BRIEF FOR APPELLANT/CROSS-APPELLEE

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 83-1764

On Appeal from the United States District Court for the District of Columbia, Hon. June L. Green, Judge

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	:	
Appellant/Cross-Appellee	:	
v.	:	Case Nos. 82-1229, 82-1274, 83/1722, 83-1764
U.S. DEPARTMENT OF JUSTICE,	:	
Appellee/Cross-Appellant	:	

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

The undersigned, counsel of record for Harold Weisberg, certifies that the following listed parties and amici, if any, appeared below:

Harold Weisberg (Plaintiff)

U.S. Department of Justice (Defendant)

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

James H. Lesar

JAMES H. LESAR

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BRIEF FOR APPELLANT/CROSS-APPELLEE

STATEMENT OF ISSUES

1. Whether the District Court erred in ruling that the defendant had conducted an adequate search for records responsive to plaintiff's Freedom of Information Act request.

2. Whether the District Court erred in sustaining agency's exemption claims where: (a) agency's Vaughn sampling index did

not include examples of each exemption claimed by it; (b) agency's Vaughn index resulted in releases of previously withheld materials; and (c) plaintiff adduced evidence that claims which agency tried to justify were also erroneous.

3. Whether evidence of error in FBI procedures for identifying "previously processed" records precluded summary judgment and requires reprocessing of field offices files.

4. Whether the District Court erred in ruling that agency did not owe consultancy fee to plaintiff because there was no binding and enforceable contract.

5. Whether the District Court, in deciding plaintiff's attorney's fees application, erred in its ruling on hourly rate, in excluding some time spent on fee application, and in denying increase in award for delay in payment.

One part of this case was previously before this Court in Weisberg v. U.S. Dept. of Justice, 203 U.S.App.D.C. 242, 631 F. 2d 824 (1980).

STATUTES AND REGULATIONS

The text of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, is reproduced in the Addendum to this brief.

REFERENCES TO PARTIES AND RULINGS

The parties to this lawsuit are Harold Weisberg ("Weisberg"), plaintiff/cross-appellant, and the United States Department of

Justice ("the Department"), defendant/cross-appellee.

Weisberg appeals from the following orders of the District Court, all of which were entered by the Hon. June L. Green:

1. The memorandum opinion and order of April 29, 1983 denying plaintiff's motion for partial reconsideration of the court's order of January 21, 1983. [JA 877, 885]

2. The memorandum opinion and order of January 20, 1983 insofar as they decided issues regarding plaintiff's application for attorney's fees adversely to him and insofar as they vacated the court's December 1, 1981 and January 5, 1982 orders granting plaintiff's motion for an order requiring defendant to pay a consultancy fee to plaintiff. [JA 711, 737]

3. The memorandum and order of January 5, 1982, dismissing this action. [JA 604, 608]

4. The memorandum opinion and order of December 1, 1981 granting summary judgment in favor of defendant. [JA 572, 585]

5. The order of September 11, 1980, insofar as it denied plaintiff's motion to require reprocessing of the FBI's Headquarters MURKIN records. [JA 523]

6. The Court's finding of February 26, 1980 as to the scope of search. [JA 477]

STATEMENT OF THE CASE

A. BACKGROUND

This case arises under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The plaintiff, Mr. Harold Weisberg, has been recog-

nized by scholars as "the premier authority" on the assassination of President Kennedy.[1/] He is also an authority on the assassination of Dr. Martin Luther King, Jr. His contribution to the fund of public knowledge about these two tragedies has been enormous, and the role he has played in trying to ensure that information disseminated to the public is complete and accurate and not false or misleading is well-known among those knowledgeable on these subjects.[2/]

Washington journalist Les Whitten has stated, for example, that he has found Weisberg's research "invaluable and even vital in pursuing the news; that he is reliable and accurate and his assessments of the importance of documents he has provided me and that I have turned up on my own have been extraordinary; that I have found him uniquely reliable among the so-called 'critics.'" Whitten has also stated of Weisberg that "he has steered me away from several stories looked plausible, but turned out under Weisberg's counselling to be false; that without such counselling and documentation, I would have printed false stories, . . . that, finally, I seldom in ever write a piece touching on the assassination without bouncing it off Weisberg. Affidavit of Leslie H. Whitten, ¶¶4, 7. [JA 276-277]

1/ The Assassination of John F. Kennedy: A Comprehensive Historical and Legal Bibliography, 1963-1979 (Westport, Connecticut: Greenwood Press, 1980), compiled by DeLoyd J. Guth and David R. Wrone, "Introduction" at xxvi.

2/ See, e.g., affidavits of Howard Roffman and David R. Wrone. [JA 279-289]

When he filed this suit in November, 1975, Weisberg had written six published books on the assassination of President Kennedy which were critical of the officicial account. In addition, he was also author of the only book which contended that James Earl Ray was not the sole assassin of Dr. Martin Luther King, Jr. 3/

On March 10, 1969, James Earl Ray entered a plea of guilty to the assassination of Dr. King. Two weeks later Weisberg wrote then-FBI Director J. Edgar Hoover and requested 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 and assistance it had given him. He asked that he be provided this same information, 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. [JA 238]

The FBI never responded to this request for information, and Weisberg later learned that the request itself was given a "100" file number, the FBI's designation for "Subversive Matter." He also later learned of an FBI policy of not responding to his requests for information. That policy was expressed in an October 28, 1969 memorandum from one high FBI official, Alex Rosen, to

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3/ Frame-Up: The James Earl Ray/Martin Luther King Case (New York: Outerbridge & Dienstfry, 1971).

another, Cartha "Deke" DeLoach, which states: "Weisberg by letter in April, 1969, requested information on the King murder case for a forthcoming book. It was approved that his letter not be acknowledged."[4/] October 12, 1977 affidavit of Harold Weisberg, Attachment 1. [JA 273]

B. April 15, 1975 Request

The 1974 amendments to the Freedom of Information Act became effective on February 19, 1975. On April 15, 1975, Weisberg made a request for information which in part repeated what he had asked for in 1969. Specifically, he requested information on the King assassination falling within seven enumerated categories:

1. The results of any ballistics test.

2. The results of any spectrographic or neutron activation analyses.

3. The results of any scientific tests made on the dent in the windowsill of the bathroom window from which Dr. King was allegedly shot.

4. The results of any scientific tests performed on the butts, ashes or other cigarette remains found in the white Mustang

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4/ The FBI's deliberate refusal to respond to Weisberg's requests was brought to the attention of Congress in 1977. See Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee of the Judiciary, U.S. Senate, 95th Cong., 1st Sess., on Oversight of the Freedom of Information Act (Sept. 15, 16, Oct. 6, Nov. 10, 1977), pp. 139-141, 174-175, 941-942. See also "Agency Implementation of the 1974 Amendments to the Freedom of Information Act," Report on Oversight Hearings by the staff of the Subcommittee on Administrative Practice and Procedure of the U.S. Senate, 95th Cong., 2d Sess. (Committee Print, March 1980), p. 71 n. 4.

abandoned in Atlanta after Dr. King's assassination and all reports made in regard to said cigarette remains.

5. All photographs or sketches of any suspects in the assassination of Dr. King.

6. All photographs from whatever source taken at the scene of the crime on April 4th or April 5th, 1968.

7. All information, documents or reports made available to any author or writer, including but not limited to Clay Blair, Jeremiah O'Leary, George McMillan, Gerold Frank, and William Bradford Huie.

