SECOND PETITION FOR PERMISSION TO PROCEED OUT OF ORDER

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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.

Harold Weisberg
7627 Old Receiver Road
Frederick, MD 21701

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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| HAROLD WEISBERG, Plaintiff-Appellant, JAMES H. LESAR, Appellant, v. WILLIAM H. WEBSTER, et al., Defendants-Appellees. | : | Case Nos. 84-5058 and 84-5201 |
| HAROLD WEISBERG, Plaintiff-Appellant, JAMES H. LESAR, Appellant, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants-Appellees. | : | Case Nos. 84-5054 and 84-5202 |

EXPLANATION AND CERTIFICATE OF SERVICE

Plaintiff-Appellant Harold Weisberg did not obtain a copy of Defendants-Appellees' Petition for Rehearing in Shaw v. FBI, which was filed after Weisberg filed his petition, until January 30, 1985. This Shaw petition again represents what is not true with regard to Weisberg and he therefore again petitions this court to permit him to proceed out of order to provide this court with the attached five additional pages.

I hereby certify that I have caused a copy of the Second Petition for Permission to Proceed Out of Order and Add to Petition mailed January 9, 1985, of Plaintiff-Appellant Weisberg and Appellant Lesar to be mailed this 1st day of February 1985 to Ms. Christine Whittaker, Attorney, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.

HAROLD WEISBERG

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JAMES H. LESAR, Appellant,

v.

WILLIAM H. WEBSTER, et al., Defendants-Appellees.

Nos. 84-5404 and 84-5202

HAROLD WEISBERG, Plaintiff-Appellant,

JAMES H. LESAR, Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION, et al., Defendants-Appellees.

Harold Weisberg, pro se
7627 Old Receiver Road
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Nos. 84-5058 and 84-5201

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JAMES H. LESAR, Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION, et al., Defendants-Appellees.

SECOND PETITION FOR PERMISSION TO PROCEED OUT OF ORDER

Harold Weisberg, Plaintiff-Appellant, petitions for permission to proceed out of order and further add these five pages to petition mailed January 9, 1985.

Concise Statement of Reasons for Second Petition
for Permission to Proceed Out of Order

Weisberg is aware of this court's time and page limitations and he would not again petition to proceed out of order were it not that the previously unavailable information he provides is of exceptional importance to this court, to justice and to him.

In his petition mailed January 9, 1985, and in the addition to it mailed January 19th, 1985, Weisberg alleged, among other things, that this court was misrepresented to and that untruthful statements were made to it by defendants-appellees. They have now done this again in their Petition in Shaw v. FBI, No. 84-5084, as Weisberg states and documents herein. Weisberg believes the misrepresentation to this court is not accidental, is of exceptional importance, involves the integrity and constitutional independence of this court and can be gravely harmful to him.

Unintendedly - if not with diametrically opposite intent - the Shaw petition actually confirms what Weisberg states with regard to what the courts have uniformly held with regard to search in FOIA cases, the requirement of personal knowledge by government's affiants. FBI SA John N. Phillips neither had nor claimed personal knowledge of the alleged searches. The discovery demanded of Weisberg thus is at best premature and inappropriate and for this reason alone sanctions against Weisberg and his former counsel in this litigation also are inappropriate and not justified.

Statement of Facts

Shaw v. FBI was decided by the same panel which ruled on Weisberg's case but two days earlier. While it is always possible that a litigant may not be able to file until the moment time permitted is about to expire, which is when the FBI's Shaw petition was filed, there appears to be a cause-effect relationship with the filing of Weisberg's petition, which it refers to on its page 5. There, prejudicially and untruthfully, the Shaw petition states that on page 5 of his petition Weisberg states that FBI SA John N. Phillips "is 'incompetent' to provide an affidavit regarding FOIA matters." (Weisberg's page 5 is Attachment 1, underscoring added third line up.) The Shaw petition appears to assume that this court would not examine the cited page or it assumes what is even more insulting to and deprecating of this court because the most casual reading of Weisberg's page 5 discloses not only did Weisberg neither state nor suggest what the FBI represents but in fact stated the exact opposite: "In a moment of atypical personal knowledge and aberrational truthfulness Phillips attested..."

The actual Phillips questions before the District Court in Weisberg relate only to his competence to attest to the field office searches, which he did not make and those correctly identified by Weisberg did make, and of his truthfulness with regard to the existence or nonexistence of withheld and indubitably existing field office records. (Phillips was not assigned to either

field office. He was assigned to FBIHQ, as the panel noted.) In all instances, as the case record reflects, Weisberg's allegations of Phillips' untruthfulness are documented with the FBI's own records. The very page cited in the Shaw petition is illustrative. Phillips swore untruthfully to both an alleged search for and the nonexistence of vital records the existence of which, in FBI field office possession, Weisberg documented before the District Court. After oral argument the existence of what Phillips swore did not exist and possession of it and related records was confirmed in writing to Weisberg by the Department of Justice.

