75-226

BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 82-1072

HAROLD WEISBERG,

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF JUDTICE, ET AL.,

Defendants-Appellees

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

James H. Lesar
1000 Wilson Blvd., Suite 900
Arlington, Va. 22209
Phone: (703) 276-0404

Attorney for Appellant

1K

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 82-1072
	:	
UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,	:	
	:	
Defendants-Appellees	:	

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 and amici (if any) 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

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES

*Cases chiefly relied upon are marked by asterisk

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 82-1072

HAROLD WEISBERG,

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,

Defendants-Appellees

BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF ISSUES

1. Did district court properly award summary judgment in favor of Federal Bureau of Investigation ("FBI") on issue of whether FBI had conducted a thorough, good-faith search for records where:

(a) after two remands by this Court, FBI produced records that it earlier had claimed didn't exist or had been destroyed;

(b) on latest remand plaintiff adduced evidence of the testing of other specimens in regard to which the FBI produced no records;

(c) FBI admittedly did not search all possible locations for responsive records;

(d) crucial items of Kennedy assassination evidence are inexplicably missing and FBI's present explanation for this contradicts that formerly given;

(e) FBI agent who testified as to nature of search conducted had executed false affidavits, testified falsely regarding FBI Laboratory records when deposed in another case, and generally lacked credibility.

2. Whether disputed issues of material fact existed which precluded summary judgment?

3. Whether FBI should be required to conduct certain tests and examinations to restore materials allegedly lost?

This case has previously been before this Court on three occasions: Weisberg v. Department of Justice (Weisberg I), 160 U.S.App.D.C. 71, 489 F.2d 1195 (en banc 1973), cert. denied, 416 U.S. 993, 94 S.Ct. 2405 40 L.Ed.2d 772 (1974); Weisberg v. Department of Justice (Weisberg II), 177 U.S.App.D.C. 161, 543 F.2d 308 (1976); and Weisberg v. United States Dept. of Justice (Weisberg III), 200 U.S.App.D.C. 312, 627 F.2d 365 (1980).

STATUTE INVOLVED

The statute involved in this case, 5 U.S.C. § 552 (the Freedom of Information Act), is set forth in the statutory addendum to this brief.

REFERENCES TO PARTIES AND RULINGS

All parties who are or have been involved in this litigation are set forth in the foregoing certificate of counsel required by Rule 8(c) of the General Rules of this Court.

Plaintiff appeals from the November 18, 1981, order of Judge John H. Pratt granting defendants' motion for summary judgment and denying plaintiff's motion to compel a further search. [App. 521]

STATEMENT OF THE CASE

This case arises out of the quest by plaintiff Harold Weisberg ("Weisberg") for crucial records pertaining to the FBI's testing of items of evidence in its investigation of the assassination of President John F. Kennedy. This is the fourth time this case has been before this Court, the third time since the Freedom of Information Act ("FOIA" or "the Act") was amended in 1974 to make it possible to obtain the kinds of records Weisberg seeks.

On April 28, 1980, this Court remanded the case for a second time under the new Act to enable Weisberg to depose FBI Special Agent John W. Kilty ("Kilty"), the FBI agent who had submitted affidavits concerning the search for responsive documents, notwithstanding the fact that the FBI had rested its case on "a claim of complete disclosure." Weisberg v. United States Dept. of Justice (Weisberg III), 200 U.S.App.D.C. 312, 315, 627 F.2d 365, 368 (1980).

More than a year after the Weisberg III decision, the FBI finally produced--towards the end of Kilty's June 19, 1981, deposition--some additional records, records it had first denied existed, then claimed had been destroyed. The FBI still failed to produce some critical records, now allegedly "lost" rather than "destroyed". Weisberg, however, adduced evidence showing that there remain other specimens that were tested in regard to which the FBI has not produced any records whatsoever.

