BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 78-1107

HAROLD WEISBERG,

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants-Appellees

On Appeal from the United States District Court for the District of Columbia, Hon. John H. Pratt, Judge

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CERTIFICATE REQUIRED BY RULE 8(c) OF THE GENERAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned, counsel of record for Harold Weisberg, certifies that the following listed parties appeared below:

Harold Weisberg (Plaintiff)

United States Department of Justice (Defendant)

United States Energy Research and Development Administration (Defendant)

These representations are made in order that Judges of this Court, inter alia, may evaluate possible disqualification or recusal.

James H. Lesar

JAMES H. LESAR
Attorney of Record
For Harold Weisberg

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BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF ISSUE

Whether summary judgment in favor of defendants was properly granted in Freedom of Information Act lawsuit in which:

(a) documentary and deposition evidence established the existence of records not provided plaintiff;

(b) The Federal Bureau of Investigation, the originator and custodian of the records sought, did not state under oath (or otherwise) what files had been searched;

(c) The District Court curtailed plaintiff's discovery and refused to allow him to depose witnesses with personal knowledge of the nature and extent of the FBI's file search;

(d) The record is replete with instances of bad faith on the part of the government, including a history of personal intrigue and vendetta against him in connection with his Freedom of Information Act requests; and

(d) The evidence shows that the FBI has a strong motive for avoiding a thorough search of all relevant files for records which may have been lost or hidden.

REFERENCES TO PARTIES AND RULINGS

This case has been before this Court on two previous occasions. In 1970 plaintiff ("Weisberg") brought suit under the 1966 Freedom of Information Act for the FBI's spectrographic analysis of certain specified items of evidence pertaining to the assassination of President Kennedy. In that suit this Court ruled that these records were exempt from disclosure under the Act's investigatory files exception. Weisberg v. U.S. Department of Justice, 160 U.S.App.D.C. 71, 480 F. 2d 1195 (1973)(en banc), cert. denied, 416 U.S. 993 (1974).

on February 19, 1974, the day the 1974 Amendments to the Freedom of Information Act went into effect, Weisberg again filed suit for the spectrographic analyses; this time, however, he expanded his FOIA request to include the results of the neutron activation analyses and other scientific tests as well. The District Court dismissed the suit as moot without allowing Weisberg the opportunity to establish through discovery that records existed which had not been provided him and Weisberg appealed. This Court reversed the decision of the District Court because there were "material factual questions still in dispute." Weisberg v. U.S. Dept. of Justice, 177 U.S.App.D.C. 161, 163, 543 F. 2d 308, 310 (1976). In remanding the case, the Court stated that the existence or nonexistence of the records sought should be "determined speedily on the basis of the best available evidence, i.e., the witnesses who had personal knowledge of the events at the time the investigation was made," and that this "must be done with live witnesses either by deposition or in court." The Court also observed that "[t]he data which plaintiff seeks to have produced, if it exists, are matters of interest not only to him but to the nation." Id. at 164, 543 F. 2d at 311.

On remand, Weisberg obtained answers to interrogatories and and took the depositions of four FBI agents with knowledge of the tests and and examinations performed on the Kennedy assassination evidence before the District Court cut off further discovery. On

March 30, 1977, a status hearing was held. At this time no transcript of any of the depositions had been filed with the District Court. Indeed, two of the witnesses had been deposed only two days before the hearing. Although the District Court had not yet had an opportunity to read the deposition testimony and the government had not put any motion before the Court, the District Court reduced such matters to mere formalities by annoucing his disposition of the case in advance. Thus he stated to Weisberg's counsel that the Government attorney would be given 30 days in which to file a disposition, "and assuming that that will conclude the case, you will have an opportunity again to re-litigate in the Court of Appeals, which you have successfully done in the past. [R. 21, p. 19]

After the parties had performed the necessary formalities, the District Court issued a Memorandum Opinion which found summary judgment should be awarded in favor of the Government because there were no genuine issues of material fact remaining. Although no agency employee had submitted an affidavit stating that all files which might contain the requested records had been searched, the District Court held that it was not necessary for an agency to specify the files searched in compliance with a plaintiff's request, "it being sufficient that the affiant has personal knowledge that all files which might contain the requested records have been searched." Weisberg v. United States Dept. of Justice, 438 F. Supp. 492, 504 (D.D.C. 1977)

STATUTES AND REGULATIONS

The Freedom of Information Act, 5 U.S.C. § 552, provides:

> *(a)(3) . . . 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.*
>
> *(a)(4)(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 improperly withheld from the complainant. In such 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.*

Because the government has not claimed that the records sought are protected from disclosure by any of the exemptions to the Act, these are the only portions of the Freedom of Information Act relevant to the present suit.

STATEMENT OF THE CASE

I. The Warren Commission: "This closes the case, you see."

On November 30, 1969, by Executive Order 11130, President Lyndon B. Johnson appointed a commission of distinguished Americans to "ascertain, evaluate and report upon the facts relating to the assassination of the later President John F. Kennedy and the subsequent violent death of the man charged with the assassination." Because it was headed by Chief Justice Earl Warren, this commission later became known as the Warren Commission.

Having no trained investigative staff of its own, the Warren Commission had to rely upon the investigative resources of the federal law enforcement and intelligence agencies, principally the Federal Bureau of Investigation and the Central Intelligence Agency. The Warren Commission soon realized, however, that the FBI had boxed it in by prejudging that Oswald was guilty of assassinating President Kennedy and that there had been no conspiracy. In an emergency secret session held on January 22, 1964 to discuss reports that Oswald had worked as an FBI Undercover Agent, Commission members noted that the FBI was acting abnormally. One person present, apparently Warren Commission General Counsel J. Lee Rankin, gave a very troubling evaluation of the FBI's conduct, saying that:

> *. . . the FBI is very explicit that Oswald is the assassin or was the assassin, and they are very explicit that there was no conspiracy,*

> *and they are also saying in the same place that they are continuing their investigation. Now in my experience of almost nine years, in the first place it is hard to get them to say when you think you have got a case tight enough to convict somebody, that that is the person that committed the crime. In my experience with the FBI, they don't do that. They claim they don't evaluate, and it is uniform prior experience that they don't do that. Secondly, they have not run out all kinds of leads . . ..* [Warren Commission Executive Session transcript, p. 11; R. 47]

The FBI's atypical behavior and the implications of the reports that Oswald might have worked as an FBI Undercover Agent frightened the Commission. Someone present, apparently Rankin,[1/] commented on the terrible implications of the report the members had been called together to discuss:

> *But when the Chief Justice and I were just briefly reflecting on this we said if that was true and it ever came out and could be established, then you would have people think that there was a conspiracy to accomplish this assassination that nothing the Commission did or anybody could dissipate.*

Commission members agreed:

> *Boggs: You are so right.*
>
> *Dulles: Oh, terrible.*
>
> *A. Terrific.*

1/ The January 22, 1964 Warren Commission executive session transcript was made public in 1975 as the result of a FOIA request by appellant Harold Weisberg. The stenotypist's tape was not transcribed until a decade after the Warren Commission had ceased to exist, when it was done not by the Court Reporter but by a stenographer at the Pentagon. This accounts for the uncertainity in the transcript as to who was speaking.

