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TRANSCRIPT OF PROCEEDINGS

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

HAROLD WEISBERG,

Appellant/Cross-Appellee,

v.

U. S. DEPARTMENT OF JUSTICE,

Appellee/Cross-Appellant.

) **Case No. 82-1229**

) **and**

) **Consolidated Nos.**

) **82-1274**

) **83-1722**

) **83-1764**

**Washington, D. C.
May 8, 1984**

Pages 1 thru 63

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Washington, D.C.

Friday,
May 8, 1984

The above-described matter came on for hearing,
pursuant to notice,

Before:

The Honorable Circuit Judge Mikva
The Honorable Circuit Judge Bork
The Honorable Circuit Judge Starr

Appearances:

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ORAL ARGUMENT OF:

JAMES H. LESAR, ESQ.

On behalf of Appellant/Cross-Appellee

3

JOHN S. KOPPEL, ESQ.

On behalf of Appellee/Cross-Appellee

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REBUTTAL ARGUMENT OF:

JAMES H. LESAR, ESQ.

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JOHN S. KOPPEL, ESQ.

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P R O C E E D I N G S

ORAL ARGUMENT OF JAMES H. LESAR, ESQ.

ON BEHALF OF HAROLD WEISBERG

MR. LESAR: Judge Mikva and members of the panel,
I am James H. Lesar, representing Mr. Weisberg.

Before we begin, Your Honors, I have been asked
to advise the Court that Counsel plan to proceed in the
following fashion:

I have allotted 20 minutes to my opening presen-
tation and I will reserve 15 minutes for my reply and Cross-
Appellee presentation.

The Government will reserve 25 minutes for its
opening and respond with 10 minutes.

Is that suitable with the Court?

THE COURT: Yes. I will ask, though, that the
Government limit its 10 minutes to its cross-appeal.

[Inaudible.]

MR. LESAR: All right. Thank you, Your Honor.

I would like to begin just briefly with an over-
view of this case, which is a Freedom of Information Act
case for records pertaining to the assassination of Dr. King
and some related matters.

The case grows out of requests originally submit-
ted by Mr. Weisberg in 1969 -- requests made shortly after
James Earl Ray entered a plea of guilty to the assassination

1 of Dr. King. Those requests were for such matters as ballis-
2 tics evidence, crime scene photographs, evidence that per-
3 suaded the FBI that James Earl Ray acted alone and evidence
4 that the FBI had provided other writers.

5 Those requests were never acknowledged.

6 In 1975, Mr. Weisberg submitted two new requests,
7 reduplicating in part and expanding upon the 1969 request.

8 Seven and a half months after the first request
9 was made, the April 15, 1969 request, Weisberg brought suit
10 on it. Three days later, the Deputy Attorney General advised
11 his counsel in a letter that the FBI would be releasing some
12 materials. He said, as stated in the letter, that the Depart-
13 ment might not have any crime scene photographs and that,
14 since James Earl Ray was the only suspect, only photographs
15 or sketches of James Earl Ray would be provided.

16 The following day, the FBI released 78 pages of
17 documents and 18 photographs. There were no crime scene
18 photographs among the materials and no photographs or
19 sketches of suspects other than James Earl Ray.

20 Thereafter, Weisberg demanded or filed a new,
21 more extensive and detailed request of December 23rd, 1975.
22 He amended his complaint and in the ensuing eight years of
23 litigation --

24 THE COURT: You mean he amended his request and
25 then filed the complaint, do you not?

1

MR. LESAR: Pardon?

2

THE COURT: He amended his complaint and then filed the request, did he not?

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4

MR. LESAR: No, he made his request and then the following day amended the complaint.

5

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THE COURT: [Inaudible.] pretty close to contemporaneous, then?

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MR. LESAR: Yes. That is correct.

9

10

After eight years of litigation, some of the materials that Weisberg obtained were, one, crime scene photographs that initially had been denied him which were located after a search of the Memphis field office and after the FBI had claimed exemptions of those materials-- claimed that they were not -- that some of them were not agency records and that issue was brought to this Court and litigated and on remand, the Government provided 107 allegedly copyrighted crime scene photographs.

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It also provided other crime scene photographs throughout the litigation. It also provided thereafter photographs and sketches of suspects other than James Earl Ray.

It provided 20,000 pages, approximately, of FBI field office records, even though it had claimed throughout the first two years of litigation that the field offices would contain nothing that was not contained at FBI

1 headquarters.

2 Weisberg also obtained a complete fee waiver for
3 all of the records at issue in this case, more than 50,000
4 pages and he obtained an important tickler file, the Long
5 tickler file which the FBI first said did not exist, then
6 claimed had been lost and eventually located on the basis of
7 information provided by Weisberg himself.

8 This is not an all-inclusive list. This is just a
9 sketch of some of the things that were obtained.

10 THE COURT: Is it true that no materials were
11 released to him until after the trial?

12 MR. LESAR: That is correct. The matter is now
13 before the Court on several issues. We have appealed with
14 respect to the adequacy of the search, with respect to the
15 validity of the court order upholding exemptions claims, some
16 minor issues regarding the award of attorney fees and costs
17 and a matter referred to as the consultancy agreement between
18 Weisberg and the Department of Justice.

19 I will address first the search issues.

20 Before doing so, I would like to inform the Court
21 that we are withdrawing some of the search issues. We are
22 withdrawing the appeals as relates to the particularized
23 searches for the Long tickler and the materials relating to
24 a Mr. Harden and Raoul Estivel and we are limiting the
25 appeal with respect to the Department of Justice components

1 to just two components, the Community Relations Service and
2 the Office of Legal Counsel.

3 With respect to the DOJ components, there has
4 been no attestation with respect to those two units of any
5 search. We have specific reasons for believing that they
6 contain materials --

7 THE COURT: Before you leave here --

8 MR. LESAR: Yes.

9 THE COURT: Am I correct that it was only under
10 that privacy exemptions were ?

11 MR. LESAR: No, it comes up in another context,
12 too, which I will get to later.

13 The two units that we now concentrate on of the
14 Department of Justice were both listed by me in a letter
15 which I wrote to the then-Government Attorney on September
16 17, 1977.

17 He had asked -- we had raised the issue of the
18 Department not having searched components of the Department
19 of Justice that they thought might have records.

20 I wrote him a letter explaining that we did not
21 know all of the components that might have records but I
22 listed several that we thought would and it included the
23 Community Relations Service and we are particularly interested
24 in that because there was an employee of that unit who was
25 on assignment in Memphis at the time of the assassination

1 and he reportedly submitted a report on the assassination so
2 we have asked and we continue to press our contention that
3 there should be a search of that unit.

4 We have also requested the the Office of Legal
5 Counsel be searched as we think that there are very likely
6 records of interest pertaining to the King assassination in
7 that office.

8 A second search issue concerns the specific items
9 of the December 23rd, 1975 request.

10 Basically, there was never any search for the
11 items of that request until the summer of 1977, when we
12 entered into a stipulation with the Government in agreeing
13 to forego a complete Vaughn upon their accomplishing certain
14 things and they agreed to search certain items of that
15 request where we provided privacy waivers or where the indi-
16 vidual had died.

17 However, there are many items of that request
18 which have nothing to do with individuals at all.

19 There is Item 18 of that request which is for
20 records pertaining to the New Rebel Motel and the DeSoto
21 Motel -- motels that James Earl Ray allegedly stayed at.

22 There is -- Item 6 is for a tape or a transcript
23 of the radio logs of the Mamphis Police Department or the
24 Shelby County Sherriffs' Office.

25 There are -- there is even one individual who is

1 listed in the request but is dead and yet no search has been
2 made for records pertaining to him.

3 Now, with respect to some items of the request,
4 there is a question that the Government has raised, although
5 I think that it has not properly raised the issue in the
6 Court below as to the Privacy Act or as to the B(6) or B(7)(c)
7 exemptions under the Freedom of Information Act.

8 The Government did not brief the issue in the
9 Court below. The Government did state that oral argument
10 that the Privacy Act prohibited them from searching those
11 files.

12 THE COURT: The search itself.

13 MR. LESAR: From the search itself.

14 Now, our position is, first of all, we do not
15 know precisely what argument they are making under the
16 Privacy Act. It has never been briefed.

17 The cases they cite, some of them go off on a
18 B(7)(c) or B(6) tangent and there is one that does mention
19 the Privacy Act -- a particular provision of the Privacy Act.

20 But we basically do not understand the argument
21 and the fundamental point is, is that there is no attestation
22 as to why they cannot do the search.

23 The nature of FBI files is such that if they
24 searched names, first of all, it is not even sure that it
25 would come within the description of a file on that person.

