UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MOTION FOR RECONSIDERATION

Pursuant to Rules 52(b) and 60(b) of the Federal Rules of Civil Procedure, plaintiff moves the Court to reconsider and vacate that part of the Court's May 3, 1974, Memorandum and Order which awarded the defendant summary judgment in this cause on the ground that the defendant's invocation of the investigatory files exemption to the Freedom of Information Act "appears to be fully justified by the record."

A Memorandum of Points and Authorities in support of this motion is attached hereto.

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Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION

I. NOTHING IN THE RECORD SUPPORTS THE DEFENDANT'S CLAIM THAT THE TRANSCRIPT SOUGHT IS ENTITLED TO EXEMPTION 7 IMMUNITY

In granting defendant's motion for summary judgment, the Court stated that "Defendant's reliance on the seventh exemption . . . appears to be fully justified." Contrary to this assertion, there is nothing in the record which supports the defendant's claim of exemption 7 immunity except a bald assertion that because it is part of the Warren Commission's files it is, *ipso facto*, exempt from disclosure. For several reasons, this is totally inadequate to meet the defendant's burden of proof under the Freedom of Information Act and thus support a motion for summary judgment.

First, unlike *Weisberg v. Department of Justice*, 489 F. 2d 1195, which will be discussed in more detail below, in the instant action *no affidavit has been submitted in support of the exemption 7 claim*. As a consequence, the defendant has made no evidentiary showing that the transcript sought is in fact part of an investigatory file compiled for law enforcement purposes. Yet such a showing is necessary for the defendant to meet its burden of proof.

As the Supreme Court said in Environmental Protection Agency v. Mink:

> An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material . . . [subject to disclosure]. E.P.A. V. Mink, 410 U.S. 73, 93 (1973). [Emphasis added]

This Circuit has specifically adopted requirements that an agency must provide a detailed justification of its allegations of exempt status:

> The problem of assuring that allegations of exempt status are adequately justified is the most obvious and the most easily remedied flaw in current procedures. It may be corrected by assuring government agencies that courts will simply no longer accept conclusory and generalized allegations of exemptions . . . but will require a relatively detailed analysis in manageable segments. Vaughn v. Rosen, 484 F. 2d 820, 826.

Not only has the defendant failed to submit any affidavit in support of its claim that the file is part of an investigatory file compiled for law enforcement purposes, but such evidence as there is in the record directly contradicts the exemption 7 claim. Thus, when called on to state forthrightly and under oath that the January 27 transcript is being withheld as part of an investigatory file compiled for law enforcement purposes, the defendant declined to do so. [See answer to interrogatory six] This unwillingness to invoke exemption 7 under oath is not accidental; rather, as defendant's answers to other interrogatories establish, it arises from a well-grounded fear of committing perjury.

The answers to interrogatories 19 and 30 show that no law enforcement officials ever saw the January 27 transcript until "1967-1968," three years after the Warren Commission had terminated its investigation. The answer to interrogatory 15 establishes that no copy of this transcript was ever provided to the only law enforcement officials who did have jurisdiction to prosecute any persons

involved in the assassination of President Kennedy. Given these facts it seems bizarre, if not ludicrous, to maintain that this transcript "relate(s) to anything that can be fairly characterized as an enforcement proceeding." [Bristol Myers Co. v. F.T.C., 424 F. 2d 935, 939] No doubt most citizens would find it curious and even a little unsettling to learn that investigatory files compiled for law enforcement purposes were not shown to law enforcement officials of any kind until more than three years after the investigation of the crime had ended.

The defendant has not claimed that all Warren Commission Executive Session transcripts are immune from disclosure under the investigatory files exemption. Indeed, Complaint Exhibit C shows that two of the four Executive Session transcripts which are still suppressed in toto are not claimed to be exempt from disclosure as investigatory files. This means that even the defendant invokes exemption 7 immunity only by reference to a particular transcript and not by deducing that status a priori from the fact that it is a Warren Commission file. This differs from the Court's decision, which is even more extreme than the defendant's, and which authorizes suppression of the entire Warren Commission files consisting of hundreds of thousands of pages. Conceivably George Orwell himself would be astonished to learn that, a full decade ahead of schedule, the Freedom of Information Act had become an instrument for suppressing all the records of an official commission established to make the truth about an assassination known to the public.