Complaint, Exhibit A. [JA 31]

By letter dated April 29, 1975, FBI Director Clarence M. Kelley acknowledged receipt of this request and stated that "our Laboratory Division is attempting to locate and identify the requested material. He assured Weisberg that "every feasible effort will be made to complete the processing of your request within thirty working days. . . ." Complaint, Exhibit B. [JA 32]

Weisberg elected to treat this as a denial of his request and appealed. Complaint, Exhibit C. [JA 33] By letter dated May 21, 1975, Mr. Quinlan J. Shea, Jr., Chief, Freedom of Information Appeals Unit, informed Weisberg's counsel that he would be advised of the action on his client's request by the Attorney General "in a further communication to be dispatched not later than June 5, 1975, unless a delay authorized by Section 552(a)(6)(B) is required." Complaint, Exhibit D. [JA 34] By letter dated June 5, 1975, Richard M. Rogers, Deputy Chief, Freedom of Information Appeals Unit, wrote Weisberg's counsel that it had proven impossible

to complete the processing of the appeal "as the result of circumstances within the purview of 5 U.S.C. 552(a)(6)(B). . . ." He promised, however, that "[y]ou will be advised of the decision of the Attorney General in a further communication to be dispatched not later than June 19, 1975." Complaint, Exhibit E. [JA 35]

The June 19, 1975 deadline passed without any further communication regarding the decision of the Attorney General. However, on June 27, 1975, FBI Director Clarence Kelley did write a letter to Weisberg's counsel stating that his request "for the results of certain Laboratory examinations, photographs, and sketches relating to the assassination of Dr. Martin Luther King, Jr., is denied." To support this denial, Director Kelley invoked Exemption 7(A) and cited the fact that an appeal from the denial of a writ of habeas corpus on behalf of James Earl Ray was pending in the Sixth Circuit. He also asserted that a search of FBI central files in connection with Item 7 of Weisberg's request "reveals no information regarding Dr. King's assassination was made available to any author or writer." March 23, 1976 Weisberg Affidavit, Exhibit J. [JA 73]

C. Weisberg Files Suit: No Crime Scene Photographs

By November 28, 1975, Weisberg had received no documents responsive to his April 15, 1975 request, so he filed suit.

On December 1, 1975, Deputy Attorney General Harold Tyler acted upon Weisberg's May 5, 1975 appeal,[5/] stating that:

5/ CBS News, which was preparing to air a documentary on Dr. King's assassination, had also requested some of the same materials sought by Weisberg. There is some evidence that the Department was motivated to make these releases "to avoid being 'blased' (on the air) by CBS for being 'uncooperative'." See November 3, 1975 memorandum from Stephen Horn, Attorney, Criminal Section, to Assistant Attorney General J. Stanley Pottinger. [JA 115]

> It may be that the Department has no photographs "taken at the scene of the crime" [item number 6 of the request], in the sense your client uses the phrase. To the limited extent that we have photographic and other materials that depict physical conditions or events, they will be released to Mr. Weisberg.

March 23, 1976 Weisberg Affidavit, Exhibit I. [JA 70]

The following day, December 2, 1975, FBI Director Kelley released 73 pages of documents and 18 photographs in response to Weisberg's request. There were no crime scene photographs among the materials released.

On December 23, 1975, Weisberg submitted a new, much longer request containing 28 categories of records, including some with a number of subparts. He then amended his complaint. [JA 36]

On December 29, 1975, Weisberg's counsel responded to Tyler's December 1 letter by protesting that Tyler had rephrased the April 15 request so as to exclude most of the records sought. He made it clear that the request was broadly worded. He defined the request for "all photographs taken at the scene of the crime" to include "all of the buildings and areas in the immediate vicinity of the crime site," stating that it would include, for example, "photographs taken of the fire station, the rooming house at 418 1/2 to 422 1/2 S. Main Street, and any areas in between or adjacent thereto," as well as photographs of the interior of any of these buildings and of any objects found in them." [JA 44]

On January 2, 1976, the Department answered Weisberg's amended complaint. [JA 42] The third defense stated that the

case was moot; the fifth defense averred that Kelley's December 2 letter had provided Weisberg with the records he had requested.

On January 8, 1976, Weisberg served the Department with a set of 39 interrogatories which were designed to establish that the Department did have additional records responsive to the request. [R. 5] On February 10, 1976, the Department filed a motion for a protective order which asserted that discovery should be postponed where a dispositive motion is on file "or is about to be filed," that this was particularly true in a Freedom of Information Act case "where defendants are permitted to establish their defenses via affidavits," and that "defendant will be taking the position that this action is moot in view of the disclosures granted the plaintiff after the filing of the instant action." Motion for a Protective Order, p. 2. [R. 7]

The first status call was held the following day. Counsel for the Department repeated this theme, variously asserting to the court that, "I think the case was filed prematurely," "I think that in a matter of time this case is going to prove to be moot," and that "we have indicated that we will be filing a motion in two weeks that we hope will demonstrate that this case is moot." [JA 49-50]

The District Court required the Department to answer the interrogatories, but the answers were not responsive. For example, Interrogatory No. 30 asked: "Did the FBI obtain photographs of the scene of the crime taken by Mr. Ernest Withers?" The FBI's

nonresponsive answer was:

> The Deputy Attorney General advised plaintiff's attorney in his letter of December 1, 1975, that ". . . In an effort to save your client considerable expense, I have construed item No. 6 [of plaintiff's request] so as not to encompass the several hundred photographs in Bureau files of Dr. King's clothes, the inside of the room rented by Mr. Ray, or various items of furniture and personal property. If Mr. Weisberg does, in fact, wish copies of these photographs, you should make a further request for them and agree to pay the reproduction and special search cost which will be involved." Plaintiff has never given the Department of Justice or the Federal Bureau of Investigation any assurance that he is willing to pay the necessary search fees.

[JA 58]

Similar nonresponsive answers were made to three other interrogatories which sought to discover whether the FBI had obtained crime scene photographs from other sources, including the police, news agencies, reporters, private citizens, etc. See Defendant's answers to Interrogatories Nos. 31-33. [JA 59]

These responses contrived a pretext for not answering Weisberg's interrogatories. There was no basis for the pretext: two weeks earlier Weisberg told the Department's counsel that he would pay the search fees as soon as a specific sum was demanded of him[6/] and pointed out that he had paid the deposit on an anticipated search fee for Civil Rights Division documents as soon as a specific sum had been demanded of him. March 23, 1976 Weisberg Affidavit,

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6/ Department of Justice regulations require that the requester be notified of estimated search and copying fees in excess of $25.00. 28 C.F.R. § 16.9(c), (e).

¶¶28-36. [JA 64-67] By February 23, 1976, the FBI still had not provided any estimate as to search costs; however, in view of the FBI's intransigent position that it would not conduct any search for crime scene photographs until it had received written assurances of payment, and to avoid further delay, Weisberg's counsel wrote the FBI that Weisberg would pay the necessary search fees, subject to his right to recover them. March 23, 1976 Weisberg Affidavit, Exhibit P. [JA 77]

On March 9, 1976, the FBI informed Weisberg that it would "begin our search to compile the photographs and records you have requested." March 23, 1976 Weisberg Affidavit, Exhibit Q. [JA 78] On March 23, 1976, Weisberg met with the FBI at FBI Headquarters to review the photographs it had compiled. Although he was shown "photographs of hairpins and . . . beer cans, everything except the basic evidence of the case," he was not shown any crime scene photographs. March 26, 1976 Trancript, p. 9. [JA 82] At this meeting, Weisberg told the FBI that he knew that the FBI had crime scene photographs.

