



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Motion of Defendants to Dismiss the Action or, in the Alternative, for Summary Judgment together with memorandum of points and authorities in support thereof, affidavits, and exhibits, has been made upon plaintiff by mailing copies thereof to Harold Weisberg, Route 8, Frederick, Maryland 21701, on this 13th day of January, 1971.

/s/  
ROBERT M. WERDIG, JR.  
Assistant United States Attorney

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff

v.

U.S. GENERAL SERVICES ADMINISTRATION

and

U.S. NATIONAL ARCHIVES  
AND RECORDS SERVICES,

Defendants.

Civil Action

No. 2569-70

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

Defendants, pursuant to this Court's Local Rule 9(h), submit the material facts as to which there is no genuine issue are:

1. Plaintiff desires to inspect and photograph the shirt and tie worn by the late President John F. Kennedy at the time of his assassination. (Exhibit 1)

2. The articles sought to be inspected and photographed by plaintiff are on deposit in the Archives of the United States (Exhibit 3 p. 1, ¶2) an operating service of the General Services Administration (hereinafter referred to as "GSA") *ibid*, ¶1.

3. The articles are on deposit by virtue of an agreement dated October 29, 1966 (Exhibit 3 p. 2, ¶3) and Exhibit A thereto.)

4. In a letter to the Director of Information, GSA, dated June 6, 1970 plaintiff wrote, in part:

"Over the months, I have made requests for documents in National Archives files relating to the assassination of President John Kennedy . . . ."

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"Herewith I appeal a subsequent decision, to refuse me photographic copies of photographs in these files. I have been provided . . . copies of photographs of some of the President's garments . . . the magnification of which . . . is automatically prevented by their having been made from

photoengraved copies, the screen of which appears as dots upon magnification."

"The National Archives has made its own photographs of these garments for the alleged purpose of making them available for study rather than permitting study of the garments . . . ."

"One of these was the front of the President's shirt. It is the only such photograph in the Archives of which I have knowledge . . . I ask you for it or an enlargement of the area showing the damage to the shirt." (Exhibit 1)

5. On September 17, 1970, the Director of Public Affairs, by letter, advised plaintiff:

"Your letter [of June 20, 1970, supra,] appears to request five items. . . ."

"After consultation with the Archives staff it has been determined that items 2,3 and 4 above have never been denied to you by the Archives and that item 1 has been denied to you only in terms of furnishing you a personal copy of the photograph. The Archives has specifically indicated it will allow you to examine the photograph indicated in item 1 in the National Archives Building. In addition, the Archives had indicated a willingness to prepare and allow you to examine the photographs in items 2 and 3 in the Archives Building to supply you the photograph in item 4, to allow you to examine item 5 photographs in the Archives Building and to furnish you prints of the item 5 photographs." (Exhibit 2)

/s/  
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THOMAS A. FLANNERY  
United States Attorney

/s/  
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JOSEPH M. HANNON  
Assistant United States Attorney

/s/  
\_\_\_\_\_  
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UNITED STATES DISTRICT COURT  
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U.S. NATIONAL ARCHIVES  
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Defendants.

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MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION OF DEFENDANTS TO DISMISS  
THE ACTION OR, IN THE ALTERNATIVE  
FOR SUMMARY JUDGMENT.

I.

Preliminary Statement

Plaintiff, an author, alleges, inter alia, he is entitled, pursuant to the provisions of the Public Information Act, 5 U.S.C. 552, to examine and photograph, at his expense, certain articles of clothing worn by the late President Kennedy on the day of his assassination.

The defendants contend plaintiff is not entitled to the relief he seeks because 1) he has failed to exhaust those administrative remedies available to him which are matters of public knowledge, 2) the refusal of defendants to permit plaintiff to do what he desires regarding these articles is an exercise of discretion committed to the defendants by statute and an agreement between defendants, on behalf of the general public, and the donors of the articles and 3) the articles which plaintiff seeks to examine are not "records" as contemplated by Congress to be within the purview of 5 U.S.C. 552.

II.

Pertinent Statutes and Regulations

The Public Information Act, pursuant to which plaintiff claims to be entitled to the relief sought, provides:

"(a)(3) . . . each agency, on request for identifiable records made in accordance with published rules . . . shall make the records promptly available to any person. On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld . . . ."

