REPLY 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 JUSTICE, ET AL.,

Defendants-Appellees

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

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

Attorney for Appellant

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SUMMARY OF ARGUMENT

This case raises two basic issues: first, whether the FBI has substantiated a thorough, good-faith search for records sought by appellant Weisberg; and, second, whether the FBI should be required to restore information allegedly lost or destroyed.

The Government does not discuss the second issue; it simply asserts at the tail end of its brief that "new testing . . . is not only beyond the scope of this Court's powers . . . but totally uncalled for by the facts in this case." Government Brief at 34.

The Government is wrong on both counts. Since filing his main brief, Weisberg has learned that in Levine v. Department of Treasury, 34 Pike and Fisher Ad. L.2d 633 (S.D.Fla., Miami Div. 1974), a court held that where an agency has destroyed pertinent records after a Freedom of Information Act request was made, it may be required to restore the lost information. In reaching this conclusion, the court reasoned that to hold otherwise "would have a devastating effect on the viability of the Act" because it would invite agencies to destroy records rather than provide them to requesters. This reasoning is persuasive, indeed, impeccable, and should be adopted by this Court. Contrary to the Government's assertion, the equitable powers of the district court may be employed to compel restoration of information allegedly lost or destroyed after a Freedom of Information Act request is received.

The facts of this case are among the strongest that can be imagined in favor of restoration of lost information. The FBI subjected specimen Q609, a piece of Dealey Plaza curbstone that was allegedly struck by bullet, to spectrographic analysis. It says it cannot locate the spectrographic plate of this examination, and the examiner's notes on this test also have not been provided. Weisberg contends that the curbstone was patched before the FBI tested it, and that the FBI passed along phoney results to the Warren Commission by not telling it the evidence had been altered. He wants the curbstone tested to determine whether it was patched.

The Government's assertion that there is no evidence to support Weisberg's charge that the "nick" in the curbstone was altered to become the "lead smear" tested by the FBI is flat wrong, as is its claim that no one ever alleged seeing a "nick" or a "chip." Government Brief at 28. Weisberg long ago put into the record the affidavit of James T. Tague, the eyewitness who was wounded in the cheek while standing on the curb in Dealey Plaza. See Tague Affidavit at Addendum 2. [15a-41a] Visual examination of before and after photographs of the curbstone also establishes the alteration. See Addenda 3-5.*

Weisberg also wants an examination made to determine if two slits in the collarband of the President's shirt coincide when the collar is buttoned together, as they must if they were caused by a bullet. A visual examination of the President's shirt collar shows that the slits do not coincide. See Addendum 6.* Weisberg disputes the FBI's claim that it has now located the "Stombaugh Report" on this examination. Rather, the "Frazier Report" they have produced is a report on the examination made by Frazier that caused him to order Stombaugh, the FBI's fibers expert, to examine the shirt to determine whether the slits coincided.

Regarding the search issue, the FBI has not substantiated a thorough, good faith search in this case. First, there are many

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*The original of this brief, a copy served on the Government, and the three copies for panel members all contain photographic copies of these pictures. For reasons of cost, the remaining copies filed with the Court have only xerox copies of them.

examples of bad faith conduct by the FBI in this case. These refute the Government's claim that Weisberg's claims of bad faith are "frivolous." They include the deliberate sowing of confusion over what records the FBI had and which ones Weisberg had requested, concealment of the fact that pertinent records were lost or destroyed, providing excised copies of records after it was acknowledged by the FBI's legal counsel that no exemptions applied, delay in providing records, stonewalling discovery, trying to charge Weisberg for copies of the very same discovery materials given free to other litigants, and giving untruthful testimony. In addition, the March 27, 1980 memorandum by the former Director of the Office of Privacy and Information Appeals, Mr. Quinlan J. Shea, Jr., makes it clear that the FBI has been recalcitrant in searching for Kennedy assassination materials pursuant to other Weisberg requests, and provides evidence of an anti-Weisberg attitude which appears to be so deeply engrained in the FBI that it must inevitably affect its response to any of his requests.

Second, the FBI has not made a systematic search for the records sought in this case. It has not identified the records sought in any systematic fashion, nor has it engaged in a systematic identification and search of all possible locations where such records might repose. The search in this case has been made by one FBI agent who testified he didn't know what this case was all about and who essentially did nothing more than ask another

agent where to look, whereupon he located some materials in two FBI lab file cabinets. He did not search all units or sections of the FBI Lab, however, no did he search other divisions of the FBI, such as the General Investigative, Domestic Intelligence and Dallas divisions, despite documentary evidence that these locations contain laboratory materials.

Third, the affidavit and deposition testimony of this agent, John W. Kilty, is so contradictory, ambulous, and amnesiac that it is completely untrustworthy. It is thus incompetent to support summary judgment on the search issue.

ARGUMENT

I. UNDER THE CIRCUMSTANCES PRESENTED, THE FBI CAN AND SHOULD BE REQUIRED TO RESTORE INFORMATION ALLEGEDLY LOST OR DESTROYED

After the Weisberg III[1/] remand, appellant Weisberg ("Weisberg") asked the District Court to order the FBI to conduct a further search for records he seeks and, if that search proved un-

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1/ The nomenclature of prior related cases is: Weisberg v. Department of Justice, 160 U.S.App.D.C. 71, 498 F.2d 1195 (en banc)(1973), cert. denied, 416 U.S. 993 (1974) ("Weisberg I"); Weisberg v. Department of Justice, 177 U.S.App.D.C. 161, 543 F.2d 308 (1976)("Weisberg II"); and Weisberg v. United States Dept. of Justice, 200 U.S. App.D.C. 312, 627 F.2d 365 (1980)("Weisberg III").

productive to direct the FBI to restore certain missing information by conducting appropriate tests and examinations. The District Court made no ruling on this question in its order granting summary judgment to appelleess ("the Government"). [App. 521]

Weisberg's main brief noted that there was no case directly on point; it also acknowledged that in NRLB v. Sears Roebuck Co., 421 U.S. 132 (1975), the Supreme Court held that the Freedom of Information Act ("FOIA") "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," and that a court order requiring an agency to create explanatory material is "baseless." 421 U.S. at 162.

The Government's brief totally ignores this issue except for a two-sentence passage on the final page of its 34-page brief where, under the heading "CONCLUSION," it asserts that: "[t]he . . . suggestion . . . for new testing . . . is not only beyond the scope of this Court's powers as noted by plaintiff (See Plaintiff's Brief, p. 23 and NLRB v. Sears Roebuck Co. . . .) but totally uncalled for by the facts in this case." Government's Brief, p. 34. The Government made no attempt to answer Wesiberg's argument that this case is legally distinguishible from NRLB v. Sears Roebuck Co. because rather than seeking the creation of records which the agency was neither required to prepare no decided on its own to create, Weisberg seeks to restore information which the FBI was required to create--and did create--as a consequence of its in-

vestigation for the Warren Commission.

A. The Levine Case

After filing his main brief, Weisberg learned of a case which is very much on point, Stuart Levine v. United States of America, et al., No. 73-1215-Civ-CA (S.D.Fla. March 23, 1974), which arose when the plaintiff brought suit under FOIA for certain Custom Declaration forms. While the suit was pending, the Customs Bureau destroyed the very records he was seeking. The District Court held that the agency would have to construct the forms so far as it was possible to do so, stating:

> To set a precedent for allowing the destruction of documents sought under the Act without taking the steps necessary to correct the ultimate effect of such destruction would have a devastating effect on the viability of the Act. Given the tendency of the Government to withhold all documents possible from public inspection, and to litigate the issue whenever in doubt, one can only foresee the day when the shredders and furnaces in Government Centers would swing into action whenever a suit under this Act was filed.

Slip Op. at 11. See Addendum 1 to this brief at 11a.

The reasoning in Levine is persuasive and should be adopted by this Court. Indeed, the Levine Court's reasoning applies with much greater force here. Levine sought copies of customs declaration forms to show that he had been wrongly convicted on a drug charge. Although this certainly invoked important public interest considerations, they are not of the same magnitude as those in this case. Here Weisberg seeks information bearing, inter

alia, on his charge that the FBI knowingly tested a piece of evidence which had been patched and then passed the results on to the Warren Commission without informing it that the evidence had been altered. Because this, if true, necessarily holds serious implications for the integrity of the FBI's investigation into the assassination of President Kennedy and its finding that there was no conspiracy to murder him, it raises an issue of singularly grave public concern.

Contrary to the Government's assertion, the District Court can avail itself of its equitable powers to order restoration of information sought under FOIA which is allegedly lost or destroyed.

B. Government's Brief Misstates Curbstone Evidence

The Government's assertion that new testing is "totally uncalled for by the facts in this case" is unsupported by any argument at the place in the brief where it is made, or even by any reference to what the facts are. It is possible, however, that this remark alludes to early passages in the Government's brief which discuss Weisberg's charge that speciment Q609, the so-called "Dealey Plaza Curbstone," was patched before the FBI tested it, and that the FBI passed phoney test results on to the Warren Commission without telling it, a claim which the Government asserts is "utter nonsense." Government Brief at 29.

In its arguments leading up to this rhetorical indulgence, the Government also asserts that "[t]here is no evidence supporting [Weisberg's] allegation" that a "nick" or "chip" in the curb-

stone was altered to become the "lead smear" tested by the FBI in August, 1964; and it boldly declares that "[a] reading of all the relevant documents attached to the Weisberg Affidavit (App. pp. 400-423) demonstrates that no one ever alleged seeing a 'nick' or 'chip'." Government Brief at 28.

The Government shows consummate sagacity in carefully limiting the basis for its pronouncement to a very restricted part of the record. Had it not done so, it would be open to a charge that it deliberately misrepresented the facts.

