APPENDIX

JOINT APPENDIX

Docket Entries

Date	Proceedings
1970	
	Deposit for cost by
Aug. 3	Complaint, appearance Exhibits A thru F. filed
Aug. 3	Summons, copies (2) and copies (2) of Complaint issued A.G. ser 8-5; deft. ser 8-4
Oct. 6	Motion of deft. to dismiss the complaint or in the alternative for summary judgment; Statement; P&A; c/m 10-6-70; M.C. filed
Oct. 16	Answer of pltf. to motion to dismiss or in the alternative for summary judgment; c/s 10-16. filed
Nov. 9	Supplement to motion of deft. to dismiss or for summary judgment; exhibit A; c/m 11-6-70. filed
Nov. 16	Motion of deft. to dismiss or alternatively for summary judgment heard; motion to dismiss granted. (Rep: N. Sokal) Sirica, J.
Nov. 17	Order granting motion of deft. to dismiss. (N) Sirica, J.
Nov. 18	Transcript of proceedings, November 16, 1970, pages 1-15; (Reporter: Nicholas Sokal, Court's copy.) filed
Dec. 7	Transcript of proceedings, November 16, 1970, pages 1-15 (Reporter: Nicholas Sokal, Court's copy.) filed
Dec. 7	Cost bond on appeal by pltf. in the amount of $250.00 with National Surety Corp. approved. filed
Dec. 7	Notice of appeal by pltf. from order of November 17, 1970; copy mailed to Robert Werdig; deposit by Fensterwald $5.00. filed
1971	
Jan. 11	Record on Appeal Delivered to USCA; Deposit by Bernard Fensterwald, Jr. 80¢.
Jan. 11	Receipt from USCA for Original Record. filed

Complaint

(Pursuant to Public Law 89-487; 5 U.S.C. 552)

1. Plaintiff brings this action under Public Law 89-487; 5 U.S.C. 552.

2. Plaintiff is a professional writer, living and working in Frederick County, near the city of Frederick, in the State of Maryland. Plaintiff has published a number of books dealing with political assassinations and currently is devoting his full time efforts to researching and writing additional books on this same subject.

3. Defendant is the U.S. Department of Justice.

4. Spectrographic analysis is a common and simple method making possible the study of objects in even minuscule quantities, so that their precise composition may be discovered and compared.

5. When bullets and fragments thereof are studied spectrographically, it is possible to make a definite determination that all of the bullets and fragments came from one particular batch made by one particular manufacturer or they did not.

6. After the assassination of President John F. Kennedy in Dallas on November 22, 1963, the Federal Bureau of Investigation, a subordinate branch of the defendant Department of Justice, spectrographically analyzed and compared the following items:

a) the bullet found on the stretcher of either President Kennedy or Governor John Connally of Texas (Identified as Exhibit 399 of the President's Commission on the Assassination of President Kennedy, hereafter referred to as the Warren Commission);

b) bullet fragment from front seat cushion of the President's limousine;

c) bullet fragment from beside front seat;

d) metal fragments from the President's head;

e) metal fragment from the arm of Governor Connally;

f) three metal fragments recovered from rear floor board carpet of limousine;

g) metal scrapings from inside surface of windshield of limousine; and

h) metal scrapings from curb in Dealey Plaza which was struck by bullet or fragment.

7. The spectrographic analyses were made by FBI Special Agent John F. Gallagher.

8. Even though Mr. Gallagher testified in deposition form before the Warren Commission, he was asked no questions about the spectrographic analyses made of the bullets and metal fragments. (Hearings Before The Warren Commission, Vol. XV, pp. 746-52).

9. The testimony *re* the said analyses was given by another FBI Special Agent, Robert A. Frazer. (Hearings Before the Warren Commission, Vol. V, pp. 58-74).

10. At page 74 of his testimony, Mr. Frazer said that the bullets and fragments listed in paragraph 6, *supra,* were "similar in metallic composition" but refused to say that they were identical.

11. It is not known whether the FBI turned over the spectrographic analyses of the bullets and fragments or a copy thereof to the Warren Commission or not, although they were requested to do so by the Commission (Commission Report, p. XI).

12. However, if the analyses were turned over to the Warren Commission, the Commission in turn did not deposit them in the National Archives, although all of the rest of its materials were so deposited.

13. Plaintiff's first formal attempt to get permission to see and/or copy the spectrographic analyses was in a letter

to FBI Director J. Edgar Hoover, dated May 23, 1966. (See Exhibit A appended hereto.)

14. Plaintiff's request went unanswered.

15. During 1966, 1967, 1968, and 1969 Plaintiff made numerous requests, both orally and in writing, of the National Archives (which should have had a copy of the analyses, but maintains that it does not) and the Department of Justice to examine and/or copy the analyses. (See Exhibit B appended hereto.)

16. On April 6, 1970, Plaintiff wrote to the Attorney General requesting his review of the denial by the Deputy Attorney General of his request for access to various materials, including the spectrographic analyses. See Exhibit C appended hereto.)

17. On May 16, 1970, in a letter addressed to Mr. Richard Kleindienst, Deputy Attorney General, Plaintiff renewed his request, accompanying it with a completed form DJ 118 ("Request for Access to Official Records Under 5 U.S.C. 552(a) and 28 CFR Part 16"), describing the records sought as follows:

> "Spectographic analysis of bullet, fragments of bullet and other objects, including garments and part of vehicle and curbstone said to have been struck by bullet and/or fragments during assassination of President Kennedy and wounding of Governor Connally. See my letter of 5/16/70.

(See Exhibit D appended hereto.)

18. On June 4, 1970, the Attorney General replied to Plaintiff's letter of April 6, 1970, denying his access to the spectrographic analysis, stating that they were exempt from public disclosure under 5 U.S.C. 552 as a part of an "investigatory file compiled for law enforcement purposes." According to the Attorney General, they were exempt from compulsory disclosure under exception No. 7 of that Act. (See Exhibit E appended hereto.)

19. In a letter dated June 12, 1970, the Deputy Attorney General took an identical position, denying access under 5 U.S.C. 552 (b) (7). (See Exhibit F appended hereto.)

20. The request remaining denied after exhaustion of administrative procedures, Plaintiff files this complaint pursuant to Public Law 89-487, 5 U.S.C. 552, further alleging that, pursuant to this law, the records must be made available to him, and the Court shall determine the matter *de novo,* and the burden is on the Defendant to sustain its refusal.

WHEREFORE, Plaintiff prays this honorable Court for the following relief: that Defendant be ordered to produce and make available for copying the spectrographic analyses of the various bullets and fragments listed in paragraph 17, *supra,* and such other relief as this Court may deem just and equitable.

BERNARD FENSTERWALD, JR.
927 Fifteenth St., N. W.
Washington, D. C. 20005
Tel. 347-3919
Attorney for Plaintiff

Dated .....

[EXHIBIT A]

May 23, 1966

Mr. J. Edgar Hoover, Director
Federal Bureau of Investigation
Washington. D. C.

Dear Mr. Hoover:

Enclosed is a copy of my book, WHITEWASH—THE REPORT OF THE WARREN REPORT. In it you will find quotations from your testimony and that of FBI agents that I believe require immediate unequivocal explanations and from the FBI's report to the Commission. Of the many things requiring explanation, I would like in particular to direct

your attention to these three, in which it would seem no question of national security can be involved:

1) In your brief discussion of the assassination in the report to the Commission you say that three shots were fired, of which two hit the President and one the governor. This does not account for the bullet that hit the curbstone on Commerce Street, which you told the Commission you could not associate with the Presidential car or any of its occupants. In another part of this report, dealing with Oswald, you told the Commission that the bullet that did not kill the President struck him in the back—not the neck—and did not go through his body. Here you seem to fail to account for the well-known wound in the *front* of the President's neck. And thus, are there not at least five bullets, the three you accounted for and the two you did not account for. The Commission itself considered the curbstone strike a separate bullet, and the President most certainly was wounded in the front of the neck.

2) In his testimony before the Commission, FBI Agent Robert A. Frazier did not offer into evidence the spectrographic analysis of this bullet and that of the various bullet fragments. Neither did FBI Agent John F. Gallagher, the spectrographer. Agent Frazier's testimony is merely that the bullets were lead, which would seem to be considerable less information then spectrographic analysis would reveal. The custodian of this archive at the National Archives informs me this analysis is not included in his archive but is in the possession of the FBI. I call upon you to make it immedately available.

3) In his testimony before the Commission, FBI Agent Frazier said that when the whole bullet was received by the FBI, *it had been wiped clean.* He does not reveal any FBI interest in this unusual destruction of evidence. He also testified that the cleansing of the bullet was not complete, that foreign matter remains in the grooves in the bullet. Yet his testimony does not show any FBI interest

in learning what the nature of the residue was. Did the FBI make the appropriate tests? Could the residue be associated with either the President's body or the governor's? What effort, if any, was made to learn? And if no effort was made, why not?

Sincerely yours,

HAROLD WEISBERG

[EXHIBIT B]

March 12, 1967

Honorable Ramsey Clark
The Attorney General
Department of Justice
Washington, D. C.

Sir:

You are seriously misinformed. In your today's appearance on "Face the Nation", you said it is the General Services Administration that is withholding evidence in the Kennedy assassination. It is your own Department of Justice in most cases. In no case of which I know is it the General Service Administration, which acts merely as custodian of the archive.

To make this simple and comprehensible to you, since May 23, 1966, I have been trying to see the spectrographic analysis of the bullet allegedly used in the assassination, the various fragments recovered from the bodies and the car, and of the windshield scrapings. Your Department of Justice, in my presence, misinformed the National Archives, insisting this document was public. When I established to the National Archives that this is not so, your Department became mute more than four months.

