

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA



JAMES H. LESAR,
Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,
Defendant

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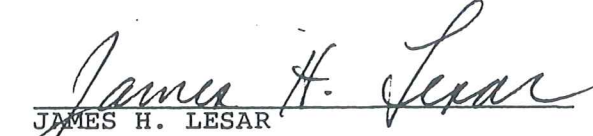
Civil Action No. 82-3600

PLAINTIFF'S MOTION TO STRIKE DECLARATION
OF SPECIAL AGENT JOHN N. PHILLIPS

Comes now the plaintiff, Mr. James H. Lesar, and moves the Court to strike the affidavit of Special Agent John N. Phillips on the ground that it does not comply with the requirements of Rule 56(e) of the Federal Rules of Civil Procedure.

A Memorandum of Points and Authorities and a proposed Order are attached hereto.

Respectfully submitted,




JAMES H. LESAR
1231 Fourth Street, S.W.
Washington, D.C. 20024
Phone: 484-6023

Attorney pro se

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of February, 1983, mailed a copy of the foregoing Motion to Strike to AUSA Nathan Dodel, United States Courthouse, Washington, D.C. 20001.



JAMES H. LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. LESAR,

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Civil Action No. 82-3600

MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO STRIKE DECLARATION
OF SPECIAL AGENT JOHN N. PHILLIPS

In this Freedom of Information Act case, plaintiff seeks records on the alleged destruction of two sets of FBI Headquarters Records on the assassination of President John F. Kennedy. Defendant has moved for summary judgment on the grounds that its search for these records has failed to locate any. The sole support for this claim is the affidavit of FBI Special Agent John N. Phillips. The pertinent parts of Phillips declaration state as follows:

(4) On November 9, 1982, a search was conducted of the General Indices of the FBI's Central Records System for the material requested by plaintiff. No record could be located for any material which was responsive to plaintiff's request.

(5) I have also taken the additional steps of contacting the persons assigned to me who handled the destruction of the two sets of Kennedy Assassination records, which are the subject of plaintiff's request. I was advised by them that to the best of their recollection no document exists relating to the destruction of the records.

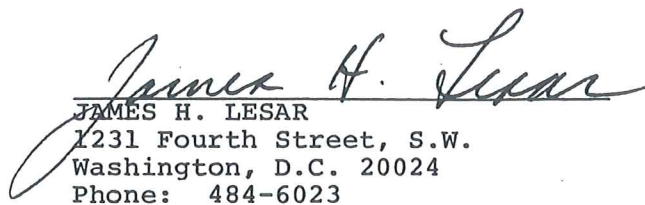
Rule 56(e) of the Federal Rules of Civil Procedure provides that affidavits supporting and opposing a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The rule means what it says. Continental Cas. Co. v. American Security Corp., 443 F.2d 649 (D.C.Cir. 1970), cert. den. 402 U.S. 907 (1971).

The substantive matters set forth in paragraphs four and five of the Phillips Declaration are not attested to on the basis of Phillips personal knowledge. Phillips does not state that he conducted the search, nor does he state that he has personal knowledge of the titles, subjects, words or phrases in the FBI's General Index which were searched. The basis of the statements made in Paragraph Four of his declaration is simply hearsay. The same is also true of Paragraph Five, which purports to do nothing more than relate what some unidentified persons are said to have told him. Hearsay testimony that would not be admissible if testified to at trial may not properly be set forth in an affidavit. Washington Post Co. v. Keogh, 365 F.2d 965 (D.C.Cir. 1966), cert. den., 385 U.S. 1011 (1967).

An affidavit that does not measure up to the standards of Civil Rule 56(e) is subject to a motion to strike. Gebhard v. GAF Corp., 50 FRD 504 (D.D.C. 1973). Because the Phillips Decla-

ration does not meet Rule 56(e) standards, it should be stricken.

Respectfully submitted,


JAMES H. LESAR
1231 Fourth Street, S.W.
Washington, D.C. 20024
Phone: 484-6023

Attorney pro se

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. LESAR,

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Civil Action No. 83-3600

O R D E R

Upon consideration of plaintiff's motion to strike the declaration of Special Agent John N. Phillips, defendant's opposition thereto, and the entire record herein, and it appearing to the Court that said affidavit is not based on the personal knowledge of Agent Phillips, it is by the Court this _____ day of _____, 1983, hereby

ORDERED, that the declaration of Special Agent John N. Phillips be, and hereby is, STRICKEN.

UNITED STATES DISTRICT JUDGE

He has not reviewed FOIA Section
It is there rather than in Contract
Rules that the extra copies
would be kept

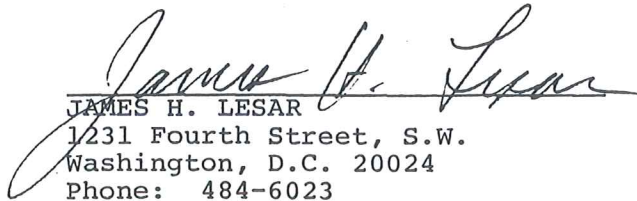
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PLAINTIFF'S RULE 1-9(h) STATEMENT

Plaintiff states that he is presently unable to submit a Rule 1-9(h) statement for the reasons stated in the Declaration of James H. Lesar Pursuant to Rule 56(e) which is attached to plaintiff's Opposition to Defendant's Motion for Summary Judgment.

Respectfully submitted,


JAMES H. LESAR
1231 Fourth Street, S.W.
Washington, D.C. 20024
Phone: 484-6023

Attorney pro se

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of February, 1983, mailed a copy of the foregoing Plaintiff's Rule 1-9(h) Statement to AUSA Nathan Dodell, United States Courthouse, Washington, D.C. 20001.


JAMES H. LESAR