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October 26, 1970

United States Attorney
District of Columbia

WDR:JFAxelrad
145-12-1449

William D. Ruckelshaus
Assistant Attorney General, Civil Division
By: Harland F. Leathers
Chief, General Litigation Section

Harold Weisberg v. Department of Justice
USDC D.C., Civil Action No. 2301-70

Attention: Mr. Robert Werdig
Asst. U.S. Attorney

Mr. Tolson
Mr. Sullivan
Mr. Mohr
Mr. Bishop
Mr. Brennan CD
Mr. Callahan
Mr. Casper
Mr. Conrad
Mr. Felt
Mr. Gale
Mr. Rosen
Mr. Tavel
Mr. Walters
Mr. Sevars
Tele. Room
Miss Holmes
Miss Gandy

Thank you for sending us copies of Answer of Plaintiff to our motion in these proceedings. We suggested the basis for defense of these proceedings in our September 3, 1970, September 16, 1970 and October 9, 1970 memoranda. As our October 9, 1970 memorandum confirms, please file the affidavit executed by Special Agent [redacted] Williams showing that the file pertaining to the assassination of President Kennedy plaintiff demands was compiled as part of a bona fide FBI investigation. Congressional reports pertaining to 5 U.S.C. 552 indicate that Congress intended to protect all such files by enactment of exemption 7. S. Rep. No. 813, 89th Cong., 1st Sess., p. 3; House Report No. 1497, 89th Cong., 2nd Sess., p. 2; Black v. Sheraton Corp. of America, 50 F.R.D. 130 (D.C. 1970). 1/

We also suggest that you file a supplementary statement of material facts pursuant to Local Rule 9(h) incorporating the facts stated in the affidavit.

Please continue to send us copies of all papers filed and keep us informed of all developments.

Cc: Mr. J. Edgar Hoover
Director, Federal Bureau of Investigation
(w/cpy of Answer of Plaintiff)

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62-109060-6967

1/ Plaintiff's suggestion that the FBI could not properly investigate the assassination of the President of the United States is utterly frivolous and ought to be rejected out of hand. In any event, the test for application of exemption 7 is whether or not the file was "compiled for law enforcement purposes" rather than actual use. Certainly, investigations may properly close with the conclusion no crime has been committed.

ENCLOSURE

NOV 16 1970

Assassination of President John F. Kennedy

OCT 27 1970

70-0329C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant

Civil Action

No. 2301-70

ANSWER OF PLAINTIFF TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Plaintiff denies that there are no issues of material fact and that there is no claim upon which relief can be granted.

I.

QUESTIONS OF FACT AND MIXED QUESTIONS OF FACT AND LAW.

In its "Preliminary Statement" on page 1 of its "Memorandum of Points and Authorities," defendant states that plaintiff "has requested permission to inspect certain spectographic analyses of bullets and bullet fragments recovered from the scene of the assassination of President John F. Kennedy in Dallas, Texas on November 23, 1963."

Bullets and bullet fragments may have been "recovered" in Dealey Plaza, the "scene" of the assassination, on November 23, 1963. However, if so, plaintiff is unaware of them; a fragment or fragments were "recovered" from a piece of curbing in Dealey Plaza, but it is plaintiff's belief that this was as late as July, 1964.

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197-6360-7

The bullets and bullet fragments, spectographic analyses of which are sought by plaintiff, were "recovered" primarily on November 22nd, the date of the assassination, but some were "recovered" on November 23rd and at later times. They were "recovered" generally not at the "scene" but at Dallas' Parkland Hospital, Bethesda Naval Hospital in Maryland, and at other places, including Washington, D.C.

More important, defendant states as a matter of fact (see page one of his Statement of Material Fact) that the records sought "are part of an 'investigatory file compiled for law enforcement purposes.'" It is plaintiff's contention that this is incorrect and that the records in fact were not compiled for any law enforcement purpose but exclusively as part of an investigation requested by President Lyndon B. Johnson on November 24, 1963; Executive Order 11130; and S. J. Res. 137, 88th Congress... none of which involved "law enforcement."

The remainder of this answer will deal with this latter question which appears to be a mixed question of fact and law.

II.

LAW ENFORCEMENT?