The record contains the affidavit of James T. Tague,[2/] an eyewitness to the murder of President Kennedy who was wounded while he stood in Dealey Plaza watching the Presidential motorcade. Although the FBI managed to ignore him in its five-volume report on the assassination,[3/] the Warren Commission did state that Tague was wounded during the shooting, and its Report does

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2/ The Tague Affidavit, which is Exhibit 36 to the referenced Weisberg Affidavit, was inadvertently omitted from the Appendix. It is reproduced as Addendum 2 to this brief for the benefit of the Court (and any Government counsel who chanced not to read it). The Tague Affidavit was originally filed in District Court on August 23, 1977, in support of Weisberg's opposition to the Government's motion for summary judgment. [R. 47] District Judge John H. Pratt remarked on it in his published decision which the Government cites so frequently in its appeal brief. See Weisberg v. United States Dept. of Justice, 438 F. Supp. 492, 503 n. 6 (1977).

3/ The FBI's initial five-volume report, dated December 9, 1963, contained less than 500 words on the murder itself. The Assassination of John F. Kennedy: A Comprehensive Historical and Legal Bibliography, 1963-1979 (Westport, Connecticut: Greenwood Press, 1980), "Introduction" at xv. The FBI's report omitted any mention of the "missed shot."

reflect that other witnesses, including Dallas County Deputy Sheriff Eddy R. Walthers, observed "a place on the south curb of Main Street where it appeared a bullet had hit the cement." Warren Report at 116.

Contrary to the Government's assertion that "no one ever alleged seeing a "nick" or a "chip" on the curbstone, Mr. Tague did just that when he was interviewed by the FBI on December 14, 1963. See Tague Affidavit, Exhibit "C". [26a] Contemporaneous news accounts refer to the mark on the curb as a "chip" or "scar" and accompanying photographs depict it. On November 23, 1963, the Dallas Morning News carried a photograph under the caption "Concrete Scar" and stated that it showed a detective pointing to a "chip" in the curb. It also referred to the mark on the curb as a "hole." See Tague Affidavit, Exhibit "A". [23a] On December 13, 1963, the Morning News carried another story on this episode in which it quoted Deputy Sheriff Walthers as saying:

> He [Tague] said something hit him on the cheek hard enough to sting. I checked the area where the man said he had been standing and found the chip in the curb. It was on the south side of the street.

(Emphasis added) See Tague Affidavit, Exhibit "B". [24a]

The transformation of the "chip" is ascertainable through comparison of pictures taken at the time of the assassination with a photograph of the curbstone taken for Mr. Weisberg by the National Archives. The "before" pictures were taken by Tom Dillard of the Dallas Morning News and James Underwood of KRLD-TV. Photo-

graphic copies of these pictures are reproduced at Addenda 3-5, respectively. A photographic copy of the "after" picture made for Mr. Weisberg by the National Archives is found at Addendum 5. Mr. Weisberg has personally examined the curbstone; he states:

> To my personal observation it had no chip, scar or hole when I first examined it toward the end of 1966. Where this visible damage was, at exactly the point the Dillard and Underwood photographs show a portion of concrete missing and show the lighter color of the previously unexposed concrete, there is now a perfectly smooth surface. It is smoother to the touch and darker to the eye rather than lighter. It is not of the same shape. It is unblemished. That this repair had been made by July 1964 is visible in the photograph Mr. Shaneyfelt took then.

July 28, 1977 Weisberg Affidavit, ¶185. [R. 47]

Mr. Weisberg's observation that the "chip" or "mark" had undergone a transformation prior to July, 1964 is confirmed by Mr. Tague. On July 22, 1964, Tague was deposed by Warren Commission staff member J. Wesley Liebeler. During the deposition Liebeler shocked Tague by disclosing that he knew that Tague had returned to Dealey Plaza to take home movies of the curbstone. Tague was surprised because he didn't know anybody knew about his taking the home movies.[4/] During this colloquy Liebeler asked Tague whether he had looked at the curb at that time, i.e., May, 1964, to see if the mark was still there. Tague said that he had. Liebeler then asked, "Was it still there?" and Tague replied, "Not that I could tell." See Tague Affidavit, ¶29, Exhibit "K". [20a, 39-40a]

4/ Tague's film has since disappeared, but he does not know how or under what circumstances. Tague Affidavit, ¶29. [21a]

In short, the Government's claim that there is no first person account of a "chip" or a "nick" in the curbstone or of its later alteration is "utter nonsense" and a distortion of the case record.

C. The Shirt Collar

President Kennedy wore especially tailored shirts. Each of the stripes on the one he was wearing when he was shot coincides where the two ends of the neckband meet for the collar to be buttoned. Weisberg asserts:

> Although allegedly made by a bullet while the collar was buttoned closed, the slits do not coincide! The slit on the button side is entire below the collarband. It can be seen to have two ragged areas, a smaller one to the left as the picture taken from the front is viewed . . . . The slit on the opposite side . . . is much longer and extends well onto the collarband about halway to the buttonhole. (Emphasis in the original)

July 28, 1977 Weisberg Affidavit, ¶125. [R. 47]

Weisberg asks that an examination be conducted to determine whether the slits in the President's shirt collar coincide. In 1977 FBI Agent Robert Frazier tesitied that he ordered the FBI's fibers expert, Paul Stombaugh, to make that examination. The FBI has now produced a report by Frazier which it claims is the Stombaugh Report. But Kilty testified that he did not contact Stombaugh in searching for this report, nor did he ask Frazier if this was the one he was talking about. Indeed, he says he was not even aware of "any document" Weisberg seeks. [App. 132]134]

Weisberg says the newly produced report

> does not have any content that could be the Stombaugh report and it does not report on the examination Stombaugh made. It is Frazier's report of the examination which led him to have the addi-

tional examination Stombaugh made thereafter. [App. 250-251] This is supported by its failure to state that the two slits in the collarband coincide, and further by visual examination of an FBI Lab photo which shows they do not coincide. See Addendum 6. Lastly, the FBI's answer to interrogator No. 5(c) indicates that only Stombaugh performed fibers analysis. [App. 188]

II. THE FBI HAS FAILED TO SUBSTANTIATE A THOROUGH, GOOD-FAITH SEARCH

At issue in this case is whether the FBI has "substantiated a file search of a caliber sufficient to assure retrieval of all existing data" sought by Weisberg. Weisberg III, 627 F.2d at 367. Related to this issue is the question of whether there is evidence of bad faith on the part of the FBI such as to render its affidavit and deposition testimony untrustworthy for summary judgment purposes. Weisberg submits that there is.

A. A Brief History of the FBI's Bad Faith

1. The FBI's Reaction to Weisberg's Requests

The FBI has long dealt with Weisberg's FOIA requests in bad faith, and this case is no exception. Weisberg first demanded release of the spectrographic analyses on the Kennedy assassination in a letter he wrote then FBI Director J. Edgar Hoover on May 23, 1966. See August 9, 1981 affidavit of Harold Weisberg ("Weisberg Affidavit"), Exhibit 6. [App. 325] In response the FBI hierarchy

produced a memorandum which distorted the contents of Weisberg's letter, attached a copy of his "background,"[5/] and recommended that his communication "not be acknowledged." See Weisberg Affidavit, ¶¶56-57, and Exhibit 7 thereto (memorandum of June 16, 1966, from Al Rosen to Cartha DeLoach). [App. 216, 327, 328] Director Hoover personally approved the recommendation that Weisberg's letter not be acknowledged. [App. 328]

The FBI's practice of not responding to Weisberg's Freedom of Information Act requests has not been limited to the matter of the Kennedy assassination. For example, in April, 1969, Weisberg requested information for a forthcoming book on the King assassination. An October 20, 1969, memorandum from DeLoach to Rose states that "[i]t was approved that his letter not be acknowledged." See Hearings before the Subcommittee on Administrative Practices and Procedure of the Committee on the Judiciary, U.S. Senate, 95th Cong.., 1st sess., on Oversight of the Freedom of Information Act (Sept. 15, 16, Oct. 6, Nov. 10, 1977)(hereafter "Hearings") at pp. 139, 940-941. See also "Agency Implementation of the 1974 Amendments to the Freedom of Information Act," Staff Report on Oversight Hearings, Subcomittee on Administrative Practice and Procedure, Committee of the Judiciary, U.S. Senate, 95th Cong., 2d sess. (Committee print, 1980)(hereafter "Staff Report") at p. 71 n. 4.

5/ The "background" was not attached to the copy of the Rosen memorandum provided Weisberg, and his appeal of the failure to provide it remains ignored. Weisberg Affidavit, ¶60. [App. 217]

The degree of personal animosity towards Weisberg on the part of Department of Justice officials is shown by the fact that after he was forced to file suit to obtain copies of public court records--the extradition papers filed against James Earl Ray in connection with the murder of Dr. King--the Department decided to "make similar copies available to the press and others who might desire them," not because this was right and proper but because "the Department did not wish Weisberg to make a profit from his possession of the documents . . . ." (emphasis added) Memorandum of June 24, 1970, from T. E. Bishop to DeLoach. Hearings, p. 941. The FBI's ill-will towards Weisberg is such that it once considered suing him for libel to "stop" his writings on the Kennedy assassination. See Weisberg Affidavit, Exhibits 10-11. [App. 335-340]

2. Congressional Hearings

In October, 1977, some of these facts were brought to the attention of the Senate Subcommittee on Administrative Practice and Procedure. The committee was also informed that about 25 of Weisberg's information requests had received no response for several years. Hearings, at 174-175. The Chairman of the committee, Sen. Abourezk, stated to Department of Justice representatives appearing before it that documents released to Weisberg "indicate an attitude regarding the Act that is, at a minimum, very disturbing. The FBI memorandum indicates that requests from Mr. Weisberg under the Act were totally ignored." Hearings, p. 139.

In response, one Department of Justice official, Mr. Quinlan J. Shea, Jr., stated: "if you are looking for a Department of Justice official to defend that sort of practice in 1969, 1970, or any time, I am not going to do it." Another Departmental witness, Deputy Assistant Attorney General William G. Schaffer, conceded that Mr. Weisberg does have reason to complain about the way he has been treated in the past." Hearings at p. 140.

Mr. Schaffer and a third Departmental representative, Mrs. Lynne K. Zusman told the comittee that efforts were under way to do something about Weisberg's requests. Id.

