UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff	)	
-v-	)	Civil Action No. 2052-73
UNITED STATES GENERAL SERVICES ADMINISTRATION, Defendant	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Preliminary Statement

Relying on the provisions of the Freedom of Information Act, 5 U.S.C. 552, plaintiff seeks by this action to compel disclosure of the transcript of the January 27, 1964 executive session of the Warren Commission. That Commission was established by Executive Order No. 11130, 28 Fed. Reg. 12789 (1963), to investigate the assassinations of President Kennedy and Lee Harvey Oswald. Congress also passed Public Law 88-202, approved December 13, 1963, authorizing the Commission to require attendance of witnesses and production of evidence. The particular transcript which plaintiff seeks in this action has been and remains classified "Top Secret" pursuant to Executive Order 10501, as amended (3 C.F.R. 280), and more recently, pursuant to Executive Order 11652, 37 Fed. Reg. 5209, March 10, 1972.

Argument

I. The Freedom of Information Act Does Not Apply to Matters Which Are Required to Be Kept Secret in the Interest of National Defense or Foreign Policy

The Public Information Section of the Administrative Procedure Act, which section is known as the Freedom of Information Act, is

expressly made inapplicable to matters that are "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. 552(b)(1). Thus, "Congress chose the Executive's determination in these matters and that choice must be honored." Environmental Protection Agency v. Mink. 410 U.S. 73, 81 (1973). In Mink, the Supreme Court gave unequivocal support to this exemption and stated that:

> [w]hat has been said thus far makes wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen. It also negates the proposition that Exemption 1 authorizes or permits in camera inspection of a contested document bearing a single classification so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter. The Court of Appeals was thus in error. The Irwin affidavit stated that each of the six documents for which Exemption 1 is now claimed "are and have been classified' Top Secret and Secret "pursuant to Executive Order No. 10501" and and as involving "highly sensitive matter that is vital to our national defense and foreign policy." The fact of thosecclassifications and the documents' characterizations have never been disputed by respondents. Accordingly, upon such a showing and in such circumstances, petitioners had met their burden of demonstrating that the documents were entitled to protection under Exemption 1 and the duty of the District Court under 552(a)(3) was therefore at an end. 410 U. S. at 84.

In other words:

> the only "matter" to be determined de novo under 552(b)(1) is whether in fact the President has required by Executive Order that the documents in question are to be kept secret. Under the Act as written, that is the end of a court's inquiry.
> 410 U.S. at 95 (Opinion of Justice Stewart, concurring).

The attached affidavit of Dr. James B. Rhoads, Archivist of the United States (Government Exhibit 1), as well as Dr. Rhoads' answers to plaintiff's interrogatories 1-3, clearly establish that the document plaintiff seeks, the transcript of the January 27, 1964 executive session of the Warren Commission, is classified pursuant to Executive Order in the interest of the national security. In short, under the controlling principles enunciated by the Supreme Court in Mink, supra, the instant action should be dismissed. See also Wolfe v. Froehlke, 358 F.Supp. 1318 (D.D.C. 1973).

While defendant respectfully submits that its reliance upon 5 U.S.C. 552(b)(1) is dispositive of this action, it contends that the document plaintiff seeks is also exempt from compelled disclosure by reason of 5 U.S.C. 552(b)(5) and (7).

II. The Freedom of Information Act Does Not Apply to Inter-agency or intra-agency memoranda embodying the Governmental Deliberative Process

The document plaintiff seeks is the transcript of the January 27, 1974 executive session of the Warren Commission. Such executive sessions were patently part of the deliberative process from which the Warren Report evolved, and the transcript of the session necessarily embodies and reflects this process. For this reason, the document falls within 5 U.S.C. 552(b)(5) which exempts

from compelled disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The Courts have recognized that

> the Congress intended that Exemption (5) was to reflect the privilege, customarily enjoyed by the Government in its litigations, against having to reveal those internal working papers in which opinions are expressed and policies formulated and recommended.
>
> The basis of Exemption (5), as of the privilege which antedated it, is the free and uninhibited exchange and communication of opinions, ideas, and points of view -- a process as essential to the wise functioning of a big government as it is to any organized human effort. In the Federal establishment, as in General Motors or any other hierachical grant, there are enough incentives as it is for playing it safe and listing with the wind; Congress clearly did not propose to add to them the threat of cross-examination in a public tribunal. Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C.Cir. 1968).

Since plaintiff seeks disclosure of a document which is part of the Government's "deliberative processes", the disclosure should be denied. International Paper Company v. F.P.C. 438 F.2d 1349, 1359 (2d Cir. 1971).

Furthermore, in K.C. Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972), cert. denied, 93 S.Ct. 1352 (1973), the Court held that

> We do not think the fact that one or more of the five [consultants who submitted memoranda] either included some factual material in his memorandum or stated to the Endowment that he was able to refute appellant's arguments transforms these opinions into factual material within the meaning of the "purely factual" rule. 460 F.2d at 1033.