(b) This section does not apply to matters that are -

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(3) specifically exempted from disclosure by statute. . . ."  
5 U.S.C. 552, Pub. L. 90-23. [Emphasis added]

In connection with the treatment of materials reposing in the Archives, Congress has indicated:

"As used in this chapter, 'records' includes all books, papers, maps, photographs, or other documentary materials . . . Library and museum material made or acquired and preserved solely for reference or exhibition purposes . . . are not included." 44 U.S.C. 3301 [Emphasis added.]

The Administrator of General Services is explicitly vested with the power of discretion in dealing with certain materials, such as the articles pertinent to this cause, by 44 U.S.C. §§2107 and 2108 (c).

The former declares:

"When the Administrator of General Services considers it to be in the public interest he may accept for deposit --

(1) the papers and other historical materials of a President or former President of the United States, or other official of the Government, and other papers relating to and contemporary with a President or former President of the United States, subject to restrictions agreeable to the Administrator as to their use . . . ."  
[Emphasis added.]

The latter section further provides:

"Papers, documents, or other historical materials accepted and deposited under section 3106 of this title and this section are subject to restrictions as to their availability and use stated in writing by the donors or depositors, including the restriction that they shall be kept in a Presidential archival depository. The restrictions shall be respected for the period stated, or until revoked or terminated by persons legally qualified to act on their behalf."  
[Emphasis added.] 1/

(footnote on following page)

Although the Public Information Act does not specifically define the word "records", predecessor legislation, within the ken of the 90th Congress, did.

Section 1 of the Act of July 7, 1943, 57 Stat. 380, providing for the disposition of records states:

" . . . 'records' includes all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included." 44 U.S.C. 3301 [Emphasis added]

This definition was made a part of the Federal Records Act of 1950, 64 Stat. 583, the pertinent provisions of which, insofar as this action is concerned, are now contained in Chapter 21 of Title 44, U.S. Code. "Records Management by Administrator of General Services." The definition originally in the Act of 1943 - incorporated into the Act of 1950 is made applicable to Chapter 21, 44 U.S.C. by 44 U.S.C. §2901:

"As used in . . . sections 2101 - 2115 of this title - 'records' has the meaning given by section 3301 of this title; . . ."

Consonant with the mandate of 5 U.S.C. 552 (a)(3) that each agency publish "rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed," the Administrator promulgated and published regulations applicable to the Archives, 32 F.R. 9564 as amended by 33 F.R. 4883; 41 CFR 105-60 and 33 F.R. 4885, as amended by 34 F.R. 200; 41 CFR 105-61.

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<sup>1/</sup>(footnote from preceding page) 44 U.S.C. 2107 and 2108 (c) re-enact former 44 U.S.C. 397 (e) and (f). The section numbers were changed by Pub. L. 90-620 "to restate in comprehensive form, without substantial change, the statutes in effect on January 14, 1968. . . and to enact title 44, United States Code." 90th Cong., 2nd Sess., Senate Report No. 1621, 1968 U.S. Code Cong. & Admin. News, p. 4438.

Significant portions of the GSA regulations are:

Definitions

"The term 'records' . . . does not include:

- (1) Library and museum material made or acquired and preserved solely for reference or exhibition purposes . . .
- (2) Objects or articles, such as structures, furniture, paintings, sculpture, models, vehicles, or equipment.
- (3) Donated historical materials (as defined in §105-61.001-4) accepted by GSA from a source other than an agency of the U. S. Government in accordance with the provisions of 44 U.S.C. 397." [see footnote 1, supra] 41 CFR §105-60, 104(a).

Appeals within GSA

"After notification that his request for identifiable records has been denied, the person submitting the request may appeal the denial. The appeal shall be submitted to the Director of Information, Washington, D. C. . . ." 41 CFR §105-60.404(a)

"If the denial is sustained, the matter will be submitted promptly by the Director of Information to the Assistant Administrator for Administration whose ruling thereon will be furnished in writing to the person requesting the records." 41 CFR §105-60.404(c).

Donated Historical Materials

"The public use of donated historical materials is subject to the following restrictions:

- (a) Use is subject to all conditions specified by the donor or transferor of such materials or by the Archivist of the United States . . ." 41 CFR §105-60.202

III.

Argument

A.

Plaintiff Has Failed to Exhaust the Available Administrative Remedies.

