REPLY BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 79-1700

HAROLD WEISBERG,

Plaintiff-Appellant

v.

CLARENCE M. KELLEY, ET AL.,

Defendants-Appellees

On Appeal from the United States District Court for the District of Columbia, Hon. John Lewis Smith, Jr., Judge

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I. GOVERNMENT HAS NOT SHOWN THAT AN ADEQUATE, GOOD-FAITH SEARCH WAS MADE FOR RECORDS RESPONSIVE TO PLAINTIFF'S REQUEST

A. Conjecturing Misrepresentations

Appellant Weisberg ("Weisberg") argues that summary judgment was improperly granted because a genuine issue of material fact remained as to the adequacy of the FBI's search for records responsive to his request. The Government replies that this claim "conflicts with the facts and is based solely upon conjecture, misrep-

resentations and irrelevancies." (Appellees' Brief, p. 12) Yet in the four pages it devotes to discussion of this issue, the Government does not cite a single misrepresentation made by plaintiff. In short, the charge of misrepresentation is without any basis whatsoever. It is pure conjecture.

B. Misrepresenting Conjecture

The Government does cite instances of what it terms conjecture. Thus it asserts that "appellant's speculation concerning the existence of an itemized list of all FOIA requests, and of inventory lists distinct from the worksheets disclosed are (sic) unsupported and insufficient to defeat summary judgment." (Appellees' Brief, p. 15)

But neither of these record categories is based on speculation. Each is based on fact--fact supplied by the FBI itself. Evidence of the existence of inventories of the records maintained on the assassination of President John F. Kennedy by each of the FBI's 59 field offices is provided by two FBI documents attached to the February 21, 1979 Weisberg Affidavit. Exhibit 11 to that affidavit is a directive from FBI Headquarters to all 59 field offices which instructs them to provide inventories of all records relating to the assassinations of President John F. Kennedy and Dr. Martin Luther King, Jr. [App. 461] Exhibit 12 is the inventory which the Dallas field office produced in response to the Headquarters directive. [App. 465] That the FBI kept one or more lists of FOIA requests for records on the assassination of President Kennedy is

strongly suggested by an FBI memorandum dated November 17, 1977, which asserts that the FBI had received "approximately 60 requests of various scope" for such records. [App. 83] That such a list did exist was testified to by FBI Special Agent John E. Howard at a hearing held on September 16, 1976, in Weisberg v. U.S. Department of Justice, Civil Action No. 75-1996. [App. 85]

In short, in charging that Weisberg's contention that there are responsive records which he has not been furnished is mere speculation, the Government has misrepresented as conjecture that which is based on fact. Other records responsive to his request do exist and have not been provided.

C. The Request and the Non-Search

As noted above, one prong of the Government's attack on the search issue is to flatly deny that other responsive records exist and to label as "speculation" Weisberg's unrefuted evidence that such records do exist. A second prong snipes away at the request itself. Describing the two-page letter in which the request was made as "lengthy and rambling," the Government asserts that the wording of the letter "was not nearly so specific" as "the four separate requests which he claims he made in his letter . . . ."[1/]

1/ The Government states: "In his brief appellant lists four separate requests which he claims he made in his letter of December 7." (Appellees' Brief, p. 14, fn. 8) Actually, Weisberg's brief list not four separate "requests" but four categories of documents described by his December 7, 1977 request. These four categories of records sought were expressly set forth in ¶7 of the Complaint.

The Government nowhere explicitly states that Weisberg's request failed to "reasonably describe" the records sought. In District Court Weisberg issued subpoenas which required FBI Special Agents Horace P. Beckwith and Alan H. McCreight to produce, inter alia, "any list(s) of requests for copies of FBI records pertaining to the asassination of President John F. Kennedy," and "all memoranda, correspondence, or other written records pertaining to a plan to deposit copies of the FBI's JFK assassination records at locations such as the Library of Congress." [App. 197-198] In moving for a protective order, the Government asserted that Weisberg "seeks the production of documents which are the subject matter of this litigation and thus, are not within the scope of proper discovery." [App. 199] This in effect concedes that these two categories of records are within the scope of Weisberg's request and shows that the FBI understood his request as having included them.[1/]

Nevertheless, the Government's brief seems by indirection to raise the issue of the adequacy of the description provided by the request. Accordingly, Weisberg addresses it.