3. The Fee Waiver

In November, 1977, a month after the Senate committee heard this testimony, Weisberg moved for a complete waiver of search fees and copying costs in Weisberg v. U.S. Department of Justice, Civil Action No. 75-1996. The Department opposed the motion.[6/]

In December, 1977, the FBI announced that it was releasing approximately 90,000 pages of Kennedy assassination records to the public. The FBI informed Weisberg that he could come to Washington, D.C. to read the documents. Instead, Weisberg brought suit for a fee waiver. On January 16, 1978, District Judge Gerhard Gesell awarded him a fee waiver for the second batch of Kennedy assassination records which was released on January 18, 1978. Weisberg v. Griffin Bell, et al., Civil Action No. 77-2155.

6/ On July 12, 1977, the Department responded to Weisberg's November 4, 1976 fee waiver request by reducing the copying charges by 40 percent, to 6 cents a page.

On March 2, 1978, District Judge June L. Green issued an opinion and order in Civil Action 75-1996 directing the Department to explain how it had arrived at the partial fee waiver it had granted Weisberg for King assassination records. On March 31, 1978, Mr. Quinlan J. Shea, Jr., acting in the name of Acting Deputy Attorney General Benjamin R. Civiletti, determined that "records of the Department of Justice compiled pursuant to the investigations of the assassinations of President Kennedy and Dr. King should be furnished to Mr. Weisberg without charge."

4. The Shea Memorandum

Less than two years after Shea granted the fee waiver, the FBI began a campaign to take it away. Ultimately, on July 1, 1980, the FBI informed Weisberg that it was rescinding the fee waiver.

When the FBI circulated its proposal to revoke Weisberg's fee waiver, Shea wrote a memorandum regarding it. Substantial portions of the Shea memorandum address the adequacy of the FBI's search for records requested by Mr. Weisberg, the lack of good faith in searching for such records, and the violation of promises and representations made to Mr. Weisberg, the courts, and Congress. For example, regarding the search issue, Shea stated:

> Although the Bureau has departed from its initial position in both the King and Kennedy cases (that the only relevant records are those filed by the FBI in the main files on those cases and/or the very principal "players"), it has done so very reluctantly and to a very limited factual extent. I am personally con-

> vinced that there are numerous additional records that are factually, logically and historically relevant to the King and Kennedy cases which have not yet been located and processed--largely because the Bureau has "declined" to search for them.

(emphasis in original) See Addendum 7, March 27, 1980 memorandum for Quinlan J. Shea, Jr. to Robert L. Saloschin. [45a]

Elsewhere in his memorandum Shea states that the "processing of [Weisberg's] efforts to obtain these records has almost become an 'us' against 'him' exercise," and that "I know that what the Bureau wants the [Freedom of Information] Committee to approve [that is, the rescission of Weisberg's fee waiver] would contradict or be inconsistent with promises made to Mr. Weisberg by Bureau and Department representatives, and to representations made in court, and to testimony before the Aboureszk Subcommittee . . ."

The Government's brief in this case asserts that Weisberg "now relies solely on allegations of bad faith on the part of the FBI in his effort to require either 1) a new improved search . . ., or 2) 'appropriate tests and examination of Kennedy assassination evidence . . . .'" Government Brief at 22. This is not true, nor is it true that "Plaintiff (sic) has exhausted all efforts to find new information through cross-examinating witnesses and falls back on frivolous claims of FBI bad faith." Government Brief at 34.

The Shea memorandum provides very damaging evidence which directly contradicts the Government's protestations that it has been handling Weisberg's requests in good faith. It gives the

personal assessment of a high Justice Department official intimately familiar with the administration of the Freedom of Information Act that the FBI continues to be recalcitrant in searching for records on the King and Kennedy assassinations pertinent to Weisberg's requests.

The Shea memorandum provides evidence of an FBI attitude that is corrosive of the aims and objectives of the Freedom of Information Act. It is obvious that if an agency with the enormous resources of the FBI chooses and is allowed to proceed in bad faith, it can easily grind down most requesters who have the temerity to exercise their rights under the Act, thereby subverting the goal of open access to nonexempt government information. Weisberg has long charged that this is what the FBI has been doing. The Shea memorandum provides potent evidence of an attitude which can have no other result.

It is true, as the Department will no doubt argue, that the Shea memorandum does not address the facts of the search in this particular case. But the point here is that the FBI's attitude towards Weisberg is such that it must inevitably affect the character of any search it conducts for records responsive to his requests.

For the reasons set forth below, it is clear that the FBI has engaged in bad faith conduct in this litigation, and that this conduct necessarily calls into question the adequacy of its search in this case.

B. Bad Faith Conduct by the FBI in This Case

This case is replete with examples of bad faith on the part of the FBI. A few are briefly set forth below.

1. Handling of the Request

In the original case, Weisberg I, Weisberg sought only the final typed reports on the spectrographic analyses performed on items of evidence in the Kennedy assassination. During four years of litigation, the FBI at no time informed Weisberg or the courts that such final reports did not exist. June 2, 1975 Weisberg Affidavit, ¶14. R. 12.

When Weisberg submitted his request under the amended Act, he expanded it to include neutron activation analysis ("NAA"). He specified that he wanted only the "final scientific reports on these tests." [App. 342] The FBI concluded, however, that since these were available at the National Archives, "his request must extend beyond these documents." Weisberg Affidavit, Exh. 16, January 24, 1975 memorandum from M.E. Williams to White. [App. 346] Accordingly, the FBI proceeded to identify and compile a variety of materials which it concluded he might want, including final reports, spectrographic plates, compositional analyses, and raw data, including NAA data. [App. 346-347]

On February 25, 1975, Attorney General Levi responded to Weisberg's appeal of FBI inaction by asserting that the Bureau had proceeded with the task if identifying the requested materials, that "[s]ome, which are clearly responsive, are contained in the

National Archives and will be made available[,]" and that there was a great bulk of material which did not reasonably come within Weisberg's specification of "final reports." With respect to the latter, the Attorney General declared that "[t]he Bureau is willing to discuss with Mr. Weisberg the nature of these materials to ascertain whether he is interested in having access to them." See June 2, 1975 Weisberg Affidavit, Attachment B. [R. 12]

Although Weisberg had requested the FBI's copies of the final report, not the Archives', the FBI took the position that he must obtain them from the Archives. This necessitated a new request by Weisberg and more delay. June 2, 1975 Weisberg Affidavit, ¶¶16-18. [R. 12]

On March 6, 1975, Weisberg wrote the Attorney General that he would be willing to meet with the FBI to discuss the implementation of his requests, but that he preferred that both sides be allowed to tape-record the conference. The FBI rejected the suggestion that the conference be recorded. June 2, 1975 Weisberg Affidavit, ¶20. [R. 12] As a result, no record was made of precisely what occurred at the ensuing March 14, 1975 conference.

At that conference the FBI claimed that there was a "semantical difference" between its interpretation of "final reports" and Weisberg's and told him that it had no "final reports" of the kind he was seeking. The FBI showed Weisberg unidentified batches of raw data, but would not permit him to examine them. In order to save time and money, Weisberg proposed that he examine all the spectrographic and neutron activation materials and select those he

wanted copied. The FBI rejected this, stating that it would select the materials he was given. June 2, 1975 Weisberg Affidavit, ¶23. [R. 12]

In an effort to avoid squabbling over whether he had a right to select what he wanted copied, Weisberg asked for all of the materials except: 1) the spectrographic plates,[7/] 2) nitrate tests, and 3) materials related to the slaying of Officer Tippit. The FBI provided him with the Tippit materials anyway and charged him for them. June 2, 1975 Weisberg Affidavit, ¶24. [R. 12]

On March 26, 1975, the FBI wrote that it was releasing 17 pages of materials to Weisberg. A protest resulted in the release on March 31, 1975, of 5 additional pages relating to the curbstone spectrographic examination, but the FBI withheld some of the curbstone records from the one report it provided. Weisberg Affidavit, ¶79, Exh. 18. [App. 221, 351] An April 3, 1975 telephone call by Weisberg's counsel caused the release of 54 pages of "data and results" of NAA examinations on April 15, 1975. Although a March 24, 1975 memorandum states that Weisberg "also requested the available material relating to the examination of the windshield of the President's automobile," this material, which includes the computer

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7/ Weisberg did not ask for the spectrographic plates at that time because the FBI stated that it would cost h im $50 a plate. This appears to have been a deliberate misrpresentation, since internal FBI records indicate that the plates are suitable for inexpensive photograph reproduction. Weisberg Affidavit, ¶53. [App. 215] In 1978, Weisberg was awarded a fee waiver for all Kennedy assassination materials. However, the FBI did not provide the plates until June, 1981.

computer printouts on Q15, was not provided.[8/]

This release was preceded by FBI Director Kelley's letter of April 10, which stated:

> It is considered that the offer of releases of the 54 pages of the above-described data, together with that already furnished to Mr. Weisberg, responds fully to his FOIA request for spectrographic and neutron activation analyses, as contained in his written request of November 27, 1975, and subsequent discussion with FBI representatives on March 14, 1975.

See Attachment to May 13, 1975 Kilty Affidavit. [R. 17] From this date until June, 1982, the FBI refused to release any more of the records sought by Weisberg.[9/]

Had the FBI been acting in good faith, it would have acted entirely differently: (1) it would have identified and described all available materials in a letter to Weisberg so he could determine what he wanted; (2) it would have permitted him to tape record the March 14 meeting so that an accurate record of what transpired would be kept; (3) it would have allowed Weisberg to inspect all the materials it displayed at the meeting so he could determine precisely which ones he wanted copied; (4) it would have provided

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8/ The printouts were not provided to Weisberg until June, 1981. Indeed, Agent Kilty testified they had never been provided to anyone before that, not even to the House Select Committee on Assassinations or the Senate Select Committee on Intelligence ("SSCI"). [App. 66] Yet on on November 26, 1975, the SSCI made a broadly worded request for "[a]ll reports and memoranda or other material pertaining to . . . the exmination and testing of . . . [the] windshield." [App. 429]

9/ On June 30, 1975, the Government did deliver photographs and printouts apparently related to NAA testing done on the Oswald paraffin casts which had been tested for nitrates, although these were materials Weisberg had said he didn't want. July 10, 1975 (Fourth) Weisberg Affidavit, ¶17. [R. 19]

all the curbstone and NAA materials, including the computer printouts, on or before March 31, 1975. Instead, the FBI did the opposite of what it should have done.