Commission member Allen Dulles, formerly the Director of the Central Intelligence Agency, then voiced another disturbing thought:

> *Dulles: Lee, if this were true, why would it be particularly in their* [the FBI's] *interest--I could see it would be in their interest to get rid of this man but why would it be in their interest to say he is clearly the only guilty one? I mean I don't see that argument that you raise particularly shows an interest.*
>
> *Boggs: I can immediately--*
>
> *A: They would like to have us fold up ang quit.*
>
> *Boggs: This closes the case, you see. Don't you see?*
>
> *Dulles: Yes, I see that.*
>
> *Rankin: They found the man. There is nothing more to do. The Commission supports their conclusions, and we can go home and that is the end of it.* [Transcript of Warren Commission executive session held January 22, 1964, at pp. 12-13; R. 47 Exh. 3 to Weisberg Affidavit]

II. The FBI Crime Lab: "However, Oswald is now dead and there will be no trial"

On November 27, 1963, just five days after President Kennedy was shot, Mr. Roy Jevons, Supervisor of the FBI Laboratory, wrote a memorandum the Chief of the Laboratory, Mr. Conrad which reflects the FBI's prejudgment of Oswald's guilt and the nonexistence of a conspiracy to accomplish the assassination. It also makes it clear that the FBI's purpose in conducting

certain neutron activation analyses was to identify Oswald as the perpetrator of Kennedy's murder and can be read as implying that the FBI was not interested in conducting tests which might show that Oswald could be excluded as the perpetrator or establish whether more than one person had to have been involved in the crime. Because the Jevons memorandum bears on the FBI's motives in conducting its investigation, and this in turn bears on the credibility of its claims as to what tests were performed and whether records of them were (or should have been) preserved, it is worth quoting at some length.

> *In connection with our examination of evidence received in the above matter, we have considered all possible examinations and techniques which would be productive in identifying the perpetrator of the crime. It is noted that we have already by means of microscopic examinations, identified the gun used in the assassination and further through handwriting examinations identified Lee Harvey Oswald as the individual who ordered and paid for the gun .....*
>
> * * *
>
> *One consideration in this technique* [neutron activation analysis] *in the present case was directed toward the possible detection of powder residues on the person and clothing of the suspect with the objective of showing that he actually fired the gun. In this respect, it is noted that the detection of such residues on the hands and on ther person of Oswald would not necessarily establish the exact kind of weapon fired by him, the time at which he fired the weapon or the number of times the weapon was fired. Accordingly, in view of the nonspecific nature of such results*

> *and in view of the massive evidence already available indicating Oswald's guilt, it was not felt that this type of examination would contribute essentially to the investigation and trial of Oswald.*
>
> *However, Oswald is now dead and there will be no trial. In view of this development, it is felt that this examination should now receive further consideration in order to protect the Bureau against any possible future allegations, however unfounded, that if neutron activation analyses type of analyses had been conducted, one might have obtained extremely significant data.*
>
> *Such allegations, for example, might originate from relatively highly placed individuals in the Atomic Energy Commission (AEC) charged with developing neutron activation analyses and who will recognize the publicity potential of such allegations.2/*
>
> *The paraffin casts reportedly made by the Dallas Police Department of the hands and face of Oswald are now being forwarded to the FBI and these casts represent the best possibility of applying the neutron activation technique for the detection of powder residues. Accordingly, for the reasons set out above and primarily to place the FBI in a position to refute any speculative allegations as to the potential value if such tests are not made, it is felt we should conduct neutron activation tests of the casts upon receipt in the Bureau. (Emphasis added)* [November 27, 1963 memorandum from Roy Jevons to Mr. Conrad. Attachment 1 to Opposition to Defendants' Motion for Summary Judgment; R. 47]

In his December 11, 1963 letter to Assistant Attorney General Herbert J. Miller, Mr. Paul C. Aebersold, Director, Division of Isotopes Development, Atomic Energy Commission, noted

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2/ This paragraph of the Jevons memorandum was excised from the copy made available to plaintiff on discovery. The full text was made public as the result of an administrative appeal of the deletion taken after the government was awarded summary judgment in this case.

that within 24 hours of the assassination,

> *we had offered verbally our assistance, and that of our laboratories experienced in obtaining criminalistics evidence by means of nuclear analytical techniques, to responsible officials in the FBI, Secret Service and Dallas police force. We believe it is not too late to outline what may yet be done.*

Noting that "we are not certain our techniques can now give added useful information," Mr. Aebersold stated, however, that "[o]ur work leads one to expect that the tremendous sensitivitiy of the activation analysis method is capable of providing useful information that may not be otherwise attainable. He specifically asserted that:

> *. . . it may be possible to determine by trace-element measurements whether the fatal bullets were of composition identical to that of the purportedly unfired shell found with the Italian rifle.*

The District Court noted that "the FBI special agent who conducted the [neutron activation analysis] appears to have resented the AEC recommendation as interfering in the FBI's investigation. 438 F. Supp. at 493, n. 1. This is plainly evident in many FBI memorandums which were obtained by Weisberg on discovery, and was not confined merely to FBI Special Agent John F. Gallagher, who performed the tests. The reason for the resentment is also obvious. To give one example, the paraffin cast of the right side of Oswald's face which the Dallas Police made to determine whether or not nitrates were present showed none were present. [Exhibit 7, October 15, 1977 Weisberg Affidavit] This is exculpatory of Oswald's having fired a rifle.

