

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

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STATES COURT OF APPEALS

.....  
HAROLD WEISBERG,

Appellant

v.

U.S. DEPARTMENT OF JUSTICE,  
ET AL.,

Appellees  
.....

Case No. 78-1107

REPLY TO APPELLEE'S OPPOSITION TO APPELLANT'S MOTION  
FOR LEAVE TO FILE REPLY BRIEF WITH ADDENDUM

This case is a Freedom of Information Act lawsuit in which Warren Commission Harold Weisberg seeks the disclosure of the records of the scientific testing conducted on items of evidence in the assassination of President John F. Kennedy. In Weisberg v. U.S. Dept. of Justice, 177 U.S.App.D.C. 161, 164, 543 F. 2d 308, 311 (1976), this Court found that "[t]he data which [Weisberg] seeks to have produced, if it exists, are matters of interest not only to him but to the nation"; accordingly, it held that "their existence or nonexistence should be determined speedily on the basis of the best available evidence, *i. e.*, the witnesses who had personal knowledge of events at the time the investigation was made."

On remand Weisberg established both that tests had been conducted which the FBI had sworn were not made and that pertinent records were created which had not been provided him. Appellees neither took the deposition nor offered the affidavit of any person said to have destroyed or discarded these vital records or to have actual knowledge of any such destruction or discarding. Weisberg therefore next noted the deposition of the FBI agent who claims to have had a file search made for the records sought by Weisberg (and who had falsely sworn that certain tests had not been conducted when in fact they were made). He also stated to the district court that he intended to take the deposition of another FBI agent who, in 1970, had executed an affidavit stating that he had reviewed the FBI Laboratory's spectrographic examinations.

Having established that pertinent records had been created which were not provided him, Weisberg felt these depositions were the next logical step in the development of the evidence. The proposed depositions of agents Kilty and Williams would have dealt with the nature of any file search that was made for the records not provided Weisberg, as well as the basis for any claim that any records had been discarded or destroyed. The government, however, moved to quash these depositions and the district court granted the motion literally before Weisberg had even received notice that such a motion had been made. (Because the district court acted without having heard from Weisberg, Weisberg stated in his Motion for Leave to File Reply Brief with Addendum that the court granted the motion

quash "on the basis of the government's ex parte representations." By that Weisberg meant simply that the district court decided the matter having heard only one side. The same point is made, with specific reference to the fact that the government had filed a motion to quash, at page 29 of Appellant's Brief.)

Long after the district court had awarded the defendants summary judgment, Weisberg obtained new evidence which bears directly on whether any claim of the destruction or discarding of these records is credible. Accordingly, Weisberg sought to bring these matters to the attention of this Court by including them as an addendum to his Reply Brief.

The government has opposed Weisberg's motion that he be allowed to file his Reply Brief with this addendum. As one ground for its opposition, the government asserts:

Appellant had full opportunity before the granting of summary judgment to depose those who have created the relevant records and to submit pertinent documents to the District Court. He failed to take advantage of that opportunity.

This is simply not true. In part it is based upon a childish interpretation of this Court's remand decision which construes the decision there as limited to taking the testimony of those who created the records in question. The truth of the matter is that the appellees opposed Weisberg's efforts to depose witnesses who have personal knowledge about the nature of the FBI's file search and who presumably would also be knowledgeable about any destruction or discarding of evidence in the assassination of President John F. Kennedy. This interpretation, it is patently clear, was seized upon

as part of the FBI's 12-year campaign to stonewall Weisberg's request for these documents.

Appellees also complain that Weisberg gave no explanation as to why the documents in the addendum to his Reply Brief "were not available for submission to the District Court." The explanation for this is contained in the attached affidavit of Harold Weisberg. [See Weisberg Affidavit, ¶¶19-22, 60] Briefly, the answer is that the FBI has for years stalled Weisberg's information requests through a variety of tactics. His requests have usually been ignored until such time as files suit. More recently, the FBI has pretended that it could not respond to requests for specific documents or kinds of documents because its JFK assassination files were not indexed. [See Exhibit 1, page 2, for example] This forced Weisberg to bring suit for hundreds of thousands of pages of documents to gain access to what he wants. Yet the FBI's statements that there is no index to JFK assassination materials is now known to be false. In fact, the Dallas Field Office has a special index to JFK assassination materials which is described as being 40 linear feet long! [See page five of Exhibit 5 to Weisberg's Motion for Leave to File Reply Brief with Addendum]

In this case, the documents which comprise the addendum were obtained from the FBI as the result of a lawsuit, Civil Action No. 78-0322, filed in District Court after the appeal was filed in this case. The documents were not available to Weisberg at the time this case was in the district court.

