Judge Gerhard Gesell
U.S. District Court
U.S. Courthouse
Washington, D.C. 20001

1/10/87

Dear Judge Gesell,

Please excuse my typing. I have to sit with the typewriter to one side and my wife, who usually retypes for me, can barely move today. We are both septagenarians. My purpose in writing has nothing to do with reopening the case you have just decided and I am without complaint about your decision. Mr. Cesar has just read it to me, I recognize its dependence on the government's Reply, and we were not able to file anything in response to it because the copy Mr. Cesar mailed me was delayed reaching me, because my letter to him telling him I would be preparing an affidavit addressing it was delayed reaching him, and because I am severely limited in what I can do.

I did not, as the government knew very well, just stand idly by and do nothing. Four days after I wrote the FBI the last letter in this matter I was admitted to Georgetown hospital for arterial surgery. It was followed by two emergency operations, the second not uncommonly fatal, and since then I've been able to stand still only briefly or not at all, can walk, at best, about two city blocks before I have to elevate my legs and rest, am enfeebled and for practical purposes am almost denied access to my own files because of the difficulty of searching those in my office and because of the difficulty I have with stairs, which are hazardous for me, when all of the records I've received under FOIA are in my basement. (I've lived for some years on a high-level of anticoagulent.)

I am perhaps alone among those known as critics of the official investigations of the assassination of President Kennedy in not being a conspiracy theorist. I've not been pursuing a whodunit. I've made a rather large study of the workings of the basic institutions of our society in time of great stress and since then. I've had no regular income until Social Security, which is my only regular income, no subsidy, and if I do nothing else, I am content to try to serve history. My view is that the assassination of a president is the most subversive of crimes in our society. And that this imposes an even greater burden on the successor administration and those that follow it. I have not been out to "get" or even just embarrass the FBI, the CIA or anyone else and I've spent a fair amount of time defending the FBI and others from what I regard as wildly irresponsible accusations of those who have sought and gotten more public attention. I've tried to keep the whole thing in balance and I am proud that in all the government records I've obtained there is no real factual error atributed to me. Nor has there been in any of the many affidavits I've filed in FOIA cases directly contradicting those of the government. I've been trying to make the unwilling system work. Once, as you noted in my second case before you, I did when my persistence led to the 1974 amending of the investigatory files exemption. Which made me more official enemies. I've sought to and I believe that to a reasonable degree I've been able to meet the obligations with which, as the first member of my family <u>ever</u> to be Born in freedom, I was born.

We are none of us Merlins who can remember the future and I have no way of knowing what uses, if any, will be made of the archive I leave but I do believe that one of the more valuable parts will be the records in my FOIA litigation. There is not one, including the three before you, in which the government did not misrepresent to the courts. This has troubled me more than the defeats, if that is what they were. It also has troubled me that the consequences include burdening the courts (for which I owe you an apology for overburdening you in my first case and from my ignorance) and negating that most American of laws, supposed to let the people know what their government does.

This reminds me of something I'd like to let you know. In the second case I sought copies of the FBI's general JFK assassination releases. (Contrary to the FBI's self-serving letters filed with you I never, ever, made any attempt to make any use of it because it was limited and I am pretty sure I never even referred to it.) After your decision I was awarded a complete fee waiver on all JFK assassination records and all those relating to the assassination of Dr. King. I've tried to live up to the obligations of a FOIA requester, who I regard as surrogate for the people, and I've preserved all of those records exactly as I've received them. I make them available to all, including those I do not like and those with whom I do not agree. I've gone farther. I've put in a working table for those who use them, without any supervision, with even a typewriter and other supplies, and we make copies for those who want them. As I told you was my purpose, I've given a great amount of time to the press, domestic and foreign, large and small, and the electronic media. And I'm pleased that it has been possible for me to do what I believe the law intended. I've never commercialized this in any way and there is no quid quo pro from the university which will get everything I have. (We have no children.)