GSA, as required by the Public Information Act, published in the Federal Register<sup>2/</sup> all applicable internal regulations regarding requesting

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<sup>2/</sup> 32 F.R. 9564 July 1, 1967, as amended at 33 F.R. 4883-4884, Mar. 22, 1968.



records, description of the types of records available as well as the types of records not available, procedures to follow when a request for identifiable records was denied and the restrictions applicable to donated historical materials. The regulations are found in 41 CFR-Chapter 105.

On June 6, 1970, plaintiff wrote the Director of Information, GSA, contending he had "made requests for documents" "[o]ver the months". (Exhibit 1) In the same letter plaintiff indicates he is appealing a "'decision', to refuse me photographic copies of photographs;" Yet, the succeeding sentence establishes: "I have been provided with utterly meaningless copies of photographs of some of the President's garments . . . ." (id.)

Defendants submit there is no responsibility upon them to produce documents subject to individual determinations as to "meaningfulness." The Act requires production of "identifiable records" not "meaningful records." Nonetheless, it is obvious from plaintiff's language that he was provided copies of photographs of the President's garments.

Plaintiff's June 20, 1970 letter continues:

"The National Archives has made its own photographs of these garments, for the alleged purpose of making them available for study rather than permitting study of the garments. When I sought permission to examine the garments . . . I was show [sic] photographs of which I was denied copies.

"One of these was of the front of the President's shirt. It is the only such photograph in the Archives of which I have knowledge that can serve research purposes . . . I ask you for it or an enlargement of the area showing the damage to the shirt." id.

The preceding portion of plaintiff's letter was designated the first of five requests by an encircled Arabic figure 1 in the right margin. By a letter dated September 17, 1960 the Director of Public Affairs indicated:

". . . item 1 has been denied to you only in terms of furnishing you a personal copy of the photograph. The Archives has specifically indicated it will allow you to examine the photograph indicated in item 1 in the National Archives Building." (Exhibit 2)

The remaining requests, 2 through 5, were disposed of by GSA in the following language:

" . . . the Archives has indicated a willingness to prepare and allow you to examine the photographs in items 2 and 3 in the Archives Building, to supply you the photograph in item 4, to allow you to examine item 5 photographs in the Archives Building, and to furnish you prints of the item 5 photographs." (id.)

Notwithstanding the response of the Archives to plaintiff's requests, he alleges in the complaint:

" . . . he has submitted a request for a photograph for a very small area of damage on the front of the President's shirt." (Complaint paragraph 16.)

"Plaintiff has sought relief at all appropriate levels and has consistently been denied his requests by the responsible agency officials. . . ." (Complaint paragraph 22.)

Defendants submit the letter from the Archives Director of Information completely refutes plaintiff's allegation that he "has consistently been denied."

The GSA regulation, 41 CFR §105-60.404(c), pertaining to the procedure for denying requests requires:

"If the denial is sustained, the matter will be submitted . . . to the Assistant Administrator for Administration whose ruling thereon will be furnished in writing to the person requesting the records."

There has been no denial of plaintiff's requests contained in his letter of June 20, 1970 and there has been no ruling by the Assistant Administrator. Absent a denial and ruling thereon plaintiff fails, first, to state a claim under 5 U.S.C. §522 and, second, to establish he has exhausted available administrative remedies.

B.

Defendants' Refusal to Permit Examination and Photographing of the Articles is a Decretionary Act Created by Statute and the Agreement with the Donors

The clothing and personal effects on the person of the late President Kennedy when he was assassinated were transferred to the United States for deposit in the National Archives by his executors by a letter agreement dated October 29, 1966. (Exhibit 3) The agreement provides,

in pertinent part:

"The family desires to prevent the undignified or sensational use of these materials (such as public display) or any other use which would tend in any way to dishonor the memory of the late President or cause unnecessary grief or suffering to the members of his family and those closely associated with him. We know the Government respects these desires.

"Accordingly, pursuant to the provisions of 44 U.S.C. 397 (e)(1),<sup>3/</sup> the executors of the estate of the late President John F. Kennedy hereby transfer to the Administrator of General Services, acting for and on behalf of the United States of America, for deposit in the National Archives of the United States, all of their right, title, and interest in all the personal clothing of the late President now in the possession of the United States Government and identified in Appendix A . . . and the Administrator accepts the same for and in the name of the United States, for deposit in the National Archives of the United States, subject to the following restrictions, which shall continue in effect during the lives of the late President's widow, daughter, son, parents, brothers and sisters, or any of them:

I.

