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

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Concise Statement of Issues and Their Importance

This case should be reheard en banc because (1) the result reached by the panel conflicts with several major Freedom of Information Act ("FOIA") cases in this Circuit; (2) the panel misconstrued pertinent facts, overlooked relevant facts, and drew wrong inferences from facts; and (3) misunderstood the facts regarding an important and novel issue raised by appellant, viz., whether an agency may be required to restore information which is allegedly lost, missing or destroyed.

The decision is in conflict with prior decisions of this Court, notably Weisberg v. United States Dept. of Justice, 627 F. 2d 365 (D.C.Cir. 1980)("Weisberg III", in that instead of viewing all inferences to be drawn from the underlying facts in Weisberg's favor, as is required on summary judgment, it invariably views them in the light most favorable to the party moving for summary judg-

ment. The panel discussion is also inconsistent with this Court's decision in McGehee v. C.I.A., 697 F.2d 1095, 1113 (D.C.Cir. 1983), in that it upholds summary judgment on the basis of untrustworthy testimony by a witness whose credibility is in dispute in a case in which there is both evidence of bad faith on the part of the agency and evidence contradicting claims of a thorough search. Lastly, contrary to McGehee, supra, Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir. 1973) and the provisions of the Act, the panel has relieved the agency of the burden of demonstrating an adequate search and placed upon the requester the burden of establishing by affirmative evidence its inadequacy.

These issues are important because of their broad implications for all FOIA requesters. In addition, this case has special significance because appellants seeks data vital to informed study and discussion of the assassination of an american president and the integrity and performance of the agency principally responsible for investigating it. As this Court noted in Weisberg v. U.S. Department of Justice, 543 F.2d 308, 311 (D.C.Cir. 1976)("Weisberg II"), the data Weisberg seeks, if it exists, is "of interest to the nation."[1/] This is perhaps truer now than then, since in the interim

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1/ In Weisberg II, this Court directed Weisberg to take the testimony of those who actually conducted the scientific tests. This imposed a very considerable burden on Weisberg. He had then published (in October, 1975) his lask book on the Kennedy assassination, Post Mortem, the book for which he sought this information. At the outset of this lawsuit he had no regular income, and during it it has not exceeded $300 a month. In addition, in October, 1975, he was hospitalized with acute, permanent and irremedial throbophlebitis in both legs and thighs. Thereafter, he was placed on an anticoagulant which brings the danger of (and has on occasion resulted in) hemorrhaging any cutting, falling or bruising. He was instructed

(footnote continued)

a congressional committee has faulted the performance of the Federal Bureau of Investigation and concluded that there probably was a conspiracy to assassinate the President. Moreover, the question of whether an agency can be required to restore information said to have been lost or destroyed is a question of exceptional importance under FOIA because not to so hold is to invite agencies to resort to such claims and practices as a means of defeating public access to potentially embarrassing information.

(footnote continued)

not to stand still, to sit only with his legs elevated, and not to sit for more than 20 minutes at a time without getting up and walking around. (These and other, more serious physical limitations and health problems have been set forth in Weisberg's February 20, 1983 affidavit filed in Civil Action No. 78-0322/0420 (consolidated), which is an addendum to this petion.

Despite serious financial and physical limitations, Weisberg undertook to carry out the instructions given by the Weisberg II court as best he could. He did so at great personal sacrifice. He was not carrying out a "private inquiry," as the panel asserts, but conducting an inquiry into matters "of interest to the nation" as directed by this Court. In view of this it is ironic, to say the least, that this Court should now deprecate his efforts and and attempt at every turn to cast blame on him. In light of Weisberg's physical afflictions, his lack of financial resources, and the complicating factor of his physical separation by more than 50 miles from his attorney, the repeated attempts by the panel to blame Weisberg for delays in this litigation are unwarranted, particularly when there were substantial delays caused by governmental obstructionism (see Reply Brief at 15-19) and also in connection with all decisions of this Court except the Weisberg II opinion, which was handed down speedily.

Because of his age, health and lack of financial resources, Weisberg will no longer be able to continue this litigation unassisted should this Court vacate the panel decision and remand the case to the district court.

