CASE SCHEDULED FOR ORAL ARGUMENT ON APRIL 14, 1988

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 87-5304

HAROLD WEISBERG,

Appellant

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee

On Appeal from the United States District Court for the District of Columbia, Hon. June L. Green, Judge

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff-Appellant, v. U.S. DEPARTMENT OF JUSTICE, Defendant-Appellee	:	Case No. 87-5304

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to General Rule 11(a)(1), Harold Weisberg, appellant in the above-captioned case, hereby submits this certificate of counsel as to parties, rulings, and related cases.

1. Parties and Amici

The parties below were Harold Weisberg (plaintiff) and the United States Department of Justice (defendant). There are no other parties, intervenors, or *amici* appearing in this Court.

2. Rulings Under Review

This appeal is from a judgment of the Honorable June L. Green entered on June 1, 1987, awarding the appellant $23,680.49 in attorney's fees and costs. The judgment reflects an opinion and order by Judge Green filed on May 28, 1987. The order and opinion are unreported. They are reproduced in the Joint Appendix at JA 239-270 and JA 271-272.

3. Related Cases

This case has been before this Court on two prior occasions. This Court's decision in the first of the two previous appeals is

reported as Weisberg v. U.S. Department of Justice, 631 F.2d 824 (D.C.Cir. 1980)(No. 78-1641). This Court's decisions in the second of the two previous appeals are reported as Weisberg v. U.S. Department of Justice, 745 F.2d 1476 (D.C.Cir. 1984) and Weisberg v. U.S. Department of Justice, 763 F.2d 1436 (D.C.Cir. 1985). Counsel for appellant is not aware of any other related cases currently pending in this Court or in any other court.

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES

1. Whether the District Court erred in ruling that appellant did not "substantially prevail" within the meaning of 5 U.S.C. § 552(a)(4)(E) with respect to his December 23, 1975 Freedom of Information Act request ("second request").

2. Whether in calculating the amount of the attorney's fee for work done in connection with appellant's April 15, 1975 request ("first request"), the District Court erroneously excluded time for which he should have been reimbursed.

3. Whether the District Court erred in ruling that appellant was not entitled to an upward adjustment in the lodestar fee for work done on his first request in circumstances where (a) the case was taken on a contigency, (b) ten years had passed between the filing of the suit and the final order awarding attorney's fees for work done on this request, and (3) the case presented a novel legal issue.

STATUTES AND REGULATIONS

The attorney's fee provision of the Freedom of Information Act ("the FOIA"), 5 U.S.C. § 552(a)(4)(E), provides that:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

A copy of the full text of the FOIA, as amended, appears at Addendum 1 to this brief.

JURISDICTION

The District Court had jurisdiction over this case pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(3) and (a)(4)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 of the final order entered in this case on June 1, 1987.

STATEMENT OF THE CASE

I. BACKGROUND

A. The Requester

The requester, Harold Weisberg, has had a long and varied career as investigator, journalist, intelligence analyst and author. He has had a great deal of experience investigating political violence. In the 1930s, as an employee of the Senate Labor and Education Committee, he investigated labor violence in Harlan County, Kentucky. In connection with his work for this committee or through his writing, Weisberg has worked with the FBI and several divisions of the Department of Justice. March 23, 1976 Weisberg Affidavit, ¶4. [Record ("R.") 10]

After 1963, Weisberg devoted himself fulltime to a study of the political assassinations of President John F. Kennedy and Dr. Martin Luther King, Jr. He is recognized by scholars as the leading authority on the assassination of President Kennedy,[1] and he is also an acknowledged authority on the assassination of Dr. King.[2] The role he has played in trying to ensure that in-

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1/ DeLoyd J. Guth and David R. Wrone, "Introduction," The Assassination of John F. Kennedy: A Comprehensive Historical and Legal Bibliography, 1963-1979 (Westport, Connecticut: Greenwood Press, 1980) at xxvi.

2/ The Justice Department has acknowledged Weisberg's "clear expertise" on the subject of Dr. King's assassination. May 24, 1978 Hearing, Tr. at 2 [R. 73].

formation disseminated to the public is complete and accurate is well-known to those knowledgeable on these subjects.[3/]

B. Purposes of the Lawsuit; Uses of Information Obtained

When he filed this lawsuit in November, 1975, Weisberg was author of the only book which contended that James Earl Ray was not the sole assassin of Dr. King.[4/] He instituted this suit to obtain materials for a second book on this subject. A principal objective of the lawsuit was to secure the release of the basic evidence of the crime and the FBI's investigation thereof. As amended by inclusion of Weisberg's December 23, 1975 request ("second request"), the suit also sought other materials pertinent to the King assassination in a broader sense, such as the FBI records on the Memphis Sanitation Workers and the Invaders.[5/]

3/ *See, e.g.*, affidavits of Howard Roffman and David R. Wrone [R. 42]. *And see* Affidavit of Les Whitten [R. 52]. Whitten states that he has found Weisberg "uniquely reliable among the so-called 'critics,'" and that, "he has steered me away from several stories that looked plausible, but turned out under Weisberg's counselling to be false; without such counselling and documentation, I would have printed false stories. . . ."

4/ *Frame-Up: The James Earl Ray/Martin Luther King Case* (New York: Outerbridge & Dienstfry, 1971).

5/ It was a strike by the Memphis Sanitation Workers which originally brought Dr. King to Memphis. The Invaders were young black activits who were widely blamed for the violence which led to Dr. King's return to Memphis on April 4, 1968, when he was shot. Weisberg provided leads to *Newsday* Les Payne which resulted in his breaking the story, syndicated nationally, that informants actively participated in the rioting which caused King to return to Memphis. October 7, 1976 Weisberg Affidavit, ¶86 [R. 30]. Payne's story on this appeared in the February 1, 1976 issue of *Newsday* and is attached to the Second Affidavit of James H. Lesar [R. 23].

Weisberg has arranged for all the materials obtained through this lawsuit to become part of a university archive when he dies. Thus, these materials will become a permanent public archive available for use by students, scholars, and the general public.[6/]

Some materials obtained from this lawsuit already have been deposited with the University of Wisconsin-Stevens Point. Duplicates of some of the records obtained from this litigation, including the entire files on the Invaders and the Memphis Sanitation Workers' Strike have been deposited with two colleges and are in use by their students. A number of scholarly uses have been made of the materials which Weisberg has made available. Some of the materials are used in seminars and teaching, and at least three "honors" papers have been based on these records. July 29, 1982 Weisberg Affidavit, ¶16 [Joint Appendix ("JA") 30].