Bearing on this is the fact that many pages of the eighty-six page transcript sought by plaintiff have been sold for profit by a member of the Warren Commission (and before they were made available to law enforcement authorities). As this Circuit noted in

Vaughn v. Rosen, "It is quite possible that part of a document should be kept secret while part should be disclosed." Vaughn, supra, 825. Counter to the directives of Vaughn, this Court has not required the defendant to index this transcript in manageable segments so that it can be determined if any of the eighty-six pages are properly withheld.

II. THIS CASE IS NOT SQUARELY CONTROLLED BY WEISBERG V. DEPARTMENT OF JUSTICE

The Court has held that "the instant case is squarely controlled by the decision of this Circuit in Weisberg v. Department of Justice, 489 F. 2d 1195 (D.C. Cir. 1973)." However, plaintiff contends that this case differs in several important respects from that case.

Weisberg v. Department of Justice [hereafter referred to as Weisberg] involved a request for the results of certain spectrographic analyses which Weisberg asserts will show that the FBI deceived Warren Commission members and the American public as to whether their tests supported the official theory that Oswald and Oswald alone killed President Kennedy. Thus, Weisberg involves FBI files, whereas the present case involves only the transcript of a Warren Commission Executive Session. The Court of Appeals expressly confined its decision to FBI files: "We are not discussing any problem except that of compelled disclosure of Federal Bureau of Investigation investigatory files compiled for law enforcement purposes." Weisberg, supra, 199-1200.

Secondly, the nature of the record before the court in Weisberg was totally different than it is in this case. In Weisberg the District Court had before it an affidavit by an FBI agent which stated that he had personally reviewed the spectrographic examinations sought and that:

> 3. These spectrographic examinations were conducted for law enforcement purposes as a part of

> the FBI investigation into the assassination. The details of these examinations constitute a part of the investigative file, which was compiled for law enforcement purposes and is maintained by the Federal Bureau of Investigation concerning the investigation of the assassination of President John F. Kennedy.
>
> 4. The investigative file referred to in paragraph "3" above was compiled solely for the official use of U.S. Government personnel. This file is not disclosed by the Federal Bureau of Investigation to persons other than U.S. Government employees on a "need-to-know" basis.

No such affidavit is on file with the Court in the present case. In addition, the answers to interrogatories dispute some of the assertions contained in this affidavit. For example, it is a matter of record that parts of the file have in fact been sold for publication, so it is not possible to pretend that the transcript was made available soley for the "official use of U.S. Government personnel" and is not disclosed "to persons other than U.S. Government employees on a 'need-to-know' basis."

Third, in the hearing before the District Court in Weisberg counsel for the defendant asserted that ". . . the Attorney General of the United States has determined that it is not in the national interest to divulge these spectrographic analyses." No such assertion has been made here. In the instant case plaintiff did call upon the defendant to repeat that claim under oath but the defendant wisely refused to do so. [See answer to interrogatory 4]

In fact, the record in the instant case demonstrates that an executive determination was made to make the Commission's files publicly available. Thus, Memorandum Exhibit H quotes former Chief Justice Earl Warren as saying: "Moreover, the Commission did not desire to restrict access to any of its working papers except those classified by other agencies." In addition, the attachment to Exhibit H, summarizes the views of the FBI on the disclosure of

the records which it provided the Warren Commission as follows: "The Federal Bureau of Investigation recognizes that materials furnished by it for use by the President's Commission, except those which were classified for reasons of national security, are in the public domain." No such matter was in the record and before the District Court or the Court of Appeals in Weisberg. Thus, this Court must confront an entirely different record than was made in that case. The decision in Weisberg can in no way substitute for the finding of fact which must be made by this Court on the basis of the record before it in this case.

CONCLUSION

In view of the foregoing, plaintiff asks the Court to reconsider and vacate its order granting the defendant summary judgment on exemption 7 grounds. Plaintiff further requests that he be allowed to continue the discovery of facts relevant to the resolution of the exemption 7 claim. Finally, plaintiff suggests that the Court direct the defendant to support its exemption 7 claim by affidavit or other evidentiary means.

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Motion for Reconsideration and the Memorandum of Points and Authorities in support thereof has been made upon the defendant by mailing a copy thereof to its attorney, Mr. Michael J. Ryan, Assistant United States Attorney, United States Courthouse, Room 3421, Washington, D.C., on this 13th day of May, 1974.

JAMES HIRAM LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff	
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UNITED STATES GENERAL SERVICES ADMINISTRATION, Defendant	

O R D E R

Having considered plaintiff's motion for reconsideration and the entire record in this case, it is by the Court this ________ day of May, 1974,

ORDERED, that the Court's Order granting the defendant summary judgment is hereby vacated.

____
UNITED STATES DISTRICT JUDGE