I. KILTY'S TESTIMONY CANNOT SUPPORT SUMMARY JUDGMENT

In crediting the testimony of Special Agent John W. Kilty, the panel views all inferences to be drawn from the facts in his favor. It credits his testimony that he went through "cart after cart" of Central Records files on the Kennedy assassination. Slip. op. at 23. Yet he produced no search slips reflecting this in response to a subpoena duces tecum and his counsel said there were none. [App. 12] Additionally, if he searched "cart after cart," then he should have come across the misfiled curbstone record, just as Weisberg did.

In his May 13, 1975 affidavit, Kilty said that neutron activation analysis ("NAA") and emission spectroscopy "were used" to determine the elemental composition of certain specimens, including Q15, the metallic smears on the limousine windshield. In his June 23, 1975 affidavit, he said NAA was not used in examining Q15. The panel asserts that it can derive no significance from the fact that Kilty was initially mistaken, "especially when the mistake overstated the records the FBI would be bound to provide." Slip op. at 25. This explanation is based on an erroneous conclusion which the panel repeats on a number of occasions. It ignores Weisberg's June 2, 1975 affidavit entirely. In that affidavit Weisberg contradicted assertions made by Kilty regarding the nature of Weisberg's request as amended at the March 1t, 1975 meeting. After recounting that the FBI had offered to provide him with "copies of unidentified batches of 'raw data' which, however, the FBI would not permit me

to examine," Weisberg states that to avoid squabbling over whether he had a right to select what he wanted copied:

> ... I asked for everything they had except: 1) the spectrographic plates, 2) nitrate tests, and 3) materials related to the slaying of Police Office J.D. Tippit. The FBI gave me the Tippit materials anyway and charged me for them. (Emphasis added)

June 2, 1975 Weisberg Affidavit, ¶24. [R. 12] Thus, Kilty's May 1975 affidavit did not "overstate" what the FBI was bound to provide. If anything, it confirms that Kilty knew Weisberg wanted everything except what he had expressly excluded, including the computer printouts Kilty says he showed Weisberg.[2/]

At his deposition Kilty stated that he didn't know whether he searched any records before he made his initial statement that NAA was used, nor did he know how he could have made the statement without checking records. [App. 78-80] He then conceded, contrary to the statement in his second, "corrected" affidavit, that NAA "was used" on Q15. [App. 81]

Weisberg's interrogatory 19 asked whether "neutron activation testing" [was] done" on any items other than a specified set of specimens that did not include Q3 and Q15.[3/] Kilty answered, "No."

2/ In its June 27, 1977 motion for summary judgment, at p. 5, the FBI represented to the court that "all the raw data of neutron activation analysis has been furnished...." It did not assert, "all raw data of neutron activation analysis except the computer printouts has been furnished."

3/ The panel incorrectly phrases the interrogatory so it reads as if not response regarding Q3 and Q15 was required.

Because these specimens were irradiate, Weisberg believes this response was untruthful. The panel believes otherwise because: 1) "[i]t is hard to imagine why the agency would gerrymander a definition to conceal the existence of the printouts for Q3 and Q15, when it offered those printouts to Weisberg at the very outset of this litigation," 2) the salient aspect in any "testing" is the analysis, and if this cannot take place the specimen has not been "tested," and 3) Weisberg defined his initial request for "tests" to include only the examiners' analysis, and not the raw data.

The first reason assumes that Weisberg was shown Q3 and Q15 printouts. Since the FBI didn't let Weisberg examine the materials to select what he wanted, this cannot be established. The only support for the second reason is Kilty himself, and as he testified he didn't know whether an analysis could be made on Q15 [App. 97], it is not clear how he could assert that it was not "tested" even by his definition. The third reason cuts in the opposite direction intended by the panel; the fact that Weisberg defined "tests" to exclude raw data merely indicates that he did not want the raw data if the analyses were available and therefore took pains to exclude what would otherwise be included within the term.

In trying to make Kilty's responses look natural and forthright, the panel ignores the import of his answer to interrogatory 21, which inquired, inter alia, why Q3 was not subjected to neutron activation testing. Kilty's answer was not that it had been irradiated but could not be analyzed, but that "[e]mission spectrographic analysis was the method of choice for analysis of bullet jacket material in 1963." [App. 1995]

In short, Kilty's testimony is unreliable and cannot support summary judgment. Moreover, the panel did not construe all possible inferences, including those regarding Kilty's credibility, in Weisberg's favor.