Professional scholars have used the Invaders/Memphis Sanitation Workers' Strike materials in their published workds. Dr. Gerald D. McKnight, Professor of History at Hood College in Frederick, Maryland, has published two articles in The South Atlantic Quarterly. The first article was based "largely on the examination of more than 2000 FBI documents" in the Memphis Sani-

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6/ Weisberg has purchased more than 50 file cabinents to hold these records, which are stored in the basement of his home. Although he himself is no longer able to work in the basement for health reasons, he has intalled extra lighting, a desk and a phone there so that scholars, members of the press and others may do so. All records are preserved exactly as he receives them. Extra copies of the more significant records are made and filed by subject. From this large file he provides information to others who request it, including the press. July 29, 1982 Weisberg Affidavit, ¶18 [JA 35].

tation Workers' Strike Force. He also made use of the FBI file on the Invaders. According to McKnight, this "first comprehensive scholarly use of these files . . . throws new light on an important event in contemporary American history and public affairs that would doubtlessly have escaped public scrutiny except for the passage of the Freedom of Information Act." He thanks Weisberg for allowing him to reproduce these files for his own research purposes. See Gerald D. McKnight, "The 1968 Memphis Sanitation Workers' Strike and the FBI: A Case Study in Urban Surveillance," The South Atlantic Quarterly (Spring 1984) at 138 n.1 [JA 37]. The same journal subsequently published a sequel by Dr. McKnight on the Invaders in its Winter 1987 issue: "A Harvest of Hate: The FBI's War Against Black Youth--Domestic Intelligence in Memphis, Tennessee" [JA 218] Dr. McKnight states that this paper was based on the examination of more that 2500 pages of FBI documents on the Invaders (both from FBI Headquarters and the Memphis field office) and from a companion file entitled "Marrell McCullough." He thanks Weisberg for allowing him to reproduce the Invaders file for his own research purposes. Id., p. 2 n.1 [JA 219].

Another scholar, historian David J. Garrow, who recently won the Pulitzer Prize for his biography of Dr. King, cites these files in his recent work The FBI and Dr. Martin Luther King, Jr.: From "Solo" to Memphis (New York: W.W. Norton & Company, Inc. 1981). In the introduction to the book, Garrow thanks Weisberg. [JA 48] Weisberg also made the FBI field office inventories of

their holdings on Dr. King available to Garrow, who used the information in them to fashion FOIA requests for FBI materials on Dr. King's associates. The New York Times ran an article on information obtained from the release of these materials. See "Wiretaps Reveal Dr. King Feared Rebuff on Nonviolence," by Ben Franklin, New York Times, September 15, 1985 [JA 50] These inventories were obtained in this lawsuit, but only after months of resistence by the FBI.

Drawing on information obtained in this lawsuit, Weisberg has assisted the news media in their projects and stories on the King assassination. This includes the wire services and a number of large newspapers, some of which have their own syndicates and syndicated the information widely. These newspapers include the New York Times, the Washington Post, the St. Louis Post-Dispatch and Newsday, which is the largest non-metropolitan paper in the country. July 29, 1982 Weisberg Affidavit, ¶12 [JA 34].

Because James Earl Ray and his family are from the St. Louis area, the Post-Dispatch had additional interest in the subject. Weisberg provided it with copies of many of the records he received, including syndication to other newspapers. For example, records on Oliver Patterson, an FBI informer, made a series of four page-one stories in the Post-Dispatch and many papers in its syndicate. Id. ¶13 [JA 34].

During the pendency of this lawsuit, Congress investigated the assassination of Dr. King. The published hearings of the

House Select Committee on Assassinations ("the HSCA") to include a 50-page analysis by Weisberg of some of its evidence. In preparing this analysis, Weisberg drew on information obtained in this litigation. Id., ¶13 [JA 34].

FBI records on the King assassination were provided to the HSCA after they had been processed and released to Weisberg.[7/] Thus, Weisberg's lawsuit may also have benefitted the HSCA.[8/]

II. THE RESULTS OF THIS LITIGATION AND HOW THEY WERE OBTAINED

Weisberg received approximately 60,000 pages of documents as a result of this litigation. Although most of these records were responsive to his second request (December 23, 1975 request), there was some overlapping; some of the records which were produced only after the FBI began to release its "entire MURKIN[9/] file were also responsive to his first request (April 15, 1975 request). Generally speaking, however, the accomplishments listed below are attributable to litigation of the second request.

7/ Some 34 sections of the Memphis field office records on the assassination of Dr. King were delivered to the HSCA on January 13, 1978, more than three and one-half months after they were provided to Weisberg. See FBI Headquarters document 62-117290-590X.

8/ Late in the HSCA's existence the FBI devised a plan to limit its requests for the FBI's Dallas and New Orleans field office files on the Kennedy assassination. If this attempt to stonewall the HSCA proved unsuccessful, the FBI then proposed to give the HSCA a copy of records* being produced in response to Weisberg's lawsuits for these records. See FBIHQ document 62-117290-958 [JA 52].

9/ "MURKIN" is the FBI's acronym for its "Murder of Dr. King" investigation and files.

* Some only

1. Fee Waiver for 60,000 Pages of Documents

A major accomplishment of this litigation was obtaining a complete fee waiver for all 60,000 pages of documents released by the FBI. Although the District Court never entered a written order directing that a complete fee waiver be granted, a review of the proceedings pertinent to the fee waiver issue leaves no doubt regarding the cause of the fee waiver. It was this lawsuit that produced the waiver.

When the FBI began releasing records responsive to Weisberg's second request in late fall 1976, it conditioned the releases on payment by Weisberg of its normal copying rate of 10 cents per page. On November 4, 1976, Weisberg responded by requesting a fee waiver. After waiting nearly four weeks without receiving any response to his letter, Weisberg moved the District Court for an order waiving all search fees and copying costs. [R. 34] The Department simply ignored the motion. No response to it was ever filed, nor did the Department seek any extension of time within which to respond to the motion.

At the next status call, held May 2, 1977, Weisberg's counsel raised the fee waiver issue, noting that he had renewed Weisberg's request, and that there still had been no response. Tr. at 2. The Department argued that the FOIA "does not provide that the Government should furnish to individuals, without charge, if they want to carry the documents out of the Freedom of Information Act rooms to their home." Tr. at 4. Unpersuaded, the District Court

stated that the matter had been "dragging on for months" and should be brought to the Attorney General's attention to so a determination could be made. Tr. at 6.

By letter dated May 26, 1977--seven months after the fee waiver request--the Department notified Weisberg that "[t]he fee waiver request, together with all other matters pertaining to [Weisberg's] pending appeal for access to the records themselves, will be determined when the final action is taken on the appeal." See Motion for Waiver of All Search Fees and Copying Costs, Exh. 2. [R. 52]

At the status call on June 30, 1977, Weisberg's counsel protested this as "another refusal to decide" and demanded that the Attorney General be ordered to decide the matter within ten days. Tr. at 20. The District Court stated that the Department had not answered the request "in a timely fashion," and that the Department's appeals personnel "ought to be able to make up their minds in ten days." Alluding to the bias against Weisberg at Justice, the Court stated that it didn't think the response made by the Department in its May 26th letter would have been given to anyone other than Weisberg. Tr. at 23-24. The Department's counsel finally conceded, "I think they have to give an answer," but followed this concession--made eight months after the fee waiver request--by inquiring whether the Court wanted "to put it in the form of an order." When the Court did so, he complained that "[t]hey ought to be required to put this in the form of a motion which they can respond to by writing." Tr. at 25.

By letter dated July 12, 1977, the Department advised Weisberg that he was being granted a 40% reduction in copying charges, to 6 cents a page. See Motion for a Waiver of All Search Fees and Copying Costs, Exh. 3. [R. 52]

Weisberg renewed his motion for a complete waiver of fees on November 2, 1977.[10/] The Department's opposition was served on January 11, 1978, nearly two and a half months later. [R. 56] On March 3, 1978, the District Court ordered the Department to file within eight days an explanation of how the partial reduction of fees was arrived at. [R. 59] In the interim, United States District Judge Gerhard Gesell award Weisberg a fee waiver for 80,000 pages of FBI Headquarters records on the assassination of President Kennedy. See Weisberg v. Griffin Bell, et al., Civil Action No. 77-2155 (D.D.C. Jan. 16, 1978).

