Senator Charles Mathias
U.S. Senate
Washington, D.C.

2/13/84

Dear Mac,

Once again the FBI and DJ are rewriting and negating FOIA through me. If you recall, the 1974 amending of the investigatory files exemption was over their excesses and abuses in one of my 1970 lawsuits. (What I then found quite remarkable is that Teddy Kennedy saw to it that this is explicit in the debate.)

In seeking to defend the Act I've been subject to severe sanctions for many months. I think the only reason the government hasn't moved for the most severe is fear of what would evolve at trial and the reasonable certainty that the trial would get the attention FOIA litigation itself never gets. Instead they have opted a device that jeopardizes all lawyers handling FOIA case, if not all lawyers handling any civil cases. They've gotten a judgement against my lawyer for the charges assessed me that I have refused to pay.

Because of my age and impaired health, I began trying to compromise the two remaining cases, one King, the other JFK, after the first of my surgeries in 1980. I wanted to drop the cases and forget about noncompliance if without prejudice to the rights of others who might in the future seek what was not provided to me. FBI/DJ refused, wanting to misuse these cases for the perpetual withholding of what had been withheld.

In the JFK case, 78-0322/0420 combined, before Judge John Lewis Smith, with the initial searches not yet made and while ignoring the case record establishing this and searches to be made, they moved for discovery. Smith is also prone to ignore the case record and go with his prejudices, so he also ignored all but one part of my opposition to discovery and granted what I believe is unprecedented, discovery in FOIA litigation in which the Act places the burden of proof exclusively on the government.

One of my objections was that such discovery is not visualized in the Act. It is the only one he considered and without making a finding of fact ruled for them. However, I also alleged, without even pro forma denial, that this discovery was excessively burdensome, excessive, impossible to comply with and could require the rest of what remains of my life; that the alleged reason for it was proven to be impossible by the unrefuted case record; that my health alone prevented compliance; and that earlier, voluntarily and for other purposes, I had already provided all such information of which I was aware, amounting to some two file drawers of memos and xeroxes of pertinent FBI records, when Quin Shea asked for my help and he was director of appeals. (I also provided about the same amount in the King case.)

Before the government got this discovery idea it actually admitted that I had provided this material in a filing of more than a year ago.

Both the DJ lawyers and the FBI are well aware of my health limitations and how my records are located where I cannot retrieve them readily. Although the arterial surgery was quite successful, the day I left the hospital blood clots broke loose and before emergency surgery was possible the resultant damage was very serious and irremedial. I have very little circulation in my left leg and thigh and then could walk only at best about a sixth of a mile before having to stop and elevate that leg and rest while circulation gradually restored itself. The following April a piece on my own artery broke loose and blocked all circulation on that side. Not uncommonly the heart then quits, but mine didn't and this obstruction was removed and I survived, with more limitations on what I can do. (The original operation was a left femoral bypass.)

Although the FBI's knowledge of my earlier arterial obstructions not yet operated on goes back to the summer of 1977, when they had to park my lawyer's car

inside their building because I was not able to walk from a parking place to it, they and their counsel made snide cracks about my health last year when all of this first came up, so I provided an affidavit with copies of the Georgetown records of the surgeries and a long series of Dr. Hickey's bills for additional illnesses I suffered at the time in question, when they demanded discovery. For the first half of last year I had two bouts of pneumonia, bronchitis and pleurisy, with a number of complications, including internal hemorrhaging (I live on a high levelmof anti-coagulent) and others I've forgotten. Thereafter I was and remain even weaker. Before those additional illnesses I had difficult with stairs and could manage a flight only a couple of times a day. Although my working files are in my office, my FOIA files are in the basement and their discovery demands relate to my FOIA files. It was and forever will remain impossible for me to go up and down those stairs to search and retrieve the records they demand from more than 200,000 pages of FBI records - which, obviously, they have in any event. (My copier is in my office, where I need it, and I have no assistance.)

As the FBI knows and DJ has seen, I preserve all FOIA records I receive exactly as I receive them for ultimate deposit at the University of Wisconsin. There are about 40 file cabinets of them and, consistent with the spirit and intent of FOIA, they are freely accessible to all others and others do use them and get copies we make for them. Radio, TV, print press, students, competitors -anyone.

Even the subject file of copies I made as I read these records consists largely of records that do not interest me but I knew did interest others. It has taken much time and for us much cost, but I have conscientiously practised what I believe FOIA requires of me.

I add on my limitations and to explain my typing that I am not allowed to keep my legs down except when I walk if I can avoid it, so I type sort of sidesaddle, with both legs elevated and the typewriter to the side. I have not driven to Washington since 1977 because that is unwise and unsafe. I am driven to Washington every six weeks for examination by my surgeon, and the trip knocks me out for a day or two.

So, obviously, this discovery, were it otherwise within my capabilities, would be excessively burdensome. Burdensomeness alone is ground for refusing discovery.

Judges are becoming more aware of abuses of the right to discovery, as the marked copy enclosed of a Post article of two weeks ago reflects.

