UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 84-5058 and 84-5201

HAROLD WEISBERG,

Plaintiff-Appellant,

JAMES H. LESAR,

Appellant,

v.

WILLIAM H. WEBSTER, et al.,

Defendants-Appellees.

Nos. 84-5054 and 84-5202

HAROLD WEISBERG,

Plaintiff-Appellant,

JAMES H. LESAR,

Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT WEISBERG

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG, Plaintiff-Appellant, JAMES H. LESAR, Appellant, v. WILLIAM H. WEBSTER, Director, Federal Bureau of Investigation, et al., Defendants-Appellees,	No. 84-5058 No. 84-5201
HAROLD WEISBERG, Plaintiff-Appellant, JAMES H. LESAR, Appellant, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants-Appellees.	No. 84-5059 No. 84-5202

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

The undersigned, counsel of record for appellant Weisberg, certifies that the following listed parties appeared below: Harold Weisberg, William H. Webster as the Director of the Federal Bureau of Investigation, and Griffin Bell and William French Smith as Attorney General. Weisberg's trial counsel, James H. Lesar, also appeals from the judgment entered against him.

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

Mark H. Lynch

Attorney of Record for Appellant Weisberg

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BRIEF FOR APPELLANT WEISBERG

After the district court ruled that the FBI had failed to perform an adequate search for records requested by plaintiff under the Freedom of Information Act (FOIA), the government sought to discover from plaintiff how the FBI had failed in its search. Although plaintiff argued that (1) it is improper to take discovery from an FOIA plaintiff because the statute places

the burden of proof on the government, (2) that his poor health made this discovery extremely burdensome, and (3) that he had already furnished much of the requested information during the administrative processing of his request, the district court nonetheless ordered plaintiff to answer the government's discovery requests. When plaintiff declined to comply in order to preserve his position for an appeal, the district court dismissed the entire case -- which included not only the search issue but also plaintiff's claim that the FBI improperly withheld information from the documents it did locate -- and also awarded attorney's fees.

ISSUES PRESENTED

1. Did the district court err in ordering a plaintiff in an FOIA case to answer the government's discovery on the question of the adequacy of the government's search for requested records, particularly where plaintiff's poor health made compliance extremely burdensome and plaintiff had already furnished much of the requested information during the administrative processing of his request.

2. Assuming that the district court properly required plaintiff to answer the government's discovery on the search issue, did the district court err in dismissing the entire case, including plaintiff's claim that the government's claims of exemption were improper, as a sanction for plaintiff's refusal to provide discovery on the search issue.

3. Was plaintiff's opposition to defendants' discovery substantially justified within the meaning of Rules 37(a)(4) and 37(b)(2), so that the district court erred in awarding expenses, including attorneys fees, to defendants.

4. Even if plaintiff's opposition to defendants' discovery was not substantially justified, did the district court err in awarding attorneys fees to defendants where their counsel failed to support his application with contemporaneous time records.*/

REFERENCES TO PARTIES AND RULINGS

The appellants in this case are plaintiff Harold Weisberg and his attorney in the district court, James H. Lesar, who separately appeals from the district court's assessment of expenses against him. Appellees are the Federal Bureau of Investigation, its Director, William H. Webster, the Department of Justice, and the Attorney General.

The Hon. John Lewis Smith issued all of the orders relevant to this appeal. On October 27, 1982, he issued a memorandum and order denying defendants' motion for partial summary judgment on the adequacy of their search for records which plaintiff had requested under the FOIA. (Docket Entries 39 and 40) (hereinafter "D.E. ___"). On February 4, 1983, he denied plaintiff's motion for a protective order and ordered him to answer defendants' discovery. (D.E. 51.) On April 13, 1983, the district judge

*/This case has not previously been before this or any other court. None of plaintiff's other past or pending cases involve the documents at issue in this case.

granted defendants' motion to compel (D.E. 68), and on April 28, 1983, awarded defendants their expenses and attorney's fees incurred in bringing that motion. (D.E. 75.) On November 18, 1983, the court denied plaintiff's motion to reconsider or in the alternative to certify for interlocutory appeal the orders of April 13 and 28, and at the same time granted defendants' motion to dismiss all of plaintiff's claims. (D.E. 98.) Thereafter, on December 21, 1983, the district court awarded defendants their expenses and attorney's fees incurred in bringing the motion to dismiss. (D.E. 101.) A final judgment was entered on January 31, 1984. (Unnumbered.)

STATEMENT OF THE CASE

Plaintiff filed suit in early 1978 after the FBI had failed to make a timely response to his FOIA requests for all records in the FBI's Dallas and New Orleans Field Offices concerning the assassination of President John F. Kennedy and individuals and organizations which figured in the Bureau's investigation of the assassination.*/ Although the case was dormant in court for four years, the administrative process was quite active as the FBI and Department of Justice processed plaintiff's requests.