On March 23, 1978, the Department filed an affidavit by Quinlan J. Shea, Jr., the Director of its appeals office, which explained that the Department was reconsidering its previous fee waiver determinations. The affidavit referenced a memorandum from

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10/ By this time Weisberg had been forced to decline some 3,000 pages of FBI Laboratory records because he was unable to pay for the entire batch. As a result, he asked the FBI to provide copies only of the ballistics-related documents and several crime scene photographs that had not been provided earlier. In 1978 the Department's appeals officer promised Weisberg that he would be given all of these lab records. Although the FBI had previously stated that Weisberg would be furnished all FBIHQ MURKIN records, it later asserted that these records were "not responsive" to his requests. See August 13, 1980 letter from James H. Lesar to Mr. William Cole. [R. 178] Ultimately, these records, too, were obtained, but only after much additional struggle.

Shea to Deputy Attorney General Flaherty. Shea's memorandum stated: "There can be no doubt that release of the King materials is of the greatest possible public interest." It also asserted that:

> Weisberg['s] . . . early efforts to obtain access, <u>and particularly this lawsuit</u>, have contributed materially to the general public. *** His familiarity with the case has also enabled the Bureau to evaluate more quickly the privacy interests of many of the hundreds of individuals involved. The public, therefore, has benefitted both from Mr. Weisberg's tenacious efforts to make the King materials public and, to some extent, from a shortening of the time necessary to process the case.

(Emphasis added) [R. 60]. Citing "Judge Gesell's order [of January 16, 1978 in Civil Action No. 77-2155] and the decision not to appeal therefrom" as grounds for reconsidering his own prior actions on fee waivers sought by Weisberg, Shea promised that he would communicate his decision of the fee waiver request pending in this case to Weisberg by March 31, 1978. March 23, 1978 Affidavit of Quinlan J. Shea, Jr., ¶9. [R. 60] On that date he granted Weisberg a complete fee waiver.

<u>2. Field Office Files</u>

Weisberg obtained approximately 20,000 pages of records from FBI field offices. The FBI initially resisted the release of its field office files. According to the Department, it did so "because of its belief that all relevant documents in those files were already being released to Mr. Weisberg." Points and Authorities in Opposition to Plaintiff's Motion for Attorney Fees and

Litigation Costs [filed October 7, 1982] at 4. [R. 258] This belief was obviously in error, since the 20,000 pages which Weisberg obtained from eight FBI field offices pursuant to stipulation were, with minor exceptions, not duplicates of Headquarters documents.[11/]

3. The Long Tickler File

In this and in other litigation, the FBI has always claimed that it keeps ticklers only a short while. October 26, 1982 Weisberg Affidavit, ¶22. [R. 260] In this case the FBI initially denied that a tickler file kept by FBI Supervisor Richard E. Long existed. *Id.*, ¶48. In July 1978, Weisberg submitted proof of its existence in a report he made to the Department. Confronted with proof that the Long Tickler File existed, the FBI said it could not find it. It was then finally located after Weisberg suggested where to look for it. *See* October 26, 1978 letter from Quinlan J. Shea to James H. Lesar thanking Weisberg for his assistance in locating the "missing file." [R. 84]

The Long tickler is a major case control file. It does not duplicate other materials but is a unique record in and of itself. It consists of 35 file folders organized by subject matter and in-

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12/ In *American Friends Service Committee v. Webster*, 485 F. Supp. 222, 232 (D.D.C. 198), *aff'd* 720 F.2d 29 (D.C.Cir. 1983), Judge Harold Greene found this assumption to be clearly erroneous. In fact, he found that "the field office files on any particular subject typically exceed in volume those kept at headquarters by a ratio of four or five to one." He also found that: "In a very real sense, insofar as historians and other investigators are concerned, the field office files would be the stuff or primary research, at least in the areas of how and why FBI investigations are conducted (as distinguished from the ultimate decision-making process)." *Id.*

cludes records from pertinent files other than the MURKIN files. It refutes the persistent FBI claim that everything germane to the King assassination is in its MURKIN file. Largely a political file, the Long tickler held, among other things, records pertaining to Weisberg that were part of a bank robbery file.[13/] [JA 168]

By letter dated November 20, 1978, the FBI released 460 pages of documents contained in the Long tickler. [JA 130]

4. Catalogues and Bay of Pigs Manuscript

After this Court remanded the issue of the copyrighted crime scene photographs, Weisberg v. U.S. Department of Justice, 631 F.2d 834 (D.C.Cir. 1980), Weisberg called attention to the fact that a gun catalogue, a scope catalogue and a "Bay of Pigs Manuscript" had also been withheld pursuant to Exemption 3 and the Copyright Act. He argued that it seemed highly implausible that a manufacturer's sales catalogue would be withholdable as copyrighted. The Department initially resisted disclosure of these materials on the ground that it was "an important matter of principle for the Department of Justice." August 15, 1980 Hearing, Tr. at 10-11.

Ultimately, these items were released. The release of the 1968 Redfield scope catalogue was particularly important because it shows that the telescopic sight on the alleged murder weapon was set grossly wrong even when it reached the FBI lab. See Weisber Consultancy Report, Part II, at 41. [R. 168]

13/ Weisberg contends, without denial, that the presence of information on him in a "bank robbery" file indicates undisclosed surveillance on his phone conversations with James Earl Ray's family. Permission for such surveillance was denied by the Attorney General.

5. Memphis Records Released Pursuant to Court's Order of December 21, 1981 and Field Office Inventories

After a considerable effort by Weisberg, the FBI finally released 404 pages of inventories of the files on Dr. King maintained in its 59 field offices. The FBI had compiled these field office inventories for the Office of Professional Responsibility which had conducted a reinvestigation of Dr. King's assassination and the FBI's campaign of harassment against him. Using these inventories, Weisberg asked to the District Court to order the FBI to search two Memphis field Office files and one Savannah field office file for responsive records.

Although records from these files were provided, the Department has tried to belittle their importance, arguing, for example, that the Memphis bomb threat file had not been turned over previously because it was not responsive to Weisberg's request since it "dealt with a threat to bomb a plane on which Dr. King was once a passenger." (Emphasis added) Brief for Appellee in D.C.Cir. No. 82-1229, at 45. In fact, tyis file deals with an April 1, 1968 phone call, thought to have originated in Memphis, from a man who reportedly said: Your airline brought Martin Luther King to Memphis and when he comes in again a bomb will go off and he will be assassinated." (Emphasis added) On May 28, 1968, the file was closed on the grounds that "all the information furnished by the unknown person making the above-mentioned call was untrue." Except, of course, that when King next returned to Memphis, three days later, he was killed.

6. Department File 144-72-662

Pursuant to this Court's order of December 1, 1981, the Civil Rights Division produced a memorandum entitled "Memorandum to the Attorney General re James Earl Ray Possible Evidence of Conspiracy." This memorandum suggested that a warrant should be sought for the notes written by James Earl Ray to William Bradford Huie, the author who paid for Ray's legal defense. The Department has claimed that it was not released earlier "by oversight." This claim is difficult to understand in light of the Department's sworn declarations that it had searched this file before. Moreover, it continued its opposition to a further search even after Weisberg had provided proof of the existence of this document. See January 5, 1981 Lesar Affidavit, ¶¶4-5, Exh. 3. [R. 202] In view of the Government's repeated assertions that James Earl Ray alone killed Dr. King, the significance of this document is obvious. The reference to this document in the report of the House Select Committee on Assassinations further indicates its importance to scholars.