1 You may search the index under Percy Foreman and
2 you come up under a "C" reference to Percy Foreman in a file
3 that is a subject matter file, not a file on Percy Foreman
4 per se.

5 And then you would clearly have to weigh that
6 under the balancing under --

7 THE COURT: I do not understand what documents
8 are filed here, in fact.

9 MR. LESAR: Well --

10 THE COURT: You got rid of the Hardin and Entravel
11 ones, so what --

12 MR. LESAR: Yes.

13 THE COURT: So what documents are there as to
14 which a privacy thing has been --

15 MR. LESAR: Well, if you look at the December 23rd
16 request, which is reproduced at pages 37 and 38 -- actually,
17 it goes on past that -- but on page 39 of the Appendix, there
18 is a request for a large number of named individuals, for
19 all tape recordings, logs, transcripts, notes of any kind
20 reflecting any surveillance on those individuals.

21 Those individuals were all connected with the
22 King assassination in some manner and it would be our posi-
23 tion that if they -- if the Government did the search and
24 located files on these individuals, then we would take the
25 position that the public interest in the disclosures would

1 almost certainly outweigh the privacy interests involved.

2 THE COURT: But did the Government claim privacy
3 as the sole basis for [inaudible]?

4 MR. LESAR: That is my understanding of their
5 position, yes.

6 So we have a situation where the Government has,
7 one, not really properly briefed the issues below and secondly,
8 it has not made the search that is required before that it
9 can make the claims that you have got to make to be able to
10 support an exemption under either the Privacy Act or the
11 Freedom of Information Act. It just has not looked at the
12 materials.

13 Once it looks at it we do not even know whether
14 they would qualify for threshold exemption under the Freedom
15 of Information Act, for example.

16 They may not be investigatory materials. They
17 may not be for law enforcement purposes. We do not know.

18 Another search issue relates to previously-
19 processed records. Pursuant to stipulation, the FBI agreed
20 in the summer of 1977 to process the field office records of
21 seven FBI field offices. There was a provision in the
22 stipulation that they would process those documents which had
23 notations, even if the text of the document was duplicative
24 of what was on file at headquarters.

25 We later learned that the FBI did not do this. As

1 a result of a review carried out by the Appeals Office head,
2 Mr. Quinlan Shea, we learned that the FBI directive to the
3 field offices instructed them to provide the documents -- to
4 not provide the documents unless they contained a substantive,
5 pertinent notation on them.

6 That was entirely different than the stipulation
7 called for and Mr. Shea, in his review, came across some
8 graphic examples of what was not provided us as a result of
9 that. At the Joint Appendix at page 382, he provides a docu-
10 ment which has a notation -- handwritten notation at the
11 bottom of it, "Previously told LR," meaning Little Rock.

12 "Previously told LR to disregard. Mosely is a
13 nut."

14 On another document, the notation reads, "Identify
15 no action unless white Mustang," referring to the chase to
16 the white Mustang or Mustangs that were involved in the
17 crime.

18 Those are very important materials to anyone
19 trying to evaluate the thoroughness and adequacy of the FBI
20 investigation and the manner in which it was carried out.

21 They were denied to us because of a qualification
22 in the instructions to the field offices that was not what
23 we had agreed to in the stipulation.

24 A second reason in which we seek a reprocessing
25 of the records is that we subsequently learned in another

1 case that, where the FBI was making claims that documents
2 were being withheld from the field office because they had
3 been previously processed at headquarters, that they were --
4 their method was defective and as a result, we ultimately
5 established that some 2,369 pages of the Dallas Field Office
6 that had originally been withheld as previously processed
7 were in fact not previously processed, had not been provided
8 from headquarters files for one reason or another -- we do
9 not know what -- they had not been and they, in that case,
10 were forced to give them to us.

11 Now, the same defect may exist in this case. We
12 do not --

13 THE COURT: Do you have any evidence that they
14 exist?

15 MR. LESAR: No, we have no way of verifying it.
16 The way we were able to verify it in the other cases is that
17 we got them to provide us with the cross-references and then
18 we matched up the cross-references and we saw that where
19 they were claiming previously processed, they had not, in
20 fact, been provided.

21 But that has not been done in this case and the
22 FBI affidavit which addresses it describes the method but it
23 does not state that the method will not result in this same
24 erroneous claim of previously processed.

25 THE COURT: But you were unable to show the judge

1 any specific flaws [inaudible.]

2 MR. LESAR: No, except that we assume that the
3 FBI being what it is, the methodology in one case is generally
4 the same as in another.

5 The presumption of regularity, I guess.

6 THE COURT: [Inaudible.] I think your presumption
7 of regular is [inaudible.]

8 MR. LESAR: Well, the way that the FBI processed
9 them. At least we have evidence in one case that they did
10 it. We would be perfectly willing if the case were remanded
11 and if there is going to be a reprocessing of the field
12 office files, to devise some method by which we could test
13 that claim.

14 If we are provided with cross-references for
15 certain --

16 THE COURT: [Inaudible] but why did you not
17 take that proposal for trial? The Government's position is
18 that they have already done this for you. You are asking
19 them to go through these documents a second time.

20 MR. LESAR: Well, we --

21 THE COURT: Without any showing that they have
22 not, in fact, provided it.

23 MR. LESAR: Well, with respect to the first argu-
24 ment that we advance for reprocessing, there is a showing.
25 The showing was made by Mr. Shea who adduced evidence that,

1 one, their instruction differed from the stipulation and two,
2 that that instruction had, in fact, resulted in documents
3 being withheld that had notations of the kind that are vital
4 to us, so that we have made that showing with respect to the
5 first ground.

6 THE COURT: That would not call for a total

7 . That would call for a . There you were --

8 MR. LESAR: Right.

9 THE COURT: -- shows specific documents but --

10 MR. LESAR: Right, that's correct.

11 THE COURT: [Inaudible.] were not.

12 MR. LESAR: Right.

13 THE COURT: But has been added for general
14 reprocessing which sounds like you are asking the Government
15 to redo all of the search at its field offices.

16 MR. LESAR: Well, I would say that if they can
17 provide the evidence to substantiate their claim, that is,
18 that the way they did it is not resulting in wrongful claims
19 of previously-processed being made, obviously, we would
20 agree to that.

21 THE COURT: But they did make such an affidavit .

22 MR. LESAR: Their affidavit just says that, "We
23 did it like this" and it does not say that this will not
24 result in the wrongful withholding.

25 We have also appealed with respect to the exemption

1 claims.

2 The Court upheld all of the exemption claims as
3 the result of on-sampling that was defective in numerous
4 respects. It was defective, among other things, because the
5 sampling did not include all of the exemption claims that
6 were advanced by the Government to withhold excisions made
7 on several thousand pages of documents.

8 The technique, which was a sampling of one out of
9 every 200 documents, resulted in an inordinate sampling of
10 minor and inconsequential claims.

11 THE COURT: Well, then you have got a second go-
12 round [inaudible.]

13 MR. LESAR: The second go-round does not cure the
14 defects. At the end of the second on-sampling, the same
15 defect remained. There were still exemptions claims which
16 had not been sampled at all.

17 There were relatively few -- only one or two or
18 three examples of some exemption claims and on top of that,
19 the FBI conceded that some of the exemption claims were
20 wrong.

21 They conceded -- they released the material that
22 had been withheld under B(1) -- and important material, at
23 that. They released a couple of claims -- exemption 7 claims.

24 And then, Weisberg filed a lengthy counter-affi-
25 davit, taking each one of their exemption claims and showing

1 that it was either factually or legally incorrect.

2 They were claiming exemption 7(D) for the source
3 of a newspaper -- not the FBI source, but the source of the
4 L.A. Times.

5 They claimed exemption 7(B) and 7(C) for the
6 Powatt Brothers. One of the ^{Powell} Powatt Brothers had been cited
7 for contempt of Congress because he had refused to testify.

8 All of this information was public, yet they with-
9 held their names.

10 They withheld, under 7(B) the identity of a
11 police informer who was very -- a central figure in the
12 events in Memphis which led to the reopening of the investi-
13 gation by Congress, Merrilly McCullough.

14 Mr. Shea, in 1978 or 1979, had promised that the
15 McCullough file would be given to Weisberg. Eventually it
16 was. But when the FBI came around to justify these excisions,
17 they justified his -- the excision of his name, even though
18 it is all public.

19 Now, the District Court itself conceded that the
20 FBI's exemption claims were inconsistent and the District
21 Court applied, I think, erroneous standards in trying to
22 uphold those claims of exemptions.

23 It did not rule that they were exempt. In effect,
24 it just said that the Plaintiff did not need them.

25 Well, that is not a ground for withholding under

1 the Act and some of them, Plaintiff very well may need and
2 certainly, the public is entitled to them in any event.