On page two of its Memorandum of Points and Authorities, defendant properly cites exemption (b)(7) correctly as "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." Plaintiff then adds: "The thrust of the exemption is to protect from disclosure all files which the government compiles in the course of law enforcement investigations which may or may not lead to

formal proceedings." [underscoring added.]. The thrust may or may not be in accordance with the underscored clause, but it is clear that there are two explicit limitations on the exemption for "investigatory files":

1) they are exempt only if compiled for law enforcement purposes, and

2) they are exempt only if they would not be available by law to a private party.

As to whether there was a "law enforcement purpose" in compilation of the sought spectographic analyses, no better witness can be found than FBI Director J. Edgar Hoover. In testimony before the Warren Commission on May 14, 1964, the following colloquy took place between Mr. Hoover and Mr. J. Lee Rankin, General Counsel to the Commission:

> " Mr. Rankin. You have provided many things to us in assisting the Commission in connection with this investigation and I assume, at least in a general way, you are familiar with the investigation of the assassination of President Kennedy, is that correct?
>
> Mr. Hoover. That is correct. When President Johnson returned to Washington he communicated with me within the first 24 hours, and asked the Bureau to pick up the investigation of the assassination because as you are aware, there is no Federal jurisdiction for such an investigation. It is not a Federal crime to kill or attack the President or the Vice President or any of the continuity of officers who would succeed to the Presidency.
>
> However, the President has a right to request the Bureau to make special investigations, and in this instance he asked that this investigation be made. I immediately assigned a special force headed by the special agent in charge at Dallas, Texas, to initiate the investigation, and to get all details and facts concerning it, which we obtained, and then prepared a report which we submitted to the Attorney General for transmission to the President.
>
> [Hearings before the Warren Commission, Vol. 5, p. 98. Underscoring added.]

Thus, according to the FBI's Director, there was no law and, hence, there could be no "law enforcement purpose." In fact,

according to Mr. Hoover, when the investigation was undertaken, there was no federal jurisdiction for it at all, except a request by the President.

Lest the argument be made that perhaps the missing law was a law of the State of Texas, it should be noted that the spectographic analyses were not given to either the Texas or Dallas authorities.

In brief, the spectographic analyses were made as part of an investigation requested by the President and by the FBI as the investigative arm of the Warren Commission. Backing up the lack of any "law enforcement purpose" is the following quote from the foreword to the Commission's Report (at p. XIV):

> " The Commission has functioned neither as a court presiding over an adversary proceeding nor as a prosecutor determined to prove a case, but as a fact finding agency committed to the ascertainment of the truth."

This contention is further strengthened by the Commission's Tenth Recommendation:

> " The Commission recommends to Congress that it adopt legislation which would make the assassination of the President and Vice President a Federal crime. A state of affairs where U.S. authorities have not clearly defined jurisdiction to investigate the assassination of a President is anomalous. [Page 26 of the Report]

"Law enforcement purposes" requires a law of some kind. Therefore, the burden is on the defendant, if he wishes to avail himself of exemption (b)(7), to state specifically (with citation) the law or laws in pursuance of which the spectographic analyses were made. So far, he has not met that burden.

III.

JENCKS

The second qualification in (b)(7) is that "investigatory files" cannot be withheld from the public if they would be "available by law to a party other than an agency."

Plaintiff is not an "agency" and it is his contention that under Jencks the spectographic analyses would certainly have been available to Lee Harvey Oswald. Hence, they cannot be withheld from plaintiff.

As the Warren Commission said in its preface: "If Oswald had lived he could have had a trial by American standards of justice where he would have been able to exercise his full rights under the law."

IV.

LEGISLATIVE HISTORY OF FREEDOM OF INFORMATION ACT (5 U.S.C. 522)

Emphasis is placed in defendant's Memorandum of Points and Authorities to the legislative history of exemption (b)(7), especially in the House of Representatives. Quoted herewith is the sum total of explanation given in the House Report on this exemption (Report No. 1497, House of Representatives, 89th Congress, 2nd Session, at p.11):

> " 7. Investigatory files compiled for law enforcement purposes except to the extent available by law to a private party: This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings."