Not a single one of the decisions cited in the Shaw petition as accepting secondhand attestations is relevant in Weisberg. (In Weisberg claims to exemption were never justified by any Vaughn indexing.)

In Weisberg there is no question of "statements from the originator" of the information and no question of "justifying each use of the confidential source" (page 6, this and other citations marked in Attachment 2 with paperclips for the convenience of the court). Phillips was not "supervisor of search for responsive records" (page 7) as he in fact acknowledged and Weisberg states on his petition's Shaw-cited page 5. There is no question of "obtain(ing) the testimony of persons who actually participated in the creation of the records" and no question of "having someone with personal knowledge attest to, inter alia, the nature of the records" (page 7). But this citation precisely supports Weisberg in stating that "the courts have recognized the need for having someone with personal knowledge attest" to "the search conducted to locate them." (Emphasis added) There is no Exemption 7 question or question of the violation of federal laws (page 8); no question of the generation of the documents (page 9) or of the citation from Londrigan which is other than its requirement cited by Weisberg (pages 9 and 10); and no question of Exemption 7(C) (page 12).

## Conclusion

In short, in addition to representing untruthfully to this court in a way that simply cannot be accidental with regard to what Weisberg states in his petition, the only relevant case law cited in the FBI's Shaw petition entirely confirms Weisberg's consistent attestations and claims that (a) for the purpose for which the FBI provided Phillips' attestation, personal knowledge is required, and (b) Phillips neither had nor claimed to have personal knowledge of the field office searches or of the existence or nonexistence of withheld field office records. Weisberg's attestations to and documentation of their existence are not refuted, are established by the FBI's own records copies of which he provided and subsequently, as is reflected in what Weisberg has provided to this court, are confirmed and established beyond question in FBI records disclosed after oral argument. (Weisberg provided only illustrative samples from a great volume of just-disclosed FBI records, from Phillips' own Division, that establish the known existence of additional relevant records neither searched for nor processed in Weisberg.)

The FBI's Shaw petition, Weisberg believes, supports his petition and does not address it in any other manner except for the cited untruthfulness in its reference to his page 5. Weisberg believes that on this additional, if entirely unintended basis, his petition should be granted. He believes this now is even more necessary in the interest of the integrity and the constitutional independence of this court.

Until the required searches are properly made and properly attested to, as the FBI has not done in this litigation, Weisberg believes that any discovery demand is at the very least premature and inappropriate and no sanctions are justified. Given the defendants-appellees' knowledge of the requirement of the relevant case law cited in the Shaw petition, Weisberg believes it is apparent that the discovery demand is, as he stated from the first, intended for ulterior

and improper purposes, including harassment and stonewalling, and is an imposition on the trust of this court by the defendants-appellees.

Defendants-appellees' brazen untruthfulness in entirely misrepresenting Weisberg's petition underscores his allegations of permeating untruthfulness to the courts, not limited to Phillips.

Respectfully submitted,

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Attachment 1

misleading attestations.[3] Weisberg requested the district court to determine whether or not sworn untruth was presented by the FBI but it refused and in this erred. No system of justice can survive dependence upon and acceptance of false swearing. Weisberg believes that when the sworn truth is by the executive branch it jeopardizes the constitutional independence of the judiciary and is grossly unjust to him.

In Shaw v. Federal Bureau of Investigation, No. 84-5084, decided only two days earlier, Phillips was held (on page 9) to be incompetent for precisely the same reason, he is "only a supervisor" in the FOIPA Section and "his assertions cannot be assumed to have been made upon personal knowledge." In Londrigan v. Federal Bureau of Investigation, No. 79-1403 this court rejected secondhand information attestations (page 3) when those of first-person knowledge are available to the FBI and held that the "requirement of personal knowledge by the affiant is unequivocal and cannot be circumvented." (Page 19)

The panel's finding that the FBI required "discovery" from Weisberg for access to its own files is ludicrous. It has extraordinarily extensive indices. Moreover, when Weisberg provided the correct titles and number identifications of relevant and withheld records he was ignored and they remain withheld. All that was required was for the FBI to make the usual searches that it never made.

In a moment of atypical personal knowledge and aberrational truthfulness Phillips attested that Dallas made no search at all to respond to Weisberg's request but instead sent it to FBIHQ where SA Thomas Bresson decided, without

3/ Illustrating Phillips' incompetence and dishonesty, the consequences of failing to make the search required and the FBI's deliberate untruthfulness in representing to this court that Weisberg's appeals had been acted upon when they had not been, is the December 31, 1984 letter he received from OIP--three weeks after decision. Phillips had sworn with consistent untruthfulness that the FBI did not have any copies of the recordings of the assassination-period radio broadcasts by the Dallas police. As Weisberg established one untruthfulness Phillips shifted to still another, always insisting that the FBI never had any such recording. In this letter OIP informed Weisberg of partial action on two of these many ignored appeals and the finding of some of these recordings and related records, all of which was sworn by Phillips and others not to exist.