3 So the FBI is just -- has not been able to make
4 its claim for exemptions and even the appeals head, who made
5 a review of the file, felt very strongly that the FBI should
6 put back material that had been inconsistently or wrongfully
7 withheld, particularly under 7(C).

8 So we feel that the case has got to be remanded
9 because you cannot uphold these claims of exemptions on this
10 kind of a record.

11 The FBI in its-- the Government, in its brief,
12 says that they cannot be required to -- they really dodge
13 the issue of Weisberg's claims with respect to these exemp-
14 tions.

15 Well, if they do, then there are disputed issues
16 of material facts with respect to those issues and that
17 cannot be decided on the summary judgment procedure.

18 The next issue I wish to discuss is the consul-
19 tancy agreement.

20 THE COURT: You are on your rebuttal time, now.

21 MR. LESAR: All right. I would just, very
22 briefly, say that at the conclusion of the processing, the
23 FBI wrote Mr. Weisberg a letter saying that it would deal
24 with his many complaints about their obliterations that they
25 had made and other complaints that he had raised in his

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correspondence with him.

They then would not do that and proposed, instead, that they hire him as their consultant to advise them on these wrongful excisions -- to provide them with a list of the matters about which he had complained and to explain why they should be released, or further action was required.

The Government then ultimately reneged on that agreement and it is Weisberg's contention that he is owed the money with respect to that, that there was a binding and in force contract --

THE COURT: It is undisputed that the contract that you allege was not reduced to writing.

MR. LESAR: That is correct.

THE COURT: Did Mr. Weisberg say he wanted it in writing because he did not have a contract?

MR. LESAR: He did not say that. He did at one point write a letter saying that he wanted it in writing with respect to the amount of which he was being paid because he had asked on several occasions and had received nothing back.

However, that same letter made it clear that his performance was not contingent upon it being reduced to writing and on January the 15th, 1978, I got a call from Lynn Zisman offering a specific rate of \$75 an hour.

As a result of that Mr. Weisberg accepted that and --

1 THE COURT: How did he warrant that? How did he
2 show his acceptance of that?

3 MR. LESAR: Well, he showed his acceptance because
4 I told Lynne Zusman about it and then I --

5 THE COURT: That was oral communication between
6 you and Ms. Zusman?

7 MR. LESAR: To that point. To that point.

8 Then, I wrote a letter to -- I had a conference
9 with Lynne Zusman and I inquired about an interim pay agree-
10 ment. She said, "Write a letter to Schaffer. Send a copy
11 to me. And spell it out."

12 So I spelled it out. I put in there the hourly
13 rate, the amount of time he had worked and there was no
14 response at all for more than two weeks after that.

15 THE COURT: According to you, what was the rate
16 of pay ?

17 MR. LESAR: \$75 an hour.

18 THE COURT: The numbers went all the way from
19 \$30 to \$100.

20 MR. LESAR: No, no, not \$100.

21 THE COURT: [Inaudible.]

22 MR. LESAR: Pardon?

23 THE COURT: I thought at one point somebody asked,
24 did Mr. Weisberg at one point ask for \$100?

25 MR. LESAR: Oh, no. No, no. He never asked for

1 anything at all.

2 Early on, they specified the normal consultancy
3 rate but did not say what it was. Then, there was no speci-
4 fic figure mentioned until Zusman's telephone call to me,
5 which was \$75.

6 THE COURT: Then at other times there was a
7 figure of \$30.

8 MR. LESAR: That was after the Government decided
9 to contest the whole matter. Then they went into court and
10 the Deputy Assistant Attorney General, William Schaffer,
11 said that they would offer \$30.

12 The Court said, "That is not enough. It should be
13 up in the range of \$50 or \$60.

14 So, I will save further arguments for my rebuttal.

15 THE COURT: Mr. Koppel.

16 ORAL ARGUMENT OF JOHN S. KOPPEL, ESQ.

17 ON BEHALF OF U.S. DEPARTMENT OF JUSTICE

18 MR. KOPPEL: May it please the Court:

19 I am John Koppel from the Appellate staff of the
20 Civil Division of the Department of Justice and I am repre-
21 senting the Appellee, Cross-Appellee, the Department of
22 Justice, in this case.

23 There are several issues before the Court on these
24 cross-appeals.

25 First, whether the Department of Justice properly

1 inspected its records and withheld only exempt material in
2 this Freedom of Information Act case.

3 Second, whether the Plaintiff and the Department
4 entered into a consultancy agreement.

5 And third, and in our view, most importantly,
6 whether the District Court erred in awarding the Plaintiff
7 approximately \$94,000 in attorney's fees, including a 50
8 percent multiplier and approximately \$14,500 in costs.

9 With respect --

10 THE COURT: We want you to -- we would like you
11 to keep cross-appeals separate.

12 Do I understand you are also protesting the costs
13 as well as the fees?

14 MR. KOPPEL: That is correct, Your Honor.

15 With respect to the first issue, the Department of
16 Justice conducted a thoroughly adequate search of its records
17 and withheld only exempt material in this FOIA case that
18 lasted roughly six years on the merits in the District Court.

19 As this Court has held recently in another of
20 Plaintiff's cases, the test for the adequacy of a FOIA search
21 is one of reasonableness.

22 Purely speculative claims about the existence of
23 other documents are not enough to defeat a showing made
24 through detailed affidavits, as in this case, that the search
25 had been adequate.

1
2 Furthermore, the issue is not -- and I emphasize
3 the word "not," whether any further documents might con-
4 ceivably exist, but whether the Government has shown that
5 its search was adequate.

6 The affidavits supplied by the Government in this
7 case clearly satisfy that test.

8 With respect to the specific items that the
9 Plaintiff has raised regarding the adequacy of the Government
10 search, we have addressed all of these issues -- the specific
11 issues -- fully in our brief.

12 Unless there are any questions --

13 THE COURT: I am troubled about how you claim
14 privacy of law enforcement materials without looking at the
15 file.

16 MR. KOPPEL: Your Honor, the FBI takes the posi-
17 tion -- which has recently been upheld by the Seventh Circuit
18 in the Antonelli -- that in a case involving -- in a case
19 where individuals where a third party requests the records
20 of other individuals and does not provide a privacy waiver
21 from those individuals, the FBI will not provide those re-
22 cords and will not even search for those records unless
23 there is a compelling public interest in the case.

24 And with respect to virtually all of these items,
25 the individuals -- to the extent that the individuals are
relevant at all to the assassination investigation, their

1 names appear in the MURKIN file, which was provided to the
2 Plaintiff.

3 Moreover, most of these individuals -- many of
4 these individuals -- well, Plaintiff has not demonstrated
5 the kind of compelling public interest with respect to any
6 of these individuals and it is not even clear what -- exactly
7 what the Plaintiff wants with respect to them.

8 If we turn to page 39, we see a -- what is
9 essentially a laundry list of names and the Plaintiff asks
10 for "All tape recordings and all logs, transcripts, notes,
11 reports, memoranda, et cetera regarding these individuals."

12 He goes on to say, "This is meant to include not
13 only physical shadowing but mail coverage, mail interception,
14 interception by any telephonic electronics or other means."

15 Now, it is clear, first of all, there is no way
16 the FBI can conduct the kind of search that Plaintiff is
17 seeking, because --

18 THE COURT: Now, whoa, whoa. You are mixing up
19 apples and oranges. If it is an impossibility, that is some-
20 thing else. But it would very much [inaudible]

21 I was asking about questions about, I do not
22 understand how you can say 7(C) applies to a document you
23 have not looked at. Or a file you have not looked at.

24 MR. KOPPEL: Your Honor, in the absence --

25 THE COURT: I did not hear Antonelli to say that,

1 either. Antonelli continued to recognize that some balancing
2 would have to be done.

3 MR. KOPPEL: That is correct, Your Honor.

4 Antonelli does recognize that balancing has to be
5 done.

6 THE COURT: How can you balance something that
7 [inaudible.] ?

8 MR. KOPPEL: Well, Your Honor --

9 THE COURT: You say "I have looked at it." And
10 you say, "Huh, I just balanced it. What did you do, weigh
11 it?"

12 MR. KOPPEL: Antonelli upholds that approach be-
13 cause Antonelli says that the Plaintiffs have to demonstrate
14 that there is a public interest before the FBI will be forced
15 to search its files under these circumstances.

16 Now, the -- we believe that the Antonelli
17 decision is correct and it accurately reflects the position
18 of the Department on this issue.

19 THE COURT: Because it is, I think, a major legal
20 question, let me make sure I do understand your exact
21 Department position.