7. Abstracts

Mr. Douglas Mitchell, an employee of the Office of Informaion and Privacy Appeals, disclosed during his deposition that the FBI maintains abstracts of records on Dr. King's assassination, and that he had used such abstracts in performing research delegated to him in connection with this case. The Department opposed Weisberg's motion for summary judgment as to the abstracts on the

ground that they were not within the scope of the August 12, 1977 stipulation regarding the processing of field office requests. It also contended that it would be burdensome to produce them. [R. 130]

The issue was first raised in Court at the December 20, 1979 hearing, when counsel for the Department asserted that the abstracts were "like the central index file" and had never before been requested.[14/] Tr. at 17. In response, Weisberg pointed out that Item 21 of his December 23rd request asked for "[a]ny index or table of contents to the 96 volumes of evidence on the assassination of Dr. King." [R. 132] The Department's counsel then asserted of the abstracts: "This is not an index.[15/] *** And it doesn't fall within that item 21 by any stretch of the imagination." January 3, 1980 Hearing, Tr. at 4. The issue was again argued orally on February 8, 1980, and at that time the District Court ordered the Department to release the abstracts. Tr. at 7.

Thus, after months of litigation, Weisberg obtained the release of 6,500 MURKIN abstracts. In the judgment of a professional historian, "the MURKIN file abstract or index cards constitute a valuable historical research file that in themselves would [be] a key asset to any search into the assassination of Dr. . . . King

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14/ It is doubtful that this is true. A FOIA handbook contains a form request letter for use by persons who want to obtain their FBI files. An optional clause asks for "abstracts." See Ann Mari Buitrago and Leon Andrew Immerman, Are You Now Or Have You Been in the FBI's Files? (New York: Grove Press, 1981), p. 88.

15/ The Department previously had used "indices" and "abstracts" interchangeably to describe three boxes of indices to some of the evicence against James Earl Ray prepared by the FBI. [R. 36]

and its investigation." Affidavit of Prof. David R. Wrone, ¶8. [R. 145] As Prof. Wrone notes, the abstracts "establish a chronology, the heart of historical inquiry since Leopold von Ranke's famous seminars," and they "give a chronological overview of the unfolding and extremely complicated federal investigation nowhere else attainable." Id., ¶12. In his view, the abstracts "are excellent examples of the summary index cards all careful historians must make" and contain a wealth of useful information in a very few words." Id., ¶¶10-13.

8. Exemptions

At the conclusion of the case, all of the Department's claims of exemption were upheld. However this gives a misleading picture, since during the course of the litigation the FBI repeatedly withdrew its exemption claims.

At the outset, the FBI needlessly withheld much material from some documents on the ground that it was "outside the scope of the request." See, for example, June 24, 1968 Airtel from Legat, London to Director, FBI. [JA 66] This material was later restored.

Early in the case the FBI asserted Exemption 7(D) for a large number of crime scene photographs taken by local law enforcement agencies. Although the Department initially indicated that it would brief this issue, this claim was later dropped and the photographs were given to Weisberg.

The FBI initially made many exemption claims under Exemption 7(C) for the names of public figures, such as New Orleans District

Attorney Jim Garrison, and for the names of King assassination witnesses well-known to the public. For example, it deleted the name of the Aeromarine Supply Company, the store in Birmingham where James Earl Ray purchased the alleged murder weapon, the name of a salesman at Aeromarine, and an alias used by James Earl Ray. Queried about these deletions, FBI Special Agent John Cunningham refused to defend them. September 16-17 Hearing, Tr. at 126-127. This material was later restored. Indeed, after many strong protests by Weisberg, the FBI reprocessed entire sections of the MURKIN file in order to restore such deletions.

The FBI also originally excised the names of FBI Special Agents "who were in the field offices investigating various leads. . . ." Seventh Affidavit of Martin Wood, ¶11(c). [R. 153] The misuse of Exemption 7(C) for this purpose reached its most absurd point when the FBI deleted the name of a lab agent from a copy of a newspaper article reporting that he might be held in contempt of court for pretrial remarks. <u>See</u> Attachment 9. However, "[b]eginning in Section 86 of the FBIHQ MURKIN file and continuing through records more currently processed, upon a reconsideration of the historical nature of this material, the names of FBI Special Agents were left in the text of the documents." <u>Id</u>. Thus, the policy initially in effect was changed, so that for the last 10 sections of FBI MURKIN records and for the 20,000 field office records, the policy was not to delete such names.

As a result of the Vaughn sampling indices, important substantive information which had been withheld under Exemption 1 was "declassified" and released. Claims to withhold the identities of FBI agents under Exemption 7(C) were also dropped where they appeared in the sample documents.

Thus, in many instances the initial exemption claims asserted by the FBI, and vigorously protested by Weisberg, were withdrawn by it prior to the District Court's order upholding the remaining claims.

III. HISTORY OF THE ATTORNEY FEES LITIGATION

A. Initial Ruling by the District Court

In 1983 the District Court ruled that Weisberg had substantially prevailed in this litigation, and that he was entitled to an award because (1) the public benefited from the disclosures made, (2) he did not benefit commercially, (3) his interest in the documents was scholarly in nature, and (4) the Department of Justice lacked a reasonable basis in law for its actions. Memorandum Opinion, January 20, 1983, at 10-15. [R. 263]

Having made this determination, the Court then calculated the award on the basis of an hourly rate of $75, which it considered to be the current rate of Weisberg's counsel, Mr. Lesar. The Court deducted 7 of 791.4 hours which Lesar said he had spent on the case, excluded 44 hours spent on the consultancy fee issue and another 37.7 hours spent on the attorney fees application.

Id., at 16-17. This produced a "lodestar" award of $62,615.50. The Court then granted a 50% enhancement of the lodestar award, raising the total amount of the fees awarded to $93,927.25. Id., at 19-20. Subsequently, the Court awarded costs in the amount of $14,481.95. Memorandum Opinion, April 29, 1983, at 5-8. [R. 282] Thus, the total amount of attorney's fees and costs initially awarded by the District Court was $108,409.20.

B. First Appeal of the Attorney Fees Issue

The Department appealed the award; Weisberg cross-appealed on three aspects of the fee award and on other issues. This Court vacated the award and remanded the case to the District Court for reconsideration of the award and several issues pertaining thereto. Weisberg v. U.S. Dept. of Justice, 240 U.S.App.D.C. 339, 745 F.2d 1476 (D.C.Cir. 1984)("Weisberg II").

Specifically, this Court directed the District Court to (1) reconsider whether Weisberg had substantially prevailed, evaluating separately the Department's responses to each of his two requests, Weisberg II, 240 U.S.App.D.C. at 360 n.33; (2) make "a considerably more careful distinction between productive and nonproductive time" and determine whether additional nonproductive time should be excluded from the fee application, Weisberg II, at 362; (3) determine whether, in light of Blum v. Stenson, 104 S. Ct. 1541 (1984) and Nat. Ass'n of Concerned Vets v. Sec. of Defense, 675 F.2d 1319 (1982), an upward adjustment of any lodestar award was appropriate, id.; and (4) determine whether further deductions should be made from the award of costs "in view of any

deductions from any fee award for nonproductive time." Id., at 363 n.35.