The Freedom of Information Act originally provided that an agency make documents available "on request for identifiable rec-

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2/ The Government's position on this has not been consistent. It now takes the position that Weisberg's complaint that he has not been provided with records pertaining to the FBI's plan to deposit its records at locations such as the Library of Congress "appear[s] to be an attempt to obtain material well beyond the scope of [his] original request." (Appellees' Brief, pp. 14-15)

ords made in accordance with published rules." The 1974 Amendments change this to require that the request must be one which "reasonably describes" the records sought. 5 U.S.C. § 552(a)(3)(A). The legislative history shows that Congress intended that:

> A description of a requested document would be sufficient if it enables a professional employee of the agency who is familiar with the subject area of the request to locate the record with a reasonable amount of effort.

H.Rep.No. 93-876, 93d Cong., 2d Sess. (1974) at 5-7.

Weisberg's request specifically asked for a list or inventory of records on the assassination of President Kennedy not yet released. Such inventories were made. Yet the FBI neither produced them nor conducted a search for them. Instead, Agent Beckwith swore that those worksheets which the FBI did provide were "the only documents available within the FBI which are responsive to plaintiff's request." 4/28/78 Beckwith Affidavit, ¶7. [App. 54]

The Government has not stated that Weisberg's request was so unclear that those of its employees who were familiar with the review and processing of its Kennedy assassination records could not locate the records sought with a reasonable amount of effort. Even if that were the case, the FBI had an obligation not to let the matter rest there. When an agency receives a request which does not "reasonably describe" the records sought, "it should notify the requestor of the defect." Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (1975) at 23.

In addition, Department of Justice regulations, 28 C.F.R. § 16.3 (c) and (d), provide as follows:

> (d) Categorical requests--(1) Records must be reasonably described. A request for all records falling within a reasonably specific category shall be regarded as conforming to the requirement that records be reasonably described if it enables the records requested to be identified by any process that is not unreasonably burdensome or disruptive of Department operations.
>
> (2) Assistance in reformulating non-conforming requests. If it is determined that a request does not reasonably describe the records sought, as specified in paragraph (d)(1) of this section, the response denying the request on that ground shall specify the reasons why the request failed to meet the requirements of paragraph (d)(1) of this section and shall extend to the requestor an opportunity to confer with Department personnel in order to attempt to reformulate the request in a manner which will meet the needs of the requestor and the requirements of paragraph (d)(1) of this section.

The FBI made no attempt to comply with these provisions. It never notified Weisberg that it considered his request deficient or that it was unable to identify or locate the records sought. Nor did it offer Weisberg any opportunity to confer with its personnel in order to attempt to reformulate the request. Instead, it limited its response to partial compliance with one item of the request and ignored the others. This violation of Departmental regulations bears not only on the adequacy of the search for responsive records--there was in fact no search--but also on the FBI's lack of good faith in its handling of the request.

Even where an agency's supporting affidavits are relatively detailed, non-conclusory and submitted in good faith,

> the requester may nonetheless produce counter-vailing evidence, and if the sufficiency of the agency's identification or retrieval is genuinely in issue, summary judgment is not in order.

The Founding Church of Scientology of Washington, D.C., Inc. v. National Security Agency, No. 77-1975 (D.C.Cir. May 15, 1979), slip op. at 27. In this case there is no affidavit setting forth the nature of any search that was conducted and it is evident that there has been no search. Accordingly, summary judgment was improperly granted.

Finally, it should be noted that the Government does not deny that other sets of worksheets exist which Weisberg has not been given. Instead, the Government resorts to a diversionary tactic, discoursing at some length on details that are utterly extraneous to this issue. Refusing even to acknowledge that Weisberg has provided documentary evidence that a different set of inventory worksheets was sent to another FOIA requester, the Government treats this as a mere "allegation" which is "unsupported by relevant information about the scope of the other request, the date of the request, and the alleged discrepancy." (Appellees' brief, p. 15) None of this has the remotest relevancy to the undisputed fact that such worksheets were provided a different requestor and have not been given to Weisberg.