22 MR. KOPPEL: Yes, sir.

23 THE COURT: I understand you to say that when-
24 ever you assert 7(C) objections -- that you are claiming a
25 7(C) exemption -- you [inaudible] unless and until the

1 Plaintiff does what --?

2 MR. KOPPEL: Your Honor, I emphasize that this
3 case -- that this analysis applies only to third party re-
4 quests, where an individual seeks the records of third par-
5 ties.

6 Now, under those circumstances, it is the FBI's
7 position that it does not have to search for the records of
8 those individuals. It does not have to confirm or deny
9 records pertaining to those individuals, absent either a
10 privacy waiver from those individuals or a demonstration by
11 the Plaintiffs that there is some sort of compelling balancing
12 test, a compelling public interest justifying release.

13 THE COURT: How can they --

14 MR. KOPPEL: Justifying search. Excuse me, Your
15 Honor.

16 THE COURT: [Inaudible.] You are confusing the
17 terms, too. Obviously, there is a -- you know, when it
18 comes to the release of that material, the FBI has a lot of
19 presumptions -- the Government has a lot of presumptions
20 in its favor, in the absence of the waiver of [inaudible.]

21 But when you are talking about the search itself,
22 I still do not understand how you can expect the Plaintiff
23 to show some great public interest about documents that you
24 do not know about and that they do not know about.

25 MR. KOPPEL: Your Honor, the problem with the

1 Plaintiff's approach --

2 THE COURT: Let me give you a specific.

3 MR. KOPPEL: Yes, sir.

4 THE COURT: Suppose it turns out that one of the
5 people they named has in fact been a defendant in a criminal
6 trial and all of the information that is in that file were
7 going to be made public.

8 Now, is there a 7(C) claim for that information?

9 MR. KOPPEL: Your Honor, to the extent that the
10 information is already in the public domain, there remains
11 the privacy consideration in that there is no reason -- no
12 public interest to be served by requiring the Department
13 to supply those records.

14 Moreover, the basic problem with the Plaintiff's
15 analysis here is that there can be damage done to individuals
16 simply by requiring the FBI to disclose the existence of
17 files.

18 THE COURT: Well, when you are talking about dis-
19 closing, the point of disclosing is, you have great strength
20 in the way of research.

21 MR. KOPPEL: Yes, Your Honor.

22 THE COURT: [Inaudible] on that and obviously, if
23 you disclose, "Yes, we have a file on Mr. Lesar," that could
24 be damaging to his privacy.

25 But you do not have -- we are not at the

1 disclosure level. We are talking about research.

2 How do you know that there is a privacy interest
3 until you look at it? How do you know what the public in-
4 terest and the balancing that the Court is supposed to go
5 through is?

6 What you are really saying is, it seems to me, is
7 that you are right, the Government has just discovered a way
8 of short-circuiting a lot of Voyek litigation. Maybe that
9 is to everybody's benefit, I do not know, but what you are
10 saying is, you are just going to say "7(C) and that is all
11 she wrote."

12 MR. KOPPEL: No, Your Honor.

13 THE COURT: Not this time?

14 MR. KOPPEL: Well --

15 THE COURT: How do we review --

16 MR. KOPPEL: If the Plaintiff satisfies the burden
17 of demonstrating some sort of significant public interest
18 with respect to these third party records --

19 THE COURT: Well, we do not know what we are
20 talking about.

21 MR. KOPPEL: But, Your Honor -- Your Honor has
22 recognized that there can be damage done to third parties --

23 THE COURT: By exposure.

24 MR. KOPPEL: But damage can also occur by the
25 admission of the existence of files regarding those

1 individuals.

2 THE COURT: [Inaudible.]

3 MR. KOPPEL: Well, Your Honor, the Department
4 takes the position that you show public interest there has to
5 be -- well, there has to be some significant connection. In
6 this case, there would have to be some significant connection
7 or demonstrably significant connection between the indivi-
8 duals listed by the Plaintiff and the King assassination case.

9 We do not believe that the Plaintiff has satis-
10 fied that burden and there is no --

11 THE COURT: Was that done in the FOIA request?

12 MR. KOPPEL: That can be done through a showing
13 in the District Court at a later stage, but initially, yes,
14 it would be appropriate for the FOIA requester to indicate
15 some sort of justification, some sort of reason for the --

16 THE COURT: Well, the public interest standard
17 then becomes a kind of a relevancy standard in this case.

18 MR. KOPPEL: That is correct, Your Honor.

19 THE COURT: How do you determine the relevancy
20 without looking at the facts?

21 THE COURT: Well, it is not relevancy as to docu-
22 ment. That is to say, the standard is relevancy of the per-
23 son to the matter. Is it not?

24 MR. KOPPEL: That is correct, Your Honor.

25 THE COURT: It is more than relevance. It is

1 demonstrably significant.

2 MR. KOPPEL: Your Honor, the --

3 THE COURT: This is not a relevancy standard
4 under the Federal Rules governing discovery, for example.

5 That is a fairly stepped-up relevancy standard,
6 would you not say?

7 MR. KOPPEL: Your Honor, in order to show the kind
8 of public interest that justifies the imposition on the
9 privacy of third parties, which is at issue here, we submit
10 that the Plaintiff has to make some sort of showing that
11 there is a meaningful public benefit to be derived from
12 disclosure. We do not see --

13 THE COURT: I guess what is troubling me, Counsel,
14 is that I am still not sure what you are really asking for
15 is another boiler plate allegation boiler request or
16 whether it is really something with real substance and I
17 do not know which would worry me more.

18 We do [inaudible] requester said, "We believe that
19 information in these files would show that there were addi-
20 tional people involved in the assassination besides
21 Mr. Ray."

22 MR. KOPPEL: Your Honor, that would not -- I do
23 not believe that that would satisfy the test because the
24 Plaintiff has to demonstrate -- has to do more than make a
25 mere allegation. Perhaps this is a problem inherent in the

1 FOIA --

2 THE COURT: If you were to make an evidentiary --
3 if you were to lay out an evidentiary [inaudible] which
4 would satisfy the standard of demonstrably significant nexus
5 in the fruit of the case?

6 MR. KOPPEL: I don't want to --

7 THE COURT: The fruit of the nexus is involving
8 the assassination and then, you, under your standard, would
9 say that justifies a search.

10 MR. KOPPEL: The -- we are saying that requester
11 should show some sort of -- should show a nexus which would
12 lead a reasonable person to believe that there is some sort
13 of -- that there is a public interest in providing records.

14 THE COURT: I propose something such as, "In docu-
15 ments I already have, this person's name appears as somebody
16 who is involved in the matter."

17 MR. KOPPEL: That is correct.

18 THE COURT: [Inaudible.] Or something like that
19 sort of thing.

20 MR. KOPPEL: That is correct, Your Honor, and a
21 mere laundry list of the type that characterizes Plaintiff's
22 second request is not sufficient to satisfy us.

23 THE COURT: What troubles me, Counsel, is, now,
24 you are talking about disclosure. I share your concern that
25 sometimes even what looks like an innocent disclosure can, in

1 fact, invade somebody's privacy.

2 I would be all for the government taking the pro-
3 position and the courts backing up the proposition about
4 disclosure. What troubles me is that you are at a point
5 where the government thinks that "We are not even going to
6 look unless you prove the case first."

7 And that worries me.

8 First of all, I do not know how you can review
9 that. Normally, when we review these questions as to whether
10 or not they have made a prima facie case or whether they have
11 shown some relevancy, there is an attempt [inaudible] in
12 some of the documents.

13 But you do not know at this point whether or not
14 these documents may, in fact, have some relationship to
15 [inaudible.]

16 MR. KOPPEL: Your Honor, in this case, we do be-
17 cause, to the extent that these individuals are relevant to
18 the King assassination investigation, their names appear in
19 the the MURKIN file. What the Plaintiff is --

20 THE COURT: [Inaudible.]

21 MR. KOPPEL: Yes, Your Honor. What the Plaintiff
22 is seeking is considerably more than just the relevant
23 material on those individuals as it relates to the assassina-
24 tion investigation. The Plaintiff is asking for their files
25 and for materials concerning their relationship with the

1 FBI, what the FBI -- possible FBI surveillance of them is.

2 THE COURT: [Inaudible.]

3 MR. KOPPEL: It is inconceivable that this could
4 have any significant bearing on the King assassination inves-
5 tigation.

6 THE COURT: How do you know that none of the docu-
7 ments in that file have any bearing on the assassination?
8 [inaudible] look at the files?

9 MR. KOPPEL: Your Honor, there has to be some
10 limit, especially in a case like this -- a case in which the
11 principal file, the MURKIN file, contained some 50,000 pages
12 of material all by itself.

