12/9/86

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG AND JAMES H. LESAR, Plaintiffs,	)	
v.	)	Civil Action No. 86-1547
U.S. DEPARTMENT OF JUSTICE, Defendant.	)	

REPLY TO PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In reply to plaintiffs' opposition to defendant's motion for summary judgment we shall show that (1) the FBI was required to search only in response to item seven of Mr. Weisberg's [1/] request of May 22, 1980 as limited by his letter of July 29, 1980; (2) the FBI conducted an adequate search for responsive records.

1. The FBI was required to search only in response to item seven of Mr. Weisberg's request of May 22, 1980 as limited by his letter of July 29, 1980

By letter dated May 22, 1980, Mr. Weisberg requested twelve categories of information relating to the processing and release of records pertaining to the Kennedy assassination. Llewellyn

1/ The request was made by Mr. Weisberg; the plaintiffs are Mr. Weisberg and Mr. Lesar. In the interest of clarity and accuracy, we refer to the request as Mr. Weisberg's.

declaration (previously filed), Exhibit A. In response, the FBI responded by letter dated July 1, 1980, that the fee waiver that had been granted by this Court was specific as to scope in that it referred to materials scheduled for release on January 18, 1978. The FBI stated, in effect, that the waiver was not indefinite; that it would include additional items specified in the letter; but that it would not extend to Mr. Weisberg's request of May 22, 1980, for documents pertaining to the processing and release of Kennedy assassination records previously disclosed under the FOIA. Llewellyn declaration, Exhibit B.

Accordingly, the FBI informed Mr. Weisberg:

> In view of the above, and in conformance with the requirements set forth in Title 28, Code of Federal Regulations, Section 16.9, processing of material responsive to your pending requests, except as delineated above [i.e., matters not pertinent here, as to which the fee waiver was extended], is being suspended until you indicate those requests or parts of requests for which you are willing to pay customary search and duplication fees. To assist you in your decision, we are willing to provide you with cost estimates on any materials you designate, before you commit yourself to pay the required fees and tender any advanced deposit which may be necessary under the aforementioned section of the Code of Federal Regulations.

Id. at 3. The regulations of the Department of Justice requiring either a promise to pay fees (above a minimum amount) or a determination to waive all fees before the request is deemed received have been specifically upheld. See, e.g., Irons v. FBI, 571 F. Supp. 1241, 1243 (D. Mass. 1983); see also Crooker v. United States Secret Service, 577 F. Supp. 1218, 1219-1220 (D.D.C. 1983).

Mr. Weisberg's letter of July 29, 1980 acknowledged receipt of the FBI's letter of July 1, 1980. He expressly referred to and quoted item 7 and stated: "Here I further limit what this Item requests and, without prejudice to my rights to recover duplication costs, agree to pay duplication costs." Mr. Weisberg went on to reiterate that portion of item 7 which he was requesting. Llewellyn declaration; Exhibit C.

Thus, having been notified that he was required to promise to pay search and duplication fees before his May 22, 1980 request would be processed, Mr. Weisberg expressly restricted his request to item 7 and limited item 7. There could not be a clearer statement to an agency of the scope of its required search and processing of documents.

The United States Court of Appeals for the District of Columbia Circuit has criticized the tendency of some requesters to retroactively revise their requests. Weisberg v. U.S. Department of Justice, 705 F.2d 1344, 1354 n.12 (D.C. Cir. 1983). In view of the large volume of Freedom of Information Act (FOIA) requests, it is only fair and reasonable to permit agencies to act upon requests as framed, rather than require agencies to divine the intentions of the requester. 2/

Plaintiff's arguments to the contrary are incorrect. He asserts: "The most that can be inferred is that he singled out

2/ The cases cited by plaintiffs at pages 6-7 of their opposition are not to the point. The FBI is not strictly construing a request contrary to the intention of the requester. Rather, the FBI is acting upon Mr. Weisberg's July 29, 1980 letter precisely as written. And the letter was written by one well familiar with invoking the FOIA to request documents.

one item of particular and immediate importance to him which was not likely to generate large duplication costs." Opposition at 8 (footnotes omitted). This is a post hoc argument by counsel that not only finds no support in the text of the July 29th letter but is negated by it. Is not my letter limited to it?

Plaintiffs refer to the August 6, 1980 administrative appeal, presented by counsel. See Llewellyn declaration, Exhibit D. In the first place, the August 6, 1980 letter does not refer to or take cognizance of Mr. Weisberg's July 29, 1980 letter. Nor does it acknowledge the FBI's response of July 1, 1980. Instead, it states: "Although more than two months have passed since Mr. Weisberg made his request, he has yet to receive a response. He hereby appeals this de facto denial of his request."

