SUPPLEMENTAL BRIEF FOR APPELLANT/CROSS-APPELLEE WEISBERG

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 82-1229

HAROLD WEISBERG,

Appellant/Cross-Appellee

v.

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

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Preliminary Statement

Subsequent to the oral argument in the above cases, appellee/cross-appellant Department of Justice ("the Department") sought permission to file a supplemental brief "concerning the issue of whether the Freedom of Information Act, 5 U.S.C. 552, requires the FBI to search for records of third parties who have not waived their

rights under the Privacy Act, 5 U.S.C. 552a, absent a showing of public interest in the information sought by the requester." The Department claimed in support of its motion that Weisberg's counsel contended at oral argument, for the first time on appeal, that under Antonelli v. Department of Justice, 721 F.2d 615 (7th Cir. 1983), pet. for cert. pending, S. Ct. No. 83-6312, Weisberg had in fact demonstrated an adequate public interest in the material in question; that counsel based this assertion on two affidavits which he had not placed in the joint appendix or referred to in his appellate briefs; that, furthermore, he made this assertion on rebuttal; and that the Department therefore had no opportunity to respond to Weisberg's public interest claim. Defendant-Appellee/Cross-Appellant's Motion for Permission to File a Supplemental Brief at 2.

In addition to these representations, which create the impression that Weisberg's counsel unfairly took advantage of the Department at oral argument by addressing on rebuttal a matter not previously raised, the Department's Supplemental Brief asserts that affidavits which Weisberg filed in April, 1981 to show the nexus between individuals named in his December 23, 1975 request and the subject matter of the King assassination "were filed in April, 1981, more than a year after the district court determined that the FBI had conducted an adequate search of its King assassination files[;]" and that "[t]hus the district court has never had an adequate opportunity to focus on plaintiff's 'public interest' claim in this case." Department's Supplemental Brief at p. 3 n.1.

These representations distort the record in this case and thus require correction. To begin with, they take the remarks of Weisberg's counsel concerning the public interest showing made by Weisberg out of context, wrongly implying that he unfairly and without basis raised a new issue on rebuttal. This is a case of the pot calling the burnished silver chalice black.

Rather, Weisberg's counsel called the Court's attention to Weisberg's showing on rebuttal because the Department's counsel misrepresented the case record during his own presentation. This occurred during the following exchange between Department counsel and a member of the panel:

> THE COURT: Well, is it your position, to come back to the facts of this case, of simply providing a list of names without more will not do?
>
> MR. KOPPEL: That is correct, Your Honor.
>
> THE COURT: And that that is all that was done. Is it your position that that is all that was done here? That there was so supplementation so as to demonstrate any nexus at all?
>
> MR. KOPPEL: That is correct, Your Honor. There is no indication that these individuals have any meaningful role in the King assassination association (sic).

(Emphasis added) Oral Argument Transcript at 38-39.[1/]

Because the record in fact contains two affidavits which in considerable detail establish a nexus between each of the individuals

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1/ Weisberg's counsel, having himself listened to the tape of the May 8 oral argument, believes that the last word quoted in this passage has been incorrectly transcribed as "association" instead of "investigation." Additionally, the first question put by the Court should read "that simply providing" rather than "of simply providing."

listed in the December 23 request and the subject of the King assassination, Weisberg's counsel sought to correct this misrepresentation by calling the Court's attention to the public interest showing that Weisberg had in fact made. He made no argument "under Antonelli" or otherwise; he simply stated that the district court had ordered Weisberg to show the nexus between the individuals named in the December 23 request and the King assassination, and that although he did not feel he was required to make such a showing, Weisberg had complied with the court's order. Transcript of oral argument at 53-54. (Hereafter, "O.A.")

The Department's assertions in its Supplemental Brief that "[t]hese affidavits were filed in April, 1981, more than a year after the district court determined that the FBI had conducted an adequate search of its King assassination files[,]" and that "[t]hus the district court has never had an adequate opportunity to focus on plaintiff's 'public interest' claim in this case," also distort the record. The district court's February 26, 1980 "Finding as to Scope of Search" which is cited by the Department in support of this claim made no finding either that the FBI had adequately searched all items of Weisberg's requests or that all relevant materials were located in the FBI's "King assassination files." To the contrary, with respect to the FBI's search of its Headquarters records, the court limited its finding to stating that a proper and good faith search had been made "for all items responsive to plaintiff's request in the FBI Headquarters' Murkin files. . . ." [JA 477] And although its finding with respect to the search of

the FBI's field office files was not similarly limited, it later found it necessary to modify that part of its finding when Weisberg established that materials pertinent to the assassination of Dr. King were located in non-MURKIN field office files. See December 1, 1981 order directing release of non-MURKIN materials in Memphis Field Office files 100-4105 and 149-121, and three internal memoranda of the Savannah Field Office. [JA 587-588] At the hearing held on August 15, 1980, the district court made it clear that her February 26, 1980 "Finding as to Scope of Search" did not foreclose issues regarding the search for non-MURKIN materials responsive to Weisberg's requests. Referring to her February 26th ruling, she stated that "we will not get back into the MURKIN files," but immediately added:

> Now I know that many of the things that you are saying have to do with things not in the MURKIN file and I am willing to go into all of those things. . . .

Tr. at 12. [R. 181] Thus, nearly six months after the date on which the Department says the district court closed all aspects of the search issue, the court herself said it was open as to non-MURKIN materials.

Nor is it accurate to state that the district court never had an adequate opportunity to focus on Weisberg's "public interest" claim. On April 6, 1981, the district court heard arguments on Weisberg's November 15, 1980 motion to compel a further search. That motion explicitly stated:

> A central problem in this case is that there has been no search at all for records responsive to many items of plaintiff's requests, particularly his request of December 23, 1975. Plaintiff has made this charge repeatedly throughout the long history of this case. At the August 15, 1980, hearing a witness for the defendant . . . confirmed it.

Memorandum of Points and Authorities in support of Motion to Compel Further Search, p. 1. [R. 183] The Department simply chose to ignore this issue and the remarks concerning the search issue made by the district court at the August 15 hearing. The Department opposed this motion solely on the ground that the district court's Finding as to Scope of Search, as modified in part by its order of September 11, 1980 [JA 523-524], had settled the search issue. In so doing, the Department mischaracterized the court's February 26th Finding as having determined that a good faith search had been made "of FBI files." Memorandum of Points and Authorities Opposing Motions (1) to Compel Further Search and (2) to Disclose FBI Field Office Records Withheld as "Previously Processed" at p. 1. [R. 186] This characterization eliminated the qualification on the court's February 26th ruling. The September 11 order did not purport to settle the search issue, nor did it do so.

In opposing Weisberg's motion to compel a further search, the Department did not argue that privacy considerations barred a search of the items of the requests which listed individuals. Nevertheless, at oral argument on April 6, 1981, the Department's counsel invoked the Privacy Act as a bar without articulating any legal rea-

son why uttering these words should magically relieve the FBI of its obligation to search for requested records. April 6, 1981 hearing, Tr. at 70-71. [R. 213] Weisberg's counsel argued that if the Department contended that the Privacy Act prohibited the searches, then "the proper procedure is for the Department to move for summary judgment on grounds of privacy and properly brief the matter and I will respond." Id. at 71.

