

United States Attorney
District of Columbia

September 1, 1970

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WDR:JFAxelrad:bd
145-12-1449

Harold Weisberg v. Department of Justice
USDC D.C., Civil Action No. 2301-70

Enclosed are 1) copy of memorandum from the FBI dated August 20, 1970; and 2) original and four copies of an affidavit executed by Special Agent Marion E. Williams. 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. Williams' affidavit, before our time to respond to the complaint runs.

The sole basis of jurisdiction alleged in the complaint is 5 U.S.C. 552. (Complaint, Par. 1). However, 5 U.S.C. 552 (b)(7) exempts from 5 U.S.C. 552 "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." (Emphasis added). Thus, the plain wording of the exemption renders it applicable to all investigation files "compiled for law enforcement purposes." 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 Barcelonista Shoe Corp. v. Compton, 271 F. Supp. 591, 592-593 (D.P.C. 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 (b)(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

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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. pending 38 L.W. 3527.

To like effect is the Court's decision in Clement Brothers Co. v. NLRB, 282 F. Supp. 540, 542 (ND 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, plaintiffs may not obtain them "absent such use." 1/ Accord: Benson v. United States, 309 F. Supp. 1144 (D. Neb. 1970).

Unlike Bristol-Myers v. FTC, supra, there can be no serious question that the FBI records plaintiff seeks are exempt from disclosure: they are part of an "investigative file, which was compiled for law enforcement purposes and is maintained by the Federal Bureau of Investigation concerning the investigation of the assassination of President John F. Kennedy." (Williams' Affidavit, Par. 3). This investigative file is not publicly disclosed (Williams' Affidavit, Par. 4). Disclosure of such files would seriously hinder the operations of the FBI (Williams' Affidavit, Par. 5). Thus, the above analysis establishes that exemption 7 to 5 U.S.C. 552 applies to exempt the material plaintiff seeks from disclosure. In addition, the legislative history to 5 U.S.C. 552 confirms that "[t]he FBI would be protected under exemption No. 7 prohibiting disclosure of 'investigatory files.' Remarks of Representative Gallagher, a strong supporter of the legislation, 89th Cong., 2nd Sess., Cong. Record, p. 13026.

1/ Insofar as dictum in Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708 (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. 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" as investigatory files. (Williams' Affidavit, Par. 3).

Indeed, Rep. Gallagher expressly noted that the bill (containing exemption 7 in a form similar to that enacted as 5 U.S.C. 552(b)(7)) "prevents the disclosure of . . . 'sensitive' Government information such as FBI files" Thus, the legislative history to 5 U.S.C. 552 and the decided cases are in accord that plaintiff may not obtain the FBI records he seeks.

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

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