SUPPLEMENTAL BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1026

HAROLD WEISBERG, Plaintiff-Appellant

v.

U. S. DEPARTMENT OF JUSTICE, Defendant-Appellee

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

BERNARD FENSTERWALD, JR.
910 16th Street, N. W.
Washington, D. C. 20006
Attorney for Plaintiff

Of Counsel:

JAMES H. LESAR
1231 4th Street, S. W.
Washington, D. C. 20024

TABLE OF CONTENTS

Page

I. NEITHER THE LANGUAGE OF EXEMPTION 7 NOR ITS LEGISLATIVE HISTORY SUPPORT THE GOVERNMENT'S CLAIM THAT EXEMPTION 7 IS A "BLANKET EXEMPTION" JUSTIFYING THE SUPPRESSION OF ALL FILES WHICH THE GOVERNMENT CHOOSES TO LABEL "INVESTIGATORY" 1

A. Section 3 of the Administrative Procedure Act..... 3

B. Legislative History of the Freedom of Information Act..... 5

C. Legislative History Directly Related to Exemption 7..... 6

II. THE GOVERNMENT'S CLAIM THAT EXEMPTION 7 IS A BLANKET EXEMPTION WHICH AUTHORIZES THE SUPPRESSION OF ALL FILES WHICH THE GOVERNMENT LABELS "INVESTIGATORY" IS NOT SUPPORTED BY JUDICIAL AUTHORITY

A. All Decisions Construing Exemption 7 Require the Government to Show Harm..... 9

B. Evans and Frankel Discussed..... 10

III. THE HOLDING OF THE SUPREME COURT IN THE ENVIRONMENTAL PROTECTION AGENCY CASE DOES NOT SUPPORT GOVERNMENT CLAIM THAT EXEMPTION 7 IS A BLANKET EXEMPTION..... 13

CONCLUSION..... 14

AUTHORITIES CITED

Environmental Protection Agency v. Mink, 35 L. Ed. 2d 119 (1973)..... 13, 14

Evans v. Department of Transportation, 446 F. 2d 821 (C. A. 5)..... 10, 11

Frankel v. Securities and Exchange Commission, 460 F. 2d 813 (C. A. 2)..... 10, 11

110 Cong. Rec. 17088, July 28, 1964..... 4

110 Cong. Rec. 17667, July 31, 1964..... 7, 8

112 Cong. Rec. 13654, June 20, 1966..... 5

I. NEITHER THE LANGUAGE OF EXEMPTION 7 NOR ITS LEGISLATIVE HISTORY SUPPORT THE GOVERNMENT'S CLAIM THAT EXEMPTION 7 IS A "BLANKET EXEMPTION" JUSTIFYING THE SUPPRESSION OF ALL FILES WHICH THE GOVERNMENT CHOOSES TO LABEL "INVESTIGATORY"

The Government now claims that ". . . it is clear from both the language of Exemption 7 and its legislative history that congress balanced the need for confidentiality of investigatory files against the policy in favor of disclosure and determined that the need for confidentiality of investigatory files was great enough to justify a blanket exemption." (Petition for Rehearing and Suggestion for Rehearing En Banc, p. 2) The thrust of the Government's argument is that exemption 7 therefore precludes any court from reviewing the Government's labeling practices.

This argument has drastic implications for the Freedom of Information Act. If upheld, the Government position would eviscerate the vitals of the Act. The burden of proof would be shifted from the Government to the plaintiff and the plaintiff would be denied his right to de novo review. In effect, district courts would be reduced to the role of rubber-stamping Government suppression.

Fortunately, there is no basis for the Government's interpretation, either in the language of the statute, or in its legislative history. Exemption 7 reads: "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." This is not a blanket exemption. The exemption does not say that all investigatory files are exempt. In

fact, exemption 7 contains two qualifications which make it explicit that under some circumstances even investigatory files may not be withheld.