The guidelines for withholding evidence are public. Not one of the restrictions apply in this case. No normal con-

sideration of national security is involved, nor is there possibility of damage to innocent persons or risk of disclosure of confidential informants. This denial of access to what may not properly be restricted is in violation of your own order of October 31. It is being done by your own department in an exercise of raw power.

There are a number of similar cases I am prepared to document to you.

It is past time for the telling of truth. If, as you say, this is all you want with regard to the assassination, I call upon you to enforce your own order at this date, to require your own department to stop violating it, and to make available to those of us accredited to research in this archive what you have been suppressing.

Other items of evidence have been suppressed and then released in response to public pressure. I hope from now on, with your pledge of dedication to the truth alone, we may expect your department to obey your order, to act in consonance with your expressed wishes, and to release spontaneously what it has been suppressing.

Respectfully,

HAROLD WEISBERG

[~~EXHIBIT C~~]

January 1, 1969

Honorable Ramsey Clark
The Attorney General
Department of Justice
Washington, D. C.

Dear Mr. Clark:

While previous correspondence with you has been less than rewarding and, when answered at all, has been answered non-responsively, there is this difference between

my writing you and my writing J. Edgar Hoover: He never answers anything, responsively or otherwise, having refused to send me even a press release he himself issued falsely attacking me.

Because you are the Attorney General and because the matters of which I write are the responsibilities of the Democratic administration now about to leave office, I again address you about the improper withholding that amounts to suppression of the evidence in the murder of President Kennedy. One of the things I would like you to bear in mind is your own executive order of October 31, 1966. In fact, you directed that "the entire body of evidence considered by" the Warren Commission "be preserved intact". This means that everything considered by the Commission must be in the National Archives.

Among those things not in the National Archives are records under your personal control. This includes such items of evidence considered by the Commission—in fact, basic to its conclusion—as the spectrographic analysis of the bullet and various fragments of bullet(s) said to have been used in the assassination. When, after promulgation of your order, I asked for this evidence at the National Archives, I was told it was not there. In my presence the Federal Bureau of Investigation was phoned and told the Archives it was, citing a file. I soon proved this file was not of and did not include the spectrographic analysis. The FBI has since failed to supply it. Mr. Hoover just refused to answer my letter on it. This most basic evidence is not covered by any of the guidelines, cannot properly be considered to be covered by the subsequently enacted "Freedom of Information Act", I believe I am entitled to it, and I ask you for it.

I ask you to recall that the FBI was the Commission's major investigative arm and the supplier of its technical and certain analytical services. What it "considered" in this work it "considered" for the Commission. Yet, in

supplying what was identified as Commission Document 1485, it failed to supply certain of the essential evidence. On page numbered 11 of this file, the concluding sentence reads, "The Identification Division further advised that the two latent fingerprints developed are not identical with the fingerprints of LEE HARVEY OSWALD". The National Archives informs me they have no record of whose fingerprints these were. Astounding as it is to a non-expert that a piece of paper preserved fingerprints for so long a period of time, it is no less astounding to me that when the FBI allegedly was looking so diligently for any Oswald accomplice, and it did have evidence of such an accomplice, it did not give the Commission the name or names of whose fingerprints were found on the literature Oswald distributed in New Orleans. This information, which should have been available to the Commission, should have been an important part of its deliberations, also should now be in the National Archives. It seems to be immune to proper withholding. I ask you for a copy.

On a number of occasions, FBI agents, acting as the Commission's investigators and for it, showed numerous witnesses various photographs. Some of these are not in the National Archives, and usually it is impossible to relate the pictures with the investigative reports, so it is not possible to know which pictures were shown which witnesses. I ask that you have this defect remedied, that a complete file of pictures, each identified with the proper investigative reports, be sent to the National Archives and there made available in the usual manner.

I also ask that this include each and every one of the photographs obtained by the FBI and not given the Commission, not put in the Commission's files, not reported to the Commission and in the full, unedited form similarly be added to the "intact" evidence in the National Archives. In this connection, I want to single out but three of the very large number of still and motion-picture photographs

fitting this description and of which I desire copies. One is the first of two Polaroid pictures taken by Mrs. Mary Moorman, of Dallas, Texas. A second is the motion-picture taken by the minor son of J. Pat Doyle, of Portland, Oregon. Another motion picture is that taken by John Martin, of Minneapolis, Minnesota. The latter two are 8 mm. movies. My own evidence convinces me each was edited. Neither was given the Warren Commission, whose files do not even reveal the existence of that taken by Mr. Martin. Both show, or in the form given to the FBI showed, Oswald's literature distribution in New Orleans leading to his arrest on August 9, 1963. This was the subject of an extensive FBI investigation. I ask that what is deposited in the National Archives include everything removed by the FBI before the film was returned to the owners, in the form of copies, if that does not exist in the originals, which were retained by the FBI.

I further ask that you cause to be deposited in the National Archives those pertinent reports of interviews with witnesses that were withheld from the Commission and/or are not in its files. I have the statements of witnesses so interviewed, where there is no report in the National Archives and where there is no record in the files of the Commission of the existence of the reports.

I am aware that the Attorney General, like any busy executive, can become the creature of those upon whom he depends for complete and dependable information. I believe I know what has not been communicated to you. Should you, while you are still Attorney General, want to rectify what I am confident history will record as a record with which you may not be content, I am willing to offer you any help I can. Should this information be made available by your successor or the coming administration, it will be a considerable reflection upon you personally, the administration of which you are part, and the Democratic Party.

There remains unanswered correspondence between us. I would appreciate responsible reply as soon as possible.

Sincerely,

HAROLD WEISBERG

cc: Fred Vinson, Jr.

~~[EXHIBIT C]~~

June 2, 1969

Attorney General John Mitchell
Department of Justice
Washington, D. C.

Dear Mr. Mitchell,

After I twice wrote you beginning three months ago, I got a non-responsive reply, for you, in the name of your Assistant Attorney General in charge of the Criminal Division, from his Chief of the General Crime Section. Without my ever having gotten any kind of honest or meaningful answer to any inquiry of your Department, under any administration, this one began with the bald statement "that further exchange of correspondence between yourself and the Department of Justice on this matter will serve no useful purpose."

At this point, after five unanswered letters subsequent to my receipt of this accurate forecast that you would never respond, letters in which I asked for access to what I am entitled to under the law it is your obligation to enforce, it looks very much as if the Department of Justice is more afraid that correspondence *would* serve a useful purpose, a purpose it fears.

As I wrote earlier, I do understand that busy executives must delegate to those under them what they cannot attend personally, as they must also depend upon others for the information they have. This in no way diminishes the re-

sponsibility of those in charge. The Attorney General still serves the Department of Justice. It is, I believe, your responsibility to see that the laws are observed, by you and by your Department, as it is to see that citizens making proper inquiries get proper response within a reasonable time.

When a citizen asks his Department of Justice for access to court records and cannot get an answer, things have passed a deplorable state in a country such as ours. I have made this request; you have not responded. Practically, this means you have refused me. I believe you cannot.

After you or your office referred my first two letters to Mr. Belcher I thereafter wrote him. Because he has not once responded, in any way, I again address you. I have two purposes. To the degree I can, I want to be certain that you know the situation, for the responsibility is yours, and, if necessary, I want to invoke the laws that entitle me to that which I seek. I prefer not to have to resort to this, as I would hope you would, too.

I made specific requests for specific information in letters to your Department between March 30 and April 23. If I am refused this information, I respectfully request citation of the authority under which you refuse it. In each case I also ask that you provide me with the forms and instructions I will need to seek to obtain this information under the "Freedom of Information" law. It is my intention to invoke the provisions of this law, if necessary. May I call to your attention that I have, in the past, asked the Government for the means of utilizing this law without ever having been so equipped? I do not think this was the intent of Congress in enacting the law.

Among those documents I have sought unsuccessfully is a memorandum of transfer of the President Kennedy autopsy material, as set forth and described in earlier correspondence in your files. Respectfully I call to your attention the fact that this document is one of the working

papers of the special panel convened by your predecessor and by it was so inventoried. I believe this removes it from any executive authority to withhold it and I herewith renew my request for it.

Under the previous administration, when I asked for access to the improperly-withheld David W. Ferrie material, I was told by Mr. Vinson that a review was under way. I have since asked the results of this review and have had no response. I renew the question, renew the request for this material, and would like the necessary instructions and forms for application under the above-cited law should I again be denied. May I, in this connection, call to your attention the seem impropriety and the inconsistency in the government claiming in court, to a litigant, that he has not exhausted his administrative remedies while the same government denies another access to his administrative remedies?

While I am unwilling to believe it, when I was informed that agents of the Federal Bureau of Investigation were defaming me, I did call this report to your attention, believing, as I do, that there should be at least a pro forma denial of it. Aside from Mr. Belcher's assurances "that such conduct would be in complete disregard of Departmental and Bureau policy" and his statement that a copy of my letter was sent "to the Director of the Bureau for consideration" I have heard nothing. When that Bureau promises to send me a copy of its press release and doesn't, and when that Director fails to respond to a written request for a press release, perhaps I should not be surprised at the absence of a for-the-record denial. However, I would prefer to think the Attorney General of the United States would not be content for the matter to rest here.

I have often requested a copy of the spectrographic analysis of the bullets and fragments of bullets alleged to have been used in the murder of President John Kennedy. My written requests to the Director has never been an-

swered. I hereby renew this request, asking, if I am denied, for a statement of the reason or reasons and the instructions and forms for invocation of the Freedom of Information law. With regard to the Warren Commission file identified as CD47:7, I make the same requests, as I do with CD1269.

Among those unanswered requests referred to above is the evidence presented in court in England. I would now like to broaden that to introduce that used in Memphis, directly and indirectly, in the case of James Earl Ray.