As the FBI periodically released documents, plaintiff filed numerous appeals concerning various aspects of the Bureau's

*/Plaintiff filed two suits: Weisberg v. Webster which concerns the records of the Dallas Field Office, and Weisberg v. FBI, which concerns the records of the New Orleans Field Office. Since the suits were consolidated both in the district court and in this court, we will refer to them as "the case."

processing with the Office of Privacy and Information Appeals (OPIA) in the Department of Justice.*/ On May 10, 1979, the FBI informed plaintiff that it had processed nearly all records within the scope of his requests. (D.E. 10, Exhibit A, Attachment 1). Shortly thereafter, plaintiff's counsel filed an appeal with OPIA which summarized plaintiff's complaints with the Bureau's processing and incorporated the specific appeals which Weisberg had already sent to OPIA. (Id.) These complaints fell into three broad categories: (1) that the Bureau had restrictively interpreted the scope of plaintiff's requests; (2) that the Bureau had not adequately searched for responsive documents; and (3) that the Bureau had wrongfully withheld material under the exemptions to the FOIA. (Id.)

A year later, on June 16, 1980, the director of OPIA wrote to plaintiff's counsel to inform him that the office had completed its preliminary groundwork for processing plaintiff's administrative appeals and to solicit plaintiff's suggestions for conducting this process. (D.E. 10, Exhibit A, Attachment 2.) Specifically, the director stated that he had begun to focus on plaintiff's complaints over the Bureau's interpretations of the scope of the requests and the adequacy of the Bureau's search. (Id.) OPIA's review eventually led to a decision by the Associate Attorney General on December 16, 1980, directing the FBI to reprocess numerous records and to conduct additional searches. (D.E. 10, Exhibit A, Attachment 3.)

*/Pursuant to Department of Justice regulations, OPIA is responsible for processing administrative appeals from the FBI and other components of the Department. 28 C.F.R. § 16.7.

When plaintiff continued to lodge appeals with OPIA over the Bureau's renewed processing of his requests, the director of the office wrote to Weisberg on February 19, 1981, stating that he was "very appreciative of the assistance you provided us by citing specific examples of what you considered to be improper processing." (D.E. 10, Exhibit A, Attachment 4.) However, he also stated that in his view the appeal process had been completed and that Weisberg's recourse was to the district court where his consolidated suits were pending. (Id.) At this point, plaintiff's appeals and supporting documentation filled nearly two file cabinet drawers. (D.E. 56, Weisberg Affidavit at ¶ 31.) During this period, counsel for the parties met periodically to attempt to resolve the problems identified by plaintiff (May 27, 1981 Tr. at 2-3), but this process apparently broke down when a new government attorney was assigned to the case in June 1981. (Dec. 10, 1981 Tr. at 3; D.E. 19, Lesar Aff. at ¶¶ 6, 8.)

In March 1982, the Bureau reported to the court that it had reviewed 35,775 documents. (D.E. 8, Phillips Declaration at ¶ 4.) Of this number, the Bureau concluded that 23,969 documents were duplicative of documents located at FBI Headquarters which had been processed in connection with a separate FOIA request. (Id.) The Bureau processed the remaining 11,806 documents, released 9,146 in full, and claimed that 2,660 documents contained exempt material either in full or in part. (Id.) The Bureau also processed two sets of card-file indices containing a total of 53,503 cards. (Id. at ¶ 5.) Of these, 3,235 were withheld in their entirety and the balance was released. (Id.)

In view of the large amount of material at issue, the Bureau proposed that the court adjudicate its claims of exemption on the basis of a representative sample of the withheld material. (D.E. 8, Memorandum.) Plaintiff opposed adjudication of the exemptions at this juncture because the Bureau had not yet performed a complete search of the files in the Dallas and New Orleans Field Offices, as detailed in his numerous appeals to OPIA. (D.E. 9, Memorandum at 2-3, Weisberg Affidavit at ¶ 2.) Rather than having the court address the claims of exemption, plaintiff urged that his appeals on the scope and adequacy of the search should be addressed first. (D.E. 9, Memorandum at 2-3.) Indeed, plaintiff even offered to forego further litigation over exempt material if the FBI would conduct the search plaintiff argued was required by his requests. (Id. at 3; D.E. 11.)

At a hearing on March 25, 1982, the district court suggested that plaintiff might be permitted to take discovery on the search issue while the Bureau proceeded with its representative sampling of exemption claims. (March 25, 1982 Tr. at 6.) Counsel for defendants stated that "we see no need for the discovery" because the Bureau's affidavits on the search issue were adequate. (Id. at 7.) The court did not reach any final conclusion at that hearing on how to proceed with the case, but directed the parties to attempt to negotiate their differences and arrive at an agreed plan for proceeding. (Id. at 9-10.)

When the parties were unable to reach agreement (D.E. 11, 11A), defendants proposed that the district court bifurcate the case by first deciding whether the Bureau's search was adequate and then resolving the validity of the Bureau's claims of exemption. (D.E. 11A at 5.) Accordingly, on May 3, 1982, defendants filed a motion for partial summary judgment on the search issue. (D.E. 12). In his second affidavit in opposition to this motion (D.E. 28), and in his amended statement of genuine issues of material fact in dispute (D.E. 30), plaintiff cited fourteen specific matters which he had raised in his appeals to OPIA as examples of the inadequacy of the FBI's search.