Similarly, in Mink, supra, the Supreme Court has plainly stated that Exemption 5 protects documents such as those involved here:

> The formulation [in drafts of the Information Act] was severely criticized, however, on the ground that it would permit compelled disclosure of an otherwise private document simply because the document did not deal "solely" with legal or policy matters. Documents dealing with mixed questions or fact, law and policy would inevitably, under the proposed exemption, become available to the public. As a result of this criticism, Exemption 5 was changed to substantially its present form. But plainly, the change cannot be read as suggesting that all factual material was to be rendered exempt from compelled disclosure. Congress sensibly discarded a wooden exemption that could have meant disclosure of manifestly private and confidential policy recommendations simply because the document containing them also happened to contain factual data.
> 410 U.S. at 90-91.

For the above reasons, therefore, defendant submits that the transcript which plaintiff seeks falls squarely within the rationale of Exemption 5.

III. The Freedom of Information Act is Inapplicable to Investigatory Files Compiled for Law Enforcement Purposes

In any event, the transcript plaintiff seeks is clearly exempt from compelled disclosure since it could only be part of "investigatory files compiled for law enforcement purposes" not available by law to a party other than an agency and therefore within the exclusion set forth at 5 U.S.C. 552(b)(7). Thus, when it is demonstrated that the files in question (1) were investigatory in nature; and (2) were compiled for law enforcement purposes, then "such files are exempt from compelled disclosure." Weisberg v. U.S. Department of Justice, No. 71-1026 (D.C. Cir., October 24, 1973) (en banc), slip opinion at 6. Since the Warren Commission was appointed to investigate the assassinations of President Kennedy and Lee Harvey Oswald (see Answer of Dr. Rhoads to plaintiff's interrogatory No. 7), it is apparent that the Commission's files, including the transcript plaintiff seeks, were investigatory in

nature and compiled for law enforcement purposes.

The whole thrust of exemption 7 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. Barceloneta Shoe Corp. v. Compton, 271 F.Supp. 591, 592-593 (D. PR. 1967); Clement Brothers Co. v. NLRB, 282 F.Supp. 540 (N.D. Ga. 1968) approved, NLRB v. Clement Brothers Co., 407 F.2d 1027, 1031 (5th Cir. 1969); Benson v. United States, 309 F.Supp. 1144 (D. Neb. 1970); Evans v. Department of Transportation, 446 F.2d 871 (5th Cir. 1971).

The rationale of the decision in Aspin v. Department of Defense, No. 72-2147 (D.C. Cir., November 26, 1973), slip opinion at 13-14, applies equally here:

> It is clear that if investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired. Few persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings. Further, the investigative techniques of the investigating body would be disclosed to the general public.
>
> We note also that the recent en banc decision of this court in Weisberg v. U.S. Department of Justice, supra, is consistent with our decision in this case. While the court in Weisberg expressly limited the question there to the application of the §7 exemption to "Federal Bureau of Investigation files" (slip op. at 8), the point remains that a §7 exemption was there upheld as applied to files almost ten years old where no prosecution was ever conducted. This squarely rebuts applicant's broad argument that when there is no longer any prospect for future enforcement proceedings (necessitated in Weisberg by the death of the only suspect) the §7 exemption from disclosure must terminate as well.
>
> We therefore hold that an exemption under §552(b)(7), as investigatory files compiled for law enforcement purposes, remains available after the termination of investigation and enforcement proceedings.

It is clear, then, that documents such as the transcript plaintiff seeks are exempted from the purview of the Information Act. It is "necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation." Mink, supra, at 80, n. 6 (1973) (quoting Senate Report No. 813, 89th Cong., 1st Sess., p.3. See also, Harbolt v. Alldredge, 454 F.2d 1243, 1244 (10th Cir. 1972), cert. denied, 409 U.S. 1025 (Regulations of the Department [of Justice which] protect the confidentiality of investigatory files compiled for law enforcement purposes except the extent available by law to a party" held to be valid); Moore v. Administrator, Veterans Administration, 475 F.2d 1283, 1286 (D.C. Cir. 1973) ("In general, it is well established that no right to a preliminary investigatory file exists in administrative law.")

Finally, the Court of Appeals en banc decision in Weisberg, supra, slip opinion 14-15, sets forth the controlling principles:

> Where the district court can conclude that the Attorney General's designation and classification are correct, the Freedom of Information Act requires no more. Here the record overwhelmingly demonstrates how and under what circumstances the files were compiled and that indeed they were "investigatory files compiled for law enforcement purposes." When the District Judge made that determination, he correctly perceived that his duty in achieving the will of Congress under the Freedom of Information Act was at an end.