To return to where I was before this digression, which was merely to let you know that although you may not recall the word I gave you, I did keep it, perhaps I am of a different era but I regard it also as a subversion when the courts are misled in any way. This is one reason I've done so much under oath and subject to the penalties of perjury rather than through lawyer's arguments. For a decade of the two decades I've devoted to these efforts it was exceptionally burdensome, more so since four days after that last letter I refer to above of six years ago. For those six years I've spent the first three hours every day in walking and resting therapy about two miles from my home. (I am permitted to drive only about 20 minutes at a time and haven't been able to drive to Washington for years.) In addition, following new thrombophlebitis a year ago, I'm to spend two hours a day lying down with my legs elevated. Doesn't leave much time for any kind of work and it accounts for the delay in completing the affidavit I was preparing to file before you.

I have no interest in reopening this litigation but I do have an interest in any efforts to mislead any courts. If you have any interest, busy as you are, in my completing that affidavit, I will do so. Otherwise the incomplete draft will just be part of this archive.

There is a simple means by which, if you can spare a little clerk's time, you can see enough of this for yourself. You will find that from the time of the July 29 letter I continue to refer to the overall request in the present tense and that when I responded to the FBI's August 26 letter treating that as a new FOIA request I began by stating that this was not a new request and that the FBI was up to its usual dirty-tricks and shenanigans, quite the opposite of limiting my request to the one item. (These are attached to defendant's Motion for Summary Judgement.) One of the reasons I wrote the FBI as I did is that it had abrogated the Department's fee waiver. I do not believe it has that authority, it was under appeal, and the appeal still has not been acted on. However, since then, the FBI had not asked for payment on anything. My purposes in saying that I would pay, subject to the right to recover, for the records responsive to that one item, leaving everything else unmentioned, is that the FBI had not provided any estimates, as required, or asked for any deposit, and with my small income I could not offer to pay for anything else. I was satisifed that if the FBI complied with that one item, as they have not, I'd get proof that you were lied to in my C.A. 77-2155, when you were told that they were making a deposit at the Library of Congress and would make others elsewhere. The records provided to you indicate that a deposit was made at the Library, but it was actually for the use of the House assassinations committee. After its life was over the FBI took it back and then destroyed that entire set. There is no public deposit anywhere except with me, for I regard mine as public.

Item 7, which I said I'd pay for, is "Conditions and restrictions, access and distribution of what was disclosed, including duplicate copies, if any, and where, when and how deposited." In the effort to keep me from getting a set without cost you were told that there would be these duplicate deposits and there were and are none.

I do not intend to file any more FOIA cases simply because doing so exceeds what I can do now. But I'd like you to know that contrary to the appeals court decisions cited, I have never expanded any request after litigation began, have never had voluntary compliance except when I was able to show that disclosure was made to later requesters, and even when without my knowledge the Congress got interested in this steadfast refusal to comply with my requests and promises were made to the Congress, they were never kept. So you can see how far back this goes I enclose a few pages of the published hearings I'd intended using as an exhibit. The lawyer who assured the Senate they were going to do something did do something - organize a "get Weisberg" crew of six lawyers all of whom were before you about three months later in C.A. 77-2155.

Please believe me, I intend nothing personal or improper. I am concerned that as I see it the constitutional independence of the judiciary is undermined by the government's misrepresentations in each and every one of my FOIA cases, each and every misrepresentation, as best a layman can have an opinion, basic, and I am concerned, again as best a layman can have an opinion, that this not uncommonly crosses the line and includes perjury. This is why the proper JFK assassination FBI FOIA expert, John N. Phillips, did not provide either attestation in the recent case and those without personal knowledge did: Phillips has yet to deny that he did perjure himself in one of my cases and he can't because he disclosed the proof of it to another requester. Perhaps I am of a different era, one of the past, but I assure you that this does trouble me and that I regard it as a danger to justice and to freedom, to our system.