The Department opposed briefing the issue, absent a "dispositive" court order to do so. Id. at 72. The district court, countermanding an earlier verbal order that items of the request be searched, id. at 55, then placed a burden of demonstrating "need" or "a valid reason" for searching the specific items of the request upon Weisberg. Id. at 72-74. Although Weisberg's counsel argued that this was not required by the Freedom of Information Act, id. at 73, Weisberg nevertheless complied with the court's directive by filing two detailed affidavits establishing the nexus between the individuals listed in the December 23 request and the King assassination. [R. 212]

The Department filed no counteraffidavit or legal memorandum challenging the sufficiency or accuracy of the two affidavits submitted by Weisberg.[2/] The district court took no action on the motions argued on April 6, 1981 until some eight months later. Thus,

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2/ The two affidavits and a brief covering memorandum which accompanied them are reproduced in the addendum to this brief.

the district court, contrary to the Department's assertion, had abundant opportunity to focus on Weisberg's public interest claim. To the extent that the court's capacity to consider the issue was at all circumscribed, this was entirely due to the Department's obstincy in declining to brief the issue without a "dispositive" court order requiring it to do so. Under the Act, the burden of demonstrating the adequacy of the search or justifying any limitations on it is clearly the agency's. The Department simply made no effort in the district court to carry that burden.

ARGUMENT

I. THE PRIVACY ACT DOES NOT RELIEVE AN AGENCY OF ITS OBLIGATION TO SEARCH FOR ALL RECORDS RESPONSIVE TO A FREEDOM OF INFORMATION ACT REQUEST

By its terms, the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, applies to all agency records. The Act itself provides no limits on the kind or quantity of agency records which may be requested. Consequently, an agency moving for summary judgment under FOIA must demonstrate "that each document that falls within the class requested 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, 94, 479 F.2d 183, 186 (1973).

Seeking to circumvent the Act's search requirements, the Department argues that a FOIA plaintiff must demonstrate "a compelling

public interest" or "significant public interest" before the FBI is required to search the files of individuals. O.A. at 27-28. Unable to cite any provision in the FOIA justifying the errection of such a barrier to access, the Department contends that it is nonetheless not an Executive Branch engraftment on the Act but "is the logical result of the interaction between the Freedom of Information Act and the Privacy Act. . . ." O.A. at 40.

This Court previously addressed the relationship between the Privacy Act and the Freedom of Information Act in Greentree v. U.S. Customs Service, 218 U.S.App.D.C. 231, 674 F.2d 74 (1982), which held that the Privacy Act was not an Exemption 3 statute under FOIA. Although this case dealt with an exemption claim rather than the search issue, its consideration of the relationship between the two acts disposes of the Department's contention that the Privacy Act prevents it from searching the files of third parties.

Greentree discussed the legislative history of the Privacy Act in exhaustive detail. It noted that the House bill which became the Privacy Act initially contained a restriction on the disclosure of individually-identifiable records, then stated that:

> After negotiations between the House and Senate, the House bill was adopted, but with two significant amendments. One amendment--now section 552a(b)(2)--modified the House's restriction on disclosure so that the Privacy Act would not interfere with public access under FOIA.

Id., 674 F.2d at 240. The court further noted that the compromise

amendment was explained to both Houses of Congress in this way:

> The compromise amendment would add an additional condition of disclosure to the House bill which prohibits disclosure without written request of an individual unless disclosure of the record would be pursuant to the Freedom of Information Act. This compromise is designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information under that section.

Id., citing remarks to the Senate by Senator Ervin, and to the House by Representative Moorhead. The Greentree court concluded that:

> The net effect of the compromise was to reinstate the essence of the Senate Committee's original provisions . . . holding separate each act's exemptions from disclosure. *** In the absence of persuasvie evidence to the contrary, we conclude from this review that Congress meant to continue business as usual with respect to access under FOIA. (Footnote omitted)

Id.

If Congress wanted to hold the two acts separate and "continue business as usual with respect to access under FOIA," then the Privacy Act does not intrude upon the search requirements imposed by FOIA. Moreover, if Congress wished to ensure that the Privacy Act would not interfere with public access by exempting records available under FOIA, then it follows a fortiori that it did not intend that agencies would be permitted to abort such access by avoiding the search that is a necessary predicate to such access.

The barrier to public access which the Department seeks to erect would make a shambles of the Freedom of Information Act. It would shift the burden of demonstrating the non-availability of

government records from the agency and place on the requester the burden of proving public interest in disclosure in circumstances where he might not even be able to establish the existence of such materials, much less attest to the nature and significance of their contents.

In addition, it would eliminate the principle of de novo review mandated by the Act. The agency's determination that insufficient public interest existed to warrant even a search would be effectively unreviewable. Because the agency refused to make the search, the court would not be able to review the documents in camera. For the same reason, the agency would be unable even to advise the court of their importance by means of an in camera affidavit. The agency would act both as advocate and judge, and there could be no meaningful appeal from its verdict.

Finally, the ruling which the Department seeks would enable agencies to hide embarrassing or controversial materials from public scrutiny by placing them in the files of individuals. This consideration is neither academic nor far-fetched. It was the FBI, the selfsame defendant in this lawsuit, which devised the sophisticated "Do Not File" procedures which enabled it to destroy or deny the existence of records pertaining to its illegal and "embarrassing" activities.[3/]

3/ Congress investigated the "Do Not File" procedures in 1975. See "Inquiry Into the Destruction of Former FBI Director J. Edgar Hoover's Files and FBI Recordkeeping," Hearing before a Subcommittee of the Committee on Government Operations, 94th Cong., 1st Sess. (1975). For a scholarly treatise, see "In-House Coverup: Researching FBI Files," in Beyond the Hiss Case: The FBI, Congress and the Cold War, Athan G. Theoharis, ed., (Philadelphia: Temple University Press, 1982).

II. ANTONELLI WAS INCORRECTLY DECIDED; ALTERNATIVELY, ASSUMING THAT ANTONELLI WAS CORRECTLY DECIDED, IT IS INAPPOSITE

A. Antonelli Was Incorrectly Decided

The Department relies on Antonelli v. Department of Justice, 721 F.2d 615 (7th Cir. 1983), pet. for cert. pending, S. Ct. No. 83-6312, for the proposition that the FBI may not be required to confirm or deny the existence of the records sought by a requester "where acknowledgement of the very existence of the records could invade a third party's privacy and the requester ha[s] not demonstrated an adequate public interest in justifying disclsoure." Defendant's Supplemental Brief at 3-4. To the extent that Antonelli holds that the FBI may refuse to confirm or deny the existence of records on a third party without first conducting a search, it was wrongly decided.

Antonelli was wrongly decided for the reasons set forth in Part I, supra, at pages 10-11. First, the Antonelli principle would shift the burden of demonstrating the non-availability of requested records from the agency and require the requester to prove public interest in their disclosure. Secondly, it would negate the principle of de novo review, since neither the district court nor the agency could have any factual basis for assessing the public interest which might inhere in the contents of unsearched for records. Thirdly, the basis under FOIA for refusing to confirm or deny the existence of FBI records on a third party rests on two

exemptions, (b)(6) and (b)(7)(C), which require a balancing of public interest against invasion of personal privacy. Such a balancing cannot occur without a search for, and review of, the requested documents.

B. Assuming that Antonelli Was Correctly Decided, It Is Inapposite

Antonelli, even if correctly decided, is not apposite to the facts of this case. In Antonelli the FBI submitted an affidavit stating that if the requested records existed, they would be exempt from disclosure pursuant to 5 U.S.C. § 552(b)(6) or (b)(7). No such affidavit has been submitted in this case, nor is it apparent how any such affidavit could be executed in good faith without a search first having been conducted.

