

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

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STATES COURT OF APPEALS

HAROLD WEISBERG,
Appellant

v.

U.S. DEPARTMENT OF JUSTICE,
ET AL.,
Appellees

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Case No. 82-1072

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

Appellant has moved the Court for leave to refer in his Reply Brief to a March 27, 1980, memornadum by Mr. Quinlan J. Shea, Jr., former Director of the Office of Information and Privacy Appeals. Appellees respond, inter alia, that the Shea memorandum "sheds no light on the issues in this appeal involving the search for [certain spectrographic and neutron activation analyses relating to the assassination of President Kennedy]."

The District Court's summary judgment order expressly found that the FBI had made a good faith search for the records requested. [App. 521] Weisberg has challenged this finding on appeal. See Brief for Appellant, pp. 20-21. Thus, the issue of the FBI's bad faith conduct has been placed before the Court.

Contrary to appellees' statement, the Shea memorandum sheds a great deal of light on the issue of the FBI's bad faith conduct.

In it Mr. Shea asserts the existence of an FBI attitude toward Mr. Weisberg, the appellant herein, which is apparently so ingrained that it inevitably corrupts the Bureau's response to his Freedom of Information Act requests. That a high Department of Justice official has remarked on this attitude in an official memorandum written about the time this case was remanded to the District Court for a second time strengthens appellant's argument that the FBI has acted in bad faith in this litigation.

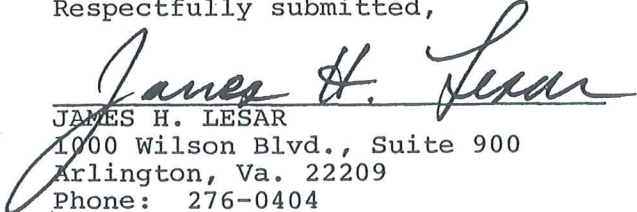
Although appellees are correct in asserting that appellate review is ordinarily unaffected by matters not contained in the record, there are exceptions to the rule. For example, facts outside the record sometimes may be judicially noticed. Landy v. Federal Deposit Insurance Corp., 486 F.2d 139, 150-151 (3d Cir. 1973), cert. denied, 416 U.S. 960 (1974). In this case, there is no question about the authenticity of the Shea memorandum. Indeed, the Government itself placed it in the record in Allen v. Federal Bureau of Investigation, et al., Civil Action No. 81-1206. This Court can properly permit appellant to refer to the filing of the Shea memorandum in District Court and to point out in his Reply Brief that the memorandum's contents are inconsistent with appellees' assertion that appellant's claims of FBI bad faith are "frivolous." See Appellees' Brief at 34.

Alternatively, the Court should remand the record (General Rule 13(d)) to permit appellant to present his newly discovered evidence to the District Court for its consideration, including, possibly, the holding of an evidentiary hearing. Contrary to ap-

pellees' contention (Response at 2), the Shea memorandum does constitute newly discovered evidence. It was not available to appellant under after January 12, 1982, and thus could not have been discovered by him in time to move for a new trial under Tule 59(b).

This Court's appellate jurisdiction includes the power to "re-mand the cause and ... require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. §2106. As this Court noted in Gomez v. Wilson, 477 F.2d 411, 417 (D.C.Cir. 1973), "[t]his broad authorization clearly encompasses remands for the purpose of ... taking additional evidence...." Given the implications of the Shea memorandum both for this case and for the administration of the FOIA generally, a remand by this Court for the purpose of taking additional evidence, including the testimony of Mr. Shea, would certainly be "just under the circumstances."

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that I have this 14th day of July, 1982, mailed a copy of the foregoing Appellant's Reply to Appellees' Response to Motion by Appellant for Leave to Refer to Document Outside the Record in His Reply Brief to Mr. William G. Cole, Civil Division. U.S. Department of Justice, Washington, D.C. 20530.


 JAMES H. LESAR