When I make requests of the National Archives, there now is a delay of not less than two months before there is any kind of response, when there is one. I believe this, in itself, clouds the purposes and integrity of the government. Your own Department does not respond at all. I do hope you will correct this, that you will agree that when a citizen and more, a writer, makes proper inquiry of the Government, response should be as prompt as possible.

Sincerely,

HAROLD WEISBERG

[EXHIBIT C]

April 6, 1970

Hon. John Mitchell
Attorney General
Department of Justice
Washington, D. C.

Dear Mr. Mitchell,

Under date of April 2, 1970, Mr. H. Richards Rolapp informed me I have the right to appeal the adverse decision of the Deputy Attorney General denying me certain identifiable and indentified directly to you.

This letter is intended as such an appeal. The material sought, generally described as the "raw materials" of the

reports of panels of experts convoked by your Department said to authenticate the autopsy of the late President Kennedy and to make an historical record, is completely described in earlier correspondence with your Department.

I want to take this occasion to renew my request for the spectrographic analyses of the bullet, fragments of bullet and other items said to have been struck by this bullet and fragments, my earlier requests having been ignored by your Department. The bullet in question is Warren Commission Exhibit No. 399. Samples for analysis were taken from the limousine, a curbstone, items of clothing, etc. The results have been published in summary form by the federal government and the Dallas police.

While I hope you will neither ignore nor deny this renewed request, the earliest one dating back to May of 1966, for I believe it would be improper to do either, I do anticipate the posssibility. In this event, I ask that the proper forms be sent to me so I can apply under the so-called "Freedom of Information" law. If there are other administrative possibilities or prerequisites, I would like to be informed of them.

Sincerely,

HAROLD WEISBERG

[EXHIBIT D]

5/16/70

Mr. Richard Kleindienst
Deputy Attorney General
Department of Justice
Washington, D. C.

Dear Mr. Kleindienst,

Your Department has engaged in a systematic effort to vitiate the clear intent of Congress and the law on "Freedom of Information" to the point that inquiries properly

made are ignored. Seeking of you what is my right and your obligation to respond to has been converted into a futility. Even so simple a request for forms *you* require for citizens to use the law is blatantly ignored. Moreover, when I asked for copies of your instructions two days ago, at two different offices of your Department, not only was I not given any, but in the proper office they even declined to take my name and address so they could mail these instructions to me. I have, in the past, addressed a number of requests to the Attorney General. He has, on not one occasion, made response. I have asked of your office that when my requests were rejected, as I anticipated they would be, the record indicating this is automatic when not ignored, it be in the name of the Attorney General so that the organized mechanism for delaying me would not be put into play again. In every case, this has *not* been done. I have three times addressed appeals from decisions to the Attorney General only to have them also ignored. I regard this record as one in which your Department has effectively surrendered any rights to insist upon compliance with those rules you employ only to frustrate my proper requests and, in the event it becomes necessary, am prepared to test this in court.

I would prefer that this not become necessary, that you change your ways, start making response, eliminate the deception and falsehood from them—in short, recognize that Congress passes laws and Presidents sign them so that they will be obeyed, most of all by that Department in whose care the sancity and integrity of the law is vested. Or, the Department from which we have been hearing so much about what it calls "law and order". Like charity, I suggest that should begin at home.

Herewith I enclose three completed DJ-118 forms. In each of these three cases my most recent requests have been made some time ago. In not one of them has there been response.

Two of them are conspicuously flagrant, and I single them out for explanation. My first request for the spectrographic analysis of the bullet, fragments of bullet and objects said to have been struck by either when the President was assassinated and Governor Connally injured is dated in May, 1966. There has never been response to it or its subsequent repetition. I addressed a request for the same public, non-secret information to the Attorney General 40 days ago. My first request of your Department for those documents relating to the late William Ferrie of New Orleans was made under the previous administration, and my most recent, still unanswered, was addressed to your office two months ago.

Because the record does not encourage belief you will provide what I seek without recourse to the courts, I feel it would be unwise for me to disclose everything I can. But because I want voluntary compliance with the law and because despite your best contrary efforts, I do not want to have this result in embarrassment for you or the government, I do suggest some of them.

With regard to the spectrographic analysis, if you are not aware of it, not then having been in your present position, I think you should know that if it does not agree in the most minute detail with the interpretation put upon it by the Warren Commission, their Report is a fiction. It was, in ways I do not explain, "considered by" that Commission. These words are from the executive order of the Attorney General of October 31, 1966. Moreover, it was, to all practical purposes, made public and published in different form, repeatedly, by the Commission. Most recently, this was done by former Dallas Chief of Police Jesse Curry, in a book bearing his name. When I asked for it of the National Archives, in person, the day this executive order was reported in the press, in my presence a representative of your Department told the National Archives it had been transferred there pursuant to this order. When we checked the file he cited, we found it was but a

paraphrase. To the best of my knowledge, there has been no response to the report made to him that this was not the analysis itself. This analysis involved no secret processes, no informants whose identities need be hidden, no defamations of the innocent, and does not in any way fall under the right to withhold embodied in any of the guidelines for withholding.

Your Department, through Mr. Vinson, told me the various documents relating to David Ferrie were being reviewed with the intent of seeing whether they would be made available. I never heard further from him. The National Archives told me it had no knowledge of any such review. Obviously, it is impossible for me to provide you with an identification of each and every such suppressed document, but to the degree I can, it is already in your files. In fairness to you, for I do not seek scandal but I do seek information I believe is properly mine, I want you to know that I have some of what is said to be withheld and it cannot possibly be withheld properly. As I have already explained, what might tend to reflect upon the innocent has already been made public, rather extensively, by the men involved and by their attorney, in a book and its serialization. Ferrie himself is dead, was unmarried, and his sexual tastes are public knowledge in a variety of ways, including but not limited to public reporting of criminal charges against him for them and in his contesting of these charges and his subsequent loss of employment because of them.

With regard to the photograph identified as FBI Exhibit 60 requested in my letter of April 22, 1970, addressed to the Attorney General, I provide this information and request:

This is a picture of President Kennedy's shirt. The shirt itself is withheld from examination and study and any taking of pictures of it is prevented on the seemingly proper ground that neither the government nor his estate want

any undignified or sensational use of it. I have explored this thoroughly with the National Archives and the representative of the estate, verbally and in extensive correspondence. However, there is no use to which the the available pictures can be put that is of any other nature, for they show nothing but his blood. This is not what I want to study or, perhaps, to show (my chief purpose *is* study). FBI Exhibit 60 is available at the National Archives and it has been published by the Warren Commission and by others. However, someone in your Department has gone to some trouble to see to it that the photograph at the National Archives is entirely useless for any serious study or to assure that it can be used only for no other than undignified or sensational purposes. Instead of a photographic print there is a photograph of the printed page. Now FBI Exhibit 60 is not lithographic but is photographic in nature. With the screen built-in for printing, any enlargement is effectively precluded. My interest is the only non-sensational one. It is restricted to the tabs of the shirt through which a bullet is alleged to have passed. I do not, really, want the entire picture, and I would much prefer the largest clear enlargement you can have made of just this very small area of the shirt. My purpose is as simple as it is obvious. It is entirely restricted to a study of the damage to the shirt by the alleged bullet. I would much prefer an enlargement of this very small area of the shirt, which would eliminate all the gore, to a standard 8x10 glossy print of the exhibit itself. If you will not do this, as I hope you will, then I will accept the clearest possible photograph of the original negative of FBI Exhibit 60. However, because I am confident the Department would prefer no suggestion that it is withholding evidence relating to the murder of a President, I do hope you will provide me with the enlargement instead, showing only the damage. It will be obvious, I hope, that there is no undignified use of such an enlargement of the original negative that is remotely possible, even if I were intending to publish it, which I am not.

The law, as you know better than I, imposes no burden upon me to make any explanation of what I seek under it. I hope you will understand that I have taken this time, gone to this trouble, in a sincere effort to put you in a position to understand that my purposes are serious, scholarly, proper and entirely within the intent of Congress and covered by the law. If you will reflect but a moment, perhaps you will also understand that, at possible cost to myself, I have sought to put you in a position to save yourself and the Department embarrassment if you do as you have in the past.

On the other hand, I will no longer accept the standard Departmental whipping from pillar to post. One of these requests to which your Department has never responded is *four years old*. The request embodied in my Civil Action 718-70 was a year old at the time you acceded to the perfectly proper request but only after I filed the action and you could no longer delay trial. If I have not heard from you within two weeks that you will comply with these requests, or if I get a rejection in any name other than that of the Attorney General. I will proceed with further civil actions. I would much prefer to avoid this. Most sincerely, I hope you would also.

Sincerely,

HAROLD WEISBERG

Form OJ-118
(Ed. 7-4-67)

U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530

REQUEST FOR ACCESS TO OFFICIAL RECORD
UNDER 5 U.S.C. 552(a) and 28 CFR PART 16

See instructions for payment and delivery of this form at bottom of page

NAME OF REQUESTER	ADDRESS (street, city, state and zip code)	
Harold Weisberg	Rt.8, Frederick, Md. 21701	
DATE 5/16/70		
DO YOU WISH TO RECEIVE COPIES? ☒ YES ☐ NO IF YES, SO INDICATE (no more than 10 copies of any document will be furnished).	NUMBER OF COPIES REQUESTED 1 each	OFFICE AND CITY WHERE RECORD IS LOCATED (If known) Washington, D.C.

