

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

HAROLD WEISBERG,  
 Appellant,

v.

Case No. 79-1700

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WILLIAM H. WEBSTER, ET AL.,  
 Appellees

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 STATES COURT OF APPEALS

APPELLANT'S REPLY TO APPELLEES' RESPONSE TO  
 APPELLANT'S MOTION FOR LEAVE TO SUPPLEMENT RECORD

After oral argument appellant Weisberg ("Weisberg") filed a motion for leave to supplement the record in this case with the December 2, 1977 letter of Allen H. McCreight, Chief, Freedom of Information/Privacy Acts Branch, Records Management Division, Federal Bureau of Investigation. Weisberg took this action because a member of the panel that heard the case had asked questions during oral argument that seemed to reflect (1) a suggestion that there was some ulterior reason why Weisberg had not included McCreight's letter in the record, and (2) a belief that Weisberg's FOIA request was limited to records pertaining solely to those FBI documents on the assassination of President Kennedy which were released to the public on December 7, 1977, and did not encompass those released at a later date.

In his motion Weisberg noted that after the appeal in this case was taken he had learned that for every important document the FBI prepares an "abstract" which identifies it and which contains a brief synopsis of its contents. He attached to his motion an excerpt describing these abstracts which appears in a publication of the FBI's Records Management Division entitled FBI Central Records System.<sup>1/</sup> He asserted that such abstracts fall within his request for "records that indicate the content of these related records," and that if this Court were to limit his FOIA request to records pertaining only to the first release of the FBI's Kennedy assassination records, he would be denied abstracts of the approximately 60,000 pages of records on this subject which were released thereafter.

With respect to McCreight's letter, the Government reluctantly states that, "should this Court find it desirable to review the letter to arrive at a full understanding of the factual situation presented, appellees would not oppose supplementing the record with that letter." However, with respect to the Central Records excerpt and its ineluctable implications for this case, the Government strenuously opposes supplementation of the record.

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<sup>1/</sup> In its Response the Government refers to this as an "undated" publication. Weisberg's motion did not state the date of the publication and it is not shown on the cover sheet which was made part of Attachment 2 to the motion. However, an inside page gives the date as August, 1978.

The Government vehemently protests that the excerpt on the abstracts is "irrelevant material," that the fact that Weisberg established through depositions taken in another case that the FBI does prepare abstracts of its records has "absolutely no bearing on the instant appeal," and that "consideration by this Court of such matters would be totally inappropriate." (Appellees' Response, p. 2) The intensity of the Government's protests makes it clear that it correctly perceives that the matter of the abstracts bears directly on the question of the adequacy of the search for records responsive to Weisberg's request. More importantly, it is crucial to the accuracy, and perhaps the honesty, of the affidavits submitted by FBI Special Agent Horace P. Beckwith which state that the inventory worksheets provided Weisberg "represent the only documents available within the FBI which are responsive to [Weisberg's] request." [App. 54]

While it is generally true that an appellate court must look only to the record before the district court in deciding questions presented, in appropriate circumstances an appellate court may, in the interest of justice, order the record enlarged to include materials which were not before the district court. Washington v. United States, 130 U.S.App.D.C. 374, 378, n. 19, 401 F.2d 915, 919 (1968); Gatewood v. United States, 93 U.S.App.D.C. 226, 230, n. 5, 209 F.2d 789 (1953); Turk v. United States, 429 F.2d 1327 (8th Cir. 1970). In addition, Weisberg notes that 28 U.S.C. § 2106 provides:

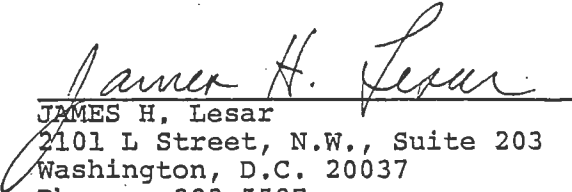
The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

This Court had occasion to address the scope of its discretion under 28 U.S.C. § 2106 in its decision in Jordan v. United States Dept. of Justice, 192 U.S.App.D.C. 144, 171, 591 F.2d 753, 780 (1978), where it held that where there had been "a substantial change in the factual context of the case" it might exercise its discretion to "remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." In this case Weisberg has now obtained information that he did not have at the time the case was in the District Court. This information comes from a Government publication and Government witnesses who testified in another Freedom of Information Act case. The thrust of the new information is to indicate that Weisberg has been denied thousands of records in this case which should have been provided him had the Government conscientiously processed his FOIA request. Under the circumstances it would be just for this Court to take cognizance of this substantial change in the factual context of this case and cite it as part of the basis for remanding this case on the issue of the adequacy of search.

Accordingly, this Court should allow the record in this case to be supplemented with both the December 7, 1977 letter of Allen H. McCreight and the page from FBI Central Records System which

was submitted as Attachment 2 to Weisberg's motion for leave to supplement the record.

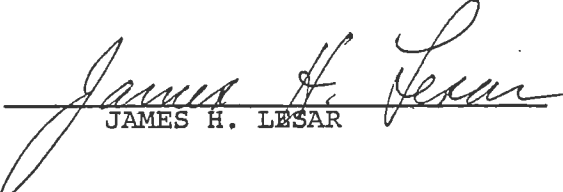
Respectfully submitted,

  
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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 12<sup>th</sup> day of May, 1980, mailed a copy of the foregoing Appellant's Reply to Appellee's Response to Motion for Leave to Supplement Record to Ms. Contance L. Belfiore, Assistant United States Attorney, United States Courthouse, Washington, D.C. 20001.

  
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JAMES H. LESAR