

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

Office of General Counsel
Washington, D.C. 20405



607 12 1970

Axelrad

Honorable William D. Ruckelshaus
Assistant Attorney General
Civil Division
Department of Justice
Washington, D. C. 20530

Dear Bill:

Subject: Harold Weisberg v. General Services Administration, et al.,
U. S. D. C. D. C., Civil Action No. 2569-70
(Your Ref: WDR:JFA:bd 145-171-95)

By letter of September 3, 1970, you requested a litigation report in connection with the above-entitled action. Mr. Jeffrey F. Axelrad of your General Litigation Section has asked that the report reach you by October 12, 1970.

Copies of the summons and complaint were accepted by the General Counsel of the General Services Administration on August 31, 1970.

Plaintiff has asked for three things:

1. An order directing the Defendant National Archives to allow Plaintiff to examine the President's clothing under proper supervision.
2. An order directing Defendant National Archives to allow Plaintiff to make photographs of said clothing at his expense.
3. A declaration that the letter agreement between Mr. Burke Marshall and the Defendant National Archives is null and void, and an Order restraining the Defendant from any further use of said letter agreement as a pretext for denying Plaintiff access to the previously described material.

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The items which Plaintiff wishes to examine and photograph are in the custody of GSA and are located in the Archives Building, 7th Street and Pennsylvania Avenue, N. W., Washington, D. C.

In his complaint, Plaintiff has made vague and non-specific reference to previous requests (and denials) for access to various articles connected with President Kennedy's assassination (complaint, paragraphs 8, 9, 10, 13, 14, 16, and 22). It is true that Plaintiff has originated a very large amount of correspondence over the past several years, most of it dealing with request for access to Kennedy material. However, as discussed below, none of these requests asked specifically for that which Plaintiff has prayed for in paragraph 25 of the complaint. Consequently, only that little correspondence that bears most directly on the specific requests will be discussed.

Regulations were promulgated by GSA pursuant to 5 U. S. C. 552 (32 F. R. 9564, as amended by 33 F. R. 4883; 41 CFR 105-60). Other relevant regulations covering the public use of records, donated historical materials, and facilities in the National Archives and Records Service were promulgated by GSA pursuant to the Administrator's General Authority to prescribe regulations contained in Section 205(c) of the Federal Property and Administrative Services Act of 1949, 40 U. S. C. 486(c) (33 F. R. 4885, as amended by 34 F. R. 200; 41 CFR 105-61). Four copies of each of the two regulations, as amended, are enclosed (Tab A).

In a June 20, 1970, letter to the GSA "Director of Information" (now called Director of Public Affairs) Plaintiff requested certain photographs of the late President Kennedy's clothing (Tab B). He did not ask to examine or photograph the clothing. By letter of September 17, 1970, the GSA Director of Public Affairs advised Plaintiff that he would be allowed to view certain of the photographs requested, but would be furnished copies of only those photographs which had become public (Tab C). In his response on September 19, 1970, Plaintiff hinted that he might be amenable to dismissal of this lawsuit (Tab D). He referred to a recent unanswered letter to the National Archives regarding one picture. That letter, enclosed as Tab E, expressed dissatisfaction with an enlargement of President Kennedy's shirt on grounds that it does not clearly show the outline of the bullet hole. Four copies, one certified, of each of these four letters are enclosed (Tabs B, C, D, and E). A copy of the Archivist's reply to Plaintiff will be forwarded to you when received. There is no assurance that it will persuade him to withdraw this lawsuit. The general requirement of the Freedom of Information Act, which is

relevant in this case is that "... 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." (5 U. S. C. 552 (a)(3)).

Plaintiff has failed to make a request "in accordance with published rules stating procedure to be followed" in that he has failed to request of the Archivist the permission sought in paragraph 25 of the complaint. (Affidavit of the Archivist, Dr. James B. Rhoads, Tab F). Not having been initially denied this permission, he of course has not been finally denied permission pursuant to 41 CFR 105-60.402 through 41 CFR 105-60.404. Plaintiff has thus failed to exhaust his administrative remedies and thus should now be denied access to the judicial process. Tuchinsky v. Selective Service System, 418 F.2d 155 (7th Cir. 1969).

The term "records" is not defined in Section 552. The Attorney General has stated:

"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' ... 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 in the Public Information section of the Administrative Procedure Act, page 23).

Congress defined the term "records" in Section 1 of the Act of July 7, 1943, 57 Stat. 380, providing for the disposition of records. This definition, as now codified in 44 U. S. C. 3301 reads:

"... 'Records' includes all books, papers, maps, photographs, or other documentary materials,

regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included."

