REPLY BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1026

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

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STATEMENT OF ISSUES

1. Does the "investigative files" exemption of the Freedom of Information Act necessarily apply to all files or all materials in a file compiled for or during an agency investigation, whether for law enforcement purposes or not?

2. Are scientific tests such as spectrographic analysis, which jeopardize no informants and reveal no suspects, properly withheld under the "investigatory files" exemption?

3. Does the Government's prior use of and reliance upon the results of the spectrographic analyses in public proceedings require their complete disclosure under the authority of American Mail Line, Ltd. v. Gulick?

4. Assuming that the spectrographic analyses sought were part of a file compiled for law enforcement purposes, have they now lost that status because there is no prospect of enforcement proceedings based upon their findings?

5. Was the FBI's investigation into the assassination of President Kennedy made for a law enforcement purpose?

CORRECTIONS TO GOVERNMENT'S STATEMENT OF THE CASE

Two corrections need to be made to the "Statement of the Case" which appears in the Government's Brief. The first is that the complaint does not seek "the results of the spectrographic analyses of various bullets and metal fragments connected with the assassination." More accurately, the complaint seeks the spectrographic analyses of a bullet, bullet fragments, articles of the President's clothing, and parts

of the vehicle and curbstone said to have been struck by bullets or bullet fragments during the assassination of President Kennedy. The vehicle referred to is the President's limousine and the parts said to have been struck are the windshield and windshield molding.

The second correction is needed to clear up the ambiguity in the Government's statement that "Appellee filed a Motion to Dismiss or, in the alternative for Summary Judgment, which was granted by the Court." Judge Sirica granted a Motion to Dismiss, not a Summary Judgment.

ARGUMENT

I. THE "INVESTIGATIVE FILES" EXEMPTION OF THE FREEDOM OF INFORMATION ACT CANNOT BE EXPANDED TO INCLUDE ALL FILES OR ALL MATERIALS IN A FILE COMPILED FOR OR DURING AN AGENCY INVESTIGATION, WHETHER FOR LAW ENFORCEMENT PURPOSES OR NOT, AND THE COURTS HAVE SO HELD.

Soon after the Freedom of Information Act was enacted, a noted authority on Administrative Law made a preliminary analysis of it. In discussing the "investigative files" exemption, he stated:

> The chief problem of interpreting this exemption will stem from the fact that investigations are often for multiple purposes, for purposes that change as the investigations proceed, and for purposes that are never clarified.
>
> * * * * * * *
>
> The Act is faulty in its use of the unsatisfactory term "files." Much of the contents of investigatory files compiled for purposes that may include law enforcement should not be exempt from required disclosure." (emphasis added) Kenneth Culp Davis, The Information Act: A Preliminary Analysis, U. Chi., L.Rev. 34:761, 800 (1967).

The Government, at least in the instant case, has taken the opposite position. The Government begins its argument by asserting flatly that" "It is not open to contest that the spectrographic analyses sought are part of the file compiled by the FBI on the investigation into the assassination of President Kennedy." (Government brief, p.3) That is, of course, not the same as saying that the spectrographic analyses are part of an investigatory file as that term is used by exemption 7 of the Freedom of Information Act. However, from other passages, it does appear that the Government claims exemption 7 immunity for all FBI files. Thus, the Government brief states that "FBI files were mentioned in the legislative history as the classic example of material which exemption 7

protects from disclosure" and then quotes one of the bill's supporters as saying:

> "[t]he FBI would be protected under exemption No. 7 prohibiting disclosure of 'investigatory files' and the bill "prevents the disclosure of * * * 'sensitive' Government information such as FBI files * * *." (Government brief, p. 4)

As quoted, this statement is certainly open to the interpretation that if the material in the FBI files is not "sensitive" it is subject to disclosure. That interpretation is buttressed somewhat when the ellipses in the quote are filled in. The speaker is then heard to say:

> ... The bill also prevents the disclosure of other types of "sensitive" Government information such as FBI files, income tax auditors' manual, records of labor-management mediation negotiations and information a private citizen voluntarily supplies. [Vol. 112, Part 10, Cong. Rec. 13659 (1966)].

It is worth noting that the "other types of 'sensitive' Government information" listed refer to specific kinds of records and information and do not indicate a blanket protection of any and all files kept by an agency.