At the hearing on defendants' motion for partial summary judgment, counsel for defendants argued that the FBI had demonstrated the adequacy of its search and made no claim that defendants needed discovery from plaintiff to supplement the record. Plaintiff's counsel, however, argued that the court should either conduct an evidentiary hearing or permit plaintiff to take discovery on the search issue, as the court had suggested during the March hearing. (Oct. 5, 1982 Tr. at 30-31.)

In a memorandum issued on October 27, 1982, the district court denied the government's motion. (D.E. 39.) The court found that "[t]he search undertaken by the FBI was inadequate both with regard to its scope . . . and as to its effectiveness in retrieving particular documents." (Id. at 3, citation omitted.) Noting that "Weisberg had provided specific evidence in his second affidavit which casts substantial doubt on the caliber

of the agency's endeavors," the court set forth twelve contested factual issues, drawn from plaintiff's second affidavit, "in order to give some guidance for the discovery which may be necessary in this case." (Id.)

On December 3, 1982, plaintiff propounded a set of interrogatories to defendants on the issues which the district court had identified (D.E. 41), and later in the month served requests for admissions and production of documents. (D.E. 42.) On December 6, defendants revealed for the first time their desire to take discovery from plaintiff on the search issue when they served interrogatories and a request for production of documents. (D.E. 41A, 41B.) The interrogatories asked plaintiff to identify "each and every fact" and "each and every document" upon which plaintiff based the fourteen contentions on the inadequacy of the FBI's search set forth in his amended statement of genuine issues of material fact. (D.E. 41A.) The request for production of documents sought each document which plaintiff identified in answering defendants' interrogatories. (D.E. 41B.)

On January 17, 1983, plaintiff moved for a protective order excusing him from responding to the FBI's discovery. (D.E. 45.) Plaintiff argued that: (1) there is no need for a government agency to take discovery from an FOIA plaintiff on search issues because the relevant information is in the agency's possession; (2) in this case plaintiff already had provided most of the information sought through his appeals to OPIA; (3) providing discovery would be particularly burdensome for plaintiff

because of his age and poor health;*/ and (4) the Bureau's discovery requests were intended to harass plaintiff. (Id. at 2-3.)**/

The FBI opposed the protective order, denying that the agency was trying to harass Weisberg. The Bureau responded to Weisberg's argument that discovery was unnecessary by arguing

*/The district court had previously taken note of plaintiff's health problems at an earlier status hearing. (Oct. 14, 1980 Tr. at 4-5.)

**/The claim of harassment was based not only on plaintiff's perception of the protracted and often acrimonious proceedings between him and the FBI, but also on a memorandum written on March 27, 1980, by the Director of the Justice Department's Office of Privacy and Information Appeals:

> It is perhaps unfortunate that Mr. Weisberg is the principal requester for King and Kennedy records. He has heaped so much vilification on the FBI and the Civil Division -- a considerable part of which has been inaccurate and some of which has been unfair -- that the processing of his efforts to obtain these records has almost become an "us" against "him" exercise. My view has always been that the two cases are too important to the recent history of this country for that attitude to have any permissible operation.

(D.E. 45, Attachment 1, emphasis in original.)

It appears from this statement that this official had concluded that not all of Weisberg's criticism of the Bureau and the Department was inaccurate or unfair and that the relations between the parties were unduly adversarial. This memorandum also stated that as of March 1980, the FBI had "declined" to search for "numerous" records relevant to the Kennedy case and also was urging a course of action that "would contradict or be inconsistent with promises made to Mr. Weisberg by Bureau and Department representatives, and to representations made in court, and to testimony before [a Senate] subcommittee . . . ." (Id.) Plaintiff's claim of harassment is also supported by the finding of another district judge that the government had engaged in "a deliberate effort to frustrate" Weisberg in his request for records on the assassination of Martin Luther King. Weisberg v. Dept. of Justice, Civ. No. 75-1996, slip op. at 15 (D.D.C., Jan. 20, 1983), appeal argued, No. 82-1229 (D.C. Cir., May 8, 1984).

that it was merely trying "to get plaintiff to articulate precisely the bases for his complaints about the adequacy of the FBI's search so that it could resolve those complaints." (D.E. 50 at 2.) The Bureau further argued that "it is clear that inasmuch as the FBI was unsuccessful in its last attempt to disprove plaintiff's assertions that the [sic] its search was inadequate, it will never be able to demonstrate otherwise unless it ascertains from plaintiff all the factual bases for those assertions." (Id. at 14.) The FBI did not respond to Weisberg's claim of poor health and how it impaired his ability to comply with the FBI's discovery requests. The Bureau also asked that expenses for preparing the motion to compel be assessed under Fed. R. Civ. P. 37(a)(4) against both plaintiff and his counsel. (Id. at 2, 19, 20.)

