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CONCLUSION

For the reasons above stated, the decision of the district court should be affirmed.

Respectfully submitted,

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For Sylvia Meagher
JM

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN NICHOLS,

Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA;
ARCHIVIST OF THE UNITED STATES,
JAMES B. RHOADS, THE GENERAL
SERVICES ADMINISTRATION, AND
SECRETARY OF THE NAVY, JOHN H.
CHAFEE,

Defendants-Appellees.

AUGUST 1971.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF KANSAS

BRIEF OF DEFENDANTS-APPELLEES

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11/ (continued) time for the hearing on the motion for summary judgment, the district court may overrule a motion made after the hearing for leave to file opposing affidavits or for a continuance to obtain discovery. " Moreover, the points on which plaintiff belatedly sought to introduce materials after judgment to controvert Vice Admiral Davis' affidavits obviously are at best peripheral to the issues on this appeal.

INDEX

	<u>Page</u>
Issues presented -----	1
Statement of the Case -----	4
Statutes Involved -----	11
Argument -----	13
I. Many of the items sought by plaintiff are not "records" within the meaning of the Information Act, 5 U.S.C. 552 -----	13
II. The x-rays and photographs taken of the late President Kennedy at autopsy are specifically exempted from disclosure by the Letter Agreement of 1966 made pur- suant to 44 U.S.C. 2107 and 2108(c) -----	16
III. Non-disclosure of x-rays and photographs taken during autopsy was authorized by exemption 6, 5 U.S.C. 552(b)(6) -----	24
IV. Summary judgment was proper in this case -----	26
Conclusion -----	28
Certificate of Service -----	29

CITATIONS

Cases:	
Alaska Airlines Inc. v. O'Leary, 216 F. Supp. 540, vacated 336 F.2d 668 (C.A. 9) -----	26
Jensen v. Voyles, 393 F.2d 131 (C.A. 10, 1968) -----	27
Kaiser Aluminum and Chemical Corp. v. United States, 157 F. Supp. 939 (Ct. Cls. 1958) -----	17
Forrest Marion Mims, III v. United States, F. Supp. _____ (D. N.M.), No. 8935 Civil, opinion entered July 8, 1971 -----	15

Cases -- Continued:

	<u>Page</u>
Northern Natural Gas Co. v. O'Malley, 277 F.2d 128 (C.A. 8, 1960) -----	26
Roane v. United States Fidelity & Guaranty Co., 378 F.2d 40 (C.A. 10, 1967) -----	27
Story v. Snyder, 184 F.2d 454 (C.A.D.C. 1950), cert. denied 350 U.S. 866 -----	17
Tuchinsky v. Selective Service System, 418 F.2d 155 (C.A. 7, 1969) -----	14
Harold Welsberg v. General Services Ad- ministration, U.S.D.C. District of Columbia, Civil Action No. 2569-70, ruling entered June 15, 1971 -----	16
Western Casualty & Surety Co. v. Grice, 422 F.2d 921 (C.A. 10, 1970) -----	27
Statutes and Regulations:	
Administrative Services Act of 1949 -----	6
Freedom of Information Act, 5 U.S.C. 552 -----	1,4,9,13, 16,24
5 U.S.C. 552(a)(1) -----	16
5 U.S.C. 552(a)(2) -----	16
5 U.S.C. 552(a)(3) -----	11,13-14
5 U.S.C. 552(b)(6) -----	4,24,25
5 U.S.C. 706 -----	26
44 U.S.C. 397 -----	17,19,20,21,22
44 U.S.C. 397(e) -----	17,19
44 U.S.C. 397(e)(1) -----	19
44 U.S.C. 397(f) -----	17
44 U.S.C. 2107 -----	6,10,11,16,17, 19,20,21,22

Statutes and Regulations -- Continued:

	<u>Page</u>
44 U.S.C. 2108(c) -----	10, 11, 16, 17, 20, 21, 22
44 U.S.C. 3301 -----	14, 15
Public Law 89-318, 79 Stat. 1185 -----	8, 10, 12, 22, 23, 24
Public Law 90-620 -----	17
41 C.F.R. 105-61.001-1 -----	15
31 F.R. 13968 -----	8, 23
Federal Rules of Civil Procedure:	
Rule 56(c) -----	26
Rule 56(f) -----	27
Miscellaneous:	
House Report 813, 89th Cong., 1st Sess., August 19, 1965, p. 2 -----	24
House Report 998, 84th Cong., 1st Sess., p. 6 -----	20
House Report 1497, 89th Cong., 2nd Sess., p. 1 -----	27
Senate Report 813, 89th Cong., 1st Sess., p. 5 -----	27
Senate Report 1621, 1968 U.S. Code. Cong. & Admin. News, p. 4438 -----	17
Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act -----	14, 20-21, 25
6 Moore's Federal Practice ¶ 56.24, p. 2881 -----	27

RECEIVED
JOHN NICHOLS
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
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PATHOLOGICAL ONCOLOGY
UNIV. KANSAS MED. CENTER
No. 71-1238