Counsel's (Mr. Lesar's) letter of appeal cannot serve to resurrect the original May 22, 1980 request, when the client's (Mr. Weisberg's) letter of July 29, 1980 had expressly limited it. In addition, there was no de facto denial by the FBI; there was a proper invocation of the Justice Department regulation requiring a promise to pay or a fee waiver before processing a request. Indeed, counsel's letter of appeal was not even to the FBI; it was addressed to the Office of Information and Privacy Appeals of the Department of Justice. This is another reason that the August 6, 1980 letter could not, like an accordion, expand what Mr. Weisberg had contracted by his July 29, 1980 letter.

only on paying

just willing to their cost estimate

where else?

The FBI should not be made to bear the consequence of what appears to have been a failure of communication and coordination between Mr. Weisberg and his counsel. In fact, the complaint in

this case does not even refer to the July 29, 1980 letter, surely an essential fact in presenting this FOIA lawsuit. 3/

Plaintiffs assert that, if there was an ambiguity, the FBI was obligated to confer with Mr. Weisberg to clear up the ambiguity. Opposition at 9. However, there was no ambiguity in the July 29, 1980 letter. Also, as shown above, none of the items plaintiffs seek to invoke to create an ambiguity nunc-pro-tunc are adequate for that purpose.

Plaintiffs present four reasons why the FBI allegedly denied Mr. Weisberg "due process" (Opposition at 9). Due process is a term of art used in connection with denial of a property or liberty right, neither of which is involved here. Nevertheless, taking each of plaintiffs' reasons in turn, we respond.

Failure to respond over a six-year period. Defendant regrets that failure. However, it is only fair to note that plaintiffs have been involved in extensive and intensive litigation with the FBI, and have been prolific in engaging in correspondence. It is, we suggest, understandable that a request was overlooked among all the paper that flowed from plaintiffs to the FBI. It is not irrelevant to note that, by December 7, 1984 the

3/ Plaintiffs seek to use Mr. Weisberg's letter of August 28, 1980 (Llewellyn declaration, Exhibit F) as a devise to expand the request. They state (at page 9): "In further support of this point it should be noted that Weisberg's August 28, 1980 letter to the FBI characterized his request as being for 'records pertaining to the FBI's general releases of 12/77 and 1/78 of assassination records,' rather than describing it as limited to Item 7." Plaintiffs are quoting from the August 28, 1980 letter out of context. Mr. Weisberg was criticizing the FBI for describing the request as one for documents pertaining to the assassination, rather than for documents pertaining to the release of assassination records.

In no case in response to requests + in all cases via litigation (use about 13th.)

FBI had released more than 200,000 pages of documents to Mr. Weisberg as a result of his FOIA requests. 4/ Weisberg v. Webster, 749 F.2d 864, 866 (D.C. Cir. 1984).

On the other hand, plaintiffs adduce no fact to show that they followed up on their request after 1980. It is reasonable to surmise that, if a follow-up letter had been sent to the FBI, there would have been a response. One might expect that persons interested in obtaining information under the FOIA of interest to them and which they claim is of public interest would not merely stand by idly and then rush to Court just as the statute of limitations is about to run. 5/ The Court of Appeals has looked askance at delay of a FOIA requester in making objections. Weisberg v. U.S. 745 F.2d 1476, 1489 n.21 (D.C. Cir. 1984).

Surely known to them.

?

Interestingly, plaintiff Lesar, as counsel for Professor Blakey, in late 1981 pursued the inquiry that is involved in item 7 of Mr. Weisberg's May 22, 1980 request. See Exhibit H to Llewellyn declaration. Yet plaintiffs waited until 1986 before following up on Mr. Weisberg's request.

Notification of "restrictive interpretation." Plaintiffs assert that the FBI failed to notify Mr. Weisberg of the "restrictive interpretation" it placed on his request. Opposition at 9. Actually, it was Mr. Weisberg himself who expressly limited his request, by his letter of July 29, 1980.

4/ Apparently this refers to requests for documents relating to the assassinations of President Kennedy and Martin Luther King.

5/ See Spannaus v. Department of Justice, 643 F. Supp. 698 (D.D.C. 1986).

Estimated fees. Plaintiffs argue that the FBI failed to advise Mr. Weisberg of the estimated fees he might incur with respect to his request. Opposition at 9. However, the FBI's letter of July 1, 1980 (Exhibit B to Llewellyn declaration) expressly stated that (with exceptions noted), Mr. Weisber's FOIA requests [6/] would not be processed until Mr. Weisberg would indicate those requests or parts of requests for which he would be willing to pay customary search and duplication fees. The FBI continued: "To assist you in your decision, we are willing to provide you with cost estimates on any materials you designate, before you commit yourself to pay the required fees and tender any advanced deposit which may be necessary under the aforementioned section of the Code of Federal Regulations." Id. at 3.

Mr. Weisberg did not respond by designating the May 22, 1980 request or any portion as to which he desired estimates. Instead, he responded to the July 1, 1980 letter by limiting his request to item 7 and restricting item 7, and agreeing to pay duplication costs only to that extent.