When they first moved for discovery I told my lawyer I would not comply and be party to negating the Act or government stonewalling. (As without contradiction the case record reflects, in 1967 the FBI decided to "stop" me and my writing -its words - with frivolous litigation. While it chickened out then, it has since forced me to litigate everything and then stonewalled everything, amounting to putting that scheme into practise.) He came up from Washington and spent much of a day trying to talk me into some kind of compliance, as the easier course, but I refused absolutely. He even indicated thereafter in court that I would comply. Then the government's lawyer, named La Haie, started threatening to have me cited for contempt. Again they did not dare that course and its consequences, so they instead moved to recover their costs in getting discovery. I have not paid it and my lawyer told them I refused and would appeal. So, they moved to amend the judgement to compel him to pay the costs against me because I refused to do as he counseled. (First page only enclosed.) Notwithstandng their knowledge from the outset that I would appeal. (Notice of appeal enclosed.)

Smith, who hasn't bothered to hide his bias in this and other litigation, was so anxious to do the government's bidding he did it three days prematurely. (Amended Judgement enclosed.) I filed my Opposition along with a motion to vacate on the 2d., within the time allowed. Without waiting for my time to expire, LaHaie sent my lawyer the enclosed threatening letter that day. He had threatened this earlier, telling my

lawyer that instead of filing against me in Maryland they'd enter the judgement against him in the District.

In additionm to all else, this is a perfect whipsawing of the lawyer, who can be subject to severe sanctions, up to and including disbarment. The 1/17/84 Daily Washington Law Reporter (enclosed) is quite specific on this and a license was lifted for it. If my lawyer had not pursued my "lawful objective," appealing, he would have been guilty of "neglect of a legal matter entrusted to him," both passages marked in red on the first page. And when he dpes what is required of him, the government seeks a judgement against him to require him to pay what I am appealing.

I've not heard from my lawyer since the 9th. If they filed anything and served it by mail, today is the earliest it could have reached him so, obviously, I have no copies. (I offered to pay the cost of sending me duplicate copies of all filings, to save the time of all parties, and this had been the practise for years, but LaHaie abrogated it and refused this request. At the same time other Civil Division lawyers also ended the practise in other cases and even when directed by the court to do this and promising the court to comply, still did not - have not for four or five years. The accumulated costs in time wasted along is considerable.)

I think the danger to the Act is apparent and that if these actions, which include dismissal -with the initial searches still not made - are sustained, as a practical matter FOIA is dead. Scholars and private citizens will not be able to get counsel and counsel will not be able to afford taking cases. Every request will be met with a demand for discovery, and even wealthy corporations will find that at the least too costly to risk.

Some time ago, when I could see what was coming, I wrote Senator Leahy. I do not recall exactly what I said but I received no response.

The amount of money the government has invested in noncompliance in this case is great. But one consequence may be that the FBI will forever be able to hide the undisclosed and pertinent records of the New Orleans and Dallas field offices relating to the JFK assassination and Garrison cases.

Because of considerable prior experience and my knowledge of what the FBI was going to do in this case - earlier counsel, an honest man, told me that instead of searching they were going to disclose records of their selection -I made it a practise to address each and every filing under oath. FBI lies under oath, I believe within the meaning of the law including perjury, characterize this case and in all instances I've proven it under oath, almost always without even pro forma denial. If nothing else, this will become an important part of the historical record. If used properly, it can do much to preserve FOIA. Unfortunately, I am not in a position to do very much. I'd like to be able to get to Washington to seek separate counsel on the issue of the sanctions because there appears to be a conflcit with my lawyer, who leaned on me to do what I still regard as wrong, and because he is an intellectual who can't bring himself to do the kind of fighting this now requires, for both the Act and for me.

I have a hunch that if pointed inquiry is made in a context that tells the FBI and DJ that there may be an airing they will back off, such is the case record.

For your information, and bearing on the waste of government money not to comply, my initial requests were ignored, on orders of the top echelon. I filed suit in 1975 and despite continuous and sometimes effective stonewalling forced the disclosure of something like 60,000 pages. The district court awarded counsel fees and costs, holding that I had "substantially prevailed." The government claims I didn't and has appealed. They'll either gyp me or waste another fortune in tax money. (One of the records I obtained actually holds that FOIA entitles the FBI to ignore my requests

merely because it does not like me. That special agent wound up processing records, so badly that I refused to accept another as long as he was assigned to that litigation. Rather than face all of that in court, they sent him into the field, describing him all the while in feigned surprise as a liberal Harvard lawyer.)

I'm sorry to be taking so much of your and/or staff time but I believe the matter is important enough and that today FOIA is even more important than in the past. Otherwise I'd not be investing as much of my time when I want so much to be able to get back to writing.

I refer above to the use of my records by students. You and the staffer who reads this may want to remember that there is extraordinarily great riches here for thesis and honors papers uses. I have a working space, with an extra typewriter and special lighting set up in the basement for those who use these records. They have unsupervised access. Two of the three Hood students who've done this have said later that it was the most educational experience they'd had. Dr. Jerry McKnight, of the Hood history faculty, has a scholarly paper on some of the King FBI records appearing soon. It relates to the FBI's intrusions into life in Memphis during the snatitation workers' strike in support of which Dr. King was there when he was assassinated. For history and political science majors there are many possibilities, including thesis topics that can make worthwhile books. And I do not mean books on the assassination.

Our best to you, Anne and the boys.

Sincerely,

Harold

Harold Weisberg
7627 Old Receiver Rd.
Frederick, MD 21701