JOHN NICHOLS,

Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA;
ARCHIVIST OF THE UNITED STATES,
JAMES B. RHOADS, THE GENERAL
SERVICES ADMINISTRATION, AND
SECRETARY OF THE NAVY, JOHN H.
CHAPEE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF KANSAS

BRIEF OF DEFENDANTS-APPELLEES

ISSUES PRESENTED

1. Whether the district court correctly held that the following designated items relating to the assassination of the late President John F. Kennedy sought by plaintiff, are not "records" within the meaning of the Freedom of Information Act, 5 U.S.C. 552:

It should be noted that the Plaintiff - Appellant was denied exemption from rule 32 and was required to print his brief, at considerable personal expense, in 12 point type on 6 x 9¹/₄ inch pages with one inch margins. The Federal Government was exempted this requirement and permitted to file a typewritten brief on letter size stationary.

(a) The 6.5 mm Mannlicher-Carcano rifle, C2766, formerly the property of the late Lee Harvey Oswald. Warren Report Exhibit CE 139.

(b) A live 6.5 mm round manufactured by Western Cartridge Company and found in the chamber of Oswald's rifle, C2766. Warren Report Exhibit CE 141.

(c) The coat worn by President Kennedy at the moment of his assassination. Warren Report Exhibit CE 393.

(d) The shirt worn by President Kennedy at the moment of his assassination. Warren Report Exhibit CE 344.

(e) The 6.5 mm bullet found on the floor of Parkland Memorial Hospital in Dallas, Texas on November 22, 1963. Warren Report Exhibit CE 399.

(f) Three empty 6.5 mm cartridge cases manufactured by Western Cartridge Company and found on the floor of the room on the 6th floor of the Texas School Book Depository in Dallas, Texas. Warren Report Exhibits CE 543, CE 544 and CE 545.

(g) Bullet recovered from the wall of the home of General Edwin A. Walker in Dallas, Texas. Warren Report Exhibit CE 573.

(h) The clip presumably from the magazine of the Oswald rifle, C2766. Warren Report Exhibit CE 575.

(i) The two or three metal fragments removed from the wrist of Governor Connally. Warren Report Exhibit CE 842.

(j) Fragments of metal removed from the brain of the late President at autopsy. Warren Report Exhibit CE 843.

(k) A mutilated bullet recovered by United States personnel after firing through a cadaver's wrist for the purpose of weighing it. Warren Report Exhibit CE 856.

(l) A grey-brown rectangular structure measuring approximately 13 x 20 mm seen in photographs of the base of the brain of the late President Kennedy.

(m) Histological preparations of the margins of the bullet holes in the skin of the neck of the late President Kennedy which were part of the Bethesda autopsy.

2. Whether the district court correctly held that the Letter Agreement of 1966 between the executors of the estate of John F. Kennedy and the United States of America, setting conditions under which materials relating to the assassination of President Kennedy were transferred to the United States for deposit in the National Archives, applies to the items specified in paragraph 6 of plaintiff's complaint, to wit: x-ray films and photographs made of the late President at autopsy, and thereby binds the United States to refuse to allow inspection of the specified items.

3. Whether the x-rays and photographs taken during autopsy fall within exemption 6 of the Information Act, 5 U.S.C. 552(b)(6), which authorizes the denial of public access to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

4. Whether summary judgment was proper in this case.

STATEMENT OF THE CASE

In this action brought under the Freedom of Information Act, 5 U.S.C. 552, plaintiff sought to obtain a court order to require the defendants to permit plaintiff, inter alia, to inspect, study, and examine photographs and x-rays taken at the autopsy of the late President John F. Kennedy; to study and submit to "neutron activation analysis" various specified exhibits of the Warren Commission and a grey-brown rectangular structure measuring

1/ The exhibits specified consisted of (1) the 6.5 mm Mannlicher-Carcano rifle, Serial C2766, formerly the property of the late Lee Harvey Oswald, Warren Report Exhibit CE 139; (2) a live 6.5 mm round of ammunition found in the chamber of Oswald's rifle, Warren Report Exhibit CE 141; (3) the coat worn by the late President Kennedy at the time of the assassination, Warren Report Exhibit CE 393; (4) the shirt worn by the late President Kennedy at the time of the assassination, Warren Report Exhibit CE 394; (5) a 6.5 mm bullet found on the floor at Parkland Memorial Hospital on November 22, 1963, Warren Report Exhibit CE 399; (6) three empty 6.5 mm cartridge cases found on the 6th floor of the Texas School Book Depository in Dallas, Texas, Warren Report Exhibits CE 543, CE 544, and CE 545; (7) a bullet recovered from the wall of the home of Major General Edwin A. Walker in Dallas, Texas, Warren Report Exhibit CE 573; (8) the clip presumably from the Oswald rifle C2766, Warren Report Exhibit CE 575; (9) two or three metal fragments from the wrist of Governor Connally, Warren Report Exhibit

approximately 13 x 20 mm seen in photographs of the base of the brain of the late President Kennedy; and to examine histological preparations of the margins of the bullet holes in the skin of the neck of late President Kennedy and the written diagnosis and/or findings made by the Bethesda Hospital radiologist from his study of the x-ray films taken at the autopsy of the late President. (R. 1-18)^{2/}