C. Proceedings on Remand

On remand the parties entered into settlement negotiations. When these proved unsuccessful, Weisberg renewed his motion for attorney fees.

Weisberg put forth three major arguments as to why he had substantially prevailed with respect to his second request. First, he argued that unless he files suit the FBI does not comply promptly, with due diligence, or even at all with his requests. Because of this, any production of records must be viewed as having result from the lawsuit rather than from "administrative processing" of his request. Second, he argued that he had substantially prevailed because all documents were provided free of charge as a result of a complete fee waiver which he obtained through the intervention of the District Court. Third, he contended that he had obtained approximately 20,000 pages of FBI field office records, as well as other important records, such as the Long Tickler file, abstracts, etc., either as a result of a stipulation requiring their expedited production or as a consequence of court orders.

In support of his first argument, Weisberg provided the District Court with several specific instances where more than five years had elapsed after he lodged appeals without any response. See Plaintiff's Reply to Defendant's Opposition to Plaintiff's Mo-

tion for Attorneys' Fees ("Plaintiff's Reply")(filed May 5, 1986), at 2 n.2, and attachments referenced therein [JA 114-117]. He also noted that where he had provided the FBI with privacy waivers for two persons involved in its King assassination investigation, the FBI had yet to provide the first document after eight years, and that his appeals about this had not been acted upon. See Plaintiff's Motion for an Award of Attorneys' Fees and Costs ("Plaintiff's Motion")(filed February 14, 1986), at 35. He further noted that in the rare instance in which the FBI has provided records without a lawsuit, he has had to wait up to ten years for even an initial, partial compliance with his request. Thus, in 1975, and again in 1978, he submitted requests for records pertaining to Yuri Nosenko, the Soviet defector who has figured in the investigations of the Warren Commission and other official bodies, but he received no documents at all until late 1985. See January 25, 1986 Weisberg Declaration and Exhibits 1-2 thereto. [JA 55-60]

The Department argued in its opposition that the materials released responsive to Weisberg's second request had either been released administratively or were duplicative of other materials that had been released. Although the Department conceded that Weisberg had substantially prevailed with respect to his first request, it continued to argue that he was entitled to no fee whatsoever because he was not eligible for a fee award with respect to either request. See Defendant's Opposition to Plaintiff's Request for Attorney's Fees (filed March 26, 1986).

D. The District Court's Decision on Remand

On remand the District Court ruled that Weisberg was eligible for an award of attorney's fees with respect to his first request. He was awarded $20,060 in fees and $3,620.49 in costs, for a total of $23,680.59. May 28, 1987 Order [JA 271-272].

In making this award, the District Court excluded 203.3 hours of time related to the first request. The time excluded falls into the following categories:

1. The District Court exluded 17.6 hours for work spent on the fee waiver issue which applies to both requests. May 28, 1987 Opinion, at 25 [JA 262].

2. The District Court excluded 77.1 hours (out of a total of 102.8 hours) spent on the Weisberg I appeal, which involved the copyright issue and related issues. Id., at 26 [JA 264].

3. The District Court excluded 61.1 hours (out of 94 hours) for work in connection with the attorney's fee application on remand. Id., at 27 [JA 265].

4. Finally, the Court excluded 37.5 hours (out of 50 hours) which Weisberg claimed for work on the attorney's fees issue in connection with the Weisberg II appeal.[16] Id., at 28 [JA 266].

The District Court awarded fees at the hourly rate of $100. Id., p. 30 [JA 268]. It declined to make an upward adjustment to the lodestar "given the Supreme Court's decision in Blum v. Stenson, 465 U.S. 886 (1984)." Although the Court stated that

16/ After Weisberg's counsel had himself cut this figure from 150 hours to 50 hours. See May 9, 1986 Supplemental Declaration of James H. Lesar, ¶5 [JA 181].

the litigation regarding the copyrighted TIME photographs did present a novel issue, it asserted that this issue "did not require a particularly complex analysis by either party." Id., at 31 [JA 268]. The Court made no determination of the appropriateness of an upward adjustment based on the "risk" factor; i.e., the fact that Weisberg's counsel undertook to represent him on a pure contingency.

With respect to Weisberg's second request, the District Court ruled that he was not entitled to any attorney's fees at all because he had not substantially prevailed with respect to that request. The District Court conceded that some of the disclosures listed by Weisberg occurred as a result of this litigation, but found that the majority of them resulted from the Department's administrative processing of the second request. Id., at 12-13 [JA 250-251]. Specifically, the Court held that the fact that Weisberg had obtained a fee waiver for all documents in this litigation did not mean that he had substantially prevailed because the waiver was based "on an administrative decision of the agency and not a lawsuit." Id., at 15 (emphasis added). [JA 253] It also held that the release of approximately 20,000 pages of FBI field records did not mean that he had substantially prevailed becase this was done pursuant to a stipulation entered into by the parties. Id., at 13 [JA 251]. The Court also dismissed the significance of some of the disclosures because it concluded that they were duplicative or of minimal significance.

ARGUMENT

I. WEISBERG QUALIFIES FOR AN AWARD OF ATTORNEY'S FEES BECAUSE HE SUBSTANTIALLY PREVAILED WITH RESPECT TO HIS SECOND REQUEST

The Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), provides that a district court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." In order to meet this standard, a plaintiff must show "that the prosecution of the action could reasonably have been regarded as necessary and that the action had a substantial causative effect on the delivery of the information." Vermont Low Income Advocacy Council v. Usery, 546 F.2d 509 (2d Cir. 1976); Cox v. Dept. of Justice, 601 F.2d 1 (D.C.Cir. 1979).

Whether or not a FOIA litigant has substantially prevailed is a question of fact entrusted to the District Court and the appellate court is to review that decision under a clearly erroneous standard. Weisberg II, 240 U.S.App.D.C. at 359. In addition, however, "findings of fact derived from the application of an improper legal standard to the facts may be deemed by an appellate court to be clearly erroneous." Id. Weisberg set forth three principal arguments in support of his claim that he substantially prevailed with respect to his second FOIA request. The District Court's holding that Weisberg did not substantially prevail, when

measured against each of these three main arguments, is clearly erroneous.

A. Weisberg Substantially Prevailed by Obtaining a Complete Fee Waiver

The Department argued in the court below that Weisberg did not substantially prevail as a result of having obtained a complete fee waiver because "the court never ordered this waiver, nor overturned any decision of the Department concerning the waiver issue." Defendant's Opposition, at 17. It characterized the grant of the fee waiver as the result of Weisberg's "administrative request." Id. (emphasis in original).

The District Court adopted the Department's position. Without engaging in any analysis or making any supporting factual findings, the Court issued a conclusory assertion that it could not conclude that requesters have substantially prevailed on the fee waiver issue "where the grant of such a waiver is based on an administrative decision of the agency and not a lawsuit." (emphasis in original) Opinion, at 15 [JA 253]. It is difficult to accord this generalized statement the status of a "finding" because it fails to address the specific facts of this case. It also applies an erroneous legal standard to the determination of whether Weisberg substantially prevailed.