Three days later Department counsel informed the court that the FBI would make a search of its Memphis Field Office for photographs and other materials responsive to Weisberg's request. March 26, 1976 Tr., p. 3. [JA 81]

On April 9, 1976, the Memphis Field Office notified FBI Headquarters ("FBIHQ") that it had located numerous crime scene photographs, including 107 pictures taken by Mr. Joseph Louw, a

photographer who was on assignment for Public TV when Dr. King was killed, 47 photographs taken by the Memphis Police Department, and 1 cannister containing photographic negatives of aerial view of the Lorraine Motel and vicinity taken by the U.S. Corps of Engineers. September 2, 1977 Weisberg Affidavit, Attachment 4. [JA 270] The Memphis Field Office also listed a number of photographs of suspects in the assassination, another item of Weisberg's April 15 request.

On May 5, 1976, Weisberg and his counsel were again shown photographs at FBIHQ. This time they were shown more than 100 photographs, some of which were crime scene photos. In addition, although the Department of Justice had previously asserted that there never were any suspects in the King assassination other than James Earl Ray, 7/ they were also shown photographs of suspects other than Ray. And Weisberg continued to assert, even after the May 5 meeting, that he had not been shown all crime scene photographs. May 17, 1976 Lesar Affidavit, ¶¶7-11. [JA 112]

By letter dated May 11, 1976, FBI Director Clarence Kelley informed Weisberg's counsel that the 107 crime scene photographs taken by Mr. Louw were the property of Time, Inc., and were protected from disclosure under Exemption 3 (by virtue of the Copyright Act, 17 U.S.C. 101, et seq.) and Exemption 4. Director Kelley also stated that photographs "provided to the FBI by a non-Federal law enforcement organization which has specifically re-

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7/ December 1, 1975 letter from Deputy Attorney General Tyler to James H. Lesar. [JA 70-71]

quested that this material continue to be held confidentially" were exempted from disclosure under 5 U.S.C. § 552(b)(7)(C) and (D). May 17, 1976 Lesar Affidavit, Exhibit Y. [JA 118]

At a status call held on May 18, 1976, the question of the exempt status of the photographs and other materials being withheld from plaintiff was raised. Counsel for the Department indicated that the Department would file a motion for summary judgment in three weeks. [JA 109] It never happened. In September, 1977, Weisberg moved for summary judgment on the issue of the exempt status of the 107 copyrighted photos obtained by the FBI from Time, Inc., and the Department cross-moved. [R. 47, 48] The District Court ruled in Weisberg's favor and the Department appealed. The Court of Appeals affirmed the District Court's decision that the photographs were "agency records" subject to the FOIA, notwithstanding Time, Inc.'s copyright claim, but remanded the case for further proceedings required by Rule 19. Weisberg v. U.S. Dept. of Justice, 203 U.S.App.D.C. 242, 631 F.2d 824 (1980). On remand it proved unnecessary to seek the joinder of Time, Inc., as contemplated by this Court, and Weisberg was furnished these photographs.

Ultimately, the FBI also dropped its Exemption 7(C) and 7(D) claims for the Memphis Police Department's crime scene photographs, and these, too, were furnished to Weisberg.

D. Defendant's Motion to Stay Proceedings

On June 2, 1976, the Department filed an affidavit by FBI Special Agent Thomas Wiseman which asserted that Weisberg had been furnished all nonexempt information responsive to his April 15th request. Second Affidavit of Thomas L. Wiseman. [JA 135] At a status call held on June 10, 1976, Department counsel indicated once again that he was going to file a motion to dismiss. [JA 137-138] He also indicated that he was prepared to file an affidavit and then a motion regarding when the FBI would reach Weisberg's December 23, 1975 request. [JA 139]

On August 10, 1976, the Department moved not to dismiss but for a stay of further proceedings, citing as grounds the decision of this Court in Open America v. Watergate Special Prosecution Force, 178 U.S.App.D.C. 308, 547 F.2d 604 (1976). In support of its motion the Department filed an affidavit by Mr. Quinlan J. Shea, Jr., then Chief, Freedom of Information and Privacy Unit, Office of Deputy Attorney General, U.S. Department of Justice. Mr. Shea asserted that "[t]he assassination of Dr. King is certainly a case of sustained public interest" and advanced two reasons for processing cases of historical interest more slowly than others, one of which was:

> Attorney General Levi and Deputy Attorney General Tyler have directed that all nonexempt records in these files of public and/or historical interest are to be released, together with every exempt record that can possibly be released as a matter of discretion. This insistence upon maximum possible release is very time consuming, both for the components of the Department in processing the requests initially and for my Unit.

(Emphasis in original) July 15, 1976 Affidavit of Quinlan J. Shea, Jr., ¶12.[8/] [JA 164-165]

On September 8, 16, and 17, the District Court heard testimony from FBI agents relevant to the Department's motion for a stay. [R. 29, 40] At the conclusion of these hearings, the FBI began processing its Headquarters records on the MURKIN[9/] investigation.

E. FIELD OFFICE FILES

For nearly two years after suit was brought, the FBI resisted any search of its field office files. In April, 1976, it was forced to search its Memphis field office for crime scene photographs and photographs of suspects. Although FBI Director Kelley's May 11, 1976 letter had promised a search of the Memphis Field Office "for any additional material which might be responsive to your [April 15, 1975 request] not available at FBI Headquarters," and although this statement was repeatedly called to the attention of the Court and the Department, no non-photographic materials were provided by the Memphis Field Office.

8/ Ironically, two and a half years later the same official testified that material which had been excised from the King assassination files no longer qualified for continued withholding, and that he thought the records should be reprocessed to restore deleted material. Testimony of Quinlan J. Shea, Jr., January 12, 1979 Hearing, Tr. at 6, 28-31. [JA 399-402]

9/ This is the FBI's acronym for its investigation of the murder of Dr. King.

Indeed, even though the FBI had located crime scene photographs in the Memphis Field Office, it continued to maintain that its field office files simply duplicated what it had at Headquarters. FBI Special Agent Donald Smith testified at a hearing held on September 8, 1976, that ". . . everything that is in the field office, particularly in a case like this, would be at headquarters. . . ." [JA 209] And, in a memorandum filed October 27, 1976, the Department represented that a search of field offices would be "counterproductive." Memorandum of Points and Authorities . . . in Support of Defendant's Motion to Stay, p. 5. [R. 32]

In August, 1977, faced with the threat that it would have to Vaughn its entire MURKIN Headquarters file, the FBI agreed to search certain specified field offices for their records on MURKIN and certain other subjects, such as "The Invaders," the Memphis Sanitation Workers Strike, and members of the Ray family. A stipulation entered into by the parties required the FBI to adhere to strict processing standards and time deadlines. In return for the FBI's commitments, Weisberg agreed to hold in abeyance a motion to require a Vaughn v. Rosen showing with respect to these files, including the Headquarters files already processed, and upon the FBI's performance of these commitments by the specified dates, to forego completely the filing of said motion. The Stipulation provided, however, that Weisberg did not waive his right to contest specific deletions after the FBI had met its commitments. [JA 268]