Defendants filed a Motion to Dismiss, or in the Alternative, for Summary Judgment, supported by affidavits from James B. Rhoads, Archivist of the United States; Richard Vawter, Acting Director of Information of the General Services Administration; and Vice Admiral George M. Davis, Chief of the Bureau of Medicine and Surgery of the Medical Corps of the United States Navy, supplemented later with a further affidavit from Vice Admiral Davis. (R. 19-50, 100-101)

It was shown, by affidavit, that the clothing worn by the late President at the time of the assassination and the x-rays and photographs taken

1/ (continued) CE 842; (10) metal fragments removed from the brain of the late President at the autopsy, Warren Report Exhibit CE 843; (11) a mutilated bullet fired through a cadaver's wrist in an attempt to reproduce Governor Connally's wrist wound, Warren Report Exhibit CE 856. (R. 4-10)

2/ Pursuant to its regulations regarding access to the Warren Commission exhibits, National Archives offered to show plaintiff all available materials concerning the Kennedy assassination. It is also offered to make photographs for him of three-dimensional exhibits which had been placed in glass cases for preservation, but declined to allow him to handle or submit these exhibits to any laboratory tests.

during the autopsy were transferred to the United States for deposit in the National Archives in 1966 by the Kennedy estate under the letter agreement executed by Burke Marshall for the Kennedy estate and by Lawson B. Knott, Jr., Administrator of General Services, for the United States. That agreement, authorized under 44 U.S.C. 2107, set restrictions on the inspection of or access to the clothing, x-rays and photographs. (R. 23-24)

The agreement provides that access to the articles of clothing is limited to certain Government officials and to serious scholars or investigators of matters relating to the death of the late President for purposes relevant to their study thereof, and the Administrator of General Services is authorized to deny requests for access or to impose conditions he deems appropriate on access, in order to prevent undignified or sensational reproduction of the articles of clothing. (R. 24, 32). In addition, in order to preserve the clothing against possible damage, the Administrator is authorized to photograph or otherwise reproduce them for purposes of examination, in lieu of the originals, by such persons as are authorized to have access thereto (R. 24, 34). The Administrator is also authorized to impose such other restrictions on access to and inspection of said articles of clothing as he deems necessary and appropriate to fulfill the objectives of the agreement and his statutory responsibility under the Federal Property and Administrative Services Act of 1949, as amended, to provide for the preservation, arrangement, and use of said materials transferred to his custody for archival

administration (R. 25, 35). The Administrator is authorized to delegate all his "duties, obligations and discretions" under the agreement to the Archivist of the United States (R. 25, 35-36). They were so delegated, and the Archivist, James B. Rhoads, determined that "(a) serious scholars or investigators authorized to have access pursuant to paragraph I(2)(b) [of the letter agreement] may view photographs of said articles of clothing, but may not inspect or examine the articles of clothing themselves; and (b) in no event shall said articles of clothing be released to the custody, temporary or otherwise, of any such scholars or investigators for any purpose." (R. 25)

The agreement further provides that access to the x-rays and photographs shall be restricted to certain Government officials and to "recognized experts in the field of pathology or related areas of science or technology, for serious purposes relevant to the investigation of matters relating to the death of the late President"; however as to experts in pathology, etc., no access shall be allowed until five years after the date of the Agreement, October 29, 1966, except with the consent of the Kennedy family representative designated in the agreement (R. 33). Moreover, the Kennedy family representative shall be the judge of the qualifications and intent of anyone seeking access to the photographs and x-rays, and shall have the power to restrict or deny access to the materials in order to prevent their reproduction or publication without consent during the lifetimes of certain members of the Kennedy family specified in the agreement (R. 33). Pursuant to this section of the agreement,

plaintiff was denied access to the x-rays and photographs taken at the autopsy of the late President (R. 41).

The other Warren Commission exhibits sought were transferred to the National Archives pursuant to the Act of November 2, 1965 (Public Law 89-318, 79 Stat. 1185), and the order of the Acting Attorney General, dated October 31, 1966 (31 F.R. 13968), issued pursuant to that Act. Section 4 of that Act provides that the items are to be placed under the jurisdiction of the Administrator for General Services for preservation under such rules and regulations as he may provide. The authority of the Administrator having been delegated to the Archivist, the following rules were set up regarding inspection of the Commission exhibits: (1) three dimensional articles, including the rifle, clip, cartridges, bullets, and metal fragments may be viewed by researchers but may not be handled either manually or with instruments for any purpose; (2) none of the articles may be taken from the National Archives building except by an authorized employee of the Federal Government, subject to the Archivist's approval; and (3) custody of the articles shall not be given to any other person for any purpose (R. 27-28, 39). Accordingly, plaintiff's request to inspect and subject these articles to "neutron activation analysis" was denied (R. 29-30).