Nor does any of the other legislative history indicate that the Congress intended that the FBI or any other agency should be able to label all its files "investigatory" and

thus prevent their disclosure. In fact, the Senate Report on Exemption No. 7 says:

> Exemption No. 7 deals with "investigatory files compiled for law enforcement purposes." These are the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court. (S. Rep. No. 813, 89th Cong., 1st Sess. p.9)

This note on Exemption 7 makes it clear that the legislative intent was to extend protection to only certain types of investigatory files: those which were prepared by Government agencies "to prosecute law violators" and whose premature disclosure "could harm the Government's case in court." Thus, explicitly, the investigatory files exemption was not intended to cover "investigatory files for law enforcement purposes" if those files were available by law to a private party, as under the Jencks Act or Rule 16 of the Federal Rules of Criminal Procedure, and there are strong indications from the legislative history alone that the exemption cannot be invoked, or at least not justified, if the disclosure would not present a specific and express threat to the law enforcement operations of the FBI.

As will be discussed in more detail below, the courts have already laid down several criteria which help to determine whether or not the "investigatory files" exemption is being properly invoked in the instant case.

Before passing on to a consideration of the court holdings, however, plaintiff Weisberg would like to note some egregious inconsistencies between what the Government practices and what it preaches with regard to the disclosure of investigatory files. In the recent past the Government, by which we mean here the Department of Justice, has taken the position that the affidavits and evidence introduced into the court records in London in connection with the extradition of James Earl Ray were not accessible to Ray; and the Department of Justice denied them to plaintiff Weisberg when he sought them under the Freedom of Information Act on the grounds that they were "part of investigative files compiled for law enforcement purposes." (See letter of Nov. 13, 1969 from Deputy Attorney General Richard Kleindienst which is attached to the Complaint as Exhibit C in Civil Action 718-70, U.S. District Court for the District of Columbia).

While the Justice Department has thus on the one hand maintained that public court records can qualify for the in-

vestigatory files exemption, it has on the other hand authorized the dissemination of great quantities of the FBI's files on the investigation into President Kennedy's assassination. However, much of the material disclosed, though of no interest to scholars, defamed innocent parties, invaded personal privacy by recounting allegations that certain named persons were homosexuals, alcoholics, or suspicious characters, and released the personal medical and psychiatric records of many persons, including some 40 pages which consisted of the medical records of Marina Oswald's pregnancy at Parkland Hospital.

What emerges from this is an indisputable inference that the Government applies a kind of Procrustean torture to the exemptions from disclosure which are part of the Freedom of Information Act. Where court records (as in the Ray case) and scientific tests like spectrographic analyses (as in the present case) are sought, the Government stretches exemption 7 to the point that even these are claimed as "investigatory files;" yet, where defamatory, libelous, and privileged personal records are concerned, the Government lops off all exemptions in a manner which suggests that it intends to lay their bloody stumps to rest on a bed built for Lilliputians. In this way the Government is in the unique position of being able to maim both the public and the private interest simultaneously.

The hypocrisy in the Government's position will become more evident as we elaborate below on the areas where courts have held that various types of "investigatory files" cannot be accorded exemption 7 protection.

II. SCIENTIFIC TESTS, SUCH AS SPECTROGRAPHIC ANALYSIS, WHICH JEOPARDIZE NO INFORMANTS AND REVEAL NO SUSPECTS, ARE NOT PROPERLY WITHHELD UNDER THE "INVESTIGATORY FILES" EXEMPTION.

In Bristol-Myers v. F.T.C., 424 F.2d 935 (C.A.D.C., 1970), this court had occasion to construe exemption 5, which protects from 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." In construing this exemption the Court held that:

> Purely factual records and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only "those internal working papers in which opinions are expressed and policies formulated and recommended." (Bristol-Myers, supra at p. 939).

If such a reasonable limitation is true for inter- and intra-agency memoranda, a similar reasonable limitation ought to be equally true for investigatory files, and the legislative history shows that such a limitation is implicit in this exemption, as it is made clear that the primary purpose of

the exemption is to prevent any premature disclosure which might harm the Government's case in court.

It should be noted that in the present caae, there is no chance of premature disclosure which would jeopardize the Government's prospect of a case against anyone other than Lee Harvey Oswald, who is now dead. In addition, scientific tests such as these spectrographic analyses are routinely made available to defendants under Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act, and the alleged results of the analyses have already been used publicly in testimony before the Warren Commission.