The FOIA prescribes a three-part test for withholding information under Exemption 7: in order to be withheld, the material must be (1) an "investigatory record," (2) must have been "compiled for law enforcement purposes," and (3) must satisfy the requirements of one of the six subparts of Exemption 7. Pratt v. Webster, 218 U.S.App.D.C. 17, 22, 673 F.2d 408, 413 (1982). The FBI, like any other federal agency, must meet the threshold requirements before it may withhold requested documents on the basis of its subparts. Id., 673 F.2d at 416.

Thus, no Exemption 7 claim can be asserted in this case until the FBI has searched its files to determine whether there are

responsive materials which meet the threshold requirements. That some of the materials sought by Weisberg's December 23, 1974 request may not meet the threshold requirements may be gathered from reading the four items of the request which are set forth in the margin on page five of the Department's Supplemental Brief. Three of the four items listed there are for correspondence between named persons and the Department of Justice. The holding in Antonelli was conditioned on the finding that "revealing that a third party has been the subject of FBI investigations is likely to constitute an invasion of that person's privacy." 721 F.2d at 618. (Emphasis added) The mere act of exchanging correspondence with the Bureau does not make the correspondent "the subject of an FBI investigation," much less one compiled for law enforcement purposes.[4/]

Like Exemption 7(C), Exemption 6 implicates privacy values and involves a balancing of privacy concerns against the public interest in disclosure in order to determine whether release of the materials would constitute a "clearly unwarranted" invasion of privacy. Such a balancing cannot be made without first making a search to determine the nature and contents of the records, if any, which are responsive to the request.

4/ At oral argument Department counsel stated that Weisberg was seeking "considerably more than just the relevant material on those individuals as it relates to the assassination investigation." O.A. at 32. To the contrary, at the April 6, 1981 hearing, Weisberg's counsel stipulated that the materials sought by these items would be limited to the subject matter of the King assassination. Tr., 59, 62. [R. 213]

III. EVEN IF ANTONELLI WAS CORRECTLY DECIDED AND ITS HOLDING APPLIES TO THIS CASE, A SEARCH IS STILL REQUIRED

A. Weisberg Has Made a Sufficient Showing of "Public Interest" or "Nexus" to Require a Search

Although the Antonelli court upheld the FBI's refusal to confirm or deny the existence of some of the records requested, it noted that Antonelli's request "failed to identify any viable public interest against which the court could weigh the privacy and agency interests at stake." 721 F.2d at 619. Under these circumstances, it held that the affidavit submitted by the FBI met the agency's threshold burden of showing why the requested information is exempt from disclosure. Antonelli stated, however, that "[t]he FBI would have had a greater burden if Antonelli had identified some public interest to be served by disclosing the information." Id.

In this case the public interest in disclosure is self-evident. The Department of Justice recognized it long ago when it decided that where records concerning the assassination of Dr. King were concerned, it would "waive[] privacy rights against public interest" and release pertinent documents to the public. (This waiver is reported in a May 16, 1978 memorandum by FBI Legal Counsel. See Motion to Compel Further Search, Attachment 2, p. 3.)

Additionally, the district court directed Weisberg to demonstrate the importance of the persons listed in his December 23rd request, and although Weisberg objected that this was not required under FOIA, he nonetheless complied with the directive.

On April 30, 1981, Weisberg filed two detailed affidavits which described the relationship of each of these individuals to the general subject of the King assassination. For example, an affidavit by Weisberg's counsel, after noting that Item 14 of the request sought all correspondence of twelve listed individuals, asserted:

> These persons are all "players" in the King/Ray case. Their correspondence regarding the King/Ray case would make it possible to write in greater detail and with more accuracy about . . . the King/Ray case.

April 29, 1981 Affidavit of James H. Lesar, ¶18. [Addendum at 9a]

The second affidavit, by Weisberg himself, dealt at some length with Item 11 of the request, which has to do with surveillance, broadly defined, of persons listed therein who are major "players" in the King/Ray case. See April 20, 1981 Weisberg Affidavit, ¶¶12-30. [Addendum at 13a-17a] Weisberg's affidavit set forth some of the known surveillances of James Earl Ray, Ray's relatives, the trial judge in the Ray case, and Ray's defense lawyers. His affidavit was based on a variety of sources, ranging from documents made available during the course of this litigation to "[a] close relative of one of Ray's prosecutors [who] informed me of the electronic surveillances conducted by Ray's defense counsel." Id. ¶14. The declarations made in the Lesar and Weisberg affidavits stand uncontradicted.

Weisberg continues to insist that the Freedom of Information Act imposes no requirement that he prove or even allege "relevancy"

or "demonstrably significant nexus" or "public interest" before an agency is required to conduct a search for records pertaining to a third-party. Such a requirement effectively saddles the requester with a burden which Congress clearly intended the agency to carry. Moreover, such a requirement would inevitably generate innumerable legal contests, thus driving up the cost of obtaining information and further burdening the judiciary. The Department has not shown or even alleged that FOIA requesters are abusing the Act by requesting searches on randomly selected names. The Lesar and Weisberg affidavits make it clear that Weisberg has acted very responsibly in selecting the specific names he wants searched. 5/

Nevertheless, should this Court determine that some such showing is required, then Weisberg submits that the showing he did make in district court more than meets any reasonable standard. Each item of the request "is based on reason to believe that the information exists and is significant." April 20, 1981 Weisberg Affidavit, ¶31. [Addendum at 18a] Much of the information sought relates to illegal government surveillance of James Earl Ray, his family, lawyers and investigators, or to circumstances surrounding Ray's allegedly coerced guilty plea. There is clearly a great public interest in disclosing information concerning wrongful government activity, such as illegal surveillance. Because of Ray's at-

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5/ These affidavits also refute Department counsel's derrogatory references to the items of the December 23rd request as "a laundry list of names." O.A. at 24, 31. Each person named in the request played a role in the Ray/King case, and each item of the request was based on reason to believe that the information sought exists and is significant. April 20, 1981 Weisberg Affidavit, ¶31. [Addendum at 18a]

tempts to overturn his guilty plea and questions about the role played by Department of Justice officials and members of Dr. King's family in the guilty plea, materials concerning the guilty plea are also of interest to the public. The public interest in all the materials sought by the December 23rd request is further enhanced by the need for maximum possible disclosure of all relevant information in order to facilitate accurate writing about important historical events. This showing goes far beyond that attempted by the pro se plaintiff in Ray v. Department of Justice, 558 F. Supp. 226 (D.D.C. 1982), aff'd without opinion, 720 F.2d 216 (D.C.Cir. 1983), a case relied upon by the Department.

B. Regarding Remand of the Antonelli Issue

The Department asserts that Weisberg has failed to demonstrate a sufficient public interest to justify a search under the names of the individuals listed in his December 23rd request. It then goes on to argue that this Court need not address this issue because "it is not properly before the Court at this time." Department's Supplemental Brief at 4-5.

Should this Court determine that some "public interest" showing is required before searches of third-party files may be undertaken, there is no need to remand the issue to the district court for her consideration. The Department had ample opportunity in district court both to brief the issue and to respond to Weisberg's

public interest showing. It failed to do either. Thus, Weisberg's public interest showing was unchallenged. The Department thereby waived its right to challenge the sufficiency of Weisberg's showing.

In arguing that this Court need not address the sufficiency of Weisberg's public interest showing, the Department makes a number of factually inaccurate statements. Among other things, it asserts that (1) throughout these proceedings the FBI has consistently and reasonably interpreted Weisberg's December 23 request as pertaining exclusively to the MURKIN file; (2) Weisberg did not even focus on the FBI's approach to his December 23, 1974 request until November 11, 1980, more than seven months after the district court had determined that the FBI had conducted an adequate search of its King assassination records; and (3) to the extent that information on the individuals listed in the request exists, it is located in the MURKIN file. Id., 6-7.