It was further shown, in the two affidavits of Vice Admiral Davis, that the autopsy protocol and all allied papers pertaining to the autopsy performed on the late President Kennedy had been turned over to the Secret Service;

that a search had been made and no such materials had been found at the United States Naval Hospital, Bethesda, Maryland, nor in the records of the Medical Department of the United States Navy; and that he did not have custody or control of the 13 x 20 mm grey-brown rectangular object from the brain of the late President, the histological preparations of the margins of the bullet holes in the skin of the neck of the late President, or the diagnosis and/or findings from the radiologist at Bethesda Naval Hospital (R. 48, 100). Consequently, plaintiff's request to inspect these items was refused (R. 50).

Plaintiff made no effort to controvert the facts shown in the affidavits, other than by unsupported assertions regarding them in his brief.

The court, treating defendants' motion to dismiss as one for summary judgment, granted the motion.^{3/} The court held that the Warren Commission exhibits sought by plaintiff^{4/} were not records within the meaning of the Information Act, 5 U.S.C. 552 (R. 113-114).

^{3/} The opinion of the district court appears at 325 F. Supp. 130.

^{4/} These exhibits consisted of: (1) the 6.5 mm Mannlicher-Carcano rifle, C2766, Exhibit CE 139; (2) five 6.5 mm round of ammunition found in the chamber of C2766, Exhibit CE 141; (3) the coat worn by President Kennedy at the time of the assassination, Exhibit CE 393; (4) the shirt worn by President Kennedy, Exhibit CE 344; (5) 6.5 mm bullet found at Parkland Hospital on November 22, 1963, Exhibit CE 399; (6) three empty 6.5 mm cartridge cases, Exhibits CE 543, CE 544, and CE 545; (7) bullet recovered from wall of the home of General Walker, Exhibit 573; (8) the clip, Exhibit CE 575; (9) metal fragments removed from Governor Connally's wrist, Exhibit CE 842; (10) fragments of metal recovered from the brain of the late President, Exhibit CE 843; (11) mutilated bullet recovered after firing through cadaver's wrist, Exhibit CE 856.

STATUTES INVOLVED

5 U.S.C. 552 provides in pertinent part:

(a)(3) * * * 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. * * *

44 U.S.C. 2107 provides in pertinent part:

When the Administrator of General Services considers it to be in the public interest he may accept for deposit --

(1) the papers and other historical materials of a President or former President of the United States, or other official or former official of the Government, and other papers relating to and temporary with a President or former President of the United States, subject to restrictions agreeable to the Administrator as to their use;

44 U.S.C. 2108(c) provides in pertinent part:

Papers, documents, or other historical materials accepted and deposited under section 3106 of this title and this section are subject to restrictions as to their availability and use stated in writing by the donors or depositors, including the restriction that they shall be kept in a Presidential archival depository. The restrictions shall be respected for the period stated, or until revoked or terminated by persons legally qualified to act on their behalf.

It was further held that the items sought in paragraph 6 of plaintiff's complaint, the x-ray films and photographs taken at autopsy, may be withheld from disclosure under the Letter Agreement, 44 U.S.C. 2107 and 2108(c), and Public Law 89-318, 79 Stat. 1185 (R. 114-116). With respect to plaintiff's claim that the Letter Agreement of 1966 was a nullity because the Kennedy estate did not have title to the items transferred, the court held that title was not required as long as the items deposited in the National Archives fell within the description of things which may be deposited, 44 U.S.C. 2107 and 2108. Further, Public Law 89-318, 79 Stat. 1185, provided added authority for the acquisition and preservation of items relating to the assassination of President Kennedy (R. 115-116).

Finally, the court held that the grey-brown rectangular structure seen in the base of the late President Kennedy's brain and histological preparations made of the margins of the bullet holes in President Kennedy's neck were also not records, and that the findings made from a study of the x-ray films by the Bethesda Naval Hospital radiologist could not be required to be produced, because it was not within the custody of the Navy, from which it was sought (R. 110-111).

Thereafter, plaintiff moved to reopen the case, attempting, after judgment had been rendered, to controvert the facts contained in defendants' affidavits, and submitting interrogatories to Vice Admiral Davis (R. 119-120, 145-153). The motion was denied (R. 154), and this appeal followed (R. 155).

Public Law 89-318, 79 Stat. 1185 provides:

Providing for the acquisition and preservation by the United States of certain items of evidence pertaining to the assassination of President John F. Kennedy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
That it is hereby declared that the national interest requires that the United States acquire all right, title, and interest, in and to, certain items of evidence, to be designated by the Attorney General pursuant to section 2 of this Act, which were considered by the President's Commission on the Assassination of President Kennedy (hereinafter referred to as "items"), and requires that those items be preserved by the United States.

Sec. 2. (a) The Attorney General is authorized to determine, from time to time, which items should, in conformity with the declaration contained in the first section of this Act, be acquired and preserved by the United States. Each such determination shall be published in the Federal Register.

(b) Whenever the Attorney General determines that an item should be acquired and preserved by the United States, all right, title, and interest in and to, that item shall be vested in the United States upon the publication of that determination in the Federal Register.