It is apparent from the manner in which the FBI has been doling out documents on a trip-to-the-Court-of-Appeals by trip-to-the-Court-of-Appeals basis, that it is engaging in a "war of attrition" designed to grind Weisberg down and weary the courts. This tactic is not limited to this case or this litigant. When plaintiff in Jaffe v. Central Intelligence Agency, 516 F.Supp. 576 (D.D.C. 1981) charged that the FBI was waging a "war of attrition" in his FOIA lawsuit, the court found that description an "apt one," id., at 587. The court also concluded that there was evidence which "strongly suggests that the [FBI] has failed to live up to its obligations under the FOIA, despite repeated opportunities to do so over the history of this case." Id., at 583.

There are special considerations which explain why this case is one in which the FBI has a particularly strong interest in resorting to such tactics. They begin with the nature of the information sought and its sigificance, factors which are briefly discussed in the section which follows.

I. Some Fundamental Questions Regarding the Assassination of President Kennedy

A. Warren Commission Findings Challenged

From the moment of the assassination, questions have been raised about the number of shots fired at President Kennedy, the direction from which they came, and which shots caused what wounds to the President and Governor Connally. The FBI and the Secret Service both disagreed with the Warren Commission on the last point. They said that the second shot hit Governor Connally, whereas the Warren Commission said the second shot missed. August 9, 1981 affidavit of Harold Weisberg ("Weisberg Affidavit"), ¶3. [App. 203-204]

The Warren Commission ultimately sought to reconcile the number of shots fired with the lone assassin theory by positing that one bullet, CE 399, frequently referred to as "the magic bullet," had caused all seven nonfatal wounds suffered by the President and Governor Connally and emerged from its ordeal in virtually pristine condition. However, an FBI teletype which reported on the President's autopsy stated:

> One bullet hole located just below shoulders to right of spinal column and hand probing indicated trajectory at angle of forty five to sixty degrees downward and hole of short depth with no point of exit. No bullet located in body. Pathologist of opinion bullet worked way out of back during cardiac massage performed at Dallas.

Weisberg Affidavit, Exh. 30. [App. 383-384]

Additional problems for the Warren Commission's theory were posed by the testimony of the doctors who were witnesses before the Commission. The Dallas surgeons who had attended the President 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." (6H103)* The three pathologists who performed the autopsy on the President confirmed the Dallas doctors' testimony on CE 399. Thus, Commander James J. Humes testified as follows:

> Mr. Spector: 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.

(2H376)

B. Records Sought by Weisberg Bear Directly on Integrity of FBI's Investigation

The FBI served as the Warren Commission's principal investigative arm. The records which Weisberg seeks are vital to an eval-

---

*Denotes Warren Commission Hearings, Vol. 6, p. 103.

uation of the FBI's performance. Indeed, Weisberg charges that they have not been produced because they would show that the FBI knowingly covered up evidence of a conspiracy to assassinate the President.

The missing spectrographic plate and notes pertaining to the testing of a piece of Dealey Plaza curbstone allegedly struck by bullet perhpas best illustrate what is at stake.

James T. Tague, a Dealey Plaza bystander, was struck in the cheek while watching the assassination of President Kennedy, and bled. Although his wound and a fresh mark on a nearby piece of curbstone were immediately pointed out to the FBI, the FBI delayed testing the curbstone for some nine months. In the interim, the alleged bullet mark on the curbstone underwent a transformation from a "nick" or a "chip" into a "lead smear". By the time the FBI got around to testing it, at the Warren Commission's behest, it was not in its original state. Indeed, the FBI's own reports establish that the FBI knew that the "nick" had been altered before it subjected the curbstone to spectrographic testing. Thus, the August 5, 1964 report of Special Agent Robert P. Gemberling stated:

> Additional investigation conducted concerning mark on curb on south side of Main Street near triple underpass, which it is alleged was possibly caused by bullet fired during the assassination. No evidence of mark or nick on curb now visible. Photographs taken of location where mark once appeared . . . .

