blanket immunity for its investigatory files. Stern v. Richardson, 367 F. Supp. 1316 (1973).

Moreover, Weisberg himself had successfully sued in Court in 1970 to obtain Justice Department copies of the evidence introduced at James Earl Ray's extradition hearing. Weisberg v. Department of State and Department of Justice, Civil Action No. 718-70 (D.D.C.). And on July 5, 1972, in the case of Bernard Fensterwald, Jr. v. Department of Justice, Civil Action No. 861-72, the FBI handed over three photographs compiled by it during its investigation of the assassination of President Kennedy.

Finally, regardless of the legal status of the requested documents, he was owed a response to requests. Yet FBI policy dictated that his requests would not even be acknowledged.

and he also requested such records as ballistics proof, photographs of the scene of the crime, and evidence that persuaded the FBI that Ray was acting entirely alone. [R. 28]

No response was made to Weisberg's 1969 requests for information on Dr. King's assassination because the FBI had a policy of deliberately not responding to them.[12/] This anti-Weisberg animus extended to the Department of Justice. In fact, when the Department decided that it would not be able to sucessfully defend against his suit for the public court documents pertaining to James Earl Ray's extradition, it decided to make similar copies available to members of the press and others because "the Department did not wish Weisberg to make a profit from his possession of the documents. . . ." June 24, 1970 memorandum from T.E. Bishop to Cartha DeLoach. [R. 52]

12/ On September 8, 16-17, 1976, the District Court took evidence in connection with the Government's motion to stay proceedings under Open America v. Watergate Special Prosecution Force, 178 U.S.App.D.C. 308, 547 F.2d 605 (1976). When Weisberg testified that he had prior requests for King (and Kennedy) assassination materials which the FBI and the Department of Justice had not responded to, and which in part were duplicated by his April 15 and December 23, 1975 requests, the Court indicated that this might justify according Weisberg priority in the processing of his new requests and directed him to document any unfulfilled King assassination requests.

Plaintiff did this on September 30, 1976, by filing a Notice of Attached Exhibits. [R. 28] The Department responded by filing, two and a half months later, an affidavit by FBI Special Agent Donald Smith executed more than a month before. Smith stated, inter alia, that: "Plaintiff's letter to the FBI dated March 24, 1969, has been located, and FBI records do not indicate that this letter was acknowledged." [R. 35] This representation failed to mention that it had been ordered that Weisberg's March 24, 1969 letter not be acknowledged. The deliberateness of the FBI policy thus remained obscured until Weisberg later obtained documentary proof of it.

On April 15, 1975, Weisberg submitted a new request for King assassination records under the amended FOIA. Despite attempts to frustrate this request and Weisberg's subsequent December 23, 1975 request, this litigation nevertheless achieved several major successes.

A. Crime Scene Photographs

1969 Request

In aswering Weisberg's complaint, the Government asserted that by letter dated December 2, 1975, FBI Director Clarence M. Kelley had provided Weisberg with the requested records. Answer, ¶9. [R. 2] At the first status call, counsel for the Government represented that the case was moot. February 11, 1976 hearing, Tr. at 2. [R. 8] Weisberg's attempt to probe the Government's claim through interrogatories met first with a motion for a protective order, which the district court denied, and then with objections and unresponsive answers. [R. 9] At the March 23, 1976 status call, counsel for the Government informed the court that "we have assured plaintiff's counsel that the photographs and other documents that were disclosed are all that are in the FBI's possession at headquarters."[13/] Tr. at 3. [R. 16]

As a result of Weisberg's insistence that the FBI did have such photographs, the FBI searched its Memphis Field Office and lo-

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13/ The caliber of the search and the reliability of the FBI's representations is shown by the fact that on August 7, 1968, the Memphis Field Office sent to FBIHQ 47 crime scene photographs. The communication forwarding these photographs to Headquarters, which consists solely of a list and description of them, appears in serial 146 in the very first section of the Headquarters MURKIN file which was allegedly searched. Plaintiff's Memorandum to the Court filed November 30, 1976, Exhibit 3. [R. 33]

cated a large number of crime scene photographs, including 107 photographs taken by Joseph Louw and obtained from Time-Life, Inc. and 49 photographs taken by the Memphis Police Department. Having located these photographs through Weisberg's efforts, the FBI then claimed they were exempt from disclosure.[14/] Ultimately, however, Weisberg did obtain them.[15/]

B. Photographs or Sketches of Suspects

In response to Item 5 of Weisberg's April 15 request, which asked for "all photographs or sketches of any suspects in the assassination of Dr. King," the FBI initially disclosed only photographs and sketches of James Earl Ray, claiming he was the "only suspect in the Martin Luther King assassination. . . ." Second Wiseman Affidavit, ¶(IX)(E). [R. 19] In making the search for these records and other items of Weisberg's request, the FBI swore that

> we conducted a complete and thorough search of all central records located at FBIHQ concerning the King assassination. We conducted the same search . . . that we utilize in our own day-to-day retrieval of necessary information in connection with our normal duties, which, because of our uniform reporting rules and and filing procedures, enable us to be certain that we maintain, in one centralized location, all pertinent information in possession of the FBI deemed worthy of retention which has been acquired in the course of fulfiling our investigative responsibilities.

Id., ¶(VIII).

14/ The FBI claimed that the Time-Life photographs were not agency records and were withholdable under Exemptions 3 (in conjunction with the Copyright Act) and 4. It initially claimed Exemption 7(D) for the Memphis Police Department photographs but later relinquished that claim.

15/ He also subsequently obtained still other crime scene photographs.

Page 13 inadvertently skipped.

However, on May 25, 1976, additional photographs of suspects were made available to Weisberg. And, indeed, throughout the course of the litigation, materials responsive to this item of the request were provided.[16/]

C. Field Office Files

Plaintiff obtained approximately 20,000 pages of records from the FBI Headquarters MURKIN file. The FBI allegedly resisted the release of its field office files "because of its belief that all relevant documents in those files were already being released to Mr. Weisberg." Points and Authorities in Opposition to Plaintiff's Motion for Attorney Fees and Litigation Costs at 5. [R. 258] This belief was in error, however.[17/] The number of nonduplicative records in the eight field offices was about equal to the number of records obtained from the Headquarters MURKIN file. Moreover, Weisberg only obtained these records as a result of a stipulation he entered into with the Government which provided that he would hold in abeyance a Vaughn motion with respect to both field office and Headquarters files, and that upon the satisfactory and timely

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16/ See Weisberg Consultancy Report, Part I. [R. 168, Exh. 1, at 4. (Sketches of suspects in Headquarters serials 5, 7, 8, 10. 11 and 16).

17/ In American Friends Service Committee v. Webster, 485 F. Supp. 222, 232 (D.D.C. 1980), the court found this assumption to be clearly erroneous. In fact, the court found that "the field office files on any particular subject typically exceed in volume those kept at headquarters by a ratio of four or five to one." Even more important, the court found that: "In a very real sense, insofar as historians and other investigators are concerned, the field office files would be the stuff of primary research, at least in the areas of how and why FBI investigations are conducted (as distinguished from the ultimate decision-making process)." Id.

processing and release of the designated field office files, he would forego it completely. [R. 144]

D. The Long Tickler File

In this and other litigation the FBI has always claimed that it keeps ticklers only a short while. October 26, 1982 Weisberg Affidavit, ¶22. [R. 260] In this case the FBI initially denied that a tickler file kept by FBI Supervisor Richard E. Long existed. Id., ¶48. Weisberg submitted proof of its existence in his consultancy report. [R. 168, Exh. 2 at 51] Confronted with proof of its existence, the FBI said it could not find the Long Tickler. It was located after Weisberg suggested to Mr. Shea, the head of the Department's appeals office, where to look for it. See October 26, 1978 letter of Quinlan J. Shea, Jr. to Mr. James H. Lesar, thanking Weisberg for his assistance in locating the "missing file." [R. 84]

The Long Tickler file is a major case control file. Rather than being duplicative of other public materials, it consists of 35 file folders organized by subject matter and includes records from pertinent files other that the MURKIN files. (This is contrary to another claim the FBI makes, that its ticklers consist entirely of records from the main case file.) Largely a political file, the Long tickler held, among other things, records pertaining to Weisberg that were contained in a "bank robbery" file.[18/]

By letter dated November 20, 1978, the FBI released to Weisberg 460 pages of documents contained in the Long Tickler.

18/ Weisberg contends that the fact records on him are contained in a "bank robbery" file indicate undisclosed surveillance on his phone conversations with James Earl Ray's brothers.

E. Abstracts

On December 17, 1979, Weisberg took the deposition of Mr. Douglas Mitchell, an employee of the Office of Information and Privacy Appeals. In that deposition, Mr. Mitchell disclosed that the FBI maintains abstracts of FBI records on the assassination of Dr. King. In fact, Mitchell testified that he had used such abstracts in performing research delegated to him in connection with this case. Weisberg moved for partial summary judgment on the withholding of the abstracts. The Department opposed the motion on the grounds that the abstracts were not within the scope of Weisberg's requests nor within the scope of the August 12, 1977 stipulation regarding the processing of field office requests. It also contended that it would be burdensome to produce them. "R. 130]

The issue was first mentioned in Court on December 20, 1979. At that hearing counsel for the Government asserted that the abstracts are "like the central index file" and had never before been requested."[19/] Tr. at 17. In response, Weisberg pointed out that Item 21 of his December 23, 1975 request asked for: "Any index or table of contents to the 96 volumes of evidence on the assassi-

1979 vs 1981

19/ It is doubtful this statement is true. A popular handbook copyrighted by the Fund for Open Information and Accountability contains a form request letter for use by persons who want to obtain FBI files. An optional clause in the form request letter asks for "abstracts." See Ann Mari Buitrago and Leon Andrew Immerman, Are You Now Or Have You Ever Been in the FBI Files? (New York: Grove Press, Inc., 1981), p. 88.

nation of Dr. King." [R. 132] Counsel for the Government then switched arguments and asserted of the abstracts: "This is not an index.[20/] *** And it doesn't fall within that item 21 by any stretch of the imagination." January 3, 1980 Hearing, Tr. at 4. The issue was again argued orally at the February 8, 1980 hearing, and at that time the district court ordered the Government to release the abstracts. Tr. at 7.

Ultimately, Weisberg obtained the release of 6,500 abstracts of MURKIN records. In the judgment of a historian, Prof. David R. Wrone of the University of Wisconsin-Stevens Point, who teaches courses on the assassinations of President Kennedy and Dr. King, "the Murkin file abstract or index cards constitute a valuable historical research file that in themselves would [be] a key asset to any searcher into the assassination of Dr. . . . King and its investigation." [R. 145] As Prof. Wrone notes, the abstracts "establish a chronology, the heart of historical inquiry since Leopold von Ranke's famous seminars," they "give a chronological overview of the unfolding and extremely complicated federal investigation nowhere else attainable." Affidavit of Professor Wrone, ¶12. In Prof. Wrone's view, "the Murkin file abstract or index cards are excellent examples of the summary index cards all careful historians must make and are seemingly tailored for future

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20/ The Government had previously described three boxes of indices to the evidence against James Earl Ray, prepared by the FBI, interchangeably as "indices" and "abstracts." [R. 36]

generations of historians to use." Id., ¶10.

Prof. Wrone analyzed several abstracts as a historian would view them. He found that they contain a wealth of useful information in a very few words. Noting that in the abstract for MURKIN serial 3065 "one is informed of the press role in reporting interviews with Jerry Ray in Chicago, he states, "[o]ne gains not only that information but also learns dates, which newspaper got the scoop, and the references historians must use in order to consult microfilm copies of the press interview held in local libraries newspaper morgues." With respect to the abstract for MURKIN serial 3066, he notes that it sets forth columnist Walter Winchell's relationship to the FBI, and that "[t]his immediately suggests to the historian that Winchell's objectivity might be tainted and also that many newspaper accounts appearing at this date might also have been sifted through federal institutions before appearing in print." He adds, "These are invaluable cautionary flags for the historian striving for objectivity." Id., ¶11. He further notes that "[f]acts within the summaries, while open to ultimate checking, sweep away the trivial work a historian must do in following out innumerable leads in press reports, emotion laced memoirs of participants, and self-serving statements by irresponsible critics." Id., ¶13.

F. Fee Waiver

When Weisberg began to receive materials responsive to his April 15, 1975 request, he paid the search and copying charges but

reserved his right to recover such charges. On November 4, 1976, his counsel wrote Deputy Attorney General Tyler requesting a fee waiver. The letter explained that Weisberg had published one book on the King assassination and two-thirds of a second. It pointed out that the first book had disseminated to the public Weisberg's analysis of Department of Justice records obtained in a previous FOIA suit and that the second book would contain information disclosed as a result of this lawsuit. The letter stated that Weisberg was a recognized authority on the assassination of Dr. King, and that at the request of the House Select Committee on Assassinations he had conferred with its then chief counsel, Mr. Richard Sprague, and some members of its staff, in order to advise them on their probe on this subject.

The letter stated that Weisberg intended to leave his files on the King and Kennedy assassinations, including those obtained in this litigation, to a scholarly institution. It also asserted that Weisberg was unable to pay for copies of the voluminous materials falling within the scope of his request, let alone the search fees. Finally, the letter concluded by stating that affidavits in support of the fee waiver application could be submitted, if required, and by asking for information on any fee waiver standards that had been established. [R. 34]

After waiting for nearly four weeks without receiving any response to his letter, Weisberg filed a motion for an order waiving all search fees and copying costs. [R. 34] The Government simply ignored the motion. No response to it was ever filed, nor did the Government seek any extension of time within which to

respond to the motion.