Defendant respectfully contends, therefore, that the Court may readily conclude from the circumstances surrounding the establishment of the Warren Commission as well as from the Warren Report itself that Commission files including the transcript of the January 27, 1964 executive session, are investigatory and were

compiled for law enforcement purposes.

Conclusion

For the foregoing reasons, defendant respectfully requests the Court to grant its motion to dismiss or, in the alternative, for summary judgment, and to dismiss the instant action.

EARL J. SILBERT
United States Attorney

ARNOLD T. AIKENS
Assistant United States Attorney

MICHAEL J. RYAN
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff	)	
-v-	)	Civil Action No. 2052-73
UNITED STATES GENERAL SERVICES ADMINISTRATION, Defendant	)	

ORDER

Upon consideration of defendant's motion to dismiss or, in the alternative, for summary judgment, and of the entire record, it is by the Court this _____ day of _____, 1974

ORDERED that defendant's motion be and the same hereby is granted and the instant action be and the same hereby is dismissed.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff -v- UNITED STATES GENERAL SERVICES ADMINISTRATION, Defendant	)	Civil Action No. 2052-73

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

In support of its motion for summary judgment and pursuant to Local Rule 1-9(g), defendant submits the following statement of material facts as to which it contends there is no genuine issue:

1. The Warren Commission was established under Executive Order and recognized by statute to investigate the assassinations of President Kennedy and Lee Harvey Oswald. (Answer to Plaintiff's Interrogatory No. 7)

2. The transcript of the January 27, 1964 Warren Commission Executive Session has been and continues to be classified "Top Secret" pursuant to Executive Order. (Government Exhibit 1) The transcript was originally classified under the provisions of Executive Order 10501, as amended (3 C.F.R., 1949-1953 Comp.), and is presently classified under the provisions of Executive Order 11652 (37 Fed. Reg. 5209, March 10, 1972). (Answers to Plaintiff's Interrogatories 1-3)

3. By letter of May 4, 1968, addressed to Dr. James B. Rhoads, Archivist of the United States, plaintiff renewed a previous request for disclosure of the January 27, 1964 transcript (Complaint Exhibit A).

4. By letter of May 20, 1968, Dr. Rhoads denied plaintiff's request (Complaint Exhibit B).

5. By letter of June 21, 1971, Herbert E. Angel, then Acting Archivist, informed plaintiff of those transcripts, including the January 27, 1964 transcript, or parts of transcripts which were being withheld under the exemptions of the Freedom of Information Act (Complaint Exhibit C).

6. By letters of January 6, 1972, plaintiff appealed the denial of his request for disclosure of the January 27, 1964 transcript (Complaint para. 12; Complaint Exhibit D).

7. By letter of February 8, 1972, Mr. Richard Q. Vawter, Director of Information, General Services Administration, responded to plaintiff's letters of January 6, 1972 (Complaint Exhibit D).

8. On November 13, 1973, plaintiff filed the instant suit under the Freedom of Information Act, 5 U.S.C. 552, in the United States District Court for the District of Columbia to compel disclosure of the transcript of the January 27, 1964 executive session of the Warren Commission.

EARL J. SILBERT
United States Attorney

HAROLD WEISBERG,

Plaintiff,

v.

GENERAL SERVICES ADMINISTRATION,

Defendant.

Civil Action No. 2052-73
United States District Court
for the District of Columbia

DISTRICT OF COLUMBIA)
CITY OF WASHINGTON) ss.:

I, JAMES B. RHOADS, Archivist of the United States, National Archives and Records Service, General Services Administration, Eighth and Pennsylvania Avenue, N. W., Washington, D. C., living at 6502 Cipriano Road, Lanham, Maryland, do hereby solemnly swear:

1. I have read and am familiar with the allegations contained in the plaintiff's complaint in the case of Weisberg v. General Services Administration, Civil Action No. 2052-73, United States District Court for the District of Columbia.

2. At all times relevant to the circumstances of the complaint, I have served in the position of Archivist of the United States.

3. In accordance with Executive Order, at all times since the document in question, the transcript of the January 27, 1964 executive session of the Warren Commission, has been in the custody of the National Archives and Records Service, General Services Administration, it has been and continues to be classified "Top Secret."

I have read the above statement, consisting of one page, and it is true and complete to the best of my knowledge and belief. I understand that the information I have given is not to be considered confidential and that it may be shown to the interested parties.

James B. Rhoads
(Affiant's Signature)

GOVERNMENT EXHIBIT 1

Subscribed and sworn to before me at Eighth and Pennsylvania Avenue, N. W., Washington, D. C., on this 10th day of January, 1974.

Francis J. Hepper
(Notary Public)

My Commission Expires August 31, 1974

HAROLD WEISBERG, Plaintiff, v. GENERAL SERVICES ADMINISTRATION, Defendant.	)	Civil Action No. 2052-73 United States District Court for the District of Columbia

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