The District Court's determination rests on the fallacy that a judgment in favor of the plaintiff is a prerequisite for the award of attorney's fees. This proposition has uniformly been rejected by the courts. Vermont Low Income Advocacy Council,

supra; Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C.Cir. 1977); Goldstein v. Levi, 415 F. Supp. 303 (D.D.C. 1976); Kaye v. Burns, 411 F. Supp. 897 (S.D.N.Y. 1976); American Federation of Government Employees v. Rosen, 418 F. Supp. 205 (N.D.Ill. 1976).

It would fundamentally undermine the FOIA if a final judgment in favor of the plaintiff were required before he could be said to have substantially prevailed. As the Goldstein court said:

> If the government could avoid liability for fees merely by conceding the cases before final judgment, the impact of the fee provision would be greatly reduced. The Government would remain free to assert boilerplate defenses, and private parties who served the public interest by enforcing the Act's mandates would be deprived of compensation for the undertaking.

Goldstein, supra, at 305, quoting Communist Party of the United States v. Department of Justice, C.A. 75-1770 (D.D.C. March 23, 1976)(Flannery, J.)(memorandum opinion at 3).

By engaging in the "jurisprudence of labels," see King v. U.S. Dept. of Justice, 830 F.2d 210, 225 (D.C.Cir. 1987), the District Court avoided the necessary task of determining what caused the "administrative" decision of the Department to withdraw its previous--and repeated--opposition to Weisberg's administrative requests (and motions) for a complete fee waiver.

The Courts have held both that a plaintiff who obtains a court-ordered fee waiver substantially prevails, Ettlinger v. F.B.I., 596 F. Supp. 867, 879 (D.Mass. 1984); and that a plaintiff

who obtains a waiver from the agency after filing suit but before judgment substantially prevails, National Wildlife Federation v. Dept. of Interior, 616 F. Supp. 889, 891 (D.D.C 1984)(two months after complaint was filed agency reconsidered its ruling and refunded plaintiffs the full amount of the search and duplication charges they had previously paid to obtain the documents); Wooden v. Office of Juvenile Assistance, 2 GDS ¶81,123 (D.D.C. March 29, 1981)(on the day defendants response was due to plaintiff's motion for summary judgment, they indicated to the court that they would waive fees).

Nothing distinguishes this case from National Wildlife except that the quantum of evidence which supports the conclusion that the lawsuit caused the waiver is very much greater. Here the Department did not respond at all to the initial administrative request, then sought to put off making any determination on it until after the FBI had finished processing the enormous volume of records--a course of (in)action which would have bankrupted Weisberg. The District Court intervene to require the Department to make a determination without more delay. When the Department granted only a partial waiver, the Court ordered it to explain and justify its decision. The Court did so shortly after Weisberg obtained a highly publicized fee waiver in another case, and in doing so it signaled its view that the partial fee waiver was inadequate. This view was further indicated by the Court's comment that this case was "one of those that has been decided even by the previous Attorney General as an historical matter. June 30, 1977 Hearing,

Tr. at 22. The Department's decision to "reconsider" the fee waiver determination came only after it had filed a formal legal opposition to Weisberg's motion for a fee waiver, and only after the official making the fee waiver determination took cognizance of the fee waiver decision by Judge Gesell in Weisberg v. Bell, and of the Department's decision "not to appeal therefrom." See Shea Affidavit, ¶9 [JA 302].

It is difficult to imagine a set of facts which could more compelling warrant the conclusion that an agency decision to waive copying fees after suit was filed was caused by the lawsuit. The District Court's decision to the contrary was clearly in error.

B. Weisberg Substantially Prevailed by Obtaining Field Office Records and Other Records

After the FBI finished processing its Headquarters MURKIN file, consisting of approximately 20,000 pages,[17/] Weisberg compelled it to release an even greater volume of records whose disclosure it had resisted. The largest block of these documents were the FBI field office records on the King assassination.[18/] The District ruled that these were released to Weisberg as a result of the "administrative processing" (emphasis in original) of his second request "or the August 17, 1977 stipulation and not plaintiff's FOIA litigation." Opinion, at 13 [JA 251].

17/ The FBI's Preprocessed List (compiled as of 10/10/85) gives the number of Headquarters MURKIN records as 21,774.

18/ The FBI's Preprocessed List places the total number of field office MURKIN records at 17,463: Atlanta (2,327); Birmingham 2,162; Chicago (958); Los Angeles (2,495); New Orleans (1,175); St. Louis (346); Washington Field (549); and Memphis (7,451).

In making this ruling, the District Court again stated a conclusion without making any factual findings to support it. Nor did the Department put before the Court any facts or documents--such as memoranda showing that the FBI had always intended to release field office records--which would support this conclusion.

The District Court failed to address facts which Weisberg brought to its attention which clearly show that the stipulation, and thus the release of the field office records, was the result of litigation developments. Thus, when this suit was brought, the FBI had a policy that "FBIHQ searches alone constitute sufficient compliance with respect to FOIA requests[.]" See March 25, 1976 Memorandum from Legal Counsel to Mr. J.B. Adamas [JA 155]. Consistent with this policy, the FBI maintained until the summer of 1977 that its field office files merely duplicated its Headquarters records. As the end of the processing of the Headquarters MURKIN file neared, Weisberg again raised the issue of searching field office files. The FBI's counsel noted that there had been no ruling regarding a search of the FBI's field office files, so far as he could recall, and he suggested it was premature until processing of the Headquarters' file was complete and Weisberg made some showing "that there was a necessity." May 2, 1977 Hearing, Tr. at 5.

Matters came to a head at the hearing held on June 30, 1977. Weisberg made several specific demands at that hearing, including

demands for a search of five field offices and a comprehensive Vaughn v. Rosen index. See Tr. at 13, 18, 27, passim. Weisberg demanded production of the field office records by September 1, 1977, in view of the FBI's testimony to Congress that it would be current with its backlog by September 1, 1977. Id. at 11, 17. This hearing was emotionally charged because Weisberg reported to the Court that the FBI, in the course of making a report requested by the Court the previous year, had misrepresented the reasons why Weisberg's many FOIA requests had been without response by omitting to mention that this had occurred as part of a deliberate policy of not responding to his requests. It was at this hearing that the Court indicated that the fee waiver request should be determined within ten days. More importantly, the Court suggested the necessity of a Vaughn v. Rosen index. Tr., at 22-23, 27.

Immediately after this hearing, a month before the stipulation regarding the processing of the field offices was signed, the FBI cabled its Memphis office to send pertinent files to FBI Headquarters. [JA 157]. Seizing upon the threat of a Vaughn index, Weisberg used it to negotiate a stipulation which required the FBI to process the field office files on an expedited basis. Thus, the stipulation was the result of litigation developments, not of the "administrative processing" of his request.

The field office files were not the only post-MURKIN Headquarters records which Weisberg received as a result of this litigation. Weisberg has detailed above, at pages 12-18, some of the

more significant of these records. The District Court rejected them for a variety of reasons. With respect to the 6,500 abstracts, for instance, the Court cited the second of her two contradictory rulings on this issue without explaining why the second was to be preferred over the first. Because the Department released these records pursuant to the Court's verbal order they clearly were released as a result of this lawsuit, regardless of what subsequent orders she gave. Furthermore, the Court relied on its prior opinion of the value of these records without addressing any of the facts indicating that they are valuable historical records. In this regard it must be pointed out that in Church of Scientology v. Harris, 653 F.2d 584 (D.C.Cir. 1981), this Court rejected a district court's subjective belief that " . . . that 108 envelopes and transmittal slips were too insignificant to be considered in determining whether a plaintiff had "substantially prevailed." The materials obtained here are undoubtedly vastly more significant than those referred to in Harris.