The FBI's bad faith is also shown by the fact that although the District Court identified "[p]rintouts for neutron activation of Q3 and other specimens" as materials sought by Weisberg but not received, Weisberg v. United States Dept. of Justice, 438 F. Supp. 492, 498 (1977)(emphasis added), it was not until four years later that any were provided.

2. Excisions

Internal FBI reports show that it recognized that no exemptions applied to the materials sought by Weisberg. Nevertheless, excisions were made in the materials provided, including obliterations of the Lab numbers by which each examination is identified and distinguished. Agent Kilty, who made the excisions, testified that he didn't know why file numbers, lab numbers, PC number, date and the name of the examiner were all excised from documents originally given Weisberg. He was not relying on any FOIA exemption, just doing what someone in the Office of Legal Counsel told him. [App. 75-76] There was no legal basis for such excisions and they were transparently not made in good faith. The only purpose of such excisions was to make it harder for Weisberg to learn who tested what, when.

3. Stonewalling Discovery

After the Weisberg III remand, the FBI once again stonewalled discovery. Because the Bureau had claimed that certain records had

been destroyed, Weisberg sought discovery, inter alia, of records pertaining to its file destruction rules and practices. After a delay of two months, the Goverment responded by stating only that "[d]efendants will produce such documents to the extent that they are in their possession, custody or control." It released no records. On inquiry, Weisberg's counsel was told Weisberg would have to go to the FBI Reading Room to examine them. When he protested this departure from normal discovery practice and explained that Weisberg's health precluded this, Government counsel replied, "the FBI is not going to give Harold copies of what he already has." A visit to the Reading Room by counsel revealed that the overwhelming majority of the discovery materials had never been provided to Weisberg. In addition, he later learned that the FBI had provided the very same materials free of charge to plaintiffs in another case.[10/] See November 12, 1981 Lesar Affidavit. [R. 64] This discovery dispute, which could have been resolved easily had the FBI extended equal treatment to Weisberg, took nearly six months before it was settled in Weisberg's favor.

10/ These facts are omitted from the Government's account of the discovery proceedings. Government Brief at 7. Similarly, in commenting at p. 8 of its brief that over a year after the remand Weisberg noticed the Kilty deposition at his home in Frederick, Maryland, the Government omits to mention that this was less than three weeks after Weisberg was released from Georgetown University Hospital where, on April 20, 1980, he underwent emergency surgery at midnight for "profound systemic insult," a complete blockage of circulation on his left side below the chest which not uncommonly results in death. See Memorandum of Points and Authorities in support of Motion for an Order Designating Frederick Maryland as Place of Taking of Kilty Deposition. [R. 77]

4. Concealment

The FBI was not forthcoming about what its files did and did not contain. For example, it did not voluntarily disclose the fact that the cubstone spectrographic plate and notes are missing. Indeed, when Weisberg filed an affidavit stating that he had not been given the spectrographic testing on the curbstone, FBI Agent John W. Kilty swore:

> . . . the Laboratory work sheet which was previously furnished plaintiff and from which he quotes is the notes and results of this test.

June 23, 1975 Kilty Affidavit, ¶3. [App. 166]

That this is false is shown by the June 16, 1975 memorandum from M.J. Stack to Mr. Cochran, which states regarding the curbstone:

> An exhaustive search of pertinent files, and storage locations has not turned up the spectrographic plates nor the notes made therefrom. Therefore, by affidavit, Kilty can say that the FBI Laboratory has turned over to Weisberg all the material it has concerning the spectrographic examination of the lead smears from the curbstone.

[App. 182] The word "notes" is circled with a line to a handwritten notation which reads: "block diagram with symbols and relative concentrations." This document, which was not made available to Weisberg until after the Weisberg II remand, confirms Weisberg's assertion that the Lab worksheet is not the notes and results of the curbstone test. See July 1, 1975, Weisberg Affidavit, ¶¶83-84. [R. 19] Moreover, it reveals that at the time Kilty executed his June 23 affidavit asserting that "[a] thorough search has un-

covered no other material concerning the spectrographic testing of the metal smear on the curbing," he knew that these materials had been created, even if they had not been found. This he did not tell Weisberg or the court. Instead, he tried to pass off the Lab work sheet as the missing notes,[11] and he said nothing at all about the missing spectro plate.[12] In the context of FOIA law and policy, which is intended to foster maximum disclosure of nonexempt government records, this is further evidence of bad faith conduct.

C. Kilty's Testimony Is Untrustworthy

The Government's case hinges entirely on the testimony given by FBI Special Agent John W. Kilty. Weisberg has repeatedly charged Agent Kilty with lying in this case. But regardless of whether Kilty has intentionally misrepresented the facts, the fact remains that his affidavit and deposition testimony is so untrustworthy that it cannot serve as the basis for an award of summary judgment. Orwellian use of language does not meet summary judgment standards any more than ourtright prevarication. Some examples follow.

1. NAA Testing Is Not Actual NAA Testing

In his May 13, 1975 affidavit, Kilty swore that NAA was used to determine the elemental composition of metallic smears present on the windshield of the Presidential limousine. [App. 159] In

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11/ The evidence notwithstanding, the Government still pretends the lab work sheet is the missing notes and results. See Government Brief at 14.

12/ If the spectrographic plate was not within the scope of the request as the Government asserts, Government Briet at 15, then why did Kilty conduct a search for it in 1975?

his June 23rd affidavit he recanted, declaring that "NAA was not used in examining the . . . windshield . . . ."[13/] [App. 168]

The Government explanation for this discrepancy is that the statement in Kilty's first affidavit was a mistake caused by Kilty's having been born. See Government Brief at 31-32; Kilty Deposition at 88-89. [App. 95-96] As it turns out, Kilty's "mistake" was correct--NAA was used to examine the windshield (Q15)--and his "correction" was in error.

Unable to offer any explanation for his mistake aside from his having been born, which explains nothing, Kilty sought refuge in semantics. He claimed that "examination" is "the total analysis and handling of a specimen which produces some kind of a report or final comment or final opinion regarding the totality of all the tests and material that you went through on that specimen." Kilty Deposition at 87-88. [App. 96-97] In line with this, the Government claims that "no actual activation analysis was ever performed on [Q3 and Q15]."[14/]

As absurd as this explanation is on its face, it becomes even more untenable when Kilty's testimony is closely scrutinized. For example, Weisberg's interrogatory No. 5 asked the date(s) on which

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13/ The Government describes this transformation from a positive to a negative as a "slight change in testimony." Brief at 31. George Orwell missed his calling. He should have been a Department of Justice lawyer.

14/ If true, this transmogrifies the picture of a bumbling FBI lab which has emerged in this case, giving it a new, magical image. What other lab can produce pages of computer printouts without actually ever having performed neutron activation analysis on the specimens?

each item was tested. The answer does not list NAA testing on either Q3 or Q15. [App. 188] Similarly, interrogatory No. 19 inquired whether "neutron activation testing [was] done on any item of evidence other than the paraffin casts and . . . five Commission Exhibits--CE 399 (Q1), CE 567 (Q2), CE 843 (Q4, Q5), CE 842 (Q9), and CE 840 (Q14) . . . ." (emphasis added) Kilty's answer was a resounding "No." [App. 194] Without question, Q3 and Q15 were tested. Even if there had been no results, the were tested. Kilty lied. More, he committed perjury.

2. Records in Lab File Cabinets Are Not "Lab Files"

Weisberg charges that Kilty gave contradictory testimony in another case. The basis for the charge is spelled out in his affidavit, which states in part:

> 99. Kilty then was asked, "Does the FBI Laboratory have its own files on scientific examinations that it conducts in cases?" Kilty responded, "No." He amplified this by stating that "we put our information regarding our examinations, that goes in the so-called file, the case file." (Page 7) On the next page Kilty added, "... there is no file or indices (sic) that have anything to do with the examination performed or specimens submitted." Five pages later, asked, "But the Lab itself keeps no separate files?" Kilty was unequivocal, "There are no files in the Laboratory that I know of." On page 20 he testified that "we did not have any Laboratory files" and that "there's no place in the Laboratory to keep any results of tests."15/

15/ The page references are to the October 12, 1979 deposition of John W. Kilty in Weisberg v. Department of Justice, Civil Action No. 75-1996, now before this Court on cross appeals (D.C.Cir. Nos. 82-1229 and 82-1274).

of the specimens tested, although he conceded that you might have to do this to comply with the request. [App. 62] Indeed, he confessed to not knowing "exactly what this lawsuit is." [App. 13] He did not search all sections and units of the FBI Laboratory. [App. 106] Nor did he search the files of the General Investigative Division or the Dallas Field Office. [App. 108-109, 135-136] Yet there is documentary evidence that the General Investigative Division and the Domestic Intelligence Division have pertinent Lab materials, since they were to be furnished with copies of outgoing Lab reports. [App. 360-361] In September, 1966, there were extensive transfers of assassination file records from the Lab to the "special file room," but there has been no attestation of any search of that location. [App. 231] Finally, although the Government tries to bolster its case by asserting that after the Weisberg III remand Kilty "searched again . . . for a period of ten days," Government Brief at 12, Kilty's actual testimony is that he searched for "parts of ten days." [App. 139] Since he did not say how long the "parts" were, this could be as little as ten minutes.

These facts and a myriad others that could also be cited make it abundantly clear that the FBI's identification and retrieval procedures do not pass muster. As a matter of law, they are inadquate to support summary judgment in this case. They have been thoroughly challenged by Weisberg, and have been shown to lack even the rudiments of a systematic search.