II. TESTS SHOULD BE PERFORMED TO RESTORE MISSING INFORMATION

The panel asserts that nothing suggests that results from the tests Weisberg seeks to have the agency perform, if they ever existed, were in the FBI's possession at the time of the request. The curbstone spectro plate and notes had to have existed, and Agent Frazier testified that he had Stombaugh perform the shirt collar test. The burden to show that records are not in an agency's possession should be on the agency which generated the records. The FBI does keep careful records of the transfer and destruction of its records. In the case of historical records such as these, the presumption of regularity is even stronger than normally.

The panel asserts that nothing in the record suggests that the tests Weisberg seeks on the curbstone were ever conducted. Slip op. at 37. Spectrographic analysis admittedly was, and it should provide the same information originally obtained. If that test is again conducted and is or is not consistent with or identical to some patching material or bullet lead, Weisberg will have the information the FBI had.[4/]

4/ All spectrographic analysis of the bullet core materials involved in the assassination shows nine elements, the only information on the curbstone spectro provided Weisberg refers to only two elements.

X-ray fluorescence was suggested because of Kilty's testimony that it would be the most appropriate method today to establish whether the curbstone was patched. Weisberg thinks a spectrographic analysis would also do the same by indicating that the chemical composition was that of a patching material, not bullet lead. This belief is based, in part, on Weisberg's personal examination of the curbstone and the fact that the "patch" differs visually and tactily from concrete and there is no nick or chip where there once was. July 28, 1977 Weisberg Affidavit, ¶185. [R. 47] Photographs taken on November 22, 1963 and those of the curbstone in its present state show an unmistakable change.[5/]

Regarding the Stombaugh report, the panel says that Weisberg has never taken Stombaugh's testimony and thus never run the risk of establishing for certain that the document does not exist. This shifts the burden from the FBI to Weisberg in contradiction of decisions of this Court and the FOIA. In this regard, Kilty testified that he contacted neither Frazier nor Stombaugh to determine whether if the report he located is the one which would have resulted from the test Frazier says he instructed Stombaugh to perform. [App. 131-134] Contrary to the panel's assertion, the Frazier report does not have the same content as that which would have resulted from the examination Frazier ordered Stombaugh to conduct. It does not state that the two slits in the collarband coincide. Thus, Weisberg does not have the information he desires, the results of an official test to make this determination.

5/ Glossies of these photographs are contained in the addendum to three copies of appellant's Reply Brief. Visual inspection of these photos helps make appellant's point clear.

III. THE RECORD DOES CONTAIN EVIDENCE OF BAD FAITH IN THIS CASE

The panel does not adequately deal with the evidence of bad faith conduct by the FBI in handling Weisberg's requests both in other cases and in this case. It does not discuss why, when all the documents possibly responsive to his request had been identified long before Weisberg filed suit, no attempt was made to release such records to him or determine which ones he wanted until after suit was filed. Nor does it address why the FBI refused to examine the "raw data" at the March 15, 1975 conference, or why even after that conference the FBI continued to dole out documents admittedly requested by Weisberg on a bit-by-bit, protest-by-protest basis. (See generally, Appellant's Reply Brief at 15-21. Nor does it concern itself with why the FBI deleted Lab file numbers on the documents when it admittedly had no legal basis for so doing.

It should also be pointed out that the panel decision badly confuses the Shea Memorandum and the Order by Judge Pratt directing the FBI to provide Weisberg with some 5,000 pages of documents initially sought on discovery free of charge. The Shea fee waiver dealt with King and Kennedy assassination materials, not the documents Weisberg had requested on discovery in this case. Virtually all of those documents had nothing whatsoever to do with the Kennedy assassination. They dealt almost exclusively with the FBI's record destruction practices and were relevant to Weisberg's position that the FBI's policies and practices precluded the destruction of records of the kind the FBI formerly claimed had been destroyed, and that in any event if there had been destruction, there would be a record of it. The same records had been provided free of charge to

another litigator in a non-FOIA case as part of the FBI's normal discovery practices, and the District Court found that the FBI's failure to give them to Weisberg without charge was a violation of that policy. This, of course, is evidence of the very bad faith treatment of him by the FBI which he has been complaining about.