13 If the Plaintiff will be able to obtain the files
14 or to force the FBI, even, to search for files of individuals,
15 in effect, at his whims, merely be requesting them, then
16 there will be a tremendous burden on the resources of the
17 FBI which we do not believe the FOIA contemplates.

18 THE COURT: Absent showing connection [inaudible],
19 is there any limitation upon upon [inaudible.]

20 I could hand you the Washington, D.C. telephone
21 directory and say, "I want you to give me everything on all
22 those names."

23 MR. KOPPEL: That is correct, Your Honor. There
24 simply has to be some sort of public interest. There has to
25 be a public interest demonstrated by the requester before the

1 FBI would have to undertake the kind of search that the
2 Plaintiff seeks here.

3 THE COURT: Do you think the particular
4 beyond the scope of the request? That does not in-
5 volve the [inaudible.]

6 MR. KOPPEL: Well, I --

7 THE COURT: That is one of your alternative ar-
8 guments and I understand [inaudible] but you obviously
9 [inaudible] want to investigate the King assassination.
10 Therefore, give us all your facts.

11 MR. KOPPEL: But, Your Honor, in Judge Bork's
12 telephone book example, the individual -- the requester is
13 free to select names at random from the phone book and say,
14 "I request the files of these individuals."

15 THE COURT: Right. So you are saying, now --
16 maybe I read more into the Government's claim as to the
17 [inaudible.] Antonelli is legitimate -- you are saying,
18 "All they have to do is to show some causal nexus to the
19 investigation"?

20 MR. KOPPEL: Well, in this case, yes, there would
21 have to be some -- well, there would have to be some reason,
22 some meaningful public interest.

23 THE COURT: [Inaudible.]

24 MR. KOPPEL: Well --

25 THE COURT: I do not know what that means. If you

1 tell me that they have to show a relationship to the request,
2 it sounds like a very reasonable limitation.

3 MR. KOPPEL: Well, Your Honor, there is a problem
4 with the formulation that you are suggesting, which is that
5 it would enable the Plaintiff, on the basis of the 50,000
6 pages of the MURKIN file, to select countless individuals
7 for searching by the FBI.

8 We believe that that is equally abusive and un-
9 warranted under the Freedom of Information Act.

10 THE COURT: So, even if there were a nexus -- for
11 example, if you had turned over the MURKIN files, the Plain-
12 tiff, then, would use rather tediously the MURKIN file and
13 come up with a list of 300 names -- all of which he can demon-
14 strate were derived from the files.

15 You would say, even though that is obviously a
16 nexus between that individual and the investigation, unless
17 it were a mistake with the names that appeared in there, that
18 that still is not enough to justify a search, under your
19 approach.

20 MR. KOPPEL: That is correct, Your Honor. The
21 Plaintiff would have to show some reason to search.

22 THE COURT: Well, he just did.

23 MR. KOPPEL: Well, above and beyond the fact that
24 the names appear in the MURKIN file.

25 THE COURT: Well, I suppose names may appear in

1 the MURKIN file that have nothing whatever to do with the
2 investigation or with any suspicion of connection with the
3 Freedom of Information Act.

4 MR. KOPPEL: Well, that is correct, Your Honor
5 and our position is that it would be a tremendous imposition
6 on the privacy of those individuals, as well as on the re-
7 sources of the FBI to require a search to be made under those
8 circumstances.

9 THE COURT: What is the privacy intrusion by a
10 search? Obviously, it is an administrative burden.

11 MR. KOPPEL: Well, since the --

12 THE COURT: But what is the privacy --

13 MR. KOPPEL: Since by searching, the FBI would be
14 admitting the existence.

15 THE COURT: Of the file on the person.

16 MR. KOPPEL: Of the file on the person, yes, Your
17 Honor.

18 THE COURT: In order to make that jump, how did
19 that ever get disclosed, that there is a file on the person?
20 legitimate
21 There is a significant privacy claim. You do not [inaudible.]

22 Traditionally, if you are claiming a [inaudible]
23 exemption, [inaudible] names, you go look at those files,
24 through them, and find that your estimate of the 7(C) exemp-
25 tion, you do not even acknowledge the existence of those
files. You just say that "These matters are covered by"

1 7(C)," as you do here.

2 The difference, though, is, having searched, if
3 the Court wants to verify your judgment, [inaudible.]

4 MR. KOPPEL: Well, Your Honor --

5 THE COURT: But you do not identify, "Yes, we have
6 a file here."

7 MR. KOPPEL: Well, it appears to me that, under
8 Your Honor's formulation, we would have to identify the
9 existence of a file. Then perhaps this is really a matter of
10 semantics, if we are saying --

11 THE COURT: [Inaudible.]

12 MR. KOPPEL: If we are saying that the FBI -- the
13 Bureau has to search, it then can say, in lights of the
14 events in 7(C) of the Freedom of Information Act, we can
15 neither disclose nor deny the existence of the files.

16 THE COURT: It makes all the difference in the
17 world when you have searched. First of all, you are then
18 able to go through the balancing [inaudible] required.

19 And also, if the Court decides to responsibly test
20 your judgment, you cannot review those items in camera.

21 MR. KOPPEL: But then, if the Court has documents
22 to review in camera, then are we not conceding the existence
23 of the files on the individuals on third parties?

24 THE COURT: [Inaudible] in camera is
25 [inaudible]. We do not acknowledge the [inaudible] at all.

1 MR. KOPPEL: But if you are reviewing documents --
2 if the requester has identified individuals and the Court
3 then reviews those and reviews documents, is not that an
4 admission that there is a file with respect to those indi-
5 viduals?

6 THE COURT: Well, the claim of the Government is
7 exactly the same as it is here, except that 7(C) [inaudible.]

8 The only difference is, you say, "We have searched
9 our files and we claim, as to the matters requested, their
10 privacy."

11 THE COURT: [Inaudible] bring in a trolley with
12 all these covers and [Inaudible] can't see the
13 names. [Inaudible]

14 And then the Court has to read everything
15 [inaudible] you to read but now the Court is in the posi-
16 tion you claim the FBI is in and I think at this point
17 [inaudible.]

18 MR. KOPPEL: Well, Your Honor, there is no doubt
19 about it. It is a very disturbing scenario.

20 THE COURT: Well, [inaudible.]

21 THE COURT: Well, is it your position, to come
22 back to the facts of this case, of simply providing a list
23 of the names without more will not do?

24 MR. KOPPEL: That is correct, Your Honor.

25 THE COURT: And that that is all that was done.

1 Is it your position that that is all that was done here?
2 That there was no supplementation so as to demonstrate any
3 nexus at all?

4 MR. KOPPEL: That is correct, Your Honor. There
5 is no indication that these individuals have any meaningful
6 role in the King assassination association.

7 THE COURT: Well, that is separate from the public
8 interest claim that [inaudible] because I read your brief
9 on the two claims that the Appellant has now abandoned.

10 [Inaudible.] I thought that the Government was
11 offering alternative reasons for not making those files
12 available.

13 One was that there had been no showing that there
14 was any relevance [inaudible] of the request.

15 And the second was [inaudible] offering us
16 [inaudible] have to show public interest first.

17 MR. KOPPEL: Well, Your Honor, I think that the
18 two are certainly related, to a large extent.

19 THE COURT: Well, one would seem threshold, so I
20 am not sure I understand what the position is.

21 Are you saying you must initially satisfy the
22 threshold test of relevancy or nexus?

23 And then, if you satisfy that, then there is a
24 public interest determination.

25 MR. KOPPEL: Yes, Your Honor. There is a two-step

1 process. The public interest has to -- under the Antonelli
2 theme, public interest is involved at two places.

3 It is involved at the outset in order to require
4 the agency to search initially and then, after the Agency --
5 if there is a showing of public interest, of sufficient
6 public interest in the agency searches, there still has to
7 be a determination that the public interest outweighs the
8 privacy considerations with respect to the files that have
9 been searched.

10 THE COURT: So what we have been discussing as
11 the nexus or relevancy is actually an Executive Branch
12 engraftment under its obligations, under the statute.

13 It does not derive from Antonelli. Is that what
14 you are saying?

15 MR. KOPPEL: Your Honor, it derives --

16 THE COURT: In the employment of relevance. It
17 is a commonsense requirement that you do not pick names out
18 of the phone book or out of the air. You must demonstrate
19 some relevancy. That is simply an Executive Branch engraft-
20 ment.

21 MR. KOPPEL: Your Honor, it is not an Executive
22 Branch engraftment. It is the logical result of the inter-
23 action between the Freedom of Information Act and the
24 Privacy Act, as the Antonelli Court recognized.

25 Turning briefly -- well, very briefly to Plaintiff

1 exemption claims, we note that these are thoroughly discussed
2 in our brief and Plaintiff, on the basis of two very minor
3 errors in two Vaughn indices consisting of approximately
4 200 documents -- 240 documents -- is seeking to impeach the
5 District Court's holdings that the Department was held on
6 the exempt material and that simply will not suffice.