Finally, such scientific tests jeopardize no informants and reveal the identity of no suspects. There is, therefore, no possible legal justification of their continued suppression.

Plaintiff Weisberg does not, however, rely solely on the Bristol-Myers holding that purely scientific tests cannot be justifiably withheld under exemption 5. In addition to that analogy, there is at least one case which suggests that the same consideration applies to exemption 7.

In Consumers Union v. Veterans Administration, 301 F. Supp. 796 (1969), the Veterans Administration refused to re-

lease the raw test data which the Veterans Administration had compiled in its program to test hearing aids for distribution to veterans. The Veterans Administration claimed the raw test data were exempt from disclosure "pursuant to 5 U.S.C. §552 (b)(2), (3), (4), (5), and (7)." Consumers Union v. Veterans Administration, 39 L.W.2419, 2420 CC.A.2, Jan. 15, 1971.

The District Court ordered the Veterans Administration to disclose raw test data even though the Veterans Administration had claimed the investigatory files exemption. Although the appeal in Consumers Union was discussed as moot, the Second Court of Appeals made it clear that it agreed substantially with the District Court:

> Subsequent to the prior appeal the Government conceded that the results of the test on hearing aids did not come within any of the exemptions to the Act and that no Public interest rationale justified withholding of the information. It is therefore quite clear that the Government will not again assert that hearing aid test results are outside the Act or should be concealed in the Public interest. Consumers Union v. Veterans Administration, 39 LW at 2420.

It is clear, therefore, that purely scientific tests are not exempt under section (b)(5) of the Freedom of Information Act, and there are indications by at least two courts that they are not protected under exemption 7 either.

III. TESTIMONY GIVEN BEFORE THE WARREN COMMISSION IN REGARD TO THE SPECTROGRAPHIC ANALYSES SOUGHT BY WEISBERG MADE THEM PART OF THE PUBLIC RECORD AND THEIR COMPLETE DISCLOSURE IS THEREFORE REQUIRED UNDER THE AUTHORITY OF AMERICAN MAIL LINE, LTD. V. GULICK.

Testimony was given before the Warren Commission in regard to some of the spectrographic analyses made in connection with the investigation into President Kennedy's assassination. In addition, some of the alleged results of the spectrographic analyses made by the FBI in conjunction with that investigation were given to Dallas Police Chief Jesse Curry, who then published them in a book: JFK ASSASSINATION FILE, (American Poster and Printing Company, 1969).

In American Mail Line, Ltd. v. Gulick, 411 F.2d 696 (1969) steamship operators brought an action under the Freedom of Information Act to compel the Maritime Subsidy Board to disclose in toto a 31-page memorandum which the Subsidy Board had relied upon in issuing an order requiring steamship operators to refund several million dollars in subsidy payments. The Maritime Subsidy Board had clipped the last 5 pages of this 31-page memorandum and recorded it as its own findings and determination in the matter.

The Maritime Subsidy Board refused disclosure and claimed that the material sought was exempt under 5 U.S.C. &.552 (b)(5) as an "intra-agency memorandum." This court

rejected that contention, saying:

> "We do not feel that [the Maritime Subsidy Board] should be required to "operate in a fish bowl," but by the same token we do not feel that [the steamship operators) should be required to operate in a dark room. If the Maritime Subsidy Board did not want to expose its memorandum to public scrutiny it should not have stated publicly in its April 11 ruling that its action was based upon that memorandum, giving no other reasons or basis for its action. When it chose this course of action ... the memorandum lost its intra-agency status and became a public record, one which must be disclosed to appellants."

Weisberg asserts that this court ought to apply the same principle to the investigatory files exemption in this case. The use of the spectrographic analyses before the Warren Commission requires that they now be made completely public. To do otherwise would place the American public in the position of "operating in a dark room." American Mail Line, Ltd., supra at 703. The Senate report on the Freedom of Information Act characterized the purpose of the Act as follows:

> "Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both." (Sen. Rep. No. 813 at 2-3, cited in American Mail Line Ltd., Supra, at 699)

Nothing could possibly be more relevant to such a purpose than the right of the American people to inform themselves

as to how a President was assassinated or to what extent Government agencies might have covered up the truth about that event.