The assertion that Weisberg did not even focus on the FBI's approach to his December 23rd request until November 11, 1980, is blatantly false. November 11, 1980 is the date of Weisberg's Motion to Compel Further Search. As noted above, page six, that motion stated that "repeatedly throughout the long history of this case" Weisberg had charged "that there has been no search at all for records responsive to many items of [his] requests, particularly his request of December 23, 1975." Even a cursory review of the case record substantiates the remarks made by Weisberg's counsel and reveals the untruthfulness of the Department's claim.

For example, nearly two and a half years before the date given by the Department, Weisberg's counsel responded to remarks

made by FBI Special Agent Horace P. Beckwith at the May 24, 1978 status call by focusing on the failure to search specific items of the request, stating:

> Now, Mr. Beckwith has spoken only about MURKIN files. The request does not specify MURKIN files, it specifies categories of information and the FBI filing procedures mean that there is information relevant to the request which is contained in files which are not part of what they call MURKIN files. One obvious example of that is the request asks for records pertaining to surveillance on numerous people. . . . Those materials may be contained and I think will be contained in other files which have not been searched.

(Emphasis added) Tr. at 17. [R. 73]

Nor was this an isolated instance. Earlier, Weisberg wrote Deputy Assistant Attorney General William Schaffer that "[w]ith the search limited to MURKIN," retrieving records responsive to the "surveillance item" [Item 11 of the December 23rd request] "is an assured impossibility." November 25, 1977 Weisberg letter to Schaffer, p. 4. [JA 757] Still earlier, Weisberg complained that he had received no materials on the Invaders, an item of his request, even though FBI Director Kelley, in response to news stories on "the Cointel/Invaders Memphis police operation that was responsible for the violence," had ordered a special investigation made in the Memphis Field Office. Testimony of Harold Weisberg at September 17, 1976 hearing. Tr. at 189. [R. 218] And whenever a suitable occasion arose, Weisberg's counsel called attention to the failure to search specific items of the request:

> And there has not even been any attempt, for example, with respect to the second of the two requests, the December 23rd request. There's been no search at all.

February 8, 1980 hearing. Tr. at 32. [R. 147]

> Well, very simply, they have not even made a claim that they have searched for most of the items in the December 23rd request.

February 26, 1980 hearing. Tr. at 16. [R. 174] These examples, although amply refuting the Department's spurious claim, do not, however, begin to exhaust the occasions on which Weisberg insisted upon the need to search the individual items of the December 23rd request.

The Department's statement that the FBI has consistently and reasonably interpreted Weisberg's December 23rd request as pertaining exclusively to the MURKIN file is wholly untenable. Although FBI Special Agent John Hartingh did tell the district court that in the FBI's point of view everything pertaining to the assassination of Dr. King is in the MURKIN file [JA 267], when Weisberg's counsel responded that "[e]verthing which pertains to Mr. Weisberg's request is not in the Merken (sic) file, Hartingh conceded the point: "Right, because you have requests for other subjects." June 30, 1977 hearing. Tr. at 32. [R. 41]

Refusing to concede on appeal what Hartingh admitted in district court, the Department proclaims that the FBI always maintained that files on certain groups and subjects, such as the Invaders and the Memphis Sanitation Workers Strike, "were not within the scope of plaintiff's requests." Department's Supplemental Brief at 6 n.5.

This self-serving declaration, based solely on the improper "testimony" of the Department's appellate counsel, is utterly ridiculous. Obviously, the scope of a request is determined by its terms, by what the requester asks for. Since Items 23-25 of Weisberg's request plainly ask for materials on the Invaders and the Memphis Sanitation Workers Strike, the files on them are with the scope of the request whether the FBI likes it or not.[6/] The FBI's arrogant attempt to rewrite Weisberg's requests to give him what it wanted to give him rather than what he requested belies its profession that in belatedly releasing these materials to him in late 1977 pursuant to stipulation it was trying to "accomodate" him.[7/]

Nor is it true that all information on the King assassination is contained in the MURKIN file. Although the FBI made this representation to Weisberg and the district court, on occasion it was forced to admit that it is not true. For example, in releasing materials on Russell Byers to Weisberg, the FBI stated:

6/ The FBI had good reason not to like it. These materials were highly embarrassing to the Bureau, revealing massive surveillance on blacks suggestive of a police state. See Gerald D. McKnight, "The 1968 Memphis Sanitation Strike and the FBI: A Case Study in Urban Surveillance," The South Atlantic Quarterly (Spring, 1984).

These files contain several thousand pages. According to Mr. McKnight, who thanks Weisberg for allowing him to reproduce the Memphis Sanitation Strike and Invaders files, the Memphis Sanitation Workers' Strike file alone contains more than 2,000 documents. Id., fn. 1.

7/ It is not clear how the FBI can reconcile its claim that Weisberg received, or would have received these materials as a result of the administrative processing of his request with its claim that it has always considered them outside the scope of his request.

> The enclosed documents originated with our St. Louis Field Office, and while they are not filed in that Office's file on the investigation of the assassination of Martin Luther King, Jr. (Murkin), they are pertinent to that investigation. . . .

August 2, 1978 letter from Allen H. McCreight to Harold Weisberg, p. 2. November 20, 1978 Weisberg Affidavit, Exhibit 1. [R. 87]

The Byers' materials concerned an informant's claim that he had been offered money to kill Dr. King. Upon discovery of this alleged "St. Louis plot," the House Select Committee on Assassinations expended considerable time and energy investigating it. It discussed it extensively in its final report, under the heading "Evidence of a Conspiracy in St. Louis." See Report of the Select Committee on Assassinations, 95th Cong., 2d Sess., pp. 359-374. The Byers' materials well illustrate the importance of records which may be found in the files of third parties. They also illustrate the need to search for and examine the contents of records contained in files on third parties before any assessment of the public interest in their disclosure can be made.

Another example of the FBI's having admitted, reluctantly, that non-MURKIN files do hold records pertinent to the King assassination topic, occurred during the deposition of Special Agent Thomas L. Wiseman. Presented with a copy of a document captioned "Gerold Frank, Author, Desire to Do Book on Assassination of Martin Luther King, Bureau File 94-63917," Wiseman ultimately conceded under questioning that it indicated that not all documents pertaining to

books on the King assassination, would be in the MURKIN file. Deposition of Thomas L. Wiseman at 248. [R. 125]

Other examples, though apparently not conceded by the FBI, abound. For instance, non-MURKIN files in the Memphis Field Office contained a bomb threat, made three days before King was shot, that "Your airlines brought Martin Luther King into Memphis and when he comes in again a bomb will go off and he will be assassinated." See Reply Brief and Cross-Appellee's Brief for Weisberg at 48.

Another example concerns records on Oliver Patterson, a former FBI informer who successfully penetrated the legal defenses of both James Earl Ray and his brother John. May 25, 1979 Weisberg Affidavit, ¶216. [R. 96] Although some of the records pertaining to Patterson's surveillance "clearly are MURKIN records . . .[,] the FBI excluded them from any MURKIN filing." Id., ¶218.