At the May 2, 1977 status call, the next one following the filing of the fee waiver motion on November 30, 1976, Weisberg's counsel raised the fee waiver issue, stating that he had renewed his November 4, 1976 administrative request again "when the Administration changed," and that there still had been no response. [R. 107 at 20] The Department's counsel argued that "the Freedom of Information Act does not provide that the Government should furnish to individuals, without charge, if they want to carry the documents out of the Freedom of Information Act rooms to their home." Tr. at 4. The court, however, stated that the matter had been "dragging on for months," and should be brought to the Attorney General's attention so a determination could be made. Id. at 6.

On May 26, 1977, seven months after Weisberg's request for a fee waiver and six months after he filed a motion for same, Mr. Quinlan J. Shea, Jr., Director of the Office of Privacy and Information Appeals, responded with a letter stating that "[t]he fee waiver request, together with all other matters pertaining to [Weisberg's] pending appeal for access to the records themselves, will be determined when the final action is taken on the appeal." [R. 52, Exh. 2]

At the status call on June 2, 1977, Weisberg's counsel protested this letter as "another refusal to decide" and demanded that the Attorney General be ordered to decide the matter within ten days. Tr. at 20. [R. 41] The court stated that the Department had not answered the request "in a timely fashion," and

also said that the Department's appeals personnel "ought to be able to make up their minds in ten days," and that she didn't think the response made by Shea in his May 26th letter would have been given to anyone other than Weisberg (alluding to the bias within the Department against him). Id. at 23-24. Counsel for the Department finally concluded, "I think they have to give an answer." But he then inquired whether the court wanted "to put it in the form of the order," and when the court did, then argued that "[t]hey ought to be required to put this in the form of a motion which they can respond to by writing." Id. at 25.

By letter dated July 12, 1977, Mr. Shea, writing on behalf of the Deputy Attorney General Peter Flaherty, that advised Weisberg that he was being granted a 40% reduction in copying charges, to 6 cents per page. [R. 52, Exh. 3]

As a consequence of this decision, Weisberg renewed his motion for a complete waiver on November 2, 1977.[21/] Two and a half months later the Department finally filed its opposition to Weisberg's renewed fee waiver motion. [R. 56] On March 3, 1978, the District Court entered an order directing the Department to file within eight days an explanation of how the partial reduction of search fees and copying costs was arrived at. [R. 59]

21/ By this time Weisberg had been forced to decline some 3,000 pages of FBI Laboratory records offered him because he was unable to pay for the entire batch. As a result, he asked the FBI to provide copies only of the ballistics-related documents and several crime scene photographs that had not been provided earlier. In 1978, Mr. Shea promised Weisberg that he would be given all these lab records. However, the FBI, which previously had stated that Weisberg would be furnished all FBIHQ MURKIN records, asserted that they were "not resposive" to his requests. See August 13, 1980 letter from James H. Lesar to Mr. William Cole. [R. 178] Ultimately, these records, too, were obtained, but only after much additional struggle.

On March 23, 1978, the Department filed Mr. Shea's affidavit explaining his decision. In explaining his decision, Mr. Shea quoted extensively from his recommendation to DAG Flaherty. In that memorandum Shea stated: "There can be no doubt that release of the King materials is of the greatest possible public interest. The Bureau itself recognized this fact very early and decided to put the releaseable material in the public reading room and not to attempt to charge any search fees." Noting that Weisberg's "earlier lawsuit [Weisberg I], which we won, was probably the single greatest factor in the decision of Congress to amend exemption 7 from a file exemption to what it is today," Shea's memorandum to Flaherty continued:

> Mr. Weisberg has devoted many years to a study of the assassination of President Kennedy and Dr. King. He has written at least two books on the Kennedy assassination (neither of which has been overly favorable to the Department or the F.B.I.). Nevertheless, he does possess a wealth of knowledge and information on these cases and is recognized as something of an 'expert' on them in many circles. Mr. Weisberg is also unique in the sense that his early efforts to obtain access, and particularly this lawsuit, have contributed materially to the more ready accessibility of these materials to the general public. In sum, the efforts he has expended and the expense he has incurred are so significant that they will not reoccur in the person of any other requester. His familiarity with the case has also enabled the Bureau to evaluate more quickly the privacy interests of many of the hundreds of individuals involved. The public, therefore, has benefited both from Mr. Weisberg's tenacious efforts to make the King materials public and, to some extent, from a shortening of the time necessary to process the case.

March 23, 1978 Shea Affidavit, ¶ 6 [R. 60]. Noting that the

Department had decided not to appeal Judge Gesell's recent grant of a fee waiver to Weisberg for FBI records on the Kennedy assassination, Shea concluded his affidavit by stating that in light of these developments he thought he should reconsider his own prior actions on fee waivers sought by Weisberg. Id., ¶ 9. On March 31, 1978, Shea determined that Weisberg should receive a fee waiver for all the Department's Kennedy and King assassination records.

G. Disclosure of Nonexisting Information

In this litigation Weisberg also succeeded in establishing the nonexistence of information in the files searched. A particularly important example of this concerns his efforts to obtain the results of a cotton swab test which is used to determine whether or not a rifle has been fired recently. Such a test was performed on a brand new .243 caliber rifle which James Earl Ray purchased at the Aeromarine Supply Company in Birmingham, Alabama and then returned. [R. 168, Exh. 1 at 8] As a result of Weisberg's consultancy report, which was utilized by Mr. Shea in his 1978 review of the case, a special search was made to see if the FBI had withheld any report of such a test conducted on the rifle which was found at the scene of the crime. Because of evidence that the 30.06 rifle left at the scene of the crime may have been planted, Mr. Weisberg considered such a test quite important. In his January 12, 1979 testimony Shea reported on the unsuccessful efforts to find such a report, stating that "[t]he logical argument for thinking you might see it is quite good. We can't find one."

H. Gun Catalogues and Bay Of Pigs Manuscript

After this Court remanded the question of the copyrighted photographs to the District Court to seek joinder of Time, Inc. under Rule 19, the Department advised that Time had no objection to copies of the photographs being made available to Weisberg. Weisberg's counsel then pointed out that a couple of gun catalogs and a "Bay of Pigs Manuscript" had also withheld under this claim, even though it seemed highly implausible that a manufacturers catalogue would be copyrighted. The Department initially resisted disclosure of these additional materials on the grounds that it was "an important matter of principle for the Department of Justice." Tr. at 10-11. [R. 181] Ultimately, however, these items were released. The release of the 1968 Redfield gun catalogue was particularly important because it shows that the telescopic sight on the alleged murder weapon was set grossly wrong when it reached the FBI lab. [R. 168 at p. 41]

The foregoing is, of course, not an exhaustive list of the important successes which Weisberg obtained in this litigation.

SUMMARY OF ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN RULING THAT PLAITIFF IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES

After eight years of litigation the District Court found that plaintiff had "substantially prevailed" in this litigation within the meaning of 5 U.S.C. § 552(a)(4)(E). This decision cannot be overturned on appeal unless the District Court's finding was "clearly erroneous."

The Government has utterly failed to make a showing that the District Court's finding is clearly erroneous. The evidence overwhelmingly supports the District Court's finding. At the outset of this case the Government rested on a claim of full disclosure of all crime scene photographs pertaining to the assassination of Dr. Martin Luther King, Jr. This proved entirely wrong. As a result of plaintiff's persistence, the FBI was compelled to search its Memphis Field Office where it found a large number of crime scene photographs, vital evidence of the crime. Similarly, although the FBI claimed that its field offices files contained only materials which duplicated what was released to plaintiff from its Headquarters files, plaintiff forced the FBI to provide him with some 20,000 pages of field office files. Plaintiff also obtained a valuable control file on the King assassination, the Long Tickler File, which the FBI first said didn't exist and then said couldn't be found. It was ultimately located when plaintiff himself suggested where to look for it. Plaintiff also obtained a complete fee waiver for the approximately 60,000 pages of records on the King assassination which were released to him.

The District Court next found that plaintiff is entitled to an award of attorney fees and costs. In order to reverse this

determination, the District Court must be found to have abused its considerable discretion in such matters. However, the District carefully followed the required guidelines as set forth in LaSalle Extension University v. F.T.C., 201 U.S.App.D.C. 23, 627 F.2d 481 (1980). She weighed each of the four criteria which LaSalle requires a district judge to consider, and she documented her reasons as to why plaintiff qualified for an award under each and every one of these standards.

Plaintiff has long been a participant in the public debate over the circumstances surrounding the murder of Dr. Martin Luther King, Jr. He sought these materials for a second book on the subject. At the time he began this lawsuit, his first book on the subject was the only one not in accord with the official version of the King assassination. Subsequently, while this lawsuit was pending, Congress began its own probe of the murder and concluded that Dr. King was probably killed as a result of a conspiracy.

Plaintiff has made extensive use of the information he has received, disseninating it far and broad through the news media and providing some of it to colleges, including a university to which he has willed his archives. At the conclusion of this lawsuit he plans to complete his second book on the King asssassination, relying heavily upon the materials received as a result of this lawsuit. On these facts, his purposes and uses of the materials are fully consonant with the the kind of work which Congress wished to foster when it amended the Freedom of Information Act to provide for attorney fees and reasonable litigation costs.

There was no abuse of discretion in awarding plaintiff attorney fees. It is beyond cavil that he has served the public interest through this litigation. The FBI itself recognized this when its Director determined to place the materials obtained by plaintiff in the Bureau's public reading room.

Nor was the award excessive. Plaintiff's counsel risked a very large amount of time representing a client deeply unpopular with the courts and the Government without any assurance that he would ever be paid for his labors. The magnitude of his risk is made apparent by the fact that although he has been awarded nearly $100,000 in attorney fees, he will, if the Government prevails in this appeals, bear the double indignity of watching all that he has worked so hard for disappear before his very eyes.

The award is necessary to foster the purposes of the Freedom of Information Act. It is particularly appropriate in this case because of the need to provide incentive sufficient engough so that attorneys will take on projects whose public benefit is as great as the risks and the sacrifices they entail.

The District Court's award should be affirmed.

II. PLAINTIFF IS OWED A CONSULTANCY FEE

During the proceedings in the court below the Government offered to hire Weisberg as its consultant in this litigation. Weisberg was offered $75 an hour for his consultancy work and accepted it. The Department subsequently reneged on the deal.

Weisberg is entitled to a consultant's fee for the work he performed both under standard contract law and the doctrine of equitable estoppel.

The District held there was no enforceable contract but found only one term lacking, the duration of the contract. The Government has failed to cite any authority for the proposition that an otherwise valid contract should be found invalid for failure to agree on its duration. Such contracts are in fact common, as in the legal profession where nearly every case taken on an hourly basis involves an attorney-client contract where the exact duration is unknown.

The Government argues that there was also no agreement as to the specifics of the work product. Since the District Court made no finding on this issue, the Government's argument at best requires a remand. In fact, however, no remand is necessary since it is clear that the two reports submitted by Weisberg contained what Deputy Assistant Attorney General Schaffer said the Department wanted.

The Government's appeal brief raises two threshhold contract defenses. First, it asserts that an award to Weisberg is barred by 31 U.S.C. § 1501 because no written contract was ever executed. The District Court correctly rejected this claim in her January 20, 1983 Memorandum Opinion, noting that this statute does not bar recovery under an implied-in-fact contract. Narua Harris Construction Corporation v. United States, 574 F.2d 508, 510-511 (Ct. Clms. 1978). An implied-in-fact contract was present in this case.

The government also argues that no contract was formed because "the officials with whom plaintiff and his attorney dealt were not authorized to enter into a consultancy agreement. . ." This overlooks the Attorney General's own contracting authority and the fact that the Department of Justice attorneys Weisberg dealt with represented the Attorney General. Ms. Zusman and Mr. Schaffer, the Justice Department attorneys involved, were authorized representatives of the Department, and such representation necessarily extened to the Attorney General himself. They had authority through the Attorney General to enter into a consultancy arrangement.

Moreover, Weisberg was not actually the type of employee envisioned as a "consultant" in 28 C.F.R. § 0.76(j), but was more akin to an expert witness. It is well settled that an attorney has implied authority to hire expert witnesses. Seavey on Agency, § 31 (1964).

The Department cites cases suggesting that the Government cannot be estopped from denying the unauthorized acts of its officials. Weisberg denies that this proposition is supported by current law. In addition, he points out that the cases cited by the Government do not involve representations made by federal attorneys to a court of law. A noted treatise on agency states that: "An attorney of law who appears in an action for a client does not have to prove that he is authorized. This is not an inference of fact but results from the position of the attorney as an officer of the court. Seavey on Agency, § 16 (1964). It follows

that opposing counsel has the right to rely on representations made to a court of law by duly appointed legal counsel. Such reliance is not based on pure agency principles but on the special position of the attorney as an officer of the court. The Department's attorneys held themselves out to a court of law as authorized to enter into a consultancy agreement. To find in the Department's favor based on lack of authority would be unfair to Weisberg and would compromise the integrity of the Court.

Equitable estoppel is also an appropriate remedy. The District Court declined to apply this doctrine because it found there was no justifiable reliance by Weisberg because he should have known not to proceed with his work. This conclusion is clearly erroneous. On the facts of this case, Weisberg had every reason to rely on the Department's representations, both emphatic and explicit, that a consultancy agreement existed.