IV. ASSUMING THAT THE SPECTROGRAPHIC ANALYSES WERE PART OF A FILE COMPILED FOR LAW ENFORCEMENT PURPOSES, THEY HAVE NOW LOST THAT STATUS BECAUSE THERE IS NO PROSPECT OF ENFORCEMENT PROCEEDINGS BASED UPON THEIR FINDINGS.

Exemption 7 provides protection for "investigatory files compiled for law enforcement purposes." (emphasis added) The very wording of this exemption indicates that the protection it affords has a time limitation. "Purpose" implies a goal toward which one strives. It means, therefore, either present or future action. Once the goal has been obtained or the potential for achieving it has passed, there is no longer any purpose.

At this point the Government's position founders on the horns of a dilemma. Either Oswald was the lone assassin of President Kennedy, as the Government has frequently proclaimed, in which case there is no longer any law enforcement purpose which can be accomplished, since Oswald is dead; or else there was a conspiracy to assassinate President Kennedy, in which case the Government should say so and then proceed to establish the concrete prospect of law enforcement proceedings against

the assassins currently at large.

The ruling of this court in Bristol-Myers Company v. F.T.C., U.S. App. D.C. , 424 F.2d 935 (C.A.D.C., 1970) to the effect that there must be a concrete prospect of enforcement proceedings in order to justify the investigatory files exemption has been discussed in Appellant's brief (at pages 18-19). Appellant Weisberg wishes to note, however, another case very much in line with that decision.

In Cooney v. Sun Shipbuilding and Drydock Co., 288 F. Supp. 708 (E.D. Pa., 1968), the Court noted that:

> .... a primary purpose of the exemptive provision in question is to avoid a premature disclosure of an agency's case when engaged in law enforcement activities. Thus, under the subsection, files or portions thereof, need not be disclosed during the investigative stages of a contemplated litigation or enforcement proceeding, and statements of witnesses need not be disclosed prior to the time that these witnesses have testified in formal proceedings. Cooney, supra, at 711-712.

The Court then went on to discuss the Barcelonata Shoe and Clement Bros. cases relied upon by the Government, saying:

> "I concur with the holding of the above cases, but only within the context in which they were rendered. For in cases in which an agency hearing or judicial litigation is impending, the situation is often rife with possibilities for a defendant to intimidate witnesses, or anticipate and avoid the Government's case; thus, a rule limiting disclosure in such cases has an obvious

> rationality. But in a situation such as is presented here, long beyond the time in which investigation would have culminated in action, the rationale of the above-cited cases has no relevance. (emphasis added). Cooney, supra at 712.

If that is true of a case some four and a half years old, what else need be said about a case some seven and a half years old in which the Government claim is that the only assassin is dead?

V. AFFIDAVIT OF FBI AGENT MARION WILLIAMS WAS NOT MADE ON PERSONAL KNOWLEDGE, SET FORTH SOME FACTS SUCH AS WOULD NOT BE ADMISSIBLE IN EVIDENCE AND DID NOT SHOW AFFIRMATIVELY THAT THE AFFIANT WAS COMPETENT TO TESTIFY TO MATTERS STATED THEREIN.

The affidavit executed by FBI Agent Marion E. Williams is defective in virtually every statement it makes. Basically, it attempts to use the prestige of an FBI Agent to establish that the spectrographic analyses sought by Appellant Weisberg "were conducted for law enforcement purposes as part of the FBI investigation into the assassination." Such a statement, however, asserts a legal conclusion. FBI Agent Williams is not competent to testify as to legal conclusions, nor is it proper for any affidavit to state legal conclusions. This alone should have been grounds for the court to have stricken the affidavit from the record.

Furthermore, the affidavit does not show affirmatively that Agent Williams is competent to testify in regard to factual matters connected with spectrographic analysis. The affidavit does not state that Agent Williams is a spectrographer or is attached to the spectrographic unit of the Physics and Chemistry Section of the FBI Laboratory, nor if so, how long he has been there. For ought we know, this Agent's sole field of expertise may be in the siience of distinguishing one type of tire tread from another. But Agent John Gallagher, who testified before the Warren Commission, stated that he had been assigned to the Spectrographic Unit for the greater part of 18 years. (Vol. XV, 746).