The District Court dismissed the disclosure of 460 pages contained in the Long tickler file because it resulted from a joint effort to search for this file. This ignores relevant facts, including that the FBI originally said that the Long tickler didn't exist, then that it couln't be located. It also ignores the fact that Weisberg had no means of compelling the FBI to take seriously his complaints about not having been pro-

vided the Long tickler except in court.

C. Weisberg Substantially Prevailed Because He Only Obtains Reasonably Prompt Disclosures When He Sues

On remand, Weisberg argued that he should be held to have substantially prevailed because it is necessary for him to bring suit if he wants to obtain the documents he has requested "reasonably promptly"--that is, within a decade. The District Court did not address this argument.

Before the FOIA was amended, as the District Court acknowledged, the FBI did not respond to Weisberg's information requests "by design." Opinion, at 4 [JA 242]. In 1978 Department officials acknowledged to Congress that Weisberg had reason to complain about the way he had been treated, that they couldn't defend it. They also promised to rectify it. See Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, on Oversight of the Freedom of Information Act, 95th Cong., 1st Sess. 139-141, 941-942 (1977) [JA 71-76], and Agency Implementation of the 1974 Amendments to the Freedom of Information Act: Report on Oversight Hearings by the Staff of the Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary of the United States Senate, 95th Cong., 2d Sess. p. 78 (March 1980) [JA 78].

Despite the Department's promises, it is clear that the FBI's policy of discriminating against Weisberg continues. The only evidence to the contrary, and it really can't be called that, is that after the Weisberg II remand the FBI suddenly made an ini-

tial partial release in response to a decade-old FOIA request.

In light of such facts--and the FBI has not denied them--it is obvious that Weisberg has been deprived of any effective administrative remedies. The Bureau's treatment of his requests has made a mockery of the law. Because Weisberg cannot obtain records without going to court--at least not without waiting for 10 years--this Court should hold that he has substantially prevailed for this reason, too.

D. Regarding this Court's Instructions on Remand

In remanding the substantially prevailed issue, this Court instructed the District Court to consideral such matters as: (1) Weisberg's failure to exhaust administrative remedies before amending his complaint to include his second request; (2) the Department's overwhelming backlog of FOIA requests; and (3) the fact that once disclosures began, they continued at a steady pace until completed in 1977. Weisberg II, at 359-360. These factors do not apply to Weisberg's argument that he substantially prevailed because he obtained a fee waiver. There was, for example, no exhaustion problem with respect to the fee waiver request--except that Weisberg and the Court became exhausted trying to get the Department to make a determination on it.

These factors were not specifically addressed in the District Court's consideration of Weisberg's argument that he substantially prevailed by securing release of the field office files and other

records because the Court dismissed that contention on other grounds. To the extent that the Court did make reference to the exhaustion issue, it seems to have considered itself bound by this Court's "finding" on the issue, rather than being charged with the task of evaluating the weight it should be assigned in reconsidering the substantially prevailed question. See Opinion, at 4 n.1 [JA 452].

Evaluation of the factors mentioned in Weisberg II does not alter the conclusion that Weisberg substantially prevailed in this litigation. The first factor, failure to exhaust administrative remedies, does not deserve to be given heavy weight in light of the attendant circumstances. First, this technical defect had no meaningful consequences (except insofar as it might be used to defeat an otherwise meritorious application for attorney's fees). The Department was--and remains--incapable of making a "determination"[19/] within the 10-day period required by the FOIA. Once that

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19/ In order to constitute a "determination," an agency response must include at least four elements: (1) a statement of what the agency will release and will not release, including a list of the documents that are releasable and withheld; (2) a statement of the reasons for not releasing the withheld records; (3) a statement notifying the requesting person of his right to appeal to the head of the agency; and (4) if a fee is charged for releasing documents, a statement of why the agency believes that waiver or reduction of the fee is not in the public interest and does not benefit the general public, and a statement of the charges for document search and duplication of the releasable documents. Shermco Industries v. Sec. of U.S. Air Force, 452 F. Supp. 306, 316 (N.D.Tex. 1978), rev'd on other grounds, 613 F.2d 1314 (5th Cir. 1980).

period has passed without a determination, a requester is deemed to have exhausted his administrative remedies and can proceed straight to court. Information Acquisition v. Department of Justice, 444 F. Supp. 458 (D.D.C. 1978). Given this inability to make a FOIA determination within the time allowed by law, exhaustion of administrative remedies by statutory fiat was, and remains, a matter of course.

Secondly, although the Department threatened to move to dismiss the second request, it never did so, thus acknowledging the futility of the gesture and waiving its right to complain about the amending of the complaint. It would be anomalous to have the very serious matter of eligibility for attorney's fees hinge on Weisberg's technical defect where (1) the Department did not feel strongly enough about this wrong to file its threatened motion to dismiss, (2) if a motion to dismiss had been filed and granted, the present spectre of failure to exhaust as an impediment to an award of attorney's fees would not exist because Weisberg could have refiled the amended complaint immediately; and (3) after the 10-day period had run, Weisberg lodged an administrative appeal, but the appeal was not acted upon.

Thirdly, the doctrine of exhaustion of administrative remedies "is, like most judicial doctrines, subject to numerous exceptions[,]" and "[a]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." McKart v. United States, 395 U.S.

185, 198 (1968). In the case of the FOIA, the traditional justifications for requiring exhaustion of administrative remedies are severely undercut by the Act's emphasis on prompt disclosure, by the unique provision for de novo review, and by the statutory directive that a requester is deemed to have exhausted his administrative remedies if the agency does not make a determination within the strict time limits specified by the FOIA.

Moreover, it is well-established that inadequacy or futility of recourse to administrative remedies is an exception to the exhaustion requirement. Soucie v. David, 448 F.2d 1067 (D.C.Cir. 1971)(FOIA); Shermco, supra, 452 F. Supp. at 316-318 (FOIA); Sunshine Publishing Co. v. Summerfield, 184 F. Supp. 767 (D.D.C. 1960). See, generally, 3 Davis, Administrative Law Treatise §§ 20.07, 20.10. Recourse to administrative remedies in this case was futile because the FBI had a policy of discriminating against him.

With respect to the second factor listed above, the FBI's overwhelming backlog, this does not apply to the records at issue after the FBI finished processing the 20,000 page Headquarters MURKIN file because the FBI testified to Congress that its backlog would be cleared up by September 1977.

The third factor, the fact that once disclosures from the Headquarters MURKIN file began they continued at a steady pace until completed in 1977, is also not relevant to the release of the field office files and other records which ensued completion

of the processing of the Headquarters MURKIN file.[20/]

II. THE DISTRICT COURT ERRED IN EXCLUDING CERTAIN AMOUNTS OF TIME FROM THE FEE APPLICATION

The District Court erroneously excluded the following amounts of time from the fee application:

1. The Court excluded 17.6 hours of work spent on the fee waiver issue which applied to both the first and second requests. Because all of this work applied equally to both requests and no lesser amount of work would have been performed if only the first request had been involved, it makes no sense to award compensation for it only if Weisberg substantially prevailed on his second request.