DESCRIPTION OF RECORD REQUESTED (Include any information which may be helpful in locating record)

Spectrographic analysis of bullet, fragments of bullet and other objects, including garments and part of vehicle and cobblestone said to have been struck by bullet and/or fragments during assassination of President Kennedy and wounding of Governor Connally. See my letter of 5/16/70

LITIGATION: DOES THIS REQUEST RELATE TO A MATTER IN PENDING OR PROSPECTIVE LITIGATION? ☐ YES ☐ NO

FILL IN IF IN PENDING → LITIGATION	COURT (check one) ☐ FEDERAL ☐ STATE	DISTRICT	NAME OF CASE	DOCKET NUMBER

There is no prospective litigation if request is complied with

SIGNATURE

FOR USE BY DEPARTMENT OF JUSTICE ONLY THIS REQUEST IS:	A MINIMUM FEE OF $3.00 MUST ACCOMPANY THIS REQUEST. OTHER CHARGES ARE AS FOLLOWS. (do not write in this box)
☐ GRANTED	FOR SECOND AND EACH ADDITIONAL ONE QUARTER HOUR SPENT IN SEARCHING FOR OR IDENTIFYING REQUESTED RECORD $ 1.00 ____
☐ DENIED	FOR EACH ONE QUARTER HOUR SPENT IN MONITORING REQUESTER'S EXAMINATION OF MATERIAL $ 1.00 ____
☐ REFERRED	COPIES OF DOCUMENTS: 50¢ FIRST PAGE, 25¢ EACH ADDITIONAL PAGE ____ FOR CERTIFICATION OF TRUE COPY $ 1.00 EACH ____ FOR ATTESTATION UNDER THE SEAL OF THE DEPARTMENT $ 3.00 EACH ____ GSA CHARGE ____ TOTAL CHARGE ____

Payment under this section shall be made in cash, or by United States money order, or by check payable to the Treasurer of the United States. Postage stamps will not be accepted.

This form may be delivered to any of the offices listed in 28 C. F. R. 16.2 or mailed to: Office of the Deputy Attorney General, Department of Justice, Washington, D. C. 20530

[EXHIBIT E]

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C. 20530

June 4, 1970

Mr. Harold Weisberg
Coq d'Or Press
Route 8
Frederick, Maryland 21701

Dear Mr. Weisberg:

This is in response to your letter of April 6, 1970, requesting my review of the denial by the Deputy Attorney General of your request under the Freedom of Information Act 5 U.S.C. § 552, for access to records thought by you to be in the files of the Department of Justice. Specifically, you have requested access to "the raw materials" including "notes, rough drafts, final panel drafts, individual reports by any of the panel members or advisors and relevant correspondence and memoranda, etc." relating to the medical reports made by the autopsy surgeons and the advisory panel to the Attorney General in connection with the assassination of President John F. Kennedy. The Deputy Attorney General denied your request on the ground that the "materials described in your letter do not exist in the files of this Department."

I have made an attempt to ascertain whether the materials you seek are in the files of this Department. It is my conclusion, after a full examination of the matter, that documents of the kind you describe do not exist anywhere in the Department. Accordingly, I must deny your request.

In your letter of April 6, you state that you wish to renew your request for the "spectrographic analyses of the bullet, fragments of bullet and other items said to have been struck by this bullet and fragments . . . ." You point out that the "bullet in question is Warren Commission Ex-

hibit No. 399." The Department of Justice has received requests for these documents in the past, and we have taken the position that they are part of an "investigatory file compiled for law enforcement purposes' and are therefore exempt from the Freedom of Information Act's compulsory disclosure requirements. 5 U.S.C. § 552(b)(7). At present, this issue is being litigated in the federal courts. If the plaintiff in that case is successful, the documents in question would of course be made available to you also.

Sincerely,

JOHN MITCHELL
Attorney General

[EXHIBIT F]

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D. C. 20530

June 12, 1970

Mr. Harold Weisberg
Coq d'Or Press
Route 8
Frederick, Maryland 21701

Dear Mr. Weisberg:

This will reply to your letters of May 16, 1970 enclosing five separate requests for information under the Public Information Section of the Administrative Procedure Act. The information and materials you request relate to the assassination of former President Kennedy.

This letter will respond to each request in the order they were explained in your letters of May 16.

(1) *Spectrographic Analyses:* You have asked for access to the spectrographic analyses conducted on certain bullet evidence involved in the assassination.

I regret that I am unable to grant your request in that the work notes and raw analytical data on which the results of the spectrographic tests are based are part of the investigative files of the FBI and are specifically exempted from public disclosures as investigatory files compiled for law enforcement purposes. 5 U.S.C. 552(b)(7). The results of the spectrographic tests are adequately shown in the report of the Warren Commission where (Volume 5, pages 67, 69, 73 and 74) it is specifically set forth that the metal fragments were analyzed spectrographically and found to be similar in composition.

(2) *Documentation Relating to David William Ferrie:* You have described the documents you are seeking, relating to the late David William Ferrie of New Orleans, as those withheld from the Warren Commission and/or withheld from the National Archives, and those withheld by the National Archives by order of the Department of Justice.

This will advise you that no documents relating to David William Ferrie were withheld by the FBI from the Warren Commission. Also, so far as is known, all record of the Warren Commission pertaining to David William Ferrie were turned over to the National Archives by the Warren Commission, together with all other records of the Warren Commission.

With respect to those records now in the custody of the National Archives which have been withheld from public disclosure, I am unable to grant your request. These investigative reports are withheld pursuant to 5 U.S.C. 552-(b)(7). The disclosure of these reports might be a source of embarrassment to innocent persons, who are the subject, source, or apparent source of the material in question which contains rumor and hearsay and details of a personal nature having no significant connection with the assassination of the President.

(3) *Exhibit 60 (Pictures of President Kennedy's Shirt and Tie):* In accordance with your requests, enclosed here-

with is a photographic copy of a portion of Exhibit 60 showing the tabs of the President's shirt.

(4) *Concerning Receipt of Material Obtained at Autopsy:* You have requested a photograph and all records relating to the material removed by Commander James Humes, M.C., U.S.N., at the time of the autopsy and receipted for by Special Agents Francis X. O'Neill and James W. Siberton November 22, 1963. This request appears to be based on your inability to specifically identify the Exhibit in the Commission report.

The material referred to in the receipt is identified as Commission Exhibit 843. A photograph of this Exhibit was furnished the Commission and was published in "Hearings Before the President's Commission on the Assassination of President Kennedy," Volume 17, page 841. Other information regarding this Exhibit appears elsewhere in the Commission's Hearings.

(5) *Autopsy Photographs:* The Department of Justice and the FBI have never had possession or custody of the autopsy photographs which you state were originally delivered to the Secret Service. It is our understanding they are now in custody of the National Archives.

Sincerely,

Richard G. Kleindienst
Deputy Attorney General

Answer of Plaintiff to Defendant's Motion To Dismiss or, in the Alternative, for Summary Judgment

Plaintiff denies that there are no issues of material fact and that there is no claim upon which relief can be granted.

I.

QUESTIONS OF FACT AND MIXED QUESTIONS OF FACT AND LAW.

In its "Preliminary Statement" on page 1 of its "Memorandum of Points and Authorities," defendant states that plaintiff "has requested permission to inspect certain spectrographic analyses of bullets and bullet fragments recovered from the scene of the assassination of President John F. Kennedy in Dallas, Texas on November 23, 1963."

Bullets and bullet fragments may have been "recovered" in Dealey Plaza, the "scene" of the assassination, on November 23, 1963. However, if so, plaintiff is unaware of them; a fragment or fragments were "recovered" from a piece of curbing in Dealey Plaza, but it is plaintiff's belief that this was as late as July, 1964.

The bullets and bullet fragments, spectrographic analyses of which are sought by plaintiff, were "recovered" primarily on November 22nd, the date of the assassination, but some were "recovered" on November 23rd and at later times. They were "recovered" generally not at the "scene" but at Dallas' Parkland Hospital, Bethesda Naval Hospital in Maryland, and at other places, including Washington, D.C.

More important, defendant states as a matter of fact (see page one of his Statement of Material Fact) that the records sought "are part of an 'investigatory file compiled for law enforcement purposes.'" It is plaintiff's contention that this is incorrect and that the records in fact were not compiled for any law enforcement purpose but exclusively as part of an investigation *requested* by President Lyndon B. Johnson on November 24, 1963; Executive Order

11130; and S. J. Res. 137, 88th Congress . . . none of which involved "law enforcement."

The remainder of this answer will deal with this latter question which appears to be a mixed questions of fact and law.

II.

Law Enforcement

On page two of its Memorandum of Points and Authorities, defendant properly cites exemption (b)(7) correctly as "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." Plaintiff then adds: "The 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.*" [italics added.] The thrust may or may not be in accordance with the italicized clause, but it is clear that there are two explicit limitations on the exemption for "investigatory files":

1) they are exempt only if compiled for law enforcement purposes, and

2) they are exempt only if they would not be available by law to a private party.

As to whether there was a "law enforcement purpose" in compilation of the sought spectrographic analysis, no better witness can be found than FBI Director J. Edgar Hoover. In testimony before the Warren Commission on May 14, 1964, the following colloquy took place between Mr. Hoover and Mr. J. Lee Rankin, General Counsel to the Commission:

> "Mr. Rankin. You have provided many things to us in assisting the Commission in connection with this investigation and I assume, at least in a general way, you

are familiar with the investigation of the assassination of President Kennedy, is that correct?

Mr. Hoover. That is correct. When President Johnson returned to Washington he communicated with me within the first 24 hours, and asked the Bureau to pick up the investigation of the assassination *because as you are aware, there is no Federal jurisdiction for such an investigation.* It is not a Federal crime to kill or attack the President or the Vice President or any of the continuity of officers who would succeed to the Presidency.

However, the President has a right to request the Bureau to make special investigations, and in this instance he asked that this investigation be made. I immediately assigned a special force headed by the special agent in charge at Dallas, Texas, to initiate the investigation, and to get all details and facts concerning it, which we obtained, and then prepared a report which we submitted to the Attorney General for transmission to the President." [Hearings before the Warren Commission, Vol 5, p. 98. Italicizing added.]