Attachment 2



> Since the affiant was only a supervisor of the Records Management Division of the Bureau's Freedom of Information/Privacy Acts Section, and did not claim any personal participation in the investigation, his assertion cannot be assumed to have been made upon personal knowledge.

Slip op. at 9 n.2.

Appellant respectfully requests that this Court reconsider its decision in this respect and amend it to modify or withdraw the above dictum.

## II. Reasons for Granting Rehearing

Although this Court's statements in footnote 2 of its decision do not affect any of the Court's holdings in this case, appellant respectfully suggests that the footnote should be modified. Those statements are at odds with the law in this and other Circuits regarding the degree of personal knowledge for affidavits in FOIA cases. The dictum could cause difficulties on this fundamental procedural point.[4]

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(footnote cont'd)
investigative leads concerning the assassination.

Id. at 2-3 (J.A. 10-11).

[4] Indeed, this footnote is already being cited as authority for the proposition that Special Agent Phillips (and, logically, anyone holding the same position in the FBI's FOI/PA Section) is "incompetent" to provide an affidavit regarding FOIA matters. See Petition For Rehearing And Suggestion Of The Appropriateness Of Rehearing En Banc, filed January 11, 1985, in Weisberg v. Webster, Nos. 84-5058, 84-5059, 84-5201 & 84-5202 (D.C. Cir.), at 5. In his petition, appellant Weisberg charges, inter alia, that the District Court's decision, affirmed by this Court in its

(footnote cont'd)

Attachment 2



Rule 56(e) of the Federal Rules of Civil Procedure requires that affidavits submitted in support of (or in opposition to) a party's motion for summary judgment "be made on personal knowledge." In the context of Freedom of Information Act cases, the courts have adopted a pragmatic approach to this personal knowledge requirement and have uniformly approved affidavits based on an expert affiant's review of the records in question. As one court has phrased it, the Government need not "locate and produce statements from the originator of each piece of information excised from a disclosed record. Such a strict application of the rules of evidence would cost the Government untold time and resources and would yield negligible benefits." Ramo v. Department of the Navy, 487 F. Supp. 127, 130 (N.D. Cal. 1979), aff'd mem., 692 F.2d 765 (9th Cir. 1982).

The affidavit of an agency official knowledgeable in the way information is gathered by the agency has the requisite personal knowledge to comply with this standard. Id. Accord Diamond v. FBI, 707 F.2d 75, 78 (2d Cir. 1983) (recognizing the "practical difficulty--if not impossibility--of justifying each use of the confidential source exemption by way of an affidavit on personal knowledge"), cert. denied, 104 S.Ct. 995 (1984); Pacheco v. FBI,

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(footnote cont'd)
decision filed December 7, 1984, was based in part on its acceptance of "false" affidavits. See id. at 4-5.

470 F. Supp. 1091, 1102 (D.P.R. 1979) (to require every claim of Exemption 7(D) to be made "by the specific agent who interviewed each source or who personally gave them promises of confidentiality would convert the evidentiary procedure contemplated by Congress into a practical impossibility") (footnote omitted). See also Exxon v. FTC, 384 F. Supp. 755, 760 (D.D.C. 1974) (supervisor of search for responsive records had sufficient personal knowledge to attest to adequacy of search; discovery not permitted to level of each individual who participated in search).

Although the issue of personal knowledge and the adequacy of agency affidavits in FOIA cases has thus arisen in a number of contexts, in each case the underlying consideration that has been recognized is that FOIA cases present a unique evidentiary situation; it would be virtually impossible in almost all instances to obtain the testimony of persons who actually participated in the creation of the records at issue. At the same time, the courts have recognized that the need for having someone with personal knowledge attest to, inter alia, the nature of the records, the search conducted to locate them, and the reasons for deleting certain information pursuant to various FOIA exemptions, is in fact met by having someone familiar with the records and the agency's procedures to explain--based upon his personal expertise and review of the documents at issue--the agency's actions with regard to the requested records.