7 The consultancy agreement likewise is fully
8 fleshed out in our brief. The District Court correctly
9 held that the Department did not benefit from the Plaintiff's
10 work, that vital terms of the proposed agreement were
11 missing and that Plaintiff did not act reasonably in pre-
12 maturely commencing work on the proposed consultancy.

13 Now, turning to what we regard as the heart of
14 this case, the District Court plainly erred in awarding
15 approximately \$94,000 in fees, including a 50 percent multi-
16 plier and \$14,500 in costs.

17 Now, the Plaintiffs did not substantially prevail
18 in this case, since virtually all of the 50,000 pages that
19 were released to him as the result of the processing of his
20 enormous administrative request of December 23rd, 1975, were --
21 which he prematurely brought into court the following day --
22 were released through the administrative process.

23 THE COURT: Now, how do we know that?

24 MR. KOPPEL: Your Honor, you know that by the
25 chronology in this case. You know that the documents were

1 released to the Plaintiff in '76 and '77. Plaintiff filed
2 the administrative request in December, '75. At that --

3 THE COURT: Who has the burden of showing that
4 documents were not released pursuant to your administrative
5 process but were released because of the lawsuit?

6 MR. KOPPEL: Your Honor, the Plaintiff has to
7 demonstrate that he has substantially prevailed in order to --

8 THE COURT: He has to prove that [inaudible] and
9 he gave, you know, a chance --

10 MR. KOPPEL: That is correct, Your Honor.

11 THE COURT: -- to file an administrative process
12 because he thought you filed a complaint at the same time.

13 MR. KOPPEL: That is correct, Your Honor. He
14 filed an extremely burdensome request which then -- which
15 took approximately two years to process, due to its --

16 THE COURT: [Inaudible.]

17 MR. KOPPEL: -- voluminous nature.

18 THE COURT: [Inaudible.] Would the burden go
19 beyond him to show that the -- suppose you had waited the
20 correct amount of time -- as I recall, ten days from the
21 time of the request to file suit. And he had heard nothing
22 during that ten-day period. Would the burden still have been
23 his?

24 MR. KOPPEL: Your Honor, if he had heard nothing,
25 which is not the case here, if he had waited the ten days,

1 we submit that this Court's Open America holding would come
2 into play. In that case, he would be entitled to go into
3 District Court.

4 However, the District Court would simply -- would
5 retain jurisdiction. That would not mean that the documents
6 he received resulted from the lawsuit, rather than the ad-
7 ministrative request.

8 THE COURT: But the mere filing of the lawsuit
9 does not shift the burden to --

10 MR. KOPPEL: That is correct, Your Honor. The
11 mere filing of the lawsuit does not demonstrate causation
12 and in this case, it is so clear that the Plaintiff received
13 the 50,000 pages between -- in '76 and '77 as a result of
14 the administrative processing of his request.

15 THE COURT: Well, you are saying that that is
16 quite clear but you have a District Court determination to
17 the contrary. Does not that come to us as a clearly erroneous
18 standard?

19 So do not we have to conclude that the District
20 Court clearly erred in finding that the production was
21 [inaudible] traditional?

22 MR. KOPPEL: Your Honor, in this case, the Dis-
23 trict Court decision is not -- on substantially prevailed --
24 is not entitled to the usual deference that a factual or
25 apparently factual holding like that would be entitled to,

1 since the District Court never gave the Government an oppor-
2 tunity to brief or discuss the substantially-prevalied
3 holding.

4 Moreover, under this Court's holding in Spencer
5 versus NLRB, the question of whether the Plaintiff has sub-
6 stantially prevailed must be subject to heightened scrutiny.

7 And furthermore, even under the clearly erroneous
8 test, we submit the District Court's decision that Plaintiff
9 substantially prevailed because he received 50,000 pages
10 while the litigation was in court is clearly erroneous be-
11 cause the District Court ignored the chronology and ignored
12 the factors which are set forth in our brief.

13 THE COURT: Would "substantially" apply in any
14 event, something like "substantially prevailed" or a finding
15 of causation? Those are not basic facts in the District
16 Court's findings on the evidence. Those are conclusions.

17 MR. KOPPEL: That is correct, Your Honor. We
18 submit that a legal standard of review is appropriate here
19 for precisely those reasons.

20 This is a legal conclusion and the Spencer Court
21 recognized that when it said that --

22 THE COURT: Now, causation is strictly a legal
23 conclusion? It is not a mixed question of law and fact?

24 That the reason the documents were produced was
25 because of the administrative process or the judicial process

1 that is strictly a legal determination?

2 MR. KOPPEL: Your Honor, it certainly -- it can
3 be characterized either way. One could say that it is a
4 mixed question, but this Court has recognized --

5 THE COURT: Well, one could say anything but is
6 it not more principal to say that it is a mixture of law and
7 fact?

8 MR. KOPPEL: Perhaps, Your Honor, and I believe
9 this Court recognized that in Spencer, where it recognized
10 that it need not --

11 THE COURT: [Inaudible] statute
12 [inaudible] said about Spencer any of
13 [inaudible.]

14 MR. KOPPEL: In a FOIA case? None comes to mind
15 immediately. However, there is this Court -- the review of
16 the substantially-prevailed issue has generally been a
17 fairly searching one.

18 I can think of numerous cases -- although I cannot
19 name them offhand -- in which this Court has reversed the
20 District Court's decision that the Plaintiffs did not sub-
21 stantially prevail.

22 I believe the Church of Scientology case, among
23 others, comes to mind. Furthermore, even assuming arguendo
24 that Plaintiff has crossed the threshold of eligibility and
25 we must apply the entitlement test, the four factor test of

1 public benefit, reasonable basis, nature of the interest and
2 commercial benefit, it is quite clear, from the nature of
3 the material that the Plaintiff received that this litigation,
4 as opposed to the administrative request, did not benefit
5 the public and the Government had a reasonable basis for all
6 of its actions in the litigation.

7 Once again, we have thoroughly demonstrated, in
8 the brief, that we did not stonewall it at any point. We
9 acted in complete good faith in processing this enormous
10 request of December 23rd, 1975 and we simply opposed the
11 Plaintiff's repeated requests for what the District Court
12 characterized as "mammoth and repetitious searches or
13 reprocessing" as well as release of duplicative documents
14 such as abstracts and indices.

15 Moreover, the consultancies, the alleged con-
16 sultancy arrangements cannot serve as an indication of
17 governmental bad faith when the District Court itself held
18 that no such consultancy agreement was ever entered into.

19 THE COURT: [Inaudible.] that travel
20 costs and long distance costs [inaudible] or other
21 items of cost.

22 MR. KOPPEL: With respect to costs? Yes, we are
23 only challenging -- we challenging the amounts of -- of
24 course, if he did not substantially prevail, then he is not
25 entitled to anything.

1 THE COURT: [Inaudible] those items?

2 MR. KOPPEL: Yes, if he is entitled to any costs,
3 it is travel costs -- primarily travel and telephone costs,
4 which we continue to maintain are excessive. Now --

5 THE COURT: Is it correct, also, that
6 [inaudible.] How much of the time was there a [inaudible]

7 THE COURT: Was there a substantial amount of
8 time here that was estimated?

9 MR. KOPPEL: Yes, Your Honor. I believe the first
10 few years of the litigation were entirely estimated. The
11 Plaintiff had to estimate. He did not have contemporaneous
12 records for that period.

13 Moreover, we believe that the District Court's
14 holding that Plaintiff spent only seven hours on unproductive
15 matters out of approximately 800 hours on the merits is mani-
16 festly incorrect on its face and unreasonable on its face,
17 especially in light of the fact that the Court itself recog-
18 nized that it had denied many motions for repetitious
19 searching and reprocessing.

20 THE COURT: Was any of the time spent on the com-
21 ponency question or claimed?

22 MR. KOPPEL: No. It was claimed, Your Honor,
23 but the District Court did not award fees for that. This
24 does not -- the 800 hours were routinely received .

25 THE COURT: [Inaudible.]

1
2
3 MR. KOPPEL: That was on the merits, yes, Your
4 Honor.

5 THE COURT: Can we go back, just for a moment, to
6 the administrative processes? What that yielded?

7 It is certainly true that the Plaintiff in this
8 case aborted, if you will, the administrative process by
9 filing the FOIA request -- the additional FOIA request for
10 28 items and then amending the complaint the very next day.

