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

HAROLD WEISBERG, Plaintiff-Appellant, v. UNITED STATES DEPARTMENT OF JUSTICE, et al., Defendants-Appellees.	)	Civil Action No. 82-1072

APPELLEES' RESPONSE TO "MOTION BY APPELLANT FOR LEAVE TO REFER TO DOCUMENT OUTSIDE THE RECORD IN HIS REPLY BRIEF"

Appellant Harold Weisberg has moved this Court for leave to refer in his reply brief to a two year old memorandum written by the former Director of the Office of Privacy and Information Appeals in the Department of Justice, Quinlan J. Shea, Jr., on the subject "Freedom of Information Requests of Mr. Harold Weisberg." Appellant's counsel has now argued in his seven page brief why the Shea memorandum, which he attaches to his motion, "provides evidence from a high government official of an FBI attitude that is corrosive of the noble aims and objectives of the Freedom of Information Act." Appellant's Motion, p. 6. Since appellant would be expected only to repeat this argument in his reply brief, denying this additional use of the document may appear inconsequential. Nonetheless, appellees oppose plaintiff's motion because, as a matter of settled law, appellate review should be unaffected by matters not contained in the record and because this document has no legal relevance to the current appeal.

In another case dealing with the FOIA, Goland v. CIA, 607 F.2d 339, 367-373 (D.C. Cir. 1979), cert. denied, 100 U.S. 1312 (1980), this court, per curiam, stated:

> Appellate review is ordinarily unaffected by matters not contained in the record.

Id. at 370. It added:

> An appellate court has no fact-finding function. It cannot receive new evidence from the parties, determine where the truth actually lies, and base its decision on that determination.

Id. at 371. Nonetheless, appellant asks this Court in his pending motion to do what the Court said it would not do in Goland, i.e., receive new evidence not presented to the trial court and base its decision on that evidence. His request should not be granted.

Appellant cannot claim in this case that the Shea document is even "new evidence" since, as he admits in his motion, the Government produced the document on January 12, 1982 in another FOIA lawsuit in which appellant's attorney was involved. (Appellant's Motion, p. 3). Appellant has waited over five months after his discovery of the document to bring it to this Court's attention with this pending motion.

Appellant was swifter to bring the Shea memorandum to another court's attention in one of his other FOIA cases. On January 15, 1982, in Weisberg v. U.S. Department of Justice, C.A. No. 75-1996, appellant filed a "Motion to Amend" the district court's summary judgment orders, relying solely on the Shea memorandum. The district court rejected his claims, which he now makes in this

case, that this "new evidence" somehow impugned the credibility of the FBI's search for documents relevant to a pending FOIA lawsuit. Instead, the court said of the Shea memorandum:

> Mr. Shea did not share the FBI's interpretation of the scope of plaintiff's numerous administrative requests. But his comments do not indicate disagreement with the scope of this action. Neither do they indicate that the FBI deliberately deceived plaintiff, the Court or Congress by withholding information.

(Exhibit A, pp. 1-2). The same logic applies in the context of this case.

There was at least some connection between the Shea document and that other Weisberg case since both deal primarily with the production of Dr. Martin Luther King, Jr. assassination documents. This appeal, however, involves the production of results of certain spectrographic and neutron activation analyses relating to the assassination of President Kennedy. The Shea memorandum now produced by appellant sheds no light at all on the issues in this appeal involving the search for those documents.

For these reasons, appellees submit that appellant's motion should be denied.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

Leonard Schaitman
LEONARD SCHAITMAN

William G. Cole
WILLIAM G. COLE

Attorneys, Department of Justice,
Civil Division, Room 3338
10th & Constitution Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 633-4300

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of July, 1982, mailed first class, postage prepaid, a copy of the foregoing Appellees' Response To "Motion By Appellant For Leave To Refer To Document Outside The Record In His Reply Brief" to:

Mr. James H. Lesar
1000 Wilson Boulevard, Suite 900
Arlington, Virginia 22209

William G. Cole

WILLIAM G. COLE

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG)
Plaintiff)
v.) Civil Action No. 75-1996
U. S. DEPARTMENT OF JUSTICE)
Defendant)

MEMORANDUM OPINION

This action is before the Court on plaintiff's motion to amend orders of December 1, 1981 and January 5, 1982 by dismissing this action "without prejudice."

The basis for this motion is a memorandum dated March 27, 1980 from Quinlan J. Shea, the former director of the Federal Bureau of Investigation's (FBI) Office of Information and Policy Appeals. Plaintiff's counsel received this memorandum in another action, Allen v. Department of Justice, No. 81-1206 (D.D.C. filed May 22, 1981). Mr. Shea wrote: "I do not agree that the FBI has searched adequately for 'King' records within the scope of Mr. Weisberg's numerous requests. In fact, I am not sure that the FBI has ever conducted a 'search' at all, in the sense I (and, I believe the Freedom of Information Act) use that word." Plaintiff argues that the memorandum is new evidence "which makes it clear that plaintiff and the Court and Congress have all been the victims of fraudulent misrepresentations by the FBI."

The Court disagrees with plaintiff's conclusion. Mr. Shea clearly did not share the FBI's interpretation of the scope of plaintiff's numerous administrative requests. But his comments do not indicate disagreement with the scope of this action. Neither do they indicate that the FBI deliberately deceived plaintiff, the Court or Congress by withholding information. Mr. Shea made these comments in opposing the withdrawal of a fee waiver by the FBI for plaintiff's administrative requests under the Freedom of Information Act.

p.2

Only two specific issues relevant to this action are raised by Mr. Shea's memorandum. First, Mr. Shea refers to the issue of what are "duplicate" documents for purposes of the Freedom of Information Act. This issue was determined by the Court in Weisberg v. Department of Justice, No. 75-1996 (D.D.C. December 1, 1981) (memorandum opinion at 4). Mr. Shea's memorandum does not shed new light on this matter. Second, Mr. Shea questions the extent to which the FBI had changed its initial position that only the main files and the files on the principal "players" were relevant to the King and Kennedy cases. The Court upheld the FBI's scope of search twice. Ibid (D.D.C. February 26, 1980) (order granting defendant partial summary judgment on the scope of search for all items responsive to plaintiff's request in FBI's headquarters Murkins file and in all files of the FBI field offices, with one exception); Ibid (D.D.C. December 1, 1981)

(memorandum op[illegible]on at 3). Mr. Shea's me[illegible]randum presents no new evidence on this issue. Even if Mr. Shea is correct that numerous records exist which are relevant to the King assassination but "have not yet been located and processed," dismissal of this seven-year action without prejudice is unwarranted. If plaintiff's assertions of physical and financial inability to pursue his quest for documents on the King assassination are to be believed, there will be no res judicata or collateral estoppel effects from the dismissal of this action. Both doctrines apply ordinarily only where the same parties or their privies bring a new action. See 1B Moore's Federal Practice ¶0.401 at 11-12 and 16-17; ¶0.412(1). The application of stare decisis will depend upon the similarity of fact situations between this action and future lawsuits. Ibid at 13. It would be highly speculative and doubtful to assume that future requests for records on the King assassination will be controlled by the precedent of this action.

P3

In summary, plaintiff has failed to present new evidence to justify a dismissal of this action without prejudice. Even accepting Mr. Shea's memorandum of March 27, 1980 as new evidence, the absence of a future res judicata or collateral estoppel bar persuades the Court not to change the dismissal to one without prejudice. Plaintiff's motion is accordingly denied.

An appropriate order accompanies this opinion.

JUNE L. GREEN
U. S. DISTRICT JUDGE

June 22, 1982