The Court's second reason for refusing to grant equitable estoppel relief was that the Department derived no benefit from Weisberg's work. This holding must be reversed as a matter of law because there is no requirement of consideration where the cause of action is equitable or promissory estoppel.

III. THE FBI HAS NOT MADE AN ADEQUATE SEARCH

The FBI has refused to search the names of persons listed in items of Weisberg's requsts except where a privacy waiver or proof of death has been provided. Not all FBI files involve law enforcement or privacy considerations. The FBI must at least

search under these names to determine whether there are any responsive records that may be nonexempt. It cannot invoke privacy considerations to refuse to undertake searches where it is possible they will find records involving no privacy considerations sufficient to justify withholding.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN RULING THAT PLAINTIFF IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS

A. Congress Intended for the FOIA to Foster the Purposes Achieved by this Lawsuit

As the Court of Appeals for the First Circuit has recently recognized, quoting the Supreme Court's decision in GTE Sylvania, Inc. v. Consumer's Union of U.S., Inc., 445 U.S. 375, 385 (1980):

> The Freedom of Information Act was intended "to establish a general philosophy of full agency disclosures," . . . and to close the "loopholes which allow agencies to deny legitimate information to the public. . . ."

Crooker v. U.S. Department of Justice, 632 F.2d 916, 920 (1st Cir. 1980). The thrust of the law is to get information out to the public, especially information which concerns matters of significant public interest. Dept. of the Air Force v. Rose, 425 U.S. 352 (1976).

The public policy underlying the Freedom of Information Act "was principally . . . in opening administrative processes to the scrutiny of the press and the general public. . . . [And] to enable the public to have sufficient information in order to be able . . . to make intelligent, informed choices with respect to the nature, scope, and procedure of federal government activities." Renegotiation Board v. Bannercraft Co., 415 U.S. 1, 17 (1974); GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375 (1980).

Thus, the FOIA is a legislative implementation of the profound values of the First Amendment; and, in particular, its extention

to the internal processes of government itself. See, inter alia, The New York Times v. Sullivan, 376 U.S. 254, 270 (1974) (First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.")

This lawsuit advanced these objectives. Weisberg, a recognized authority on the assassination of Dr. Martin Luther King, Jr., sought information on the basic evidence concerning the crime and the FBI's investigation of it, as well as on certain related subjects such as the files on the Memphis Sanitation Workers and the Invaders. He had long sought such information. At the onset of this litigation he was the only author of a book on the King assassination not in accord with the official view that James Earl Ray alone killed Dr. King, and thus was the major participant in the public debate over Dr. King's death. Indeed, but for his work on the subject, there is every reason to doubt that there would have been any debate over the subject of sufficient magnitude to merit claim that it was "uninhibited, robust and wide-open."

Shortly after this lawsuit was instituted, Congress began its own probe into the King assassination. At the conclusion of its inquiry, the House Select Committee on Assassinations concluded

that there probably had been a conspiracy to kill King.[22/]

22/ The Committee also concluded that there probably had been a conspiracy in the assassination of President Kennedy. Weisberg, considered by scholars to be the "premier authority" on this subject, too, was a major participant in the extremely robust and wide-open debate over the President's murder and the several official investigations of it. One of his lawsuits for Kennedy assassination records, Weisberg v. General Services Administration, Civil Action No. 2052-73, and a subsequent FOIA request, resulted in the release of two Warren Commission transcripts which "had a devastating impact on the credibility of the Warren Commission's findings" and "helped create the climate of opinion which later caused the House of Representatives to establish a select committee to investigate the assassinations of President John F. Kennedy and Dr. Martin Luther King, Jr." Guth, DeLloyd J. and David R. Wrone, The Assassination of John F. Kennedy: A Comprehensive Historical and Legal Bibliography, 1963-1979 at 59.

When Congress began its investigations into the King and Kennedy murders, it confronted the difficult task of attempting to reconstruct these crimes from a cold trail. Had the Government disclosed the information Weisberg sought on these events at or even reasonably close to the time he requested it, the Congressional undertaking might have occurred far sooner, faced fewer serious difficulties, and reached more definitive conclusions. As matters stand now, the controversy over both assassinations remains unresolved, and public distrust of the official findings is extensive. See, e.g., November 20, 1983, issue of the Washington Post at F2, which reports the results of a recent Washington Post-ABC News poll on the Kennedy assassination. According to the poll, even now, 20 years after the assassination and all the many official investigations, including what is said to have been the most expensive probe ever undertaken by Congress, approximately 30 percent of the public are said to favor yet another "large-scale" investigation, indeed, to consider it "necessary" and 80 percent persist in disbelieving the official Executive Branch of the slaying.

In light of such considerations, not to mention the Congressional policy of implementing, through FOIA, a national policy of full disclosure of nonexempt government information, the Department's attack upon Weisberg in its brief for being the requester to make most use of the Act and for "profoundly abusing the Freedom of Information Act," is outrageous. Coupled with the vicious attack made upon Weisberg (and his attorney) in the court below -- see Points and Authorities in Opposition to Plaintiff's Motion for Attorney Fees and Litigation Costs -- the Government's

[Footnote continued on next page]

Of necessity, research on the subject of the King assassination requires access to relevant archival materials in the possession of the Government. This is particularly true given the broad focus of Weisberg's work and its searching scrutiny of the functioning of basic societal institutions -- the law enforcement agencies, the press, Congress, the judiciary.

Of necessity, research on the subject requires access to the relevant archival materials. Among the most important such files are those maintained by the defendant FBI, especially at its field offices. This point has been established by the detailed factual findings of Judge Harold Greene in American Friends Service Committee v. Webster, 485 F.Supp. 222 (D.D.C. 1980) (preliminary injunction granted to forbid FBI and National Archives from further destruction of FBI field office files because of their unique historical value).

In that case it was established that primary and original investigative records, materials, notes, exhibits and other records (including informer source records and logs, transcripts, tapes, electronic and physical surveillance records, and statements of witnesses) are collected and retained solely by FBI field offices. Consequently, "the field office files on any particular subject typically exceed in volume those kept at headquarters by a ratio of four or five to one." Id. at 232. Therefore:

[Footnote 22/ continued from previous page]

> unsupported allegations represent both the familiar litigation tactics of a lawyer with no case and a recrudesence of the Government's never-ending efforts to subvert FOIA's disclosure mandate. This Court cannot countenance such efforts, and should firmly reject them. It is the Department, not Weisberg, that has been profoundly abusing the FOIA, as the whole history of this litigation reflects.

> In a very real sense, insofar as historians and other investigators are concerned, the field office files would be the stuff of primary research, at least in the areas of how and why FBI investigations are conducted (as distinguished from the ultimate decision-making process).

Id.

This Court may take judicial notice that many significant scholarly works on recent American history published over the past several years would have been impossible of achievement without documents produced pursuant to the FOIA. In particular, works involving the actions of executive agencies carrying out sensitive and vital policy decisions have been made possible by use of FOIA.

These books, whether or not flattering to the agency involved, clearly vindicates the Congressional purpose in the passage of the FOIA. (Its objective "was principally . . . in opening administrative processes to the scrutiny of the press and the general public . . . to enable the public to have sufficient information in order to be able . . . to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities." Renegotiation Board v. Bannercraft Co., 415 U.S. 1, 17 (1974).)

As example of them is Professor David J. Garrow's The FBI and Martin Luther King, Jr.: From "Solo" to Memphis, a work which would have been impossible of achievement without use of the relevant FBI files.

Weisberg's work is similarly dependant upon access to government records, especially those of the FBI.

B. Congress Amended the Act to Include Attorney's Fees In Order to Foster Works of the Kind Undertaken by Weisberg and to Discourage Obduracy in Refusing to Comply With FOIA's Disclosure Mandates

Unfortunately, the purpose for which the FOIA was enacted was initially thwarted because the original Act contained no fee waiver provision. In enacting the 1974 Amendment which added the provision for attorney fees and litigation costs, "Congress realized that too often the insurmountable barriers presented by court costs and attorney fees to the average person requesting information under the FOIA enabled the government to escape compliance with the law." Cuneo v. Rumsfeld, 553 F.2d 1360, 1363-1364 (D.C.Cir. 1977). The Senate Report on the 1974 Amendments stated that "[t]he obstacle presented by litigation costs can be acute even when the press is involved." S. Rep. No. 93-854, 93d Cong., 2d Sess. 17-18 (1974).

Congress, as this Court has noted, clearly intended the award of fees to serve two separate and distinct FOIA objectives.

> One goal . . . is to encourage Freedom of Information Act suits that benefit the public interest. *** Congress also provided attorneys' fees . . . as compensation for enduring an agency's unreasonable obduracy in refusing to comply with the Freedom of Information Act's requirements.

LaSalle Extension University v. F.T.C., 201 U.S.App.D.C. 23, 25, 627 F.2d 481 (1980). In the instant litigation, both of these goals will be served by an award of attorney's fees. The FBI recognized the public benefit by placing copies of the records obtained by Weisberg in its public reading room. In the words of the Department's Director of the Office of Privacy and Information

the Act was amended remained without any responsive answer long after they should have been processed, even given the Bureau's backlog. October 7, 1976 Weisberg Affidavit, ¶ 60-62. [R.30]

Furthermore, the record in this case is replete with unjustifiable delays, failure to comply with court orders, failure to respond timely or even at all to motions by Weisberg, misrepresentations as to the nature of FBI field office files, and flagrant abuse of exemption claims.25/ And, despite the obvious public interest in expediting the processing of records necessarily involved in ongoing Department of Justice and Congressional investigations into the assassination of Dr. King, the Department repeatedly resisted the District Court's attempts to have more than one analyst assigned to the so-called "Team Project." See transcripts of September 8, 16, 17 hearings and October 8, 1976 status call. [R. 40, 29, and 31]

C. The District Court's Ruling that Weisberg "Substantially Prevailed" in this Litigation was not Clearly Erroneous

The District Court ruled that Weisberg "substantially prevailed" in this litigation. This Court cannot overturn that finding unless it was "clearly erroneous." Case v. Morrisette, 475 F.2d 1300, 1307 (1973). The finding is "presumptively correct," and the burden

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25/ The FBI's abuse of exemption claims, particularly Exemption b(1) and b(7)(D), has been noted by other scholars. See, e.g., Garrow, The FBI and Martin Luther King, Jr., From "Solo" to Memphis, Preface at p. . In this case the FBI's deletions ranged from 7(F) for lab examiners names to 7(C) for the name of District Attorney Jim Garrison, photographs of James Earl Ray's brother, Jerry Ray, and the identity of the William Len Hotel in Memphis. The nadir came when the FBI claimed 7(C) -- 10 times! -- for the name of an FBI Special Agent as it appeared in the Memphis Commercial Appeal.

of persuading this Court that it is clearly erroneous rests upon the Department. Id. at 1308.

The Department does not come close to meeting this burden. It rests its attack on the District Court's finding principally upon the grounds that the Court erred in ruling that this lawsuit caused the release of more than 50,000 pages. The Department asserts that this is in error because (1) virtually all of these pages were released as a result of the processing of Weisberg's administrative request of December 23, 1975, and (2) the information he received as a result of the lawsuit "was essentially duplicative or unresponsive to his request." Department's Brief at 40-41.

The Department's analysis ignores the simple fact that many, if not most, of the materials released were obtained by Weisberg only after the Department asserted (1) they didn't exist or no longer existed, (2) were exempt from disclosure, (3) couldn't be found, (4) were not responsive to Weisberg's requests, or (5) duplicate materials already being processed for him. With respect to each of these claims, the Department was repeatedly found to be wrong. Additionally, the Department ignores the fact that Weisberg obtained a complete waiver of all copying costs for all Headquarters and other records in this litigation only after twice moving the District Court to order this relief.

The field office records obtained by Weisberg constitute approximately 20,000 pages of the documents he received in this litigation. These records were not received as the result of any administrative action but because Weisberg insisted, contrary to

the representations of the FBI, that these locations contained responsive materials not duplicative of the Headquarters records. Because the FBI resisted searching and processing these records in the mistaken belief that "all relevant documents in those files were already being released to Mr. Weisberg," (Points and Authorities in Opposition to Motion for Attorney Fees and Litigation Costs at 5) it is clear that this litigation produced their release. See Church of Scientology of California v. Harris, 653 F.2d 584 (D.C.Cir. 1981) (plaintiff substantially prevailed where absent litigation, files would never have been searched and documents would never have been identified as falling within the scope of plaintiff's FOIA request). A fortiori is this the case where, as here, the search was not voluntarily made by the FBI but was undertaken only as a result of a Stipulation entered into by the parties which required Weisberg to forego a Vaughn v. Rosen motion as a quid pro quo for the field office searches.

Similarly, the FBI's answer to Weisberg's complaint asserted that the records responsive to this April 15, 1975 request had been provided. In fact, this was not true. Only Weisberg's discovery efforts in this lawsuit, obdurately resisted by the Department, and his insistence on the obvious fact that the FBI had to have crime scene photographs and he knew that they did, caused the FBI to search for these records and locate them. Moreover, once located, the FBI claimed that they were exempt. One group of very important crime scene photographs, 107 photographs taken by a man travelling with Dr. King's party as a representative of the Justice Department's

Community Relations Service, was obtained by Weisberg only after extensive litigation, including a trip to the Court of Appeals. The Department's suggestion that Weisberg may not have "substantially prevailed" with respect to these photographs because it was merely "a stakeholder" for TIME, Department's Brief at 40 n. 15, ignores two facts: (1) Weisberg's suit caused the Bureau to locate the photographs; but for that neither Weisberg nor anyone else would have been able to view, much less obtain, the FBI's copies; and, (2) the Department sought to bar their release to Weisberg not only on the grounds that they were protected by the Copyright Statute, but further contended that they were not agency records and were also immune under Exemption 4. Indeed, more than a third of the brief which the Government submitted to this Court in Weisberg v. Department of Justice, D.C. Cir. No. 78-1641, dealt with these two claims.