(c) The authority conferred upon the Attorney General by subsection (a) of this section to make determinations shall expire one year from the date of enactment of this Act, and the vesting provisions of subsection (b) of this section shall be valid only with respect to items described in determinations published in the Federal Register within that one-year period.

Sec. 3. The United States Court of Claims or the United States district court for the judicial district wherein the claimant resides shall have jurisdiction, without regard to the amount in controversy, to hear, determine, and

render judgment upon any claim for just compensation for any item or interest therein acquired by the United States pursuant to section 2 of this Act; and where such claim is filed in the district court the claimant may request a trial by jury: Provided, That the claim is filed within one year from the date of publication in the Federal Register of the determination by the Attorney General with respect to such items.

Sec. 4. All items acquired by the United States pursuant to section 2 of this Act shall be placed under the jurisdiction of the Administrator of General Services for preservation under such rules and regulations as he may prescribe.

Sec. 5. All items acquired by the United States pursuant to section 2 of this Act shall be deemed to be personal property and records of the United States for the purposes of laws relating to the custody, administration, and protection of personal property and records of the United States, including, but not limited to, sections 2071 and 2112 of title 18 of the United States Code.

Sec. 6. There is hereby authorized to be appropriated such sums as may be necessary to carry out the purposes of this Act.

Approved November 2, 1965.

ARGUMENT

- 5/
I. Many of the items sought by plaintiff are not "records" within the meaning of the Information Act, 5 U.S.C. 552.

Plaintiff bases his claim for production of all items sought by his complaint upon the Freedom of Information Act, 5 U.S.C. 552 (R. 1). 5 U.S.C.

5/ These items are those set forth in paragraph 1 of Questions Presented.

552(a)(3) states:

* * * 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. * * *

Clearly, to come within the Act, the items sought must be "identifiable records", and not a "mass of information." Tuchinsky v. Selective Service System, 418 F.2d 155, 157-158 (C.A. 7, 1969). "Records" does not include such items as bullets, a rifle, articles of clothing, etc. as the legislative history shows:

It is evident from the emphasis in the legislative history of Public Law 89-487 upon the concept that availability shall include the right to a copy, that the term "records" in subsection (c) does not include objects or articles such as structures, furniture, paintings, sculpture, three-dimension models, vehicles, equipment, etc., whatever their historical value or value "as evidence." * * * [Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, p. 23]

Likewise, in connection with the treatment of official records by the National Archives, Congress has provided in 44 U.S.C. 3301:

As used in this chapter, "records" includes all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics * * *. Library and museum material made or acquired and preserved solely for reference or exhibition purposes * * * are not included.

In addition, General Services Regulations promulgated in keeping with the statutory definition in 44 U.S.C. 3301 provide that "[t]he term 'records' does not include * * * donated historical materials * * *." 41 C.F.R. 105-61.001-1.

The Warren Commission exhibits sought, the grey-brown rectangular structure seen in the base of the late President's brain, and the histological preparations of the margins of the bullet holes are not "records". They are items of historical and evidentiary value, but they are not the sort of documentary items which were considered by Congress to be within the purview of the Information Act. The district court so held, after an extended discussion of the meaning of the term "records" (R. 110-114). Two other district courts, considering requests for production of similar items, have held the items not to be "records" within the meaning of the Information Act. In one case, plaintiff sought to photograph a non-classified laser located at Kirtland Air Force Base and to interview the officer in charge of the laser. The United States District Court for the District of New Mexico held that the "request to photograph and interview are not identifiable records within the meaning of the Act." Forrest Marion Mims, III v. United States, ___ F. Supp. ___ (D. N.M.), No. 8935 Civil, opinion entered July 8, 1971. In a suit in the District Court for the District of Columbia to photograph the clothing worn by President Kennedy at the time of his assassination,

he court held that the Act did not apply to the type of material sought.

Harold Weisberg v. General Services Administration, U.S.D.C. District of Columbia, Civil Action No. 2569-70, ruling entered June 15, 1971.

A reading of the Information Act, 5 U.S.C. 552, provides further assistance in understanding what types of information Congress was attempting to reach. 5 U.S.C. 552(a)(1) speaks of the information which agencies are required to publish in the Federal Register so as to inform the public. 52(a)(2) deals with the types of documents which an agency is required to make available to the public upon request. It lists: final opinions, statements of policy, and staff manuals. Nowhere in the Act can there be seen any reference to the sort of items requested by plaintiff in this action. Clearly, the district court was correct in holding that the items sought are not records within the meaning of the Information Act.

II. The x-rays and photographs taken of the late President Kennedy at autopsy are specifically exempted from disclosure by the Letter Agreement of 1966 made pursuant to 44 U.S.C. 2107 and 2108(c).