Thus, according to the FBI's Director, there was no law and, hence, there could be no "law enforcement purpose." In fact, according to Mr. Hoover, when the investigation was undertaken, there was no federal jurisdiction for it at all, except a *request* by the President.

Lest the argument be made that perhaps the missing law was a law of the State of Texas, it should be noted that the spectrographic analyses were *not given* to either the Texas or Dallas authorities.

In brief, the spectrographic analyses were made as part of an investigation requested by the President and by the FBI as the investigative arm of the Warren Commission. Backing up the lack of any "law enforcement purpose" is

the following quote from the foreword to the Commission's Report (at p. XIV):

> "The Commission has functioned neither as a court presiding over an adversary proceeding nor as a prosecutor determined to prove a case, but as a fact finding agency committed to the ascertainment of the truth."

This contention is further strengthened by the Commission's Tenth Recommendation:

> "The Commission recommends to Congress that it adopt legislation which would make the assassination of the President and Vice President a Federal crime. A state of affairs where U.S. authorities have not clearly defined jurisdiction to investigate the assassination of a President is anomalous." [Page 26 of the Report]

"Law enforcement purposes" requires *a* law of some kind. Therefore, the burden is on the defendant, if he wishes to avail himself of exemption (b)(7), to state specifically (with citation) the law or laws in pursuance of which the spectrographic analyses were made. So far, he has not met that burden.

III.

JENCKS

The second qualification in (b)(7) is that "investigatory files" cannot be withheld from the public if they would be "available by law to a party other than an agency."

Plaintiff is not an "agency" and it is his contention that under Jencks the spectrographic analyses would certainly have been available to Lee Harvey Oswald. Hence, they cannot be withheld from plaintiff.

As the Warren Commission said in its preface: "If Oswald had lived he could have had a trial by American

standards of justice where he would have been able to exercise his full rights under the law."

IV.

Legislative History of Freedom of Information Act (5 U.S.C. 522)

Emphasis is placed in defendant's Memorandum of Points and Authorities to the legislative history of exemption (b)(7), especially in the House of Representatives. Quoted herewith is the sum total of explanation given in the House Report on this exemption (Report No. 1497, House of Representatives, 89th Congress, 2nd Session, at p. 11):

> "7. Investigatory files compiled for law enforcement purposes except to the extent available by law to a private party: 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. 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."

There is also considerable reference in the defendant's Memorandum to debate on the floor of the House. The quotations are incomplete, out of context, and generally irrelevant in view of the text of Exemption (b)(7). The debate is not very helpful in ascertaining legislative intent. It is true that some members either preferred to omit (b)(7) in its entirety or to amend it in part. However, they did not prevail, (b)(7) stayed in, as reported by the Committee and it stayed in in its present text. The exemptions are carefully drawn in specific terms, and there

is no loose exemption for "sensitive" government information as such, as hinted by defendant.

In this regard, FBI files are like those of any other agency. Whether a particular FBI file is exempt from disclosure depends on whether it falls within one of the nine specific exemptions, not whether it is "sensitive." Parenthetically, what could be "sensitive" about spectrographic analyses of bullets and bullet fragments made in a fact finding investigation in 1963?

Spectrographic analyses, like other scientific pieces of evidence, are not sensitive and should never be withheld. If spectrographic analyses can be withheld from a defendant in a criminal case, other scientific evidence, such as autopsies and fingerprints, could also be withheld. This would lead to absurd and patently unfair results.

V.

Case Law

The primary allusion in defendant's quotation from *Barceloncta Shoe Corp.* v. *Compton* (271 F. Supp. 591) is to the following sentence from Attorney General Clark's Memorandum of June, 1967:

> ". . . In addition, the House report makes it clear that litigants are not to obtain special benefits from this provision, stating that S. 1160 is not intended to gave a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceeding. (H.Report 11)"

In the sense that the Attorney General was speaking, the "litigant" would be Lee Harvey Oswald. The plaintiff in the present case wants no "earlier or greater access" than would have been granted to Oswald, had he lived to be tried; conversely, he wants exactly the same right of access as Oswald. And under Jencks, Oswald would have been entitled to the spectrographic analyses.

On page 3 of its Memorandum of Points and Authorities, defendant quotes at some length from *Clement Brothers'* v. *NLRB*, 282 F. Supp. 540. Unfortunately, defendant omitted what is probably the most important paragraph in the decision, the one immediately preceding the three quoted:

> "The Court must agree that the determination of the Court in Barceloneata is sound, though not controlling on this Court. In addition to the common sense necessity of protecting the investigatory function and procedures of the Board, the legislative history of the Act itself makes it clear that the exemption in question is not limited solely to *criminal* law enforcement but rather applies to law enforcement activities of all natures."

Conceding, *arguendo*, that this is true, both *Barceloneta* and *Clement* are irrelevant in the present case where there is no law enforcement, criminal or otherwise. Further, there is no "common sense necessity" in protecting scientific tests such as spectrographic analyses, as compared to protecting witness statements before the NLRB.

Puzzlingly, defendant goes on: "In the instant case, since the records plaintiff seeks have not been made part of any record in any agency proceeding he may not obtain them 'absent such use.'" If they had been "part of any record in any agency proceeding" they would automatically be available. Also, the analyses were put to intense *use* by Warren Commission; as explained below, they were a key to the Commission's basic conclusion of a "single, lone assassin."

The last case cited by the defendant is *Black* v. *Sheraton Corp.*, 50 F.R.D. 130-133 (D D.C. 1970). Again, the quoted passages are misleading. In the first place, the case concerns the breadth of Rule 26 of the Federal Rules of Civil Procedure, and touches on 5 U.S.C. 552 only in passing. Second, when Commenting on 5 U.S.C. 552, the Court

repeats the language of the Congressional exemption, i.e., "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than the agency." Third, the following telling paragraph in the Court's opinion was not quoted:

> "As background for the present motion, the Court notes that the United States has previously made available to the plaintiff copies of all documents in the FBI files which contain information from the surveillance. These include: (1) all logs of the surveillance, which are the actual handwritten notes of the agents who monitored the bugging device; (2) all summary airtels prepared from the logs, which are typewritten summaries of the information in the logs; (3) copies of all portions of reports which contain information obtained from the surveillance; and (4) two memoranda from the Director of the FBI to the Attorney General advising the latter of the information which had been obtained from the surveillance."

Thus, there is certainly no sanctity enveloping *all* FBI files as implied by defendant. In fact, to the extent that *Black* is relevant to the present case at all, it would appear to weigh heavily in favor of plaintiff. What was being held back by the Court in *Black* were certain additional transcribed conversations from an illegal wiretap; revelation of these could harm innocent persons, divulge the identity of informants, expose leads in other criminal cases, embarass the FBI, etc.; none of these harms could come through making available the spectrographic analyses in the instant case.

In summary, none of the cases cited by defendant is directly in point, and to the extent that they are relevant, not a single one passes upon the question of withholding of records of the nature sought in this case.

VI.

Conclusion

In signing the Freedom of Information Act (PL 89-487) into law on July 4, 1966, President Johnson said: "I have always believed that freedom of information is so vital that only national security, not the desire of public officials or private citizens, should determine when it must be restricted." [The Presidential statement *in toto* is reproduced as Exhibit A hereto.]

In issuing a Guidance Memorandum on the FOI Act in June, 1967, Attorney General Clark stated:

> "This law was initiated by Congress and signed by the President with several key concerns:
>
> —that disclosure be the general rule, not the exception;
>
> —that all individuals have equal rights of access;
>
> —that the burden be on the Government to justify the withholding of a document, not on the person who requests it;
>
> —that individuals improperly denied access to documents have a right to seek injunctive relief in the courts;
>
> —that there be a change in Government policy and attitude.
>
> [All of Attorney General Clark's Foreword is reproduced as Exhibit B hereto.]

A provocative Note in the Harvard Law Review (Vol. 80, 1967, p. 914) suggests that "it seems that such investigatory files could be made available after the enforcement activity in question has been completed." Doubly so where there is no "enforcement activity" but only "fact finding."

In the Conclusion to its Memorandum of Points and Authorities, defendant says that "Congress particularly drafted into the Public Information Act a prohibition against the release to the public of the type of document plaintiff seeks in the instant action. Yet, there is no *prohibition,* as evidenced in the following quotation from a letter of May 7, 1970 to plaintiff's attorney in respect to another Freedom of Information suit in this Court (718-70):

> "Whether or not the documents you seek are technically exempt under one or more of the provisions of 552(b), I have determined that you shall be granted access to them. The exemptions do not require that records falling within them be withheld; they merely authorize the withholding of such records, by exempting them from the Act's otherwise applicable compulsory disclosure requirements."
>
> [The full text of this letter is printed as Exhibit C hereto.]

When one looks at the history and spirit of 5 U.S.C. 552, one wonders what is the real reason for withholding in the instant case. There is no question of divulging the identities of informants. There is no question of divulging secret investigative processes. There is no question of embarrassment to private persons.

If the spectrographic analyses in fact prove what the government witnesses before the Warren Commission imply they do, i.e., a "common source" for all bullets and bullet fragments, there would appear to be no valid reason why the government should withhold them . . . even as a matter of policy. If, on the other hand, they do not prove what the witnesses imply, there is an imperative reason to wish to withhold them, i.e., the whole Warren Commission Report and its conclusions come tumbling down.

Plaintiff does not ask, however, that these records be made available to him as a matter of policy or grace. It is plaintiff's contention that he is entitled to access to them under 5 U.S.C. 552 as a matter of law.

Therefore, the Court is asked to over-rule defendant's motions to dismiss and for summary judgment and to set the case down for trial near the head of the docket, as provided in 5 U.S.C. 552 (a)(3):

> "Except as to causes the court considers of greater importance, proceedings before the District Court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

Plaintiff renews his request that the Court enjoin the defendant from further withholding of the records sought.