With respect to the approximately 20,000 pages of Headquarters MURKIN records,[26/] the Department makes much out of the fact that

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26/ Although most of these records pertained to the December 23rd request, some were also responsive to the earlier request. These records also included many that were not within the literal scope of Weisberg's request, such as reports on racial unrest in Springfield, Illinois, and other placed in the aftermath of the slaying. In determining to provide Weisberg with all Headquarters MURKIN records, the FBI construed his December 23rd request as a request for all records pertaining to the King assassination. Until he received a fee waiver for these documents, this resulted in extra copying charges to Weisberg. The record does not clearly indicate whether the other components of the Department of Justice, such as the Civil Rights Division and the Criminal Division, accorded his request a similar sweep.

Weisberg amended his complaint to include his December 23, 1975 request before he had exhausted his administrative remedies.27/ This, however, had no bearing on the timing of the Headquarters release.

On August 10, 1976, nearly three months after it had told the Court it would file such a motion, the Department moved to stay proceedings insofar as they related to the December 23rd request.28/ The Department sought an indefinite stay until action had been taken

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27/ At the May 5, 1976 status call, Government counsel sought to have the Court dismiss the Amended Complaint insofar as it related to the December 23rd request. Although the Court agreed that technically it could be dismissed, it also indicated that leave to refile would be granted. Tr. at 11. [R. 21] In fact, by the time of the first status call, Weisberg had long since exhausted his administrative remedies. Although there was no need for him to take an appeal because his administrative remedies were deemed exhausted when the Department failed to act upon his request within ten days of its receipt, Information Acquisition v. Department of Justice, 444 F.Supp. 458 (D.D.C. 1978), he did so anway. The Department also failed to act upon his appeal within the required time.

A graphic example of the futility of Weisberg's waiting for the Department to act on his requests may be gleaned from the court record in Weisberg v. Department of Justice, Civil Action No. 81-0023. In that case Weisberg waited three years for compliance with his December 27, 1977 and January 7, 1978 requests for records of the Office of the Deputy Attorney General and the Office of the Attorney General before finally filing suit. After he filed suit, the records were produced.

28/ These delays may have occurred because the Department was awaiting this Court's decision in Open America, infra, which was then pending.

on Weisberg's administrative appeal, which would only occur after a component had completed its own review of the request. Although the appeals chief gave an estimate as to when the appeal would be assigned to a staff attorney "for processing," he gave no estimate as to when review of the records would actually commence or how long it would take. July 15, 1976 Shea Affidavit, ¶ 17.

A series of evidentiary hearings held by the court in September, 1976, failed to provide justification for the stay. These hearings developed evidence that the FBI was not in fact proceeding on "strictly first-in, first-out basis" and maintaining "approximately the same rate of progress" for project and non-project cases, as this Court seems to have assumed in Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 613 (D.C. Cir. 1976). Instead, the backlog for project requests was 9-10 months, whereas that for nonproject requests was only 6 months. Testimony of Special Agent John E. Howard, September 16, 1976, Tr. at 28. [R. 29] Because large-volume or "project" requests are almost by definition cases of greater public interest, this meant that these cases, the ones more likely to prove embarrassing to the Bureau, were being placed on the backburner while the small requests were being given priority. This, of course, was contrary to Congress' clear preference for the allocation of resources to cases of public interest. This disparate treatment was enhanced by the fact that more analysts were assigned to the nonproject unit than to the project unit. Id. at 12. Notwithstanding the fact that project requests were assigned to a "Project Team,"

only one analyst normally worked on a project request. The analyst to whom Weisberg's December 23rd request was assigned was said to be working on a case in excess of 65 volumes which he estimated completing in December, 1975, or January, 1976. Id. at 84-85. Additionally, the testimony showed that projections requests were being handled piecemeal in an effort to placate the greatest number of requesters and in the hope that they would give up their voluminous requests. Id. at 19-20, 86. This practice, too, violated the first-in first-out principle by allowing requesters later in line to begin receiving records at the same time earlier requesters were still receiving theirs.

The District Court repeatedly stated that it did not believe that Weisberg's request was being handled in order and never acted on the Department's motion for a stay. On October 28, 1976, the FBI made its first release of its Headquarters MURKIN file. Thus, the result of the lawsuit and the evidentiary hearings was to speed up the actual processing and release of the Headquarters files. This itself may be a sufficient basis for this Court to hold that Weisberg substantially prevailed with respect to the Headquarters documents as well as the rest. Exner v. FBI, 443 F.Supp. 1349, 1353 (S.D.Cal. 1978), aff'd, 612 F.2d 1202 (9th Cir. 1980) (plaintiff substantially prevails by compelling an agency to release documents on a "priority basis.") Accord, Milic v. Department of State, Civil Action No. 81-2340 (D.D.C. January 27, 1983) (the speed of disclosure as well as the simple fact of disclosure is a relevant factor in determining that plaintiff had

substantially prevailed). In this regard, note must also be taken of the March 23, 1978 affidavit of Quinlan Shea which states that in his memorandum to DAG Flaherty on Weisberg's fee waiver he asserted that Weisberg's "familiarity with the case has also enabled the Bureau to evaluate more quickly the privacy interests of many of the hundreds of individuals involved." Moreover, the Department has made no showing that it would have processed Weisberg's December 23rd request at all, much less in timely fashion, if there had been no suit. Indeed, the record holds evidence to the contrary. Weisberg's pre-Amended Act and post- requests were not even acknowledged, much less complied with, in the absence of a lawsuit. Nor did the Department make timely response to his post-1975 requests, either. Indeed, the FBI did not even make partial compliance with Weisberg's April 15, 1975 request until December 1976 when the Department felt obliged to respond to an overlapping request submitted by CBS News in September, 1975.[29/]

29/ The December 2, 1975 letter releasing some materials responsive to Weisberg's request rewrote the scope of his request without any consultation with him. In addition, Weisberg was instructed to submit a new request if he wanted the materials gratuitously excluded from his request. Assuming that Weisberg would, for a change, have been treated like any other requester, the effect of requiring him to make a new request would have been to push back his priority date by nine months or more.

Assuming arguendo that the District Court incorrectly concluded that this lawsuit caused the release of 20,000 pages of Headquarters MURKIN records, this would still not render her finding that Weisberg "substantially prevailed" clearly erroneous.

> [a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Case v. Morrisette, supra, 475 F.2d at 1308, quoting United States v. United States Gypsum Co., 333 U.S. 364 at 395 (1948). There is abundant evidence in the record in this case to support the District Court's finding that Weisberg "substantially prevailed" regardless of whether he prevailed with respect to Headquarters MURKIN documents.

There is, for example, simply no question but that he prevailed with respect to crime scene photographs, photographs or sketches of artists, the 20,000 pages of field office files, the Long Tickler File and 6,500 abstracts, not to mention many other records. Additionally, as a result of this litigation he obtained first a partial reduction in fees and then a complete waiver of fees. At least one case, Wooden v. Office of Juvenile Justice Assistance, 2 GDS ¶ 81, 123 (D.D.C. Msrch 29, 1981) (unpublished), has held that a plaintiff who obtains a fee waiver as a result of litigation has "substantially prevailed" within the meaning of 5 U.S.C. § 552(a)(4)(E).

of 5 U.S.C. § 552(a)(4)(E).[30/]

In arguing that Weisberg did not substantially prevail, the Department spends a great deal of time on aspects of the litigation that were generally much less important and involved far less of an expenditure of attorney's time than the major litigation issues which Weisberg has discussed above. Nevertheless, a couple of points regarding the Department's contentions should be made.

The Department argues that the abstracts were "duplicative material" given to no prior requester. The fact that they have been given to no other requester does not establish that Weisberg did not substantially prevail with regard to this issue; if anything, it does the opposite. If the abstracts were merely "duplicative" and served no useful purpose beyond what the underlying documents accomplished, then there was no need for the FBI to have compiled them in the first place. Whether or not they also duplicate an important separate record of inestimable value to scholars and investigators. Their importance to scholarship was set forth with admirable clarity in the affidavit of a history professor, Dr. David

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30/ Throughout its brief the Department repeatedly brings in irrelevant considerations in an attempt to prejudice this Court's decision. At page 51, n. 19 of its brief the Department asserts that the fee waiver resulted in a $181,059.93 administrative expense to the public. This cost is irrelevant by law to this Court's determination of the issues and the Department's repeated citation of it is obviously calculated to inflame prejudices and divert attention from the merits of the pending issues. It is also blatantly unfactual, since Weisberg did not get a reduction of fees until nearly all the Headquarters document had already been processed and did not get a complete fee waiver until all the field waiver was $6100. The remaining costs in the figure given by the FBI are not broken down, so there is no way of determining what they include.

R. Wrone, and the Department failed to contest, or even address, his assertions. See Affidavit of Prof. David R. Wrone. [R. 145]

At page 45 of its brief the Department discusses some files which were turned over to Weisberg as a result of the District Court's December 1, 1981 Order. With respect to Memphis files involved in this order, the Department states:

> The Memphis files had not been turned over because they were not responsive to plaintiff's FOIA request (they dealt with a threat to bomb a plane on which Dr. King was once a passenger and with a file entitled "Martin Luther King Security Matters" that was unrelated to the assassination). (Emphasis added)

Department's Brief at 45. The Memphis bomb threat file illustrates the wrongness of the FBI's persistent representation both to Weisberg and to the court below that all records pertaining to the King assassination and its investigation are contained in its MURKIN files. This file deals with an April 1, 1968 phone call, thought to have originated in Memphis, from a man who reportedly said: "Your airline brought Martin Luther King into Memphis and when he comes in again a bomb will go off and he will be assassinated." Emphasis added. The file records that the FBI, the Secret Service, the Memphis Police Department, the Shelby County Sheriff, the 111th Military Intelligence Unit and the FAA were all notified on this threat, but Dr. King and his family were not. It further reflects that on May 28, 1968, the file was closed on the grounds that "all the information furnished by the unknown person making the above mentioned call was untrue." Clearly this file is relevant to

scholarly study of Dr. King's assassination and the FBI's investigation thereof. Disclosure of this existence of this file and its possible relevance to the subject of Weisberg's requests resulted from Weisberg's successful efforts to obtain the FBI's inventories of its field office files pertaining to Dr. King.

The general thrust of the Department's argument regarding the abstracts, the bomb threat file, and other matters ordered disclosed by the District Court's December 1, 1981 order is that they were duplicative or peripheral materials of little significance. However, this Court previously has rejected a district court's "subjective belief that . . . 108 envelopes and transmittal slips were too insignificant" to be considered in determining whether a plaintiff had "substantially prevailed," holding that:

> Since disclosure of the envelopes and buck slips was required by FOIA, nothing in the Act in general, nor in section 552(a)(4)(E) in particular, suggests that their disclosure should be ignored or discounted in evaluating the relative success of appellant in this litigation.

Church of Scientology of California v. Harris, 209 U.S.App.D.C. 329, 334, 653 F.2d 58, 589 (1981).

In summary, the District Court's finding that Weisberg "substantially prevailed" is not only not "clearly erroneous" but is redundantly supported by the record in this case, and the Department's contentions to the contrary are utterly without merit.

D. The District Court Did Not Abuse Its Discretion In Awarding Attorney Fees To Weisberg

The standard of review of a determination to award attorney fees under the FOIA is "abuse of discretion." LaSalle Extension University v. F.T.C., 201 U.S.App.D.C. 23, 25, 627 F.2d 481, 483 (1980). In order to meet that standard, LaSalle held that:

> courts must consider all relevant factors in deciding whether to award attorney's fees and "must be careful not to give any particular factor dispositive weight." Nationwide Building Maintenance, Inv. v. Sampson, 559 F.2d at 714. We accord the district court considerable discretion in making its decision, but the district court abuses that discretion when it fails to weigh at least the four basic factors.

Id. (footnote omitted).

In this case the District Court carefully weighed each of the four basic factors without giving any particular factor dispositive weight. Its findings on these factors were "sufficiently comprehensive and pertinent to the issues to provide a basis for decision, LaSalle, 627 F.2d at 26, quoting Schilling v. Schwitzer-Cummins Co., 142 V.2d 82 (D.C.Cir. 1944). And the court documented its reasons. Id. On its face, then, the District Court did not abuse its discretion in awarding attorney's fees. Further support for this conclusion is found in even a cursory examination of the court's findings relevant to the "four basic factors."

1. The Benefit to the Public

The District Court found that this factor weighed in Weisberg's

favor. In reaching this conclusion it considered eight instances of actual benefit to the public. The Department quibbles over three of these.

At the outset, it may be questioned whether the "public benefit" criterion places on the requester the burden of demonstrating specific instances of actual "public benefit" flowing from release of particular documents or portions thereof. In explaining the public benefit criterion the Senate report gives no hint that a substantially prevailing litigant must demonstrate the actual benefit derived from the information in order to be entitled to attorney's fees. Rather, the examples given by the Senate report suggest that it is the intended use or purpose which is controlling. S.Rep.No. 854, 93d Cong., 2d Sess. 19 (1974). Under that standard it should be sufficient that the information Weisberg sought and obtained concerns a matter of public interest and was sought for scholarly purposes; that is, for the purpose of ultimately enriching public knowledge on the broad subject of the assassination of Dr. King. In this regard it is important to remember the admonition expressed in Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704, 715, that in order to effectuate the purpose of § 552(a)(4)(E) "to facilitate citizen access to the courts to vindicate their statutory rights," the Courts must be wary of a "gruding application of this provision, which would dissuade those who have been denied information from invoking their right to judicial review.