The Long Tickler File is yet another example of a non-MURKIN file found to have contained important King assassination materials, including some not duplicated in the MURKIN files. Thus, ". . . a major part of the MURKIN conspiracy investigation is not included in any MURKIN file at HQ or the field offices. It is filed separately, classified as bank robbery files." May 14, 1980 Weisberg Affidavit, ¶110. [R. 165]

The rationality and bona fides of the FBI's assertion that materials related to the King assassination are to be found only in the MURKIN files is contradicted by the March 27, 1980 memorandum

of Mr. Quinlan J. Shea, Jr., then Director of the Office of Privacy and Information Appeals. Mr. Shea, who became intimately familiar with the King assassination files as part of his special administrative review of the records released in this case, stated:

> I am personally convinced that there are numerous additional records that are factually, logically and historically relevant to the King and Kennedy cases which have not yet been located and processed--largely because the Bureau has "declined" to search for them.

[JA 613]

Indicative of the correctness of Mr. Shea's observations, the need of Weisberg to file suit to obtain any records he has requested and the insincerity of the FBI's claim that it has been trying to accomodate him (the Department's representation in note 5 of its Supplemental Brief), is the fact that even where he has provided privacy waivers from the individuals concerned, the FBI still has not provided pertinent records. See April 20, 1981 Weisberg Affidavit, ¶18. [Addendum at 15a] (At the time of the representations in Weisberg's April 20, 1981 affidavit, the records had not been provided three years after Weisberg had provided privacy waivers and appealed the withholdings. It has now been more than six years!)

The claim that Weisberg "actually benefited" (emphasis in the original) from the Bureau's "reasonable interpretation" of his request, is without foundation. Weisberg knew what kind of informa- he was looking for and requested it. Instead, he was given the

entire MURKIN file containing a lot of material not at all responsive to his request. He has repeatedly made it clear that he did not appreciate the Bureau's substitution of the MURKIN file for his actual request, a substittion which has served to divert attention and stonewall that request for eight years:

> The 'mass of information,' most of which is absolute junk and a paper monument to the FBI's dedication to the irrelevant as a substitute for investigating the crime, was forced upon me when I was hard put to pay the copying costs.

May 25, 1979 Weisberg Affidavit, ¶167. [R. 96]

* * *

The foregoing represents a concerted effort by Weisberg to correct misrepresentations and errors made by the Department in its oral argument and its Supplemental Brief. Unfortunately, it is not exhaustive. Similarly problems with the accuracy of the Department's representations exist with respect to the briefs it filed before oral argument. Although Weisberg sought permission to exceed the page limit for his Reply and Cross-Appellee's Brief so that he might have an opportunity to correct these errors, that motion, opposed by the Department, was denied. Weisberg requests that in light of the above showing, the Court exercise particular care in accepting the representations made to the Court by the Department.

CONCLUSION

For the reasons set forth above, this Court should hold that neither the Privacy Act nor the exemption provisions of the Freedom of Information Act require a FOIA requester to make a showing of public interest or nexus before a search of third party files is undertaken. The Court should remand the case to the district court so that the appropriate searches can be made.

Alternatively, if this Court determines that some showing of public interest or nexus is required, the Court should find that Weisberg has met that standard or that the Department has waived its right to assert otherwise because of its failure to properly raise the issue in the court below. It should then remand the case for the required searches.

Respectfully submitted,

JAMES H. LESAR
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Arlington, Va. 22209
Phone: 276-0404

Attorney for Plaintiff

A D D E N D U M

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM TO THE COURT

At the last status call in this case the Court indicated that plaintiff would have to make a showing as to the public prominence of certain persons in the Martin Luther King/James Earl Ray case before the Court would order defendant to conduct a search for records pertaining to persons listed in certain items of plaintiff's December 23, 1975 request. Attached hereto are two affidavits, one by plaintiff Harold Weisberg, the other by his counsel, James H. Lesar, which identify the persons listed and give some indication of their role in the King/Ray case. The Weisberg affidavit, executed the day he was rushed to Georgetown University Hospital from Frederick, Maryland by ambulance for emergency surgery, focuses upon the importance of the surveillance items of the request. While more detail concerning the status of the persons listed on these items of the requests as "promiment public figures" could be given, those stated are both sufficient for the purpose and irrefutable. If, however, defendant disputes the characterizations, plaintiff will, of course, supply additional information.

Respectfully submitted,

James H. Lesar

James H. Lesar
2101 L Street, N.W., Suite 203
Washington, D.C. 20037

Phone: 223-5587

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AFFIDAVIT OF JAMES H. LESAR

I, James H. Lesar, first having been duly sworn, depose and say as follows:

1. I am attorney for plaintiff Harold Weisberg in the above-entitled cause of action.

2. By letter dated December 23, 1975, I made request on Mr. Weisberg's behalf for certain categories of records pertaining to the assassination of Dr. Martin Luther King, Jr. Item 7 of that request is for "[a]ll correspondence and records of other communications exchanged between the Department of Justice or any division thereof and:

R.A. Ashley, Jr.
Harry S. Avery
James G. Beasley
Clay Blair
David Calcutt
John Carlisle
Robert K. Dwyer
Gov. Buford Ellington
Michael Eugene
Percy Foreman
Gerold Frank
Roger Frisby
Arthur Hanes, Jr.
Arthur Hanes, Sr.
W. Henry Haile
William J. Haynes, Jr.
William Bradford Huie
George McMillan
William N. Morris
Jeremiah O'Leary
David M. Pack
Lloyd A. Rhodes
J.B. Stoner
[Hugh Stanton, Jr.]
[Hugh Stanton, Sr.]

(The last two names on this list do not appear in the December 23, 1975 FOIA request because they were mistakenly put down as "Hugh Stoner, Jr." and "Hugh Stoner, Sr." This error was later corrected.)

3. Sixteen of the twenty-five names of this list are lawyers who represented James Earl Ray or the authorities who prosecuted him. David Calcutt was the British barrister who represented the United States at the extradition proceedings of James Earl Ray. Roger Frisby and Michael Eugene were, respectively, the barrister and the solicitor who represented James Earl Ray at those proceedings. Subsequent to his extradition, Ray was represented by the following lawyers on this list: Percy Foreman, Arthur Hanes, Jr., Arthur Hanes, Sr., J.B. Stoner, Hugh Stanton, Jr., and Hugh Stanton, Sr. The State of Tennessee, which prosecuted Ray, was represented by James G. Beasley, Robert K. Dwyer, W. Henry Haile, William J. Haynes, Jr., David M. Pack, and Lloyd A. Rhodes.

4. In addition to representing James Earl Ray, Percy Foreman and Arthur Hanes, Sr. wrote about the Ray case and the Ray guilty plea in Look magazine. They were paid to do so. Foreman and the Haneses also were paid by William Bradford Huie to represent Ray, an arrangement that has been publicly criticized by those familiar with the Ray case, including Mr. Weisberg.

5. Any communications between the Justice Department and the officials who represented the State of Tennessee or the United States Government regarding the Ray case would necessarily be imbued with a significant public interest simply because of their pertinence to events of great public importance and controversy. Among other things, knowledge of such communications would enable more detailed and more accurate writing about these events. Moreover, there is no privacy interest involved in records of communications made by public officials in their official capacity.

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6. Similarly, the attorneys who represented James Earl Ray are public figures who have not protectible privacy interest in matters concerning the Ray case. During the periods that they represented Ray, Foreman and Arthur Hanes, Sr. received extensive publicity in the media. To a lesser extent, Hugh Stanton, father and son, and J.B. Stoner did also. The conduct of Foreman, Hanes, and the Stantons has been the subject of extensive publicity. In 1974 the United States District Court for the Western District of Tennessee-Memphis Division held a two-week evidentiary hearing which focused upon: (1) allegations that Foreman and the Haneses had a conflict of interest because their fee was paid by William Bradford Huie out of the sale of the exclusive literary rights he had been granted to the James Earl Ray story; (2) allegations that Foreman, the Haneses, and the Stantons had ineffectively represented Ray; and (3) allegations that Foreman had coerced Ray's guilty plea. Particularly because Ray continues to insist that he did not shoot Dr. King and there is reason to believe that more than one person had to have been involved in the assassination, the public interest in the disclosure of all of the Ray case activities of these Ray lawyers is of overriding public importance.