However, in violation of the express terms of the Stipulation, the FBI failed to release the field office documents "periodically

as they are processed," and instead accumulated 6,000 pages and mailed them to Weisberg at the very last moment, in one large carton too large to lift or even move, and which was not accompanied by any inventory or list of the enclosures, which included more than 20 different file designations that were totally disorganized. November 20, 1978 Weisberg Affidavit, ¶¶7-11. [JA 389-391] In addition, unbeknownst to Weisberg, Headquarters did not instruct its field offices to send to Headquarters for processing "copies of documents with notations," as required by the Stipulation; instead, the field offices were instructed to send only those duplicates of Headquarters records which contained "a substantive, pertinent notation other than an administrative-type directive." (Emphasis in Shea letter)

These secret qualifications on the kinds of records to be processed and released pursuant to the Stipulation came to light as a result of an administrative review conducted by Mr. Shea as head of the Department's appeals office. Shea stated that his office could not determine "whether in fact this inconsistency of language resulted in the failure of any field office to supply all 'documents with notations,' because the decisions as to which records should be forwarded to Bureau Headquarters for processing were made at the field offices." With regard to the Memphis records, which were searched and processed at Headquarters, he stated that "the practice of processing only those duplicate records that contained substantive field office notations was followed. In his re-

port to Lesar, he included, at Tab G, some typical examples of the types of Memphis Field Office notations not considered to be substantive, and therefore not processed and released. He concluded that he had no alternative but to ask "whether you and your client are satisfied with the result in this area. If you are not, it seems to me that the issue should be resolved in your favor." Id.

Weisberg was not satisfied with the result. The examples given of notations withheld by the Memphis Field Office because they were not "substantive" included significant information. However, the matter was not resolved in Weisberg's favor. The FBI did not reprocess these records and make available those copies with notations which had been previously withheld.

A second issue with respect to the processing of the field office records concerned those which were withheld on the grounds that they had been "previously processed." On November 15, 1980, Weisberg filed a motion to compel the FBI to disclose these records on the grounds that the FBI did not actually compare the field office records withheld under this claim with the Headquarters records which allegedly had been "previously processed." In support of his motion, he pointed out that in Weisberg v. Webster and Weisber v. FBI, Civil Actions 78-0320 and 78-0420, the same claim had been made for Dallas and New Orleans field office records on the assassination of President Kennedy. Ultimately, however, the FBI had been forced to admit that 2,369 pages of Dallas field office records had been withheld as "previously processed" when in fact

they had not been provided and could not even be found at Headquarters. June 16, 1980 affidavit of Harold Weisberg, ¶19. [JA 544-545]

F. The Department's Summary Judgment Motions

The Department repeatedly sought to end this litigation by prematurely moving for summary judgment (or partial summary judgment) on the issues of the scope and thoroughness of the search and the adequacy of its exemption claims. The first two motions, filed May 11, 1979 and December 13, 1979, dealt with the search issue. [R. 128] The first of these motions was denied by order dated August 27, 1979. [JA 440A] After the second motion, the District Court issued a very limited "Finding As To Scope of Search" which stated that "proper and good faith search has been made for all items ressponsive to plaintiff's request in the FBI Headquarters' Murkin files and in all files of the FBI field offices, with the exception of the Frederick residency." [JA 477]

The last two motions, filed April 25, 1980 and December 10, 1980, focused on the Department's attempts to justify its exemption claims. [R. 153, 187] The first of these motions was denied by the District Court on September 11, 1980, at which time the Court also directed the Department to file a second Vaughn index. [JA 523] After the filing of the second Vaughn index, the Court did grant summary judgment in favor of defendant, though it did so conditionally, in its order of December 1, 1981. [JA 585]

1. The Search Issue

At a status call on June 30, 1977, FBI Special Agent John Hartingh told the Court that

> . . . from the FBI point of view, everything that pertains to the assassination of Dr. Martin Luther King is in one file, the Mercken (sic) file.

[JA 267] The FBI view was not founded on fact.[10/] Records relating to the King assassination do in fact exist outside the MURKIN file. Departmental counsel gave one very good example of this at the September 28, 1978 status call when she referred to a May 13, 1968 memorandum from T.E. Bishop to Cartha DeLoach in regard to Gerold Frank's request to interview FBI agents for a book on the King assassination. It was not filed in the MURKIN file. Tr., pp. 4-8. [JA 352-356]

Weisberg contended throughout this litigation that his requests could not be limited to the MURKIN file, nor even to the FBI. In a September 17, 1977 letter to the Department's counsel, Weisberg's attorney noted that he and Weisberg were not familiar with all components of the Department of Justice and did not know whether some of them had records relevant to the King assassination, so they could not specify all components which should be searched. He went on to identify four components where he and his client had reason to believe relevant records would be found: Office of the Attorney General, Office of the Deputy Attorney Gen-

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10/ The FBI further claimed that the field office MURKIN files contained no records not at FBIHQ. See ante, p. 17.

eral, Office of Legal Counsel, and Community Relations Service.[11/] In opposing the Department's December 13, 1979 motion for partial summary judgment, Weisberg also listed the Internal Security Division. December 28, 1979 Weisberg Affidavit, ¶63. [JA 455]

Weisberg also contended that the FBI was required to search not only its Central Records files, but also its divisional files. Weisberg was told by FBI Special Agent Hartingh that the divisions do not have their own files, that all records are kept in Central Records. May 25, 1979 Weisberg Affidavit, ¶150. [JA 423-424] However, this was disputed by the deposition testimony of Douglas Mitchell, an employee in the Department's appeals office. Id., ¶32. [JA 422]

On November 11, 1980, Weisberg filed a motion to compel a further search which contended that there had been no search at all for many of the items of his requests, particularly those set forth in his request of December 23, 1975. In support of his motion, Weisberg cited the August 15, 1980 testimony of a Department employee, Miss Contance Fruitt. She testified that because no privacy waiver had been provided for individuals listed in Item No. 11 of the December 23rd request, no search had been made. She conceded, however, that a file on one individual listed in Item No. 11 had been provided to another requester without his having been required to submit a privacy waiver. Tr., pp. 39-42. [JA 519-522] However, in opposing plaintiff's motion to compel a further

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11/ Weisberg has received some records from the Office of the Attorney General and the Office of the Deputy Attorney General and the response of these components is no longer at issue in this case.

search, the Department took the position that the Privacy Act prohibited even a search. Tr. April 6, 1981 Hearing, pp. 55-71. [R. 213] The District Court ultimately decided this issue against Weisberg.

Apart from these broad search issues, Weisberg also pointed to many more particular issues, such as the FBI's failure to search and locate the "Lawn tickler", December 28, 1979 Weisberg Affidavit, ¶44 [JA 454]; the absence of any search for "receipts of items of physical evidence," a specific item of his December 23, 1975 request, February 20, 1980 Weisberg Affidavit, ¶67; records on J.C. Hardin, May 25, 1979 Weisberg Affidavit, ¶199-201; records on the investigation which the New Orleans Field Office was ordered to conduct of Raul Esquivel, Sr., May 16, 1978 Weisberg Affidavit, ¶191. [JA 337-338]

2. Defendant's Exemption Claims

On February 25, 1980, the District Court ordered the Department to prepare a Vaughn v. Rosen index justifying the deletions made on every 200th document released or to be released to Weisberg. [R. 149] The resulting index was objected to by Weisberg on several grounds. Of the 147 documents sampled, 90 contained no excisions whatever. Of the 57 remaining documents representing, by Weisberg's count, only one-half of one percent of the records on which excisions were made, there was not a single example of the use of Exemptions 1, 2, 3, 5, 6, 7(A) and 7(F), all of which were

used to withhold information in the case. May 14, 1980 Weisberg Affidavit, ¶101. [JA 494] The FBI in effect conceded that it could not justify the excision of the names of FBI agents. (In June, 1976, the judge had issued a verbal order against routinely deleting the names of FBI agents unless the Department chose to brief the issue. The issue was never briefed; the FBI simply ignored it.)