(Emphasis added) See Weisberg Affidavit, Exh. 44. [App. 415]

Weisberg has charged that the curbstone was patched before the FBI tested it, and that the FBI passed phony test results on to the Warren Commission by not advising it that the test was run not on the original "nick" but on a "lead smear" patched over the nick. See Weisberg Affidavit, ¶¶239-258. [App. 265-270] In this regard it is pointed out that the FBI itself found that another sidewalk bullet hole was patched shortly after it was called to the attention of the FBI. See Weisberg Affidavit, Exhs. 57-58. [App. 447, 449]

The "missing" curbstone spectrographic plate and notes are thus crucial to not only an evaluation of the FBI's performance in investigating the assassination, but to the very integrity of its probe and the Warren Commission findings. It is this that gives the FBI an exceptionally powerful motive for continuing to stonewall Weisberg--and this Court. Although an Executive Branch reinvestigation of the Kennedy assassination has thus far been avoided, notwithstanding the findings of a Congressional committee that the President was probably murdered as the result of a conspiracy, the implications of evidence that the FBI deliberately faked its investigation are such that records of the nature sought by Weisberg in this case have the potential of compelling that result.

II. Proceedings on Second Remand

A. Initial Discovery Proceedings

After the Weisberg III remand, Weisberg immediately iniated some discovery prepartory to taking the deposition of Special Agent John W. Kilty. R. 58. Because the FBI had claimed--and the district court had previously found--that certain materials sought by plaintiff had been destroyed, Weisberg sought, inter alia, FBI documents relating to its destruction of records. The FBI sought to thwart this line of inquiry by requiring plaintiff to pay some $500 for an estimated 5,000 pages of records. This was a departure from the FBI's normal practice of providing discovery records without charge, and virtually all of the records sought by Weisberg had been provided free of charge to another litigant who obtained them on discovery in a non-FOIA case. Accordingly, Weisberg made an FOIA request for them, requesting a fee waiver, then moved to compel their production in a motion filed on November 12, 1981. Although the FBI continued to resist their production, on January 7, 1981, the district court ordered that they be made available to Weisberg free of charge. R. 68. After the FBI made these records available to Weisberg, it dropped its claim that certain records sought by Weisberg had been destroyed or routinely discarded.

After some further discovery in the form of interrogatories, Weisberg noticed the deposition of FBI Special Agent John W. Kilty, who testified at length on June 19, 1981.

B. Kilty Deposition

On May 13, 1975, Agent Kilty had executed an affidavit which the FBI filed in this case which stated:

> I have conducted a review of FBI files which would contain information that Mr. Weisberg has requested . . . . The FBI files to the best of my knowledge do not include any information requested by Mr. Weisberg other than the information made available to him.

In Weisberg III, this Court quoted this passage from Kilty's affidavit, then asserted:

> Even if, as the Department argues, this is to be read as an indication of a review of all FBI files potentially containing information Weisberg demanded, the affidavit gives no detail as to the scope of the examination, and thus is insufficient as a matter of law to establish its completeness. This is particularly so in view of the inference, arising from other evidence, that some documents once existing may not have been discarded and thus remain in the files.
>
> Unlike earlier cases in which summary judgment was predicated in part on a finding that the document search was complete, the agency affidavits now before us do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable Weisberg to challenge the procedures utilized.

Weisberg III, supra, 200 U.S.App.D.C. at 317-318, 627 F.2d at 370-371.

On remand Weisberg amassed a considerable body of information relevant to these observations. Agent Kilty testified that he had no recollection of anyone other than himself search for the materials. Kilty Deposition at 35. [App. 44] Contrary to the representation which the Deparment of Justice made to the Court of Appeals, he did not search "all FBI files potentially containing information Weisberg demanded." He did not, for example, search the

files of the Dallas field office, though he ultimately conceded that Dallas may have gotten all FBI Lab reports, and that there are reports that might not be found at FBI Headquarters. Id. at 126-127. [App. 135-136] Nor did he search other divisions at Headquarters, even though there is clear evidence that Lab reports went to the General Investigative and Domestic Intelligence Divisions. Weisberg Affidavit, ¶135, Exh. 29. [App. 237, 381]

Kilty was unaware of searches and affidavits made by other agents regarding the materials sought by Weisberg, even though two such agents served as his section chief, and he recalled no discussions with them about locating these materials. Id. at 36-37. [App. 45-46] He did not know whether the FBI keeps a record of previous searches for records, stating "I don't know. That's not my business. I simply don't know." Id. at 38. [App. 47] Although he stated that he located lab reports in "central files," he didn't remember how he determined what sections to look at and didn't know whether a search of the central records index would have assisted his search. Id. at 50, 53. [App. 59, 62] He did not look at all sections, however. Id. at 53. [App. 62] Queried if he wouldn't have to get a list of all of the specimens in order to comply with the requests, he answered, "That possibility is a good one," but he could not remember if he did that." Loc. cit.