CONCLUSION

For the foregoing reasons, the panel decision should be vacated and the case reheard en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of May, 1983, mailed a copy of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc to Mr. William G. Cole, Civil Division, Room 3338 U.S. Department of Justice, Washington, D.C. 20530.

James H. Lesar

JAMES H. LESAR

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION et al., Defendants.	C.A. Nos. 78-322 and 78-420 (Consolidated)

AFFIDAVIT

My name is Harold Weisberg. I am the plaintiff in C.A. 78-0322 / 0420 combined. In prior affidavits in this case I have attested to my professional and FOIA experiences and expertise and to my medical and physical limitations. In this affidavit I update and expand upon my medical and physical limitations to indicate that the defendant's discovery demands upon me are at the least extraordinarily burdensome. Full compliance with them is a practical impossibility because at the very least, it would require a year of my time and that when I am nearing my 70th birthday. (I will be 70 on April 8th of this year .)

1. In October 1975 I was hospitalized at George Washington University Hospital for acute thrombophlebitis in both legs and thighs. My doctors then informed me that the damage to the veins in both legs and both thighs was permanent and irremedial. The damage to the left leg and thigh w as more severe. All the main

veins on my left side were blocked permanently. I required a heavy dosage of anticoagulent (15 mg. coumadin daily). Because of the danger of hemorrhaging, this must be monitored carefully, with regular laboratory tests of the prothrombin time or the time it takes the blood to clot. At the end of six months my doctors of that period informed me that I had been on this dangerous drug as long as was considered safe. I also was instructed not to stand still, to sit only with my legs elevated, and not to sit for more than 20 minutes at a time without getting up and walking around.

2. From then on, and this means forever, I am not able to type in the usual manner. I also am not able to write or correct my typing by sitting with my legs under my desk, except for brief periods. I have had to have special, heavily-padded footrests made for use at my desk and wherever I sit at home. I have had to design a special typewriter table, a pedestal rather than a four-legged table, and I have to type sideways. This is awkward and makes for typing errors that require correction. In making corrections I use a clipboard rather than my desk - I hold the clipboard with (my left) hand and write with the right hand. This, too, is awkward. It also makes an almost illegible handwriting more difficult to read when my corrected drafts are retyped.

3. In 1977 arterial blockages were detected by my family doctor. He sent me to a well-known surgeon at Georgetown University Hospital, who made additional tests and identified some of these blockages. My family doctor also told me that I have atherosclorsis, that the circulation to my head is impaired and that this could not be corrected surgically. At Georgetown it was determined that my arteries are partially blocked under the shoulder-blades. Because of these circulatory impairments I may move my head only slowly. I may lie down or get up only in stages and at each stage not move my head for about 20 seconds. If I

do, circulation is impaired and I get extremely dizzy. If I rise from a sitting position without exercising this kind of care, I can fall from dizziness.

4. Since August 1, 1977 this is more serious because since then, despite the danger of hemorrhaging, I have required a higher level of anticoagulent. I have been given the strictest cautions against falling, cutting or bruising myself, and I have been told that a relatively minor accident can be fatal.

5. I can and I have passed out following what had been only nominal physical activity for me. This does not happen at the time of the exertion. It comes some time after it, when the circulation of blood cannot meet the demands of my body. Because loss of consciousness can lead to falling and that can cause me to bleed to death, I must be careful.

6. The FBI and the Civil Division of the Department of Justice have been well aware of my physical and medical limitations since the summer of 1977. That summer, when the FBI wanted to confer with me following a calendar call in C.A. 75-1996, my ability to walk was so limited that SA . John Hartingh, FOIA supervisor, arranged to park my counsel's car inside the J. Edgar Hoover FBI Building. In the same litigation the then head of the Civil Division's FOIA litigation section testified to their knowledge of my medical and physical limitations.