Thus, the findings made by the District Court may go far beyond what a FOIA requester is required to demonstrate under the "public benefit" criterion. In any event, each of the five undisputed factors is clearly sufficient in and of itself to qualify under the "public benefit" criterion. Thus, the District Court found that newspapers articles have been published which are based on the information released. The Senate Report on the 1974 Amendments noted that under the "public benefit" criterion, "a court would ordinarily award fees, for example, where a newsman was seeking information to be used in a publication or a public interest group was seeking information to further a project benefitting the general public. . ." S.Rep.No. 93-854, 93d Cong., 2d Sess. 17-19. Under this criterion, Weisberg clearly qualifies for an award of attorney fees and costs. See, e.g., Church of Scientology of California v. Postal Service, 700 F.2d 486, 493 (9th Cir. 1983); Des Moines Register v. U.S. Department of Justice, 563 F.Supp. 82 (D.D.C. 1983). Since he qualifies under this ground alone, there is no need to belabor the obvious by discussing each of the five benefits not disputed by the Department. The Department's only ground for attacking Weisberg's qualification under them is its assertion that these benefits derived not from the lawsuit but from the processing of Weisberg's December 23, 1975 request. As the specious nature of this claim has been pointed out above in discussing whether Weisberg "substantially prevailed" in this litigation, it neednot be addressed again here.

H. Gun Catalogues and Bay Of Pigs Manuscript

After this Court remanded the question of the copyrighted photographs to the District Court to seek joinder of Time, Inc. under Rule 19, the Department advised that Time had no objection to copies of the photographs being made available to Weisberg. Weisberg's counsel then pointed out that a couple of gun catalogs and a "Bay of Pigs Manuscript" had also withheld under this claim, even though it seemed highly implausible that a manufacturers catalogue would be copyrighted. The Department initially resisted disclosure of these additional materials on the grounds that it was "an important matter of principle for the Department of Justice." Tr. at 10-11. [R. 181] Ultimately, however, these items were released. The release of the 1968 Redfield gun catalogue was particularly important because it shows that the telescopic sight on the alleged murder weapon was set grossly wrong when it reached the FBI lab. [R. 168 at p. 41]

The foregoing is, of course, not an exhaustive list of the important successes which Weisberg obtained in this litigation.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN RULING THAT PLAINTIFF IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS

A. Congress Intended for the FOIA to Foster the Purposes Achieved by this Lawsuit

As the Court of Appeals for the First Circuit has recently recognized, quoting the Supreme Court's decision in GTE Sylvania, Inc. v. Consumer's Union of U.S., Inc., 445 U.S. 375, 385 (1980):

> The Freedom of Information Act was intended "to establish a general philosophy of full agency disclosures," . . . and to close the "loopholes which allow agencies to deny legitimate information to the public. . . ."

Crooker v. U.S. Department of Justice, 632 F.2d 916, 920 (1st Cir. 1980). The thrust of the law is to get information out to the public, especially information which concerns matters of significant public interest. Dept. of the Air Force v. Rose, 425 U.S. 352 (1976).

The public policy underlying the Freedom of Information Act "was principally . . . in opening administrative processes to the scrutiny of the press and the general public. . . . [And] to enable the public to have sufficient information in order to be able . . . to make intelligent, informed choices with respect to the nature, scope, and procedure of federal government activities." Renegotiation Board v. Bannercraft Co., 415 U.S. 1, 17 (1974); GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375 (1980).

Thus, the FOIA is a legislative implementation of the profound values of the First Amendment; and, in particular, its extention

to the internal processes of government itself. See, inter alia, The New York Times v. Sullivan, 376 U.S. 254, 270 (1974) (First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.")

This lawsuit advanced these objectives. Weisberg, a recognized authority on the assassination of Dr. Martin Luther King, Jr., sought information on the basic evidence concerning the crime and the FBI's investigation of it, as well as on certain related subjects such as the files on the Memphis Sanitation Workers and the Invaders. He had long sought such information. At the onset of this litigation he was the only author of a book on the King assassination not in accord with the official view that James Earl Ray alone killed Dr. King, and thus was the major participant in the public debate over Dr. King's death. Indeed, but for his work on the subject, there is every reason to doubt that there would have been any debate over the subject of sufficient magnitude to merit claim that it was "uninhibited, robust and wide-open."

Shortly after this lawsuit was instituted, Congress began its own probe into the King assassination. At the conclusion of its inquiry, the House Select Committee on Assassinations concluded

that there probably had been a conspiracy to kill King.[22/]

22/ The Committee also concluded that there probably had been a conspiracy in the assassination of President Kennedy. Weisberg, considered by scholars to be the "premier authority" on this subject, too, was a major participant in the extremely robust and wide-open debate over the President's murder and the several official investigations of it. One of his lawsuits for Kennedy assassination records, Weisberg v. General Services Administration, Civil Action No. 2052-73, and a subsequent FOIA request, resulted in the release of two Warren Commission transcripts which "had a devastating impact on the credibility of the Warren Commission's findings" and "helped create the climate of opinion which later caused the House of Representatives to establish a select committee to investigate the assassinations of President John F. Kennedy and Dr. Martin Luther King, Jr." Guth, DeLloyd J. and David R. Wrone, The Assassination of John F. Kennedy: A Comprehensive Historical and Legal Bibliography, 1963-1979 at 59.

When Congress began its investigations into the King and Kennedy murders, it confronted the difficult task of attempting to reconstruct these crimes from a cold trail. Had the Government disclosed the information Weisberg sought on these events at or even reasonably close to the time he requested it, the Congressional undertaking might have occurred far sooner, faced fewer serious difficulties, and reached more definitive conclusions. As matters stand now, the controversy over both assassinations remains unresolved, and public distrust of the official findings is extensive. See, e.g., November 20, 1983, issue of the Washington Post at F2, which reports the results of a recent Washington Post-ABC News poll on the Kennedy assassination. According to the poll, even now, 20 years after the assassination and all the many official investigations, including what is said to have been the most expensive probe ever undertaken by Congress, approximately 30 percent of the public are said to favor yet another "large-scale" investigation, indeed, to consider it "necessary" and 80 percent persist in disbelieving the official Executive Branch of the slaying.

In light of such considerations, not to mention the Congressional policy of implementing, through FOIA, a national policy of full disclosure of nonexempt government information, the Department's attack upon Weisberg in its brief for being the requester to make most use of the Act and for "profoundly abusing the Freedom of Information Act," is outrageous. Coupled with the vicious attack made upon Weisberg (and his attorney) in the court below - see Points and Authorities in Opposition to Plaintiff's Motion for Attorney Fees and Litigation Costs -- the Government's

[Footnote continued on next page]

Of necessity, research on the subject of the King assassination requires access to relevant archival materials in the possession of the Government. This is particularly true given the broad focus of Weisberg's work and its searching scrutiny of the functioning of basic societal institutions -- the law enforcement agencies, the press, Congress, the judiciary.

Of necessity, research on the subject requires access to the relevant archival materials. Among the most important such files are those maintained by the defendant FBI, especially at its field offices. This point has been established by the detailed factual findings of Judge Harold Greene in American Friends Service Committee v. Webster, 485 F.Supp. 222 (D.D.C. 1980) (preliminary injunction granted to forbid FBI and National Archives from further destruction of FBI field office files because of their unique historical value).

In that case it was established that primary and original investigative records, materials, notes, exhibits and other records (including informer source records and logs, transcripts, tapes, electronic and physical surveillance records, and statements of witnesses) are collected and retained solely by FBI field offices. Consequently, "the field office files on any particular subject typically exceed in volume those kept at headquarters by a ratio of four or five to one." Id. at 232. Therefore:

[Footnote 22/ continued from previous page]

> unsupported allegations represent both the familiar litigation tactics of a lawyer with no case and a recrudesence of the Government's never-ending efforts to subvert FOIA's disclosure mandate. This Court cannot countenance such efforts, and should firmly reject them. It is the Department, not Weisberg, that has been profoundly abusing the FOIA, as the whole history of this litigation reflects.

> In a very real sense, insofar as historians and other investigators are concerned, the field office files would be the stuff of primary research, at least in the areas of how and why FBI investigations are conducted (as distinguished from the ultimate decision-making process).

Id.

This Court may take judicial notice that many significant scholarly works on recent American history published over the past several years would have been impossible of achievement without documents produced pursuant to the FOIA. In particular, works involving the actions of executive agencies carrying out sensitive and vital policy decisions have been made possible by use of FOIA.

These books, whether or not flattering to the agency involved, clearly vindicates the Congressional purpose in the passage of the FOIA. (Its objective "was principally . . . in opening administrative processes to the scrutiny of the press and the general public . . . to enable the public to have sufficient information in order to be able . . . to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities." Renegotiation Board v. Bannercraft Co., 415 U.S. 1, 17 (1974).)

As example of them is Professor David J. Garrow's The FBI and Martin Luther King, Jr.: From "Solo" to Memphis, a work which would have been impossible of achievement without use of the relevant FBI files.

Weisberg's work is similarly dependant upon access to government records, especially those of the FBI.

B. Congress Amended the Act to Include Attorney's Fees In Order to Foster Works of the Kind Undertaken by Weisberg and to Discourage Obduracy in Refusing to Comply With FOIA's Disclosure Mandates

Unfortunately, the purpose for which the FOIA was enacted was initially thwarted because the original Act contained no fee waiver provision. In enacting the 1974 Amendment which added the provision for attorney fees and litigation costs, "Congress realized that too often the insurmountable barriers presented by court costs and attorney fees to the average person requesting information under the FOIA enabled the government to escape compliance with the law." Cuneo v. Rumsfeld, 553 F.2d 1360, 1363-1364 (D.C.Cir. 1977). The Senate Report on the 1974 Amendments stated that "[t]he obstacle presented by litigation costs can be acute even when the press is involved." S. Rep. No. 93-854, 93d Cong., 2d Sess. 17-18 (1974).

Congress, as this Court has noted, clearly intended the award of fees to serve two separate and distinct FOIA objectives.

> One goal . . . is to encourage Freedom of Information Act suits that benefit the public interest. *** Congress also provided attorneys' fees . . . as compensation for enduring an agency's unreasonable obduracy in refusing to comply with the Freedom of Information Act's requirements.

LaSalle Extension University v. F.T.C., 201 U.S.App.D.C. 23, 25, 627 F.2d 481 (1980). In the instant litigation, both of these goals will be served by an award of attorney's fees. The FBI recognized the public benefit by placing copies of the records obtained by Weisberg in its public reading room. In the words of the Department's Director of the Office of Privacy and Information

Appeals, Weisberg's efforts, "and particularly this lawsuit, have contributed materially to the more ready accessibility of these materials to the general public." March 23, 1978 Shea Affidavit, ¶ 6. [R. 60]

Additionally, as the District Court correctly found, the Department engaged in obdurate conduct in this case. At the time that he filed suit there was an overwhelming pattern of obduracy in responding to Weisberg's requests, to the extent that there was a deliberate policy of refusing to acknowledge them at the FBI and an obvious anti-Weisberg animus at the Department of Justice. Despite the amendment of the Act in 1974, this pattern of abuse of the law's requirements continued. Although other requesters with pre-Amendment Act requests pending were given priority under the new Act,[23/] Weisberg was not. Thus, some 25 pre-amendment requests by Weisberg remained without compliance as of October, 1976.[24/] Even nonproject requests submitted after

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23/ See July 15, 1976 Shea Affidavit at p. 8 n. 2 [R. 26]

24/ On July 10, 1967, Weisberg made a written request for an FBI press release which addressed his second book on the Kennedy assassination even though nobody was supposed to have a copy of the book. He renewed his request on January 1, 1969, June 2, 1969, and August 13, 1973. [R. 29 at 182-183] Although oral requests by others were honored and counted in FBI statistics [R. 40 at 19], Weisberg's was not. [R. 29 at 183] The press release was later obtained after his attorney submitted a written request for it under the amended FOIA.

Although Department of Justice representatives testified to Congress in 1977 that they were going to do something about these requests "as a whole rather than handling them piecemeal," this did not happen. See testimony of Deputy Attorney General William G. Schaffer, 1977 Oversight Hearings on the Freedom of Information Act, Subcommittee on Administrative Practice and Procedure of the Committee of the Judiciary, United States Senate, 95th Cong., 1st Sess. 140 (Committee Print 1978).

the Act was amended remained without any responsive answer long after they should have been processed, even given the Bureau's backlog. October 7, 1976 Weisberg Affidavit, ¶ 60-62. [R.30]

Furthermore, the record in this case is replete with unjustifiable delays, failure to comply with court orders, failure to respond timely or even at all to motions by Weisberg, misrepresentations as to the nature of FBI field office files, and flagrant abuse of exemption claims.25/ And, despite the obvious public interest in expediting the processing of records necessarily involved in ongoing Department of Justice and Congressional investigations into the assassination of Dr. King, the Department repeatedly resisted the District Court's attempts to have more than one analyst assigned to the so-called "Team Project." See transcripts of September 8, 16, 17 hearings and October 8, 1976 status call. [R. 40, 29, and 31]

C. The District Court's Ruling that Weisberg "Substantially Prevailed" in this Litigation was not Clearly Erroneous

The District Court ruled that Weisberg "substantially prevailed" in this litigation. This Court cannot overturn that finding unless it was "clearly erroneous." Case v. Morrisette, 475 F.2d 1300, 1307 (1973). The finding is "presumptively correct," and the burden

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25/ The FBI's abuse of exemption claims, particularly Exemption b(1) and b(7)(D), has been noted by other scholars. See, e.g., Garrow, The FBI and Martin Luther King, Jr., From "Solo" to Memphis, Preface at p. . In this case the FBI's deletions ranged from 7(F) for lab examiners names to 7(C) for the name of District Attorney Jim Garrison, photographs of James Earl Ray's brother, Jerry Ray, and the identity of the William Len Hotel in Memphis. The nadir came when the FBI claimed 7(C) -- 10 times! -- for the name of an FBI Special Agent as it appeared in the Memphis Commercial Appeal.

of persuading this Court that it is clearly erroneous rests upon the Department. Id. at 1308.