Section 2107 of 44 U.S.C. provides in pertinent part:

When the Administrator of General Services considers it to be in the public interest he may accept for deposit --

(1) the papers and other historical materials of a President or former President of the United States, or other official or former official of the Government, and other papers relating to and contemporary with a President or former President of the United States, subject to restrictions agreeable to the Administrator as to their use;

44 U.S.C. 2108(c) further provides:

Papers, documents, or other historical materials accepted and deposited under section 3106 of this title and this section are subject to restrictions as to their availability and use stated in writing by the donors or depositors, including the restriction that they shall be kept in a Presidential archival depository. The restrictions shall be respected for the period stated, or until revoked or terminated by persons legally qualified to act on their behalf. [Emphasis added] 6/

It is clear that Congress is empowered to provide by legislation for the acceptance of gifts subject to conditions and restrictions specified by a donor, and that such conditions will be respected by the courts. Story v. Snyder, 184 F.2d 454, 456 (C.A.D.C., 1950), cert. denied 350 U.S. 866.

In the case at bar, pursuant to 44 U.S.C. 397, which has been reenacted without any changes material here as 44 U.S.C. 2107 and 44 U.S.C. 2108(c), the x-rays and photographs enumerated were accepted subject to specified restrictions. The letter agreement provides:

* * * no access to the Appendix B materials [which include the x-rays and photographs] pursuant to this paragraph II (a)(b) shall be authorized until five years after the date of this agreement except with the consent of the Kennedy family representative designated * * *.

6/ 44 U.S.C. 2107 and 2108(c) reenact former 44 U.S.C. 397(e) and (f). The section numbers were changed by P.L. 90-620 which was intended "to restate in comprehensive form, without substantial change, the statutes in effect on January 14, 1968 * * * and to enact title 44, United States Code." 90th Cong., 2nd Sess., Senate Report No. 1621, 1968 U.S. Code Cong. & Admin. News, p. 4438.

7/ The Court's attention is also directed to the considerations for non-disclosure stated by Mr. Justice Reed in Kaiser Aluminum and Chemical Corp. v. United States, 157 F. Supp. 939 (Ct. Cls. 1958).

There was no suggestion that the Kennedy family representative had consented to the disclosure of the x-rays and photographs in question, and, accordingly, the Archivist had no authority to produce the articles enumerated in the certificate.

As noted by Dr. Rhoads' affidavit (R. 25-27), the authority of the National Archives and Records Service to accept gifts of papers and other articles subject to whatever conditions of limited access may be requested by the donor ensures that during the period when a degree of sensitivity attaches to discussion of events and personalities, the rights of privacy of the donor and of persons discussed in the papers are fully protected. It also ensures that valuable collections of papers will be saved, and with the passage of an appropriate period of time will be made available to writers, scholars, and other interested persons for research use. If this protection is removed by order of Court or otherwise, the public confidence in the Federal Government to honor its commitments to such donors will be destroyed.

Public figures, no longer assured that their interests will be protected when their papers are deposited in public institutions, would cease to place important and sensitive papers in such institutions. The result would be a drying-up of basic research in history, economics, public administration,

and the social sciences generally. ^{8/}

The letter agreement, page 1, provides that it is expressly entered into pursuant to the provisions of 44 U.S.C. 397(e)(1). ^{9/} It is clear from the statutory provisions recited above that this agreement is "subject to restrictions agreeable to the Administrator as to their use." The statute's legislative history dispels any possible doubt that the restriction in the present case is within the terms and purpose of the statute:

8/ The Archivist received the materials covered by the letter agreement of October 29, 1966, as property of the estate of John F. Kennedy, and has never challenged the original ownership of the materials as being in the Kennedy estate (R. 23-24). Under the statute, 44 U.S.C. 397(e)(1), the Administrator has the authority to agree to conditions for the deposit, whether the papers technically belong to the donor or not. Restrictions may be agreed upon with respect to any materials of a President or former President, or "relating to and contemporary with any President or former President." It is beyond dispute that the materials sought in this action are ones "relating to and contemporary with" President Kennedy.

In order to ensure that papers and other invaluable historical materials relating to Presidents will be placed in the Archives, the Archivist accepts such materials subject to restrictions placed on the materials by the persons presenting them to the United States (R. 23-24, 25-27). Any requirement that the Archivist demand proof of technical, legal ownership when receiving materials for deposit would serve to defeat, not implement, the purpose of 44 U.S.C. 397 to authorize receipt of such important materials by the United States.

9/ Footnote 6 above points out that present 44 U.S.C. 397(e) without any substantive change has been reenacted as 44 U.S.C. 2107.

[Such materials are to be held] subject to such restrictions respecting their use as may be specified in writing by the donors or depositors, including the restrictions that they shall be kept in a Presidential archival depository, and to enforce such restrictions for so long a period as shall have been specified, or until they are revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf with respect thereto. These provisions make it clear that the Administrator, once having come to agreement with the donor on restrictions as to use, in accordance with subsection (e), [now 44 U.S.C. 2107] has the authority to enforce such restrictions. Authority to agree to, and to enforce, certain restrictions as to access and use is essential if private papers are to come into public custody at all. [House Report 998, 84th Cong., 1st Sess., page 6].

Since 44 U.S.C. 2107 and 2108(c) specifically provide that items deposited in the National Archives may be accepted with restrictions as to their use, and the Letter Agreement contains such restrictions as to the use of the x-rays and photographs taken at the autopsy, the court below correctly held that the items could not be required to be produced under the Information Act.

