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United States Attorney
Newark, New Jersey

April 6, 19[illegible]

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L. Patrick Gray, III
Assistant Attorney General, Civil Division
By: Harland F. Leathers, Chief
General Litigation Section

Emory L. Brown, Jr. v. Mitchell, et al.,
U.S.D.C. D. N.J., Civil Action No. 44-71

Enclosed are originals and three copies of an affidavit executed by FBI Special Agent Henry A. Schutz, Jr. For the reasons given below, we suggest that you file a motion to dismiss or, in the alternative, for summary judgment pursuant to Rules 12(b)(1), (6) and 56 of the Federal Rules of Civil Procedure, supported by Mr. Schutz' affidavit, before our time to respond to the complaint as extended runs. This will obviate the necessity of filing an answer in these proceedings. Rule 12(a), Federal Rules of Civil Procedure.

Plaintiff brings this suit pursuant to the Information Act, 5 U.S.C. 552. (Complaint II, Par. 1.) As is shown below, the action must be dismissed or summary judgment granted for defendants because the statute upon which plaintiff relies, 5 U.S.C. 552, conveys no right to obtain the information plaintiff seeks: Plaintiff has not requested any "identifiable records" as is made a precondition of exercise of jurisdiction by federal courts, and, in any event, all the information plaintiff seeks comes within the exclusion from the provisions of 5 U.S.C. 552 set forth at 5 U.S.C. 552(b)(7), exempting "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 1/

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1/ Of course the mandamus statute also cited by plaintiff, Complaint II, Par. 2, set forth at 28 U.S.C. 1361, does not aid plaintiff since it would be relevant only where plaintiff has shown that some statutory right has been denied him. See [illegible] v. [illegible], 294 F. Supp. 1[illegible]3 (E.D. Pa. 19[illegible]); the cases cited in Bowen v. Culotta; and Carter v. [illegible], 411 F.2d 7[illegible], 7[illegible]3 (5th Cir. 19[illegible])

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Mr. Schultz' affidavit sets forth these relevant facts:

> While the FBI maintains an extensive and detailed indexing system permitting material in its files and records to be located, a search of our indexing systems failed to identify certain of the information requested by plaintiff. However, since plaintiff's demands are based on material originating in the files and records of other law enforcement agencies (principally the Dallas Police Department), to insure that our files do not contain the demanded information in any form would necessitate a detailed, page by page search of a substantial portion of the 384 volumes of this file. [Schultz' affidavit, par. 3]

Section 552(a)(3) of 5 U.S.C. provides:

> * * * each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. * * *

The statutory language thus limits the material to be made available to "identifiable records" and grants the Court jurisdiction only to enjoin the agency with respect to agency records improperly withheld from the complainant. 5 U.S.C. 552 thus does not require agencies to produce information or to alter records so that they may become available or to compile information not contained in identifiable records. Tuchinsky v. Selective Service System, 418 F.2d 155 (7th Cir. 1969). This holding confirms what is evident in the light of the legislative history discussed in the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act at pp. 23-24, which points out that 5 U.S.C. 552(a)(3)

> "refers of course, only to records in being and in the possession or control of an agency. The requirement of this subsection imposes no obligation to compile or procure a record in response to a request. This is evidenced by the fact that the term 'information' in the bill, as introduced, was changed by the Senate to 'identifiable records' and by the legislative history of that change. (S. Rept., 89th Cong., 2.)"

As in Tuchinsky v. Selective Service System, 418 F.2d 155 (7th Cir. 1969), it would be "an unreasonable burden" not contemplated by the identifiable record requirement set forth in 5 U.S.C. 552(a)(3) to require a Government agency to compile information for members of the public such as the information sought by plaintiff. The requirement that plaintiff seek "identifiable records" stands as a barrier to plaintiff's use of judicial proceedings to obtain such information. Tuchinsky v. Selective Service System, supra. The file referred to at the present time "consists of 384 volumes containing 12,659 serials. Some of these 'serials', each of which is a separate document, are over 1400 pages in length." (Schultz' affidavit, Par. 2). Thus, it is manifest that the action should be dismissed since plaintiff has not requested any "identifiable records," 5 U.S.C. 552(a)(3).