[App. 227-228]

The Government objects to this on the grounds that Kilty's 75-1996 deposition is not in evidence, but says that if it were, "defendants could show in that deposition that Kilty explained that raw data from NAA in the King case was retrieved by him from the laboratory file cabinets . . . but that they were not considered FBI 'files.'" Government Brief at 33, n. 8. This only gets Kilty in more trouble. It does not jibe with his May 13 affidavit, which says he conducted a review "of FBI files," or with his testimony that his search in this case included two filing cabinets in the FBI Lab and that the records he located in the lab were files. See Kilty Deposition at 38-48; passim. [App. 47-57] And after his testimony in this case, he cannot truthfully have maintained, as he did testify in C.A. 75-1996, that "there's no place in the Laboratory to keep any results of tests."

D. Requirements of Thorough Search Have Not Been Met

In Weisberg III this Court found that the Kilty affidavits "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." 627 F. 2d at 371. The discovery taken on remand has established that there was no systematic approach to document location. Essentially, all Kilty did was to look in a couble of file cabinets in the FBI Lab where another agent, Frazier, told him to look. [App. 49] He recalled making no list of

CONCLUSION

For the reasons set forth above, the award of summary judgment in favor of appellees should be reversed.

Respectfully submitted,

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

Attorney for Plaintiff

A D D E N D A

Addendum 1: Levine v. Treasury 1a

Addendum 2: Affidavit of James T. Tague 15a

Addendum 3: Dillard photograph of curbstone . . . 42a

Addendum 4: Underwood photograph of curbstone . . 43a

Addendum 5: National Archvies photograph of curbstone 44a

Addendum 6: Photograph of President's shirt collar 45a

Addendum 7: March 27, 1980 memorandum of Quinlan J. Shea, Jr. 46a

ADDENDUM 1

the fact that the very forms over which the controversy raged had been inadvertently destroyed by the Customs Bureau between the dates of September 7 and 13, 1973. The question of mootness was broached after this disclosure, but when the plaintiff advised the Court that further discovery was necessary to determine the extent of the destruction and the possible existence of an ulterior motive, the cause was set for a Pretrial Conference on January 10, 1974, with all discovery to be completed by January 5. The defendants filed, together with their unilateral pretrial stipulation, a motion to dismiss because the cause of action was moot. The plaintiff filed a motion to strike the defense motion to dismiss as being untimely filed and submitted his own unilateral pretrial stipulation. It was in this posture that the cause came before the undersigned for a pretrial conference as scheduled. After a review of the stipulations, together with the remainder of the pleadings in the file, and a discussion with counsel, it became obvious to the Court that no benefit would be derived from proceeding to a trial on the merits at this time. Based on this decision, the matter was taken off the trial calendar with the understanding that an appropriate order would be issued on the various pending motions and the pretrial stipulation. An analysis of the facts will be helpful in this regard.

I

While seemingly innocuous in their own regard,[2/] the Customs Declaration forms have taken on a new dimension for the purposes of this plaintiff because of the facts they may disclose to the informed observer when examined carefully. The plaintiff hopes to be able to determine the times and dates of arrivals into the Miami International Airport of certain Customs agents and

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2/ Attached as Appendix A is a copy of both sides of the form in dispute.

Records Management System

Our office has reviewed Baggage Declaration CF-6059 Records Disposal Schedules with the Bureau Management Analysis Division and they advised that baggage declarations may be destroyed as follows:

CF-6059	Destroy after (3) three years
CF-6059-A	Destroy after (3) three years
CF-6059-B	Destroy after (1) one year
CF-6059-C	Destroy after (1) one year

The above schedule was also reviewed with the Office of Director, Security and Audit.

/s/ R. C. Muser
Ralph C. Muser

By the time the destruction was noticed, the 6059-B forms had been disposed of through July of 1972. Another circular, released on Septem.er 27, 1973, provides for the implementation in Miami of the United States Customs Service Record Control Manual, and that means that 6059-B forms will now be kept for three years under the supervision of a designated District Records Officer.

During the discovery period allotted by the Court prior to the trial the plaintiff noticed and took the depositions of District Director Townsend, Assistant U.S. Attorney Ullman, DEA Agent Omar Aleman, and BNDD Agents John B. Stevenson and William J. Logay. The thrust of the depositions of the agents just mentioned was to attempt to reconstruct the events in May and June of 1972 that formed the bases of the plaintiff's indictment and conviction.

II

The issues of law presented here can be broken down rather simply into three main headings:

A.) Are the Customs Bureau forms 6059-B discoverable under the Act?

B.) If the forms have been destroyed after the instigation of proceedings under the Act, may the plaintiff pursue an alternative method to discover the information previously contained on the forms?

C.) Can the man responsible for the destruction of the forms, or his supervisor, or the District Director, or all of them, be punished by the Court for contempt?

These issues will be discussed <u>seriatim</u>.

The courts have had an opportunity to deal with the proviso relied on by the defendants in this instance. Before non-disclosure is permitted it is settled that "the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." National Cable Television Association, Inc. v. F.C.C., 479 F.2d 183, 186 (D.C. Cir. 1973). See also Bristol-Myers Company v. F.T.C., 424 F.2d 935, 938 (D.C. Cir. 1970). The Act itself is clear in this regard:

> . . . In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. .

5 U.S.C. §552. See Soucie v. David, 448 F.2d 1067, 1073 (D.C. Cir. 1971). This is not a situation where the plaintiff requested "all" the customs declaration forms filed with the Bureau at the Miami International Airport, Sears v. Gottschalk, 357 F.Supp. 1327, 1328 (D.C.C. 1973), but instead only two months of one year were singled out for discovery. The defendants are not really attempting to come within the "identifiable records" exception to disclosure--they knew exactly what declarations were the subject of the request and have not succeeded in demonstrating otherwise. See Bristol-Myers Company v. F.T.C., supra at 938. The objection instead centers around the bulk of the documents properly identified and subject to a careful search and/or disclosure. That objection, however, is not well taken:

> . . . This statement leaves no doubt that the defendant knows what information is being sought. This is all that the identifiability requirement contemplates. The fact that to find the material would be a difficult or time-consuming task is of no importance in making this determination; an agency may make such charges for this work as permitted by the statute. To deny a citizen that access to agency records which Congress has specifically granted, because it would be difficult to find the records, would subvert congressional intent to say the least. . . .

Wellford v. Hardin, 315 F.Supp. 175, 177 (D. Md. 1970) affirmed, 444 F.2d 21 (4th Cir. 1971). See also National Cable Television, supra at 192. The court in Wellford concluded this phase of the inquiry as follows:

the back side contains several lines for listing the description and price of articles purchased outside of the United States and brought in. How the remainder of the information on the face side of the form can be considered commercial or financial is puzzling While the listing of articles purchased abroad may be considered commercial or financial, it certainly doesn't fall within the last requirement of being privileged or confidential. Viewed in the most realistic and pragmatic light, the last thing the people who fill out these forms expect is confidentiality. The form itself provides that "all your baggage (including handbags and hand-carried parcels) may be examined," and that examination is conducted in public. In fact, there is some authority for the proposition that even if the form promised confidentiality the information might still be discoverable.

> . . . While, perhaps, a promise of confidentiality is a factor to be considered, it is not enough to defeat the right of disclosure that the agency "received the file under a pledge of confidentiality to the one who supplied it. Undertakings of that nature cannot, in and of themselves, override the Act."

Robles v. Environmental Protection Agency, 484 F.2d 843, 846 (4th Cir. 1973), quoting Ackerly v. Ley, 420 F.2d 1336, 1339-40 (D.C. Cir. 1969), n. 3. The Bureau has not met its burden of proof under this exception.10/

10/ It should be mentioned that even should some of the information be "confidential" under this section, disclosure would not automatically be forbidden.

> This burden is compounded by the fact that an entire document is not exempt merely because an isolated portion need not be disclosed. Thus the agency may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information. It is quite possible that part of a document should be kept secret while part should be disclosed. (footnotes omitted)

Vaughen v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973). Excision of the confidential portions would protect all parties involved and not frustrate the effectiveness of the Act. Cooperation in this regard is essential to avoid needless litigation, but was not present in this instance.

> . . . The assumption of unavailability may, in fact, explain the District Court's failure to treat these items in the dismissal order. If, upon remand, the District Court determines, as a matter of fact that these materials cannot be located, the controversy as to their disclosure may be rendered moot.

Id. at 791. This precisely is the defendant's contention in their motion to dismiss the complaint herein--the declaration forms sought no longer exist, therefore the cause is moot. The plaintiff takes the position that if the forms are subject to disclosure, an issue now decided in the affirmative, the forms should be reconstructed as far as possible when the items sought have been destroyed during the pendency of the litigation, whether intentionally or not.

After a consideration of the pros and cons involved, the Court is of the opinion that the destroyed forms in question--those relating to the four men mentioned earlier in this Order--must be reconstructed as far as possible. To set a precedent for allowing the destruction of documents sought under the Act without taking the steps necessary to correct the ultimate effect of such destruction would have a devastating effect on the viability of the Act. Given the tendency of the Government to withhold all documents possible from public inspection, and to litigate the issue whenever in doubt, one can only foresee the day when the shredders and furnaces in Government centers would swing into action whenever a suit under this Act was filed. See Vaughen v. Rosen, supra at 826.

The only way this information can be gathered from sources relatively contemporaneous to the declaration forms requested would be by examining the case reports filed by the agents themselves with the Bureau of Narcotics & Dangerous Drugs covering the

show that the destruction of the forms in question was done with an intent to obstruct justice. Rather, he has resigned himself to the quest for this unprecedented type of "substituted" disclosure.