Additionally, the Department also admitted to "two errors in the original exemption claims" (other than the names of FBI agents) in the 57 documents with deletions. Moreover, in a counter-affidavit Weisberg took issue with those excisions which the FBI sought to justify. With respect to the Exemption 7(C) deletions, he noted, for example, that the FBI justified the withholding of the names of Claude and Leon Powell, even though their names had been released by the FBI in other documents and had been publicized on countless TV news stories and in the print media. He further noted that one of the Powell brothers had been cited for contempt because he refused to testify before the House Select Committee on Assassinations ("HSCA").

With respect to Exemption 7(D) claims, he asserted that the FBI had excised much information that was public information rather than confidential information, as well as information which would not qualify for this exemption even if it were not already public. He noted, for example, that the FBI attempted to justify the excision of the identity of former Memphis policeman Marrell

McCullough, that he had appealed the withholding of McCullough's name in 1977, that Mr. Shea had testified in 1979 that he would be given the McCullough file, and that prior to that McCullough had testified before the House Select Committee on Assassinations and it had published his testimony. May 14, 1980 Weisberg Affidavit, ¶¶201-206. [JA 495-496]

Moreover, he pointed out that in addition to the improper use of Exemption 7(D) which was reflected in the Vaughn index, other evidence was available to show its misuse. For example, the copy of MURKIN HQ serial 2622 which the FBI gave Weisberg had a sentence deleted from it that is quoted in Volume XIII of the Hearings published by the HSCA. The FBI deleted from Weisberg's copy of this serial, which is a May, 1968 directive to four FBI field offices instructing them to conduct surveillance on James Earl Ray's relatives, the sentence: "You should obtain all long distance telephone calls from their residence for period April 23, 1967 to the present time." May 28, 1980 Lesar Affidavit, ¶4, Attachments 1-2. [JA 500-502] Since this deletion disclosed neither a confidential source nor information obtained from a confidential source, Weisberg maintained this was further evidence of the FBI's misapplication of Exemption 7(D).

Regarding Exemption 7(E), Weisberg noted that the FBI's Vaughn index failed to state that the technique sought to be protected in Document 91 was not already well-known to the public. He asserted that investigative techniques such as wiretapping,

bugging, mail interception and the like are investigative techniques that are already well-known to the public. May 14, 1980 Weisberg Affidavit, ¶¶93-98. [JA 492-493]

In light of the showing made by Weisberg, the District Court denied the Department's motion for partial summary judgment and ordered it to prepare a new Vaughn index. The Department did so and again filed for summary judgment. Weisberg again opposed the motion and again pointed out the flaws in the Department's Vaughn showing.

He pointed out that even as augmented by a second sampling, the Vaughn index did not include a single example of the use of Exemptions 3, 5, 6 and 7(F). The second Vaughn index did include examples of the uses of Exemptions 1 and 7(A) for the first time, but Weisberg noted that the only example of Exemption 7(A) in the new sample was in fact dropped, as were several Exemption 1 claims.

Moreover, Weisberg again took issue with the justifications attempted by the Vaughn index. He noted with regard to Exemption 7(C), Mr. Shea had stated that ". . . no 7(C) excisions can be upheld unless a specific reason can be articulated for doing so, sounding in personal information essentially unrelated to the assassination of Dr. King, or to the FBI's investigation of the crime." October 26, 1978 letter of Quinlan J. Shea to James H. Lesar. [JA 367] Yet in the second Vaughn index the FBI again withheld the names of Claude and Leon Powell, just as it had done in the first. January 6, 1981 Weisberg Affidavit, ¶175. With

respect to Exemption 7(D), he noted that in the first Vaughn index the FBI had used that exemption for a person who was a source for the Los Angeles Times, not the FBI, and that the same (mis)use of this exemption was made in Document 31A of the new Vaughn.

Nothwithstanding these and many other points made by Weisberg, this time the District Court sustained the Vaughn showing and awarded summary judgment in favor of the Department.

G. The Consultancy

Throughout the litigation, Weisberg protested both the FBI's failure to conduct an adequate search and its excisions in, and withholding of, documents. As he reviewed the documents provided him, Weisberg wrote detailed letters complaining about specific deletions, withholdings and failures to search. On August 30, 1977, James M. Powell, then Chief of the FBI's Freedom of Information/Privacy Acts 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.

See Plaintiff's Motion to Require Reprocessing of MURKIN Headquarters Records, Exhibit 4. [JA 511]

This did not happen. However, on November 11, 1977, Weisberg and his counsel met in the Department of Justice Building with Deputy Assistant Attorney General William Schaffer, Mrs. Lynne Zusman, Chief, Freedom of Information and Privacy Acts Section,

Civil Division, U.S. Department of Justice, and several FBI agents to discuss the resolution of problems preventing the conclusion of this case. May 16, 1978 Lesar Affidavit, ¶1. [JA 311] (Hereafter, "Lesar Affidavit")

During this conference, Schaffer proposed that the Department hire Weisberg as a consultant to review MURKIN records and advise the Department on wrong excisions and other matters, such as the existence of other records not yet produced. While Weisberg did not reject this proposal outright, he did resist it. Lesar Affidavit, ¶¶4-5. [JA 312-313]

On November 21, 1977, Mr. Weisberg met in the chambers of this Court with his counsel, Mrs. Zusman, AUSA John R. Dugan, and FBI agents. During the conference the government set forth its proposal that Weisberg act as its paid consultant. Weisberg again indicated his reluctance to undertake this obligation, stating several times that he wanted a sign of good faith from the Government before he agreed to become its consultant. Lesar Affidavit, ¶6. [JA 313]

After the District Court commented that the Government was not going to pay him as its consultant, then disregard his criticisms, he agreed, in response to a direct question by the Court, to undertake the consultancy. Lesar Affidavit, ¶7. [JA 313]

On November 25, 1977, Weisberg wrote Schaffer concerning the consultancy. He explained how he would go about the task, and he

stated, "I will do what I was asked as rapidly as possible . . . ." He also enclosed a receipt in the amount of $22.60 for dictation tapes which he had purchased and asked for reimbursement of this expense. Lesar Affidavit, Attachment 1. [JA 319, 761]

On December 11, 1977, Weisberg again wrote Schaffer. He told Schaffer that he had spent 80 hours on the consultancy and estimated that it would take about two hours per Section to complete the work. He also noted that he had not been informed of what compensation he was to receive. Although he expressed his belief that the Government was stalling him, he asserted, "I have proceeded in good faith and this will continue." Lesar Affidavit, Attachment 2. [JA 326]

On December 17, 1977, Weisberg wrote Schaffer again. Referring to the consultancy as "this matter of my involuntary servitude all of you imposed upon me by misrepresenting to the judge," he again raised the issue of his compensation, stating: "You stipulated the normal consultancy rate. I did not ask what it is. Lynne was not able to tell Jim what it is." Lesar Affidavit, Attachment 3. [JA 327]

On December 26, 1977, Weisberg's counsel wrote to Mrs. Zusman explaining that Schaffer had not responded to Weisberg's inquiries about his rate of pay and requested that she find out. He also inquired about the possibility of an interim payment to Mr. Weisberg. Lesar Affidavit, ¶11 [JA 314-315]; February 22, 1983 Lesar Declaration, Exhibit 10 [JA 789].