7. Harry Avery was the Tennesseee Commissioner of Corrections at the time Ray was convicted of Dr. King's murder. When threats were made against Ray by telephone, Avery kept Ray in solitary confinement. On May 29, 1969, Avery was fired by Governor Buford Ellington. Concommittantly, the press reported the accusation that Avery had used his position "to gather facts about James Earl Ray for a book."

8. John Carlisle investigated the King assassination for the Shelby County District Attorney General, Phil M. Canale. In 1974 he testied at Ray's evidentiary hearing. He also assisted Canale at public slide lectures on the King assassination.

the individual Items of my request after six years. Information I requested, information that does exist and is not exempt, is information that can be embarrassing to the FBI and other Department components. The information sought in the surveillance Items and those pertaining to the guilty plea can be particularly embarrassing because the surveillances involved violations of cherished rights the FBI and the Department are supposed to protect, not violate; and because the guilty plea is tainted, without reasonable doubt involving considerable and entirely improper pressures, and because it aborted the workings of the American system of justice in this most serious of terrible crimes, the most costly crime in our history.

5. Defendant's seemingly proper protestation of concern for the rights of privacy actually is a put-on. The record in this and in other of my FOIA cases is entirely undisputed in reflecting the opposite. Although there are legitimate privacy interests and they should be protected, in practice this defendant uses privacy claim for political and ulterior purposes, to withhold information that should not be withheld. At the same time it roughly violates the privacy rights of those it does not like. The undisputed record in this case reflects the refusal to protect privacy, violation of these rights in pursuance of the racist and sexist views of some in the FBI and intent to damage those not liked by the FBI. The disclosures of defamatory but irrelevant information in this case, in an effort to argue the FBI's political prejudices and its political preconceptions, are astounding. Its lack of genuineness in this feigned concern for privacy is illustrated by my own case.

6. Because of the possibility of disclosure of total fabrications in the FBIHQ JFK assassination records, I sought to exercise my rights under the Privacy Act. When the FBI, including the supervisor in this case, SA John Hartingh, failed to respond, I asked Mr. Lesar's assistance. He wrote the FBI Director and never received any response. He then wrote the Attorney General, who also failed to respond. Instead, there was wholesale unloading of the meanest, most vicious and deliberate lies about my wife and me. At the same time the FBI ignored the Privacy Act and failed to disclose the documented and written corrections I had provided in accord with the Privacy Act. Of course, if the FBI had not deliberately violated my privacy rights and the Act, it would not have undertaken to spread

its contemptible untruths about me. Long before FBIHQ's general JFK assassination releases, it knew that some of what it planned to disclose about me was false and fabricated. Nonetheless, it made these defamatory disclosures of what it knew was fabricated and false.

7. About as dirty an example of this vicious and deliberate FBI character assassination was an annual religious gathering at a farm we then owned. It was immediately after the Jewish high holidays, generally in late September. It was arranged by the rabbi of the Jewish Welfare Board who served Washington area service personnel and their families. The children and their parents enjoyed gathering eggs, seeing them hatch, and playing with baby chicks and tame animals. The FBI twisted this into the false representation that my wife and I annually celebrated the Russian revolution with an outing at our home.

8. When my work, which is critical of the FBI and which the FBI cannot fault factually, was attracting attention, including at the White House, the FBI, not able to attribute factual inaccuracy to me, instead gave the White House its political falsehoods. It redbaited me. It also did this with Attorneys General and the Congress. The FBI's internal records reflect the fact that it also used its fabrications as pretended justification for not complying with FOIA. It even went so far as to prepare a legal opinion stating that because it did not like me it was not required to comply with the Act or my requests under the Act.

9. FBIHQ did not withhold this fabrication after I informed it of the truth and it did not withhold any part of the concoction to protect my wife's right to privacy or my own. Instead, knowing full well that its defamation was totally false and with the letters of my counsel also on file, the FBI not only released its falsifications - it also suppressed and withheld the correction I had filed many months earlier. Then it called its cruel hoax to the attention of the press.

10. This is but one of many illustrations of the FBI's wholesale and deliberate violations of the privacy of those it does not like. It and the many other such illustrations reflect the Orwellian nature of any alleged FBI devotion to the Act and to protection of privacy. At the same time, privacy has become an FBI buzzword with which it seeks to cover its stonewalling of FOIA cases and of plaintiffs. As Quinlan J. Shea, Jr., Director of FOIPA Appeals, the Department's own expert, testified in this case as a Department witness, there is such enormous overuse of the privacy claim that the records in this case require reprocessing

to restore that withheld information.

11. In this instance, the names involved are all those of public persons, as is set forth below. The privacy claim with regard to these names is more than mere FBI stonewalling. It is made to hide wrongful acts and constitutional violations that can embarrass the FBI.

12. My requests are not frivolous and are not fishing expeditions. I had reason to believe that the requested information existed. In some instances I had proofs. In some I had actual copies. I had specific and indisputable knowledge not only of surveillances of various kinds, which I did, I also had a copy of the instructions for the violation of the most basic of the accused James Earl Ray's Constitutional rights. I had copies of some of the records of this, and I had knowledge of the fact that all of this was contrived under the guise of "security" for Ray, devised by experts loaned to local authorities by the defendant in this case. (The FBI continues to withhold the names of these Department experts, despite the contrary Order of the Court, despite the fact that their names appeared in the public press, and despite my appeals, which provide a factual account of the actualities.)

13. Ray was the only prisoner in the so-called Ray cell-block. He was under constant microphone and closed-circuit TV surveillance, all inside his cell-block, for all the world as though any danger to him would have been from his guards only. These electronic surveillances excluded the outside of the jail and the entire jail outside the Ray cell-block. They thus excluded all the possible sources of the imagined dangers to Ray. The only purpose served by these contrivances of the Department's experts on security was to destroy any privacy for Ray, even in his communications with his counsel. It was evident when I received some copies of the Memphis Field Office records that the FBI continued to receive this surveillance information even after the local judge ordered that there be no intrusion into Ray's communication with counsel. After the judge ordered the end of the unConstitutional violation of Ray's rights, about which he had been lied to when the prosecution told him there were no such intrusions, FBIHQ did not end these wrongful acts. Instead, FBIHQ directed Memphis not to get caught, not to accept more copies of the various interceptions and instead to send only paraphrases of them to FBIHQ.

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14. My sources of information were many and excellent. I also was Ray's investigator. I did the habeas corpus investigation, based on which the sixth circuit court of appeals ordered an evidentiary hearing. I also oonducted the investigation for that evidentiary hearing. I found and interviewed witnesses pertaining to whom the FBI still withholds information which is inconsistent with its solution to the King assassination. I interviewed witnesses in federal and state maximum security jails and in local jails. I had access to all the Rays, James, his brothers and his sister, from whom I still hear. Almost all of Ray's prior counsel provided information. I had much to do with the preparation and presentation of evidence at the evidentiary hearing. The trial judge ordered that I participate in discovery. Mr. Lesar and I alone engaged in this discovery. My sources also included a number of reporters; attorneys, particularly Memphis criminal attorneys who had pertinent knowledge; judges; police and sheriff's officials up to the rank of inspector; and other public officials. I even had sources inside the prosecution. A close relative of one of Ray's prosecutors informed me of the electronic surveillances conducted on Ray's defense counsel.

