

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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PATHOLOGY & ONCOLOGY
UNIV. KANSAS MED. CENTER

JOHN NICHOLS

Plaintiff,

v.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

CIVIL NO. T-4761

REPLY TO PLAINTIFF'S MEMORANDUM BRIEF

Statement

Defendants have moved to dismiss or, in the alternative for summary judgment in this action and have filed affidavits executed by Dr. James B. Rhoads; Mr. Richard Vawter; and Vice Admiral George M. Davis in support of their motion. The facts stated in Dr. Rhoads' affidavit establish that the autopsy photographs, X-rays, clothing worn by President Kennedy at the time of his assassination, and Warren Commission Exhibits are specifically exempted from disclosure by 44 U.S.C. 2107, 2108(c) and Public Law 89-318. In addition, such materials are clearly not "records" within 5 U.S.C. 552, the basis for jurisdiction alleged in the complaint. The materials are excluded from the definition of records set forth at 44 U.S.C. 3301 as "[l]ibrary and museum material made or acquired and preserved solely for reference or exhibition purposes * * * are not included [within the meaning of the term records]."

Furthermore, the autopsy X-rays and photographs are obviously medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

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CHARLES W. CAHILL, Clerk
By/ Sharon L. Pratt, Deputy

and are therefore exempt for this reason as well as the others stated above. 5 U.S.C. 552(b)(6). Plaintiff's memorandum brief simply does not, and could not, controvert the showing made by the Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative for Summary Judgment that plaintiff is not entitled to any relief as a matter of law.

Finally, Vice Admiral Davis' affidavit establishes that the Navy does not have the records plaintiff seeks from it. Certainly plaintiff cannot obtain records from the Navy which it does not have.

Argument

The Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative for Summary Judgment shows that defendants are entitled to judgment as a matter of law. None of the statements made in Plaintiff's Memorandum Brief cast any doubt upon the prior showing in Defendants' Memorandum that the pertinent authorities entitle them to judgment as a matter of law. Plaintiff's purportedly factual assertions in his Memorandum Brief (such as "the Letter of Agreement, dated October 29, 1966 is a nullity * * *") lack any support whatsoever in the record. "[N]either the pleadings nor the statements made in brief and argument create a fact issue when opposed to positive contrary statements which were made in support of the motion for summary judgment." Roane v. United States Fidelity & Guaranty Co., 378 F.2d 40, 42 (10th Cir. 1967). Accord: Jensen v. Voyles, 393 F.2d 131 (10th Cir. 1968). Western Casualty & Surety Co. v. Grice, 422 F.2d 921, 922-923 (10th Cir. 1970). Plaintiff's affidavit contains only assurances "that all requests as made in the body of his complaint have been filed for the purpose

of enhancing scholarly research and public enlightenment" (Nichols' affidavit, par. 7) and have no relevance to the issues before the Court. Since defendants' affidavits establish the facts showing that they are entitled to prevail, summary judgment should be entered for defendants. Rule 56(e) F. R. Civ. P.; Bumgarner v. Joe Brown Co., 373 F.2d 749 (10th Cir. 1967), cert. denied 389 U.S. 831.

Plaintiff's Memorandum Brief makes much of the assertion that:

It is particularly noteworthy that Admiral Davis does not specifically deny that the United States Navy has: (a) custody or control of the desired 13 x 22 mm. object from the brain of the late President, (b) custody or control of the desired microscopic preparations from which Commander Humes made his diagnosis on the bullet holes in the skin of the neck and head of the late President as set out in the eighth paragraph of the second page of the supplementary autopsy report CE 391 which is attached as plaintiff's exhibit "B", and (c) custody and control of the desired radiologist's report on form SF 519 and/or 519A.

Defendants have filed a supplement to their Motion to Dismiss or, in the Alternative for Summary Judgment submitting a further Affidavit executed by Admiral Davis specifically denying that the Navy has control over the materials enumerated in plaintiff's Memorandum Brief. Thus, there can be no doubt that the Navy cannot produce such materials.