II. THE GOVERNMENT'S EXEMPTION 1 CLAIMS ARE FRAUDULENT

In upholding the Government's Exemption 1 claims, the District Court cited but a single case, Weissman v. CIA, 184 U.S.App. D.C. 117, 565 F.2d 692 (1977). In arguing that the District Court erroneously relied upon Weissman, Weisberg stated that this decision "was substantially modified, if not in fact overturned," by Ray v. Turner, 190 U.S.App.D.C. 290, 587 F.2d 1187 (1978), a decision handed down some six months prior to the District Court's ruling. (Appellant's Brief, p. 24) The Government ignores the fact that Weisberg qualified his characterization of the effect of Weissman and and levels the accusation that "[Weisberg's] first contention--that [Weissman] was overruled by [Ray]--is blatently false." (Appellees' brief, p. 18, fn. 12)

The point is that the District Court's ruling shows no awareness that Weissman was subsequently changed by Ray. But as Chief Judge Wright stated in his concurring opinion in that case, the

> per curiam's changes, in the light of experience, in the advice given the District Courts in earlier cases such as Weissman v. CIA . . . are obvious and significant.

Ray, supra, 190 U.S.App.D.C. at 302, 587 F.2d at 1199, fn. 1.

The Government also attacks Weisberg's assertion that the District Court gave conclusive weight to the FBI's affidavits, asserting that: "The record is devoid of any indication that the court gave 'conclusive' weight to the agency affidavits . . . ." (Appellees' brief, p. 18) The Government's claims notwithstanding,

there is not a scintilla of evidence to show that the District Court gave any weight whatsoever to Weisberg's affidavits. The absence of any indication that the District Court even considered Weisberg's affidavits, much less accorded them any weight, means that the FBI's affidavits were in effect given "conclusive" weight.

If the District Court had accorded any weight at all to Weisberg's affidavits, it could not have sustained the Government's Exemption 1 claims under Weissman, unmodified, or any other decision of this Court. The Weisberg affidavits, through uncontroverted documentary evidence, show that the FBI's purported "national security" claims are unfounded, even ludicrous. The FBI has excised the initials "RCMP," standing for "Royal Canadian Mounted Police," in order to conceal the cooperation it extended to the investigation into President Kennedy's assassination. A self-respecting graduate of the Disneyland Night Law School could not give any credence to such claims.

Yet the Government continues to try and justify this withholding, asserting that "[t]he FBI affidavits clearly and comprehensively state the totally confidential atmosphere in which such cooperation was conducted, and the great damage to our international relations that official disclosure of such cooperation could cause." (Emphasis in original)(Appellees' brief, p. 20) The Government makes this argument even though this cooperation has been disclosed repeatedly and officially, including by the FBI itself.

See 7/10/78 Weisberg Affidavit, ¶¶70, 81 [App. 112, 115]; 2/14/79 Weisberg Affidavit, ¶¶66-67, 107, 153 [App. 298, 308-309, 317].

The Government concludes its discussion of Exemption 1 by proclaiming that "even if information concerning the general co-operation of the RCMP were in the public domain, disclosure of their cooperation in the context of the worksheets would add great detail to that information, detail which must be withheld in the interests of national security and institutional integrity." (Appellees' Brief, p. 21)

The serious implication of such disclosure makes the mind reel. R-C-M-P, R-C-M-P. One wonders how many billion rubles the Russkies would pay to wrest from the FBI these awesome classified initials. And to think, they wouldn't have to pay a plug kopeck if they only knew they could be gotten from the National Archives or old newspapers or even from records the FBI released years ago. But the secret must be kept, even if it is out. Perhaps a mistake was made in releasing them earlier. Perhaps a spy let them out. Perhaps the vaunted KGB "mole" who lives at the CIA burrowed into the J. Edgar Hoover Building one night and maneuvered the release of these initials to divert suspicion to the FBI. But don't repeat the tragedy by letting them out again. Keep 'em locked up! Above all, don't give 'em to Weisberg! He might publish them!

In a more serious vein, it should be noted that the Government fails to cite any authority for the proposition that information

that has been officially released can still remain properly classified in the interests of national security.[3/] Weisberg is aware of no such authority in this Circuit.

3/ After claiming that even if general FBI-RCMP cooperation is in the public domain, "disclosure of their cooperation in the context of the worksheets would add great detail to that information, deta which must be withheld in the interests of national security and institutional integrity," the Government states, in footnote 13, that:

> "In addition, the fact that appellant, who is a self-acclaimed expert on the Kennedy and King assassinations, can piece together identifying data does not make the classified data automatically a part of the public domain. Lesar v. Department of Justice, supra, mem. op. at 6."