15. The files to which I had access ranged from newspaper morgues to all of the investigation by the public defender's office. It included some of the prosecutor's records and nine large cartons of alleged evidence sequestered in the walk-in safe of the Shelby County, Tennessee, Clerk of the Court. Many FBI evidentiary specimens were there. I cannot remember a single instance in which the report of the FBI's Laboratory was attached to any specimen. The clerk of the court informed me that he had no such reports. Most of the so-called evidence had no more relationship to the commission of that terrible crime than has the garlic wafted over a simmering stew.

16. During the 1973 evidentiary hearing I observed a man I later learned was an FBI informer in the same maximum-security cell with James Earl Ray. I knew him as a very identifiable member of the so-called Dixie Mafia. After I learned that Ray's cellmate was an FBI informer, I requested the pertinent and withheld information. This request, too, remains totally ignored. While I do not expect the FBI to willingly provide proof of that additional violation of Ray's rights, this information is pertinent to the surveillance Items of my requests.

17. The surveillance Items are not limited to electronic surveillances, which are included. The language employed in my request is "any surveillance of

any kind whatsoever" and "meant to include not only physical shadowing, but also mail covers, mail interceptions, interception by any telephonic, electronic, mechanical or other means, as well as conversations with third persons and the use of informants." These Items also are not limited to the FBI as the surveillor, nor to its continued evasion, the names of persons as the "subject" of surveillances.

18. Despite noncompliance so complete that searches have not been made and attested to, I have received, in this and other cases, proofs of the existence of all kinds of surveillances aimed against persons listed in my requests. The most obvious proof of the fact that the FBI, the Department and Department counsel have knowledge of the deliberateness of noncompliance with regard to the surveillance Items is the evidence I have produced, especially from Oliver Patterson. He had been an FBI informer. He became my informant. He confessed to direct and indirect surveillance on all the Rays and their attorney, J. B. Stoner. Proof that Patterson surveilled them is in FBI records I have. For three years my appeals pertaining to Patterson records and those of an associate pertaining to whom no records have been provided, remain ignored. I did provide privacy waivers from both.

19. The MURKIN records provided, while far from complete, do hold proof of surveillances on James Ray and his counsel beginning as soon as Ray was arrested in England. The FBI knew the names of the lawyers Ray asked to represent him before his requests reached those lawyers. The FBI received the results of Scotland Yard's surveillance of Ray, as it later did those of the Memphis sheriff's office. FBI agents as well as informers surveilled Ray's relatives. Although this is in FBI records I have examined, the FBI still has not conducted searches to comply with the surveillance Items of my request. It also has not disputed the proofs I produced.

20. FBIHQ MURKIN records include instructions to the St. Louis office to obtain Carol Pepper's bank statements, even if no grand jury was sitting, as long as the FBI was protected against embarrassment. This is FBI doubletalk for by hook or crook, even by breaking, entering and stealing. With regard to Carol Pepper, although no grand jury was sitting, the FBI got her bank records. Copies were even in the hands of sycophantic writers who are included in my request.

21. That Bernard Fensterwald was under physical and electronic surveillance

has been disclosed by the FBI.

22. Wayne Chastain, then a reporter covering the King assassination and its aftermath for the Memphis Press-Scimitar, was fired after meeting with me in public places. When he was fired he was given a full account of his meetings with me. We had been under surveillance.

23. The FBI's denial of having information pertaining to me is deceptive and deliberately evasive. My appeals note the childishly evasive semantical contrivances employed to deceive and misrepresent. For years there has been no response. The FBI's denial is limited to me as the "subject" of the surveillance. Whether or not I ever was, whether or not FBIHQ would have been informed, and whether or not it would, from embarrassment, admit the truth, the fact is that the FBI surveilled me in its surveillances of others and thus has pertinent records. To my knowledge this does back to pre-Pearl Harbor days. My source was then the assistant attorney general in charge of the Criminal Division.

24. My Lesar and I both observed surveillance of us in Memphis in 1973. Our mail then was interfered with, sometimes crudely. We had reason to believe that the FBI was the beneficiary of, if not the agency conducting, this surveillance.

25. Despite the FBI's boiler-plated insistence that it may not provide copies of the records of other police, it has done this extensively in this instant cause, particularly with copies of surveillance reports. Almost all held unflattering information the FBI wanted to be available. In addition to copies of some of James Ray's intercepted communications, the FBI, in this case, provided me with hundreds of pages of xeroxes of Memphis police political records pertaining to the Invaders and the sanitation workers strike, surveillance records. The FBI also used its own informers. At least one of those Mr. Lesar and I caught keeping an eye on us looked like an Invader.

26. Mail of the late Judge Preston Battle was intercepted and copied before it reached him. Mr. Lesar and I knew this and had copies of some of his intercepted mail. We obtained it under discovery while we were preparing for the 1973 evidentiary hearing.

27. When we forced the former District Attorney General to disgorge some of what he referred to as "souvenirs" that he had stashed away in his cellar,

they held the results of surveillances, including copies of Judge Battle's intercepted mail pertaining to the Ray case.

28. Beyond question, Gerold Frank and George McMillan, who wrote books supporting the FBI's solution to the crime, had copies of FBI records before their books were published and long before I forced the disclosures made in this instant cause.

29. While I had no proof of surveillance of William Bradford Huie, whose money corrupted all the processes of justice in the King assassination, I did have proof that Huie, while pretending to be Ray's defender, in fact was spilling his guts to the FBI. This was obvious even to Ray, who knew that no sooner had he provided information to Huie, through his counsel of the time, than those identified by Ray were subpoenaed. In 1973 the State of Tennessee entered the transcript of Huie's grand jury testimony in the record of the evidentiary hearing. In it Huie boasted of his duplicity and claimed it was right and proper. He claimed that he was gypped because, whether or not guilty, Ray owed him a confession of guilt in return for the $40,000 Huie gave Ray's lawyers, not a cent of which reached Ray.

30. Renfro Hays is the only other person listed in my Items who is not accounted for in the preceding paragraphs. Hays is an investigator who was not trusted for major investigations by the Memphis lawyers for whom he did occasional small jobs. He also floats in and out of psychiatric wards. He latched onto the Ray case by phone, by contacting Arthur Hanes, Sr., before Hanes set foot in Memphis. Hays was well-connected with the people of the rundown area in which Dr. King was killed. As a result, he came up with much information that contradicted the official account of the King assassination. Hays told me that when he felt pressures from the police, who shared information and solutions with the FBI, he merely made up wild stories to lead the police and FBI on wild-goose chases. Some of the fictions he created still endure in the assassination mythology. Nonetheless, Hays was the first investigator to produce evidence contradicting the FBI's claimed solution. Despite the state of his mind, his relish of vengeance and the fabrications he launched in his quest for vengeance, some of Hays' information was sound. It is confirmed by my own investigations, those of the public defender, and even by the FBI's. The FBI developed the same exculpatory evidence and then merely ignored it. Hays also is listed in my Item because he told me he was the subject of FBI interest.