Please understand that I am asking nothing of you, that no response is needed and that I am merely making an offer in the event it is not improper and in the event it interests you and that without response this is ended here.

Sincerely,

Harold Weisberg

Harold Weisberg
7627 Old Receiver Road
Frederick, Md. 21701

FREEDOM OF INFORMATION ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

OVERSIGHT OF THE FREEDOM OF INFORMATION ACT

SEPTEMBER 15, 16, OCTOBER 6, AND NOVEMBER 10, 1977

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PREPARED STATEMENTS

GENERAL OVERSIGHT

Thursday, October 6, 1977

OPENING STATEMENT

WITNESSES

PREPARED STATEMENTS

GENERAL OVERSIGHT

Thursday, November 10, 1977

OPENING STATEMENT

WITNESSES

APPENDIX [1]

STATUTE

[1] Numbers in italic type indicate page where exhibit first is referred to in the hearing text. Numbers in roman type indicate page where exhibit appears.

Mr. SHEA. I still would not exclude the possibility of——

Senator ABOUREZK. If you think the implementation of the new policy took a while let's consider the September 30, 1977, supplementary response to my request. That was several months after your memo and the same policy was being espoused by the FBI in June.

Are you saying that the Justice Department cannot control one of its components, namely the FBI?

Mr. SHEA. No, sir; I am not going to say that.

I am going to say I would hope that would indicate that at the time they made the second release, there was a judgment made that was in compliance with the policy directive on May 25.

Senator ABOUREZK. The same arguments are advanced in the September 30 response as in the June 17 response.[1] There obviously was no change in FBI policy.

Mr. SHEA. Then I am going to have to say I can only assure you that we will look very hard at these questions when we are processing the appeal.

Senator ABOUREZK. Documents released by the FBI to Mr. Harold Weisberg under the Freedom of Information Act indicate an attitude regarding the act that is, at a minimum, very disturbing.[2] The FBI memorandum indicates that requests from Mr. Weisberg under the act were totally ignored.

Let me read a sentence or two from the document. This is a memorandum dated October 20, 1969, to Mr. Deloch from Mr. Rosen.

> By letter in April 1969, Weisberg requested information on the King murder case for a forthcoming book. It was approved that his letter not be acknowledged.

The subject of another memorandum[3] to Mr. Deloch from Mr. Bishop of the FBI, dated June 24, 1970, was the assassination of Dr. Martin Luther King. The memo reads in part:

> Accordingly, copies of these documents were furnished to Weisberg. King advised that, in view of the fact that the Department had released the documents to Weisberg, the Department did not wish Weisberg to make a profit from his possession of the documents and accordingly has decided to make similar copies available to the press and others who might desire it. King stated that the documents to be released consisted of approximately 200 pages of copies, or affidavits, autopsy reports, affidavits with regard to fingerprint examinations, and ballistics tests and copies of other documents which served to link Ray with the assassination of Martin Luther King.

So, there was an eventual shift in position by the FBI.

Mr. SHEA. That was 1969?

Senator ABOUREZK. And 1970, yes.

Mr. SHEA. From a strictly legal point of view on what was and was not released in that timeframe, I point out that, first, that was the time that the investigatory file exemption existed. As I had occasion to comment yesterday in front of the Civil Service Commission training seminar, the Department of Justice expired in the Halls of Congress in 1974 when you overruled the court decisions that approved our withholding of that sort of material. We died in the Halls with the words on our lips, "We were legally right." We were stupid, but we were legally right.

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[1] See exhibits 119, 122, pp. 878, 880 of the appendix.
[2] See exhibit 133, p. 941 of the appendix.
[3] See exhibits 134, 135, pp. 941, 942 of the appendix.

So, that was our position.

Beyond that, about not acknowledging letters and that sort of thing, Mr. Chairman, if you are looking for a Department of Justice representative to defend that sort of practice in 1969, 1970, or any other time, I am not going to do it.