On Sunday evening, January 15, 1978, Zusman called Weisberg's counsel at his home and inquired whether $75 per hour would be

enough to compensate Weisberg. Lesar Affidavit, ¶12. [JA 315] This offer to pay Weisberg at the rate of $75 per hour came on the evening before a hearing was scheduled in front of Judge Gerhard Gesell in the case of Weisberg v. Bell, Civil Action No. 77-2155, on the question of whether Weisberg was entitled to a fee waiver for copies of 100,000 pages of FBI records on the assassination of President Kennedy.

After checking with his client, Mr. Lesar informed Mrs. Zusman that Weisberg had agreed to accept the Department's offer. On January 18, 1978, Weisberg wrote Mrs. Zusman a letter alluding to many events connected with the fee waiver hearing in front of Judge Gesell on Monday, January 16, 1978. Beginning his letter with "I am not clear on what you meant by a letter on Monday," he later stated, "If what you wanted to know is how much time I've put in it is about 100 hours." He also indicated that he doubted he would be able "to get back on the review of my notes before next week." Lesar Declaration, Exhibit 14. [JA 796] On January 26, 1978, Mr. Lesar met with several Department attorneys, including Mrs. Zusman. On that occasion he also raised again the possibility of an interim payment to Weisberg. July 22, 1982 Lesar Affidavit, ¶4. [JA 635] Mrs. Zusman told him that he should write a letter to Schaffer explaining the nature of the agreement, what Weisberg had done and would do, the number of hours he was claiming compensation for, and his desire for an interim payment. At the same time, Zusman put pressure on Lesar to have Weisberg get on

with the consultancy project, stating that Weisberg "could better devote his time to the tasks involved in his consultancy arrangement with the Department" than spend them on another of his cases. And she reminded Lesar that the District Court "had clearly placed the burden on Mr. Weisberg to review these material. . . ." The handwritten notes taken by a Justice Department attorney on the January 26 meeting reflect that Zusman also told Lesar that the FBI was "not going to do anything until they get Weisberg's list." Lesar Declaration, Exhibits 15-16. [JA 797, 799]

On January 27, 1978, Weisberg again wrote Zusman. Noting the Department's failure to inform him in writing what he would be paid for the consultancy work, he stated: "You finally did tell Jim verbally. Why not in writing? Why is the bill for the tapes I bought immediately not even acknowledged? Lesar Declaration, Exhibit 17. [JA 801]

By letter dated January 31, 1978, Lesar did as Zusman had directed. He wrote Schaffer requesting an interim payment of $6,000 for 80 hours of work at the rate of $75 per hour. As suggested by Zusman, Lesar sent her a complimentary copy of his letter to Schaffer. Lesar Affidavit, ¶¶14-15; Attachment 5. [JA 316, 317; 329-330]

Lesar's letter was received by the Department on February 2, 1978. No response of any kind was made until Lesar received a phone call from a Justice Department attorney, Dan Metcalfe, on February 15, 1978. The purpose of his call was "to let him know

that there's a problem with $75.00 per hour." Lesar Declaration, Exhibit 21. [JA 810] See also, id., Exhibit 20. [JA 808-809]

At a March 7, 1978 status call, Zusman reaffirmed the Department's commitment to pay Weisberg for his consultancy work, describing its offer to pay him a fee as "generous and unique" and "highly unusual." Tr. p. 7. [JA 297] She also complained about not yet having received the work product from Weisberg's consultancy. Tr., p. 3. [JA 296]

On March 28, 1978, not having heard further from the Department about the dispute over the consultancy rate to be paid Weisberg, his counsel raised the issue in a letter to Zusman. Lesar Declaration, Exhibit 22. [JA 812] On April 7, 1978, Zusman responded. Addressing herself to her Sunday evening phone call on January 15, 1978,[12/] she stated that "the purpose of my phone call was to re-state the intention of the government to support this plan and by so doing, prevent it from being raised as an issue the following day at the hearing on your client's preliminary injunction motion in Civil Action No. 75-2155." Although she admitted that she had mentioned the $75 per hour rate, she claimed that she had not in fact offered it, and that her recollection was that she had said that Schaffer would have to make the final determination on the matter. Lesar Declaration, Exhibit 22A. [JA 814-815]

12/ At one point the letter incorrectly places the date of the phone conversation as March 15, 1978; at another it is correctly given as January 15, 1978.

Thereafter, the dispute as to whether and how much Weisberg should be paid came before the District Court on several occasions. At a status call on May 10, 1978, the District Court stated that an offer had been made in chambers to pay Weisberg for his work, although no dollars and cents figure was mentioned. Tr., 4-5. [JA 204-205] When the Department asserted, at a hearing held on May 17, 1978, that "[t]his offer was not apparently agreed to until some time in January . . .," the Court replied: "I believe it was agreed to in this Court's chambers."[13/] Tr., 4. [JA 342] In an order issued December 1, 1981, the Court granted plaintiff's motion for an order requiring defendant to pay him a consultancy feee, and this was reaffirmed in its order of January 5, 1982. [JA 604] Subsequently, however, by its order of January 20, 1983, the Court vacated the part of these orders pertaining to the consultancy and denied plaintiff's motion for payment of the consultancy fee. [JA 737] Weisberg moved for reconsideration, but this was denied by the Court's order of April 29, 1983. [JA 885]

ARGUMENT

I. THE DEPARTMENT DID NOT SUSTAIN ITS BURDEN OF DEMONSTRATING THAT IT HAS CONDUCTED AN ADEQUATE SEARCH FOR RECORDS RESPONSIVE TO WEISBERG'S REQUESTS

To prevail in a Freedom of Information Act lawsuit, "the defending agency must prove that each document that falls within

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13/ The in-chambers conference took place on November 21, 1977.

the requested class either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." National Cable Television Association, Inc. v. F.C.C., 156 U.S. App.D.C. 91, 479 F.2d 183 (1973). In order to meet its burden of demonstrating that it has conducted a thorough, good faith search, an agency must detail the scope of the search and the manner in which it was conducted. Weisberg v. United States Dept. of Justice, 200 U.S.App.D.C. 312, 317, 627 F.2d 365, 372 (1980). Agency affidavits which "do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the requester] to challenge the procedures utilized," are insufficient to support summary judgment on the search issue. Id., 200 U.S. App.D.C. at 318, 627 F.2d at 373. Furthermore, even if the agency affidavits are detailed and nonconclusory and are submitted in good faith, "the requester may nontheless produce countervailing evidence, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." Founding Church of Scientology, Etc. v. Nat. Sec. Agcy., 197 U.S.App.D.C. 305, 317, 610 F.2d 836 (1979).

Lastly, the agency "bears the burden of establishing that any limitations on the search it undertakes in a particular case comport with the obligation to conduct a reasonably thorough investigation." McGehee v. C.I.A., 697 F.2d 1099, 1101 (D.C.Cir. 1983).

A. The Search Was Unreasonably Limited

The search in this case was unreasonably limited. The Department of Justice failed to search all of its components which might have responsive documents. For example, no search of the Internal Security Division, the Community Relations Service or the Office of Legal Counsel was substantiated. The FBI insisted, contrary to the testimony of the Department's Freedom of Information and Privacy Acts appeals unit, that its divisions do not have their own records. Hence, it made no search of its divisional records.

In addition, the FBI attempted to restrict its search to its MURKIN file despite evidence that other relevant documents existed outside MURKIN. It made no showing that it had searched the individual items of Weisberg's December 23, 1975 request. Indeed, it is clear that the only items on that list which the FBI made a particularized search for were those which it was required to search pursuant to the August, 1977 Stipulation between Weisberg and the Department. The remaining items it either did not search or refused to search.