Nevertheless, this Court is of the opinion that the actions of the defendants, and their attorney, demonstrate either extraordinary negligence or utter disregard for the process of law in this country. The least that would be expected of a private party litigating the validity of a subpoena duces tecum issued by the Government would be a conscientious effort to segregate and protect the documents in dispute so that, in the event the subpoena was held to be valid, the documents could be turned over as requested. No less can be expected from the Government. With the possible exception of deterrence, it would serve no useful purpose at this juncture to hold the District Director, the employee responsible for the actual destruction, or the Assistant United States Attorney in contempt for their respective failures in this regard. However, that option will remain open pending the conclusion of this litigation. Accordingly it is ORDERED AND ADJUDGED AS FOLLOWS:

1. The defendants' motion to dismiss the cause as moot is denied;

2. The plaintiff's motion to strike the defendants' motion to dismiss is denied;

3. The defendants' motion for summary judgment is denied;

4. The plaintiff's motion for summary judgment is granted;

5. The defendants will produce for in camera inspection by the Court the Bureau of Narcotics & Dangerous Drugs files relating to the activities of Juan Ortiz, Omar Aleman, John B. Stevenson, Jr., and William J. Logay during the months of May and June of 1972, this information to include all BND-6 forms and daily record sheets compiled by and/or relating to these individuals, as well as all records of travel into and out of the United States; and

6. Jurisdiction is retained by the Court in order to evaluate the compliance by the defendants with the

A D D E N D U M 2

FILED: AUGUST 23, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-226

AFFIDAVIT OF JAMES T. TAGUE

1. My name is James T. Tague. I live at 14324 Shoredale Lane, Dallas, Texas. I am the Fleet Sales Manager of Steakley Chevrolet, Inc., at 6411 East Northwest Highway, Dallas, Texas, an automobile dealership which employs over 200 people.

2. I am the bystander mentioned in the Warren Commission Report as having received a minor wound in the shooting that killed President John Kennedy and seriously wounded then Texas Governor John Connally.

3. The place at which the assassination occurred is known as Dealy Plaza. It is bounded on the north by Elm Street, on the south by Commerce Street, with Main Street between them. At that time, Elm Street was a one-way street headed west and Commerce Street was a one-way street headed east. These three streets flow together at the west end of Dealy Plaza at what is known as the "Triple Underpass," formed by bridges and an excavation to permit traffic to flow underneath the wide railroad tracks.

4. At shortly before 12:30 p.m., Dallas time, on November 22, 1963, I was driving east on Commerce Street, in the northern (left) lane. As I was about to emerge from under the triple underpass, I was blocked by stopped traffic. I left my car and was standing on the north side of Commerce Street between Commerce Street and Main Street, when the Presidential motorcade was going west on Elm Street.

5. As the motorcade came down Elm Street, I heard a noise that at first, sounded like an exploding firecracker. As I was looking around Dealy Plaza, trying to determine what it was that I had heard, I heard the sounds of the second and third shots. I saw people throwing themselves to the ground. I reacted by stepping behind a pillar of the

11. I thought it was strange that with an extensive official investigation going on, that no FBI agent ever spoke to me when the fact of my minor wound was on the police radio and in police reports and when a picture of the impact on the curbstone had been printed in Dallas newspapers. A copy of one that I preserved is attached as Exhibit "A". This is one of the photographs taken on November 23, 1963, by Tom Dillard, of the Dallas Morning News.

12. The next month, on December 13, 1963, after a news story headlined "Questions Raised on Murder Bullets" appeared in the Dallas Morning News, I phoned the FBI. It then interviewed me the following day.

13. This news account goes into a question that perplexed me, in addition to the lack of official interest in a first-person account of some of the firing during the assassination. It is with President Kennedy's having received a fatal wound and a non-fatal wound and Governor Connally's having been wounded in three different parts of his body and with only three shots fired, what caused my wound when I was twice as far from the place the shots were said to have come from as the Presidential car was?

14. Because of the manner in which I preserved this news account, it did not keep in good condition. I have asked my wife to retype it, and her retyped copy and a photostat of the news story are attached herein as Exhibit "B".

15. While there are these and other news accounts, my own notes of the time and the FBI account of its interview with me all refer to a chipping of the curbstone, I now have no independent recollection of a chipped point. I am absolutely without doubt that there was a very visible mark and that Deputy Sheriff Walthers saw it from a distance.

16. All accounts are as this news story expressed it, "freshly made."

17. Harold Weisberg showed me a copy of the FBI's account of its December 14, 1963, interview with me on June 10, 1977. A copy of this report is attached, marked Exhibit "C". A sentence in it that refers to this and to what I then said about it reads, "He did look around

"What bothers me is why nobody has taken an interest in my story before," said the 27-year-old man, who asked that his name not be used. (Emphasis added).

Mr. Lehrer had contacted me on the morning of June 5, 1964, and told me that a mutual friend had told him of my experience in Dealy Plaza on November 22, 1963, and wanted to know if he could come by and talk to me. I told him yes, and he came to my place of employment a few minutes later. I told him briefly of my experience and asked him not to use my name. Around noon, approximately an hour and a half after Mr. Lehrer had left, he called me, very excited. He told me, "They are calling me from all over on this story." I was a bit taken aback, and asked if the paper had come out already. He said no, he had put it on the wire service and Washington was calling--the FBI was calling, and they wanted to know who the man was in the article. He told me he had given them my name.

22. While after 13 years, I now have no independent recollection of the total conversation with Mr. Lehrer, I am certain it was not as represented in this secret record I saw for the first time on June 10, 1977. What appears to be more likely is my concern that Mr. Lehrer might try to use what I had told him for his personal gain. At that time, the large picture magazines were reportedly paying large sums for stories about the assassination.

23. Mr. Weisberg has also shown me other records bearing Warren Commission identifications. One of these, attached as Exhibit "F", shows that although I was publicly known to have been wounded, if very slightly, during the assassination, and had observed the impact point of a bullet fired during the assassination, the Warren Commission sought no information from me for more than six months. This memo of June 11, 1964, shows that as of that date, no effort had been made to "determine the knowledge of each on where the missing bullet struck." (The other person being Mrs. Donald Baker, in reference to another incident).

24. Exhibit "G" is the letter of about a month later in which I was finally asked to testify.

ask you if you took that picture." The fact is that my film has since disappeared from my home and I have no knowledge of how or under what circumstances.

30. Earlier this year, I obtained a copy of Mr. Weisberg's book, Post Mortem. It has several references to my experiences that tragic day. On Pages 608 and 609, it has pictures of the impact point on the curbstone. On November 22, 1963, approximately 10 minutes after the shots were fired in Dealy Plaza, I witnessed Mr. Walthers pointing out the mark to several people and some photographs being taken of this mark. After reading Post Mortem, I phoned Mr. Weisberg.

31. During our conversation, I told Mr. Weisberg of my taking movies of the curbstone and of the later disappearance of the film. He has given me and I have read a file of records relating to me from which the foregoing exhibits of official origin are selected, as well as the letter of February 3, 1977, to him from the National Archives enclosing "copies of the Warren Commission file relating to James Tague" (Exhibit "L").

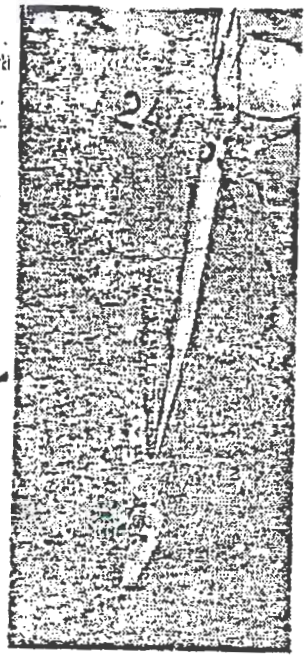
32. There is no record among these indicating any basis for Mr. Liebeler to have known that I had any film. There is no reference to my film of any kind, no matter how indirect, that even suggests its existence. There is only the disclosure of Mr. Liebeler's knowledge of it in the pages of the deposition attached hereto as Exhibit "K".

33. How any government agent or official knew I had taken these movies and how they later disappeared, I cannot explain.

34. I cannot be certain whether it was a fragment of bullet or a small piece of concrete that caused the minor cheek wound I sustained during the assassination of President Kennedy. There is not and never has been any doubt in my mind that this minor wound was associated with the mark on the curbstone, as every newspaper and official account I have seen states, including the Warren Report (Chapter III, Subtitle, "The Third Shot"). As Exhibit "B" states, from the moment of the shooting this was also the expressed belief of then Chief Criminal Deputy Sheriff Alan Sweatt and his assistant, Deputy Sheriff Buddy Walthers.

Exhibit A Tagne Affidavit C.A. 75-226

1963 ****



—Dallas News Staff Photo.

CONCRETE SCAR

A detective points to a chip in the curb on Houston Street opposite the Texas School Book Depository. A bullet from the rifle that took President Kennedy's life apparently caused the hole.

The motorist could have been hit by a sliver from the bullet or a particle of concrete from the curb, they concluded.

The chip appeared freshly made.

It was in line with the path a bullet would have taken if fired from the sixth floor of the Texas School Book Depository building toward the Kennedy motorcade. The trajectory, however, would have carried it above the heads of President Kennedy and the governor.

Walthers and Sweatt were within a block of the slaying site when the sniper opened fire. They agreed with other witnesses that the assassin fired only three shots.

Governor Connally said the first shot struck President Kennedy and the second entered his body.

Then, the governor related, another bullet struck President Kennedy.

That would account for the three shots.

It would not, however, account for the chipped spot.

Various theories have been advanced.

Was Gov. Connally mistaken about what happened during the 10-second period in which the sniper shot him and the President? Did the rifleman fire two bullets into the car, with one striking both President Kennedy and Gov. Connally, and then hurriedly fire a third which passed over their auto?

Or did the chipped spot have no connection with the shooting? Couldn't the motorist have been struck by a speck of gravel thrown up by a car? Couldn't the chip have been caused by other gravel?

FBI and Secret Service agents may have the answers. But they haven't revealed what they learned during their intensive investigation of the murder of President Kennedy.

Exhibit D Tague Affidavit C.A. 75-226

1

DL 100-10461
WFG/ds

K.P.

Following the re-enactment of the assassination of President JOHN FITZGERALD KENNEDY at Dallas, Texas, on May 24, 1964, considerable publicity was given to the effect that one of the three bullets fired at the time of the assassination went wild.

