

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

Office of General Counsel
Washington, D.C. 20405



JAN 24 1974

Honorable Irving Jaffe
Acting Assistant Attorney General
Civil Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Jaffe:

Subject: Harold Weisberg v. GSA, U.S.D.C. D.C.,
Civil Action No. 2052-73
(Your ref: JAxelrad:pad:145-171-122)

In your letter of November 28, 1973, you enclosed a copy of the complaint in the subject action, and you requested a litigation report on the same matter. In accordance with various telephone conversations between Mr. Axelrad of your division and Mr. Siegel of this office, the due date for our litigation report has been extended. This letter constitutes our litigation report. We have, under separate cover, already delivered to Mr. Axelrad copies of all correspondence between Mr. Weisberg and the National Archives pertaining to the information referred to in the complaint in the subject case; copies of GSA Order ADM 1035.3, dated March 15, 1968, entitled "GSA regulations pursuant to 'Freedom of Information Act';" and copies of an affidavit of Dr. James B. Rhoads, Archivist of the United States, setting forth facts establishing the applicability of a defense to the subject complaint.

Question Presented

Plaintiff's action is brought under the provisions of the Freedom of Information Act, 5 U.S.C. 552. The complaint prays for a court order directing the defendant to produce and make available for copying the transcript of the January 27, 1964, executive session of the Warren Commission. The question presented, then, is whether or not plaintiff is entitled to his requested relief.

Statement of Facts

Since 1968, plaintiff has been seeking the production of the transcript of the January 27, 1964, executive session of the Warren Commission which investigated the assassination of President John F. Kennedy. Additionally,

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plaintiff sought a great deal of other information on the same subject with which he was supplied. In a letter dated August 13, 1971, Dr. Rhoads informed the plaintiff that the transcripts of executive sessions of the Commission were being withheld under the authority of Executive Order 10501 (18 F.R. 7049). The allegation contained in plaintiff's complaint that he was informed by letters dated February 8, 1972, and March 6, 1972, from Mr. Richard Q. Vawter, Director of Information of GSA, that plaintiff would be informed of defendant's decision regarding a reconsideration concerning release of the aforementioned transcript is correct. There was a reconsideration, but no change in policy. Plaintiff was not, however, notified of this final decision. On March 13, 1972, representatives of GSA met with the Department of Justice Freedom of Information Committee concerning the plaintiff's request as well as a somewhat similar request by another individual, and the decision was reached that the transcript in question should continue to be withheld from disclosure.

The Law

The Public Information Section of the Administrative Procedure Act (more commonly referred to as the "Freedom of Information Act"), 5 U.S.C. 552, requires each Government agency to make available to the public all official orders, records, and proceedings; there are, however, certain exceptions to the rule that are enumerated in subsection (b) of the Act. Among the exceptions listed are the following:

[m]atters that are--

- (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
- (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.

These exceptions properly constitute a defense to this action.

Discussion

The transcript in question was classified "top secret" by the Warren Commission, and was originally withheld from disclosure under the terms

of Executive Order 10511 (18 F.R. 7049). A classification review of all of the Warren Commission materials was undertaken in accordance with Executive Order 11652 (37 F.R. 5209, March 10, 1972); and while some of the material was downgraded, the subject transcript was not. In Mink v. E.P.A., 464 F. 2d 742 (D.C. Cir. 1972), rev'd 410 U.S. 73, 93 S. Ct. 827 (1972), Justice White, writing for the Court, stated that both the wording of 5 U.S.C. 552 (b)(1) and its legislative history make "wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen." 410 U.S. at 84. Indeed, there was even rejection of "the proposition that Exemption 1 authorizes or permits in camera inspection of a contested document bearing single classification so that the court may separate the secret from the supposedly non-secret and order exposure of the latter." Id. It should be noted, however, that the automatic tenth-year reclassification review will be held in the near future, and any change in position regarding the Exemption 1 argument will have to await that reclassification.

The efficacy of Exemption 5 has been shown in many court opinions. In Ackerley v. Ley, 420 F. 2d 1336 (D.C. Cir. 1969), for example, the court stated that the purpose of Exemption 5 was to protect the Government "against having to reveal those internal working papers in which opinions are expressed and policies formulated and recommended." 420 F. 2d at 1341. The court went on to talk about the necessity in Government for "the free and uninhibited exchange and communication of opinions, ideas, and points of view." Id. Clearly, those are the same principles with which we are here dealing. See also, Aspin v. Department of Defense, 348 F. Supp. 1081 (D. D.C. 1972); Fisher v. The Renegotiation Board, 473 F. 2d 109 (D.C. Cir. 1973), on remand 355 F. Supp. 1171 (D. D.C. 1973); International Paper Co. v. FPC, 438 F. 2d 1349 (2d Cir. 1971); and Wu v. Nat'l Endowment for Humanities, 460 F. 2d 1030 (5th Cir. 1972).

Finally, Exemption 7 is, likewise, applicable to the facts of the subject suit. One of the purposes of the Warren Commission investigation was to obtain all possible information concerning the dual slayings of President Kennedy and Lee Harvey Oswald. If violations of Federal law had been found by the Commission, such information might have been used for law enforcement purposes. In Frankel v. SEC, 336 F. Supp. 675 (S.D. N.Y. 1971), rev'd 460 F. 2d 813 (2d Cir. 1972), cert. denied 93 S. Ct. 125 (1972), the court stated that:

The conclusion that the §552(b) (7) exemption from disclosure applies even after an investigation and an enforcement proceeding have been terminated is supported both by the authority of the cases decided under the Act and by consideration of the policies underlying the Act in general and the investigatory files exemption in particular. 460 F. 2d at 817.

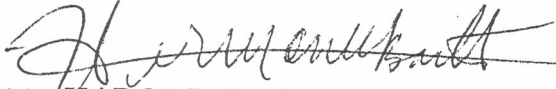
See also, Aspin v. Department of Defense, Supra.

Recommendation

We recommend that the Government move in the alternative to dismiss or for summary judgment on the ground that the material sought, the transcript of the January 27, 1964, executive session of the Warren Commission, is exempt from disclosure under 5 U.S.C. §552 (b) (1), (5), and (7).

Should you have any questions relating to this matter, please do not hesitate to contact Mr. Gary Siegel (183-39117), who has been handling this case.

Sincerely,


HAROLD S. TRIMMER, JR.
Acting General Counsel