The FBI's refusal to search certain items of the December 23, 1975 request without a privacy waiver was unjustified. The FOIA exemptions which implicate privacy values are Exemptions 6 and Exemption 7(C). Both require a balancing of the right of privacy against the public interest in disclosure before it can be determined whether or not they will support the withholding of in-

formation. Thus, in order to justifiably invoke these exemptions, a search for possibly responsive records and a review of their content must first be undertaken. If the content of the records is such that the agency takes the position that it can neither confirm or deny the existence of records, then the district court may resolve the matter by in camera inspection, including ex parte affidavits. But "[b]efore adopting such a procedure, the district court should attempt to create as complete a public record as possible." Phillippi v. Central Intelligence Agency, 178 U.S.App.D.C. 243, 246-247, 546 F.2d 1009, 1012-1013 (1976).

B. "Previously Processed" Records

In processing field office records for Weisberg, the FBI withheld many on the grounds that they had been "previously processed" and released to him. However, Weisberg obtained evidence in another case, Weisberg v. Webster, Civil Action No. 78-0322, that the FBI procedures for identifying "previously processed" field office records are flawed. In that case it was discovered that the FBI erroneously withheld 2,369 pages of Dallas Field Office records on the assassination of President Kennedy as "previously processed" when in fact they had not been processed and released at all. Thus, Weisberg adduced relevant evidence which placed in dispute the sufficiency of the FBI's identification procedures. This precludes summary judgment in the Department's favor. There simply is no evidence in the record which shows that its procedure for identifying "previously processed" records is reliable, and there is countervailing evidence which suggests that it is not.

A second circumstance regarding the field office records also demands a reprocessing of these records. A Stipulation entered into between the parties provided that field office records which were duplicates of Headquarters documents would be provided to Weisberg if they contained "notations." FBIHQ directed, however, that the field offices only provide duplicates which had "substantive, pertinent" notations. The Department's appeals officer stated that under the circumstances, this matter should be resolved in Weisberg's favor if he was not satisfied with the result. Since the Department has chosen not to reprocess these records in accordance with the Stipulation signed by the parties, this Court should require it to do so.

C. Particularized Search Issues

In addition to the search issues listed above, there are many particularized search issues pertaining to matters such as records on the investigation which the New Orleans Field Office was ordered to conduct on Raul Esquivel, Sr., records on J.C. Hardin, the Lawn tickler, etc. On remand the FBI must be required to describe with particularity its efforts to locate such records.

II. THE DEPARTMENT DID NOT SUSTAIN ITS BURDEN OF SHOWING THAT ITS EXEMPTION CLAIMS WERE JUSTIFIED

The Department submitted two Vaughn indexes in this case. Each one resulted in the release of information that previously had been withheld from Weisberg. Each index also tried to justify the

continued withholding of information which did not qualify for exemption. Moreover, even taken together they failed to include examples of all the kinds of exemption claims made by the Department in this litigation.

In Vaughn v. Rosen, 484 F.2d 820, 826 (D.C.Cir. 1973), this Court devised a detailed indexing and justification procedure which it deemed necessary because the

> existing and customary procedures foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in the adversary capacity. It is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information.

The Vaughn sampling procedure simply cannot be used to justify withholdings in circumstances where the Vaughn index itself shows that there have been wrongful withholdings. To hold this would pervert the intended use of this procedure and turn it into a mechanism for allowing the Government to avoid rather than carry the burden placed upon it in FOIA litigation.

There especially can be no justification whatsoever for relying on a Vaughn index to support claims of exemption which are not even sampled. Yet in this case, as noted above at page 27, there were no examples at all of the use of Exemptions 3, 5, 6 and 7(F), and the only 7(A) claim which appeared was dropped. The District Court's decision upholding the Department's exemption

claims on the basis of a Vaughn index which showed many examples of wrongful withholding and no examples of several exemptions was in error and must be reversed.

III. THE CONSULTANCY AGREEMENT BETWEEN WEISBERG AND THE DEPARTMENT IS A BINDING AND ENFORCEABLE CONTRACT

The District Court found that no consultancy contract was formed between Weisberg and the Department because "essential terms were never agreed upon." Memorandum Opinion of January 20, 1983 at 24. [JA 734] There is no dispute that the parties agreed on the nature of the work to be performed. Furthermore, the District Court found that there was agreement on the place the work was to be done and the rate of compensation. Thus, with regard to rate of compensation, the Court found that it was "more likely than not that Ms. Zusman offered to pay Mr. Weisberg $75 an hour in a conversation with plaintiff's counsel in March 1978."[14/] April 29, 1983 Memorandum Opinion at 3. [JA 879]

In fact, the Court's holding that no contract was formed rests entirely on her finding that the parties did not agree on the number of hours to be worked. The Court's ruling must be reversed for two reasons.

First, the Court erred in finding that there was no agreement as to duration. It is evident from the facts of this case that the duration of the contract was fixed by the size of the task to be performed. Mr. Weisberg was given a specific job and it was

agreed that he would complete it. As in many tasks performed under contract, it was not known at the outset how long it would take to complete it. That the parties did not initially agree on a time certainly is not surprising; indeed, it is difficult to see how the parties could have known what figure to chose. Essentially, the parties understood that Weisberg's employment would last as long as it took to complete the tasks at hand. This is what the parties agreed to and it was all they could agree to at the outset. In addition, as soon as he had a basis for estimating how long it might take him to complete the project, Weisberg promptly informed the Department. At no time did the Department tell Weisberg to stop working or to work to a certain point and then quit. To the contrary, the Department pressed him to do more work to complete the project.

The Court's holding would essentially deprive individuals of the right to contract in all situations where the duration of the service to be performed could not be initially ascertained.

Secondly, the Court offered no authority for the proposition that an otherwise valid employment contract should be considered uneforceable simply because there was no agreement as to its duration. To the contrary, the prevailing view is that such an agreement might be considered terminable at will or after a reasonable time, but would not be deemed invalid. Lewis v. Harcliff Coal Co., 237 F. Supp. 6 (D.C.Pa. 1965). Murray on Contracts, §27 (2d ed. 1974). Here the Department never attempted to terminate the con-

sultancy arrangement until the work was complete. Furthermore, there has been no allegation that the time spent on the project was unreasonable. It must therefore be found that a valid contract was formed and that Weisberg is entitled to the full amount claimed.

The District Court erred in finding that Weisberg is not entitled to relief under the doctrine of quasi-contract.

Assuming arguendo that no enforceable contract existed because of failure to agree on the term or duration, there is ample authority on which to award monetary relef under the doctrine of "quasi" or "implied in law" contract. As stated in Williston on Contracts:

> The same principles apply where the parties have attempted to make a contract which is void because its terms are too indefinite, but where one party has, in good faith, and believing that a contract existed, performed part of the services which he had promised in reliance upon it. He has performed these services at the request of the other party to the contract, and in the expectation, known to the other, that he would be compensated therefor. Here is sufficient basis for an implication in law that reasonable compensation would be made.

Williston, § 1480.

Additional authority is found in Corbin on Contracts, § 95:

> Effect of part performance on an indefinite agreement. The determination of the intention of the parties and the interpretation of their words may both be largely affected by their conduct in the course of a transaction. The fact that one of them, with the knowledge and approval of the other, has begun performance is nearly always evidence that they regard the contract as consumated and intend to be bound thereby. *** In this way indefiniteness may be cured, or at least reduced. The fair and just solution may

> then be the enforcement of promises rather than a decision that no contract exists. One of the alternatives open to the court is a "quasi-contractual" remedy of restitution. . . .