On June 5, 1964, there appeared an article in the "Dallas Times Herald" newspaper by reporter JAMES C. LEERER alleging that a Dallas auto salesman had stated one of the three bullets fired during the assassination went wild, crashed into a curb and apparently struck him.

On June 5, 1964, JAMES C. LEHRER, reporter, "Dallas Times Herald," advised SA ALFRED C. ELLINGTON that he had interviewed one JIM TAGUE, aged 27, used car salesman, employed by the Cedar Springs Dodge Automobile Agency, Dallas, Texas, and that a story regarding this interview would appear in the "Dallas Times Herald" on June 5, 1964.

Mr. LEERER stated that he had made an appointment with TAGUE prior to the interview and, upon his arrival at TAGUE's place of employment and prior to the beginning of the interview, TAGUE inquired of him, "What's in this for me?" Additional conversation with TAGUE disclosed that if his story were worth any money he, TAGUE, desired to receive the money. Mr. LEHRER advised that he told TAGUE he would not know whether his story was worth any money until he "had heard the story."

At the conclusion of his interview with TAGUE, Mr. LEHRER stated he informed TAGUE that his story was "interesting", but was not considered startling and was not believed to be worth any money to anyone.

Mr. LEHRER advised that as he was leaving following the interview, TAGUE requested LEERER to view three minutes of motion picture film which TAGUE had taken at the Indianapolis 500-mile race depicting the crash and resulting fire which

32 CR 1245

Tague Affidavit EXHIBIT "E" C.A. 75-226

THE DALLAS TIMES HERALD Friday, June 5, 1964

WITNESS OFFERS JFK SHOTS THEORY

By Jim Lehrer
Staff Writer

A Dallas auto salesman has memories of a bloody cheek to support the theory that one of the three bullets fired into the Nov. 22 presidential motorcade went astray.

A bullet crashed into a curb some 10 feet in front on him and grazed his face.

"What bothers me is why nobody has taken an interest in my story before," said the 27-year-old man, who asked that his name not be used.

In an exclusive Times Herald interview, he said he was standing by the concrete abutment on the east side of the Triple Underpass watching the motorcade turn at Elm and Houston and proceed toward the underpass.

"There was that first shot, then the second and the third. Some time, I think it was the second shot, a bullet--I'm sure it was a bullet--hit the curb in front of me and I felt a sting on my cheek."

In the confusion that followed, he thought no more about it until a policeman pointed out that there was blood on the right side of his face.

"We went back to where I was standing and we saw the creased mark--obviously fresh--on the curb," he said. "Apparently what hit me was the bullet richocheting off the curb, or possibly even a part of the concrete--though I doubt it."

He pinpointed his position as being about in a direct line from the Texas School Book Depository Building on a downward angle in front of the Kennedy car.

His theory is that a bullet fired from the sixth floor of the depository building would have hit the curb in front of him if it had missed the

Exhibit F Tague Affidavit

C.A. 75-226
Other Persons and Organizations Involved or Interviewed

Tague, Jim
Rackley, Virgie

AS:mln

MEMORANDUM

(1)

June 11, 1964

TO: Mr. J. Lee Rankin

FROM: Arlen Specter

If additional depositions are taken in Dallas, I suggest that Jim Tague, 2424 Inwood, Apartment 253, and Virgie Rackley, 405 Wood Street be deposed to determine the knowledge of each on where the missing bullet struck. These two witnesses were mentioned in the early FBI reports, but they have never been deposed.

Exhibit H Tague Affidavit C. A. 75-228 Pltf's 5

PLEASE ADDRESS ALL MAIL TO
UNITED STATES ATTORNEY
P. O. BOX 198

United States Department of Justice

Tague, Jim

UNITED STATES ATTORNEY
NORTHERN DISTRICT OF TEXAS
DALLAS, TEXAS 75221

- AIRMAIL -

July 15, 1964

Mr. Howard Willens
President's Commission on the
Assassination of President Kennedy
200 Maryland Avenue N.E.
Washington, D. C. 20002

Dear Howard:

This will confirm our telephone conversation to the effect that the depositions set for tomorrow will be postponed until Wednesday, July 22, 1964.

The tentative schedule looks like this:

11:45 Mrs. Donald Sam Baker
12:30 Mr. James W. Altgens
1:30 Mr. Abraham Zapruder
2:15 Mr. Philip L. Willis
3:00 Mr. Warren Reynolds

Mr. Jim Tague advises that he thinks he will be out of town but if he is in Dallas he will call the office and arrange to come in.

Sincerely yours

Barefoot Sanders
United States Attorney

Martha Joe Stroud

Martha Joe Stroud, Assistant
United States Attorney

you were hit. We go east along --

MR. TEAGUE: Right here is the curb.

MR. LIEBELER: There is a curb that runs along --

MR. TEAGUE: About 12 to 15 feet right on the top of round of the curb, was the mark that very definitely was fresh, and I would say it was a mark of a bullet.

MR. LIEBELER: ~~Let's put a number eight there where you saw this mark, approximately~~. You say it is about 15 or 20 feet east of where you were standing?

MR. TEAGUE: No, about 12 to 15 feet.

MR. LIEBELER: East of where you were standing?

MR. TEAGUE: Right.

MR. LIEBELER: At point six?

MR. TEAGUE: Right.

MR. LIEBELER: So we have the point fixed there, and we can just estimate 12 to 15 feet east on Main Street, is that right?

MR. TEAGUE: That's correct.

MR. LIEBELER: That would have been on the south curb of Main Street, is that right?

MR. TEAGUE: It would have been on the south curb.

MR. LIEBELER: About 12 to 15 feet east of the point number six on Commission Exhibit No. 354.

Now you yourself, as I understand it, did not see the President hit?

you, did you see any evidence of anybody having fired from the area on the railroad tracks above the Triple Underpass?

MR. TEAGUE: None.

MR. LIEBELER: Do you t hat it is consistent with what you heard and saw that day, that the shots could have come from the sixth floor of the Texas School Book Depository

MR. TEAGUE: Yes.

MR. LIEBELER: There was in fact a considerable echo in that area?

MR. TEAGUE: There was no echo from where I stood. I was asked this question before, and there was no echo.

It was just a loud, oh, not a cannon, but definitely louder and more solid than a rifle shot.

MR. LIEBELER: So you, being in a place where there was no echo, you were able to recognize how many shots there were quite clearly?

MR. TEAGUE: I believe so.

MR. LIEBELER: And you say you heard three shots?

MR. TEAGUE: That is right.

MR. LIEBELER: There has been considerable testimony from people who were standing up near the corner of Elm Street and Houston that it was hard to tell, but of course, you were standing completely across the plaza?

MR. TEAGUE: I can't recall any echo, not at all.

MR. LIEBELER: Do you remember seeing anything else or observing anything else that day that you think would

Exhibit K Tague Affidavit C.A. 75-226

notice the time on the Hertz clock. It was 12:29.

MR. LIEBELER: That was about the time that you felt yourself struck?

MR. TEAGUE: I just glanced. I mean I just stopped, got out of my car, and here came the motorcade. I just happened upon the scene.

MR. LIEBELER: Now I understand that you went back there subsequently and took some pictures of the area, isn't that right?

MR. TEAGUE: Pardon?

MR. LIEBELER: I understand that you went back subsequently and took some pictures of the area.

MR. TEAGUE: Yes, about a month ago.

MR. LIEBELER: With a motion picture camera?

MR. TEAGUE: Yes. I didn't know anybody knew about that.

MR. LIEBELER: I show you Baker Exhibit No. 1, and ask you if you took that picture.

MR. TEAGUE: No, not to my knowledge.

MR. LIEBELER: Now in point of fact, that picture was taken by another individual with a motion picture camera, and the picture is not quite as striking as I thought. I confused the picture taken by somebody else with the picture I thought you had taken.

You yourself did take pictures of the area about a month ago?

Exhibit C Tague Affidavit C.A. 75-226

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
National Archives and Records Service
Washington, DC 20408

February 3, 1977

Mr. Harold Weisberg
Route 12
Frederick, MD 21701

Dear Mr. Weisberg:

This is in reply to your letter of January 18, 1977.

Enclosed are a copy of our letter of January 17, 1977, to you and copies of the Warren Commission file relating to James Tague. As you will note, our letter of January 17 does not contain a promise to prepare and furnish you lists of records that were withheld from you. It does state that copies of records relating to the material we have denied to you since the 1970 review will be furnished to you. These records consist of our correspondence with you and your deposit account records.

Copies of all records on the lists of records made available in the calendar years 1974 and 1975 have been furnished to you.