31. As with all other Items, my request for information pertaining to plea bargaining is based on reason to believe that the information exists and is significant. The plea into which Ray claims he was forced by Percy Foreman - and from which Ray appealed as soon as he could fire Foreman - represents no compromise and no bargaining. It actually resulted in what then was the maximum sentence possible. When in court Foreman tried to extend the plea into a confession that there had not been any conspiracy, Ray interrupted the proceedings to refuse to agree to that. Had Foreman remained uncorrected he would have pled Ray guilty to the shooting, which Ray refused to do. Moreover, for all his vaunted reputation, Foreman negotiated nothing. He merely accepted the judge's 99-year term. (For the judge to participate in the guilty plea that was to come before him violated the ABA's standards which, as I reported in my book, Frame-Up, were drafted by the present chief justice. From my knowledge of the facts of the case, which was good enough for the habeas corpus petition to prevail, there was no basis for considering the maximum possible sentence as a compromise and there was little reason for considering any kind of plea. The prosecution could not place Ray in the State of Tennessee at the time of the crime. It was never able to place him at the scene of the crime. It was not able to connect the so-called Ray rifle with the crime. Investigation, including by the FBI, supported many of Ray's claims.

32. I also knew that before Foreman snatched the case the prosecution had offered Ray a 20-year deal, through Arthur Hanes; that Ray had rejected it; and that Hanes had testified he would have advised rejection of it if Ray had asked his opinion. It did not make sense that, after turning down a 20-year deal, Ray would have begged for a 99-year sentence or would have regarded that as a compromise.

33. When Mr. Lesar and I obtained access to the public defender's investigation, we learned that, skimpy and late as that investigation was, it nonetheless was a substantial defense of Ray. (The judge appointed the public defender as co-counsel after Foreman pled poverty.) MURKIN records support the case built by the public defender's investigators. It was not by any means an investigation that would lead an experienced criminal lawyer, least of all a Percy Foreman, to enter into a 99-year deal. More suspicion was added after the federal indictment of Foreman for selling out a different indigent client, Jon Kelley, a

wiretapper. I became aware of this when I met the lawyer who replaced Foreman as Kelley's counsel. I then saw and I have copies of records reflecting the fact that the sons of the late H. L. Hunt paid Foreman $100,000 to stifle Kelley. The cases against all others have been resolved but as of my last knowledge, not the case against the now aged Foreman. I had earlier knowledge of this case from the former FBI agent who was then Hunt's chief of security and a target of the wiretappers. He caught the wiretappers hired by Hunt's sons.

34. Whether or not so, there is the appearance that Foreman was being repaid by the Department for earlier favors. Whether or not this is the fact, there is no doubt that the 99-year deal was not a compromise and it did put Ray away for the longest period then possible under Tennessee law; that at the very least there was and there was in the hands of Ray's lawyers a substantial defense; that there had been whoesale violation of Ray's rights, including by the Department and the FBI; and that, instead of protecting his rights, the FBI violated them and also was the beneficiary of the violations. The FBI was aware that the local sheriff was violating the local court's order protecting Ray's rights and it did nothing about those additional violations. Any trial of Ray would have been a great embarrassment for the federal government. These indicate some of my reasons for seeing information pertaining to the plea bargaining and those participating in it.

35. I can provide similar information about the basis for all of the Items of my requests if the Court so desires. With regard to each, I had reason to believe that the information exists and is significant. In many instances I have found pertinent information in MURKIN records, even though no search has been made to respond to each Item. For example, Items 5 and 6 of the November 23, 1975, request are based on my personal investigation and its use in the 1973 evidentiary hearing. The cabdriver, James McCraw, informed me that the FBI had seized his manifest after the word got out that he had refused to transport Charles Stephens, the only alleged eyewitness of any kind, because as of only minutes before the crime Stephens was too drunk. McCraw so testified at the evidentiary hearing and was not rebutted. Item 6 seeks the sheriff's radio logs. I located the former deputy sheriff, Judson Ghormley, who actually found the strange package that included the rifle. He had immediately reported this finding by radio. The log

discloses that he found it significantly earlier than the FBI story has it. He found it, in fact, before - from the FBI's account - Ray could have dropped it. He also testified at the evidentiary hearing and was not rebutted.

36. Although to the degree possible I have avoided arguing the facts of the King assassination, I have also offered to inform the Court on several occasions. This was not because I believe it is required of a requester. Rather is it because of the continuous official campaign of distortion, deception, misrepresentation and outright untruth that have succeeded in stonewalling this case and in obfuscating most of the issues.

37. With regard to each of the Items that have not been searched in the more than five years this case has been before the Court, I can provide considerably more on the Department's motive for refusing to comply with the Act, for its refusing to search for information responsive to each Item, and for its endless stalling and efforts to divert, mislead and misinform the Court. These have enabled defendant to avoid compliance that can be so embarrassing to defendant.

38. For example, with regard to Charles Stephens, James McCraw and Judson Ghormley, in Paragraph 35 above, as little as there is about them in MURKIN files, that little is what can be enormously embarrassing. It disputes the official account of the crime and it confirms the investigations I made for and prior to the 1973 evidentiary hearing. For all the FBI effort to hide McCraw, who knew that the alcoholic Stephens was too drunk to have been a witness to anything, the FBI covered itself by having similar information from another source - and suppressing it. Even after Stephens made a <u>negative</u> identification of Ray, the Civil Rights Division drafted the affidavit in which Stephens pretended to make a positive identification of Ray. This is the <u>only</u> claimed eyewitness identification and the only Ray identification used to effect his extradition. Ghormley was the first to find and report the package that held the rifle. Because the FBI knew that Ray could not have dropped that odd package by the time Ghormley found it, the FBI created a witness and a finding more to its liking. Protecting its creation requires the suppression of the log of the sheriff's radio broadcasts. In the FBI account a city policeman named Vernon Dolahite found the package. However, after this the FBI was silent when the Department ignored its Dolahite concoction and fabricated still another version, which it then used in the extradition. The

Department pretended that Captain N. E. Zachary first found that package. He swore to this official lie. In fact, Zachary did not even reach the scene until long after the package was found. Not only was the FBI silent about this - it furthered the fabrications of evidence by conceiving and fashioning its own false evidence and extending this even to its elaborate mockup of the scene of the crime, all to make it possible to allege that Ray had dropped the package that led to him when all the evidence was to the contrary. In fact, the FBI also had and ignored an abundance of other proof that Ray was not at the scene of the crime at the time it was perpetrated.

39. My requests seek information pertaining to the crime and to the various official efforts to manipulate the courts and what would be known and believed. It is because the information I seek is so embarrassing to officialdom that there are and have been all the multitudinous devices for stonewalling and avoiding compliance by any means possible.

40. If at this late hour the Court desires any further explanation of any Items of my request, whether or not the Act requires it, I will provide that information as expeditiously as is now possible for me and at whatever length the Court may desire.

HAROLD WEISBERG

FREDERICK COUNTY, MARYLAND

Before me this 20th day of April 1981 Deponent Harold Weisberg has appeared and signed this affidavit, first having sworn that the statements made therein are true.

My commission expires July 1, 1982.

LILLIAN WEISBERG NOTARY PUBLIC FREDERICK CO., MD.

Lillian Weisberg

NOTARY PUBLIC IN AND FOR
FREDERICK COUNTY, MARYLAND

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	:	
	:	
Appellant/Cross-Appellee	:	
	:	
v.	:	Case Nos. 82-1229, et al.
	:	
U.S. DEPARTMENT OF JUSTICE,	:	
	:	
Appellee/Cross-Appellant	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of June, 1984, mailed two copies of Supplemental Brief for Appellant/Cross-Appellee Weisberg to Mr. John S. Koppel, Appellate Staff, Civil Division, Room 3617, U.S. Department of Justice, Washington, D.C. 20530.

JAMES H. LESAR