7. By August 1, 1977, I was not able to walk from my home to the end of my lane and back up the two steps into my home without getting dizzy and weak. (The lane is about 400 feet long.) After medication with the anticoagulent my family doctor prescribed walking therapy, carefully monitored, under which I was able to increase my walking capability slowly but dramatically; but by 1980 this capability had decreased and I was able to walk only slowly. My family doctor, finding no pulse at all in my left foot, sent me back to the Georgetown surgeon. He located

two new arterial blockages in the left thigh with non-invasive tests and then, with an invasive test that required brief hospitalization, decided they were correctable by surgery. Shortly after Labor Day of that year, he performed a successful arterial bypass from my groin to my left knee, by implanting a plastic artery between those points.

8. The first post-surgical complication was an additional venous thrombosis. Then, the day I was discharged from the hospital, blood clots broke loose. By the time I could get an ambulance and return to the hospital and emergency surgery was performed, there was additional and permanent damage. All of the clots could not be reached and only some could be removed. The result is additional and serious circulatory impairment on the left side. There also was serious muscle damage and destruction from oxygen starvation from the lack of blood.

9. From that time on my ability to walk has been seriously impaired and diminished, as are other physical activities. I cannot walk to my mailbox and back without pain from oxygen insufficiency in the leg and thigh muscles.

10. In April 1981 I began to feel ill at supper. The local doctor covering for my family doctor had me rushed back to Georgetown by ambulance. He told me that if I were to be treated locally at the very least I'd lose my left leg and thigh. The Georgetown surgeon and his staff performed emergency surgery from about 10 o'clock that night until 2 in the morning. There had been a total blockage on the left side and I was told that I was lucky to have survived it at all. That blockage was removed and the cause repaired, but there apparently was additional damage from additional oxygen starvation. My counsel, Mr. Lesar, probably knows more about what happened in and was diagnosed in the emergency room than I do because he was there, having been notified by my wife, but I was by then drifting in and out of consciousness and was not conscious most of the time. I know that the surgery

was so rushed that when I later came to, my undershorts were still around my ankles. The doctors and nurses did not take time to remove them.

11. During this hospitalization I was told by the chief of podiatry not even to try to trim my toenails myself and that I should be seen by a local foot specialist regularly. Since then I have been under the care of three doctors; my surgeon, who examines me every six weeks, my family doctor, who does not examine me regularly (although he has examined me as much as twice a week,last on February 2 and 5) and every four weeks by the local podiatrist (who is also a surgeon).

12. There has been muscle atrophy in the left foot and particularly the toes, in addition to the deformities from oxygen starvation. Following the most recent of what is known as a Doppler examination about two months ago the podiatrist informed me that, while the course of walking therapy I have been on has been beneficial, there is not enough circulation in the left foot for surgery to be considered. The deformities, which cause serious problems, thus are not correctable.

13. For about two years I have been under the strictest medical injunction against any breaking of the skin on the left foot in any way. As recently as February 2 of this year my family doctor warned me that if the skin breaks at the heel, which has been irritated and inflamed for some months, the consequences can be serious and that until it heals, something I understand is not certain, I'll be flat on my back, with my feet elevated. This irritation to the heel has required that I keep it protected with large sterile surgical pads for about six months. Because I am required to keep my feet elevated when I'm not walking this has become an additional and serious problem. Resting that heel on four inches of foam is not enough to eliminate the pain and the irritation the consequences of which can be so serious for me. The need to protect this heel is so urgent I have been directed to sleep with it in a lamb's wool boot.

14. An additional consequence of the impaired circulation is a fluid-retention problem in the left foot, leg and thigh, which are always swollen. This is sometimes painful, usually restricts my ability to move even more and requires a diuretic three times a day.

15. My family doctor, with the hearty approval of my other doctors, has me go to a particular local mall every morning because there I can sit about every hundred feet and when I feel a particular kind of pain, referred to as a claudication pain, I am to sit as soon as possible and keep the leg elevated until what circulation I still have is restored. As I was building up my walking capability after the last surgery, this therapy was gradually extended until I was spending four and a half hours a day at it. This has now been reduced to three hours. It takes me that long to walk three miles, which is what my doctors want. This therapy consumes every morning of my time six days a week. I can usually walk about a sixth of a mile before I am required to stop and elevate the left leg. As the morning therapy progresses, I am sometimes able to walk a little more without stopping and resting but on January 26 of this year the surgeon and a week later my family doctor directed me not to press to lengthen the short distance I am able to walk without having to rest and raise the leg. In addition, my family doctor told me not to stand, even briefly, to speak to friends when I meet them, particularly at the mall, but to ask them to accompany me to where I can sit and hold the leg up while we talk.

