UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK A. ALLEN)
Plaintiff)
v.) Civil Action No. 81-1206
FEDERAL BUREAU OF INVESTIGATION, et al.)
Defendants)

MEMORANDUM OPINION

The plaintiff, Mark Allen, seeks access under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), to records of any communications between the United States House of Representatives' Select Committee on Assassinations (Committee) and the Federal Bureau of Investigation (FBI) relating to the Committee's investigation into the assassination of President Kennedy.

This action is before the Court on motions for summary judgment by defendant-intervenor Clerk of the House of Representatives (Clerk) and the Executive Branch defendants, the FBI and Department of Justice. The Clerk argues that the more than 300,000 pages collected by the Committee and held by the FBI are congressional documents under the test established in Goland v. Central Intelligence Agency, 607 F.2d 339 (D. C. Cir. 1978), modified on other grounds, 607 F.2d 367 (D. C. Cir. 1979), cert. denied, 445 U. S. 927 (1980). In addition, the Clerk contends that the Speech or Debate Clause of the Constitution, Article I, § 6, cl. 1, bars their disclosure. The Executive Branch defendants, on the other hand, argue that all the records are protected from disclosure by exemption five of the FOIA, 5 U.S.C. § 552(b)(5).

For the reasons stated below, the Court grants the Clerk's motion with respect to communications sent from the Committee to the FBI. The Court denies the Clerk's motion in all other respects and denies the defendants' motion in its entirety, without prejudice to a renewal on sufficient showing of exemption.

I.

The parties have divided the documents requested by plaintiff into six broad categories. The majority were either FBI records sent to the Committee or FBI records made available to the Committee for perusal at FBI Headquarters or at FBI field offices. These documents reflect the results of numerous FBI investigations and were created during the last twenty years or even earlier. Affidavit of FBI Special Agent John N. Phillips, Exhibit C to Executive defendants' motion for summary judgment, ¶ 5.

The FBI generated about 6,000 pages of documents during the existence of the Committee. These documents were divided into three categories: internal FBI memoranda pertaining to the Committee; FBI communications with other agencies pertaining to the Committee; and communications sent from the FBI to the Committee. The last category, communications sent from the Committee to the FBI, contained the smallest number of documents. Ibid.

On March 26, 1979, three days before the Committee issued its report, Chairman Stokes wrote the Attorney General concerning the records generated by the Committee. He noted that the Department of Justice had physical custody of a variety of materials originating from the Committee and had generated materials in response to specific requests or

concerns of the Committee. Representative Stokes, as chairman of the Committee, requested the Attorney General not to disclose "this Congressional material and related information in a form connected to the Committee" without the written concurrence of the House of Representatives. Exhibit 1 to the Clerk's motion for summary judgment.

On March 2, 1981, the Clerk wrote to FBI Director William H. Webster, and referred specifically to FOIA requests with the FBI for the records of the Committee. The Clerk asserted that "none of the congressional materials" held by the FBI could be released "consistent with the letter from Chairman Stokes asserting the exemption for Congress under 5 U.S.C. § 551(1)(A)."

II.

Congress excluded itself from the FOIA. 5 U.S.C. § 551(1)(A) ("'agency' . . . does not include the Congress"); 5 U.S.C. § 552(a) ("Each agency shall make available to the public. . ."). The Court will not permit plaintiff to obtain from the FBI what he could not get from Congress directly.

Whether or not documents held by an agency are congressional "depends on whether under all the facts of the case the document had passed from the control of Congress and become properly subject to the free disposition of the agency with which the document resides." Goland v. Central Intelligence Agency, supra at 347. In Goland, the transcript of an executive session of a House committee was held to be a congressional document, notwithstanding its possession by an agency. In Holy Spirit Association v. Central Intelligence Agency, 636 F.2d 838 (D. C. Cir. 1980), vacated in part as moot, 50 USLW 3715 (March 9, 1982), the Court of Appeals

looked to the circumstances surrounding Congress' creation of the documents and transfer for "some clear assertion of congressional control." The Holy Spirit Court found that some thirty-five documents reflecting correspondence and memoranda originated by a congressional committee and fifteen documents created by the CIA in response to the committee's inquiry were agency records subject to the Freedom of Information Act. Id., at 840-43.

To show Congress' assertion of control over the creation of the records here, the Clerk relies on a memorandum of understanding between the Attorney General and the Committee. The memorandum of understanding, however, establishes the terms for congressional access to agency records; it does not indicate that the information provided would thereafter belong exclusively to Congress. See exhibit 3 to the Clerk's motion for summary judgment. The nondisclosure agreement signed by Committee staff employees similarly establishes the rules for congressional access to information without asserting control over it. See exhibit 6 to the Clerk's motion for summary judgment.

The Clerk relies on Chairman Stokes' letter of March 26, 1979 and the Clerk's letter of March 2, 1981 to show Congress' assertion of control upon transfer of the records. However, the Committee expired on January 3, 1979 at the close of the 95th Congress. House Resolution 49 authorized Chairman Stokes of the Committee "to exercise the authority of the former select committee with respect to the handling of classified materials relating to the operations of such committee." H.R. Res. 49, 96th Cong., 1st Sess., 124 Cong. Rec. 414-15 (1979). Surely not all the records of the

Committee can be considered classified. The Clerk's letter is entitled to even less weight because it was written after the records had been transferred, more than two years after the Committee's investigation ended, and in response to FOIA requests with the FBI.