On September 15, 1964 Special Gallagher became the last witness to testify before the Warren Commission. His testimony occurred just nine days before the Warren Commission issued its final report. The testing of the paraffin casts by chemical means (diphenylbenzidine) having tended to exculpate Oswald of having fired a rifle, Gallagher sought to discredit the testing of nitrates by this means as unreliable. [Warren Commission Hearings, Vol. XV., p. 750] However, the Jevons memorandum had recommended that the paraffin casts be tested by neutron activation analysis (NAA) in an attempt to identify Oswald as the perpetrator of the crime. Accordingly, the paraffin casts were subjected to NAA testing. Agent Gallagher testified that the NAA tests showed greater amounts of barium on the outside surface of the cast, which was used as the control for the experiment, than on the inside surface of the cast next to Oswald's cheek. In addition, Gallagher testified that there was only slightly less antimony on the inside surface than on the outside. [Warren Commission Hearings, Vol. XV, p. 751]

On February 27, 1964 Dr. Vincent P. Guinn, head of the Neutron Activation Analyses Section of General Atomic Division, General Dynamics Corporation, who was in charge of exploring the use of neutron activation analysis as a criminalistics technique under a contract with the Atomic Energy Commission, "intruded" into the FBI's investigation by reporting some unwelcome findings

directly to Special Agent Gallagher. According to a memo by FBI Laboratory Supervisor Roy Jevons of that same date,

> [Guinn] *advised that since the assassination a large part of their efforts have been directed to the determination of powder residues on paraffin casts taken from the hands and cheeks of individuals who have shot a rifle similar to the one reportedly owned by Lee Harvey Oswald. He advised that there appears that triple firing of this rifle will leave unambiguous positive tests every time on the paraffin casts. It further appears that washing the casts with diphenylbenzidine does remove one of the characteristic elements (barium) but such washings do not remove all of the other characteristic element in powder residues (antimony).*
>
> *Further he advised that the test to date indicate that powder residues are deposited on both cheeks of the shooter after the rifle is fired either one time or three times.*
>
> *It appears, he added, that these results can be obtained even if the paraffin casts are made 2 1/2 hours after shooting the rifle providing that the skin of the shooter had not been washed in the meantime.*

Special Agent Gallagher did not mention this in his Warren Commission testimony, nor did he inform the Commission that the results of the FBI's own tests produced similar results. [October 15, 1977 Weisberg Affidavit, ¶¶178-183]

III. Weisberg's Request for Spectrographic Reports

Under questioning by Warren Commission Assistant Counsel Arlen Specter, Special Agent Robert A. Frazier testified as follows:

Mr. Specter. Was a comparison made of the lead residues on the inside of the windshield with any of the bullet fragments recovered about which you have heretofore testified?

Mr. Frazier. Yes. They were compared with the bullet fragments found on the front seat, which in turn was compared with Commission 399. The lead was found to be similar in composition. However, that examination in detail was made by a spectrographer, Special Agent John F. Gallagher.

Mr. Specter. Was that examination made in the regular course of examining procedures by the FBI?

Mr. Frazier. Yes, sir.

Mr. Specter. And was that information made available to you through the normal conference procedures among FBI examiners?

Mr. Frazier. Yes, sir. He submitted his report to me and I prepared the formal report of the entire examination.

Mr. Specter. Are his report and your formal report a part of the permanent record of the FBI then?

Mr. Frazier. Yes, sir.

[Warren Commission Hearings, Vol. V., p. 69]

During the Warren Commission proceedings, Weisberg, who had prior experience as an investigative reporter, a Senate investigator and an intelligence analyst for OSS, became attentive to a series of leaks by the FBI which began before the Commission took its first testimony and continued thoughout the taking of testimony which could be explained as a systematic

attempt to condition the national and official minds. [October 15, 1977 Weisberg Affidavit, ¶¶3-6]

After the Warren Report appeared, Weisberg made an analysis of it. He later wrote and published a book, Whitewash: The Report on the Warren Report. In analyzing the Warren Report, Weisberg became concerned by substantial deficiencies in the evidence. Thus, despite its length, most of the Report bears no relationship to the crime itself. When he was able to compare the Report with the Warren Commission's 26 volume appendix, he became even more deeply disturbed by characteristics he observed in it. These included:

1. The use of semantics as a replacement for evidence, as exemplified by repeated reference to Oswald's alleged dedication to Communism and Marxism.

2. Conclusions completely in contradiction to 100% of the evidence, as where the Report alleged that on the morning of the crime Oswald took a disassembled rifle into the Texas School Book Depository where he worked when the Commission's own witnesses stated this was impossible. Moreover, where the Report tried to circumvent this by stating that no person saw Oswald enter the TSBD that morning, there was in fact a witness, Jack Dougherty, who was deposed and who insisted that Oswald was carrying nothing when he entered their place of work.

3. The long delays in conducting the most fundamental investigations. For example, Abraham Zapruder and Phil Willis,

who took the best-known nonprofessional motion picture and still photographs of the actual crime and the crime scene, were not deposed until July, 1964, eight months after the crime, in spite of the fact that the Warren Commission had originally planned to issue its Report in June.

4. Countless other photgraphers, both professional and amateur, were not used as witnesses by the Commission in any form. Moreover, their film was not even in the Commission's estimated 300 cubic feet of files.

5. Those who placed Oswald as other than at the scene of the crime, such as Mrs. Carolyn Arnold, were not witnesses. Mrs. Arnold was also not mentioned in the Report.

6. On the key question of whether bullet 399 (Commission Exhibit 399) had inflicted all seven nonfatal wounds suffered by President Kennedy and Governor Connally, a finding essential to the Commission's conclusions and to stating that there had been no conspiracy, the Commission substituted the hypothesis of Assistant Counsel Arlen Specter for the evidence. This conclusion was exactly opposite the tetimony of all the doctors who were witnesses before the Commission. The Dallas surgeons testified that they did not credit the so-called "single bullet" theory. Dr. Gregory testified that: "I would believe that the missile in the Governor behaved as though it had not struck anything but him." [Warren Commission Hearings, Vol. VI, p. 103]

The three pathologists who performed the autopsy on the President confirmed the Dallas doctors' testimony on the fragments and bullet 399. Thus, Commander James J. Humes testified as follows:

> *Mr. Specter. Dr. Humes, under your opinion, which you have just given us, what effect, if any, would that have on whether this bullet, 399, could have been the one to lodge in Governor Connally's thigh?*
>
> *Commander Humes. I think that extremely unlikely. The reports, again Exhibit 392 from Parkland, tell of an entrance wound on the lower midthigh of the Governor, and X-rays taken there are described as showing metallic fragments in the bone, which apparently by this report were not removed and are still present in Governor Connally's thigh. I can't conceive of where they came from this missile.*

[Warren Commission Hearings, Vol. II, p. 376]

7. The absence of any records of the extensive scientific testing of the crucial items of evidence by means of spectrographic or neutron activation analysis and of any final or comprehensive statement of the results of such tests.