On February 4, 1983, the district court issued an order denying both plaintiff's motion for a protective order and the FBI's request for expenses and directing plaintiff to respond to the government's discovery requests. (D.E. 51.) In response to this order, plaintiff on March 8, 1983, filed particularized objections to each of the FBI's interrogatories and corresponding requests for document production on the same grounds, although in more specific form, as he had sought a protective order. (D.E. 56, 57.) However, in support of his claim of ill health, which was referred to only briefly in the earlier memorandum in support of his motion for a protective order, Weisberg filed a fourteen page affidavit describing his condition in detail. (D.E. 56.)

As a result of life-threatening circulatory problems, for which he has undergone surgery several times, and the prescribed drug and physical therapy for these problems, Weisberg's doctors have instructed him "not to stand still, to sit only with [his] legs elevated, and not to sit for more than 20 minutes at a time without getting up and walking around." (Id. at ¶ 1.) Furthermore, he cannot readily consult his files, and it is therefore extremely burdensome for him to identify "each and every document" relevant to his claims. (Id. at ¶¶ 19-23.) In this affidavit, plaintiff also made it clear that his contentions on the inadequacy of the FBI's search were all contained in his appeals to OPIA which included voluminous documentation supporting his claims. (Id. at ¶ 31.)

The FBI then moved for an order compelling discovery, arguing that plaintiff was seeking to relitigate issues foreclosed by the denial of his motion for a protective order, and again sought an award of expenses under Fed. R. Civ. P. 37(a)(4) against both plaintiff and his counsel. (D.E. 58.) Plaintiff responded that he had complied with the court's order by properly objecting to each interrogatory and production request and by providing a detailed affidavit, not challenged by the FBI, attesting to the impossibility of Weisberg providing the demanded discovery. (D.E. 63.)

At the hearing on defendants' motion to compel, plaintiff's counsel addressed defendants' argument that the government needed discovery to ascertain the basis for plaintiff's contentions

that the search was inadequate and suggested a reasonable alternative for achieving this goal without burdening plaintiff with the requirement of responding to defendants' interrogatories and document requests. Counsel proposed that after he had completed his discovery of defendants on the search issue, plaintiff would move to compel a further search and would support that motion with all the evidence on which he relied:

> If Mr. Weisberg files his motion, and puts his evidence before the court and the government responds and the issue is joined, obviously that's the end of the matter. The court decides it. Either he has prevailed or he has not prevailed.
>
> So why the need for discovery when they are going to get everything that he has gotten that is relevant -- that he feels is relevant to his motion when he makes his motion. There is no need to go through a double proceeding.
>
> * * *
>
> The defendant's summary judgment has been found lacking. At this point I think the proper, convenient and easy way is to allow us to complete the discovery and to give us the time to put forward all the evidence that we need with respect to a motion to compel a further search and then that would dispose of that issue.

(April 8, 1983 Tr. at 44, 48.)

On April 13, 1983, the district court ordered Weisberg to file reponses to the Bureau's discovery requests within thirty days. (D.E. 68.) The court also allowed defendants to "submit an affidavit within 10 days from the date of this Order, detailing the expenses, including attorneys' fees, which were incurred in obtaining the Order compelling plaintiff to answer interrogatories and produce documents." (Id.)

Defendants filed a timely application for expenses and attorney's fees of $684.50. (D.E. 72.) However, the declaration

filed by the government's attorney attesting to the time he had spent on the motion to compel was not based on contemporaneous time records but rather on a "reconstruction" of his time. (D.E. 72, LaHaie Declaration at ¶ 3.) On April 28, 1983, the district court signed an order assessing expenses against Weisberg only. (D.E. 75.)

Prior to the due date for plaintiff's answers to the discovery, his counsel informed government counsel that Weisberg had decided to maintain his position that the discovery was improper, unnecessary, and burdensome, and therefore he would not file any answers. (D.E. 81, Memorandum at 2.) Accordingly, on May 18, 1983, defendants moved to dismiss the case pursuant to Fed. R. Civ. P. 37(b)(2)(C), and sought their expenses and attorney's fees incurred in filing this motion pursuant to Rule 37(b)(2). (D.E. 81.)

Plaintiff responded that total dismissal of all claims -- including the ultimate issue of whether any exemptions properly applied to the documents that had been processed -- was too severe a remedy when the only issue was failure to comply with discovery orders on the threshold issue of the adequacy of the FBI's search. (D.E. 86 at 4-5.) He further argued that if any sanction was applied to plaintiff, it should only be to preclude him from relying on additional evidence beyond what he had already furnished to defendants through his appeals and had developed through his discovery of defendants on the inadequacy of the FBI's search. (Id. at 5-6.)