Respectfully submitted,

BERNARD FENSTERWALD, JR.
927 15th St., N.W.
Washington, D.C. 20005
Tel: 527-4580
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that service of this Answer has been made upon Thomas A. Flannery, Joseph M. Hannon, and Robert M. Werdig, Jr., U.S. Courthouse, Washington, D.C., on this 16th day of October, 1970.

BERNARD FENSTERWALD, JR.

EXHIBIT A

STATEMENT BY PRESIDENT JOHNSON UPON SIGNING PUBLIC LAW 89-487 ON JULY 4, 1966

The measure I sign today, S. 1160, revises section 3 of the Administrative Procedure Act to provide guidelines for the public availability of the records of Federal department and agencies.

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.

At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets. A citizen must be in confidence to complain to his Government and to provide information, just as he is—and should be—free to confide in the press without fear of reprisal or of being required to reveal or discuss his sources.

Fairness to individuals also requires that information accumulated in personnel files be protected from disclosure. Officials within Government must be able to communicate with one another fully and frankly without publicity. They cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions.

I know that the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people. Moreover,

this bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires. There are some who have expressed concern that the language of this bill will be construed in such a way as to impair Government operations. I do not share this concern.

I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted.

I am hopeful that the needs I have mentioned can be served by a constructive approach to the wording and spirit and legislative history of this measure. I am instructing every official in this administration to cooperate to this end and to make informatoin available to the full extent consistent with individual privacy and with the national interest.

I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.

EXHIBIT B

FOREWORD

If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure.

Beginning July 4, a most appropriate day, every executive agency, by direction of the Congress, shall meet in spirit as well as practice the obligations of the Public Information Act of 1966. President Johnson has instructed every official of the executive branch to cooperate fully in achieving the public's right to know.

Public Law 89-487 is the product of prolonged deliberation. It reflects the balancing of competing principles within our democratic order. It is not a mere recodification of existing practices in records management and in providing individual access to Government documents. Nor is it a mere statement of objectives or an expression of intent.

Rather this statute imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the act.

This memorandum is intended to assist every agency to fulfill this obligation, and to develop common and constructive methods of implementation.

No review of an area as diverse and intricate as this one can anticipate all possible points of strain or difficulty. This is particularly true when vital and deeply held commitments in our democratic system, such as privacy and the right to know, inevitably impinge one against another. Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government.

It is the President's conviction, shared by those who participated in its formulation and passage, that this act is not an unreasonable encumbrance. If intelligent and purposeful action is taken, it can serve the highest ideals

of a free society as well as the goals of a well-administered government.

This law was initiated by Congress and signed by the President with several key concerns:

—that disclosure be the general rule, not the exception;

—that all individuals have equal rights of access;

—that the burden be on the Government to justify the withholding of a document, not on the person who requests it;

—that individuals improperly denied access to documents have a right to seek injunctive relief in the courts;

—that there be a change in Government policy and attitude.

It is important therefore that each agency of Government use this opportunity for critical self-analysis and close review. Indeed this law can have positive and beneficial influence on administration itself—in better records management; in seeking the adoption of better methods of search, retrieval, and copying; and in making sure that documentary classification is not stretched beyond the limits of demonstrable need.

At the same time, this law gives assurance to the individual citizen that his private rights will not be violated. The individual deals with the Government in a number of protected relationships which could be destroyed if the right to know were not modulated by principles of confidentiality and privacy. Such materials as tax reports, medical and personnel files, and trade secrets must remain outside the zone of accessibility.

This memorandum represents a conscientious effort to correlate the text of the act with its relevant legislative history. Some of the statutory provisions allow room for

more than one interpretation, and definitive answers may have to await court rulings. However, the Department of Justice believes this memorandum provides a sound working basis for all agencies and is thoroughly consonant with the intent of Congress. Each agency, of course, must determine for itself the applicability of the general principles expressed in this memorandum to the particular records in its custody.

This law can demonstrate anew the ability of our branches of Government, working together, to vitalize the basic principles of our democracy. It is a balanced approach to one of those principles. As the President stressed in signing the law:

> "* * * a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest * * *. I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."

This memorandum is offered in the hope that it will assist the agencies in developing a uniform and constructive implementation of Public Law 89-487 in line with its spirit and purpose and the President's instructions.

RAMSEY CLARK,
Attorney General,
June 1967.

EXHIBIT C

OFFICE OF THE ATTORNEY GENERAL
[SEAL] WASHINGTON, D. C.

May 6, 1970

Mr. Bernard Fensterwald, Jr.
Fensterwald, Bevan and Ohlhausen
Attorneys At Law
927 Fifteenth Street, N. W.
Washington, D. C. 20005

Dear Mr. Fensterwald:

This is in response to your letter of February 2, 1970, requesting my review of the denial by the Deputy Attorney General of your request under the Freedom of Information Act, 5 U.S.C. § 552, for access to official records of the Department of Justice. Although you requested access to several items which the Deputy declined to make available, you have appealed only his denial of the request for "[a]ll documents filed by the United States with the Court in England in June-July, 1968, in the extradition proceeding by which James Earl Ray, the convicted killer of Dr. Martin Luther King, was returned to this country."

Whether or not the documents you seek are technically exempt under one or more of the provisions of § 552(b), I have determined that you shall be granted access to them. The exemptions do not require that records falling within them be withheld; they merely authorize the withholding of such records by exempting them from the Act's otherwise applicable compulsory disclosure requirements.

Sincerely,

JOHN —. MITCHELL
Attorney General

Motion of Defendant To Dismiss the Action or, in the Alternative, for Summary Judgment

The defendant by its counsel, the United States Attorney for the District of Columbia, moves the Court to dismiss the action, or in the alternative, for summary judgment on the grounds that the complaint and the exhibits attached thereto and by reference made a part hereof, demonstrate there is no claim upon which relief can be granted there is no issue as to any material fact and the defendant is entitled to judgment as a matter of law.

/s/ THOMAS A. FLANNERY
United States Attorney

/s/ JOSEPH M. HANNON
Assistant United States Attorney

/s/ ROBERT M. WERDIG, JR.
Assistant United States Attorney

Statement of Material Fact as to Which There Is No Genuine Issue

Pursuant to Local Rule 9(h) the material facts in the instant action are summarized below.

1. In a series of letters of May 23, 1966; March 12, 1967; January 1, 1969; June 2, 1969; April 6, 1970; and May 15, 1970 and a "Request for Access to Official Record Under 5 U.S.C. 552(a) and 28 CFR Part 16," dated May 16, 1970, plaintiff requested various officials of the defendant to produce for inspection the "Spectrographic analysis of bullet, fragments of bullet and other objects, including garments and part of vehicle and curbstone said to have been struck by bullet and/or fragments during assassination of President Kennedy and wounding Governor Connally."

2. On June 4, 1970 the Attorney General wrote:

> ". . . The Department of Justice has received requests for these documents in the past, and we have taken the position that they are part of an 'investigatory file compiled for law enforcement purposes' and

are therefore exempt from the Freedom of Information Act's compulsory disclosure requirements. 5 U.S.C. § 552(b)(7) . . . ''

3. In a letter of June 12, 1970, the Deputy Attorney General wrote plaintiff:

''I regret that I am unable to grant your request in that the work notes and raw analytical data on which the results of these spectrographic tests are based are part of the investigative files of the FBI and are specifically exempted from public disclosure as investigatory files compiled for law enforcement purposes. 5 U.S.C. 552(b)(7) . . . . ''

4. The instant action was filed on August 3, 1970.

/s/ THOMAS A. FLANNERY
United States Attorney

/s/ JOSEPH M. HANNON
Assistant United States Attorney

/s/ ROBERT M. WERDIG, JR.
Assistant United States Attorney

Memorandum of Points and Authorities in Support of Motion of Defendant To Dismiss the Action or, in the Alternative, for Summary Judgment

I.

PRELIMINARY STATEMENT

Plaintiff has attached to his complaint copies of letters written to the Department of Justice over a period of three years in which he has requested permission to inspect certain spectrographic analyses of bullets and bullet fragments recovered from the scene of the assassination of President John F. Kennedy in Dallas, Texas on November 23, 1963. Also attached to the complaint are two responses from the Department of Justice in which plain-

tiff's requests are denied on the basis that such analyses are part of an "investigatory file compiled for law enforcement purposes."

II.

Discussion

The sole basis upon which the Court's jurisdiction and the relief sought is evoked is 5 U.S.C. 552, the Public Information Act amendment to the Administrative Procedure Act. The purpose of the Act, as explained by the Attorney General in his "Memorandum on the Public Information Section of the Administrative Procedure Act," June 1967, is to make "information available to members of the public unless it comes within specific categories of matters which are exempt from public disclosure." p. 1. Among the specific categories of documents which are exempt are:

> "(b)(7) investigatory files compiled for law enforcement purposes except to the extent *available by law to a party* other than an agency." [Emphasis added.]

The 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. In *Barceloneta Shoe Corp.* v. *Compton* the Court stated:

> "In general terms I agree with the Attorney General's analysis of the nature and scope of the exemption, in his Memorandum of 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 (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 met the burdens of the Jencks statute (18 U.S.C. 3500) may obtain prior statements given to an FBI agent or an SEC investigator 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." 271 F. Supp. 591, 592-593 (D.P.R., 1967)

To like effect is the decision in *Clement Brothers Co.* v. *NLRB* with which the Fifth Circuit has stated it "fully concurs", *NLRB* v. *Clement Brothers Co.*, 407 F. 2d 1027 (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." 282 F. Supp. 540, 542 (ND Ga. 1968).