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(2) Access to the Appendix A material [the President's clothing] shall be permitted only to:

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(b) Any serious scholar or investigator of matters relating to the death of the late President for purposes relevant to his study thereof. The Administrator shall have full authority to deny requests for access, or to impose conditions he deems appropriate on access, in order to prevent undignified or sensational reproduction of the Appendix A materials . . . ." [Emphasis added.]

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III.

"(1) In order to preserve the Appendix A materials . . . against possible damage, the Administrator is authorized to photograph or otherwise reproduce any of such materials for purposes of examination in lieu of the originals by persons authorized to have access pursuant to paragraph I(2) or paragraph II(2)." (Exhibit 3)

In addition to the proscriptions of the agreement, the Administrator is authorized to impose such other restrictions on access to and

<sup>3/</sup> See footnote 1, supra.

inspection of materials in the Archives as he deems necessary and appropriate by virtue of the Federal Property and Administrative Services Act of 1949, now codified as 44 U.S.C. 2107 and 2108(c) and the regulations promulgated thereafter including, specifically as to donated historical materials, 41 CFR §105-61.202 which states that "public use of donated historical materials is subject . . . to all conditions specified by the donor. . . or by the Archivist." [Emphasis added]

The affidavit of the Archivist indicates that pursuant to his authority he has "determined that serious scholars or investigators. . . may view photographs of said articles of clothing, but may not inspect or examine the articles of clothing themselves." (Exhibit 3 ¶5.) [Emphasis added.]

It is clear that Congress is empowered to provide by legislation for the acceptance of gifts subject to conditions and restrictions specified by a donor and that such conditions will be respected by the courts. Story v. Snyder, 87 U.S. App. D.C. 96, 184 F.2d 454, 456 (1950), cert. denied 350 U.S. 866.<sup>4/</sup>

A brief glimpse at the legislative history of 44 U.S.C. 397(e), pursuant to which President Kennedy's clothing was donated, establishes the rationale for permitting the statutory restrictions and supporting the Archivist's regulation.

" . . . Authority to agree to, and to enforce, certain restrictions as to access and use [of donated materials] is essential if private papers are to come into public custody at all." H.Rpt 998, 84th Cong., 1st Sess. p. 6. [Emphasis added.]

In the words of the Archivist,

" . . . To permit the confidential restrictions to be violated would completely destroy public confidence in the Federal Government's ability and willingness to honor its commitments to donors of . . . historical materials. . ."  
(Exhibit 3 ¶6)

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<sup>4/</sup> The Court's attention is also invited to the considerations for non-disclosure stated by Mr. Justice Reed in Kaiser Aluminum and Chemical Corp. v. United States, 157 F. Supp. 939 (Ct. Cls., 1968)

C.

The Kennedy Clothing is not a "record" within 5 U.S.C. 552.

44 U.S.C. 3301, supra, specifically indicates "Library and museum material . . . acquired and preserved solely for reference . . . are not included" in the definition of "records":

The regulations of GSA, promulgated pursuant to the Public Information Act, published in the Federal Register on July 1, 1967 (32 F.R. 9564) particularly describe, "Donated historical materials (as defined in [41 CFR] §105-61.001-4) accepted by GSA from a source other than an agency of the U. S. Government in accordance with the provisionsoof 44 U.S.C. 397" as not included in the meaning of the term "records."

Further, the "Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act" is illuminative in stating:

"It is evident from the emphasis in the legislative history of pPublic Law 89-487 upon the concept that availability shall include the right to a copy, that the term 'records' in subsection (c) does not include objects or articles such as structures, furniture, paintings, sculpture, three-dimension models, vehicles, equipment, etc., whatever their historical value or value 'as evidence' . . . ." at 23.

Defendants submit it is obvious from the above that the materials sought to be examined and photographed are not 'records' within the contemplation of the language of the Public Information Act and, therefore, are not such 'records' which this court has jurisdiction to compel the defendants to produce or not withhold.

IV.

CONCLUSION

Wherefore, based upon the foregoing defendants' respectfully urge there are no genuine issues as to any material fact and they are entitled to have this action dismissed or, in the alternative, to have judgment entered in their favor.

/s/

THOMAS A. FLANNERY  
United States Attorney

/s/

JOSEPH M. HANNON  
Assistant United States Attorney

/s/

ROBERT M. WERDIG, JR.  
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