20/ The statement in Weisberg II that "once the disclosures began, they continued at a steady pace until completed in 1977," id. at 360, is misleading unless limited to the Headquarters MURKIN file. As of November 1977 the FBI had released approximately 40,000 pages. This total was split between FBI Headquarters (21,000) and the field offices (17,000). From 1978 through July 1980, the FBI released nearly 12,000 more pages, including the following: 877 pages on FBI informant Oliver Patterson [JA 126-129]; 460 pages from the Long tickler [JA 130-135]; 98 documents on Marrell McCullough, an informant who spied on Dr. King in Memphis [JA 136-138]; 3,396 pages of laboratory documents [JA 139]; 404 pages of field office inventories of the FBI's holdings on Dr. King [JA 141]; 6 pages on Russell G. Byers, a major witness before the House Select Committee on Assassinations, that were allegedly misfiled in the St. Louis field office and therefore not provided to Weisberg when that office was searched [JA 143]; and photographs of a street map allegedly used by James Earl Ray to pinpoint Dr. King's home and offices, which the Atlanta field office initially claimed could not be copied [JA 146-149]. Still other records were released after the District Court reopened the case in 1981, bringing the total volume of documents released to approximately 60,000 pages. In short, fully one-third of the materials released to Weisberg were released after October 1977, including some of the most significant.

2. The District Court excluded 77.1 hours out of 102.8 which Weisberg's counsel spent on the Weisberg I appeal, which involved the copyright and related issues. The Court excluded this very large amount of time because "plaintiff spent almost three times as many hours on an issue in which he had previously prevailed in this Court when it went before the Court of Appeals." Opinion, at 26 [JA 264]. This may sound reasonable, but on examination it turns out to be simplistic. The Department, which had submitted a nine-page memorandum of points and authorities on the copyright issue in District Court, filed a 45-page brief in the Court of Appeals. Only three of the twenty-one cases listed in the table of contents of its appeal brief were even mentioned in the brief it submitted to the District Court. This five-fold increase in the number of pages and six-fold increase in the number of cases cited, including two D.C. Circuit cases that had been decided subsequent to the District Court's opinion on the copyright issue, occasioned much additional work for Weisberg's counsel. The 18 new cases cited had to be read and analyzed; the new points made in the expanded brief had to be addressed. As a result Weisberg's brief in the Court of Appeals ran to 52 pages, whereas his motion for summary judgment on this issue had only included a seven-page memorandum of points and authorites. In view of this, the three-fold increase of time is not surprising. In addition, it is noted that this appeal involved three major legal issues: (1) whether the crime scene photographs were exempt

under Exemption 3 and the Copyright Act; (2) whether they were exempt under Exemption 4; and (3) whether they were agency records. Weisberg's counsel spent approximately 34 hours per issue on appeal. This is not unreasonable.

3. The District Court excluded 61.1 hours (out of 94 hours) for work in connection with the attorney's fee application on remand. Id., at 27 [JA 265]. The Court reasoned that Weisberg's second motion for fees and reply should have required less time than the first motion for fees and reply brief. This ignores the fact that the Weisberg II remand enormously complicated Weisberg's work on remand, requiring, as it did, that Weisberg's two requests be analyzed separately in light of a number of new considerations which this Court said should be addressed. This entailed a new review of the enormous record for factual materials that would support Weisberg's legal arguments, new analysis of legal issues raised by Weisberg II, and new writing. The District Court's meataxe approach to the issue of "unproductive time" on remand failed to take such considerations into account.

4. The District Court excluded 37.5 hours out of 50 hours which Weisberg sought for work on the attorney's fees issue in connection with the Weisberg II appeal. This after Weisberg had himself reduced the amount claimed from 150 to 50 hours. Weisberg notes that the Court excluded this time because it was not related to the first request. The Court felt that most of this time could not be attributed to the first request because the

Department "had already conceded that plaintiff substantially prevailed as to the first FOIA request. . . ." Opinion, at 28 [JA 266]. That concession, however, was couched in terms of an assumption made for purposes of argument only, and because it was so qualified Weisberg could not assume that he need not continue to address the "substantially prevailed" issue in terms of the first request. More importantly, should this Court rule that Weisberg has substantially prevailed with respect to his second request, this time should be restored.

III. THE DISTRICT COURT ERRED IN DENYING AN UPWARD ADJUSTMENT OF THE LODESTAR AWARD

This Court instructed the District Court to reconsider on remand the 50% contingency adjustment of the lodestar which it had originally awarded Weisberg in light of Blum v. Stenson, 104 S.Ct. 1541 (1984). The District Court declined to make an upward adjustment to the lodestar "given the Supreme Court's decision" in Blum, stating that although the case had presented a novel issue, it "did not require a particularly complex analysis by either party." Opinion, at 31 [JA 268]. The Court made no determination of the appropriateness of an upward adjustment based on the "risk" factor, the primary reason advanced by Weisberg for such an adjustment.

Blum v. Stenson did not decide the question of whether the risk of not prevailing is a proper basis for awarding an upward

adjustment of fees; rather, it reserved this issue for future decision. In Nat. Ass'n of Concerned Vets v. Sec. of Defense, 675 F.2d 1319 (D.C.Cir. 1982), this Circuit stated that: "The [Copeland] Court noted that a premium should generally be awarded if counsel would have obtained no fee in the event the suit was unsuccessful or if the fee award is made long after services were rendered." 675 F.2d at 1323, quoting Copeland v. Marshall, 641 F.2d 880 (1980)(en banc)(emphasis added). Several courts which have ruled on the contingency issue post-Blum have upheld risk adjustments. Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985); LaDuke v. Nelson, 762 F.2d 1318 (9th Cir. 1984); Sierra Club v. Clark, 755 F.2d 608 (8th Cir. 1985).

This case was taken on a pure contingency. Weisberg's counsel received no payment at all until 12 years after suit was filed, and then he received only partial payment. Under these circumstances, both the risk of no-compensation at all and the great delay in receiving payment[21/] warrant an upward adjustment in the lodestar. Weisberg respectfully suggests that a 30% enhancement would be modest and appropriate under the circumstances.

21/ The payment which was ordered by the District Court on May 28, 1987 was not actually paid until November 30, 1987, five months later.

CONCLUSION

For the reasons set forth above, the District Court's decision should be reversed and remanded for further proceedings to determine the appropriate amount of fees to be awarded with respect to Weisberg's second request.

Respectfully submitted,

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THE FREEDOM OF INFORMATION ACT

5 U.S.C. §552

As Amended

§552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that --

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public

interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section --

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest

practicable date and expedited in every way.] Repealed. Pub. L. 98-620, Title IV, 402(2), Nov. 8, 1984, 98 Stat. 3335, 3357.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request--

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion

of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and --

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include--

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any Executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

* * * * *

Section 1804. Effective Dates [not to be codified].

(a) The amendments made by section 1802 [the modification of Exemption 7 and the addition of the new subsection (c)] shall be effective on the date of enactment of this Act [October 27, 1986], and shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date.

(b)(1) The amendments made by section 1803 [the new fee and fee waiver provisions] shall be effective 180 days after the date of the enactment of this Act [April 25, 1987], except that regulations to implement such amendments shall be promulgated by such 180th day.

(2) The amendments made by section 1803 shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date, except that review charges applicable to records requested for commercial use shall not be applied by an agency to requests made before the effective date specified in paragraph (1) of this subsection or before the agency has finally issued its regulations.