These were among the considerations which led Weisberg to concentrate his inquiries on the ballistics and medical evidence. [See July 28, 1977 Weisberg Affidavit, ¶¶7-15]

Accordingly, on May 23, 1966, Weisberg wrote FBI Director J. Edgar Hoover a letter suggesting that there were at least five bullets involved in the assassination of President Kennedy

rather than the three alleged by the Warren Commission and called upon Director Hoover to make public the FBI's spectrographic analysis. His letter said:

Dear Mr. Hoover:

Enclosed is a copy of my book, WHITEWASH--THE REPORT ON THE WARREN REPORT. In it you will find quotations from your testimony and that of FBI agents that I believe require immediate unequivocal explanations and from the FBI's report to the Commission. Of the many things requiring explanation, I would like in particular to direct your attention to these three, in which it would seem no question of national security can be involved:

1) In your brief discussion of the assassination in the report to the Commission you say that three shots were fired, of which two hit the President and one the governor. This does not account for the bullet that hit the curbstone on Commerce Street, which you told the Commission you could not associate with the Presidential car or any of its occupants. In another part of this report, dealing with Oswald, you told the Commission that the bullet that did not kill the President struck him in the back--not the neck--and did not go through his body. Here you seem to fail to account for the well-known wound in the <u>front</u> of the President's neck. And thus, are there not at least five bullets, the three you accounted for and the two you did not account for? The Commission itself considered the curbstone strike a separate bullet, and the President most certainly was wounded in the front of the neck.

2) In his testimony before the Commission, FBI Agent Robert A. Frazier did not offer into evidence the spectrographic analysis of this bullet and that of the various bullet fragments. Neither did FBI Agent John F. Gallagher, the spectrographer. Agent Frazier's testimony is merely that the bullets were lead, which would

seem to be considerably less information than spectrographic analysis would reveal. The custodian of this archive at the National Archives informs me this analysis is not included in his archive but is in the possession of the FBI. I call upon you to make it immediately available.

3) In his testimony before Commission, FBI Agent Frazier said that when the whole bullet was received by the FBI, it had been wiped clean. He does not reveal any FBI interest in this unusual destruction of evidence. He also testified that the cleansing of the bullet was not complete, that foreign matter remains in the grooves in the bullet. Yet his testimony does not show any FBI interest in learning what the nature of the residue was. Did the FBI make the appropriate tests? Could the residue be associated with either the President's body or the governor's? What effort, if any, was made to learn? And if no effort was made, why not?

[Attachment to Complaint Exhibit C, February 18, 1975 Weisberg Affidavit]

Hoover never responded to Weisberg's letter.3/ During all the furor over the assassination of President Kennedy in following years, the never disclosed the results of the spectrographic analysis, nor did it answer any of the other questions raised in Weisberg's letter. This was at variance with the tenor of Hoover's testimony before the Warren Commission:

3/ In 1977, as the result of long-delayed partial compliannce with other FOIA and Privacy Act request by Weisberg, Weisberg obtained FBI records showing that the FBI hierarchy had approved that his 1969 FOIA request for records on the assassination of Dr. King "not be acknowledged." Other records obtained in 1977 show that the Secret Service conspired with the National Archives to transfer a Kennedy assassination record to Archives which the Secret Service admitted it could not withhold under FOIA. Archives then denied Weisberg access to this nonexempt record. [Exhibits 3 and 4 to Supplement to Plaintiff's Motion for Reconsideration.

> *Mr. Hoover. Well, I can assure you so far as the FBI is concerned, the case will be continued in an open classification for all time. That is, any information coming to us or any report coming to us from any source will be thoroughly investigated, so that we will be able to either prove or disprove the allegation.*

[Warren Commission Hearings, Vol. V, p. 100]

IV. Weisberg's Suit Under the 1966 Freedom of Information Act

On May 16, 1970, nearly four years after he had written Director Hoover, Weisberg filed a DJ 118 form requesting disclosure of:

> *Spectrographic analysis of bullet, fragments of bullet and other objects, including garments and part of vehicle and curbstone said to have been struck by bullet and/or fragments during assassination of President Kennedy and wounding of Governor Connally.*

The Department of Justice claimed that the records sought were immune from disclosure under the investigatory files exemption to the 1966 Freedom of Information Act. Consequently, on August 3, 1970, Weisberg filed suit. [Weisberg v. Department of Justice, Civil Action No. 2301-70]

In support of its claim that the spectrographic analysis was not subject to disclosure the government submitted a false, misleading, and obfuscatory affidavit by FBI Special Agent Marion E. Williams, which stated in part:

> *5. The release of raw data from such investigative files to any and all persons who request them would seriously interfere with the efficient operation of the FBI and with the proper discharge of its important law enforcement responsibilities, since it would open the door to unwarranted invasions of privacy and other possible abuses by persons seeking information from such files. It could lead, for example, to exposure of confidential informants; the disclosure out of context of the names of innocent parties, such as witnesses; the disclosure of the names of suspected persons on whom criminal justice action is not yet complete; possible blackmail; and, in general, do irreparable damage. Acquiescence to the Plaintiff's request in instant litigation would create a highly dangerous precedent in this regard.*

In addition, during oral argument of the case before District Judge Sirica on November 16, 1970, the government's attorney told the court:

> *In this instance the Attorney General of the United States has determined that it is not in the national interest to divulge these spectrographic analyses.*

This was false. No such determination was ever made by the Attorney General.[4/]

Judge Sirica, ruling from the bench, granted the government's motion to dismiss. The Court of Appeals sitting en banc

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4/ A 1972 Office of Legal Counsel memorandum to the the Acting Director of the FBI actually indicates that as of that date the Justice Department was urging a discretionary release of these records to another requester in hopes of avoiding a damaging precedent for FBI investigatory files. [See Exhibit 11 to Supplement to Plaintiff's Motion for Reconsideration]

vacated a panel decision in Weisberg's favor and then affirmed Judge Sirica's ruling. Weisberg v. U.S. Department of Justice, 160 U.S.App.D.C. 71, 489 F. 2d 1195 (1973 (en banc), cert. denied, 416 U.S. 993 (1974).

Subsequently, however, the Weisberg decision was cited by Congress as requiring amendment of the Freedom of Information Act's investigatory files exemption. 120 Cong. Rec. S9329-S9337 (daily ed. May 30, 1974).

V. Weisberg's Suit Under the New Freedom of Information Act

On September 19, 1974, Weisberg's counsel wrote the Atomic Engery Commission, now the Environmental Research and Development Administration (ERDA), and requested "copies of any tests" which the AEC had performed for the Warren Commission or any person or agency acting for it, including, but not limited to, "any spectographic or neutron activation analyses which were made on the bullets, bullet fragments, clothing, automobile parts, medical specimens, curbstone, or any other objects." The letter explicitly stated: "By 'copies of tests' I mean the reports on the results of any such tests, not the 'raw data' on which they are based." [Complaint, Exhibit D]

On October 16, 1974, Mr. Bertram Schur, the Associate General Counsel for the AEC, replied:

> *The AEC's Oak Ridge National Laboratory (ORNL) did provide technical support to the Federal Bureau of Investigation in the per-*

> *formance of neutron activation analyses on the paraffin casts from the right hand, the left hand, and the right cheek of Lee Harvey Oswald. * * * Neither AEC nor ORNL prepared any report on the results of these analyses.*
>
> *No other tests such as you described were performed by AEC or at any AEC facility.*