Even more important is what Congress meant when it used the term "investigatory files". Taken in its broadest sense, which seems more or less coterminous with the Government's definition, "investigation" may encompass any process by which information is gathered. Similarly, "law enforcement purposes" may be construed so broadly as to refer to any activity which an agency might undertake at some time, no matter how speculative its actual occurrence or how vaguely it is related to law enforcement actions brought as a result of an agency's statutory duties. Under this definition of "investigatory files", the FCC could properly suppress a list of radio stations licensed to broadcast in the United States because the list was compiled to assist the FCC in regulating the broadcasting industry. Or the Justice Department could invoke exemption 7, as in fact the Justice Department did, in an attempt to suppress the public court records relating to the extradition of James Earl Ray. (See Plaintiff's Memorandum to the Court, pages 1-7)

Congress has always construed the term "investigatory files" quite narrowly. When the Government asserts that ". . . congress balanced the need for confidentiality of investigatory files against the policy in favor of disclosure and determined that the need for confidentiality of investigatory files was great enough to justify

a blanket exemption," the Government distorts the legislative history. Rather Congress balanced the need to protect certain confidential activities against the policy in favor of disclosure and limited the investigatory files exemption to those cases in which the Government could show that a specific harm to the agency's law enforcement purposes would result from disclosure. The sections which follow elucidate what Congress meant by "investigatory files" by examining the legislative history pertinent to that exemption.

A. Section 3 of the Administrative Procedure Act

In enacting section 3 of the old Administrative Procedure Act (Chapter 324 of the Act of June 11, 1946, 60 Stat. 238), Congress intended to set guidelines for the disclosure of information. Instead the Government seized on vague language in old section 3 to justify the suppression of records. As a result, old section 3 ultimately became known as a withholding statute. Congress sought to change that state of affairs by enacting the present Freedom of Information Act.

The legislative history of old section 3 shows that even with regard to that Act, the "withholding statute", Congress never considered a blanket exemption for investigatory files. In introducing S. 1666, the substance of which became the present Freedom of Information Act, Senator Edward Long summarized the history of

old section 3. In doing so, Senator Long quoted Representative Francis Walter, who, in a speech on the floor of the House of Representatives in 1946, had described the bill which became section 3 as follows:

> Public information requirements of section 3 are among the most important and useful provisions of the bill. Excepted are matters requiring secrecy in the public interest--such as certain operations of the Secret Service or FBI--and matters relating solely to the internal management of an agency. (Emphasis added. Quoted at 110 Cong. Rec. 17088, July 28, 1964)

Senator Long further elaborated upon the legislative history of old section 3 by quoting from the report of the Judiciary Committee on it:

> The introductory clause states the only general exceptions. The first, which excepts matters requiring secrecy in the public interest, is necessary but is not to be construed to defeat the purpose of the remaining provisions. It would include confidential operations in any agency, such as some of the investigating or prosecuting functions of the Secret Service or the Federal Bureau of Investigation, but no other functions or operations in those or other agencies. (Emphasis added. Quoted at 110 Cong. Rec. 17088, July 28, 1964)

Thus, the legislative history of old section 3 shows that rather than a blanket exemption for what the Justice Department now conceives to be investigatory files, Congress intended by that Act to limit the withholding of FBI files to certain investigatory or prosecutory records relating to confidential operations.

B. Legislative History of the Freedom of Information Act

When Congress enacted the Freedom of Information Act it sought to change section 3 of the old Administrative Procedure Act from a withholding statute to a disclosure statute. As Representative Rumsfeld asserted:

> It is our intent that the courts interpret this legislation broadly, as a disclosure statute and not as an excuse to withhold information from the public. (112 Cong. Rec. 13654, June 20, 1966)

In order to achieve this end Congress decreed that the exemptions from disclosure were to be more narrowly construed than under the former section 3. Representative Ogden Reid declared:

> . . . in the bill there is a very clear listing of specific categories of exemptions, and they are more narrowly construed than in the existing Administrative Procedure Act. (112 Cong. Rec. 13647, June 20, 1966)

In trying to avoid the pitfalls which turned old section 3 into a withholding statute, Congress added two novel provisions to the law. These provisions give a plaintiff the right to a de novo review and place upon the Government the burden of justifying the withholding of documents. Congressman Gallagher noted the Governments strenuous opposition to these provisions:

> An important impact of the provision is that in any court action the burden of the proof for withholding is placed solely on the agency. As might be expected, Government witnesses . . . vigorously opposed the court provision. They particularly did not like the idea that the burden of proof for withholding

> would be placed on the agencies, arguing that historically, in court actions, the burden of proof is the responsibility of the plaintiff." (112 Cong. Rec. 13659, June 20, 1966)

Notwithstanding the strong Government opposition, Congress manifested its deep resolve to make the Freedom of Information Act a disclosure rather than a withholding statute by passing this provision intact. Yet the Government interpretation of exemption 7 would nullify this strong congressional policy of disclosure by allowing the exception to swallow the rule.