In any event, the information plaintiff seeks is clearly exempt from disclosure since it could only be part of "investigatory files compiled for law enforcement purposes" not available by law to a party other than an agency and therefore within the exclusion set forth at 5 U.S.C. 552(b)(7). Indeed Mr. Schultz' affidavit details at great length in paragraph 4, 5 and 6, the grave injury which would be done to the FBI's investigative processes and to the security of the President if the file compiled in connection with the assassination of President Kennedy were made available.

The whole thrust of the exemption is to protect from disclosure all files which the Government compiles in the course of law enforcement investigations which may or may not lead to formal proceedings. As the Court held in Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591, 592-593 (D. P.R. 1967):

> In general terms I agree with the Attorney General's analysis of the nature and scope

of the exemption, in his Memorandum on the Public Information Section of the Administrative Procedure Act, dated June 1967, wherein he states at p. 38:

> 'The effect of the language in exemption (7), on the other hand, seems to be to confirm the availability to litigants of documents from investigatory files to the extent to which Congress and the courts have made them available to such litigants. For example, litigants who meet the burdens of the Jencks statute (18 U.S.C. 3500) may obtain prior statements given to an FBI agent or an SEC investigatory by a witness who is testifying in a pending case; but since such statements might contain information unfairly damaging to the litigant or other persons, the new law, like the Jencks statute, does not permit the statement to be made available to the public. In addition, the House report makes clear that litigants are not to obtain special benefits from this provision, stating that 'S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings.' (H.Rept. 11).'

As I suggested before, Congress could not have intended to grant lesser rights of inspection and copying of witnesses' statements to persons who are faced with the deprivation of their life or liberty, than to persons faced only with remedial administrative orders under regulatory statutes.

Accord: Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir. 1970), cert. denied 39 L.W. 3147.

To like effect is the Court's decision in Clement Brothers Co. v. NLRB, 282 F. Supp. 540, 542 (N.D. Ga. 1968), with which the Fifth Circuit has stated it "fully concurs," NLRB v. Clement Brothers Co., 407 F.2d 1027, 1031 (5th Cir. 1969):

> Though the Court does not feel that it is necessary to reiterate an exhaustive documentation of the Act's legislative history, the following statement is exemplary of numerous others which make it clear that the plaintiff's interpretation must be rejected:
>
> > 'This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. H.R. Report # 1497, 89th Cong., 2nd Sess., p. 11.'
>
> In sum, it is clear that the plaintiff could obtain the employees' statements taken by the Board if the employees had been called to testify-- in fact, the plaintiff was given access to the statements of the employees who did so testify. However, the plaintiff is not entitled to employee statements absent such use.

Since, the records plaintiff seeks have not been made part of the record in agency proceedings, plaintiff may not obtain them "absent such use." 2/ Accord: Benson v. United States, 332 F. Supp. 1144 (D. Neb. 1970). Thus, by enactment of 5 U.S.C. 552(b)(7) "[t]he public policy in favor of maintaining the

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2/ Insofar as dictum in Cooney v. Un Shipbuilding & Drydock Co., 288 F. Supp. 703 (E.D. Pa. 1968), which involved subpoena proceedings, not a suit pursuant to 5 U.S.C. 552, is to the contrary, it is plainly wrong for the reasons stated above.

secrecy of FBI investigative reports has been recognized by Congress." Black v. Sheraton Corp. of America, 50 F.R.D. 139, 132 (D. D.C. 1970).

In summary, common sense, the wording of 5 U.S.C. 552, its legislative history, and the decided cases are in accord that plaintiff may not obtain the relief he seeks in these proceedings.

Please send us copies of all papers filed and keep us informed of all developments.

Enclosures

cc: Mr. J. Edgar Hoover
Director
Federal Bureau of Investigation

2/ (continued) It is significant that the language Congress chose, "compiled for law enforcement purposes" was criticized at hearings on the proposed legislation as unduly restrictive. 89th Cong., 1st Session, Hearings on H.R. 5012 before the House Committee on Government Operations, pp. 245-247.- Notwithstanding this criticism Congress enacted exemption 7 as referred to above because it thought the broad protection against disclosure contained therein necessary to effective operation of the agencies which compile investigation reports. In any event, the records plaintiff seeks are presently maintained by the Federal Bureau of Investigation "in a 'pending' or open status." (Schutz' affidavit, Par. 4).