Weisberg's counsel informed the AEC that Mr. Schur's statement was not true and that Weisberg did not want the AEC's materials on the Oswald paraffin casts. On February 19, 1975, three months after the AEC was provided with proof [Complaint, Exh. F] that other tests had been conducted at AEC facilities, Mr. Schur retracted his denial that tests besdies those on the paraffin casts had been performed at AEC facilities:

> *The information contained in my October 16, 1974, letter was based primarily on advice we obtained from the former FBI agent who participated in the work described. He now advises that, in addition to the anlayses of paraffin casts mentioned in that letter, neutron activation analyses of bullet fragments were performed at the Oak Ridge National Laboratory (now the Holifield National Laboratory). As in the case of the paraffin casts analyses, the bullet fragment analyses were done for the FBI and with FBI participation.*4/ [June 2, 1975 Weisberg Affidavit, Attachment E]

In the meantime, on November 27, 1974, Weisberg wrote the Department of Justice renewing his request for the spectrographic analyses and expanding it to include NAA testing:

4/ On remand former FBI Agent John F. Gallagher testified he could not remember what he told the AEC. [Gallagher Deposition, pp. 88-90]

> *The Department saw fit in this previous case to make misrepresenations to the courts. I therefore want it to be clear that I sought and now seek only the final scientific reports on these tests. Not raw materials, not laboratory work, only the conclusions as embodied in the full report, or the report itself.*
>
> *Herewith I expand that request to include similar neutron activation testing, whether or not by the FBI, of those same objects and materials, namely the bullet allegedly used in the assassination, various fragments of bullet also allegedly so used, and the various objects said to have been in contact with any or all of these.*

On December 19, 1974, FBI Director Clarence Kelley replied to Weisberg by saying that the FBI was awaiting Department of Justice guidelines on the implementation of the recently amended Freedom of Information Act and that "In the meantime, we are attempting to identify and locate the documents in which you have expressed an interest, and will communicate with you concerning this in the near future." [Complaint, Exhibit A]

On January 15, 1975, there having been no further communication from Director Kelley, Weisberg's counsel appealed the de facto denial of Weisberg's request. Referring to the FBI's contrived difficulty in "identifying and locating" the documents which Weisberg had requested, he called attention to the August 20, 1970 affidavit of FBI Agent Marion E. Williams:

> *. . . I wish to point out that an FBI Agent has stated under oath that he "examined" the spectrographic records. In view of this, it is evident that there is no problem at all in either identifying of locating these records, and any alleged problem is obviously only a*

> *pretext for evading and stalling legal action by Mr. Weisberg. This conclusion is further supported by the fact that there has been no further communication from Mr. Kelley, despite his assurances that there would be.* [Complaint, Exhibit B]

On February 19, 1975, there having been no response to his appeal, Weisberg filed suit. After further delays, the government produced some records. Weisberg asserted, however, that he had not been given all the records that existed. Weisberg's efforts to exercise discovery on this issue were resisted and the District Court characterized his interrogatories as "oppressive."

Instead of answering Weisberg's interrogatories, the government submitted an affidavit by FBI Special Agent John W. Kilty. Kilty's May 13, 1975 affidavit stated in part:

> *. . . affiant states that the FBI Laboratory employed methods of elemental analysis, namely, neutron activation analysis and emission spectroscopy. Neutron activation analysis and emission spectroscopy were used to determine the elemental composition of the borders and edges of holes in clothing and metallic smears present on a windshield and curbstone.*

When Weisberg countered by asserting that he had not been given any NAA testing of any clothing and noted that this contradicted the assurances of FBI Director Kelley and Agent Kilty that the FBI had fully complied with his request for NAA testing, Agent Kilty executed a new affidavit, in which he swore:

> *Concerning plaintiff's allegation that, although NAA testing was conducted on the clothing of President Kennedy and Governor Connally, he has not been furnished the results of this testing: further examination reveals emission*

> *spectroscopy was used to determine the elemental composition of the borders and edges of holes in clothing and metallic smears present on a windshield and a curbstone. * * * NAA was not used in examining the clothing, windshield or curbing.*

Thus, Kilty's second affidavit directly contradicted his first, stating that tests which he had sworn were performed, were not performed. NOthwithstanding this blatant and unexplained contradiction, the District Court accepted the FBI's self-contradictory affidavits as demonstrating "a good faith effort on the part of the government" and dismissed the case because "the government has complied substantially with its obligations under the Freedom of Information Act." [Transcript of July 15, 1975 hearing, p. 19]

On appeal, however, this Court reversed on the grounds that there were material issues of fact in dispute. In stating that Weisberg should be afforded an opportunity to establish the existence or nonexistence of relevant records, the remand opinion also intructed him to take the testimony of FBI agents who actually performed the tests. Weisberg v. U.S. Department of Justice, 177 U.S. App.D.C. 161, 164, 543 F. 2d 308, 311 (1976).

VI. The Case on Remand

A. Nature of the Proceedings

The remand opinion called for the existence or nonexistence of the data sought by Weisberg to be determined "speedily" on the

basis of the best available evidence and suggested that Weisberg might be well-advised to proceed with depositions or a court hearing rather than proceed with his attempt to secure answers to interrogatories. Weisberg chose, however, to reinstitute his interrogatories and to file requests for the production of documents as his initial discovery devices.

Weisberg served interrogatories on both defendants on August 9, 1976. On August 12, 1976, requests for the production of documents were served on both defendants. On October 1, 1976, the date of the second status call after remand, ERDA responded to Weisberg's interrogatories and request for production of documents. The Department of Justice, however, had not responded to either by that date. Accordingly, the District Court indicated that the Department of Justice must respond by October 15, 1978. The Department, however, did not serve its answers to interrogatories or its response to the request for production of documents until October 28, 1976, the day before the third status call after remand.5/

The interrogatories which Weisberg addressed to the Department of Justice requested the current addresses of the FBI agents who had conducted tests on specific items of evidence. The FBI re-

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5/ In 1977, as a result of an FOIA request not part of this case, Weisberg obtained an October 5, 1976 FBI memorandum which states that the Assistant United States Attorney representing the Department of Justice did not advise the FBI of Weisberg's interrogatories until October 1, 1976, nearly two months after they were served on him. [Exhibit 7 to Supplement to Plaintiff's Motion for Reconsideration]

sponded that: "Our records do not indicate the current address and employment of retired employees." [Answer to Interrogatory No. 5(e)]

Because Weisberg needed the addresses of former FBI agents in order to take their depositions, he raised this issue at the status call on October 29, 1976. Judge Pratt suggested that he write FBI Director Kelley for them. Although this was done on November 4, 1976, no response was received, so on November 30, 1978, Weisberg moved for an order compelling Director Kelley to provide the addresses of these witnesses. In doing so, he pointed out that the court had set January 15, 1977 as the cut-off date for his discovery. The court took no action on the motion to compel and it was not until New Year's Day approached that the government, by letter dated December 27, 1976, provided the addresses of four former FBI agents. [Exhibit 1 to Motion to Compel]

In February and March, 1978, Weisberg took the depositions of four FBI agents who had participated in the testing and examination of the Kennedy assassination evidence. The depositions were characterized by large measures of arrogance and amnesia on the part of the former FBI agents. For example, ex-Agent Lyndal Shaneyfelt sent Weisberg a bill for his "expert" testimony, and other agents refused to answer questions which they asserted call for an expert opinion. Nonetheless, as will be set forth below, the depositions proved helpful in clarifying some of the issues and facts in this case.