11 But how do you deal with the District Court's
12 express finding in the May, I believe it was, '76 status
13 hearing, that under the circumstances, and this is complex
14 litigation that the District Court had before it, that under
15 these circumstances, that was simply harmless and that, in
16 fact, ample time had gone by and that now the litigation had
17 supervened, as it were, to overtake this administrative
18 process?

19 Was not there an express determination by the
20 District Judge to that effect?

21 MR.. KOPPEL: Well, Your Honor, that certainly
22 furnishes no basis to question the FBI's good faith in the
23 matter because the FBI complied with --

24 THE COURT: Well, I am not talking about good
25 faith. I am going to the nexus between litigation.

MR. KOPPEL: Causation.

THE COURT: Yes. And the production of the

1 documents.

2 MR. KOPPEL: Your Honor --

3 THE COURT: Your position is, the documents were
4 produced pursuant to the administrative process.

5 A difficulty with that is that the District
6 Judge concluded to the contrary.

7 MR. KOPPEL: Your Honor, to the extent that the
8 District Court did, indeed, conclude to the contrary, we
9 would submit that her determination is clearly erroneous in
10 view of the magnitude of the Plaintiff's requests.

11 The Plaintiff's request of December 23rd, 1975 and
12 the timing of that request, that it is essential to note
13 that that request was filed shortly after the FOIA Amendments,
14 the '74 Amendments took effect, at a time when the FBI was
15 inundated with FOIA requests and was only just in the pro-
16 cess of becoming familiar with the amended statute and there-
17 fore, the FBI was unable to proceed with the speed with
18 which it --

19 THE COURT: Well, what happened with this liti-
20 gation? What did you do when they moved the Amendment in
21 question? They did not amend this at once. This litigation
22 had been going on for awhile. So they had to move to amend.

23 What did the Department say?

24 MR. KOPPEL: Well, Your Honor, I believe --

25 THE COURT: Did you oppose?

1 MR. KOPPEL: I believe they did amend, as a matter
2 of right.

3 THE COURT: As a matter of right.

4 MR. KOPPEL: Yes, Your Honor.

5 THE COURT: I see.

6 THE COURT: I have forgotten what the District
7 Court said. Did she give a reason for concluding that the
8 litigation from these documents being mostly administrative
9 process as reason that would not apply to any case in which
10 there was both a request and litigation?

11 MR. KOPPEL: No, Your Honor. The District Court
12 did not do that. In fact, the District Court simply con-
13 cluded -- without any additional elaboration -- that Plain-
14 tiff had prevailed because he received 50,000 pages. That
15 is the extent of the District Court's analysis on the ques-
16 tion of substantially-prevailed.

17 Furthermore, turning briefly to --

18 THE COURT: You know, it seems like you are
19 talking about the January 20th, 1983 order.

20 MR. KOPPEL: I believe it was the December --

21 THE COURT: [Inaudible.]

22 MR. KOPPEL: Well, the District Court held, on
23 Dececeber 1st, 1981, at the same time that she disposed of
24 the case on the merits, that the Plaintiff had substantially
25 prevailed, even though the government had not briefed that

1 issue, because the District Court had specifically deferred
2 dealing with that issue, pending the conclusion of the case
3 on the merits.

4 THE COURT: According to the [inaudible] you are
5 saying you certainly can look at the [inaudible] and see
6 what the [inaudible.]

7 THE COURT: Which date is that?

8 THE COURT: January 20th, 1983 the Memoranda of
9 Opinion was filed at that point in which she even said that
10 you acknowledged the Plaintiff had triggered a complete
11 review of the [inaudible] file. .

12 MR. KOPPEL: Your Honor, we also -- we maintain
13 that the District Court's statement in that regard is
14 erroneous, that the District Court had misinterpreted the
15 colloquy between itself and the U.S. Attorney in that case.

16 THE COURT: But she then said that it was apparent
17 to the Court -- whether you agree with her or not -- it was
18 apparent to the Court that Mr. Weisberg was instrumental
19 in causing review of the investigation by the team.

20 Is that [inaudible] by the Office of [inaudible]
21 Department of Justice definition.

22 MR. KOPPEL: Your Honor, even to the extent that
23 that is true, Mr. Weisberg's alleged contributions in that
24 regard would result from the administrative process and the
25 administrative processing of his enormous request of .

1 December 23rd, rather than from this litigation.

2 THE COURT: Incidentally, your theory is that the
3 whirl began with the '74 amendments and the fact that there
4 was no response to his original request that in '69 was sim-
5 ply irrelevant to our determination?

6 MR. KOPPEL: Yes, your Honor. We take the posi-
7 tion that that has no bearing, that the '69 request -- which
8 clearly, was not -- could not secure the release of documents
9 under the original FOIA Act and, of course, holding, in the
10 Weisberg case in 1973.

11 THE COURT: And also, no lawsuit was filed until
12 after the effective date of --

13 MR. KOPPEL: Correct, Your Honor. This is a new
14 request, which was brought after the effective date of the
15 '74 amendment.

16 THE COURT: What do you say about the fact that
17 it did at one point [inaudible.]

18 MR. KOPPEL: Yes, Your Honor.

19 THE COURT: How long a period was that? About a
20 year or so?

21 MR. KOPPEL: Six months. Six to ten months, I
22 would say. And that was an eminently reasonable position
23 under the circumstances, since the Department contended that
24 it had complied -- fully complied with the initial request
25 of April, '75.

1 THE COURT: The Court of Appeals of this Court
2 said it was not, that it [inaudible.]

3 MR. KOPPEL: Excuse me, Your Honor?

4 THE COURT: Weren't you reversed on that appeal?

5 MR. KOPPEL: No, Your Honor, that was not appealed.
6 The District Court did not accept the mootness argument and
7 at that time we did not pursue it.

8 Only the Kennedy -- only the Time/Life photographs
9 went to this Court in 1978.

10 THE COURT: Yes. [Inaudible.]

11 THE COURT: Mr. Koppel, your time has expired but
12 we will give you a minute or so for rebuttal on this question
13 of attorneys' fees and costs.

14 MR. KOPPEL: Thank you, Your Honor.

15 THE COURT: How much time does Mr. Lesar have
16 left?

17 THE CLERK: Seven minutes.

18 THE COURT: Mr. Lesar, you have seven minutes.

19 REBUTTAL ARGUMENT OF JAMES H. LESAR, ESQ.

20 MR. LESAR: Thank you.

21 First, just a brief rebuttal with respect to the
22 privacy claims.

23 The -- I wish to point out to the Court that,
24 although we did not feel that we were required to do so,
25 that the District Court directed us to show the nexus .

1 between the King assassination and the individuals on the
2 December 23rd, 1975 request.

3 She made that order at the April 21, 1981 hearing
4 on the number of motions.

5 We complied with that. Mr. Weisberg and I both
6 filed rather lengthy affidavits detailing the connection
7 between those individuals and the King assassination.

8 THE COURT: Do you recall, Counsel, where that is
9 in the Joint Appendix?

10 MR. LESAR: Pardon?

11 THE COURT: Do you recall where those affidavits
12 are in the Joint Appendix?

13 MR. LESAR: I do not believe they are in the
14 Joint Appendix. They are found in the record at 212. They
15 are April 30th, 1981, I believe.

16 With respect to the question of substantially pre-
17 vailed, our position is that Mr. Weisberg did, indeed, sub-
18 stantially prevail.

19 First of all, he clearly substantially prevailed
20 with respect to the April 15th, 1981 request and that con-
21 sumed a major portion of the litigation time.

22 I think what needs to be looked at here is, what
23 were the issues that were litigated? And whether or not he
24 prevailed on those issues.

25 The major portion of the time was spent on the

1 issue of the crime scene photographs. He prevailed on that
2 beyond any question, after an appeal to the Court.

3 He sought a fee waiver and he obtained a fee
4 waiver for all records in this lawsuit responsive to both
5 requests.

6 The Department of Justice initially took the
7 position that it was not going to respond to that fee waiver
8 request until after the conclusion of the litigation.

9 Well, there is causal connection -- nexus, right?
10 They were not going to respond to it until after the pro-
11 cessing was done.

12 If we had not obtained that (B) waiver, he would
13 not have been able to purchase all of the records at issue
14 in the case.

15 The District --

16 THE COURT: [Inaudible.] [Loud buzz.]

17 MR. LESAR: That is correct, Your Honor.

18 THE COURT: [Inaudible.]

19 MR. LESAR: The National Association of Concerned
20 Vets case came down long after those hours were worked and I
21 believe that --

22 THE COURT: [Inaudible.]

23 MR. LESAR: I am not sure. I thought that that
24 was the amended position, that it held that, but I may be
25 wrong on that.

1 But at the time the hours were worked, records
2 were not kept or were misplaced and so the only think I
3 could do was go over and review each of the items and make
4 an estimate as to how much time was spent on them.