Other points raised by appellees' Opposition are addressed in the attached affidavit of Harold Weisberg. As Weisberg's affidavit notes, one continuing problem in all his FOIA lawsuits has been the constant misrepresentations by the government and its counsel. An example of this occurs in appellees' Opposition, at page two, where it is asserted:

The first attachment, the document dated August 5, 1964, does not in any way support appellant's allegation that the curbstone was "altered" by the FBI; it merely reports that as of that date no mark was visible. If a change had occurred, the document provides no basis for believing that the change resulted from intentional government action rather than weather conditions and traffic. (Emphasis in original)

The fact is that Weisberg made no allegation that the curbstone "was 'altered' by the FBI." His Motion for Leave to File Reply Brief With Addendum stated instead that:

. . . newly obtained FBI documents seem to confirm the evidence adduced by Weisberg which shows that the curbstone was altered or "patched" before it was tested, and that the FBI knew this. In addition, it is obvious that no space would be saved by discarding one spectrographic plate. (Emphasis in the original)

Appellees also assert that "Without testimony or evaluation, they [the documents contained in the Addendum to Weisberg's Reply Brief] mean nothing." (Appellees' Opposition, page two) This overstates the case. They do mean something. They raise an inference that FBI documents on the assassination of President Kennedy are not destroyed or discarded as a matter of "routine housecleaning" or otherwise. It is true that these and other such records should be the subject of first-hand testimony and evaluation. This is

precisely why the district court decision, which was reached without such evidence because the court foreclosed it, must be reversed. The documents which Weisberg has obtained and reproduced in the Addendum to his Reply Brief make this clear. Because these records are clearly relevant to the issues presented by this appeal and could not have been put before the district court when the case was in front of it, Weisberg should be allowed to file his Reply Brief with the Addendum.

Respectfully submitted,

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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of January, 1979, mailed a copy of the foregoing Reply to Appellees' Opposition to Appellant's Motion for Leave to File Reply Brief with Addendum to Assistant United States Attorney John H. Korn, D.C. Superior Court Building, Washington, D.C. 20001.

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JAMES H. LESAR

Exhibit 1



UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

January 10, 1978

Mr. Harold Weisberg  
Route 12  
Frederick, Maryland 21701

Dear Mr. Weisberg:

Reference is made to the Federal Bureau of Investigation's (FBI) forthcoming release of file materials, under the Freedom of Information Act (FOIA), concerning the assassination of President John F. Kennedy.

The second segment of these materials will be made available beginning 9:30 a.m., January 18, 1978, in Room 1060, J. Edgar Hoover Building, 10th Street and Pennsylvania Avenue, Washington, D. C. Two sets of the materials will be made available during business hours for public review.

We normally require 48 hours advance notice from individuals who desire to make an appointment to review materials in our reading room. However, with respect to this release, no appointments are necessary for the first week. You may contact us at telephone number 324-3520 for any later appointment.

Due to limitations in space available for reviewing documents, each news organization is requested to limit the number of reviewers to two per session.

Materials to be released are copies from the raw investigative files of the FBI as they were compiled chronologically in our central records system during the investigation. Details of the substantive investigation were incorporated in reports which the FBI furnished in 1964 to the President's Commission on the Assassination of President Kennedy (Warren Commission). As you may be aware, many of these FBI investigative reports became part of the documentary record made public with the Warren Commission's testimony and exhibits in 1964, and subsequently made available in the National Archives.



Mr. Harold Weisberg

Our second segment FOIA release will consist of 58,754 pages of duplicated FBI documents, and will cover the balance of our substantive investigation concerning President Kennedy's murder in Dallas, Texas, on November 22, 1963. Pursuant to Title 28, Code of Federal Regulations, 16.9, there is a fee of ten cents per page for duplication. A complete copy of the second segment release can be purchased for \$5,875.40.

It will require substantial research effort by interested scholars to relate these FOIA materials to the public record. No index of our FBI materials is available to cross-reference these materials to other records of the assassination investigation, such as the material available at the National Archives.

I hope the above is of assistance to you.

Sincerely yours,

*Allen H. McCreight*

Allen H. McCreight, Chief  
Freedom of Information-  
Privacy Acts Branch  
Records Management Division