In addition to opposing dismissal, plaintiff also filed a motion for the court to reconsider its order of April 13 directing plaintiff to answer defendants' discovery and its order of April 28 assessing expenses. (D.E. 84). In this motion, he reiterated the proposal made by counsel at the April 8, 1983 hearing that upon completion of his discovery of defendants, plaintiff would move for an order requiring a further search and that this motion would be accompanied by a comprehensive statement of all the evidence on which plaintiff relied. (D.E. 84, Memorandum at 4-5.) In the alternative, plaintiff sought certification for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Id.)

In a memorandum and order dated November 18, 1983, the court denied plaintiff's motions for reconsideration and for certification of an interlocutory appeal. (D.E. 97.) The court also dismissed the case in its entirety, pointing to plaintiff's "willful and repeated refusals" to comply with the court's orders directing him to answer defendants' discovery and pay the expenses assessed against him in connection with the earlier motion to compel. (Id. at 3-4.) The court also directed defendants to submit a fee application within ten days without specifying whether fees would be assessed against either Weisberg, Lesar, or both.

The FBI sought expenses and attorneys' fees totalling $1053.55. (D.E. 99.) Again the application was based on counsel's reconstruction of his time rather than on contemporaneous time

records. (Id., LaHaie Declaration at ¶3.) On December 21, 1983, the court signed defendants' proposed order which made the award run against both Weisberg and Lesar. (D.E. 101A.) Following entry of a judgment which held only Weisberg liable for expenses (D.E. 103), and defendants' motion to amend that judgment (D.E. 104), the court on January 31, 1984, entered an amended judgment which made Weisberg and Lesar jointly liable for the second set of expenses. (Unnumbered.) A timely notice of appeal on behalf of both Weisberg and Lesar was filed on March 30, 1984. (Unnumbered.)*/

ARGUMENT

I. THE DISTRICT COURT ERRED IN REQUIRING PLAINTIFF TO ANSWER DEFENDANTS' DISCOVERY.

In order to determine whether the district court erred in imposing sanctions on plaintiff, this court must first examine whether the district court erred in ordering plaintiff to answer defendants' discovery. "The validity of the sanctions imposed under [Rule 37(b)] depends, in the first instance, on the validity of the discovery orders on which they were based." International Union, UAW v. National Right to Work Legal Defense & Education Foundation, Inc., 590 F.2d 1139, 1152 (D.C. Cir. 1978). See Smith v. Schlesinger, 513 F.2d 462, 467 (D.C. Cir. 1975). In

*/On January 23, 1984, plaintiff filed a notice of appeal from the November 18, 1982 order, which had been entered on November 23. (D.E.105.) This notice appears to be a nullity under Fed. R. App. P. 4(a)(4) because it was filed while defendants' Rule 59 motion to amend the judgment was pending and also because plaintiff subsequently filed a timely Rule 59 motion to alter the amended judgment. (Unnumbered.) See Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982).

other words, "sanctions can be imposed for failure to obey an order compelling discovery under Rule 37(a) only if that order was justified." The Black Panther Party v. Smith, 661 F.2d 1243, 1255 (D.C. Cir. 1981), judgment vacated, 458 U.S. 1118 (1982).*/ Accordingly, in the instant case, this court must examine the district court's order of February 4, 1983, denying plaintiff's motion for a protective order and directing him to respond to plaintiff's discovery, and its order of April 13, 1983, granting defendants' motion to compel responses. As we demonstrate below, both of these orders were in error.

The issue before the district court was whether the FBI had performed an adequate search in response to plaintiff's FOIA request. Whenever such an issue arises, the FOIA places the burden on the agency to demonstrate the adequacy of its search. Weisberg v. Dept. of Justice, 627 F.2d 365, 368-71 (D.C. Cir. 1980); Founding Church of Scientology v. NSA, 610 F.2d 824, 836-38 (D.C. Cir. 1979); National Cable Television Ass'n, Inc. v. FCC, 479 F.2d 183, 186, 190-93 (D.C. Cir. 1973). Indeed, one of the unique features of the FOIA is that, unlike most other forms of review of agency action, the statute specifically

*/Although the judgment in Black Panther Party was vacated for reasons of mootness, "the opinion is indicative of the position of the Court of Appeals and may be independently persuasive as a discrete piece of legal reasoning." Parker v. Baltimore & Ohio R.R. Co., 555 F. Supp. 1177, 1180 n.5 (D.D.C. 1983). See 13 Wright, Miller & Cooper, Federal Practice & Procedure, Civil, § 3533 at pp. 294-95 (1975).

places the burden of proof on the agency rather than on the party seeking review. 5 U.S.C. § 552(a)(4)(B). Congress deliberately drafted the statute this way in order to assist the public in seeking government information:

> Placing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it. The private party can hardly be asked to prove that an agency has improperly withheld public information because he will not know the reasons for the agency action.

S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965). See also H.R. Rep. No. 1497, 89th Cong. 2d Sess. 9 (1966).