The Department does not come close to meeting this burden. It rests its attack on the District Court's finding principally upon the grounds that the Court erred in ruling that this lawsuit caused the release of more than 50,000 pages. The Department asserts that this is in error because (1) virtually all of these pages were released as a result of the processing of Weisberg's administrative request of December 23, 1975, and (2) the information he received as a result of the lawsuit "was essentially duplicative or unresponsive to his request." Department's Brief at 40-41.

The Department's analysis ignores the simple fact that many, if not most, of the materials released were obtained by Weisberg only after the Department asserted (1) they didn't exist or no longer existed, (2) were exempt from disclosure, (3) couldn't be found, (4) were not responsive to Weisberg's requests, or (5) duplicate materials already being processed for him. With respect to each of these claims, the Department was repeatedly found to be wrong. Additionally, the Department ignores the fact that Weisberg obtained a complete waiver of all copying costs for all Headquarters and other records in this litigation only after twice moving the District Court to order this relief.

The field office records obtained by Weisberg constitute approximately 20,000 pages of the documents he received in this litigation. These records were not received as the result of any administrative action but because Weisberg insisted, contrary to

the representations of the FBI, that these locations contained responsive materials not duplicative of the Headquarters records. Because the FBI resisted searching and processing these records in the mistaken belief that "all relevant documents in those files were already being released to Mr. Weisberg," (Points and Authorities in Opposition to Motion for Attorney Fees and Litigation Costs at 5) it is clear that this litigation produced their release. See Church of Scientology of California v. Harris, 653 F.2d 584 (D.C.Cir. 1981) (plaintiff substantially prevailed where absent litigation, files would never have been searched and documents would never have been identified as falling within the scope of plaintiff's FOIA request). A fortiori is this the case where, as here, the search was not voluntarily made by the FBI but was undertaken only as a result of a Stipulation entered into by the parties which required Weisberg to forego a Vaughn v. Rosen motion as a quid pro quo for the field office searches.

Similarly, the FBI's answer to Weisberg's complaint asserted that the records responsive to this April 15, 1975 request had been provided. In fact, this was not true. Only Weisberg's discovery efforts in this lawsuit, obdurately resisted by the Department, and his insistence on the obvious fact that the FBI had to have crime scene photographs and he knew that they did, caused the FBI to search for these records and locate them. Moreover, once located, the FBI claimed that they were exempt. One group of very important crime scene photographs, 107 photographs taken by a man travelling with Dr. King's party as a representative of the Justice Department's

Community Relations Service, was obtained by Weisberg only after extensive litigation, including a trip to the Court of Appeals. The Department's suggestion that Weisberg may not have "substantially prevailed" with respect to these photographs because it was merely "a stakeholder" for TIME, Department's Brief at 40 n. 15, ignores two facts: (1) Weisberg's suit caused the Bureau to locate the photographs; but for that neither Weisberg nor anyone else would have been able to view, much less obtain, the FBI's copies; and, (2) the Department sought to bar their release to Weisberg not only on the grounds that they were protected by the Copyright Statute, but further contended that they were not agency records and were also immune under Exemption 4. Indeed, more than a third of the brief which the Government submitted to this Court in Weisberg v. Department of Justice, D.C. Cir. No. 78-1641, dealt with these two claims.

With respect to the approximately 20,000 pages of Headquarters MURKIN records,[26/] the Department makes much out of the fact that

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26/ Although most of these records pertained to the December 23rd request, some were also responsive to the earlier request. These records also included many that were not within the literal scope of Weisberg's request, such as reports on racial unrest in Springfield, Illinois, and other placed in the aftermath of the slaying. In determining to provide Weisberg with all Headquarters MURKIN records, the FBI construed his December 23rd request as a request for all records pertaining to the King assassination. Until he received a fee waiver for these documents, this resulted in extra copying charges to Weisberg. The record does not clearly indicate whether the other components of the Department of Justice, such as the Civil Rights Division and the Criminal Division, accorded his request a similar sweep.

Weisberg amended his complaint to include his December 23, 1975 request before he had exhausted his administrative remedies.[27] This, however, had no bearing on the timing of the Headquarters release.

On August 10, 1976, nearly three months after it had told the Court it would file such a motion, the Department moved to stay proceedings insofar as they related to the December 23rd request.[28] The Department sought an indefinite stay until action had been taken

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27/ At the May 5, 1976 status call, Government counsel sought to have the Court dismiss the Amended Complaint insofar as it related to the December 23rd request. Although the Court agreed that technically it could be dismissed, it also indicated that leave to refile would be granted. Tr. at 11. [R. 21] In fact, by the time of the first status call, Weisberg had long since exhausted his administrative remedies. Although there was no need for him to take an appeal because his administrative remedies were deemed exhausted when the Department failed to act upon his request within ten days of its receipt, Information Acquisition v. Department of Justice, 444 F.Supp. 458 (D.D.C. 1978), he did so anway. The Department also failed to act upon his appeal within the required time.

A graphic example of the futility of Weisberg's waiting for the Department to act on his requests may be gleaned from the court record in Weisberg v. Department of Justice, Civil Action No. 81-0023. In that case Weisberg waited three years for compliance with his December 27, 1977 and January 7, 1978 requests for records of the Office of the Deputy Attorney General and the Office of the Attorney General before finally filing suit. After he filed suit, the records were produced.

28/ These delays may have occurred because the Department was awaiting this Court's decision in Open America, infra, which was then pending.

on Weisberg's administrative appeal, which would only occur after a component had completed its own review of the request. Although the appeals chief gave an estimate as to when the appeal would be assigned to a staff attorney "for processing," he gave no estimate as to when review of the records would actually commence or how long it would take. July 15, 1976 Shea Affidavit, ¶ 17.

A series of evidentiary hearings held by the court in September, 1976, failed to provide justification for the stay. These hearings developed evidence that the FBI was not in fact proceeding on "strictly first-in, first-out basis" and maintaining "approximately the same rate of progress" for project and non-project cases, as this Court seems to have assumed in Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 613 (D.C. Cir. 1976). Instead, the backlog for project requests was 9-10 months, whereas that for nonproject requests was only 6 months. Testimony of Special Agent John E. Howard, September 16, 1976, Tr. at 28. [R. 29] Because large-volume or "project" requests are almost by definition cases of greater public interest, this meant that these cases, the ones more likely to prove embarrassing to the Bureau, were being placed on the backburner while the small requests were being given priority. This, of course, was contrary to Congress' clear preference for the allocation of resources to cases of public interest. This disparate treatment was enhanced by the fact that more analysts were assigned to the nonproject unit than to the project unit. Id. at 12. Notwithstanding the fact that project requests were assigned to a "Project Team,"

only one analyst normally worked on a project request. The analyst to whom Weisberg's December 23rd request was assigned was said to be working on a case in excess of 65 volumes which he estimated completing in December, 1975, or January, 1976. Id. at 84-85. Additionally, the testimony showed that projections requests were being handled piecemeal in an effort to placate the greatest number of requesters and in the hope that they would give up their voluminous requests. Id. at 19-20, 86. This practice, too, violated the first-in first-out principle by allowing requesters later in line to begin receiving records at the same time earlier requesters were still receiving theirs.

The District Court repeatedly stated that it did not believe that Weisberg's request was being handled in order and never acted on the Department's motion for a stay. On October 28, 1976, the FBI made its first release of its Headquarters MURKIN file. Thus, the result of the lawsuit and the evidentiary hearings was to speed up the actual processing and release of the Headquarters files. This itself may be a sufficient basis for this Court to hold that Weisberg substantially prevailed with respect to the Headquarters documents as well as the rest. Exner v. FBI, 443 F.Supp. 1349, 1353 (S.D.Cal. 1978), aff'd, 612 F.2d 1202 (9th Cir. 1980) (plaintiff substantially prevails by compelling an agency to release documents on a "priority basis.") Accord, Milic v. Department of State, Civil Action No. 81-2340 (D.D.C. January 27, 1983) (the speed of disclosure as well as the simple fact of disclosure is a relevant factor in determining that plaintiff had

substantially prevailed). In this regard, note must also be taken of the March 23, 1978 affidavit of Quinlan Shea which states that in his memorandum to DAG Flaherty on Weisberg's fee waiver he asserted that Weisberg's "familiarity with the case has also enabled the Bureau to evaluate more quickly the privacy interests of many of the hundreds of individuals involved." Moreover, the Department has made no showing that it would have processed Weisberg's December 23rd request at all, much less in timely fashion, if there had been no suit. Indeed, the record holds evidence to the contrary. Weisberg's pre-Amended Act requests were not even acknowledged, much less complied with, in the absence of a lawsuit. Nor did the Department make timely response to his post-1975 requests, either. Indeed, the FBI did not even make partial compliance with Weisberg's April 15, 1975 request until December 1976 when the Department felt obliged to respond to an overlapping request submitted by CBS News in September, 1975.[29/]

29/ The December 2, 1975 letter releasing some materials responsive to Weisberg's request rewrote the scope of his request without any consultation with him. In addition, Weisberg was instructed to submit a new request if he wanted the materials gratuitously excluded from his request. Assuming that Weisberg would, for a change, have been treated like any other requester, the effect of requiring him to make a new request would have been to push back his priority date by nine months or more.

Assuming arguendo that the District Court incorrectly concluded that this lawsuit caused the release of 20,000 pages of Headquarters MURKIN records, this would still not render her finding that Weisberg "substantially prevailed" clearly erroneous.

> [a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Case v. Morrisette, supra, 475 F.2d at 1308, quoting United States v. United States Gypsum Co., 333 U.S. 364 at 395 (1948). There is abundant evidence in the record in this case to support the District Court's finding that Weisberg "substantially prevailed" regardless of whether he prevailed with respect to Headquarters MURKIN documents.

There is, for example, simply no question but that he prevailed with respect to crime scene photographs, photographs or sketches of artists, the 20,000 pages of field office files, the Long Tickler File and 6,500 abstracts, not to mention many other records. Additionally, as a result of this litigation he obtained first a partial reduction in fees and then a complete waiver of fees. At least one case, Wooden v. Office of Juvenile Justice Assistance, 2 GDS ¶ 81, 123 (D.D.C. Msrch 29, 1981) (unpublished), has held that a plaintiff who obtains a fee waiver as a result of litigation has "substantially prevailed" within the meaning of 5 U.S.C. § 552(a)(4)(E).

of 5 U.S.C. § 552(a)(4)(E).[30/]

In arguing that Weisberg did not substantially prevail, the Department spends a great deal of time on aspects of the litigation that were generally much less important and involved far less of an expenditure of attorney's time than the major litigation issues which Weisberg has discussed above. Nevertheless, couple of points regarding the Department's contentions should be made.

The Department argues that the abstracts were "duplicative material" given to no prior requester. The fact that they have been given to no other requester does not establish that Weisberg did not substantially prevail with regard to this issue; if anything, it does the opposite. If the abstracts were merely "duplicative" and served no useful purpose beyond what the underlying documents accomplished, then there was no need for the FBI to have compiled them in the first place. Whether or not they also duplicate an important separate record of inestimable value to scholars and investigators. Their importance to scholarship was set forth with admirable clarity in the affidavit of a history professor, Dr. David

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30/ Throughout its brief the Department repeatedly brings in irrelevant considerations in an attempt to prejudice this Court's decision. At page 51, n. 19 of its brief the Department asserts that the fee waiver resulted in a $181,059.93 administrative expense to the public. This cost is irrelevant by law to this Court's determination of the issues and the Department's repeated citation of it is obviously calculated to inflame prejudices and divert attention from the merits of the pending issues. It is also blatantly unfactual, since Weisberg did not get a reduction of fees until nearly all the Headquarters document had already been processed and did not get a complete fee waiver until all the field waiver was $6100. The remaining costs in the figure given by the FBI are not broken down, so there is no way of determining what they include.