There is also considerable reference in the defendant's Memorandum to debate on the floor of the House. The quotations are incomplete, out of context, and generally irrelevant in view of the text of Exemption (b)(7). The debate is not very helpful in ascertaining legislative intent. It is true that some members either preferred to omit (b)(7) in its entirety or to amend it in part. However, they did not prevail, (b)(7) stayed in, as reported by the Committee and it stayed in in its present text. The exemptions are carefully drawn in specific terms, and there is no loose exemption for "sensitive" government information as such, as hinted by defendant.

In this regard, FBI files are like those of any other agency. Whether a particular FBI file is exempt from disclosure depends on whether it falls within one of the nine specific exemptions, not whether it is "sensitive." Parenthetically, what could be "sensitive" about spectographic analyses of bullets and bullet fragments made in a fact finding investigation in 1963?

Spectographic analyses, like other scientific pieces of evidence, are not sensitive and should never be withheld. If spectographic analyses can be withheld from a defendant in a criminal case, other scientific evidence, such as autopsies and fingerprints, could also be withheld. This would lead to absurd and patently unfair results.

V.

CASE LAW

The primary allusion in defendant's quotation from Barcelonata Shoe Corp. v. Compton (271 F. Supp. 591) is to the

following sentence from Attorney General Clark's Memorandum of June, 1967:

> "....In addition, the House report makes it clear that litigants are not to obtain special benefits from this provision, stating that S.1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceeding. (H.Report 11)"

In the sense that the Attorney General was speaking, the "litigant" would be Lee Harvey Oswald. The plaintiff in the present case wants no "earlier or greater access" than would have been granted to Oswald, had he lived to be tried; conversely, he wants exactly the same right of access as Oswald. And under Jencks, Oswald would have been entitled to the spectographic analyses.

On page 3 of its Memorandum of Points and Authorities, defendant quotes at some length from Clement Brothers' v. NLRB, 282 F. Supp. 540. Unfortunately, defendant omitted what is probably the most important paragraph in the decision, the one immediately preceding the three quoted:

> " The Court must agree that the determination of the Court in Barcelonata is sound, though not controlling on this Court. In addition to the common sense necessity of protecting the investiagory function and procedures of the Board, the legislative history of the Act itself makes it clear that the exemption in question is not limited solely to criminal law enforcement but rather applies to law enforcement activities of all natures."

Conceding arguendo that this is true, both Barcelonata and Clement are irrelevant in the present case where there is no law enforcement, criminal or otherwise. Further, there is no "common sense necessity" in protecting scientific tests such as spectographic analyses, as compared to protecting witness statements before the NLRB.

Pusslingly, defendant goes on: "In the instant case, since the records plaintiff seeks havenot been made part of any record

in any agency proceeding he may not obtain them 'absent such use.'" If they had been "part of any record in any agency proceeding" they would automatically be available. Also, the analyses were put to intense use by Warren Commission; as explained below, they were a key to the Commission's basic conclusion of a "single, lone assassin."

The last case cited by the defendant is Black v. Sheraton Corp. 50 F.R.D. 130-133 (D D.C. 1970). Again, the quoted passages are misleading. In the first place, the case concerns the breadth of Rule 26 of the Federal Rules of Civil Procedure, and touches on 5 U.S.C. 552 only in passing. Second, when commenting on 5 U.S.C. 552, the Court repeats the language of the Congressional exemption, i.e., "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than the agency." Third, the following telling paragraph in the Court's opinion was not quoted:

> " As background for the present motion, the Court notes that the United States has previously made available to the plaintiff copies of all documents in the FBI files which contain information from the surveillance. These include: (1) all logs of the surveillance, which are the actual handwritten notes of the agents who monitored the bugging device; (2) all summary airtels prepared from the logs, which are typewritten summaries of the information in the logs; (3) copies of all portions of reports which contain information obtained from the surveillance; and (4) two memoranda from the Director of the FBI to the Attorney General advising the latter of the information which had been obtained from the surveillance."

Thus, there is certainly no sanctity enveloping all FBI files as implied by defendant. In fact, to the extent that Black is relevant to the present case at all, it would appear to weigh heavily in favor of plaintiff. What was being held back by the Court in Black were certain additional transcribed conversations from an

illegal wiretap; revelation of these could harm innocent persons, divulge the identity of informants, expose leads in other criminal cases, embarass the FBI, etc.; none of these harms could come through making available the spectographic analyses in the instant case.

In summary, none of the cases cited by defendant is directly in point, and to the extent that they are relevant, not a single one passes upon the question of the withholding of records of the nature sought in this case.