In its October 27, 1982 memorandum denying defendants' motion for partial summary judgment, the district court ruled not merely that defendants had failed to carry their burden on the search issue -- which might have entitled them to another chance to bolster their proof -- but rather found that "[t]he search undertaken by the FBI was inadequate both with regard to its scope . . . and as to its effectiveness in retrieving particular documents." (D.E. 39 at 3.) That finding should have been sufficient to require the Bureau to conduct a new search. However, the district court had earlier raised the possibility of permitting plaintiff to take discovery on the search issue (March 25, 1982 Tr. at 6), and plaintiff adopted this suggestion in opposing defendants' motion for partial summary judgment. (D.E. 19, Memorandum at 15; October 5, 1982 Tr. at 31.) Defendants' counsel, however, disclaimed the need for any discovery and vigorously opposed the district court's suggestion. (March 25, 1982 Tr. at 7.)

Thus, the October 27, 1982 memorandum contemplated discovery of defendants, which was consistent with the FOIA's allocation of the burden of proof on the agency. Nonetheless, following the denial of their motion for partial summary judgment, defendants sought discovery from plaintiff. So far as we are aware, there is no other FOIA case where discovery has been taken from the plaintiff. Indeed, defendants' counsel conceded that the government had never before attempted to take discovery from a plaintiff in an FOIA case (April 8, 1983 Tr. at 58), and that such discovery was unnecessary in a usual FOIA suit. (November 9, 1983 Tr. at 24.)

Thus, plaintiff's motion for a protective order was well-taken and should have been granted. As plaintiff argued, there was no need for the FBI to ask plaintiff why the Bureau's search was inadequate. The burden was on the Bureau to demonstrate that the search was adequate, and the information relevant to that demonstration was within the Bureau's possession. Moreover, in this case plaintiff had provided his complaints on the search issue through his appeals to OPIA. Furthermore, the discovery sought by defendants would be extemely burdensome for plaintiff because of his age and ill-health. Although plaintiff did not elaborate on this issue in his motion for a protective order, as he subsequently did in his objections to the discovery, plaintiff's counsel had previously informed the court of plaintiff's health problems and the court had taken note of this situation. (Oct. 14, 1980 Tr. at 4-5.)

Moreover, defendants' opposition to the motion for a protective order conceded that defendants' discovery was an attempt to shift the burden of proof on the search issue to the plaintiff: "it is clear that inasmuch as the FBI was unsuccessful in its last attempt to disprove plaintiff's assertions that the [sic] its search was inadequate, it will never be able to demonstrate otherwise unless it ascertains from plaintiff all the factual bases for those assertions." (D.E. 50 at 14.) Having failed to prove that the search was adequate on their motion for partial summary judgment, defendants then sought to force plaintiff to prove that the search was inadequate. This inversion of proper procedure under the FOIA should not have been permitted, particularly since plaintiff had provided the basis for his assertions through his appeals to OPIA. However, the district court denied the motion for a protective order and ordered plaintiff to answer defendants' discovery.

Plaintiff then filed objections which asserted the grounds raised in the motion for a protective order in somewhat greater detail with respect to each of the discovery requests. At this point, plaintiff also filed two affidavits which set out his medical problems in detail and demonstrated that these problems made it extremely difficult, if not impossible, to respond to the discovery requests. (D.E. 55, Weisberg Aff. at 1; D.E. 56, Weisberg Aff. passim.) One of these affidavits also made it clear that plaintiff had already set forth his contentions on the adequacy of the search through his appeals. (D.E. 56, Weisberg Aff. at ¶ 31.)

With the issue of unnecessary burden now fully supported by Weisberg's affidavits, the impropriety of requiring him to respond to defendants' discovery was even clearer than it had been at the time plaintiff sought a protective order. Indeed, the court recognized the problems created by plaintiff's medical condition when the judge acknowledged that it had "thrown a terrific burden" on counsel and had required counsel "to carry the work load in court over a period of several years." (April 8, 1983 Tr. at 46-47.)

Throughout defendants' papers in opposition to plaintiff's motion for a protective order and in support of their motion to compel, as well at the hearing on the latter motion, defendants argued that they needed discovery from plaintiff in order to pin down his various contentions on the inadequacy of the search. (D.E. 50 at 2, 12-13; D.E. 58, Memorandum at 1; April 8, 1983 Tr. at 12, 21.) Assuming without conceding the validity of this point, there was an alternative for achieving defendants' asserted goal without imposing the burden of requiring plaintiff to respond to defendants' discovery, and indeed plaintiff's counsel pressed this alternative at the hearing on the motion to compel. At that time, he stated that after he had completed his discovery of defendants on the search issue, he would move to compel a further search, and this motion would present all the previously furnished evidence on which plaintiff relied. Through this procedure, defendants would be provided with

a comprehensive statement of the evidence, and plaintiff would not be put to the burden of answering defendants' discovery. (April 8, 1983 Tr. at 44, 48.) Plaintiff also renewed this argument when, in response to defendants' motion to dismiss, he moved for reconsideration of the order compelling plaintiff to answer defendants' discovery. (D.E. 84, Memorandum at 4-5; November 9, 1983 Tr. at 26.)