Kilty initially testified that he could not remember how he conducted his 1975 search, that he did not know what searching he did before he executed his May 13, 1975 affidavit. Id. at 33-34,

38. [App. 42-43, 47] He then testified that he found the materials produced in this suit in two file cabinets in the FBI Lab which were shown to him by FBI Special Agent Robert Frazier. Id. at 38-40. [App. 47-49] He was unable to state how these file cabinets were labelled and didn't know if they contained materials on any subject other than the Kennedy assassination. Id. at 39. [App. 48] He didn't remember how the files were organized of if they had a file number. Id. at 40-41. [App. 49-50] And although he "didn't go through it all," he didn't remember how he determined what he was looking for and how he got it without a reference. Id. at 41.

Asked about a statement in his June 23, 1975 affidavit that "a thorough search has uncovered no other material concerning the spectrographic testing of the metal smear on the curbing," he was unable to state what search he had made then. Id. at 89. [App. 98] Asked about his phone call to FBI Special Agent Heilman, the spectrographer who tested the Dealey Plaza curbstone, he first said that Heilman "told me that he didn't remember what he did with the plate. Basically, that is my recollection of it. That it might have been in the plate drawer which caused it to be subsequently destroyed." Loc. cit. [App. 98] He did not ask Heilman if he had destroyed the curbstone spectro plate, or if Heilman knew who might have destroyed it if he didn't. Id. at 94-95. [App. 103-104] Nor did he recall asking Heilman about his notes on the curbstone spectro examination. Id. at 95-96. [App. 104-105] After testifying that all spectrographic plates he found in

this case were found in a file cabinet in the FBI Lab, Kilty finally conceded that it was unusual to have just one spectrographic plate destroyed.* Id. at 91-92. [App. 100-101]

Kilty also testified that after the Weisberg III remand he made a new search. In fact, he made this search more than a year after the remand, just a month or so before his deposition. Id. at 130. [App. 139] Asked where he looked on this search that he didn't look before, Kilty replied, "Different building." Id. at 135. [App. 144] In truth, it appears that the only place he looked after the second remand that he hadn't looked before was in a spectro plate drawer where plates in cases of some historical significance are kept. Id. at 136. [App. 145] In making his new search, Kilty didn't talk to any of the examiners again, not even Agent Heilman. Id. at 139.

The foregoing is not an exhaustive account of all of the things that Kilty testified he didn't know, couldn't remember, and didn't do, but it suffices to give the general flavor.

C. Dispositive Motions

On September 8, 1981, the parties filed dispositive motions. R. 88, 89. The Department of Justice moved for summary judgment, and Weisberg moved to compel a thorough and complete search and, if that failed to uncover certain allegedly missing records, for an order directing the FBI to conduct test and examination to restore the "lost" information.

* Emphasis

In support of his motion, Weisberg filed a lengthy affidavit which set forth much evidence pertinent to the FBI's contention that it now has conducted a thorough search. First, he pointed out that Agent Kilty had failed to locate a pertinent copy of the Lab curbstone report in his search. Initially the FBI pretended that it had no Lab curbstone records at all, but after Weisberg's vigorous complaint he received what was described as the entire Lab curbstone report. But as several pages had been removed from it, it was not the entire report. Weisberg Affidavit, ¶222. [App. 260] Weisberg obtained a more complete copy which had been misfiled in the FBI Headquarters "Oswald" file. Although Kilty said he searched this file, he did not provide this copy. Weisberg Affidavit, ¶¶240-241. [App. 265-266] Even though this copy was misfiled, Kilty should have located it in the process of making a thorough search because the Lab copies of the record have the correct serial number added, so misfiling did not hide the record from Kilty. Weisberg Affidavit, ¶240. [App. 265]