VI.

CONCLUSION

In signing the Freedom of Information Act (PL 89-487) into law on July 4, 1966, President Johnson said: "I have always believed that freedom of information is so vital that only national security, not the desire of public officials or private citizens, should determine when it must be restricted." [The Presidential statement in toto is reproduced as Exhibit I hereto.]

In issuing a Guidance Memorandum on the FOI Act in June, 1967, Attorney General Clark stated:

> " This law was initiated by Congress and signed by the President with several key concerns:
> - that disclosure be the general rule, not the exception;
> - that all individuals have equal rights of access;
> - that the burden be on the Government to justify the withholding ofaa document, not on the person who requests it;
> - that individuals improperly denied access to documents have a right to seek injunctive relief in the courts;
> - that there be a change in Government policy and attitude.
>
> [All of Attorney General Clark's Foreword is reproduced as Exhibit II hereto.]

provocative Note in the rv[illegible] Law Review (Vol. 80, 1967, p. 914) suggests that "it seems that such investigatory files could be made available after the enforcement activity in question has been completed." Doubly so where there is no "enforcement activity" but only "fact finding."

In the Conclusion to its Memorandum of Points and Authorities, defendant says that "Congress particularly drafted into the Public Information Act a prohibition against the release to the public of the type of document plaintiff seeks in the instant action." Yet, there is no prohibition, as evidenced in the following quotation from a letter of May 7, 1970 to plaintiff's attorney in respect to another Freedom of Information suit in this Court (718-70):

> " Whether or not the documents you seek are technically exempt under one or more of the provisions of 552(b), I have determined that you shall be granted access to them. The exemptions do not require that records falling within them be withheld; they merely authorize the withholding of such records, by exempting them from the Act's otherwise applicable compulsory disclosure requirements."
>
> [The full text of this letter is printed as Exhibit III hereto.]

When one looks at the history and spirit of 5 U.S.C. 552, one wonders what is the real reason for withholding in the instant case. There is no question of divulging the identities of informants. There is no question of divulging secret investigative processes. There is no question of embarassment to private persons.

If the spectographic analyses in fact prove that the government witnesses before the Warren Commission imply they do, i.e., a "common source" for all bullets and bullet fragments, there would appear to be no valid reason why the government should withhold them.... even as a matter of policy. If, on the other hand, they do not prove what the witnesses imply, there is an imperative

reason to wish to withhold them, i.e., the whole Warren Commission Report and its conclusions come tumbling down.

Plaintiff does not ask, however, that these records be made available to him as a matter of policy or grace. It is plaintiff's contention that he is entitled to access to them under 5 U.S.C. 552 as a matter of law.

Therefore, the Court is asked to over-rule defendant's motions to dismiss and for summary judgment and to set the case down for trial near the head of the docket, as provided in 5 U.S.C. 552 (a)(3):

> " Except as to causes the court considers of greater importance, proceedings before the District Court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

Plaintiff renews his request that the Court enjoin the defendant from further withholding of the records sought.

Respectfully submitted,

BERNARD FENSTERWALD, JR.
927 15th St., N.W.
Washington, D.C. 20005
Tel: 527-4580
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that service of this Answer has been made upon Thomas A. Flannery, Joseph M. Hannon, and Robert M. Werdig, Jr., U.S. Courthouse, Washington, D.C., on this 16th day of October, 1970.

BERNARD FENSTERWALD, JR.

EXHIBIT II

FOREWORD

If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure.

Beginning July 4, a most appropriate day, every executive agency, by direction of the Congress, shall meet in spirit as well as practice the obligations of the Public Information Act of 1966. President Johnson has instructed every official of the executive branch to cooperate fully in achieving the public's right to know.

Public Law 89–487 is the product of prolonged deliberation. It reflects the balancing of competing principles within our democratic order. It is not a mere recodification of existing practices in records management and in providing individual access to Government documents. Nor is it a mere statement of objectives or an expression of intent.

Rather this statute imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the act.

This memorandum is intended to assist every agency to fulfill this obligation, and to develop common and constructive methods of implementation.

No review of an area as diverse and intricate as this one can anticipate all possible points of strain or difficulty. This is particularly true when vital and deeply held commitments in our democratic system, such as privacy and the right to know, inevitably impinge one against another. Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government.