Senator ABOUREZK. I understand that you would not want to, but we are informed that Mr. Weisberg still has 25 FOIA requests that to date have not been answered.

Mr. SCHAFFER. Mr. Chairman, I can respond to that in part.

We had a meeting in my office with Mrs. Zusman, the Chief of the Information and Privacy Section in the Civil Division, Mr. Weisberg, and his attorney. Cases like Mr. Weisberg's are not the routine freedom of information requests. I can assure you that the Department is going to try to do something about his requests as a whole rather than treating them piecemeal and processing them in strict chronological order, and this sort of thing.

It is a unique request. It is a case of unique historical importance. Mr. Weisberg does have reason to complain about the way he was treated in the past. We in the Civil Division are going to try to do something to straighten out all of those cases.

Mrs. ZUSMAN. Mr. Chairman, I would like to expand on Mr. Schaffer's comments. I am Chief of the litigating section that you referred to and have been in charge of the section for approximately 7 weeks. I would like to explain a little bit of the background of that meeting so that you can understand how importantly we in the Civil Division take our responsibilities under the Attorney General's guidelines sent to the Federal agencies as a memorandum on May 5. I am sure you and your staff are familiar with this document.

Mr. Weisberg has had for some time a number of lawsuits pending. I became acquainted with him in the late spring—early summer when I was asked to assist the assistant U.S. attorney who was primarily responsible for one of the pending Weisberg lawsuits. I did meet in my office with Mr. Weisberg and his attorney, Mr. Lesar, and representatives of the FBI. We had several sessions. Excuse me; Mr. Weisberg did not come. It was his counsel, Mr. Lesar who met with us. Then we had a subsequent meeting involving a number of hours where we drafted a stipulation by the parties setting forth a variety of tasks and how they would be performed by the client agency, the Bureau, in trying to satisfy the types of information and the timing of the release of the information, and so forth, in Mr. Weisberg's very voluminous request.

This fall Mr. Lesar and Mr. Weisberg contacted me and said that they had some problems in regard to the stipulation—which is being carried out and is being fulfilled by the FBI as well as other questions. I invited them to my office. At that time I discussed with them a number of problems. I picked up the phone and called Mr. Schaffer's secretary. I said, "If Mr. Schaffer is in now, we are coming downstairs. Hold him there. I think there is somebody that he should meet."

Mr. Schaffer did make the time to see Mr. Weisberg and Mr. Lesar. We spent quite a bit of time discussing the problems. This is the type of effort that we are now putting forth. We are a little bit hampered because, of course, primarily the Civil Division is in the litigation business. But, in this particular area of the law, we have to also put a

lot of our efforts into attempts at settlement where it is appropriate, and into mediation and arbitration. Very often, plaintiffs file lawsuits based on a misunderstanding of the information that they are seeking, which they think an agency should have, but it doesn't. Or they have misunderstood something that has been deleted, et cetera.

In other words, what I am trying to indicate is that there is a very broad area where we are trying to be innovative as to reducing the number of lawsuits by working directly with plaintiffs and with plaintiffs' counsel. It can be very successful. It does depend upon a lot of manpower. This is something we are working for.

Another case that is an example of this approach occurred where a national newspaper represented by Washington, D.C., counsel made request for a large number of files on a number of celebrities long since dead, in the entertainment field and, in addition, Franklin Delano Roosevelt. After the Bureau processed the entertainment figures, the question arose: What was it that the plaintiff requester really wanted from the files concerning the former President, Franklin Roosevelt?

It turned out the way the FBI maintained its file system, we were talking about 25 pages of FBI files index citations and thousands and thousands and thousands of pages of files. It became possible for plaintiff's counsel, based on the previous relationship with FBI personnel under my supervision in working on the other aspects of the request, to ask me to sample at random from the files; which I did.