Notwithstanding the fact that these depositions imposed a heavy financial burden upon Weisberg, he intended to take further depositions. These additional depositions undoubtedly would have further clarified the facts and perhaps have limited this time-consuming litigation.

However, at the status call held on March 30, 1978, the District Court made it plain that he did not want any further discovery and had already determined the outcome of the case, even though the depositions taken had not yet been transcribed, much less read by the parties or the court:

> *. . . I'm going to accept Mr. Ryan's suggestion and give him 30 days to file* [a] *dispositive motion, and assuming that that will conclude the case, you will have an opportunity again to re-litigate in the Court of Appeals, which you have successfully done in the past.* [Tr., p. 13]

Subsequently, more than two months before the government filed its dispositive motion, Weisberg noted the deposition of FBI Agent John W. Kilty. Agent Kilty had played a major role in this case. When the case was originally before the District Court he filed two contradictory affidavits as to what tests had been performed upon specific items of evidence. When the case was appealed, he was present at the oral argument before this Court. On remand, he answered the interrogatories addressed to the Department of Justice. He was also responsible for searching the files for the records sought by Weisberg. Yet the District Court granted the government's motion to quash Kilty's deposition ex parte, before

Weisberg was even aware of it, much less had a chance to oppose it. This definitely foreclosed any further discovery attempts by Weisberg.6/

B. The Facts Adduced on Remand

1. Additional Tests Were Conducted

As noted above, FBI Agent John W. Kilty had originally sworn that neutron activation analysis had been conducted on certain items of evidence, such as the windshield of the Presidential limousine. However, his second affidavit contradicted his first and flatly declared that NAA testing was not done on those items. Or remand, Agent Kilty answered the interrogatories which Weisberg put to the Department of Justice. His answer to interrogatory No. 19 again swore that Q15, the windshield scrapings, had not been subjected to NAA testing. In answering interrogatory 21(d) he also swore to the reasons why specimen Q3 was not tested:

> *Records indicate that Q3 is a section of bullet jacket devoid of its lead core. Bullet jacket material made of copper, zinc,*

6/ The District Court's opinion states that: "At a hearing March 30, 1977, counsel for plaintiff indicated that no further depositions of FBI employees who had participated in the Bureau's investigation were planned." (Emphasis added) Weisberg v. United States Department of Justice, 438 F. Supp. 492, 495. This grossly distorts what Weisberg's counsel actually said and demonstrates the District Court's unfairness and lack of objectivity. In response to the District Court's loaded question, "I take it you don't have any further depositions scheduled?" (emphasis added), Weisberg's counsel naively replied: "I have not scheduled some," (emphasis added) and then stated that he did intend to take some. (Tr., pp. 3-4)

> *and/or iron is generally unsuitable for examination by NAA unless chemical separations are conducted. The chemical separations would necessarily destroy markings on the item of evidence. Emission spectrographic analysis was the method of choice for analysis of bullet jacket material in 1963.*

On remand, however, the deposition evidence proved that Agent Kilty's June 13, 1975 affidavit and his answers to interrogatories 19 and 21(d) were false. Both Q15 and Q13 were tested by NAA. [Gallagher Deposition, 71, 90-92]

2. Existence of Records Not Provided Weisberg Established

In addition to proving that the FBI had conducted tests on items of evidence which it had previously denied making, Weisberg's discovery also established the existence of records not provided him. For example, in response to Weisberg's request for the production of documents the FBI produced a June 16, 1975 memorandum from M.J. Stack, Jr. to Mr. Cochran which states:

> *As can be noted on the first page of the Laboratory worksheet, lead smears from the curbstone were examined spectrographically. * * * An exhaustive search of pertinent files, and storage locations has not turned up the spectrographic plates nor the notes made therefrom. Therefore, by affidavit, Kilty can say that the FBI Laboratory has turned over to Weisberg all the material it has concerning the spectrographic examination of the lead smears from the curbstone.* [Attachment 2, Opposition to Defendant's Motion for Summary Judgment]

Other documentary evidence obtained by Weisberg on discovery also establishes the existence of materials not provided Weisberg. For example, the January 24, 1975 memorandum from FBI Agent Marion E. Williams to Mr. White states that: "In the case of the neutron

activation data, the total reproduction of this material will involve the equivalent of approximately 1,000 page." Yet Weisberg has not been given anthing like 1,000 pages of records pertaining to the NAA testing.

The depostions taken by Weisberg also established the existence of records not provided him. For example, former Special Agent Robert A. Frazier testified that he had asked another examiner, he thought Paul Stombaugh, to determine, by buttoning the President's shirt, whether the two anterior holes in the shirt collar overlap. [Frazier Deposition, pp. 60-62] No report on such an examination has been provided Weisberg. Yet Frazier's testimony that such an examination was done is uncontradicted.7/

In addition to these clear-cut examples, there is evidence that still other records were created which have not been given Weisberg. Thus, when former Special Agent Gallagher was asked whether there had been an examination after the date of Frazier's November 23, 1963 report on the spectrographic analysis of certain items that Frazier prepared a report on, Gallagher replied: "I imagine there was. It probably went to the chief." [Gallagher Deposition, p. 86]

7/ The District Court went outside the evidence and engaged in sheer speculation in order to try and explain away Frazier's testimony. In doing so he misstated facts and misconstrued Warren Commission Warren Commission testimony. [See October 15, 1977 Weisberg Affidavit, ¶¶143-161] While the District Court speculated, on the basis of its misunderstanding of Warren Commission testimony, that Frazier himself had conducted this examination. Frazier, however, as the FBI's ballistics expert, was not the proper person to perform this examination. Stombaugh, the FBI's hair and fiber examiner, was. [See Answer to Interrogatory 5(c)]

Gallagher's testimony also indicates that there "probably" were computer printouts on each specimen subjected to neutron activation testing. [Gallagher Deposition, pp. 92, 117] Weisberg has received computer printouts on the NAA testing of the Oswald paraffin casts only. As he describes them, "[t]he ERDA printouts I have received of four-digit figures are pages wide and of many pages." [October 15, 1977 Weisberg Affidavit, ¶86] In view of this, it would seem that computer printouts were essential and would have been carefully preserved.