Secondly, Weisberg adduced evidence showing that several bullets and a scraping from a sidewalk scar allegedly made by bullet were sent to the FBI Laboratory for testing, but pertinent records on these items have not been produced. Weisberg Affidavit, ¶¶288-314. [App. 278-285]

Thirdly, Weisberg produced documentary evidence from the FBI's own files showing that locations not searched by Agent Kilty might--indeed, should--contain materials sought by Weisberg. These locations include such places as special file rooms, tickler files, divisional files, and the files of the Dallas field office. See

Weisberg Affidavit, ¶¶113-115, 119-135. [A-p. 231, 233-235]

D. Order Granting Summary Judgment

By order filed November 18, 1981, District Judge John H. Pratt granted defendants' motion for summary judgment and denied Weisberg's motion to compel a thorough search. The order recited that the court was "satisfied that the matters specified as the basis for the previous remand, Weisberg v. U.S. Department of Justice, 627 F.2d 365, 367-370 (D.C.Cir. 1980) have been the subject of further extensive inquiry (see Kilty deposition, pp. 1-139) and that defendant has adequately responded after a further search made in good faith . . . ." [App. 521]

On January 15, 1982, Weisberg filed his notice of appeal. R. 95.

ARGUMENT

I. THE ADEQUACY OF THE FBI'S SEARCH IS IN DISPUTE: THUS SUMMARY JUDGMENT WAS IMPROPERLY GRANTED

In this case Weisberg seeks records relating to scientific and ballistics tests performed on items of evidence in the assassination of President John F. Kennedy. The FBI concedes that at least some Laboratory records generated during the investigation into the President's murder have not been produced. Weisberg contends, in addition, that data on still other Laboratory tests has not been provided, and that there are several locations which have

not been searched at all. Thus, at issue in this case is the adequacy of the FBI's search for records pertinent to Weisberg's request.

In Founding Church of Scientology, Etc. v. Nat. Secy. Agcy., 197 U.S.App.D.C. 305, 318, 610 F.2d 824, 836 (1979), this Court held that "if the sufficiency of the agency's identification or retrieval procedures is genuinely in issue, summary judgment is not in order." In order for an agency search to pass muster, it must be shown that it was thorough and complete. Weisberg III, supra 200 U.S.App.D.C. at 317-318, n. 49, 627 F.2d at 370-371. Indeed, the issue here remains the same as it was it Weisberg III: viz., whether the FBI has substantiated "a file search of a caliber sufficient to assure retrieval of all existing data." Id., 200 U.S.App.D.C. at 314, 627 F.2d at 367.

The facts adduced at Agent Kilty's deposition and those set forth in Weisberg's August 6, 1981 affidavit establish that the FBI's search in this case was not thorough and complete. Nor has the FBI carried out its search responsibilities in good faith.

Several factors compel this conclusion. First, it is evident that all locations which might contain materials sought by Weisberg have not been searched. These locations include such places as special file rooms, tickler files, divisional files, and the files of the Dallas field office.

The importance of the Dallas field office is particularly obvious. Because Dallas was the Office of Origin in this case, it has about 10,000 more pages of bulkies on the Kennedy assassi-

nation than are housed at FBI Headquarters. Weisberg Affidavit, ¶157. [App. 242] Even where it is thought that Dallas records simply duplicate what is maintained at Headquarters, this may be erroneous. In a case in which the FBI withheld Dallas field office records which it insisted had already been disclosed in Headquarters releases, it turned out that some 3,000 pages of the Dallas records were in fact missing from Headquaters files and had not been disclosed. Weisberg Affidavit, ¶155. [App. 242]

Moreover, even if the documents at one file location are basically the same as those at others, one copy of a document may contain significant notations that are not added to another. Weisberg Affidavit, ¶124, Exh. 23. [App. 234, 360] In fact, even the text of supposedly identical reports may differ. An example of this is found in Exhibits 17 and 18 to the Kilty deposition. These documents are the identical page of two differenct copies of the identical consolidated report sent to the Warren Commission by the Dallas field office. Their text is identical in all respects except that Exhibit 17 states that some brown paper was tested by the FBI Laboratory and "found to have the same observable characteristics as the brown paper bag shapped like a gun case which was found near the scene of the shooting on the sixth floor of the Texas School Book Depository," whereas Exhibit 18 states that this paper "was examined by the FBI Laboratory and found not to be identical with the paper gun case found at the scene of the shooting." See Weisberg Affidavit, ¶125 [App. 234]; Kilty Deposition, Exhs. 17-18 [App. 198-199]

