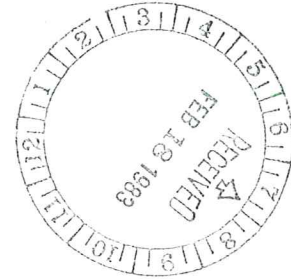


UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA



JAMES H. LESAR,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant

Civil Action No. 82-3600

OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

This case arises under the Freedom of Information Act, 5 U.S.C. § 552. Plaintiff seeks records pertaining to the alleged destruction of two sets of the FBI's Headquarters records on the assassination of President John F. Kennedy. Claiming that the FBI's search of the General Index to its Central Records System failed to locate any such records, defendant has moved for summary judgment. The sole support for its motion is the affidavit of Special Agent John N. Phillips, the pertinent parts of which read 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 documentation exists relating to the destruction of the records.

Because these statements are not based on personal knowledge and thus do not comply with the requirements of Civil Rule 56(e), plaintiff has this date moved to strike the declaration of Special Agent Phillips. For this and additional reasons set forth below, summary judgment in defendant's favor is improper at this time.

ARGUMENT

It is well established in Freedom of Information Act cases as in any others that summary judgment may be granted only if the moving party proves that no substantial and material facts are in dispute and that he is entitled to judgment as a matter of law. Moreover, the party seeking summary judgment has the burden of showing there is no genuine issue of material fact in dispute, and in considering the motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Weisberg v. United States Dept. of Justice, 200 U.S.App.D.C. 312, 315, 627 F.2d 365, 368 (1980)

As in Weisberg, supra, where the Court of Appeals held that the FBI "had not substantiated a file search of a caliber sufficient to assure retrieval of all existing data," id. at 100 U.S. App.D.C. 314, the FBI has not supplied sufficient information to meet its burden. The FBI attempts to do so by alleging that the

records requested were never created, and that in any event a search of the General Indices to its Central Records System does not reflect any such records. There are many deficiencies in the FBI's showing. The statement that no documentation exists relating to the destruction of the two sets of Kennedy assassination records is based on hearsay; thus, it is incompetent to support a motion for summary judgment. Washington Post Co. v. Keogh, 365 F.2d 965 (D.C.Cir. 1966), cert. den., 385 U.S. 1011 (1967). Given the FBI's known proclivity for recording every transaction and event on paper in multiple, yea, multitudinous copies, it is inconceivable that some records pertaining to the destruction of 200,000 pages of documents were not generated. Those who believe in the Tooth Fairy may credit this claim, but there is no reason this Court should.

Phillips' declaration that a search of the General Indices was made is inadequate. First, he does not affirmatively show that he has personal knowledge of the search, a failing which renders his declaration nugatory for summary judgment purposes. Continental Cas. Co. v. American Security Corp., 443 F.2d 649, (D.C.Cir. 1970), cert. den. 402 U.S. 907 (1971). He does not state that he himself made the search and that he knows what subjects, titles, words or phrases were checked in the General Indices. Nor does he assert that records of the kind sought here would necessarily be locatable through the General Indices, or that there are no other indices or other means of locating these records.

A check of the General Indices may not be sufficient to locate records of the kind sought by plaintiff. Indeed, such records may not be indexed at all. If such records are indexed in the General Indices, or if they are not indexed at all, then the FBI may be required under the Freedom of Information Act to undertake additional searches. For although an agency is not required to reorganize its files in response to a demand for information, "it does have a firm statutory duty to make reasonable efforts to satisfy it." McGehee v. CIA, 3 GDS ¶82-039 at p. 83,512, quoting Founding Church of Scientology v. National Security Agency, 610 F. 2d 824, 837 (D.C.Cir1 1979). Whether the FBI has made reasonable efforts to locate these records depends on a number of facts not presently of record in this case. The burden is on the FBI to establish "that any limitations on the search it undertakes in a particular case comport with its obligation to conduct a reasonably thorough investigation." McGehee, supra, 3 GDS at p. 83,512. The FBI has not shown that it has met this burden by restricting its search to its General Indices.

Additional grounds exist for denying defendant's motion for summary judgment. On motion for summary judgment, if there is a real issue of credibility, the movant's motion must be denied and the issue of credibility determined at trial by the trier of facts. Firemans Mutual Ins. Co. v. Aponaug Mfg. Co., 149 F.2d 359 (5th Cir. 1945). In this case there is an issue as to the credibility of the FBI's claim that no records regarding the destruction of


were created. Common sense alone suggests that the FBI did not make and carry out a decision to destroy 200,000 pages of records without memorializing this fact in some way. Second, the credibility of the FBI's affiant, Agent Phillips, is very much at issue. He has submitted sworn statements in a number of Freedom of Information Act cases involving Kennedy assassination documents, but his affidavits have been shown to be untruthful or not made on personal knowledge. See attached Declaration of James H. Lesar.

Further grounds for denying defendant's motion are set forth in plaintiff's Rule 56(f) affidavit. The Declaration of James H. Lesar Pursuant to Rule 56(f) sets forth the reasons why discovery is essential if he is to develop facts which must be ascertained before he can effectively demonstrate that there are material issues of fact genuinely in dispute.

CONCLUSION

For the reasons stated above, defendant's motion for summary judgment must be denied. The Court should allow plaintiff to undertake discovery to determine whether the records he requested are extant, Weisberg v. U.S. Dept. of Justice, 177 U.S.App.D.C. 161, 543 F.2d 308 (1976), and if so, whether the FBI has conducted an adequate search for them.

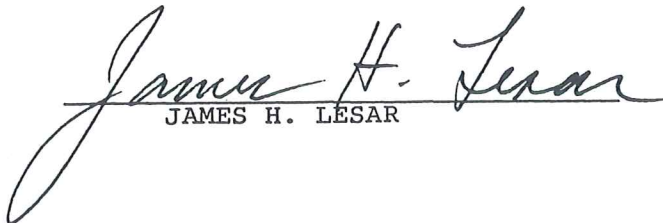
Respectfully submitted,


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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 Opposition to Defendant's Motion for Summary Judgment to AUSA Nathan Dodell, United States Courthouse, Washington, D.C. 20001.


JAMES H. LESAR