There is nothing in the Williams affidavit which asserts, much less establishes, that he has personal knowledge of the spectrographic analyses as of the time they were originally made. To be charitable, there is much in the affidavit which indicates an unfamiliarity with their subsequent history. Paragraph 4 of his affidavit flatly states:

> The investigative file referred to in paragraph "3" above was compiled solely for the official use of U.S. Government personnel. <u>This file is not disclosed by the Federal Bureau of Investigation to persons other than U.S. Government employees</u> on a "need-to-know" basis. (JA-50) (emphasis added).

Notwithstanding such claims, reports of spectrographic analyses made in connection with the FBI investigation into President Kennedy's murder are reproduced in a book by former Dallas Police Chief Jesse Curry. (See JFK Assassination File, p. 3). If true, however, this statement in the Williams affidavit that "this file is not disclosed by the Federal Bureau of Investigation to persons other than U.S. Government employees" would contradict the attempt made in the Government's brief to claim that the FBI was acting as an adjunct to the Dallas Police investigation of the crime.

Paragraph 5 of the Williams affidavit is an agglomeration of wild speculation and baseless allegations. Whereas Plaintiff is primarily interested in obtaining the written reports based on the raw data accumulated in the process of making the spectrographic analyses, the Williams affidavit addresses itself to the raw data, declaring that its release:

> ..... could lead.... to exposure of confidential informants; the disclosure out of contest of the names of innocent parties, such as witnesses; the disclosure of the names of suspected persons on whom criminal justice action is not yet complete; possible blackmail; and, in general, do irreparable damage. (JA-51).

This catalog of horrors does not explain how it is possible that the release of scientific test like these spectrogra-

phic analyses can accomplish such facts. How can the spectrographic analyses, particularly the "raw data," expose confidential informants? How can they disclose the names of innocent parties, witnesses or suspects? The affiant seems not to have grasped the fact that Appellant Weisberg seeks only the reports of scientific tests conducted by the FBI. In the unforseeable event that these reports jeopardized informants, witnesses or suspects, their names easily could be deleted.

In short, the release of the spectrographic analyses can not produce any such phantasmagoric results. What the spectrographic analyses can show, however, is whether the bullet fragments found in the presidential limousine, the bullet fragments removed from Governor Connally and President Kennedy during hospitalization and surgery, and the bullet traces on the President's clothing and the windshield, windshield molding and the curbstone all had a common origin. Therein, perhaps, is where the Government's real fear lies.

VI. GOVERNMENT HAS NOT SUBSTANTIATED ITS CLAIM THAT THE FBI INVESTIGATION INTO THE ASSASSINATION OF PRESIDENT KENNEDY WAS CONDUCTED FOR A LAW ENFORCEMENT PURPOSE.

The Government asserts that in its investigation into the assassination of President Kennedy, the FBI "clearly was

acting for 'law enforcement purposes' within the meaning of t the Public Information Act."

However clear this may be to the Government, it fails to cite any statute or other authority to substantiate it. Instead, the Government invents a law enforcement purpose: "A purpose of that investigation ... was to ascertain who had killed the President so that he or they could be apprehended and brought to justice." (Government brief at pp. 3-4)

It may be noted in passing that Lee Harvey Oswald, the Government-proclaimed "lone assassin," had already been apprehended by the time that President Johnson had requested the FBI investigation. Whatever else the President may have intended the FBI to do, apprehension of the assassins was not among them. More importantly, however, the President of the United States could not in any case, completely on his own hook, create a law enforcement purpose where none existed. It takes a Congressional enactment to do that, and because of the President's assassination, one was eventually passed. (See 18 U.S.C. §1751).

FBI Director Hoover in his testimony before the Warren Commission stated that President Johnson had requested that the FBI make a "special investigation" into the assassination. The very wording - "special investigation" - suggests that it

was conceived from the very beginning as something apart from the FBI's normal "law enforcement" type of investigation.

Moreover, the FBI's investigation into the assassination was done for and as the agent of the Warren Commission. On November 29, President Johnson appointed the members of a Commission which was to "ascertain, evaluate, and report upon the facts relating to the assassination of the late President Kennedy and the subsequent violent death of the man charged with the assassination." (Emphasis added) Executive Order 11130. The purposes for which the Commission was convened were express, specific and limited:

> The purposes of the Commission are to examine the evidence developed by the Federal Bureau of Investigation and any additional evidence that may hereafter come to light or be uncovered by federal or state authorities; to make such further investigation as the Commission finds desirable; to evaluate all the facts and circumstances surrounding such assassination, including the subsequent violent death of the man charged with assassination, and to report to me its findings and conclusions. (Emphasis added). Executive Order 11130, Nov. 29, 1963.