Thus, an affidavit by an FBI Special Agent who acts in a supervisory capacity in the FBI's Freedom of Information/Privacy Acts Section and who has knowledge of the FBI's criminal investigations may attest, on the basis of his review of the records, to their purpose and the circumstances surrounding their preparation, with sufficient personal knowledge. Indeed, the requirement of personal knowledge with regard to the Exemption 7 threshold showing and the applicability of the second clause of Exemption 7(D) was specifically considered by the District Court of this Circuit in Founding Church of Scientology of Washington, D.C., Inc. v. Levi, 579 F. Supp. 1060 (D.D.C. 1982), aff'd sub nom. Founding Church of Scientology of Washington, D.C., Inc. v. Smith, 721 F.2d 828 (D.C. Cir. 1983). In that case, the court found that the affidavit of FBI Special Agent John N. Phillips, "as well as the copies of the redacted documents themselves, present ample grounds for legitimate concern on the part of the FBI that federal laws had been or might be violated" by the subjects of the records at issue. 579 F. Supp. at 1063. In response to the plaintiff's challenge to the sufficiency of the affidavits under Fed. R. Civ. P. 56(e) with regard to personal knowledge, the court found that both affiants in the case (Special Agents Phillips and Wood) were familiar with the documents at issue and were "competent to testify to their own observations upon review of the documents" as well as to other matters such as the FBI's practices and procedures. Id. at 1064.

Furthermore, the court rejected the plaintiff's argument that the records were not "compiled by a criminal law enforcement authority in the course of a criminal investigation" for purposes of the FBI's invocation of the second clause of Exemption 7(D). It found such an argument "contradicted by the assertions of both the Wood and Phillips affidavits," id., and noted further:

> [E]ven if Special Agents Wood and Phillips were not personally involved in any criminal investigation of the Church, their observations and statements, based upon review of the documents and their knowledge of FBI practice and procedure in criminal investigations, is relevant and admissible for the purpose of determining whether the documents were generated "in the course of a criminal investigation."

Id. at n.2. See also Laborers' International Union of North America v. United States Department of Justice, 578 F. Supp. 52, 55-56 (D.D.C. 1983) (rejecting argument, in context of application of FOIA Exemption 7(C), that affiant be required to have taken part in creation of records or to have been involved in investigation which was subject of records), aff'd mem., No. 83-2100 (D.C. Cir. Nov. 27, 1984).

The affidavit and declaration of Special Agent Phillips in this case clearly meet the personal knowledge requirement of Rule 56(e), even under the more stringent standards set forth by this Court in Londrigan v. FBI, 670 F.2d 1164, 1170-74 (D.C. Cir. 1981) ("Londrigan I"), and 722 F.2d 840, 844-45 (D.C. Cir. 1983) ("Londrigan II"). In Londrigan I--a Privacy Act case concerning the application of Exemption (k)(5) of that Act, 5 U.S.C.

§552a(k)(5), to an FBI background investigation file--this Court held that the affiant

> was competent to testify to his own observations upon review of the documents . . . ; the procedural history of [the plaintiff's] attempt to acquire information held by the FBI; the agency's procedures with respect to investigations during his own tenure therewith and earlier practices of which he possesses personal knowledge; and his personal experiences as an agent to the extent that they bore relevance to the case.

670 F.2d at 1174 (footnote omitted). It was only with regard to the circumstances surrounding promises of confidentiality given to sources that this Court found the affiant not competent to testify. See id. at 1175. Such a finding was based upon the statutory design of the Privacy Act's Exemption (k)(5) regarding the protection of confidential sources and was specifically held not to extend to the FOIA. See id. at 1170 n.34. See also Diamond v. FBI, 707 F.2d at 78 (analysis of Londrigan I requiring affidavits based on personal knowledge, demonstrating express or implied promises of confidentiality given to sources, was "unique to the purposes and scope of the Privacy Act, and would not apply to criminal law enforcement documents"); Laborers' International Union of North America v. United States Department of Justice, 578 F. Supp. at 55 ("Londrigan was a Privacy Act case" and "does not require the affiant to take part in creation of the [law

other cases before it that have involved criminal law enforcement investigatory records, see, e.g., Weisberg v. United States Department of Justice, 745 F.2d 1476, 1489-92 (D.C. Cir. 1984) (affidavits describing, inter alia, claims of Exemptions 7(C) and 7(D) in FBI's files pertaining to investigation of assassination of Dr. Martin Luther King, Jr.); Pratt v. Webster, 673 F.2d at 422 (affidavit attesting to nature of "national security file generated by an investigation 'instituted as a result of the FBI receiving information that [Pratt] was engaged in activities which could involve a violation of' 18 U.S.C. §§2383-2385 (1976)").

In the instant case, the attestations in the affidavit and declaration of Special Agent Phillips were indeed made upon personal knowledge and, as in the typical FOIA case, were based upon the affiant's review of the records involved, his knowledge of procedures followed in the processing of FOIA and Privacy Act requests, and information acquired by him in the course of this official duties, see Affidavit of John N. Phillips at 1-2 (J.A. 70-71); in this regard, he was clearly qualified to testify as to the purposes for which the records containing the photographs at issue were compiled. Appellant therefore respectfully suggests that this Court's statement that such an affiant must have personally participated in the investigation giving rise to the records at issue in this FOIA case, see slip op. at 9 n.2, is not compatible with its decisions in other FOIA cases. Even