It is the President's conviction, shared by those who participated in its formulation and passage, that this act is not an unreasonable encumbrance. If intelligent and purposeful action is taken, it can serve the highest ideals of a free society as well as the goals of a well-administered government.

This law was initiated by Congress and signed by the President with several key concerns:

—that disclosure be the general rule, not the exception;

—that all individ have equal rights of access;
—that the burden be on the Government to justify the withholding of a document, not on the person who requests it;
—that individuals improperly denied access to documents have a right to seek injunctive relief in the courts;
—that there be a change in Government policy and attitude.

It is important therefore that each agency of Government use this opportunity for critical self-analysis and close review. Indeed this law can have positive and beneficial influence on administration itself—in better records management; in seeking the adoption of better methods of search, retrieval, and copying; and in making sure that documentary classification is not stretched beyond the limits of demonstrable need.

At the same time, this law gives assurance to the individual citizen that his private rights will not be violated. The individual deals with the Government in a number of protected relationships which could be destroyed if the right to know were not modulated by principles of confidentiality and privacy. Such materials as tax reports, medical and personnel files, and trade secrets must remain outside the zone of accessibility.

This memorandum represents a conscientious effort to correlate the text of the act with its relevant legislative history. Some of the statutory provisions allow room for more than one interpretation, and definitive answers may have to await court rulings. However, the Department of Justice believes this memorandum provides a sound working basis for all agencies and is thoroughly consonant with the intent of Congress. Each agency, of course, must determine for itself the applicability of the general principles expressed in this memorandum to the particular records in its custody.

This law can demonstrate anew the ability of our branches of Government, working together, to vitalize the basic principles of our democracy. It is a balanced approach to one of those principles. As the President stressed in signing the law:

> "* * * a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest * * *. I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."

This memorandum is offered in the hope that it will assist the agencies in developing a uniform and constructive implementation of Public Law 89–487 in line with its spirit and purpose and the President's instructions.

RAMSEY CLARK,
Attorney General,
June 1967.

EXHIBIT III

Office of the Attorney General
Washington, D. C.

MAY 6 1970

Mr. Bernard Fensterwald, Jr.
Fensterwald, Bevan and Ohlhausen
Attorneys At Law
927 Fifteenth Street, N. W.
Washington, D. C. 20005

Dear Mr. Fensterwald:

This is in response to your letter of February 2, 1970, requesting my review of the denial by the Deputy Attorney General of your request under the Freedom of Information Act, 5 U.S.C. § 552, for access to official records of the Department of Justice. Although you requested access to several items which the Deputy declined to make available, you have appealed only his denial of the request for "[a]ll documents filed by the United States with the Court in England in June-July, 1968, in the extradition proceeding by which James Earl Ray, the convicted killer of Dr. Martin Luther King, was returned to this country."

Whether or not the documents you seek are technically exempt under one or more of the provisions of § 552(b), I have determined that you shall be granted access to them. The exemptions do not require that records falling within them be withheld; they merely authorize the withholding of such records by exempting them from the Act's otherwise applicable compulsory disclosure requirements.

Sincerely,

John N. Mitchell
Attorney General

~~62-109060-447~~

ENCLOSURE 197-636-7

EXHIBIT 1

STATEMENT BY PRESIDENT JOHNSON UPON SIGNING PUBLIC LAW 89-487 ON JULY 4, 1966

The measure I sign today, S. 1160, revises section 3 of the Administrative Procedure Act to provide guidelines for the public availability of the records of Federal departments and agencies.

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.

At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets. A citizen must be able in confidence to complain to his Government and to provide information, just as he is—and should be—free to confide in the press without fear of reprisal or of being required to reveal or discuss his sources.

Fairness to individuals also requires that information accumulated in personnel files be protected from disclosure. Officials within Government must be able to communicate with one another fully and frankly without publicity. They cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions.

I know that the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people. Moreover, this bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires. There are some who have expressed concern that the language of this bill will be construed in such a way as to impair Government operations. I do not share this concern.

I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted.

I am hopeful that the needs I have mentioned can be served by a constructive approach to the wording and spirit and legislative history of this measure. I am instructing every official in this administration to cooperate to this end and to make information available to the full extent consistent with individual privacy and with the national interest.

I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.

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