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No. 71-1026

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG,

Plaintiff-Appellant

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM FOR THE APPELLEE FILED
PURSUANT TO DIRECTION OF THE COURT

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At the oral argument of the appeal in the above-styled cause on April 14, 1971, Judge Danaher directed Government counsel to file a supplemental memorandum addressed to a question which the Court had raised respecting the last two sentences of the Attorney General's June 4, 1970, letter to Mr. Weisberg (J.A. 23-24). This memorandum is being submitted in compliance with that direction.

1. In stating in his June 4, 1970, letter that "[a]t present, this issue is being litigated in the federal courts", the Attorney General had reference to Nichols v. United States, et al. which, on that date, was still pending in the District Court for the

District of Kansas (No. T-4536). In Nichols, the plaintiff sued under the Freedom of Information Act, seeking access to various materials in the Government's possession which were associated with the assassination of President Kennedy. Paragraph 9 of the complaint stated that "plaintiff has made a request to examine the results of certain spectrographic studies on the bullet (CE 399) that allegedly struck our President as well as certain articles of our President's clothing. The Warren Commission makes reference to these tests but the results of these tests have not been divulged and have been denied by the United States of America through their various employees and agents of the Federal Bureau of Investigation." And the final paragraph of the complaint read as follows:

Plaintiff further prays that this honorable court issue an order requiring the director of the Federal Bureau of Investigation to divulge to the plaintiff the results of the spectrographic test on Warren Commission exhibit number CE 399, and the results of all other spectrographic analyses conducted by the Federal Bureau of Investigation.

The Government filed a motion to dismiss the complaint or, in the alternative, for summary judgment. With respect to the spectrographic analyses, the Government relied expressly on the exemption to the Freedom of Information Act contained in 5 U.S.C. 552(b)(7) -- i.e., the exemption for "investigatory files compiled for law enforcement purposes". In support of its reliance upon that exemption, it filed the March 12, 1969, affidavit of Roy H. Jevons, a Special Agent of the Federal Bureau of Investigation, which stated in relevant part that:

These laboratory examinations, including the spectrographic examination were conducted for

law enforcement purposes under my supervision as a part of the FBI investigation into the assassination. The details of the above-referred-to Laboratory examinations constitute a part of the investigative file, maintained by the FBI concerning the investigation of the assassination, which was compiled for law enforcement purposes.

The Government's motion to dismiss or for summary judgment was never acted upon, however, because on June 19, 1970 -- 15 days after the Attorney General's June 4 letter to Mr. Weisberg -- the District Court for the District of Kansas (Templar, J.) dismissed the complaint without prejudice on the plaintiff's own motion.

Thereafter, the same plaintiff brought a second action seeking to require production under the Freedom of Information Act of many of the same materials sought in the first suit but not the spectrographic analyses. On February 24, 1971, the district court granted the Government's motion for summary judgment in this second action. Nichols v. United States, 325 F. Supp. 130 (D. Kan.), appeal pending, C.A. 10 (No. 71-1238).

2. It might be added that it was solely the first Nichols case to which the Attorney General was referring in his June 4 letter -- specifically, contrary to the suggestion of appellant's counsel at the oral argument, the Attorney General was not referring to Mr. Fensterwald's attempt to obtain access to the documents filed by the United States in the James Earl Ray extradition proceedings in Great Britain.

Nor was there any reason why the Attorney General would have raised the matter of the Ray extradition documents in discussing

Mr. Weisberg's request for the spectrographic analyses. In the first place, it is obvious that the question of Mr. Fensterwald's entitlement to access to the Ray extradition documents was entirely unrelated to the issue as to whether the Freedom of Information Act required disclosure to Mr. Weisberg of the spectrographic analyses (the extradition documents were, of course, not a part of a FBI investigatory file). Moreover, almost a month before his June 4 letter to Mr. Weisberg, the Attorney General had advised Mr. Fensterwald (by letter of May 6, 1970) that "[w]hether or not the [extradition] 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" (J.A. 43). At no subsequent point was that determination withdrawn by the Attorney General. Thus, insofar as the Attorney General was concerned, on June 4, 1970 there remained no issue whatsoever respecting whether the Ray extradition documents would be disclosed to Mr. Fensterwald.

In sum, insofar as we are aware, there has been only one other attempt to compel the disclosure under the Freedom of Information Act of the spectrographic analyses herein involved -- that of Dr. Nichols. That attempt was resisted on precisely the same grounds assigned by the Government in the present litigation. And while, after voluntarily dismissing his complaint, Nichols then brought a second suit, he chose not to renew his claim of entitlement to the analyses (although he did reassert an entitlement

to some of the other material associated with the assassination).^{1/}
In the circumstances, Weisberg can derive no comfort from the Attorney General's statement in the June 4, 1970, letter to the effect that if "the plaintiff in that case [i.e., Nichols] is successful, the documents in question [i.e., the spectrographic analyses] would of course be made available to you also" (J.A. 24). For Nichols did not succeed and, apparently, recognized when he brought his second action that he was not entitled to the analyses in view of the seventh exemption to the Act, 5 U.S.C. 552(b)(7).

Respectfully submitted,

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^{1/} For example, in both suits, Mr. Nichols sought certain items of the President's clothing and X-rays and photographs taken at the autopsy.