In summary, there were four reasons why the district court erred in ordering plaintiff to answer defendants' discovery: (1) defendants were attempting to shift the burden of proof under the FOIA to require plaintiff to prove that the search was inadequate; (2) the discovery was extremely burdensome in view of plaintiff's medical condition; (3) plaintiff had already provided the basis for his contentions through his appeals to OPIA; and (4) plaintiff offered a reasonable alternative method for providing defendants with a final comprehensive statement of the evidence in support of his contention that the search was inadequate. Since the orders compelling discovery were in error, the ensuing order to dismiss for failure to provide discovery was also in error. The Black Panther Party v.Smith, supra, 661 F.2d at 1255.

II. ASSUMING THAT THE ORDERS COMPELLING DISCOVERY WERE PROPER, THE SANCTION OF DISMISSAL WAS TOO SEVERE FOR PLAINTIFF'S REFUSAL TO ANSWER.

Even if the district court did not err in ordering plaintiff to answer defendants' discovery, the court's decision to dismiss the entire case was an excessive sanction for plaintiff's refusal to answer. Rule 37(b) provides a range of sanctions for failure to comply with a discovery order, and of these, dismissal should be imposed only in extraordinary circumstances. This court has summarized the law in this area in its opinion in The Black Panther Party:

> Even when the underlying discovery order is valid, the District Courts should exercise their discretion to impose the extreme sanction of dismissal in rare circumstances. Ordinarily that sanction is appropriate only when a party has displayed callous disregard for its discovery obligations, or when it has exhibited extreme bad faith. . . . The extent to which the other party's preparation for trial has been prejudiced is a relevant consideration. If less drastic sanctions will be equally effective, they should be employed; dismissal should be used as a last resort.

661 F.2d at 1255 (citations and footnote omitted). See cases collected at id. n.83.

In this case, equally effective, less drastic sanctions plainly were available. In this regard, it is important to remember that at the point of dismissal the litigation had focused solely on the search issue which the parties and the court had agreed to address first before proceeding to litigate the propriety of the FBI's claims of exemption. The truly extraordinary aspect of the district court's dismissal order

is that it dismissed plaintiff's claims on the merits of the exemption issues as well as on the search issue. This sweeping use of the sanctions weapon was plainly improper, for a court "should not go beyond the necessities of the situation to foreclose the merits of controversies as punishment for general misbehavior." Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858, 860-61 (5th Cir. 1970).

The strongest sanction which the district court might have properly imposed would have been to rule in defendants' favor on the search issue and direct the parties to address the exemption issues. This approach would have been consistent with Rule 37(b)(2)(A) which provides for "[a]n order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order."

However, even a sanction ruling that the search was adequate would have been too extreme in light of the district court's prior finding that the search was inadequate and the other equally effective, less drastic sanctions that were available. First, the district court might have precluded plaintiff from relying on any additional evidence beyond that which either he or defendants had already placed in the record with respect to the search issue.*/ Another, more drastic, alternative would

*/At the time the district court ruled on defendants' motion to dismiss, they had filed answers to plaintiffs' interrogatories on the search issue (D.E. 46, 48, 78, 79), and plaintiff had filed fourteen affidavits. (D.E. 9, 19, 28, 38, 55, 56, 67, 87, 88, 89, 93, 94, 95, 96.)

have been to preclude plaintiff from relying on any evidence beyond that contained in the one affidavit (D.E. 28) on which the district court had based its finding that defendants' search was inadequate and to require defendants only to resolve the issues identified by the court in its decision denying their motion for partial summary judgment. (D.E. 39 at 3-5.) Either of these alternatives would have been consistent with Rule 37(b)(2)(B) which provides for "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence."

Defendants will no doubt argue that dismissal of the entire suit is appropriate because plaintiff "displayed callous disregard for [his] discovery obligations" and "exhibited extreme bad faith." The Black Panther Party v. Smith, supra, 661 F.2d at 1255. This, however, is not an accurate characterization of plaintiff's conduct. There is no dispute that plaintiff refused to answer defendants' discovery, but he did so on the basis of his reasonable, good faith argument that discovery of plaintiffs is not appropriate in FOIA cases in general and was particularly inappropriate in this case. Even if this argument is ultimately rejected by this court, it has sufficient merit that plaintiff's reliance on it cannot be characterized as bad faith. First, the FOIA places the burden of proof on the government, and indeed Congress regarded this allocation of proof as a key provision to achieving the statute's goals. See pp. 17-18, supra. Second, the issue was novel, and defendants could cite no case

where the government had taken discovery from an FOIA plaintiff. Third, defendants counsel conceded that "discovery is unnecessary . . . in the usual FOIA case." (November 9, 1983 Tr. at 24.) Fourth, plaintiff demonstrated that the discovery was both unnecessary and burdensome.

