Bad faith

At several points the brief states that there has been no bad faith. Onpage 17 it quotes ~~itself~~ the defendant's Opposition of October 7, 1982 as "asserting that 'Mr. Weisberg's minimal success in this lasuit and the lack of evidence og Government bad faith/" prove that I am not entitled to any award.

With "minimal success"including obtaining what the FBI got away with withholding from the Department and the Congress and representing some 60,000 pages after intial totla denials and then after mootness was claimed, words have no meaning in this brief.

The representation then and esl elsewhere that there is "the lack of evidence of Government bad faith" is made in the litigation in which the court banished the FBI's FOIPA supervisor assigned to and fproviding affidavits in this case after he was proven to have sworn falsely and to have provided phoney documents as genuine. More on this follows.

It also is lleged that there was no "bad faith" in the processing of field office records that allegedly duplicate those disclosed in FBIHQ records.

What actually happened is that any record that originated in the field offices was assumed to have been disclosed at F in FBIHQ records, without checking to determine whether they even existed as FBIHQ, without checking to see if they held other information, as the Appeals office's check established that they do, and without ant checking after a forced check of Dallas F JFK assassination records disclosed that more than 3,000 pages, assumed to have been disclosed in FBIHQ records, did not even exist at FBIHQ. This never was rectified, and contrary to the representation of the brief (page 27) the appeals office found in my favor on this in a report filed with the court. To this day it has not been determined that the withheld field office records were all disclosed in those of FBIHQ.

It is hardly a demonstration of good faith to make an unwarranttd assumption and swear to compoiance without making any effort to ascertain the truth of the attestation.

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The Department's concept of good faith was to use an undicted co-conspirator in the criminal case involving Acting Director Pat Gray and others as an affidant in this litigation. The acount that follows also addresses the plain dirtiness of the brief's contention that my "travel" expenses were personal, that I had no need for special travel arrangement to get material to my counsel, and that I, not the defendant, stonewalled this case. It also addresses the outright untruth relating to the consultancy, that I was to have prepared a non-narrative list of the matters in my correspondence with the FBI. This allegation is an outright fabrication, one of many of convenience relating to the matter of the consultancy. The fact is that such a non-narrative list was prepared and was provided - and was also ignored by the defendant. The undergraduate who prepared what FBI clerks could have prepared, if any such preparation was necessary (because the FBI had all the raw material), also was not paid, despite the advance agreement to pay her.

Obviously, with this list already in the defendant's possession it did not require that I do it all over again.

After it had ben ignored for some time my counsel raised the matter in court and the FBI was directed to respond.

The response, dated August 11, 1978, was prepared and sworn to by the unindicted co-conspirator SA Horace Beckwith, then FBI supervisor in this lawsuit. It was prepared a Friday, and was mailed on Friady, about am month after the judge directed that the non-narrative list be responded to. The response, more than two inches thick, was mailed that Friday. Ordinarily, it would not have reached me until after the calendar call scheduled for the following Monday. But because it was sent with a receipt requested and because it was from the FBI, the post office phoned, stating it was considered important and if I wanted it before the next mail delivery I could come in and pick it up.

Beckwith provided a long affidavit and untruthful, with 52 exhibits, some of which I soon established were phony. I had part of Saturday and part of Sunday for the prepartion

abd documentation of an affidavit of response, then had to find a notary in the country on a Sunday afternoon during vacation time, then prepare notes for my counsel and still get it to him before the calendar call that was the first order of business the next day. The effectiveness and the importance of what I prepared is established by the court's banishment of SA Beckwith, who left without a murmur and without a sound from the Dep artemt department and FBI lawyers, who heard what my counsel said and who were given copies of the authentic records and Beckwith's fakexxx phonies.

Bader bad faith than false swearing and providing phony documents as genuine is not easy to imagine, unless it be a defedant who uses a very vulnerable man, one nearing retirement age and an unindicted coconspirator, to provide affidavits in an FOIA case.

To this day the defendant has not provided a truthful response to that non-narrative list alleg dly desired so much, has not replaced Beckwith's false swearing and records and represents this entire matter as not being bad faith.

By this standard swearing that a search has been made and the records searched for do not exist and they providing them, as happened inthis litigation, isnnot bad faith, either. BNor is it bad faith to claim that pertinent records are exempt when I request them and for them to be disclosed to another and later requester. Or to continue to withhold them from me after I produce the volumes disclosed to another in court.

requiring a new search of all field office records to compare them with what has been released. The practical effect of plaintiff's request would be to require reprocessing of all field office MURKIN files, a truly monumental and time-consuming task. The district court properly refused to order this massive and unwarranted undertaking, stating:

> The parties agreed in 1977 that "duplicates of documents already processed at headquarters will not be processed as listed on the work-sheets, but attachments that are missing from headquarters' documents will be processed and included if found in field offices as well as copies of documents with notations." Stipulation of August 15, 1977, page 1. Special Agent John N. Phillips stated that this procedure was followed. Second affidavit of John N. Phillips, paragraph 4, filed December 10, 1980 as appendix D to defendant's motion for summary judgment. There is nothing to indicate Mr. Phillips' statement of compliance was made in bad faith. The Court will not require the mammoth reprocessing plaintiff seeks based on what happened in another case. Plaintiff's motion is denied.

R. 223, p.4. This Court should affirm the district court's action regarding reprocessing.[10]

In short, the record in this case clearly reflects that the Department searched its files thoroughly and repeatedly in response to plaintiff's FOIA requests. Accordingly, this Court

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[10] Plaintiff unsuccessfully employed a similar bootstrap approach to attack the FBI's good faith in Weisberg v. Department of Justice, supra, 705 F.2d at 1362 and n.29. In that case, this Court rejected plaintiff's attempt to impeach the Department's good faith on the basis of alleged improprieties in another of plaintiff's many lawsuits.

dum opinion of December 1, 1981, which closed the case on the merits, the court simply concluded that plaintiff had "substantially prevailed," without giving the Department an opportunity to brief the issue. On January 5, 1982, the court denied the Department's motion for reconsideration on this matter.

On August 23, 1982, plaintiff filed a motion for $267,516, in attorney's fees. The Department filed an opposition on October 7, 1982, asserting that "Mr. Weisberg's minimal success in this lawsuit and the lack of evidence of Government bad faith suggest that he is not 'entitled' to an award." The Department also noted that "an award of any size would encourage the type of protracted FOIA litigation practiced in this case by Mr. Weisberg and his attorney, litigation that is clearly not in the public interest." Finally, the Department maintained that in any event plaintiff should not receive fees for his attorney's nonproductive time, i.e., time spent on plaintiff's many unsuccessful motions.[4]

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[4] A partial list includes:

MOTION RE:		DISPOSITION
Aug. 1, 1977:	OPR Vaughn Index	Denied (Sept. 2, 1977)
Dec. 20, 1979:	Abstracts	Denied (Dec. 1, 1981)
Jan. 2, 1980:	"Kelley" documents	Denied after permitting further search (Dec. 1, 1981)
Jan. 7, 1980:	"New" Vaughn v. Rosen Inventory of all Dept.	Full Vaughn v. Rosen Inventory rejected in favor (CONTINUED)

Dub granted - pub interest
Bad faith
Attorney
(3)