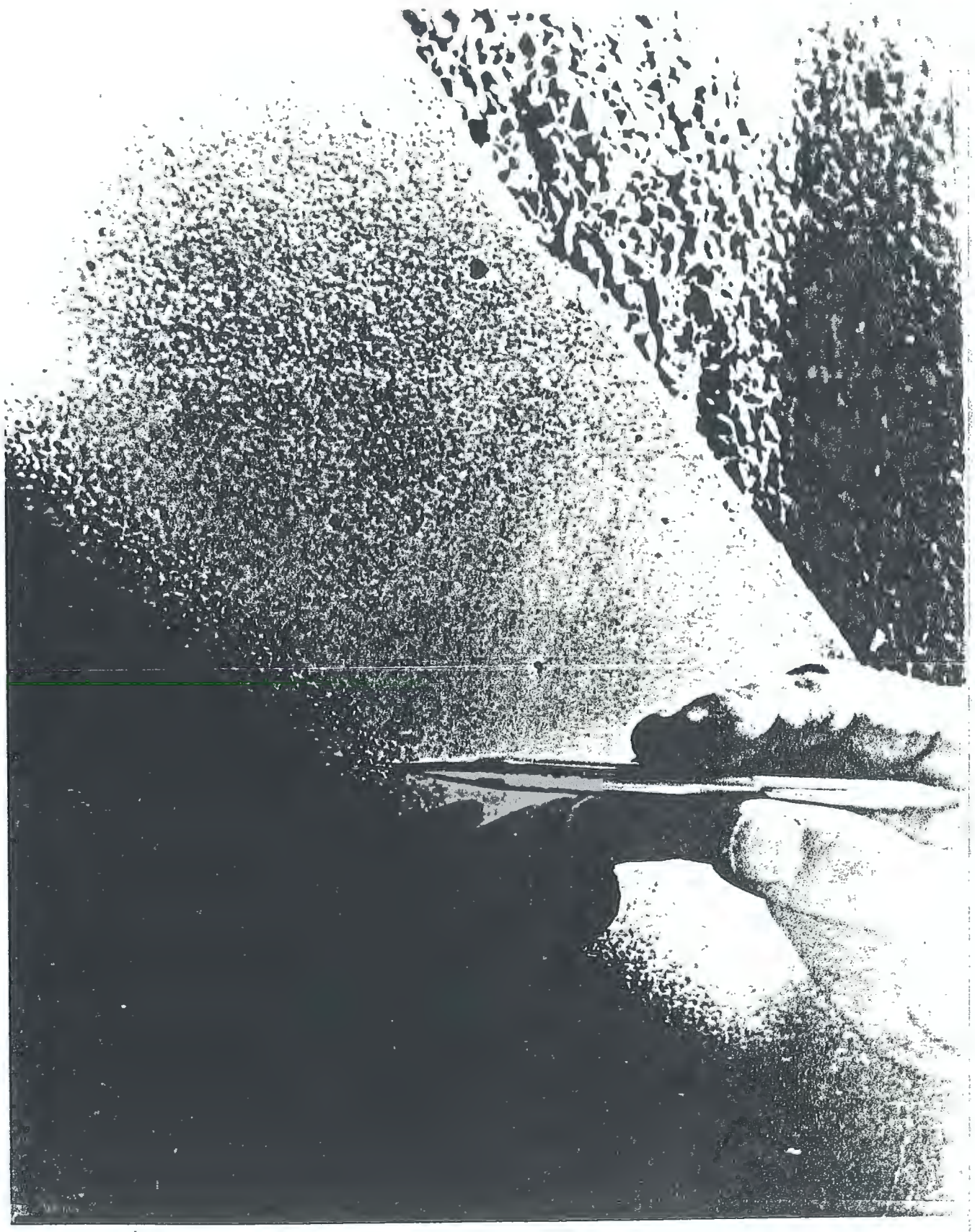
Sincerely,

Jane F. Smith

(MISS) JANE F. SMITH
Director
Civil Archives Division

Enclosures

ADDENDUM 3



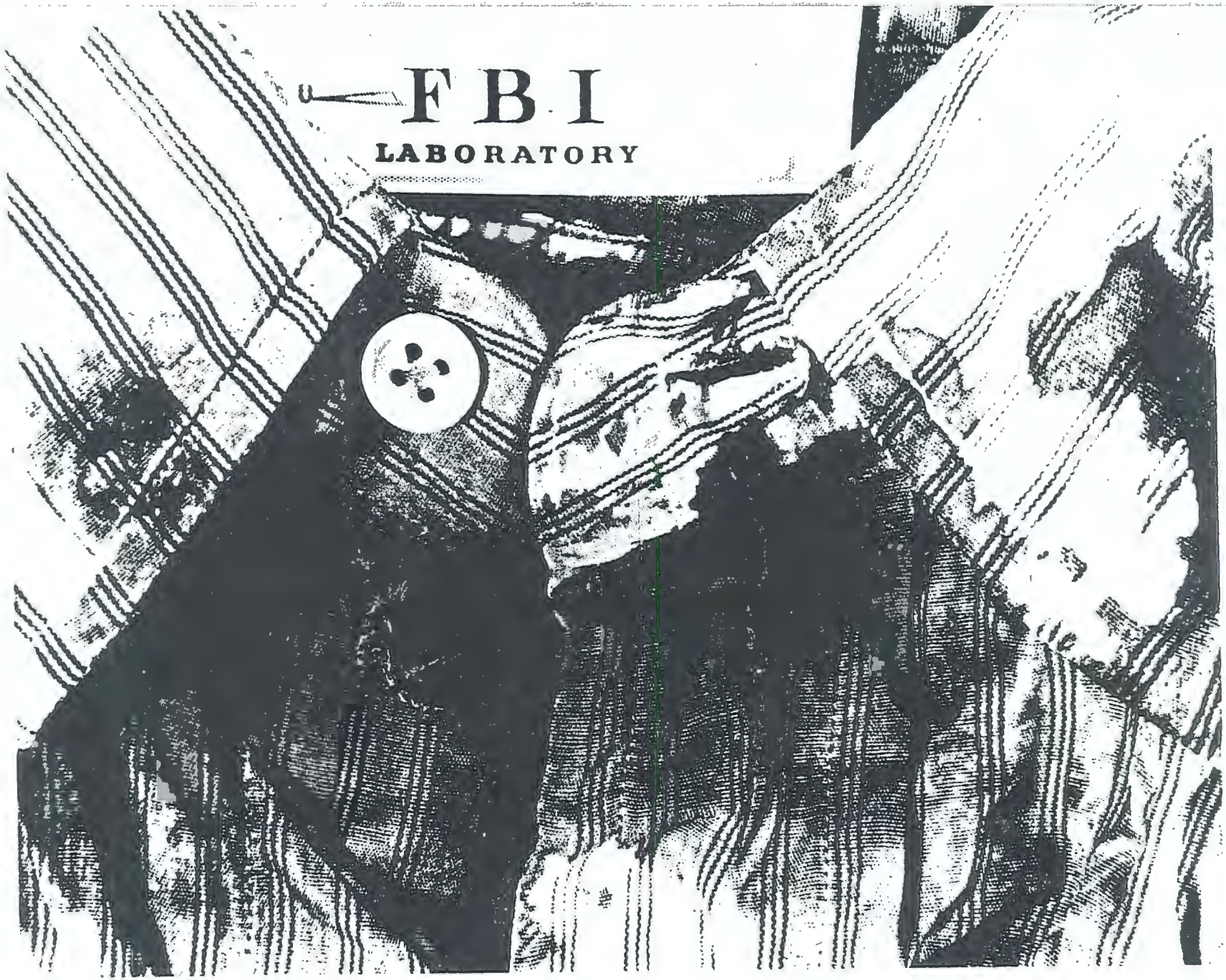
ADDENDUM 4

— Shaneyfelt Exhibit No. 29 —

ADDENDUM 5

1 2 3 4 5 6
8 9 10 11 12
Shaneyfelt Exhibit No. 34

ADDENDUM 6


FBI
LABORATORY

ADDENDUM 7

Attachment 3

Case No. 82-1072

United States Department of Justice

OFFICE OF THE ASSOCIATE ATTORNEY GENERAL

WASHINGTON, D.C. 20530

MEMORANDUM

March 27, 1980

TO: Robert L. Saloschin, Director
Office of Information Law and Policy

FROM: Quinlan J. Shea, Jr., Director
Office of Privacy and Information Appeals

SUBJECT: Freedom of Information Requests of Mr. Harold Weisberg

Reference is made to Mr. Flanders' memorandum to you dated March 4, subject as above.

I have no strong objection to placing this subject on the agenda of the Freedom of Information Committee, although I see no real need to do so. I disagree with many of the assertions in Mr. Flanders' memorandum. I do not agree that the Bureau has searched adequately for "King" records within the scope of Mr. Weisberg's numerous requests. In fact, I am not sure that the Bureau has ever conducted a "search" at all, in the sense I (and, I believe, the FOIA) use that word. It is confusing two totally different matters -- the scope of his requests administratively and the scope of a single lawsuit which we claim is considerably narrower than his administrative requests. Not really touched on in Mr. Flanders' memorandum, but very much involved in this matter, is the issue of what are "duplicate" documents for purposes of the Freedom of Information Act. The Bureau has rejected -- still informally, but very emphatically -- the position I espouse (and with which you agreed in your informal comments on my earlier memorandum to you). Lastly, but very important, is the matter of the scope of the fee waiver granted to Mr. Weisberg. In my view (and as intended by me at the time it was granted), the waiver extends to all records about the King assassination, about the Bureau's investigation of the King assassination (not at all the same thing), about the "security investigation" on Dr. King, and about the

Bureau's dealings with and attitudes towards its "friends" and its "critics" as they relate to the King case. The key point is that it extends to records by virtue of their subjects and contents, to the extent they can be located with a reasonable effort -- and is not determined by where and how the Bureau has filed the records. Although the Bureau has departed from its initial position in both the King and Kennedy cases (that the only relevant records are those filed by the FBI in the main files on those cases and/or the very principal "players"), it has done so very reluctantly and to a very limited, factual extent. I am personally convinced that there are numerous additional records that are factually, logically and historically relevant to the King and Kennedy cases which have not yet been located and processed -- largely because the Bureau has "declined" to search for them.

It is perhaps unfortunate that Mr. Weisberg is the principal requester for King and Kennedy records. He has heaped so much vilification on the FBI and the Civil Division -- a considerable part of which has been inaccurate and some of which has been unfair -- that the processing of his efforts to obtain these records has almost become an "us" against "him" exercise. My view has always been that the two cases are too important to the recent history of this country for that attitude to have any permissible operation.

The problem I have is that, although I know that what the Bureau wants the Committee to approve would contradict or be inconsistent with promises made to Mr. Weisberg by Bureau and Department representatives, and to representations made in court, and to testimony before the Abourezk Subcommittee, I do not have the time to carry out the extensive research that would be required for me adequately to represent Mr. Weisberg's interests before the Committee, in an effort to avoid the very real blot on the Department's escutcheon which would result from the approval of the Bureau's position. Accordingly, if this matter is to be placed on the Committee's agenda, I strongly recommend that Mr. Weisberg and his lawyer, Jim Lesar, be invited to attend and participate in the discussions.

cc: Vincent Garvey, Esq.
Civil Division

Inspector Flanders
Federal Bureau of Investigation