ARGUMENT

I. SUMMARY JUDGMENT WAS NOT PROPERLY GRANTED WHERE PLAINTIFF ESTABLISHED THE EXISTENCE OF RECORDS HE HAS NOT BEEN GIVEN AND GOVERNMENT HAS NOT STATED UNDER OATH THAT IT SEARCHED ALL RELEVANT FILES FOR SUCH RECORDS

A. Plaintiff Has Shown the Existence of Records Which Have Not Been Provided Him

As noted above, both the documents produced on discovery and the deposition testimony taken on remand establish the existence of materials which are within the scope of Weisberg's request but which have not been give to him. Thus, it has been established beyond any doubt that the spectrographic plates on the testing of the curbstone and notes on this testing were created. They have not been given to Weisberg. In addition, the uncontradicted testimony of former Special Agent Robert A. Frazier is that he instructed someone, apparently Special Agent Stombaugh, to determine whether or not the holes in the President's shirt collar overlapped. Weis-

berg has not been given this crucial report either. While the evidence adduced indicates the liklihood of other records responsive to Weisberg's request, the fact that these vital documents were created and have not been produced is sufficient to require a thorough search of all relevant files which might contain them.

B. Government Has Not Shown That It Conducted a Good Faith Search of All Relevant Files

Under the Freedom of Information Act an agency must, at a minimum, submit an affidavit by an employee which states that he has personal knowledge that all files which might contain requested material have been searched. Exxon Corp. v. FTC, 384 F. Supp. 755, 759-61 (D.D.C.1974), remanded without opinion, 174 U.S.App.D.C. 77, 527 F. 2d 1386 (1976). In this case, however, no FBI Agent has stated under oath (or otherwise) what FBI files were searched for the records Weisberg seeks or that all relevant files were searched.

The present record does not support a contention that all relevant files have been searched. When Weisberg first instituted suit in 1970 for the results of the spectrographic analyses, FBI Special Agent Marion E. Williams executed an affidavit stating that:

> *I have reviewed the FBI Laboratory examinations referred to in the suit entitled "Harold Weisberg v. Department of Justice, USDC D.C., Civil Action No. 2301-70," and more specifically, the spectrographic examinations of bullet fragments recovered during the investigation of the assassination of President John F. Kennedy . . ..*

The Williams Affidavit was executed on August 20, 1970, barely two weeks after the suit was filed on August 3, 1970.

In 1975 Agent Williams wrote a memorandum on the materials which would come within Weisberg's request under the Amended Freedom of Information Act for the results of the spectrographic, neutron activation, and other scientific tests. This memorandum is at variance with Williams' 1970 affidavit, which gave the impression that he had reviewed all spectrographic records and that they were all located in a single, easily locatable file. Referring to the spectrographic and neutron activation tests, Williams' January 24, 1974 memorandum states:

> *Notes were made at the time the examinations were conducted which contain the actual analyses, including percentage of some elements present, relative concentrations of other elements and absence of detectable concentrations of elements. Some of these notes are physically in the Laboratory and others are assumed to be interspersed in the case file. (Emphasis added)* [Exhibit 10 to Motion For Reconsideration]

Even the assumption the examiners' notes are interspersed may be very misleading. If by "case file" is meant the FBI Headquarters' files on the JFK assassination, even this would not contain all relevant documents sought by Weisberg. As Weisberg notes, it is a standard FBI pretense that all relevant records are contained in its Headquarters' files. [October 15, 1977 Weisberg Affidavit, ¶19] However, in addition to having a "do not file" system, Weisberg's personal experience shows that the FBI also buries relevant records not in its Headquarters files in its Field

Office files. [October 15, 1977 Weisberg Affidavit, ¶19] A particularly graphic example of this concerns Weisberg's request for photographs of the scene where Dr. Martin Luther King, Jr. was shot. The FBI submitted an affidavit attesting that a search of the index to its Central Headquarters' files show there were no crime scene photographs. Weisberg asserted that he had personal knowledge that the FBI had such photographs and forced a search of the FBI's Memphis Field Office which produced over 150 crime scene photographs whose existence had been previously denied.

The depositions taken in this case establsih that the Dallas Field Office and received copies of the reports of the FBI's scientific tests on JFK assassination evidence. [See Cunningham Deposition, pp. 11-12, 16; Frazier Deposition, pp. 11-16] There is no statement by the FBI that it searched the Dallas Field Office files for the missing records. In fact, Weisberg states that he has not received a single record from the Dallas Field Office. [October 15, 1977 Weisberg Affidavit, ¶20] In addition, Weisberg has specified by file number other files which have apparently not been searched. [October 15, 1977 Weisberg Affidavit, ¶21]

In order to comply with Rule 56(e) of the Federal Rules of Civil Procedure, it is apparent that an agency must supply affidavits which attest, on the basis of personal knowledge, that a good faith search has been made for the requested records. In this case the government has not submitted any affidavit which states that all relevant files have been searched. Consequently, there is a genuine issue of material fact with respect to an essential

element in a Freedom of Information Act case; namely, whether or not a good faith search has in fact been conducted.

In addition, because the nature of the search is a necessary element in a Freedom of Information Act case, a litigant must be allowed to undertake discovery to establish whether or not a good faith search was in fact made. The decision of this Court in National Cable Television Association, Inc. v. F.C.C., 156 U.S.App. D.C. 91, 479 F. 2d 183 (1973), plainly holds that such factual issues are to be resolved insofar as possible through the discovery process. Yet the District Court cut off Weisberg's discovery when he attempted to depose the FBI Agent who appears to have been primarily responsible for the search.

There are, in fact, some circumstances that attend this case which may warrant a more stringent standard than might ordinarily be applied to claims that a good faith search had been made. At the outset, it must be noted that this Court observed in its remand opinion in this case that Weisberg's inquiry is "of interest to the nation." Secondly, the nature of the evidence which Weisberg has put into the record makes it clear that the FBI has an exceptionally strong motivation for not attempting thorough search for missing records. If found, these records would severely embarrass the FBI. For example, the evidence which has put into the record plainly shows that the alleged bullet holes in the President's shirt collar do not overlap and thus could not have been caused by a bullet. Moreover, Weisberg has testified that his own

investigation establishes that the President's tie was cut off by a scapel during emergency medical procedures and that Dr. Carrico, one of the Dallas physicians who attened the President at Parkland, told him that there was no hole in the President's shirt or tie when he first examined him. It is apparent, therefore, that the slits in the President's shirt collar were caused by a scapel rather than a bullet. This is further corroborated by the fact that the spectrographic analysis of the shirt collar and tie shoed no traces of any kind of bullet metal. [See July 28, 1977 Weisberg Affidavit, ¶¶125-146] The examination of the President's shirt collar directed by Agent Frazier would necessarily have established this. Since this destroys any basis for the Warren Commission's conclusion that a bullet did pass through the President's shirt collar and would also establish that the FBI mislead the Warren Commission on this point, discovery of the report on this examination could be acutely embarrassing to the FBI.