5 THE COURT: [Inaudible.]

6 MR. LESAR: That is my recollection. Their only
7 challenge was as to whether or not it was productively
8 spent. But they did not challenge the amount of time.

9 And I think it is quite evident, if you look at
10 them and see the nature of the pleadings and the amount of
11 time, that the time was reasonable.

12 The District Court ruling with respect to the
13 release of the 50,000 pages is amply supported in the record.
14 The District Court reached that conclusion on the basis of
15 evidence that showed that there had been a deliberate policy
16 of not responding to Mr. Weisberg's request.

17 And that that policy extended past the amending
18 of the Act, that he was not being treated as other requesters
19 were treated.

20 The -- Weisberg submitted affidavits on this. He
21 testified on this. His statements in that regard are un-
22 contradicted. The Department of Justice admitted to the
23 Congress of the United States in hearings before a Committee
24 of Congress that he, in fact, had been wrongly treated and
25 they promised to do something about all of his requests that

1 had not been responded to and that still has not been done.

2 So, under the unique circumstances of this case,
3 it seems to me quite clear that he substantially prevailed
4 in this litigation.

5 There is no showing that anything would have been
6 released to him except upon the filing of suit.

7 The fact that the claim was amended has no
8 bearing on the issues, really, that were litigated and for
9 which time is claimed.

10 We are claiming time with respect to the December
11 23rd request for litigating the fee waiver, for example.

12 Clearly, the litigation caused the ^{fee}"B" waiver to
13 be granted.

14 It is true that, ultimately, the Department of
15 Justice made that decision but they did so only after ig-
16 noring the request, not responding to the request at all for
17 a period of seven months -- not even responding at all to
18 the motion for a fee waiver filed November 30th, 1977.

19 They simply did not file a brief opposing it.

20 Then, they granted a partial reduction -- a 40
21 percent reduction.

22 We filed a new motion and then, months after that
23 motion was filed and after Mr. Weisberg had won a victory on
24 the fee waiver decision in another court pertaining to the
25 Kennedy assassination documents, then the Department of

1 Justice granted a complete ^{fee} "B" waiver.

2 I submit that it is painfully clear, under those
3 circumstances, that it was the litigation that caused the
4 granting of the fee waiver.

5 With respect to the field office files, for
6 example, the Government has made a new claim in its brief,
7 not advanced below -- in its reply brief, not advanced below --
8 that the field office records -- that we should have made
9 requests to the individual field offices for the records.

10 If you will look at page 569(M) of the -- 569(L)
11 and 569(M) of the Appendix, you will see a memorandum dated
12 March 25, 1976 from the legal counsel to Mr. Adams of the
13 FBI and on the second page, it has a paragraph in parenthe-
14 ses that says that they are recommending that they are going
15 to search the Memphis field office files for the photographs
16 and other materials.

17 And then it says, "This would be an exception to
18 the FOIPA's section's position that FBI headquarters searches
19 alone constitutes sufficient compliance with respect to FOIA
20 requests. However, this position is not considered tenable,
21 given the facts in this case and to attempt to defend it in
22 this litigation could very well result in a precedent-
23 setting daverse decision on this point."

24 The issue was never argued or briefed by the
25 Government in the Court below, for obvious reasons.

1 THE COURT: Your time has expired. I have one
2 question. Judge Green allowed it 50 percent acceleration
3 schedule?

4 MR. LESAR: Yes.

5 THE COURT: How do you square that allowance with
6 the Supreme Court's decision in Blum v. Stenson?

7 MR. LESAR: Well, the Supreme Court decision in
8 Blum v. Stenson does not really address the issue because it
9 addresses the question of a quality enhancement and reserves
10 for future decision the question of an enhancement due to
11 the contingency or risk factor involved.

12 That leaves in place this Court's holding in
13 Copeland v. Marshall.

14 And this Court has clearly held that the con-
15 tingency is proper.

16 We properly documented and argued in our brief
17 the nature of the contingency here. The magnitude of the
18 risk was quite great. The law was unsettled at the time the
19 complaint was filed. The magnitude of the undertaking was
20 considerable, more than 1,000 hours have already been risked
21 and there is, according to the Government's view, still no
22 certainty, in fact, that we should get any attorney fees at
23 all for this enormous undertaking.

24 In fact, the Government intends that, quite
25 plainly, that we are not entitled to a farthing.

1 So, the risk is quite justified and under the
2 precedent en banc in Copeland, should be upheld here.

3 THE COURT: What is your response to Mr. Koppel's
4 statement to the effect that the issue of substantially pre-
5 vailed was not, in fact, briefed?

6 MR. LESAR: Yes.

7 THE COURT: By the Government as well.

8 MR. LESAR: I thank you for bringing that up.

9 The Government chose not to brief it.

10 I think it has waived its substantially prevailed
11 argument.

12 It is true that the Court -- that we initially
13 moved to substantially -- for a ruling that we had substan-
14 tially prevailed.

15 The Court deferred ruling on that and then, later,
16 ruled that we had substantially prevailed.

17 The Government moved to reconsider that.

18 The Court denied it.

19 Then, when we moved for attorneys' fees, I briefed
20 the issue all over again.

21 They declined to respond to that issue.

22 In fact, all of the arguments that they made re-
23 garding whether or not we substantially prevailed are not
24 contained in their brief under "substantially prevailed."

25 Their brief, at page 2, says that "We are not

1 briefing this issue."

2 They did raise some of the factual claims, but
3 they did it under the issue of, "Is he entitled to an award?"
4 not, "Is he eligible for an award?"
5

6 They did not brief that issue and they chose not
7 to brief it.

8 Thank you, Your Honors.

9 THE COURT: Mr. Koppel, I will give you a minute.

10 REBUTTAL ARGUMENT OF JOHN S. KOPPEL, ESQ.

11 MR. KOPPEL: Thank you, Your Honors.

12 With respect to Plaintiff's last statement, that
13 the Department chose not to brief that issue, that is simply
14 untrue..

15 The Department -- the District Court originally
16 deferred briefing and decision of that issue until the end
17 of the case on the merits. It then unexpectedly decided
18 that issue without giving the Government an opportunity to
19 brief it, in its decision, including the case on the merits.

20 Thereafter, the Government moved for reconsidera-
21 tion on that issue.

22 The Court denied that, denied the Government's
23 motion and then the Government proceeded to brief and in sub-
24 sequent briefs, the Government simply briefed the issue of
25 entitlement -- the public benefit, the four factors test.

What Plaintiff did in his -- if the Plaintiff

1 chose to brief that issue again, the substantially prevailed
2 issue, in his four-factor brief, that did not give the
3 Government the right to challenge it at that point, since it
4 had already been decided by the District Court and reconsi-
5 deration had been denied.

6 Now, under the circumstances, it simply cannot be
7 said that the Government waived its position on the substan-
8 tially prevailed issue.

9 I notice that my red light is on so, in closing,
10 I would just like to state that, while we do not dispute
11 that he substantially prevailed with his small first request,
12 the April 23rd request, because he got the Time/Life photos,
13 as a result of them, we do challenge his entitlement to fees
14 for that work, since we maintain that the Time/Life photos
15 were already available to the public.

16 There was no benefit to the public and the
17 Government behaved reasonably in withholding them until this
18 Court -- or until Time/Life said that it did not want to be-
19 come embroiled in this litigation.

20 Now, with respect to the fee waiver, there, too,
21 we maintain that this is the result of the administrative
22 process.

23 If anything, if it resulted from any litigation,
24 it resulted from the Kennedy litigation, to which the Plaintiff
25 alluded, in which Judge Desell had denied the -- had granted

1 a fee waiver.

2 It was at that point that the Department adminis-
3 tratively decided to grant the fee waiver in this case.

4 It was not due to this litigation.

5 Moreover, we maintain that a fee waiver is not --
6 obtaining or securing a fee waiver is not sufficient to hold
7 that the Plaintiff substantially prevailed.

8 Now, regarding the multiplier. Your Honor has al-
9 ready discussed that. It is our position that the Plaintiff
10 must show extraordinary -- that the Supreme Court has held
11 in Blum that the Plaintiff only gets a multiplier in an
12 extraordinary case and we have shown in our supplemental
13 brief that Plaintiff has shown no risk above and beyond --
14 that, first of all, Plaintiff did not achieve extraordinary
15 results here and second of all, he did not show any risk
16 above and beyond that normally attendant to every case.

17 In closing, I would urge the Court to hold that
18 the District Court's decision awarding the Plaintiff approxi-
19 mately \$110,000 in fees and costs must be reversed.

20 And if there are no further questions, I thank
21 the Court.

22 THE COURT: All right, the case is submitted.
23 [Whereupon, the case was submitted.]
24

25