In the instant case, since the records plaintiff seeks have not been made part of any record in any agency proceeding he may not obtain them "absent such use."

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 addition, the legislative history of the act states, explicitly: "[t]he FBI would be protected under exemption No. 7 prohibiting disclosure of "investigatory files.'" 89th Cong., 2nd Sess., Cong. Record, p. 13026. The speaker quoted above, Representative Gallagher, a strong supporter of the Act, also stated, the bill containing exemption 7: "prevents the disclosure of . . . 'sensitive' Government information *such as FBI files* . . . ." [Emphasis added.]

This Court has had occasion only recently to speak on the matter of FBI file disclosure.

> "The public policy in favor of maintaining the secrecy of FBI investigative reports has been recognized by Congress. In passing the Freedom of Information Act, which greatly expanded the information which government agencies must make available to the public, the Congress explicitly exempted from its coverage [5 U.S.C. 552(b)(7)]
>
> * * *

"While these cases [*Alderman* v. *United States*, 394 U.S. 165 and *Taglianetti* v. *United States*, 394 U.S. 316, both criminal appeals] are not binding in that the scope of discovery in criminal cases is not as broad as in civil cases, they do show the concern of the Supreme Court for the secrecy and sanctity of the FBI investigative files.

"It is thus apparent that the information sought by the plaintiff comes within the government's right to protect information which, if released, *might be harmful* to the public interest. The *results of investigations* of alleged criminal activity *are by their nature the type* of information that *the public interest requires be kept secret.*" *Black* v. *Sheraton Corp. of America*, 50 F.R.D. 130, 132-133 (D D.C. 1970). [Emphasis added.]

III.

Conclusion

From the foregoing, it is obvious that the Congress particularly drafted into the Public Information Act a prohibition against the release to the public of the type of document plaintiff seeks in the instant action. The prohibition was enacted after criticism and discussion on the floor of Congress. The Congressional intent has been interpreted by the courts of this and other jurisdictions in unanimity. Plaintiff is not entitled to the spectrographic analyses sought and the Court should enter judgment in favor of the defendant and dismiss the action.

/s/ Thomas A. Flannery
United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Robert M. Werdig, Jr.
Assistant United States Attorney

Supplement to Motion of Defendant To Dismiss the Action or, in the Alternative, for Summary Judgment

The defendant by its counsel, the United States Attorney for the District of Columbia, hereby files, to supplement its motion to dismiss the action or, in the alternative, for summary judgment, the annexed affidavit of Marion E. Williams as Defendant's Exhibit A.

For the reasons set forth in the original motion and in this supplement the Court should now dismiss the action or, in the alternative, enter judgment in favor of defendant.

THOMAS A. FLANNERY
Thomas A. Flannery
United States Attorney

JOSEPH M. HANNON
Joseph M. Hannon
Assistant United States Attorney

ROBERT M. WERDIG, JR.
Robert M. Werdig, Jr.
Assistant United States Attorney

Affidavit of FBI Agent Marion E. Williams

I, Marion E. Williams, a Special Agent of the Federal Bureau of Investigation, being duly sworn depose as follows:

1. I am official of the FBI Laboratory and as such I have official access to FBI records.
2. I have reviewed the FBI Laboratory examinations referred to in the suit entitled "Harold Weisberg v. Department of Justice USDC D. C., Civil Action No. 2301-70," and more specifically, the spectrographic examinations of bullet fragments recovered during the investigation of the assassination of President John F. Kennedy and referred to in paragraphs 6 and 17 of the complaint in said case.
3. These spectrographic examinations were conducted for law enforcement purposes as a part of the FBI investigation into the assassination. The details of these ex-

aminations constitute a part of the 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.

4. The investigative file referred to in paragraph "3" above was compiled solely for the official use of U. S. Government personnel. This file is not disclosed by the Federal Bureau of Investigation to persons other than U.S. Government employees on a "need-to-know" basis.

5. The release of raw data from such investigative files to any and all persons who request them would seriously interfere with the efficient operation of the FBI and with the proper discharge of its important law enforcement responsibilities, since it would open the door to unwarranted invasions of privacy and other possible abuses by persons seeking information from such files. It could lead, for example, to exposure of confidential informants; the disclosure out of context of the names of innocent parties, such as witnesses; the disclosure of the names of suspected persons on whom criminal justice action is not yet complete; possible blackmail; and, in general, do irreparable damage. Acquiescence to the Plaintiff's request in instant litigation would create a highly dangerous precedent in this regard.

Signed .....

Washington
District of Columbia

Before me this ..... day of ....., 19.., Deponent ..... has appeared and signed this affidavit first having sworn that the statements made therein are true.

My commission expires

.....
Notary Public in and for the District of Columbia

Filed Nov. 17, 1970

Order

Upon consideration of the complaint; the motion of defendant to dismiss the action or in the alternative, for summary judgment; the answer of plaintiff to defendant's motion; the argument of counsel in support thereof and in opposition thereto, it is by the Court this 17th day of November, 1970,

ORDERED that the motion of defendant to dismiss the action is granted and the above entitled cause be, and it is hereby, dismissed.

John J. Sirica
United States District Judge

* * * * * * * * * *

Notice of Appeal

Notice is hereby given that Harold Weisberg, Plaintiff above-named, hereby appeals to the United States Court of Appeals for the District of Columbia from the order of dismissal entered in this action on the 17th day of November, 1970.

BERNARD FENSTERWALD, JR.
927 15th St., N. W.
Washington, D. C. 20005
Tel: 347-3919
Attorney for Harold Weisberg

Date:

* * * * * * * * * *

Transcript of Proceedings

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2301-70

HAROLD WEISBERG, *Plaintiff*,

v.

U. S. Department of Justice, *Defendant*.

Monday, November 16, 1970

The above-entitled cause came on for Motion of Defendant to Dismiss or Alternatively for Summary Judgment, at 10:00 a.m., before The Honorable John J. Sirica, Judge, United States District Court for the District of Columbia.

Appearances:

On Behalf of the Plaintiff:
BERNARD FENSTERWALD, JR., Esq.

On Behalf of the Defendant:
ROBERT M. WERDIG, JR., Ass't. U.S. Attorney

[2] PROCEEDINGS

The Court: All right, I'll hear you.

I have had an opportunity to read the motion in the complaint and some of the exhibits. Tell me what you think the issue is in the case.

Mr. Werdig: I would preliminarily state, Your Honor, the motion as you recognize is for Summary Judgment or to dismiss for failure to state a claim upon which relief can be granted. Ordinarily, inasmuch as the government filed the motion we would ask that we argue first; however, under these circumstances I believe we can reserve our comments more in the nature of rebuttal and I would like

to ask Your Honor if I might have the privilege of having the last word as if I had the opening argument.

The Court: This is off-the-record.

(Off-the-record discussion.)

Mr. Fensterwald: Your Honor, I am Bernard Fensterwald Jr., counsel for the plaintiff. This is Mr. Jim Lesar with me, a member of the Bar of Wisconsin but not of the District of Columbia, and he has been helping with this case.

Your Honor, I will certainly bear with you on the question of time and also with respect to the fact that you have read the material that is submitted.

We bring this case on the grounds that the plaintiff is entitled to the sought material as a matter of law and not as a matter of grace. However, I would like to take about one minute to explain this is not a frivolous case. On the surface it might appear to be so. He is asking for a technical series of tests, of a case that concluded a long time ago. He is a professional writer but what is at issue here will deeply affect whether the Warren Commission Report continues to be upheld or possibly will be reopened by the government.

Now the reason I say that is that the Commission concluded that there were three shots fired at Dealey Plaza. One of those shots missed the car completely, hit a curbstone and disintegrated. The second bullet went through the President's neck and allegedly went through Governor Connally and was later found on Governor Connally's stretcher. That bullet was more or less intact, there is no fragments off of it, so you have a whole bullet. The third bullet, the fatal bullet that hit the President's brain did fragment.

Now, what we are asking for is the FBI's spectrographic analysis of bullet 399, the bullet that hit the curb, and all the fragments. The reason I did not make a cross motion for summary judgment is I think there are questions of fact. They may be mistakes on the part of the govern-

ment, I don't know. In the first place they said we wanted the spectrographic analysis of the bullet and fragments collected on November 23, 1963. Some of the fragments were collected on November 22, which was the date of the shooting, many of them were recovered after that in places as far apart as Dallas and Bethesda, Maryland. Many were recovered in Maryland. I don't know precisely where the ones taken from the car were recovered, but they were not recovered on November 23 in Dallas. If the government is willing to stipulate that there were errors in their statement on that, that will narrow down what we are talking about.

As to the question of law, the Freedom of Information Act, which is in question here has nine exceptions to it. This is subsection (c) of 5 U.S.C. 552. The seventh one is the one in question and has to do with investigatory files for law enforcement purposes except to the extent that they are available to a party other than an agency. That in fact means to a private party.

Now, there are two basic exceptions. One, the investigative file which is what we are looking for, has to involve law enforcement and I raise the question here if there is law enforcement there has to be some law which is being enforced. There has to be the federal or state. There was no federal law in question. The killing of a president was not made a federal crime until some years after this took place.

Secondly, there was not even any federal jurisdiction to investigate the case. The Director of the FBI stated in his testimony before the Commission that it was done at the request [5] of the President and there was no federal jurisdiction at that time.

This is also confirmed by the Commission's finding itself that it was not a law enforcement body but a fact-finding body, that what it was concerned with was only the truth and that is what we are concerned with.

The other exception is that it is available by law to a party other than an agency. Now the party other than

an agency in this case would be Lee Harvey Oswald, who is not the plaintiff in this case.