16. If I stand still, even momentarily, my legs and thighs, particularly the left, begin to swell immediately from the blood that gets down and cannot get back up to the heart. I have to sit to wash, shave, brush my teeth and for other functions. (If I sit without the leg and foot elevated, the same thing happens, but not as rapidly.)

17. Foot, leg and thigh exercises have been prescribed and these take time. My

wife does not drive, so I also drive her to her medical appointments . Usually I have two weekly medical interruptions in what time remains for work. In one recent week I had six such medical interruptions. The weekly testing of the clotting rate of my blood requires, in all, almost two hours because I must await the results before I can safely take the anticoagulent that day and this, too, reduces the time I have for work. If the prothombin time is not within a certain range, I must consult my family doctor before taking the medication, and that takes more time.

18. My family doctor and the surgeon want my blood to take about twice its normal rate to clot, but that makes me prone to hemorrhaging. If the back of my hand brushes a chair when I walk past, or if it comes into contact with a door when I open it, I usually hemorrhage at the point of contact. I have bled internally from this medication and I have had an abdominal hemorrhage that swelled to the size of a large goose egg. This indicates the care I must exercise in every action, no matter how minor.

19. From the time of the first surgery I have not been able to squat to use the lower drawers of the file cabinets. Even with a stool the lowest drawers present such problems for me that I have had to empty all the lowest drawers of the file cabinets in my office. I also have had to empty the four two-drawer file cabinets I had in my office for FOIA requests and appeals. The contents of those file drawers are now in regular file cabinets in my basement. I also keep all the records I receive under FOIA in my basement because I have no other place for them. In all I have about 60 file cabinets, all pretty well filled.

20. However, my use of stairs is limited. The day of the first scheduled calendar call in this case, long before the surgeries and their complications, the day Judge Oberdorfer rescued himself, when I tried to walk up two flights of stairs in the Department of Justice main building, going from Mr. Shea's office to that of

defendant's then counsel, Daniel Metcalfe, I almost passed out. Walking down stairs is more awkward and difficult for me, but I am not able to carry much up stairs, even for one flight, in part from physical limitations now and in part because I must use the handrail. This limits my access to my own files.

21. I am not able to stand at any cabinet except very briefly. I am not able to squat at them at all. I am not able to work at any file cabinet because I must keep my left leg, in particular, elevated. It is time-consuming to move chairs from cabinet to cabinet and it is a practical impossibility for me to keep a leg elevated while I work and search at any cabinet. In practice I am required to locate records in the basement, take them up to my office, use them there, then take them back to the basement and refile them. This is time-consuming, awkward, sometimes painful and not infrequently somewhat hazardous. There is a limit to the number of times I can safely use the stairs any one day.

22. Locating some of the records pertinent in this litigation requires the use of two indices which, necessarily, are in different locations. This is much more time-consuming for me than it is for others. If I identify a record by the Dallas index, I may find on going over that Section of Dallas records that it was withheld as "previously processed" in the FBIHQ general JFK assassination disclosures. This is true of most Dallas and New Orleans records. Then I must search the bulky cross-references provided in substitution for these withheld "previouly processed" records to identify the FBIHQ record said to duplicate it. Even then I may find that it was withheld under claim to exemption. For me this also is much more time-consuming than for others. No index was provided of New Orleans or FBIHQ records and I have no index to my own records, my affidavits and my appeals. Searching in all these records is enormously time- consuming.

23. My medical and physical limitations and injunctions are such that for years

I have not been able to go to a movie, a concert, a play or lecture. I have not been able to drive outside of Frederick safely since 1977. I am driven to see my surgeon in Washington, but that trip tires me and has since the first surgery. This weariness sometimes continues for a day or more. As a result I never go to Washington for any other purpose and I have not gone anyplace else outside of Frederick for any reason or purpose since then.