A second factor which demonstrates the inadequacy of the FBI's search is the discovery of additional documents not produced as a result of the original search. The FBI initially indicated, in its answers to Weisberg's interrogatories, that neither Q3 nor Q15 was subjected to neutron activation analysis. At depositions taken after the first remand, plaintiff established that this was untrue. However, in Weisberg v. United States Dept. of Justice, 437 F.Supp. 492 (D.D.C. 1977), this Court nevertheless credited the testimony of former FBI Special Agent Gallagher that the computer printouts might not have been kept because the data on them was duplicative of that on the worksheets. Id.at 503. This now has been proven false; the FBI produced the printouts on these specimens at Kilty's June 19, 1981 deposition. (Copies of the printouts at long last produced by the FBI are exhibits to the Kilty Deposition and have been reprinted in part in the Appendix at 169-181)

As this Court noted in Goland v. CIA, 197 U.S.App.D.C. 25, 56, 607 F.2d 339, 370 (1978), "the discovery of additional documents is more probative that the search was not thorough than if no other documents were found to exist," and "the delay in disclosing the documents at least arguably evidences a lack of vigor, if not candor, in responding to Freedom of Information Act requests." In this case the additional documents were not produced until nearly six years after this suit was instituted, some four years after Weisberg had established that these specimens had been subjected to neutron activation testing, and more than a year

after the Weisberg III remand issued.

A third factor evidencing the lack of a thorough search is the failure of the FBI to produce a record pertaining to the curbstone testing which, although misfiled, should have been located because Lab copies bear the correct serial number showing where it was placed in the file. Weisberg Affidavit, ¶¶222, 236-241. [App. 260, 264-266]

Fourthly, Weisberg has adduced evidence that several bullets and a scraping from a sidewald scar allegedly made by bullet were sent to the FBI Laboratory for testing, but pertinent records on these items have not been produced. Weisberg Affidavit, ¶¶288-313. [App. 278-284] Again, this bespeaks a failure on the part of the FBI to identify and retrieve such records, and thus an indequate search.

Fifth, the facts adduced regarding the search made by Agent Kilty reflect no systematic procedures for identifying and retrieving the records requested. Although he conceded that he might have to get a list of all the specimens tested in order to comply with Weisberg's request, Kilty could not remember if he did that, and the evidence seems quite clear that he did not. In making his "new" search in 1981, which basically repeated whatever search he made in 1975, Kilty made no effort to obtain first-hand knowledge about where responsive records might be from those most likely to know. He did not talk to any of the examiners about this, for example, even though they would likely have the most first-hand knowledge. Kilty Deposition, at 139. [App. 148]

A sixth factor relevant to whether the FBI has met its burden of demonstrating a thorough and complete search concerns evidence of bad faith. Whether Agent Kilty has given truthful testimony is a matter which bears directly on this issue. The evidence that he has not is strong.

In his May 13, 1975 affidavit, Kilty stated that:

> 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.

May 13, 1975 Kilty Affidavit, ¶7. [App. 159] When Weisberg demanded the NAA data, Kilty then executed a second affidavit which directly contradicted the first, stating unequivocally that: "NAA was not used in examining the clothing, windshield or curbing. June 23, 1975 Kilty Affidavit, ¶8. [App. 167-168] When he answered Weisberg's interrogatories addressed to the FBI after the first remand, Kilty again swore that Q15, the windshield scrapings, had not been subjected to NAA testing. In addition, he also swore that specimen Q3 had not been tested by NAA. Answer to Interrogatory No. 19, filed October 28, 1976. R. 31. Once it was established that these tests had been made, Kilty and the FBI did not conduct a new search for the data but instead continued to withhold it until this Court handed down its second remand decision, and even then the FBI delayed producing it until the very last moment.