R. Wrone, and the Department failed to contest, or even address, his assertions. See Affidavit of Prof. David R. Wrone. [R. 145]

At page 45 of its brief the Department discusses some files which were turned over to Weisberg as a result of the District Court's December 1, 1981 Order. With respect to Memphis files involved in this order, the Department states:

> The Memphis files had not been turned over because they were not responsive to plaintiff's FOIA request (they dealt with a threat to bomb a plane on which Dr. King was once a passenger and with a file entitled "Martin Luther King Security Matters" that was unrelated to the assassination). (Emphasis added)

Department's Brief at 45. The Memphis bomb threat file illustrates the wrongness of the FBI's persistent representation both to Weisberg and to the court below that all records pertaining to the King assassination and its investigation are contained in its MURKIN files. This file deals with an April 1, 1968 phone call, thought to have originated in Memphis, from a man who reportedly said: "Your airline brought Martin Luther King into Memphis and when he comes in again a bomb will go off and he will be assassinated." Emphasis added. The file records that the FBI, the Secret Service, the Memphis Police Department, the Shelby County Sheriff, the 111th Military Intelligence Unit and the FAA were all notified on this threat, but Dr. King and his family were not. It further reflects that on May 28, 1968, the file was closed on the grounds that "all the information furnished by the unknown person making the above mentioned call was untrue." Clearly this file is relevant to

scholarly study of Dr. King's assassination and the FBI's investigation thereof. Disclosure of this existence of this file and its possible relevance to the subject of Weisberg's requests resulted from Weisberg's successful efforts to obtain the FBI's inventories of its field office files pertaining to Dr. King.

The general thrust of the Department's argument regarding the abstracts, the bomb threat file, and other matters ordered disclosed by the District Court's December 1, 1981 order is that they were duplicative or peripheral materials of little significance. However, this Court previously has rejected a district court's "subjective belief that . . . 108 envelopes and transmittal slips were too insignificant" to be considered in determining whether a plaintiff had "substantially prevailed," holding that:

> Since disclosure of the envelopes and buck slips was required by FOIA, nothing in the Act in general, nor in section 552(a)(4)(E) in particular, suggests that their disclosure should be ignored or discounted in evaluating the relative success of appellant in this litigation.

Church of Scientology of California v. Harris, 209 U.S.App.D.C. 329, 334, 653 F.2d 58, 589 (1981).

In summary, the District Court's finding that Weisberg "substantially prevailed" is not only not "clearly erroneous" but is redundantly supported by the record in this case, and the Department's contentions to the contrary are utterly without merit.

D. The District Court Did Not Abuse Its Discretion In Awarding Attorney Fees To Weisberg

The standard of review of a determination to award attorney fees under the FOIA is "abuse of discretion." LaSalle Extension University v. F.T.C., 201 U.S.App.D.C. 23, 25, 627 F.2d 481, 483 (1980). In order to meet that standard, LaSalle held that:

> courts must consider all relevant factors in deciding whether to award attorney's fees and "must be careful not to give any particular factor dispositive weight." Nationwide Building Maintenance, Inv. v. Sampson, 559 F.2d at 714. We accord the district court considerable discretion in making its decision, but the district court abuses that discretion when it fails to weigh at least the four basic factors.

Id. (footnote omitted).

In this case the District Court carefully weighed each of the four basic factors without giving any particular factor dispositive weight. Its findings on these factors were "sufficiently comprehensive and pertinent to the issues to provide a basis for decision, LaSalle, 627 F.2d at 26, quoting Schilling v. Schwitzer-Cummins Co., 142 V.2d 82 (D.C.Cir. 1944). And the court documented its reasons. Id. On its face, then, the District Court did not abuse its discretion in awarding attorney's fees. Further support for this conclusion is found in even a cursory examination of the court's findings relevant to the "four basic factors."

1. The Benefit to the Public

The District Court found that this factor weighed in Weisberg's

favor. In reaching this conclusion it considered eight instances of actual benefit to the public. The Department quibbles over three of these.

At the outset, it may be questioned whether the "public benefit" criterion places on the requester the burden of demonstrating specific instances of actual "public benefit" flowing from release of particular documents or portions thereof. In explaining the public benefit criterion the Senate report gives no hint that a substantially prevailing litigant must demonstrate the actual benefit derived from the information in order to be entitled to attorney's fees. Rather, the examples given by the Senate report suggest that it is the intended use or purpose which is controlling. S.Rep.No. 854, 93d Cong., 2d Sess. 19 (1974). Under that standard it should be sufficient that the information Weisberg sought and obtained concerns a matter of public interest and was sought for scholarly purposes; that is, for the purpose of ultimately enriching public knowledge on the broad subject of the assassination of Dr. King. In this regard it is important to remember the admonition expressed in Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704, 715, that in order to effectuate the purpose of § 552(a)(4)(E) "to facilitate citizen access to the courts to vindicate their statutory rights," the Courts must be wary of a "gruding application of this provision, which would dissuade those who have been denied information from invoking their right to judicial review.

Thus, the findings made by the District Court may go far beyond what a FOIA requester is required to demonstrate under the "public benefit" criterion. In any event, each of the five undisputed factors is clearly sufficient in and of itself to qualify under the "public benefit" criterion. Thus, the District Court found that newspapers articles have been published which are based on the information released. The Senate Report on the 1974 Amendments noted that under the "public benefit" criterion, "a court would ordinarily award fees, for example, where a newsman was seeking information to be used in a publication or a public interest group was seeking information to further a project benefitting the general public. . ." S.Rep.No. 93-854, 93d Cong., 2d Sess. 17-19. Under this criterion, Weisberg clearly qualifies for an award of attorney fees and costs. See, e.g., Church of Scientology of California v. Postal Service, 700 F.2d 486, 493 (9th Cir. 1983); Des Moines Register v. U.S. Department of Justice, 563 F.Supp. 82 (D.D.C. 1983). Since he qualifies under this ground alone, there is no need to belabor the obvious by discussing each of the five benefits not disputed by the Department. The Department's only ground for attacking Weisberg's qualification under them is its assertion that these benefits derived not from the lawsuit but from the processing of Weisberg's December 23, 1975 request. As the specious nature of this claim has been pointed out above in discussing whether Weisberg "substantially prevailed" in this litigation, it need not be addressed again here.

In view of the fact that Weisberg redundantly meets the requirements for an award of attorney fees under the five undisputed benefits listed by the District Court, there is really no need for elaborate consideration of the three benefits with which the Department takes issue. However, some brief comments are offered anyway.

With respect to the photographs copyrighted by Time, the Department urges that these did not confer a public benefit because (1) they were withheld solely because they had been copyrighted by Time; (2) there was never any objection to viewing the photographs; and (3) plaintiff's personal need to possess copies was purely a matter of private concern with no public benefit whatsoever. Department's Brief at 53. As pointed out above, it is false to state that the Government rested it withholding only on the copyright claim; it claimed as well that they were not agency records and also exempt under (b)(4). The fact that there never was any objection to viewing them is irrelevant. But for Weisberg's lawsuit no one would have ever been able to view them because the FBI claimed they didn't exist. In addition, Weisberg's possession of copies does have a substantial public benefit because it allows him and other scholars to carefully study and compare the photographs when the need arises. Congress has expressly recognized the importance of this. The bill introduced in the Senate in 1964 provided only for inspection but was changed by the Senate Committee to add a provision for copying because:

> it is frequently of little use to be able to inspect orders or the like unless one is able to copy them for future reference. Hence, the right to copy these matters is supplemental to the right to inspect and makes the latter right meaningful.

S. Rep. No. 813, 89th Cong., 1st Sess. 7 (1965).

The Department also contends that the Court's assertion that the abstracts, indices and ticker files are valuable to historians is erroneous "since the Department's affidavits establish the duplicative nature of these materials." Department's Brief at 52. FBI agents are not experts in the field of historiography, hence the court was not required to give their affidavits any particular weight. The court properly relied upon the expert opinion of a professional historian, Dr. Wrone, that they were indeed valuable. The Long Tickler File is obviously of value to historians for several reasons, not the least being that it was the FBI's control file for the King murder investigation. Its importance is further enhanced by the fact that it was partly gutted when finally located, contained non-MURKIN records, and included documents that have Weisberg in bank robbery file. The claim that this file is duplicative is simply not true.

2. Commercial Benefit to Plaintiff

The Department does not discuss this factor and apparently does not contest the District Court's finding that this factor also weighs in Weisberg's favor.

3. Nature of Weisberg's Interest in the Records Sought

The Department's Brief does not discuss this factor and

apparently concedes that the District Court was correct in finding that this factor, too, weighs in Weisberg's favor. Quite obviously, the Court's finding was correct. The Senate Report's guideline on the third criterion, the nature of the complainant's interest in the records sought, states:

> Under the third criterion, a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented, but would not do so if his interest was of a frivolous or purely commercial nature.

Since Weisberg's interest in the information sought was scholarly and public-interest oriented and neither frivolous nor of a commercial nature, consideration of this criterion also militates in favor of a fee award. Consistent with the Act's legislative history, courts have awarded attorney fees where the FOIA plaintiff's interest in seeking the information was scholarly, journalistic and public-interest oriented. Goldstein v. Levi, 415 F. Supp. 303, 305 (D.D.C. 1976); Consumers Union of the United States v. Board of Governors of the Federal Reserve System, 410 F. Supp. 63 (D.D.C. 1975) (public interest type organization sought information for benefit of the general public). Given the thrust of these decisions, Weisberg should be awarded attorney fees.

4. "Reasonable Basis in Law" for Withholdings

The District Court held that the Department lacked a reasonable basis in law because it had engaged in "a deliberate effort to frustrate this requester." [R. 263, P. 15.] This holding is absolutely correct. The Department repeatedly acted in a manner which can only be construed as obdurate conduct of the worst kind. In

its answer to the complaint the Department asserted that all materials responsive to the April 15, 1975 request when in fact they had not. When Weisberg sought to ascertain the existence of relevant materials through discovery, the Department stonewalled him with nonresponsive answers. When Weisberg filed a request for production of documents on May 4, 1976, the Department did not answer it or move for an extension of time. When Weisberg filed a motion under Vaughn v. Rosen on May 18, the Department did not answer it or move for an extension of time. When Weisberg made an administrative request for a fee waiver on November 4, 1976, the Department did not answer it until seven months later and then gave a nonresponsive answer. When Weisberg moved for a fee waiver on November 10, 1976, the Department did not answer or move for an extension of time within which to do so.

What was true in 1975 remained true in 1977 and thereafter. On August 30, 1977 James M. Powers, Chief of the FBI's FOIA Branch, wrote Weisberg that: "A review of obliterations about which you have raised complaints will be conducted when we have completed the initial processing of all the files involved in this request." When this occurred, however, the FBI refused to conduct this promised review. Thereafter, the Department offered to pay Weisberg $75 an hour to act as its consultant but then reneged on that (complaining all the while that he was not performing his end of the bargain.)

This only scratches the surface, but it is sufficient to indicate the fundamental rightness of the District Court's finding.

That said, however, it must be pointed out that the Court's finding on this fourth criterion is not essential to an award of attorney fees in this case. In Cuneo, supra, this Court addressed the fourth criterion and stated that "the reasonableness of the government's opposition does not preclude a recovery of costs and attorney fees. It is but one aspect of the decision left to the discretion of the trial court." Id.

In discussing its four criteria, the Senate Report further stated that, for example, newsmen would ordinarily recover fees even where the government's defense had a reasonable basis in law, while corporate interests might recover where the withholding was without such basis." Senate Report at 19. (Emphasis added) Thus, even if the Department had not engaged in obdurate conduct and did have a reasonable basis in law for its actions, an award of fees for Weisberg would be warranted under this guideline.

In short, the District Court did not abuse its discretion in awarding Weisberg attorney fees.

time had been charged for two of them; and (3) the total amount of time spent on all 15 motions totaled 30.5 hours, 16.0 hours of which were spent on the successful motions, 14.5 on the unsuccessful. Weisberg stated in his Reply, at p. 7, that he would deduct the 14.5 hours of unproductive time from the total. The Department has now compiled a new list which again lists the 15 motions but adds three new ones. Having reviewed his itemization of time, Weisberg's counsel finds that these three motions were unproductive and that he spent a total of 8.3 hours on them. This time should be excluded from the total amount of reimbursable time.

The Department concedes that the multiplier awarded by the District Court is available in this Circuit but argues that it was Weisberg and his counsel who prolonged the case unnecessarily. This is a gross distortion of the truth. In fact, when Weisberg moved to have the case dismissed in 1981, the Department opposed the motion. Although Weisberg felt that he had a number of justifiable reasons for appealing the District Court's rulings, he did so only after the Department appealed. If the Department had not appealed, the case would be over now.

Moreover, as Weisberg has detailed above, it was the Department that repeatedly failed to make timely response to valid motions filed by Weisberg and it was the Department which repeatedly broke its promises to Weisberg and the District Court, thus greatly acerbating the conduct of this litigation and pro-

longing it. The Department repeatedly had to move for summary judgment because it couldn't come even remotely close to substantiating its burden under the law. In an effort to resolve issues that were unresolvable because the Department would not deal with them any other way, Weisberg did file a number of motions after the Department reneged on the consultancy agreement. Some were successful, some were not. None of them occupied much time, and all together they were but a tiny fraction of this case. The Department seizes upon them in the hope that by raising a rumpus about this minor aspect of this case, it will divert attention from the the major issues which occupied the bulk of the time spent in this litigation. This Court should keep its attention riveted on the major issues that were litigated and upon which plaintiff prevailed, notwithstanding the Department's recalcitrant and dilatory opposition.

II. WEISBERG SHOULD BE PAID A CONSULTANCY FEE

Weisberg is entitled to a consultant's fee for the work he performed, based on both standard contract law as well as the doctrine of equitable estoppel. Each will be discussed separately.

