Harold

FILED
JUL 20 1973
JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARL L. STERN,
Plaintiff,
v.
ELLIOT L. RICHARDSON, Attorney General of the United States,
Defendant.

Civil Action No. 179-73

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant, by his attorney, the United States Attorney for the District of Columbia, herewith records his opposition to plaintiff's cross-motion for summary judgment filed herein, and respectfully refers the Court to the memorandum of points and authorities filed by him herein in support of his motion for summary judgment on June 15, 1973.

Pursuant to the order of the Court dated July 16, 1973, defendant will submit to the Court in camera the requested documents by July 24, 1973. Defendant respectfully suggests, however, that the Court defer an in camera inspection of the documents pending a ruling en banc by the United States Court of Appeals for this Circuit in Weisberg v. Department of Justice, No. 71-1026, which cause has recently been argued, and which ruling should be issued shortly. Defendants believe that the Court of Appeals in its ruling may provide guidance as to how the Court should proceed with respect to Information Act suits in which records of the Federal Bureau of Investigation are requested.

merits of the instant case." (Memorandum in opposition to defendant's motion to extend time at 2 (footnote)). However, defendant submits that Weisberg presents broader issues in this regard than plaintiff suggests.

Defendant has already extensively discussed the authorities upon which he relies for non-disclosure in this case, and will not repeat them here. However, in response to the assertions on pages 8-9 of plaintiff's memorandum that the requested documents are without the fifth exemption because they would be routinely discoverable in litigation with the agency, defendant offers the discussion of this language in Sterling Drug, Inc. v. FTC, 146 U.S.App.D.C. 237, 243-244, 450 F.2d 698, 704-705 (1971), wherein the Court said:

> ...Congress' description of those entitled to disclosure under the Act and earlier cases decided by this court clearly indicate that disclosure under the Act is not to depend on the needs of a particular litigant. The correct test for determining which documents are not exempt under § 552(b)(5) is given in the House Committee's report on the section, which states that "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." H.R.Rep. No. 1497, 89th Cong., 2d Sess. 10 (1965). The question for decision is thus whether a "private party'--not necessarily the applicant--would routinely be entitled to [the Commission memoranda] through discovery." ...The clear answer is that he would not be so entitled. While some cases suggest that government memoranda containing legal analyses and recommendations may in some circumstances be subject to discovery, it is beyond question that granting discovery of such documents is a very extraordinary step, not a routine one. [emphasis added; footnotes omitted]

Finally, plaintiff's reliance on section (a)(2)(B) of the Freedom of Information Act, 5 U.S.C. § 552(a)(2)(B), is misplaced. It seems clear from a reading of the cited section that its thrust is to require disclosure of "statements of policy and interpretations" which are useful for "the guidance of the public," (5 U.S.C. §552(a)(1)), or which may be "relied on, used, or cited as precedent by an agency against a party..." (5 U.S.C. §552(a)(2)). Defendant submits that this language limits application of the provision upon which plaintiff relies (Memorandum, 8-9) to policy and interpretation by government agencies in the context of rule-making and adjudication, and it is not applicable to a program such as that involved in the instant case which in no way is promulgated for the guidance of the public, and would not be used as precedent in connection with legal proceedings involving a member of the public. The further suggestion of plaintiff that public policy requires that the existence of a counter-intelligence program be made a matter of public knowledge is doubtful as a legal proposition and certainly without merit as a matter of common sense.

WHEREFORE, plaintiff's cross-motion for summary judgment should be denied; and defendant's motion for summary judgment should be granted.

Harold H. Titus Jr.
HAROLD H. TITUS, JR.
United States Attorney

Arnold T. Aikens
ARNOLD T. AIKENS