Plaintiff's counsel accepted my representations as to the type of material I found in the sample. We talked about what his client, a national newspaper, was looking for, which was specifically personal material, which did not appear to be there. The final stage was when the FBI personnel suggested to me that I ask plaintiff's counsel if he would want to random sample from these files because it was felt that they were so old and the nature was such that privacy and confidential source aspects just were not relevant in this area, and they were willing to waive this consideration.

That is how it became resolved. Plaintiff's counsel did pick a random sample. That material was Xeroxed. He did look at it. He consulted with his client. They determined that it was not worth his client's investment financially to pursue it because it did not appear that he would be able to get what he wanted to get.

This is the kind of work we are trying to do now.

Senator ABOUREZK. You are saying there wasn't enough scandal in there to satisfy him.

Mrs. ZUSMAN. You said it, Senator; I did not.

Mr. SHEA. Mr. Chairman, could I mention, in the context of Mr. Weisberg, that he is requesting both Martin Luther King and, I believe, John Kennedy assassination materials. I have had one of my more senior attorneys acting both as an ongoing reviewer and consultant to the people processing the file at the Bureau now for over a year. As a result of this ongoing process, there have been approximately 20,000 pages of FBI records that have been, not only released to Mr. Weisberg on the King assassination, but are available for public inspection in the FBI's reading room.

So, the wheels may grind a bit slowly, but we are addressing the problem that is presented by these voluminous requests.

Senator ABOUREZK. I would like to return to some policy questions. Mr. Shea, you and others from the Justice Department and the FBI

I am pleased to say that we think the Justice Department at that stage is now much more open in listening to the arguments that plaintiffs' attorneys are making in litigation, with a view toward trying to decide whether the prodisclosure mandate in Attorney General Bell's memorandum[1] would require disclosure in a particular case because the public interest so requires. In addition, the Department has in general been more willing to reexamine some of the legal positions which it has taken in the past.

The problem is in having the Attorney General's policy applied at the lower levels of government, so that there is no need for unnecessary litigation. It must be remembered that you have to first make your initial request to an agency. Suppose you are making a request to the FBI. The FBI presently has taken up the practice of using a form letter in responding. So, if you have waited your 5 or 6 months to get a response from the FBI, you then get a form letter that merely checks off the several exemptions which are claimed to apply to the documents which have been withheld. I have submitted a copy of this particular form as an exhibit to my statement.[2] If you look at that form, you will see that you are not told how many documents have been withheld, what is the basis for the Government's argument that the exemptions apply in a particular case. This practice makes it largely impossible to intelligently appeal a denial and, in effect, simply shifts your request over to Mr. Shea's office.

After 5 or 6 months, Mr. Shea may do a somewhat better job in trying to tell you how many documents there are that have been withheld and hopefully, in trying to put some of the arguments that the FBI has made in better perspective. But it may still require the filing of a lawsuit before the agency's position is thoroughly examined.

My point really is that, unless something is done about trying to filter down the true philosophy of the FOIA to the lower levels of government, to the actual individuals who are responsible for reviewing documents in response to FOIA requests—I just do not think that we can have a better sense of trust that the Government will be fully complying with the spirit of the act.

It is in this regard that I think the Weisberg correspondence,[3] which has already been discussed in some detail, is really important. Its importance is not that some of the King information which Mr. Weisberg requested has now independently been released to the press and its importance is not in the fact that—although commendable—Mrs. Zusman and Mr. Schaffer are now finally trying to find out what is going on.

Its importance lies in the fact that it is an example of an agency's total disregard for the requirements of the FOIA. Here, the FBI decided that since the requester of information was a critic of the Warren Commission, of the FBI, and of other investigatory agencies, for that reason alone, his request would simply be ignored.

Again, unless we have some real guidance and direction from the Justice Department in trying to bring all the agencies at the initial request level into line, we are not going to see very much change or very much litigation being avoided in the future.

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[1] See p. 217 of the appendix.
[2] See p. 958 of the appendix.
[3] See exhibits 133, 134, 135, pp. 941, 942 of the appendix and p. 139 of the hearing text.