A similar definition was adopted in the Federal Records Act of 1950, 64 Stat. 583, as amended, the pertinent provisions of which, insofar as this action is concerned, are now contained in Chapter 21 of Title 44, U.S. Code. (The definition is made applicable to Chapter 21 by 44 U.S.C. 2901.)

Substantially the same definition is contained in GSA regulations under the Freedom of Information Act (41 CFR 105-60.104), with two additional provisions excluding from the definition of "records":

1. Objects or articles (see Attorney General's memorandum on the Public Information Section of the Administrative Procedure Act, June 1967, page 23); and
2. Donated historical materials (as defined in Section 105-61.001-4) accepted by GSA from a source other than an agency of the United States Government in accordance with the provisions of 44 U.S.C. 397 (now codified in 44 U.S.C. Chapter 21).

In our opinion, none of the items which are the subject of the complaint and which are in the custody of GSA are records within the meaning of 5 U.S.C. 552. Furthermore, it is our opinion that, even

if it were to be assumed that any of such items are records within the meaning of this section, the plaintiff is not entitled to the order requested in the complaint.

As you know, the items of clothing were transferred to the United States pursuant to a letter agreement dated October 29, 1966, entered into by Burke Marshall on behalf of the executors of the estate of John F. Kennedy, and by the Administrator of General Services Administration on behalf of the United States. A copy of the agreement is attached to this report (Tab G).

The letter agreement contains restrictions on access to the items of clothing (paragraph 1(2)) and further provides that, in order to preserve these items, the Administrator is authorized to photograph or otherwise reproduce any of such items for purposes of examination, in lieu of the originals, by persons authorized to have access pursuant to paragraph 1(2). Under this authority, photographs of the items of clothing are available for inspection by such persons, but access to the items themselves is not permitted. The granting of the relief requested by the plaintiff with respect to the clothing would violate the applicable restrictions contained in or provided for by the letter agreement.

The letter agreement recites that the donation and transfer were made pursuant to the provisions of 44 U. S. C. 397(e)(1), (section 507(e)(1) of the Federal Property and Administrative Services Act of 1949). This section authorizes the Administrator of General Services, whenever he deems it to be in the public interest, to accept for deposit the papers and other historical materials of any President or former President of the United States, subject to restrictions agreeable to the Administrator as to their use.

44 U. S. C. 397(f)(3) (section 507(f)(3) of the Federal Property and Administrative Services Act of 1949) provides that papers, documents, or other historical materials accepted and deposited under subsection (e) shall be held subject to such restrictions respecting their availability and use as may be specified in writing by the donors or depositors, and that such restrictions shall be respected for so long a period as shall have been specified or until they are revoked or terminated by

the donors or depositors or persons legally qualified to act on their behalf with respect thereto. None of the restrictions in this case have been revoked or terminated.

The two sections referred to in the last two paragraphs above are now codified as positive law in 44 U.S.C. 2107(1) and 2108(c), respectively.

Based on the foregoing, it is our position that compliance with the restrictions is required as a matter of law.

In addition, the Freedom of Information Act itself provides that it does not apply to "matters" specifically exempted from disclosure by statute (5 U.S.C. 552(b)(3)). As the Attorney General's memorandum states, this "indicates an intention to preserve whatever protection is afforded under other statutes, whatever their terms. For examples of the variety of statement of such provisions compare . . . 44 U.S.C. 397"

In any event, it seems obvious that items of clothing are not "records" and therefore are not subject to the provisions of the Freedom of Information Act.

Inasmuch as title to the late President's clothing was vested in the United States by the above-mentioned letter of agreement, on the date it was ratified, October 29, 1966, the clothing is not within the scope of the October 31, 1966, order issued by the Acting Attorney General, preserving "items of (Warren Commission) evidence not owned by the United States which were considered by the Commissioner." (31 F.R. 13968, implementing P.L. 89-318, November 2, 1965; 79 Stat. 1185). (underscoring supplied).

Consequently, a discussion of the legislative history of P.L. 89-318 and the orders promulgated pursuant to it is not thought to be pertinent or useful.

Our comments on the numbered paragraphs of the complaint are enclosed (Tab H). No comment is made regarding the addendum to the complaint, styled "a memorandum of fact and law" by the plaintiff, which is so filled with unsubstantiated opinion and extraneous matter as to make any comment non-productive.

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Mr. Robert A. Prince, Assistant General Counsel for Claims and Litigation, will be pleased to furnish such additional material as you may desire. He may be reached on Government Code 183, extension 39111.

Sincerely,

A handwritten signature in cursive script, appearing to read "Hart T. Mankin".

HART T. MANKIN
General Counsel

Enclosures