24. I have other medical problems and may face the need for other serious surgery, but only one of these other medical conditions causes any kind of significant problem in searching for and using records. I have, since birth, had impaired vision in both eyes. I have little use of my left eye. I also have cataracts on both eyes, but they are not yet ripe for surgery. They do, however, further impair my vision.

25. I have other medical needs that take additional time. Since my first thrombosis or for eight years I have had to wear venous or surgical supports around the clock. They completely encase my thighs, legs and feet. They create a dry-skin problem and that can lead to infection, which can be quite serious because of my impaired circulation. To combat this, my doctor has me air my thighs, feet and legs for about an hour a day. I also have to soak my feet. I am prohibited from using a towel between my left toes, so I must keep them spread until they are air dry, then apply a lotion and let it be absorbed by the skin before putting these supports on again. Even though I do all these things at the same time they require time I am not able to spend working.

26. All of these factors seriously impair and limit the efficiency with which I can work in the fraction of a day I can now devote to work. Merely having to stop work and get up and walk around every 20 minutes is in itself a serious interruption in concentration. When I get involved in work and forget to walk around, my circulation is further impaired and with it my efficiency in working is additionally impaired.

27. It is not possible for anyone else to respond to the defendant's discovery demands for me. I have no help and no one else has my knowledge.

28. At the age of 70 the time that remains for the work I have undertaken is not predictable and appears not to be great because of my age and impaired health. I have undertaken a very large study. I know of no other study of its magnitude. If the information I have obtained and of which I can make unique uses because of my knowledge and expertise is to made available to the people, which I understand to be a purpose of FOIA, then I must have time to write. I have little enough time for that now. As a practical matter this would be entirely eliminated for a long period of time, perhaps forever, if I were to be required to respond to the defendant's discovery demands that I believe to be entirely unnecessary if not also inappropriate. And as I have already attested, without denial, since 1967, this defendant has had the purpose stated in FBI records I obtained outside of this instant cause of "stopping" me and my writing.

29. While they have not known of my medical and physical limitations in the detail set forth in this affidavit, the FBI and the Department of Justice have been well aware of them and in more than adequate detail for more than five years. In addition, I have stated them repeatedly in affidavits.

30. Both therefore knew that these discovery demands would at the very least be extraordinarily burdensome for me. Both also knew that if I am required to do what is demanded it would effectively, to use the FBI's word, "stop" me and my writing for at the least a long period of time and perhaps forever.

31. Moreover, the FBI does not now require the information demanded of me and has not even claimed it does. Quite aside from the fact that it is no substitute for a search and the fact that most of it is in the records the defendant has provided to me, I have already provided the information pretendedly needed. I have provided it in detailed and documented appeals that take up about two file drawers

and in many detailed affidavits in this instant cause. I have not received a single letter from the FBI or the Department of Justice claiming that any of my appeals was not understood or did not provide adequate information and I have not been asked for any information in addition to what is in them and my affidavits. My appeals contain thousands of pages of attachments, almost entirely of the FBI's own records. I have taken a considerable amount of time to assist the appeals office and its head, Mr. Shea . As the FBI's own witness in C.A. 75-1996, he went out of his way to volunteer that my assistance was invaluable. I was always available to the FBI, if it had desired any additional information. It has neither phoned nor written me, as it has others and is required to do by its own regulations- if it had ever had any genuine question. On a number of occasions, even though it required a rental car and someone to drive it, I did go to meet with Mr. Shea and his staff. I took the additional time, particularly in the appeals, to provide detailed explanations. Not until now, when it provides a means for further stonewalling, avoidances of the required searches and running life's time clock on me, has the FB I even pretended to need any additional information. And even now the demand is not merely for any information on any point but for all information and all pertinent documents. Based on my own knowledge and experience, I state that there is not and cannot be any need for "all" the information and documents on which my knowledge and allegations are based. Moreover, when the information and extensive documentation I have already provided has been meaningless, I have no reason to believe that duplicating it again would serve any purpose at all except to prolong this case and further burden the Court, my counsel and me.