5 U.S.C. 552(b) provides:

This section does not apply to materials that are —

* * *

(3) Specifically exempted from disclosure by statute;

This exemption "indicates an intention to preserve whatever protection is afforded under other statutes, whatever the terms. For example of the variety of statement of such provisions compare * * * 44 U.S.C. 397 * * *,"

Attorney General's Memorandum on the Public Information Section of the

Administrative Procedure Act, pp. 29-30. As has been shown above, the autopsy x-rays and photographs are specifically exempted from disclosure by 44 U.S.C. 2107 and 2108(c) which reenact 44 U.S.C. 397 in all material respects. Thus, these materials are "specifically exempted from disclosure by statute," and accordingly they may not be obtained by plaintiff under the Information Act.

Similarly, even if the items of clothing worn by President Kennedy at the time of the assassination were held to be "records" within the meaning of the Information Act, the withholding of access to them is authorized under exemption 3, 5 U.S.C. 552(b)(3).

The October 29, 1966 letter agreement provides:

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(1) None of the materials identified in Appendix A ("the Appendix A materials") [including the Kennedy clothing] shall be placed on public display.

(2) Access to the Appendix A materials shall be permitted only to:

(a) Any person authorized to act for a committee of the Congress, for a Presidential committee or commission, or for any other official agency of the United States Government, having authority to investigate matters relating to the death of the late President, for purposes within the investigative jurisdiction of such committee, commission or agency.

(b) Any serious scholar or investigator of matters relating to the death of the late President,

for purposes relevant to his study thereof. The Administrator shall have full authority to deny requests for access, or to impose conditions he deems appropriate on access, in order to prevent undignified or sensational reproduction of the Appendix A materials * * * (R. 32)

ursuant to the authority delegated to him by the Administrator, the Archivist as:

determined that (a) serious scholars or investigators authorized to have access pursuant to paragraph I(2)(b) may not view photographs of said articles of clothing, but may not inspect or examine the articles of clothing themselves; and (b) in no event shall said articles of clothing be released to the custody, temporary or otherwise, of any such scholars or investigators for any purpose. (R. 25)

Since the Kennedy clothing is covered by the October 29, 1966 letter agreement entered into pursuant to 44 U.S.C. 397, reenacted by 44 U.S.C. 2107 and 2108(c), restrictions imposed pursuant to the letter agreement must be respected for the same reasons, stated above, that restrictions on access to the autopsy x-rays and photographs must be respected, and production may not be ordered under 5 U.S.C. 552(b)(3).

Moreover, if the other Warren Commission exhibits sought were considered to be "records" within the meaning of the Information Act, they would also be exempt from disclosure under exemption 3, 5 U.S.C. 552(b)(3).

The Warren Commission exhibits plaintiff seeks were transferred to the National Archives under authority of Public Law 89-318, 79 Stat. 1185 and order promulgated by the acting Attorney General dated October 31, 1966

issued pursuant to P. L. 89-318 and published at 31 F. R. 13968 (R. 27-28). Public Law 89-318, after declaring "that the national interest requires that the United States acquire * * * certain items of evidence to be designated by the Attorney General * * * and requires that those items be preserved by the United States" provides at Section 4 that "[a]ll items acquired by the United States pursuant to * * * this Act shall be placed under the jurisdiction of the Administrator of General Services for preservation under such rules and regulations as he may prescribe." (Emphasis supplied.) The Administrator's authority has been delegated to the Archivist (R. 23, 27-28). Pursuant to the authority granted by Public Law 89-318, the Archivist has:

determined that (a) three dimensional articles held in the National Archives pursuant to the Act of November 2, 1965, including the rifle, clip, cartridges, bullets and bullet fragments referred to above, may be viewed by researchers but may not be handled either manually or with instruments for the purpose of testing or otherwise; (b) none of said articles shall be taken from the Archives building for any reason by anyone except an authorized employee of the Federal Government, subject to my approval; and (c) in no event shall custody of such articles, temporary or otherwise, be given to any other person for any purpose. The foregoing rules with respect to such articles are necessary to prevent loss, damage, destruction, or alteration to which such articles would be subjected if they were permitted to be handled, transported, or tested. Adherence to the foregoing rules and continued, uninterrupted custody of such articles by the National Archives is imperative in order to permit the full discharge of the responsibilities imposed by the Act of November 2, 1965, for the secure preservation of the articles. (R. 27-28) [The Archivist's determinations are also set forth in written regulations which are attached to his affidavit as Exhibit B, R. 38-39.]

Congress clearly contemplated that regulations such as those set forth in Paragraph 8 of Dr. Rhoads' affidavit (R. 27-28) would be promulgated:

The committee is persuaded that the national interest requires that the Attorney General shall be in a position to determine that any of these critical exhibits, which were considered by the President's Commission, shall be permanently retained by the United States. The committee concurs in the view expressed by the Attorney General that in years ahead allegations and theories concerning President Kennedy's assassination may abound. To eliminate questions and doubts the physical evidence should be securely preserved. A failure to do so could lead to loss, destruction or alteration of vital evidence and in time might serve to encourage irresponsible rumors undermining public confidence in the work of the President's Commission. [House Report No. 813, 89th Congress, 1st Session, August 19, 1965, page 2.] [Emphasis supplied]

Therefore, it must be concluded that Public Law 89-318 exempts materials obtained pursuant to its provisions from disclosure contrary to regulations issued under this statutory provision.