Furthermore, plaintiff did not "callously disregard" the district court's order compelling him to answer defendants' discovery. Since he believed as a matter of law that the discovery was improper, and since his health problems made the discovery requests extraordinarily burdensome, the only way he could protect his interests was to decline to comply. Indeed, when defendants moved to dismiss, plaintiff sought reconsideration of the order compelling discovery or in the alternative certification for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) so that he could present his position to this court. (D.E. 84.) Indeed, in the absence of an interlocutory appeal, which the district court denied (D.E. 98), the only way plaintiff could preserve his position was to refuse to answer defendants' discovery. This course of action demonstrates not callous disregard; instead it demonstrates a good faith attempt to vindicate a firmly held, reasonable legal position that had been rejected by the district court. Under these circumstances, dismissal of the entire suit was improper.

III. THE DISTRICT COURT ERRED IN IMPOSING EXPENSES ON PLAINTIFF.

The district court erred in awarding expenses for two reasons. First, plaintiff's position in opposing discovery was substantially justified within the meaning of Rules 37(a)(4) and 37(b)(2). Second, even if plaintiff's position was not substantially justified, defendants' counsel failed to properly document his fee application under the standards adopted by this court in National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982).

The Notes of the Advisory Committee suggest that when there is some merit to a party's position, that position is substantially justified under Rules 37(a)(4) and 37(b)(2):

> On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists.*/

The cases also demonstrate that an award of expenses is not appropriate if there is a genuine dispute on which reasonable persons could differ and there is some merit to the losing party's position. Liew v. Breen, 640 F.2d 1046, 1050 (9th Cir.

*/This comment pertains to Rule 37(a)(4). However, the comment to Rule 37(b)(2) states that the fee provision under that section, which also uses the "substantial justification" standard, was intended to conform with the standard under Rule 37(a)(4). Accordingly, it appears that there is no need to distinguish between the April 28, 1983 award under Rule 37(a)(4) and the December 21, 1983 award under Rule 37(b)(2).

1981); Baxter Travenal Laboratories, Inc. v. Lemay, 89 F.R.D. 410, 417 (S.D. Ohio 1981); Usery v. Brandel, 87 F.R.D. 670, 684 (W.D. Mich. 1980); Johnson v. W. H. Stewart Co., 75 F.R.D. 541, 543 (W.D. Okla. 1976); Quaker Chair Corp. v. Litton Business Systems, Inc., 71 F.R.D. 527, 535 (S.D.N.Y. 1976); Wood v. Breier, 66 F.R.D. 8, 14-15 (E.D. Wisc. 1975), appeal dismissed on other grounds, 534 F.2d 330 (7th Cir. 1976); Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc., 54 F.R.D. 551, 553-54 (S.D.N.Y. 1972).

For the reasons stated at pages 25-26, supra, plaintiff's opposition to defendants' discovery was sufficiently meritorious that it was "substantially justified" within the meaning of Rules 37(a)(4) and 37(b)(2). Accordingly, the district court erred in imposing expenses on plaintiff.

The district court also erred in awarding expenses because defendants' application was not supported with counsel's contemporaneous time records. This court has held that:

> Casual after-the-fact estimates of time expended on a case are insufficient to support an award of attorneys' fees. Attorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney.

National Ass'n of Concerned Veterans v. Secretary of Defense, supra, 675 F.2d at 1327 (emphasis added).

In the instant case, both of the applications for attorneys' fees were supported by counsel's "reconstruction" of the time he believed he had spent litigating his motion to compel and

his motion to dismiss. (D.E. 72, LaHaie Declaration at ¶ 3; D.E. 99, LaHaie Declaration at ¶ 3.) All of this work was done in 1983, long after this court had announced the rule in Concerned Veterans that contemporaneous time records would be required to support fee applications. Moreover, at the time counsel filed his motion to compel, he plainly knew that he would be seeking fees if he prevailed, for he had unsuccessfully sought fees for opposing plaintiff's motion for a protective order (D.E. 50 at 2, 18-20). Consequently there is no excuse for his failure to keep contemporaneous records of his time for his subsequent motions. Since defendants' counsel failed to maintain the requisite records to support his fee application, they are entitled to no fee at all.

CONCLUSION

For the reasons stated above, the district court's judgment should be vacated and the case remanded for further proceedings, first to determine the adequacy of defendants' search for the requested records and then to determine the merit of their claims of exemption.

DATED: May 17, 1984

Respectfully Submitted,

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STATUTORY ADDENDUM

The Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), provides in pertinent part:

> In such a case . . . the burden is on the agency to sustain its action.

Fed. R. Civ. P. 37 provides in pertinent part:

> (a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:
>
> * * *
>
> (2) Motion. If . . . a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, . . . or an order compelling inspection in accordance with the request. . . .
>
> * * *
>
> (4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.
>
> * * *
>
> (b) Failure to Comply with Order.
>
> * * *
>
> (2) Sanctions by Court in Which Action is Pending. If a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

* * *

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

CERTIFICATE OF SERVICE

I hereby certify that this 17th day of May, 1984, I caused two copies of the foregoing Brief for Appellant Weisberg to be mailed, first-class, postage prepaid, to

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