

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

APPELLEES' SUPPLEMENTAL BRIEF

J. PAUL McGRATH
Assistant Attorney General
STANLEY S. HARRIS
United States Attorney

LEONARD SCHAITMAN
WILLIAM G. COLE
United States Department
of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530

September, 1982

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Goland v. CIA</u> , 607 F.2d 339, 367-373 (D.C. Cir. 1979), <u>cert. denied</u> , 100 U.S. 1312 (1980) -----	2
<u>Forsham v. Harris</u> , 445 U.S. 169 (1979) -----	4
<u>Kissinger v. Reporters Committee</u> , 445 U.S. 136 (1979) ---	4
<u>Levine v. Department of Treasury</u> , 34 Ad. L. 2d (P&F) 633 (1974) -----	4
<u>NLRB v. Sears Roebuck Co.</u> , 421 U.S. 132 (1975) -----	4
<u>Perry v. Brock</u> , No. 81-1330 (D.C. Cir., July 30, 1982) --	2
<u>Weisberg v. U.S. Department of Justice</u> , C.A. No. 75-1996 (D.D.C., filed Nov. 28, 1975) -----	2

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

APPELLEES' SUPPLEMENTAL BRIEF

Pursuant to the order of this Court of August 13, 1982, Appellant Harold Weisberg was granted leave to refer to a March 27, 1980 internal Justice Department memorandum, ("the Shea memo"), outside of the record. Pursuant to the Court's Order, Appellees were granted five days after the date set for the filing of Weisberg's reply brief to respond to that document.

Weisberg's reply brief was served on appellees on September 1, 1982, and appellees have moved for an extension of time of until September 10, 1982, to respond to the Shea memo.

The basic issue before this Court on appeal is whether the district court below properly found that, after three remands,

the FBI has now adequately searched for results of spectrographic and neutron activation analyses of Kennedy assassination evidence.^{*/} The "newly found" Shea memorandum is not directly relevant to this issue.^{**/}

The Shea memorandum deals specifically with the "scope" of Weisberg's Justice Department fee waiver and the "scope" of the FBI's administrative searches for Weisberg requested documents. It does not discuss the FBI's search for documents in this case. The Shea memo has previously been used by Mr. Weisberg in an attempt to throw doubt on the FBI's searches in the context of specific FOIA litigation. However, in Weisberg v. U.S. Department of Justice, C.A. No. 75-1996, a District of Columbia district court rejected Weisberg's claim that the Shea memorandum was relevant to the adequacy of the FBI's search for specific King documents. The court explained:

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.

^{*/} The issue in a similar case has been stated to be "not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, No. 81-1330 (D.C. Cir., July 30, 1982), 14.

^{**/} This memorandum was originally given to plaintiff's counsel by the Government on January 12, 1982 in the context of another lawsuit, (Appellant's Motion for Leave to Refer to Document, p. 3), over five months before he sought to bring it before this Court's attention. The Justice Department continues to believe that it is not the type of "new evidence" that should be considered in an appellate review. Goland v. CIA, 607 F.2d 339, 367-373 (D.C. Cir. 1979), cert. denied, 100 U.S. 1312 (1980).

(Exhibit A, pp. 1-2). Certainly, if the Shea memo, which specifically references only searches for King documents, is irrelevant to a Weisberg case regarding King documents, it is of even less relevance in a Kennedy assassination case.

Weisberg uses the Shea memorandum in an attempt to show a history of FBI "bad faith" toward him over the years. (Appellant's Reply Br., pp. 8A-15). It is important to recognize just how weak that charge is. Outside of the Shea memorandum, Weisberg points only to FBI unresponsiveness to his letters asking for assassination documents in 1966 and 1969 (Appellant's Reply Br., pp. 8-9) and the 1980 withdrawal of a fee waiver covering his many requests for King and Kennedy assassination documents. (Appellant's Reply Br., p. 12). This is not a convincing argument for "bad faith". The FBI's early unresponsiveness, which is not at issue, occurred 13 and 16 years ago, prior to the passage of the 1974 FOIA amendments. The withdrawal of the fee waiver can only remind this Court that the Department of Justice voluntarily granted Weisberg a fee waiver in 1978 which he used to his advantage for over two years. In addition, the Shea memorandum itself demonstrates that certain Department of Justice authorities have been advocates for Weisberg's interests, even though litigation has often placed Weisberg and the Department on opposite sides in specific lawsuits.

Finally, Weisberg uses these allegations of "bad faith", indicating the Shea affidavit, to justify seeking an order that would require the testing of President Kennedy's shirt collar and

a piece of Dallas curbstone (Appellees' Reply Br., pp. 1A and 1B). In support he refers to Levine v. Department of Treasury, 34 Ad. L. 2d (P&F) 633 (1974), where the defendant agency had inadvertently, but undeniably, destroyed requested documents during the pendency of a FOIA lawsuit. In the present case, no such claim has been made by Weisberg. The remedies he seeks are also radically different from those in Levine, calling for the production of documents which the government believes have never existed. Consequently, the government suggests that the controlling precedent continues to be NLRB v. Sears Roebuck Co., 421 U.S. 132 (1975), previously cited by appellees. See also Forsham v. Harris, 445 U.S. 169 (1979) " . . . FOIA applies to records which have been in fact obtained, and not to records which merely could have been obtained." Id. at 186; and Kissinger v. Reporters Committee, 445 U.S. 136 (1979), "[O]nly the Federal Records Act and not the FOIA requires an agency to actually create records. . . . Id. at 152.

CONCLUSION

For the reasons stated here and in the Government's opening brief, the judgment of the district court granting summary judgment for the Government should be affirmed.

J. PAUL McGRATH
Assistant Attorney General
STANLEY S. HARRIS
United States Attorney

LEONARD SCHAITMAN
WILLIAM G. COLE
United States Department
of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of September, 1982, sent by United States mail, postage prepaid, to copies of appellee's brief to:

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

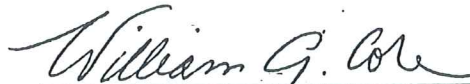

WILLIAM G. COLE

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JUN 22 1982

CLERK, U.S. DISTRICT COURT
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.

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 opinion at 3). Mr. Shea's memorandum 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.

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

FILED

JUN 22 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

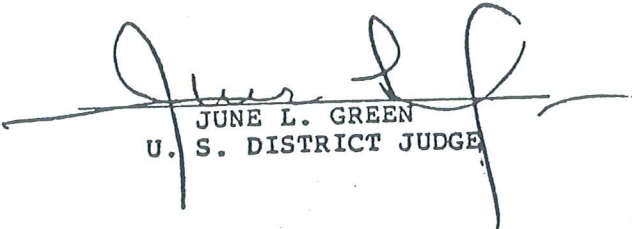
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of plaintiff's motion to amend orders of December 1, 1981 and January 5, 1982, defendant's opposition, and the entire record in this action, for the reasons expressed in the accompanying memorandum opinion, it is by the Court this 22nd day of June 1982,

ORDERED that plaintiff's motion to amend orders of December 1, 1981 and January 5, 1982 is denied.


JUNE L. GREEN
U. S. DISTRICT JUDGE