III. Non-disclosure of x-rays and photographs taken during autopsy was authorized by exemption 6, 5 U.S.C. 552(b)(6).

Finally, with respect to the x-rays and photographs taken during the autopsy, an additional exemption to the Information Act would apply to render them exempt from disclosure. 5 U.S.C. 552(b)(6) exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" from the purview of 5 U.S.C. 552. After examining the legislative history behind this exemption,

the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act concludes:

It is apparent that the exemption is intended to exclude from the disclosure requirements all personnel and medical files, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person, including members of the family of the person to whom the information pertains. [Page 36]

The Letter Agreement entered into by the Kennedy family and the Administrator of General Services Administration evidences the understandably strong feelings of the family of the late President with regard to disclosure of the items covered by the agreement. Indeed the Letter Agreement states:

The family desires to prevent the undignified or sensational use of these materials (such as public display) or any other use which would tend in any way to dishonor the memory of the late President or cause unnecessary grief or suffering to the members of his family and those closely associated with him.

Surely, disclosure of medical files relating to the late President's assassination, such as the autopsy x-rays and photographs sought here, would be precisely the type of unwarranted invasion of personal privacy which Congress intended to avoid when it enacted 5 U.S.C. 552(b)(6).^{10/}

^{10/} The Kennedy family's nonconsent to disclosure of the materials covered by the Letter Agreement is another factor indicating that Exemption 6 is applicable here since the nonconsent evidences that disclosure would be an invasion of privacy.

IV. Summary Judgment was proper in this case.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is proper when the pleadings and other papers filed show no genuine issue as to any material fact. In this case on the pleadings and affidavits filed prior to judgment, there was no genuine issue as to any material fact. Plaintiff in his brief (pp. 17-19) asserts that there are several genuine issues of material fact which the district court should have considered, making the granting of defendants' motion for summary judgment improper, yet he can point only to one example: the determination of the meaning of the term "records". However, the determination of the meaning of that term is not one of fact, but of interpretation of law. Northern Natural Gas Co. v. O'Malley, 277 F.2d 128 (C.A. 8, 1960); Alaska Airlines Inc. v. O'Leary, 216 F. Supp. 540, vacated 336 F.2d 668 (C.A. 9); see also 5 U.S.C. 706, which states, "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of agency action."

Plaintiff's purportedly factual assertions in his Memorandum Brief (R. 66-92) 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 (C.A. 10, 1967). Accord: Jensen v. Voyles, 393 F.2d 131 (C.A. 10, 1968). Western Casualty & Surety Co. v. Grice, 422 F.2d 921, 922-923 (C.A. 10, 1970). Plaintiff's affidavit (R. 91-92) 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." In a suit to compel production of records under the Information Act, the purpose for which the information is sought is irrelevant. If the plaintiff can show that an agency has improperly withheld records it is required to produce, he may obtain the records no matter what his purpose. Conversely, if an agency has authority under one of the nine exemptions to withhold the records, production may not be compelled no matter how lofty plaintiff's purpose in wishing to obtain them. See Senate Report 813, 89th Congress, 1st Sess., p. 5; House Report 1497, 89th Congress, 2nd Sess., p. 1.

In short, plaintiff can point to no genuine issue of material fact before the district court. The motion for summary judgment was properly granted.

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Plaintiff offers no substantial arguments that the district court's denial of his motion to reopen the case was an abuse of discretion. He did not prior to the district court's entry of a judgment dismissing the action file any affidavits which controverted the Government's affidavits, which he now characterizes as "spurious" and "incredible"; nor did he file an affidavit pursuant to F.R.Civ.P. 56(f) explaining why he did not file relevant counter-affidavits. As stated in 6 Moore's Federal Practice ¶ 56.24, p. 2881, "*** where no sound reason is offered for not *** filing opposing affidavits in

Rec'd 9/8/71

CONCLUSION

For the reasons above stated, the decision of the district court should be affirmed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN NICHOLS,

Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA;
ARCHIVIST OF THE UNITED STATES,
JAMES B. RHOADS, THE GENERAL
SERVICES ADMINISTRATION, AND
SECRETARY OF THE NAVY, JOHN H.
CHAFEE,

Defendants-Appellees.

AUGUST 1971.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF KANSAS

BRIEF OF DEFENDANTS-APPELLEES

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11/ (continued) time for the hearing on the motion for summary judgment, the district court may overrule a motion made after the hearing for leave to file opposing affidavits or for a continuance to obtain discovery." Moreover, the points on which plaintiff belatedly sought to introduce materials after judgment to controvert Vice Admiral Davis' affidavits obviously are at best peripheral to the issues on this appeal.