This requires comment. First, Weisberg is recognized by scholars as an authority on both assassinations. This undoubtedly was a factor in the District Court's decision to award him a waiver of copying costs for 40,000 pages of the FBI's JFK assassination records in Weisberg v. Bell, et al., Civil Action No. 77-2155, as well as in the Justice Department's subsequent decision to waive copying costs for all other FBI and Justice Department records he obtains on these assassinations. This Court has noted that his inquiries into the assassination of President Kennedy are "of interest not only to him but to the nation." Weisberg v. U.S. Dept. of Justice, 177 U.S.App.D.C. 161, 164, 543 F.2d 308, 311 (1976).

The use of perjoratives such as "self-acclaimed" to disparage Weisberg is a reprehensible tactic. Once again, the Government is attempting to try the case on Weisberg rather than on the issues. The Court should indicate the inappropriateness of this practice.

Finally, the citation of Lesar is misapplied. First, because the ruling of the District Court in Lesar to which the Government adverts did not deal with Exemption 1. Secondly, because it is based upon a factual error which found its way into the District Court's opinion in that case. At oral argument, plaintiff pro se Lesar remarked that a great deal of and money which was being wasted on Exemption 7(C) and 7(D) excisions could be saved if the Department of Justice would

(continued on next page)

Other contentions which the Government makes in support of its Exemption 1 claims are simply unfactual. For example, the Government tries to get around the fact that the worksheets were not classified until months after their origination by asserting that this does not undermine the claimed exemption because "the worksheets receive derivative protection from the underlying documents, which undisputedly were timely classified." (Appellees' Brief, p. 20)(Emphasis added) This misrepresents the facts.

The simple truth is that not one of the four affidavits submitted by the FBI testifies that the underlying documents were timely classified. The two affidavits executed by FBI Special Agent Horace P. Beckwith on April 17 and April 28, 1978 state only

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3/ inquire of Weisberg whether the information was in the public domain. The following exchange then took place:

> THE COURT: What he [Weisberg] knows isn't public. *** The fact that he can make a very educated guess as to what somebody's name is has nothing to do with whether or not the document can be released.
>
> LESAR: I think that is not the point. The point is not that he can make an educated guess but he knows that the material in fact has been published in a book or it was in a court-proceeding.
>
> THE COURT: All right.

(Transcript of June 9, 1978 hearing in Lesar v. Department of Justice, Civil Action No. 77-0692, pp. 42-43) Although the District Court's concluding remark seemed to indicate that he understood the distinction being made by Lesar, his opinion, reported at 455 F.Supp. 921 (1978), contains his initial and entirely erroneous interpretation of Lesar's position. (The case is now on appeal to this Court as No. 78-2305)

that the information contained in the worksheets "is identical to information which is duly classified in the original documents." April 17, 1978 Beckwith Affidavit, ¶2(a) [App. 24]; April 28, 1978 Beckwith Affidavit, ¶6(a) [App. 52]. The conclusionary statement that information is "duly classified" does not establish that it was timely classified. Neither the affidavit of FBI Special Agent David M. Lattin nor that of Special Agent Bradley B. Benson makes any assertion regarding the classification of the underlying documents.

Moreover, the "testimony" of Government counsel, given for the first time on appeal, that the underlying documents were timely classified, is disputed.[4/] Weisberg's February 14, 1979 affidavit shows that some of the underlying records were not classified until more than 13 years after their origination! Exhibit 22 to Weisberg's February 14, 1979 affidavit is a dispatch from the Legal Attache, Ottawa, to the Director of the FBI. Dated February 11, 1964, the face of this document shows that it was not classified until July 12, 1977. [App. 371] Exhibit 23, as August 12, 1964 memorandum from W.A. Branigan to W.C. Sullivan, was not classified until September 26, 1977. [App. 372] See also February 14, 1979 Weisberg Affidavit, ¶¶99, 105, 138. [App. 306, 308, 314]

4/ Government counsel in the court below asserted that Weisberg's opposition to the Government's motion for summary judgment had raised a "red-herring" in stating that FBI Agent Lattin's affidavit did not swear that he had reviewed the underlying records. January 10, 1979 transcript p. 4. [App. 219] He argued that this was not necessary because the worksheets had been independently reviewed by Mr. Lattin.

In addition, some of the underlying records apparently never were classified. See, for example, February 14, 1979 Weisberg Affidavit, ¶¶96, 108 [App. 305, 309]; Exhibits 21, 24 [App. 368-374].

These facts make it patently obvious that the District Court improperly sustained the Government's Exemption 1 claims.