C. Legislative History Directly Related to Exemption 7

Nor can it be said that the legislative history directly related to exemption 7 is any more helpful to the Government interpretation than the history relating to the general congressional intent to enact a strong policy of disclosure. Rather the legislative history of exemption 7 reveals that Congress was concerned with limiting the suppression of investigatory documents to certain specific instances where disclosure would cause a definite harm to a specified law enforcement purpose. Above all, Congress was concerned that exposure of confidential informants could result in harm to the informants or jeopardize the very operation of a government agency, or that premature disclosure could harm the Government's case in court litigation. Thus, one congressman, Representative Joelson, spoke of withholding information only where it

would "impede investigation for law enforcement purposes. (Emphasis added. 112 Cong. Rec. 13655, June 20, 1966) And the Senate Report described investigatory files as follows:

> These are the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court. (S. Rep. No. 813, p. 9)

A particular concern for protecting the identity of informers is revealed by the evolution of the wording employed in exemption 7. Exemption 7 was originally worded as follows:

> investigatory files until they are used in or affect an action or proceeding or a private party's participation therein. (S. 1666, 88th Cong., 2nd Sess., 1964)

During congressional debate Senator Humphrey moved to amend S. 1666 and replace exemption 7 with two different exceptions:

> (7) investigatory files
>
> (8) statements of agency witnesses until such witnesses are called to testify in an action or proceeding and request is timely made by a private party for the production of relevant parts of such statements for purposes of cross examination. (110 Cong. Rec. 17667, July 31, 1964)

In moving to amend exemption 7, Senator Humphrey had a very specific harm in mind:

> This clause . . . which provides for disclosure of investigatory files as soon as they "affect an action or proceeding or a private party's effective participation therein" is susceptible to the interpretation that once a complaint of unfair labor practice is filed by the General Counsel of the NLRB, access could

> be had to the statements of all witnesses, whether or not these statements are relied upon to support the complaint.
>
> Witnesses would be loath to give statements if they knew that their statements were going to be made known to the parties before the hearing. While witnesses would continue to be protected in testifying at the hearing, they would enjoy no protection prior to that time. (Emphasis added. 110 Cong. Rec. 17667, July 31, 1964)

Senator Long then combined Senator Humphrey's two proposed amendments into one amendment which became exemption 7 of the present Freedom of Information Act, reading:

> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency

Thus, with great economy of language, Senator Long combined Senator Humphrey's two proposals into one amendment which reflected the intent of Congress to protect against: 1) exposure of confidential informants which might bring harm to the informants or jeopardize the efficient operation of law enforcement agencies; and 2) premature disclosure of information which might affect the Government's case in court adversely.

Obviously, none of these congressional concerns applies to Weisberg's suit for the spectrographic analyses made in connection with the investigation into President Kennedy's assassination. The spectrographic analyses which Weisberg seeks will not reveal the identity of any confidential informers, nor will their disclosure harm the Government's case in court or in any other way do harm to the proper functioning of the Government or its agencies. Nor has

the Government even claimed that release of the spectrographic analyses would work any harm in this specific case.

II. THE GOVERNMENT'S CLAIM THAT EXEMPTION 7 IS A BLANKET EXEMPTION WHICH AUTHORIZES THE SUPPRESSION OF ALL FILES WHICH THE GOVERNMENT LABELS "INVESTIGATORY" IS NOT SUPPORTED BY JUDICIAL AUTHORITY

A. All Decisions Construing Exemption 7 Require the Government to Show Harm

In discussing the opinion which Judge Kaufman wrote for the three-judge panel which originally heard and decided this case, the Government complains that: "In effect, the panel decision completely negates exemption 7 and opens up all FBI files to disclosure unless the district court judge affirmatively finds a 'concrete prospect of serious harm to its law enforcement efficiency.'"

Far from negating exemption 7, the panel decision's holding that the Government must establish "the nature of some harm which is likely to result from public disclosure of the file" if the Government is to meet its burden of justifying withholding is perfectly in accord with the meaning of the exemption and the Act's intent. All judicial decisions construing exemption 7 have required the Government to demonstrate some harm which would result from the disclosure of documents in the particular case before the court. Those courts which have ordered the release of documents claimed to constitute investigatory files have found that their disclosure would not cause a harm which Congress intended to pro-

tect against. On the other hand, those courts which have refused to order the disclosure of documents did so on the grounds that the Government had demonstrated that a harm which Congress intended to protect against was likely to occur should the records be disclosed.