Thus, notwithstanding plaintiffs' arguments, the FBI was required to search only in response to item seven of Mr. Weisberg's request of May 22, 1980 as limited by his letter of July 29, 1980. Plaintiff's contention to the contrary is another instance of retroactive expansion of a request. See Weisberg v. U.S. Department of Justice, 705 F.2d 1344, 1354 n.12 (D.C.Cir. 1983).

6/ Mr. Weisberg's FOIA requests then pending included, but were not limited to a request for FBI records furnished to certain Congressional Committees during their investigations of the King and Kennedy assassinations, as well as the May 22, 1980 request. Id. at 2.

2. The FBI's search was adequate

Prior to the filing of plaintiffs' opposition, the FBI had searched in the logical places where responsive records would be found, if any existed. In response to plaintiffs' opposition, an additional search was made, acting upon suggestions made in the opposition. See Declaration of David H. Cook, filed herewith.

An agency seeking to defend its search can do so by filing a detailed and non-conclusory affidavit indicating the extent to which it has conducted a search reasonably calculated to uncover the relevant documents. Weisberg v. U.S. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

Plaintiffs' speculation that certain records exist is identical to arguments authoritatively rejected by the Courts. 7/ See, e.g., Meeropol v. Meese, 790 F.2d 942, 952-954 (D.C. Cir. 1986); Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980).

7/ Plaintiffs refer to letters provided to this Court in 1978 in Weisberg v. Bell, C.A. No. 77-2155, respecting additional sets of documents to be placed in research facilities such as the Library of Congress. Opposition at 2. Plaintiffs' contentions in this regard are not germane to the issue in this FOIA case; i.e., the adequacy of the search. We do note that the answers to interrogatories in the Blakey case state that the Library of Congress received 98,755 pages on January 19, 1978, at no charge, to assist the House Select Committee on Assassinations investigation into the Kennedy assassination. (These records were subsequently returned to the FBI by the Library of Congress). In addition Southern Louisiana University and three news media received the same number of pages, in late 1977 and early 1978, for which they paid $9060.50. Another newspaper paid $4,000.10 for 40,001 pages in December of 1977. Llewellyn declaration, Exhibit H, page 3. (We also note that the House Select Committee on Assassinations conducted a lengthy inquiry and issued a voluminous report and exhibits in performing its task.)

"[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request but rather whether the search for those documents was adequate." Weisberg, 745 F.2d at 1485 (emphasis in original). See Ground Saucer Watch v. CIA, 692 F.2d 770, 772 (D.C. Cir. 1981).

Here, the request was assigned to a person knowledgeable about the subject matter, so that he would not be limited to information obtained from the search. Cook declaration, par. 5. In addition, based upon experience, the FBI searched locations in which material of the requested nature would have been filed, if any existed. Cook declaration at par. 6.

Furthermore, the FBI did not merely stand still on its former searches, but pursued suggestions made by plaintiffs in their opposition: i.e., the Weisberg v. Bell file, Project Onslaught, "ticklers," and contacts with people involved in the project which produced the Kennedy assassination releases. Cook declaration, paragraphs 7-10.

The Llewellyn and Cook declarations clearly are not conclusory, and satisfy the Weisberg standard. They show the reasonableness and adequacy of the search made by the FBI. 8/

8/ Plaintiffs' allegation of bad faith is unjustified and unsupported. They refer to failure to respond to the request or the appeal and failure to provide a routine estimate of costs which might be incurred before requiring a commitment to pay costs. We have dealt with both of these matters at pages 5-7 above. As we have noted, while we regret the delay, it is also true that plaintiffs did not pursue this matter for six years. In Blakey, the FBI made prompt response to discovery requests made by Mr. Lesar for this and additional information. As to plaintiffs' latter point, the FBI offered to provide estimates, but Mr. Weisberg's response was to limit his request by his July 29, 1980 letter. He did not accept the FBI's offer to provide estimates.

Said I'd pay

Although plaintiffs claim that there are issues of material fact, their Rule 108(h) statement asserts only questions relating to the application of law to the facts; the statement does not include any genuine issue of material fact.

This is, then, a case typically and properly adjudicated on the agency's declarations. See, e.g., Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981); Weisberg v. U.S. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). 9/

CONCLUSION

For these reasons, as well as those previously stated, it is respectfully submitted that defendant's motion for summary judgement should be granted.

Respectfully submitted,

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9/ In a trilogy of non-FOIA cases decided during the last term (Celotex Corp. v. Catrett, 91 L.Ed. 2d 265 (1986); Anderson v. Liberty Lobby, 91 L.Ed.2d 202 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio, 106 S.Ct. 1348 (1986)), the Supreme Court has enhanced the utility of summary judgment in adjudicating cases. We suggest that, all the more so, summary judgment should be used as it has in the past as the means of resolving FOIA litigation in an orderly and efficient manner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing reply to plaintiff's opposition to defendant's motion for summary judgment was mailed, to James H. Lesar, Esquire, 918 F. Street, N.W., Suite 509, Washington, D.C. 20004 this 19th day of December, 1986.

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