A. Weisberg and the Department of Justice entered into a valid and enforceable contract.

The District Court found that no enforceable contract was formed because Weisberg should "reasonably have realized that further terms needed to be agreed upon before proceeding with the consultancy work." (Memorandum Opinion of January 20, 1983 at 25-26) However, the only "term" ultimately found lacking by the Court was duration of the contract.[31/] In its appeal brief, the government failed to cite any authority for the proposition that an otherwise valid contract should be found invalid for failure to agree on contract duration. In fact, such contracts are formed and enforced nearly

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31/ The Court initially relied on a lack of agreement as to the place of work. However, in her Memorandum Opinion of April 29, 1983, the Court observed that her previous reliance on place of work had been "misplaced." (Order at 4) The Court also found in her April 29, 1983 Order that it was "more likely than not" that Ms. Zusman had offered to pay Weisberg $75.00 an hour for his work. The Court's finding of the Zusman offer cannot be disbursed unless found to be clearly erroneous. It should also be noted that Deputy Attorney General Schaffer offered Weisberg the "normal consultancy rate" in November 1977. (Lesar Declaration of February 22, 1983, Exhibit #9) Three months after the Zusman offer, Schaffer tried to persuade Weisberg to accept $30.00 an hour. May 17, 1978 Hearing, Tr. at 4 [R. 72]

every business day. To cite the most obvious example to the legal profession, nearly every case taken on an hourly basis involves an attorney-client contract where the exact duration is unknown. Based on the above and the authority cited in Weisberg's previous brief, it is clear that the District Court's reliance on lack of agreement as to specific duration was erroneous as a matter of law and should be reversed.

The government's appeal brief mentions other alleged "essential terms" on which there was supposedly no agreement. Essentially they relate to the specifics of the work product which was expected from Weisberg. The government maintains that it "simply wanted plaintiff to specify that deletions he took issue with . . . while plaintiff had a more expansive idea that enabled giving advice and comments as the Department's consultant." Since the Court made no finding on this issue, the government's argument at best merits a remand.

Fortunately, no remand is necessary, as the record shows that there was agreement on the nature of the work to be performed. In fact, the two reports submitted by Weisberg contained precisely the details the Department was seeking to facilitate the resolution of this litigation.

As background, it should be noted that the vast majority of exemption disputes which arose in this lawsuit involved claims by Weisberg that information being withheld was already in the public domain. To facilitate resolution of these claims, the government wanted Weisberg not only to compile a list of items he felt were

improperly withheld, but to state why he considered the deletions to be unwarranted. This is shown by the remarks of Deputy Attorney General Schaffer in a status call held May 24, 1978. Mr. Schaffer stated that what the Department wanted (and soon after received) "essentially was a list and an explanation of why the items on the list were in the public domain." (Emphasis added; Status Call of May 24, 1978 at 2)

From the above remarks it is evident that the Department and Weisberg reached a basic agreement on the nature of the work to be performed. The government's allegation that it simply wanted a non-narrative list, a task which could have been performed by a clerical, is ludicrous and unsupported by the record. Obviously, the Department could have supplied its own "clerical" to compile a list obtained from reading Weisberg's correspondence.

The government further alleges that Weisberg and his counsel knew that further details needed to be agreed upon, and that they evidenced that awareness on two occasions. The government points to Weisberg's letter of December 17, 1977, in which he asks for a written contract. The letter clearly shows that Weisberg had accepted his obligations under the consultancy arrangement,[32/] and merely sought clarification of the hourly rate he was to be paid. At no point in the letter did Weisberg suggest that his

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32/ In the letter Weisberg stated: "Of course, I am the plaintiff in this, as I am your consultant." (Emphasis added) Later in the same correspondence, Weisberg wrote: "Earlier and again as your consultant I gave you certain cautions." (Emphasis added)

obligations to the Department were conditional on any factors yet to be resolved. In fact, by the date of this letter, Weisberg had already worked 80 hours on the consultancy project. (Lesar Declaration, February 22, 1983, at Exhibit #8) A month later, Weisberg's concerns about his compensation rate were eliminated by Ms. Zusman's offer of $75.00 an hour, which he accepted.

The government also points to a letter written by Weisberg's counsel on February 15, 1983, as evidence that Weisberg knew that further details needed to be worked out. (Lesar Declaration at Exhibit #20) Actually, the government's appeal brief alleges that in this correspondence "plaintiff's counsel . . . admitted there was no contract until the amount of the fee could be worked out." (Brief for the Department at 36)

A review of the February 15 letter reveals the government's characterization to be wholly inaccurate. The letter states, in pertinent part:

> While I am not a contract lawyer, I have a feeling that all of the essential elements of a contract are present in this set of facts. I do not see how, legally, you can now go back on an agreement which was reached between myself and a responsible official of the Department of Justice.

Nor does Weisberg's counsel see how, legally or not, this letter can be characterized as an "admission" that no contract existed.

The government's appeal brief raises two threshhold contract defenses. First, it alleges that an award to Weisberg is barred by 31 U.S.C. § 1501, because no written contract was ever executed. The District Court rejected this contention in her Memorandum Opinion of January 20, 1983, noting that this statute does not bar recovery under an implied-in-fact contract, citing Narua Harris

Construction Corporation v. United States, 574 F.2d 508, 510-511 (Ct.Clms. 1978). For the reasons discussed above, an implied-in-fact contract was present in the case at bar.

The government also argues that no contract was formed because "the officials with whom plaintiff and his attorney dealt were not authorized to enter into a consultancy agreement. . ." (Brief for the Department at 37) The government alleges that only the Assistant Attorney General for Administration and certain specifically designated contract officers have authority to retain consultants. However, this bureaucratic dodge overlooks the Attorney General's own contracting authority, and the fact that the DOJ attorneys Weisberg dealt with represented the Attorney General. While not a named defendant, the Attorney General is the government official ultimately responsible for the administration and enforcement of the FOIA at the Department of Justice, and is the person who would be held accountable for assuring compliance of any court orders requiring disclosure.33/ It must be said that Ms. Zusman and Mr. Schaffer were authorized representatives of the Department of Justice, and that such representation necessarily extended to the head of said agency. Accordingly, Zusman and Schaffer had authority through the

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33/ In many previous FOIA cases against the Department of Justice, the Attorney General has been a named party, e.g., Founding Church of Scientology, Etc. v. Bell, 195 U.S.App.D.C. 363, 603 F.2d 945 (1979).

Attorney General, to enter into a consultancy arrangement.[34/]

While the word "consultant" has been used by both parties to describe Weisberg's status with the Department, it should be noted that Weisberg's role was not to advise the Department concerning its statutory responsibilities relating to law enforcement, but was to assist the DOJ in litigation brought against it. As such, Weisberg was not actually the type of employee envisioned as a "consultant" in 28 C.F.R. § 0.76(j), but was more akin to an expert witness. It is well settled that an attorney has implied authority to hire expert witnesses. Seavey on Agency, § 31 (1964).

From the above, it can readily be found that the government counsel who proposed the contract in question were authorized to do so. Nevertheless, even assuming arguendo they were not, it must be found that the Department is bound under the principles of apparent authority.

The Department has cited cases suggesting that the government cannot be estopped from denying the unauthorized acts of its officials

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34/ It is unclear whether the Department alleges that Deputy Assistant Attorney General Schaffer lacked authority to execute a consultancy agreement. As second in command of the Civil Division, his authority to act on behalf of the Department would appear evident. To the extent that Schaffer is found to have authority, Weisberg points out that Schaffer made an open offer to enter into a consultancy arrangement on November 11, 1977, which was accepted in Schaffer's absence in Court chambers on November 21, 1977. Weisberg would further argue that any "unauthorized" act by Zusman was ratified by Schaffer by the latter's failure to tell Weisberg to cease work on the consultancy project after he (Schaffer) had been advised repeatedly by Weisberg that work was progressing. (Lesar Declaration, Exhibits # 8, 9, 10, 13; see Seavey on Agency § 40 (1964))

While Weisberg would contest that this proposition is supported by current case law (see following section), he would point out nevertheless that the court cases cited by the government do not involve representations made by federal attorneys to a court of law. As stated in a noted treatise on agency:

> An attorney of law who appears in an action for a client does not have to prove that he is authorized. This is not an inference of fact but results from the position of the attorney as an officer of the court. Seavey on Agency, § 16 (1964)

It follows that opposing counsel has a right to rely on representations made to a court of law by duly appointed legal counsel. Such reliance is based not on pure agency principles, but on the special position of the attorney of an officer of the court. In the case at bar, the Department's attorneys held themselves out to a court of law as authorized to enter into the consultancy agreement. To find in the Department's favor based on lack of authority would be unfair to Weisberg and would compromise the integrity of the Court.[35/]

B. Weisberg is entitled to relief under the doctrine of equitable estoppel.

The government argues that estoppel is an inappropriate remedy

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35/ The District Court was evidently unimpressed with the Department's authority argument. While it could have ruled on this threshhold contention, it assumed authority and ruled on whether the contract was definite enough to be enforceable.

because government officials cannot be estopped. Yet the Supreme Court case cited by the Department does not stand for this proposition. Instead, the case implies that estoppel is an appropriate remedy under the right circumstances by holding that the facts presented there fell "far short" of demonstrating estoppel. Schweiker v. Hansen, 450 U.S. 785 (1981) Furthermore, it is well settled in this Circuit that estoppel may be applied to government officials. Vestal v. IRS, 152 F.2d 132 (D.C.Cir. 1945)

The District Court declined to apply the estoppel doctrine for two reasons: First, it found that there was no justifiable reliance by Weisberg because he should have known not to proceed with his work. This conclusion is clearly erroneous. Weisberg wrote Department officials repeatedly about the progress of his work, and the officials never advised him to stop. In January Ms. Zusman offered to pay Weisberg $75.00 an hour, which he accepted, and shortly thereafter she chided Weisberg's counsel for his client's attention to other matters. According to her own memorandum, written in late January, 1978, Ms. Zusman informed Weisberg's counsel that Weisberg "could better devote his time to the tasks involved in his consultancy arrangement with the Department . . ." Lesar Declaration, Exhibit # 16 [R.] In short, Weisberg had every reason to rely on the Department's representations both emphatic and explicit, that a consultancy agreement existed.

The Court's second reason for refusing to grant equitable estoppel relief was that the Department derived no benefit from Weisberg's work. This holding must be reversed as a matter of

law, for there is no requirement that consideration be present where the cause of action is equitable or promissory estoppel. In fact, detrimental reliance is said to replace consideration in such cases. See generally, Murray on Contracts, §§ 91-93 (1974). Furthermore, the record shows that the Department did benefit by Weisberg's reports. Mr. Quinlan J. Shea, Jr., the head of the Department's appeals units, relied extensively on Weisberg's consultancy reports, which he dubbed the "Short Report" (SR) and the "Long Report" (LR). He acknowledged the benefit to his administrative review at the outset of his testimony on January 12, 1979, saying, "[t]o a very considerable extent, we followed specific leads suggested by the plaintiff." Tr. at 5 [R. 89]

The Court stated, nevertheless, that the Department did not benefit because no material was released because of the consultancy reports. This confuses benefit to Weisberg with benefit to the Department. Clearly, the Department received what it bargained for; it is irrelevant whether Weisberg's work for the Department benefitted Weisberg. Furthermore, the record shows that Weisberg's consultancy reports did result in the release of material. In his consultancy reports Weisberg called attention to undeniable proof of the Long Tickler file. In his September 27, 1978 report to Weisberg's counsel, Shea acknowledged that there were many indications in the file that copies of documents were sent to Mr. Long, but because the FBI had been unable to locate it and he considered ticklers to be, by their very nature, temporary, he concluded that "Supervisor Long's tickler file no longer exists." [R. 84] In

response, Weisberg suggested where the FBI might look, and the file was located, as Shea acknowledged in his October 26, 1978 report to Lesar. [R. 84] As a result 460 pages of this tickler file were released to Weisberg.

In summary, it is evident that the circumstances present here warrant the application of equitable or promissory estoppel and said relief should be granted.

III. THE DEPARTMENT HAS STILL FAILED TO CONDUCT AN ADEQUATE SEARCH

Weisberg contends that summary judgment was improper with respect to the search issue because the FBI did not show that it had searched the individual items of his requests. The Department argues that it is not required to reorganize its files in response to a FOIA request. Department's Brief at 23. This avoids the issue. Weisberg does not seek to have the Department reorganized its files. What he is concerned about is the failure to conduct an adequate search with respect to item 7 of his April 15, 1975 request and the items of his December 23, 1975 request which named individuals. The FBI has not searched these items except insofar as Weisberg has provided privacy waivers for the persons appearing on the list or they are dead.

Weisberg contends that the FBI must first make a search before it invokes privacy considerations. The issue was raised at the hearing on August 15, 1980, when Weisberg's counsel questioned Connie Fruitt, an FBI employee. Miss Fruitt insisted that the FBI couldn't search another individual's file without a privacy waiver. The following exchange then occurred:

Q: Do you recall that I made a request for materials on Gerold Frank?

A: Yes, sir.

Q: Do you recall that I was initially told that they would not be processed without a privacy waiver?

A: Yes, sir.

Q: Do you recall that I was later provided with those materials without a privacy waiver?

A: That was at the directige of Mr. Shea, I believe.

Tr. at 41-42.

Weisberg's counsel did obtain materials on Gerold Frank from the FBI. There was no ground for withholding these materials on Frank because they did not fall within the threshhold requirement of law enforcement records compiled for investigatory purposes and did were not withholdable under Exemption 6. A similar search under the names of the individuals listed in Weisberg's request may reveal similar nonexempt records on those individuals as well. Not all FBI files are law enforcement files. Indeed, Weisberg has established that there are "94" or "Research Matters" files on some of the individuals listed in his requests. The FBI is obligated to search the individual items of plaintiff's requests to if there are nonexempt materials pertinent to his requests on the individuals listed therein.

Respectfully submitted,

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