Further evidence of Kilty's willingness to give untruthful testimony comes from the fact that at his deposition in this case he admitted that the FBI Laboratory does maintain files. Indeed,

in this case he testified that his search concerned two file cabinets maintained in the FBI Laboratory. But in a deposition taken in Weisberg v. Department of Justice, Civil Action No. 75-1996, Kilty testified, "There are no files in the Laboratory that I know of," "we did not have any Laboratory files," and "there's no place in the Laboratory to keep any results of tests." See Weisberg Affidavit, ¶99. [App. 227-228]

A finding that an agency has adequately searched for records cannot be sustained where it is based on testimony that is not credible; even less can it be upheld where the person giving the testimony habitually swears in contradiction to himself, as Agent Kilty has done.

Finally, Weisberg points out that although the FBI has tried to claim that it has located the missing Stombaugh report and released it to him, he vigorously disputes the claim that the report given him is the Stombaugh report. Among other things, he notes that the report produced does not state whether an examination was made to see if the slits in the President's shirt collar coincide," which is what FBI Special Agent Robert Frazier testitied to in his 1977 deposition. See Weisberg Affidavit, ¶¶176-211. [App. 248-255] This, of course, creates a disputed issue of material fact; viz., whether or not the FBI has identified the Stombaugh report referred to by Frazier. Kilty's failure to ask either Stombaugh or Frazier if this was the report Frazier referred to also shows a lack of reliable identification procedures in the search process.

II. IF CURBSTONE SPECTROGRAPHIC PLATE AND NOTES AND STOMBAUGH REPORT CANNOT BE LOCATED, FBI SHOULD BE ORDERED TO CONDUCT APPROPRIATE TESTS AND EXAMINATION

In Founding Church of Scientology, Etc. v. Nat. Secy. Agcy., 197 U.S.App.D.C. 305, 318-319, 610 F.2d 824-837 (1979), this Court recognized that the adequacy agency search procedures is critical to enforcement of FOIA, saying:

> To accept [the agency's] claim of inability to retrieve the requested documents in the circumstances presented is to raise the specter of easy circumvention of the Freedom of Information Act. *** If the agency can lightly avoid its responsibilities by laxity in identification or retrieval of desired materials, the majestic goals of the Act will soon pass beyond reach. And if, in the face of well-defined requests and positive identications of overlooked materials, an agency can so easily avoid adversary scrutiny of its search techniques, the Act will inevitably become nugatory.

(Citations omitted)

Such concerns apply with equal force to the case of crucial information which has allegedly been destroyed or is said to be lost. These claims, too, afford an easy way for agencies to avoid producing embarrassing information.

The issue presented in this case is whether there are any circumstances under which FOIA may compel an agency to create or replace records it has destroyed, lost, or been unable to locate. There is no case directly on point. The closest case appears to be Krohn v. Department of Justice, 202 U.S.App.D.C. 195, 628 F.2d 195 (1980), where the plaintiff sought to have the agency compile

certain information from its records. The Court found, over Justice Wald's dissent, that this request would require the agency to create extensive new records "which are not mandated by law and which have not been determined to be necessary or useful for the overall work of the agenc. Id, 202 U.S.App.D.C. at 197. The Court found that its decision was determined by the holding of Justice White's opinion in NLRB v. Sears Roebuck Co., 421 U.S. 132 (1975), which asserted:

> The [Freedom of Information Act] . . . only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create. Sterling Drug, Inc. v. FTC, 146 U.S.App.D.C. 237, 450 F.2d 698 (1971). Thus, insofar as the order of the court below requires the agency to create explanatory material, it is baseless.

(Citation ommitted) 421 U.S. at 162.

The relief which Weisberg seeks is distinguishable, however. It does not seek the creation of documents which the agency was neither required to prepare nor decided on its own to create. Rather it seeks to restore information which would have been provided by records which the FBI was required to create as a consequence of its investigation for the President's Commission on the Assassination of President Kennedy.