32. I illustrate this with an FBI record already in the case record. FBIHQ asked all field offices to provide it with a description of certain of their JFK investigation main files. (The New Orleans response is still withheld, I have

alleged this without response, and no further information is required of me for it to be searched for and located at both New Orleans and FBIHQ). The Dallas response refers to the two indices that were initially withheld, to the Marina Oswald electronic surveillance files also initially withheld, and to a secure storage area for films of various kinds, tapes and similar evidence. (The latter still has not been searched and again no further information is required of me for this search to be made.) These indices, films and tapes and the Marina Oswald surveillance records clearly are within my requests, yet the FBI, claiming full compliance, withheld them until Mr. Shea required their disclosure.

33. This pre-existing Dallas partial inventory reflects the FBI's intent not to search and not to comply with my requests. Particularly because in the JFK investigation New Orleans was virtually a second office of origin and because I have already identified withheld records pertinent to the Garrison portion of my request, there is a high probability that if this pertinent New Orleans inventory is provided it also will reflect the FBI's intent not to comply and not to make a good faith search.

34. A similar New Orleans illustration is the case of Ronnie Caire, about whom I had made a separate FOIA request in 1969. (This is one of the 25 very old requests the Department promised the Senate would be complied with - in 1976. They have not been complied with.) When that request was rejected on the claim that there were no Caire records and I complained that the response was untruthful, that caused an internal investigation. The internal investigation disclosed that there are Ronnie Caire records. No additional information was ever required of me - not then and not now- and because I provided all the information I have on appeal in this case there simply is no other information I can provide. In addition, the FBI did not need me to tell it that Caire is involved in its, the Warren Commission's

and the Secret Service's investigations.

35. Yet now, with regard to Caire (Interrogatory 21), the defendant responded that he is "indexed in Dallas 3x5 Special Index. These cards and the corresponding documents were process(sic) in response to plaintiff's FOIA request." Caire is of New Orleans, not Dallas, and the Dallas index, as the FBI knows, does not and cannot index the New Orleans records. Moreover, this special Dallas index is limited to the few main files from which FBIHQ provided records to the Warren Commission. My request, specifically, is not so limited. It is, specifically, for information not so filed and limited. No information from me can possibly be needed for the FBI to stop rewriting and wrongly limiting and deliberately misinterpreting my requests, or for it to end its evasiveness and non-responsiveness.

36. With regard to other matters, like those referred to as "critics" of the official investigations, the FBI now admits, in its response to Interrogatory, No. 23, that it "recognizes most of the names" of those I provided in an unsuccessful effort to compromise this case and end the litigation last year. Recognition of the names indicates that the FBI knows it has pertinent records still not searched for and processed. Moreover, as it has not denied, the FBI has and withheld similar lists of names compiled by the Department. I provided them with the ignored appeals.

37. I have been using indices for more than 50 years, all kinds of indices, and I have a good idea of how much time is required to use index cards. I am without any doubt at all that making the belated searches now would have required considerably less time and cost than trying to exercise entirely unnecessary discovery on me - which leaves the searches still un-made. However, if the FBI ever made a good faith search with due diligence, it could not continue to withhold the pertinent information it does have and is embarrassing to it; could not continue to "stop"

me and my writing by wasting as much as it can of what remains of my life and work; and could not continue to waste taxpayers' time and money in its relentless campaign to frustrate the Act and to have artificial statistics of its own creation to present to the Congress in its effort to negate the Act. In the course of all of this the FBI and the Department also burden and weary the courts, as I have observed (and some courts have complained) in all my cases.

38. It is not merely that the FBI and the Department know that these discovery demands are extraordinarily burdensome, particularly because of my age and impaired health. I know and I state that this discovery is entirely unnecessary. It is a simple and inexpensive matter for the FBI to have its clerks determine whether or not there is undisclosed information within my requests. Only if a genuine search fails to disclose the information I have stated exists might there be any need for any further information from me. Such searches have not been made. I therefore believe and state that the purpose of this effort to exercise discovery on me is to be burdensome to the Court, my counsel and me.

HAROLD WEISBERG

COUNTY OF FREDERICK, MARYLAND

Before me this 20th day of February 1983 Deponent Harold Weisberg has appeared and signed this affidavit, first having sworn that the statements made therein are true.

My commission expires July 1, 1986.

LILLIAN WEISBERG NOTARY PUBLIC FREDERICK CO., MD.

Lillian Weisberg
NOTARY PUBLIC IN AND FOR
FREDERICK COUNTY, MARYLAND