Conclusion

For the foregoing reasons and those stated in the memorandum in support of defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, the Court should grant defendants' Motion to Dismiss or, alternatively, grant defendants' Motion for

Summary Judgment.

/s/
WILLIAM D. RUCKELSHAUS
Assistant Attorney General

/s/
ROBERT J. ROTH
United States Attorney

/s/
HARLAND F. LEATHERS

/s/
EDWARD H. FUNSTON
Assistant United States Attorney

/s/
JEFFREY F. AXELRAD

Attorneys, Department of Justice
Attorneys for Defendants

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SUPPLEMENT TO DEFENDANTS' MOTION
TO DISMISS OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT

Defendants herewith submit a further affidavit executed by Vice Admiral George M. Davis, in additional support of their Motion to Dismiss or, in the Alternative, for Summary Judgment filed in these proceedings.

Respectfully submitted,

/s/
WILLIAM D. RUCKELSHAUS
Assistant Attorney General

/s/
ROBERT J. ROTH
United States Attorney

/s/
HARLAND F. LEATHERS

/s/
EDWARD H. FUNSTON
Assistant United States Attorney

/s/
JEFFREY F. AXELRAD

Attorneys, Department of Justice
Attorneys for Defendants

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CHARLES W. CAMILL, Clerk
By _____ Deputy

Washington,)
)
District of) ss:
Columbia)

George M. Davis, being first duly sworn, upon oath deposes and says:

That he is a Vice Admiral, Medical Corps, United States Navy, and Chief of the Bureau of Medicine and Surgery thereof, and as such has command jurisdiction over the United States Naval Hospital, Bethesda, Maryland; that an autopsy was performed upon the remains of the late President John Fitzgerald Kennedy at the said Hospital on or about November 22, 1963; that the autopsy protocol and all allied papers were thereupon delivered over to agents of the United States Secret Service; that he does not have: (a) custody or control of the desired 13 x 22 mm. object from the brain of the late President, (b) custody or control of the desired microscopic preparations from which Commander Humes made his diagnosis on the bullet holes in the skin of the neck and head of the late President as set out in the eighth paragraph of the second page of the supplementary autopsy report CE391, and (c) custody and control of the desired radiologists's report on form SF519 and/or 519A; that he has caused a search to be made of the records of the Medical Department of the United States Navy, and more particularly the records of said Hospital, and that no copies of the said autopsy protocol or any materials relating thereto, or otherwise, have been found; and that based upon such information, to the best of his knowledge and belief, no information pertaining to the said autopsy is contained in the said records.

AND FURTHER the Affiant sayeth not.

George M. Davis

George M. Davis, Vice Admiral, MC,
U. S. Navy

On this the 29th day of October, 1970, before me, the undersigned officer, personally appeared George M. Davis, Vice Admiral, Medical Corps, United States Navy and Chief of the Bureau of Medicine and Surgery

thereof, and known to me to be the person whose name is subscribed to the foregoing affidavit, and made oath that he knows the contents thereof and the same is true to the best of his knowledge and belief, and the undersigned certifies that he is, at the date of this certificate, a commissioned officer of the rank stated below, and is in the armed forces of the United States.

Richard B. Blair

Captain, Judge Advocate General's
Corps, U. S. Navy, Bureau of
Medicine and Surgery

CERTIFICATE OF SERVICE

I, hereby certify that on the 13TH day of November 1970, I served the attached supplement to defendants Motion to Dismiss or, in the Alternative for Summary Judgment, supporting Affidavit and Reply to Plaintiff's Memorandum Brief upon plaintiff's attorneys, Sam A. Crow, Esquire, 612 New England Building, Topeka, Kansas 66603; John H. Wilkinson, Esquire, First National Bank Building, Topeka, Kansas 66603; and M. C. Slough, Esquire, St. Marys, Kansas 66536, by depositing copies in the United States mails, postpaid, addressed to each as stated, their last known addresses.

Assistant United States Attorney
Topeka, Kansas