The circumstances justifying an order requiring the FBI to restore informaton which is allegedly missing from its Kennedy assassination files are of unique and overriding importance. The information contained in the curbstone spectrographic materials and the Stombaugh shirt collar report is vital to the question of

whether more than three shots were fired at the President and, in turn, to whether there was a conspiracy to assassinate him. The circumstances surrounding the missing curbstone spectrographic plate and notes strongly indicate that the curbstone was patched before the FBI tested it, and that the FBI passed phony information along to the Warren Commission by not advising it that the test was run not on the original "nick" but on a "lead smear" patched over the nick. See Weisberg Affidavit, ¶¶239-258. [App. 265-270] The transformation of the description of the mark on the curbstone from a "nick" or "chip" into a "smear" is quite clear, and the FBI reports establish that the FBI knew before it subjected the curbstone to spectrographic testing that the nick had been altered. See Weisberg Affidavit, Exh. 44. [App. 415]

The Freedom of Information Act was enacted so the American people could learn what their government is doing. They have a right to know whether the FBI tested a specimen that had been patched and then passed the information along to the Warren Commission without informing it that the evidence tested had been altered and was thus invalid.

FBI Special Agent Kilty testified that the FBI could determine whether the curbstone was patched, probably through X-ray fluorescence. Kilty Deposition, at 102. [App. 111] The FBI has, in fact, already made a finding that another sidewalk bullet hole was patched shortly after it was called to the atten-

tion of the FBI. See Weisberg Affidavit, Exhibits 57-58. [App. 449-450] Whatever tests are needed to make this determination with respect to the curbstone should be made if the curbstone spectrographic plate and notes remain unlocatable.

Similarly, the FBI should also be ordered to conduct the examination which Special Agent Frazier testified he ordered Agent Stombaugh to perform to see whether the slits in the President's shirt collar overlapped. This information, too, is of fundamental importance to the study of the Kennedy assassination.

CONCLUSION

For the foregoing reasons the district court's award of summary judgment should be reversed. The case should be remanded to the district court with instructions that a plan be drawn up to in insure that the FBI conducts a systematic search which will retrieve all the records sought by Weisberg.

Respectfully submitted,

JAMES H. LESAR
1000 Wilson Blvd., Suite 900
Arlington, Va. 22209
Phone: 276-0404

Counsel for Appellant

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	:	
	:	
Plaintiff-Appellant	:	
	:	
v.	:	Case No. 82-1072
	:	
U.S. DEPARTMENT OF JUSTICE, ET AL.,	:	
	:	
Defendants-Appellees	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of April, 1982 hand-delivered two copies of appellant's brief and one copy of his appendix to the office of Mr. William G. Cole, U.S. Department of Justice, Washington, D.C. 20530.

James H. Lesar

JAMES H. LESAR

A D D E N D U M

(5 U.S.C. § 552)

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter

issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, 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.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(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 and to order the production of any agency records improperly withheld from the complainant. In such a 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.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subpara-

graph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title [5 USCS § 552b]), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records complied for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological or geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection

(a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title [5 USCS § 551(1)] includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 383; June 5, 1967, P. L. 90-23 § 1, 81 Stat. 54; Nov. 21, 1974, P. L. 93-502, §§ 1–3, 88 Stat. 1561, 1563, 1564; Sept. 13, 1976, P. L. 94-409, § 5(b), 90 Stat. 1247; Oct. 13, 1978, P. L. 95-454, Title IX, § 906(a)(10), 92 Stat. 1225.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 USC § 1002	June 11, 1946, ch 324, § 3, 60 Stat. 238.

In subsec. (b)(3), the words "formulated and" are omitted as surplusage. In the last sentence of subsec (b), the words "in any manner" are omitted as surplusage since the prohibition is all inclusive.

Standard changes are made to conform with the definitions applicable and the style of this title (5 USCS §§ 101 et seq.).

Explanatory notes:

A former 5 USC § 552 was transferred by Act Sept. 6, 1966, which enacted 5 USCS §§ 101 et seq., and now appears as 7 USCS § 2243.

Amendments:

1967. Act June 5, 1967 (effective 7/4/67, as provided by § 3 of such Act), substituted this section for one which read:

~~Atombaugh [illegible] missing~~

Kitty also withheld Gamberling synopsis page