There is not a word in this Executive Order which indicates a law enforcement purpose. The order is to prepare a report to the President, not to apprehend or prosecute assassins. The Commission is to be judge and jury, not Prosecutor, to make

findings and conclusions, a task it could not assume consistent with an investigation to be made for law enforcement purposes.

Senate Joint Resolution No. 137, which was enacted on Dec. 13, 1963 was a resolution:

> authorizing the Commission established to report upon the assassination of President John F. Kennedy to compel the attendance and testimony of witnesses and the production of evidence. (Emphasis added) Public Law 88-202, 88th Cong., S.J. 137, Dec. 13, 1963.

S. J. 137 made it very clear that the Commission was not intended to apprehend assassins for law enforcement purposes. Section (e) of that Resolution stripped from witnesses brought before the Commission their 5th Amendment privilege against self-incrimination. Section (e) further stipulated:

> ... but no individual shall be prosecuted or subjected to a penalty or forefeiture (except demotion or removal from office) for or on account of any transaction, matter, or thing concerning which he is compelled after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. (emphasis added)

From this it may be justifiably inferred that the Warren Commission was established in order to establish the truth about the circumstances surrounding the assassination, rather than as an instrumentality for apprehending assassins.

The Government has consistently maintained that no statutory authority is needed to establish a law enforcement purpose. In the court below the Government invoked "natural or human" law as sufficient to establish a law enforcement purpose. Before this court that claim has been dropped for the newly-invented fiction that the FBI was out to apprehend assassins.

Plaintiff Weisberg is not alone in his insistence that the "investigatory files" exemption cannot be claimed by an agency where it has no statutory basis for claiming enforcement powers. An article in Georgetown Law Journal has discussed the legislative background to the investigatory files exemption, saying:

> When exemption (b)(7) was introduced into Congress, there was much criticism by the agencies that it was too narrow, and Congress was repeatedly urged to expand its scope." Freedom of Information: the statute and the regulations. Georgetown Law Journal, Vol. 56:18, 47 (1967).

A discussion of agency regulations regarding the application of Freedom of Information Act exemptions notes that: "a second class of material listed in many (b)(7) regulations is data compiled during investigations into areas not involving the violation of statutes." However, the article notes that a Justice Department proposal that would have permitted

the exemption of such materials as "investigatory files: was rejected by Congress, and then concludes:

> Since no change was made and since even the broadening language of the House Report still requires statutory enforcement, this category is an unauthorized extension of the exemption. (Emphasis added) [Ibid pp. 49-20]

There is, moreover, sound reason for requiring that there be a statutory basis before an agency can be said to have a "law enforcement purpose." Such a requirement sets controls and limits on what an agency can legitimately investigate. The alternative to this is to allow agencies to exceed the powers given them by Congress, and to exceed those powers with impunity; for without such controls, there is no fear of exposure at all.

CONCLUSION

Plaintiff Weisberg is already entitled to the spectrographic analyses he seeks. The test of the Freedom of Information Act and the case law construing it do not permit the investigatory files exemption to be invoked where the records sought are scientific tests, where such records have been referred to and relied upon in public proceedings, or in situations where the Government has not established that there is a concrete prospect of law enforcement action to come.

Each of these criteria applies to the records Plaintiff seeks. The spectrographic analyses which Plaintiff Weisberg has requested are scientific tests. The Government relied upon the spectrographic analyses in testimony before the Warren Commission but now seeks to suppress them although it has not claimed that there presently exists any concrete possibility of law enforcement action based upon them.

In regard to this question of present law enforcement action, the Government must make a painful choice. Either Lee Harvey Oswald was the lone assassin of President Kennedy, in which case there is no longer any possibility of law enforcement action; and the Government must disclose these spectrographic analyses; or else there was a conspiracy and the possibility of law enforcement against the conspirators remains, in which case the Government is obligated to establish the concreteness of the possible prosecutions.

But the painfulness of the Government's decision on this matter is not at issue here. What is at issue is the right of the public to have access to information which will enable it to reach a more accurate judgment about the important events which shape our lives.