III. GOVERNMENT HAS NOT SUSTAINED ITS BURDEN OF SHOWING THAT RECORDS WERE COMPILED FOR LAW ENFORCEMENT PURPOSES

Weisberg contends that the Government's Exemption 7 claims cannot be sustained because it has failed to show that the FBI's Kennedy assassination records were compiled for law enforcement purposes. The Government asserts that "this issue was never raised before the District Court, and therefore is not properly raised on appeal." (Appelles' Brief, p. 22)

This is false. Weisberg raised this issue in his opposition to the Government's motion for summary judgment, at page eleven. [App. 69] He again raised it at the January 10, 1979 hearing on the Government's motion for summary judgment. January 10, 1979 transcript, p. 19. [App. 234]

The Government also asserts that this issue is foreclosed by the decision of this Court in Weisberg v. United States Department of Justice, 160 U.S.App.D.C. 71, 489 F.2d 1194 (1973)(en banc). The decision in Weisberg, which is replete with factual errors, was overturned by Congress when it enacted the 1974 Amendments to the Freedom of Information Act. Subsequent to Weisberg

but prior to the enactment of the 1974 Amendments, this Court handed down another decision, Rural Housing Alliance v. United States Dept. of Agr., 162 U.S.App.D.C. 122, 498 F.2d 73 (1974), in which it held that:

> It is established now that the Government need not show "imminent adjudicatory proceedings or the concrete prospect of enforcement proceedings." What the Government is required to show is that the investigatory files were compiled for adjudicative or enforcement purposes.

Rural Housing Alliance, supra, 162 U.S.App.D.C. at 129, 498 F.2d at 80. In discussing Exemption 7, the Court noted its holding in Weisberg that FBI materials concerning the investigation of President Kennedy's assassination were exempt from disclosure because they were investigatory files compiled for law enforcement purposes. However, in a footnote the Court asserted that: "The court relied heavily on the Attorney General's determination, and the District Court review of that determination. No in camera inspection was undertaken by either court." Rural Housing Alliance, supra, 162 U.S.App.D.C. at 128, 498 F.2d at 79.

Whether investigative files were compiled for adjudicative or enforcement purposes is a question of fact to be determined by the District Court from all the attendant circumstances. In this case the Government made no showing that the FBI's Kennedy assassinational records were compiled for adjudicatory or law enforcement purposes and the District Court made no finding to that effect. Weisberg, on the hand, put forward evidence that the FBI's investigation was made for the Warren Commission; that the Warren Commis-

sion explicitly stated in its Report that it had no law enforcement purpose; that the Director of the FBI had testified to the Warren Commission that there was no federal jurisdiction which authorized the FBI to investigate the President's assassination; and that the FBI was not part of law enforcement by local authorities. 7/10/78 Weisberg Affidavit, ¶¶41-42. [App. 105]

In the absence of any evidence that the FBI had any statutory basis for conducting its investigation into the assassination of President Kennedy, the records it compiled as part of that investigation were not compiled for law enforcement purposes and the Government's Exemption 7 claims must be rejected.

IV. THE GOVERNMENT HAS NOT CARRIED ITS BURDEN OF DEMONSTRATING ENTITLEMENT TO ITS EXEMPTION 7 CLAIMS

In discussing the Government's claims of exemption under 7(C), 7(D), and 7(E), Weisberg's brief noted that the District Court had erred in adjudicating these issues on an insufficient record, by not requiring the FBI to cross-index its claims of exemption to its justification for withholding, and by denying Weisberg the opportunity to take discovery. The Government has made no response whatsoever to this argument. There is none that it can make. In Founding Church of Scientology, Etc. v. Bell, ___ U.S.App.D.C. ____, 603 F.2d 945 (1979), this Court stated:

> We have observed repeatedly that the Vaughn index is critical to effective enforcement of FOIA. Without such an index neither reviewing courts nor individuals seeking agency records can evaluate an agency's response to a request for government records.

Id., 603 F.2d at 947. The Government failed to submit a Vaughn index in this case and the District Court denied Weisberg's motion that one be granted. This defect alone requires reversal of the District Court's ruling upholding the Government's Exemption 7 claims.

CONCLUSION

For the reasons set forth above, the decision of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of February, 1980, hand-delivered two copies of the printed Reply Brief for Appellant to the office of Assistant United States Attorney John A. Terry, United States Courthouse, Washington, D.C. 20001.

James H. Lesar

JAMES H. LESAR