Similarly, given the history of the curbstone allegedly struck by bullet, the most likely explanation for the disappearance of the spectrographic plates and notes is that they cast doubt on the official theory of the crime. [See July 28, 1977 Weisberg Affidavit, ¶¶ 177-198; October 15, 1977 Weisberg Affidavit, ¶¶125-131]

Secondly, the record reflects that the FBI has long sought to frustrate Weisberg's Freedom of Information Act requests in any manner possible. At least one government agency has even transferred a nonexempt record to another agency which, in accordance with the purpose of this conspiracy, then withheld it from Weis-

berg. This past history of vendetta and discrimination against Weisberg must be taken into account in evaluating whether the refusal to state under oath that all relevant files have been searched is but another subterfuge to further grind Weisberg down and to delay and prevent his access to vital records which do exist somewhere in FBI files but which have not yet been produced.

Finally, the whole history of Weisberg's efforts to obtain these records dating back to May 23, 1966 must be weighed as another factor. That history, which is replete with delays, evasions, and deceits on the part of the government is another factor which should be weighed in requiring that the government establish by stringent evidence, and evidence subjected to cross-examination, that it has conducted a thorough and good-faith search for the records which this Court has said are "of interest to the nation."

II. DISTRICT COURT ERRED IN NOT VIEWING MATTERS OF FACT IN THE LIGHT MOST FAVORABLE TO WEISBERG

In considering a motion for summary judgment, matters of fact are to be viewed in the light most favorable to the party opposing the motion. Nyhus v. Travel Management Corp., 151 U.S.App.D.C. 269, 271, 466 F. 2d 440, 442 (1972); Semaan v. Mumford, 118 U.S. App.D.C. 282, 283, 335 F. 2d 704, 705 n. 2 (1964). Although the the District Court cited this standard, it did not apply it to the facts of this case.

One example of this is the District Court's handling of former FBI Agent Robert Frazier's testimony that he had ordered an examination made of whether or not the holes in the President's shirt collar overlapped. The District Court resorted to Frazier's Warren Commission testimony about which he was not questioned during his deposition in order to speculate that Frazier rather than another examiner, Paul Stombaugh, had made this examination. Because Stombaugh was the FBI's hair and fiber examiner, this task would seem logically to have fallen to him rather than Frazier, the FBI's ballistics expert. In any event, Frazier's testimony that a report on this examination was prepared remains uncontradicted. Viewing the facts most favorably to Weisberg, the evidence tended to establish the existence of such a report. Yet the District Court simply asserted that there there was "no genuine question as to the existence of the report alluded to by Frazier in his deposition." Weisberg v. United States Dept. of Justice, 438 F. Supp. 492, 503 (1977).

The District Court routinely accepts any testimony given by the FBI Agents who were deposed. Yet the credibility of these deponents is not very high. The credibility of Agent Gallagher, the key witness, is particularly open to question. For the most part he testified as if he suffered from amnesia. Where he did remember and did offer explanations, the truthfulness and accuracy of his testimony is at best extremely doubtful.

In 1974 when Weisberg made an FOIA request of the Atomic Energy Commission for records on the testing of JFK assassination items at its facilities, Gallagher advised the AEC only that he

had tested the Oswald paraffin casts by means of neutron activation analysis, omitting to mention that he had also subjected other items of evidence to NAA testing. When he was deposed in 1977 he could not remember what he had told the AEC.

Gallagher initially could not remember having subjected the Q15 windshield to neutron activation analysis. After being shown proof, however, he admitted it. [Gallagher Deposition, p. 71] Because the windshield scrapings were an important and unusual specimen in what has been termed the crime of the century, it is difficult to believe that Agent Gallagher could not remember subjecting it to NAA testing, even after the passage of thirteen years.

Also lacking in credibility is Gallagher's testimony that probably as the result of an oversight he didn't write down the time that specimen Q3 entered and left the nuclear reactor. He did write this figure down for the Q15 specimen on which he claims he got no results. In addition, without knowing the time the Q3 specimen spent in the reactor, he could not make any computations. Moreover, explanation of the lack of results on the testing of Q3 seems to be at variance with Agent Kilty's answer to interrogatory 21(d), which indicates that results on copper specimens are obtainable if chemical separations are performed.

Finally, Gallagher's suggestion that he was not able to test various portions of "the pristine bullet" for composition because "we were asked to keep it for posterity" is spurious. There is no evidence of any such directive and various portions of the bullet

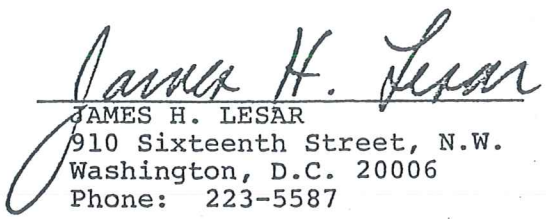
could have been removed for testing without altering the appearance of the bullet. [October 15, 1977 Weisberg Affidavit, ¶¶206-210]

While this brief recital does not exhaust the problems with Gallagher's credibility, it does indicate that his testimony should not automatically be adopted as truth. Yet the District Court uncritically adopted the testimony of Gallagher and the other FBI witnesses in violation of the principles of summary judgment. Indeed, on several occasions the District Court went beyond or outside the evidence to give its own speculation as to what the truth might be.

CONCLUSION

Through the discovery taken on remand Weisberg has established that the FBI did perform scientific tests and examinations which it previously had denied making. Moreover, he has also established that there are missing records responsive to his Freedom of Information Act request which have not been given him. The FBI has not stated under oath, or otherwise, that it has searched all relevant files where these and other missing records might be found. Weisberg has established that there are relevant files which should be searched for records responsive to his request but from which he has not yet been provided any materials. On this set of facts, summary judgment is clearly inappropriate and Weisberg should be allowed to proceed with discovery to determine whether or not all relevant files have been searched and all records responsive to his requested provided.

Respectfully submitted,



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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Appellant v. U.S. DEPARTMENT OF JUSTICE, Appellee	:	Case No. 78-1107

CERTIFICATE OF SERVICE

I hereby certify that I have this ~~15~~ 14th day of June, 1978, mailed two copies of the Brief for Appellant to Mr. John Terry, Assistant United States Attorney, United States Courthouse, Washington, D.C. 20001.

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