If an agreement is too indefinite and uncertain for enforcement, but performances of value have been received under it, a restitutionary remedy is available. See Tompkins v. Sandeen, 67 N.W. 2d 405, 243 Minn. 246 (1954).

In the case of Marta v. Nepa, 385 A.2d 727 (Del. Supr. 1978), one party alleged that the contract was unenforceable because there was no agreement as to compensation. The court disagreed:

> The circumstances of the case permit a recovery based on quasi contract. The general rule barring recovery for indefinite time of terms in contract is not applicable where the party performing the services expected to be paid." 13 Williston on Contracts § 1575; Bellanea Corp. v. Bellanea, 169 A.2d § 20 (Del. Supr. 1961).

In the case at bar, the court held that no quasi-contract relief was appropriate for two reasons: (1) the Department did not benefit from Weisberg's work, and (2) Weisberg should have realized that further terms needed to be agreed upon before he proceeded with his work.

Both findings of fact are clearly erroneous. The Department did benefit from Weisberg's work. Weisberg provided two lengthy reports to the Department and these served as the basis for the administrative review of the FBI's performance by the Departmental appeals office. The use the Department made of these reports is reflected in two lengthy reports which Mr. Shea made to James H.

Lesar. [JA 357, 364] This review culminated in Mr. Shea's testimony regarding his review at the hearing held on January 12, 1979.

With respect to the Court's second finding, Weisberg did realize that the rate of pay needed to be clarified and he and his counsel repeatedly wrote the Department about this. This matter was resolved when Ms. Zusman offered to pay him at the $75 per hour rate and he accepted. As he was under direct pressure from the Department and indirect pressure from the Court to complete his work, he did so.

IV. THE DISTRICT COURT ERRED IN CONSIDERING HOURLY RATE, EXCLUDING TIME SPENT ON ATTORNEY'S FEE APPLICATION, AND DECLINING TO INCREASE AWARD TO ACCOUNT FOR DELAY IN PAYMENT

A. Time Excluded

The District Court excluded 36.7 hours from the total reimbursable time expended by Weisberg's counsel because she thought the time spent on the fee application itself was excessive. Although substantial time was spent on this issue, it does not appear to be out-of-proportion when compared with other cases. In Environmental Defense Fund v. Environmental Prot., 217 U.S.App.D.C. 189, 209, 672 F.2d 42, 62 (1982), which involved a roughly comparable amount of time spent on the case-in-chief, the EDF sought reimbursement for 114.4 hours of time spent on the attorney's fees issue, which is approximately 31% more than was claimed here. This Court approved all but 9.75 hours which EDF spent on a peripheral "timliness" issue. Weisberg's counsel should be reimbursed for the full amount of time spent on his fee application. The time spent on the fee application did not include time spent re-

constructing time records as the District Court apparently believed. January 20, 1983 Memorandum Opinion at 17. [JA 727]

B. An Adjustment for Delay in Receipt of Payment Should Have Been Made

The District Court declined to adjust the lodestar to take into account delay in payment because "the hourly rate is based on present hourly rates." Id. at 20. [JA 730] However, this only takes into account back delay, not forward delay. A FOIA plaintiff is not entitled to interest on an award of attorney's fees, as this Court ruled in Holy v. Chasen, 205 U.S.App.D.C. 273, 639 F.2d 795 (1981). However, this Court did suggest in that opinion that the possibility of a substantial delay in payment of a fee is a factor which the court may wish to take into account in considering a fee application. Id., 205 U.S.App.D.C. at 276.

C. The District Court Should Not Have Excluded Non-FOIA Cases in Considering Hourly Rate

The District Court awarded Weisberg's counsel $75 an hour. He sought $100 an hour, based in part on the finding in North Slope Borough v. Andrus, 515 F. Supp. 961 (D.D.C. 1981), that the hourly rate for an experienced attorney (over 9 years) in the D.C. area was $110 per hour. The District Court excluded non-FOIA cases from consideration in setting the hourly rate. This is at odds with EDF v. EPA, supra, where the Court found that a listing

of recent awards under a range of fee statutes should be accorded weight in determining the prevailing rate. 672 F.2d at 58 n. 11. The approach in EDF is consonant with both the prevailing view that awards under other fee provisions are relevant, see, e.g., Knighton v. Watkins, 616 F.2d 795, 800 (5th Cir. 1980); Population Services International v. Carey, 476 F. Supp. 4, 10 (S.D.N.Y. 1980), and with the fact that "lawyers engaged in litigation practice ordinarily do not vary their rates . . . depending on the subject matter of the litigation." Berger, Court Awarded Attorneys' Fees: What Is Reasonable?, 216 U.Pa.L.Rev. 281, 321 n. 160 (1977).

Moreover, it is at odds with the legislative history of the FOIA, where Congress made it clear that prior experience in implementing other fee provisions should serve as a guidepost for courts assessing reasonable fees in FOIA litigation. See, e.g., H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 607 (1974); S. Rep. No. 93-854, 93d Cong. 2d Sess. 17-20 (1974).

In addition, the District Court's $75 an hour rate was not based on current market rates at all, but seems to have rested primarily on the rate Weisberg's counsel negotiated in two cases concluded two and five years ago.

CONCLUSION

For the reasons stated above, the Department failed to conduct an adequate search in this case or to justify the validity of its excisions through a Vaughn sampling technique. Summary

judgment was therefore improper. In addition, the Department and Weisberg had a binding and enforceable consultancy contract and the Department should be ordered to pay Weisberg for the work he performed at the agreed upon rate.

Respectfully submitted,

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A D D E N D U M

THE FREEDOM OF INFORMATION ACT

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter

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issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subpara-

graph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title [5 USCS § 552b]), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

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(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records complied for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological or geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection

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(a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title [5 USCS § 551(1)] includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 383; June 5, 1967, P. L. 90-23 § 1, 81 Stat. 54; Nov. 21, 1974, P. L. 93-502, §§ 1–3, 88 Stat. 1561, 1563, 1564; Sept. 13, 1976, P. L. 94-409, § 5(b), 90 Stat. 1247; Oct. 13, 1978, P. L. 95-454, Title IX, § 906(a)(10), 92 Stat. 1225.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 USC § 1002	June 11, 1946, ch 324, § 3, 60 Stat. 238.

In subsec. (b)(3), the words "formulated and" are omitted as surplusage. In the last sentence of subsec (b), the words "in any manner" are omitted as surplusage since the prohibition is all inclusive.

Standard changes are made to conform with the definitions applicable and the style of this title (5 USCS §§ 101 et seq.).

Explanatory notes:

A former 5 USC § 552 was transferred by Act Sept. 6, 1966, which enacted 5 USCS §§ 101 et seq., and now appears as 7 USCS § 2243.

Amendments:

1967. Act June 5, 1967 (effective 7/4/67, as provided by § 3 of such Act), substituted this section for one which read:

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Appellant/Cross-Appellee v. U.S. DEPARTMENT OF JUSTICE, Appellee/Cross-Appellant	:	Case Nos. 82-1229, 82-1274 83-1722, 83-1764 (consolidated)

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of January, 1984, hand-delivered two copies of the brief for appellant/cross-appellee Weisberg in final form to the office of Mr. John S. Koppel, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.

James H. Lesar

JAMES H. LESAR