The Court declines to hold the more than 300,000 pages of material congressional records under the Goland test. The Clerk's analogy of congressional investigations to grand jury proceedings is erroneous. No statute prohibits disclosure of congressional investigations, but Rule 6(e) of the Federal Rules of Criminal Procedure has been applied to exempt grand jury proceedings from the Freedom of Information Act. See Iglesias v. Central Intelligence Agency, 525 F.Supp. 547 (D.D.C. 1981). Congressional investigations to oversee the Executive Branch and develop legislation differ markedly from the grand jury's determination whether or not to indict. The need for secrecy in the latter proceeding is clearly greater. Most congressional investigations, in fact, are publicized thoroughly to explain what Congress is doing and to seek public comment and participation.

III.

Even if Congress failed to properly assert control over the records, the Clerk contends that they are part of the Committee's "deliberative and communicative process" and are therefore barred from disclosure by the Speech or Debate Clause of the Constitution, Article I § 6, cl. 1. That clause provides that "for any Speech or Debate in either House, they (the Senators and Representatives) shall not be questioned in any other place."

The Speech or Debate Clause shields matters which are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." United States v. Gravel, 408 U. S. 606, 625 (1972). See also United States v. Helstoski, 442 U. S. 477, 488 (1979); Eastland v. United States Servicemen's Fund, 421 U. S. 491, 503-04 (1975); United States v. Brewster, 408 U. S. 501, 512 (1972).

The Clerk argues that anything Congress investigates, like King Midas' golden touch, becomes an integral part of Congress' deliberative and communicative process. The FBI investigatory records, created before the Committee's existence, do not reflect the "deliberative and communicative processes" of the Committee. Parts of the 6,000 pages of documents reflecting FBI communications within or without the agency pertaining to the Committee may be barred from disclosure by the Speech or Debate Clause, but it would be erroneous to withhold those records in their entirety on this basis. In addition, dissemination of these records to the public or throughout the Executive Branch may have eliminated such protection. See Doe v. McMillan, 412 U. S. 306, 317 (1973).

The Court agrees with the Clerk that communications sent from the Committee to the FBI in pursuit of a lawful congressional investigation are an integral part of the "deliberative and communicative process" of Congress. Accordingly, the Speech or Debate Clause bars their disclosure.

See United States v. People's Temple of the Disciples of Christ, 515 F.Supp. 246 (D.D.C. 1981); Tavoulareas v. Piro, 527 F.Supp. 676 (D.D.C. 1981). In People's Temple, this Court quashed a subpoena which sought unpublished documents from a House committee investigation. In Tavoulareas, this Court prohibited questioning Congressional staff regarding their "active acquisition of information." Id. at 680. Barring production of the documents originated by the Committee, whether they are in the possession of Congress or an agency, is consistent with Congress' exclusion of itself from the Freedom of Information Act.

IV.

Matters that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party" may be withheld pursuant to exemption five of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). This exemption protects the predecisional deliberative process within agencies "in which opinions are expressed and policies formulated and recommended." Ackerly v. Ley, 420 F.2d 1336, 1341 (D. C. Cir. 1969). Its application depends upon the individual document and the role it plays in the administrative process. Playboy Enterprises v. Department of Justice, No. 81-1605, Slip op. at 7-8 (D. C. Cir. May 11, 1982).

The Executive Branch defendants argue that the 300,000 pages of documents requested by plaintiff disclose the deliberative process of the Committee, its efforts to obtain the FBI's cooperation, and the Committee's interaction with the FBI during its investigation. Disclosure of records to Congress, they contend, did not eliminate the deliberative

process privilege because of the public policy which encourages broad congressional access to government information.

The exemption five claim is premature. First, defendants have failed to comply with Local Rule 1-9(h) of the United States District Court for the District of Columbia. They did not provide any information regarding this claim in their statement of material facts to which there is no genuine issue. See Gardels v. Central Intelligence Agency, 637 F.2d 770, 773 (D. C. Cir. 1980). More important, they made no attempt to apply this claim to the six categories of records or any individual documents. See Playboy Enterprises v. Department of Justice, supra.

FBI investigatory records provided to the Committee do not reflect any deliberative process by the Committee or the FBI's interaction with the Committee. The application of exemption five to the remaining categories of records must await a more particularized presentation of the documents.

An appropriate order accompanies this opinion.

JUNE L. GREEN
U. S. DISTRICT JUDGE

November 24, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK A. ALLEN)

Plaintiff)

v.) Civil Action No. 81-1206

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Defendants)

FILED

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CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

O R D E R

Upon consideration of the motions for summary judgment by defendant-intervenor Clerk of the House of Representatives and the Executive Branch defendants, plaintiff's oppositions thereto, plaintiff's motion to strike parts of intervenor's answer and motion for summary judgment raising defense of speech or debate clause, and the entire record in this action, for the reasons stated in the accompanying memorandum opinion, it is by the Court this 24th day of November 1982,

ORDERED that the Clerk's motion for summary judgment is granted with respect to communications sent from the Committee to the FBI and is otherwise denied; it is further

ORDERED that the Executive Branch defendants' motion for summary judgment is denied without prejudice to a renewal on sufficient showing of exemption; and it is further

ORDERED that plaintiff's motion to strike is denied.

JUNE L. GREEN
U. S. DISTRICT JUDGE