The government goes into some length the legislative history of this act. I happened to have been involved in that legislative history as counsel for the Senate committee that drafted it. I think I am familiar with it and I don't think there is much in that except as I will come to in a minute, that bears on this, but the very wording of the statute alone, I believe is clear enough that you don't need to go into the legislative history at all. It says No. 7 is not effective if the information sought, the records sought, were available to a private party other than an agency.

Now the government cites three cases: Barceloneta case and it quotes there former Attorney General Clark's memo to the effect that Section 7 was not meant to give private parties other than a litigant any earlier or greater access than the litigants would have. I think that is a correct interpretation. We are [6] not asking for greater or earlier access than Lee Harvey Oswald would have had.

Clemmons Bros (phonetic spelling) case, they quote there is common sense necessity of protecting investigatory function of federal agencies under certain circumstances. I would certainly agree with that, but certainly there is no blanket coverage of FBI files anymore than other government files unless they fall specifically within one of the nine exceptions.

The third case they state which is Black v. Sheraton, which deals primarily with Rule 26 rather than with the statute, I think confirms the fact that there is no blanket exemption because in that case the government had already revealed recordings of the FBI made on the wiretap, the logs of the recordings, much of the technical information involving the taking of the report.

The Court: What was the citation of that case?

Mr. Fensterwald: Black v. Sheraton, Your Honor, is—

The Court: —didn't I rule on that? I am pretty sure I did.

Mr. Werdig: Yes, that is your case, Your Honor.

The Court: Black v. Sheraton Carlton.

Mr. Fensterwald: Yes. It is a 1970 case. It is 50 F.R.D. 130—I don't have the Federal supplement.

The Court: I remember the case.

[7] Mr. Fensterwald: But in that case as Your Honor will remember a great deal of FBI material had already been given to the defendant.

Your Honor, there is a more recent case which I ran across since I filed the complaint. I would like to bring Your Honor's attention to it, it is Welford vs. Hardin; it is 315 Fed. Supp. 175. It was decided in the District Court in Maryland or June 26, 1970. I have a copy of the case here if Your Honor would like.

The Court: I have it in the office.

Mr. Fensterwald: This case involves two problems. One, what is an identifiable record, which I don't think is any question here. The other is Exception 7, and it pertains to letters of warning and detention information put out by the Department of Agriculture.

The judge in that case, Judge Northrop, decided the exact issue we have got here. I would like to read a couple quotations from it.

> "It is clear this is not a situation as envisaged by the House Report where parties to an enforcement action is seeking to obtain investigatory material prematurely. The fact the parties directly affected by the material sought in this action are fully aware of the content. Disclosure of the material already in the hands of potential [8] parties to law enforcement proceedings can in no way be said to interfere with the agency's legitimate law enforcement function.
>
> "This conclusion is based on this Court's reading of the legislative history surrounding this exception which reveals its purpose was to prevent premature discovery by defendant in enforcement proceedings. Whatever valid policy reasons there may be for extending this exception to other situations cannot serve

to alter this Court's result. Such a judgment must be made by Congress."

Your Honor, just before this was to come to trial the government filed an affidavit by a special FBI agent by the name of Marion E. Williams. I am curious to find out from the government's counsel what qualifications Mr. Williams has. The spectrographic analyses of this case were made by an FBI agent by the name of Gallagher. He testified before the Warren Commission but, he gave no testimony as to the spectrographic analyses.

In a similar case in Kansas City another FBI agent named Jeffrey made a similar affidavit to this one. I don't know how either of these gentlemen are qualified unless they were involved in making the analyses themselves.

Now in the paragraph 4 of this affidavit it says: "The investigative file referred to was compiled solely for the official use of U.S. Government personnel."

It is difficult for me to see how this is true as the results of the test were sent on November 23, 1963, one day [9] after the murder to the Chief of Police of Dallas. He has actually published this summary in a recent book. It said: "The file is not disclosed by the Federal Bureau of Investigation to persons other than U.S. Government employees on a need-to-know basis." Certainly the results of the analyses if the analyses themselves have not been disclosed.

Then the affidavit goes on and says, "It can lead, for example, to exposure of confidential informants." We are not dealing with any informants here, we are dealing with scientific series of tests. It says here it could lead to disclosure out of context names of innocent parties. There are no innocent parties involved here. This is of content of lead bullets and fragments. There are no witnesses involved and no names of suspected persons. It says it could do irreparable damage because of these things; giving to the plaintiff in this case these scientific tests do none of these things.

The Court: For what purpose does your client seek this information?

Mr. Fensterwald: My client is a professional writer, Your Honor. He has written and published up to this point four books on the Kennedy assassination. He has a fifth one which is going to be published soon. This information is key to whether the Warren Commission's conclusions are correct or incorrect. We asked for it as a matter of law but there is [10] certainly considerable interest and not just pure curiosity on his part.

I have quoted and I think Your Honor has taken note of the fact that former President Johnson and former Attorney General Clark said only national security should require any withholding other than what the exemptions specified.

Also, there is a statement that if it falls within one of the nine exemptions there is a prohibition against showing it. This too is not true because another case before this Court earlier this year the Attorney General decided as a matter of grace he would give plaintiff in this case some other material. He said whether he was entitled under law or not he as a matter of grace would give it to him, and he did give it to him. We are not asking that in this case.

To get back basically to your question of what is the real reason for withholding this evidence, if the spectrographic analyses show what the government contends they do in its summary all these bullet fragments and bullets come from the same source this would give considerable backing to the Warren Commission Report. If, however, they do not come from a common source, which is what the spectrographic analyses will show, it will merely mean that there have been at least four bullets or more fired, in which case there would have to be at least two assassins which in turn means there was a conspiracy and not a single assassin.

[11] So that the validity of the Warren Commission Report turns at least in part on the spectrographic analyses which we think is a legal right, he has the right to them.

The Court: All right, I understand your position.

Mr. Werdig: May it please the Court.

Briefly, plaintiff's basis upon which he seeks this information can be broken down into two arguments.

Primarily, however, we must recognize that the exemption which are contained in the Act are in part discretionary exemption in that the administrative party may make a determination not whether the information sought should not be released because of national security, but I believe the President's comments say national interest as well. In this instance the Attorney General of the United States has determined that it is not in the national interest to divulge these spectrographic analyses.

Plaintiff's argument therefore goes on two points. The first of which is that since there is no statutory law on assassinating presidents nothing that the FBI did subsequent to the assassination could be for a law enforcement purpose. I think that the fallacy of the argument is in the statement of the argument, that there must be some law enforcement purpose to be served by the FBI investigating a cold-blooded murder of an American president.

We know now that there is a statutory law, but does that mean basically as we as lawyers understand that because [12] there wasn't any statutory explication of the crime, that there wasn't any law, natural or human, to our basic society that wasn't violated before. So I say the fallacy of the argument is in this statement.

The second premise upon which the plaintiff relies is that this information would be available by law to a private party, to wit, Lee Harvey Oswald. But the problem with that is that Mr. Oswald is not before the Court trying to get the information. A party who has no privity to Mr. Oswald is trying to get the information. And Plaintiff admits it is not an agency so therefore he is not like the statute provides, a private party to whom this information would be available to under something like the Jencks Act.

The case that Your Honor decided, Black v. Sheraton Hotel includes in it the fact that some of the FBI records

which were sought were not produced and I think that goes to support the government's position in this case.

Counsel has appended to his opposition a letter from the Attorney General stating that he is going to release certain documents regarding Mr. Earl Ray, who is accused of assassinating Martin Luther King. However, I must also state that based upon my information Mr. Fensterwald is counsel of record to Mr. Ray and I think that takes it a little out of the ambit of the situation here.

[13] I also state further that even if the FBI had made these spectrographic analyses, even Mr. Oswald would not have been entitled to them had they not been introduced into evidence against him. I think that the cases which I cited in my memorandum support our proposition. I would submit that the Welford case must deal with a litigant who is in actual adversary proceedings with the Secretary, Mr. Harding, and that takes Mr. Welford's case out of the category that Mr. Weisberg is in. Mr. Weisberg is not in an adversary proceeding with the Attorney General in an administrative hearing.

For those reasons we submit, Your Honor, that the plaintiff is not entitled as a matter of law to the spectrographic analyses to which he seeks access in this action.

The Court: All right.

Mr. Fensterwald: Your Honor, I would make one or two comments. One is I don't see how the national interest is possibly served by not having the truth come out of this matter.

Furthermore, I will say that if it is researched that the test is not national interest but national security. However in the Welford case I fail to read one, I think, rather crucial sentence: Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only those internal working papers in which opinions are expressed and policies formulated and recommended.

As to federal jurisdiction I can do no better than [14] quote one short paragraph from J. Edgar Hoover's testimony before the Warren Commission. He says:

"When President Johnson returned to Washington he communicated with me within the first 24 hours and asked the Bureau pick up the investigation of the assassination because as you are aware, there is no federal jurisdiction for such an investigation. It is not a federal crime to kill or attack the President or Vice President, or any of th continuing officers who would succeed the presidency. However, the President has the right to request the Bureau to make special investigations, and in this instance he asked that this investigation be made."

The Court: All right. Is that all?

Mr. Werdig: In reference to Mr. Fensterwald's citation from the Welford case, that is typically a Grumman Aircraft type of situation in which an administrative agency in an adversary administrative quasi-judiciary proceeding before it refuses to release certain documents in its possession. I am fully aware of the exemption, I am fully aware that scientific and factual reports are produceable, but this is not in this instance an adversary proceeding which they would be entitled to those things such as in the Grumman case, or Boeing Aircraft, I believe was the one who made the submission.

So I still earnestly urge before the Court, Mr. Weisberg [15] does not come within the ambit of having the privilege of receiving these documents.

The Court: From what the Court has read and heard during the arguments this morning, the Court believes that the motion to dismiss should be granted.

Counsel for the government prepare an appropriate order.

Mr. Werdig: Yes, Your Honor.