This requirement that the Government show harm is the only way to effectuate Congress' intent to enact a disclosure statute and to implement the Freedom of Information Act provisions for de novo review and burden of proof on the Government. The Government's interpretation of exemption 7 guts the Act's provisions relating to de novo review and burden of proof and makes the exemption a grounds for withholding rather than disclosing information. Thus, it is the Government's interpretation which negates exemption 7 and the congressional intent behind it.

B. Evans and Frankel Discussed

The Petition for Rehearing cites two cases, Frankel v. Securities and Exchange Commission, 460 F. 2d 813 (C. A. 2), and Evans v. Department of Transportation, 446 F. 2d 821 (C. A. 5), as standing for the proposition that two other circuits have concluded that Congress determined that all investigatory files, not simply open files, should remain confidential. (Petition for Rehearing, p. 4)

In Frankel the court examined the legislative history behind exemption 7 and found that:

> (The House and Senate) Reports indicate that Congress had a two-fold purpose in enacting the exemption for investigatory files: to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court, and to keep confidential the procedures by which it has obtained information. Both these forms of confidentiality are necessary for effective law enforcement. Frankel, supra, at 817.

Frankel found a harm did exist and that disclosure would defeat important purposes of the exemption for investigatory files." Frankel, supra, at 818. While Frankel expressly states that it does not involve a situation in which the investigatory agency has affirmatively decided that it will bring no further law enforcement actions related to the the records sought (Frankel, supra, at 815), the decision does contain language to the effect that exemption 7 may protect "closed" as well as "open" files. But above all else, the point of Frankel is that the court found a specific harm which would result from the disclosure of the documents requested.

Similarly, Evans found that the plaintiff's requests, which specifically included the identity of confidential informants, would seriously jeopardize law enforcement activities. (Evans, supra, at 823, 824. The fact that Evans applied this finding to files which were more than a decade old and presumably "closed" is of no relevance to Weisberg's request for the spectrographic analyses performed in connection with the assassination of President Kennedy. The salient point of Evans, Frankel and all other decisions construing exemption 7 is that they compel the Government to establish some

harm to its law enforcement activities. The corollary of this is that should the Government's position that exemption 7 is a blanket exemption be adopted, all existing decisions construing exemption 7, both in this circuit and elsewhere, must be repudiated.

Again, it must be emphasized that in the instant case the Government has established no harm which could result from the disclosure of the spectrographic analyses which Weisberg seeks. In its Petition for Rehearing the Government cites "four essential reasons why FBI files should remain confidential." (Petition for Rehearing, p. 4, fn. 1) The Government does not assert that any of these four reasons apply to the disclosure of the spectrographic analyses sought by Weisberg.

Indeed, the only one of these reasons which could conceivably apply to the release of the spectrographic analyses is the third: "disclosure could reveal investigatory techniques." Of course, this reason does not apply to Weisberg's case because spectrographic analysis is explained in any standard criminalistics textbook, sometimes with the aid of illustrations provided by the FBI. This perhaps explains why the third "essential reason" is not contained in the catalogue of speculative horrors recited in the affidavit by FBI Agent Williams. (See JA 50-51)

III. THE HOLDING OF THE SUPREME COURT IN THE ENVIRONMENTAL PROTECTION AGENCY CASE DOES NOT SUPPORT GOVERNMENT CLAIM THAT EXEMPTION 7 IS A BLANKET EXEMPTION

The Petition for a Rehearing cites Environmental Protection Agency v. Mink, 35 L. Ed. 119 (1973) for the proposition that: "Where Congress has created a blanket exemption, in camera inspection to determine whether the documents in question should be disclosable because nondisclosure will not further the policy of the exemption is unwarranted." (Petition for Rehearing, p. 5)

In the Environmental Protection Agency case, the Supreme Court applied exemptions 1 and 5 and accorded them different treatment. With respect to exemption 1, the Supreme Court held that the language of exemption 1 and its legislative history limited judicial review solely to the question of whther the documents sought were "specifically required by Executive order to be kept secret." With respect to exemption 5, however, the Court held that judicial review was to be had and that the district court could inspect exemption 5 documents in camera.

Since exemption 5 is closer to exemption 7 in language than is exemption 1, these holdings of the Supreme Court have some relevance to exemption 7. As Judge Kaufman pointed out in his opinion in the instant case:

> In this case no Executive order, and no matter of national defense or foreign policy, is asserted to be involved. Further, it is to be noted that in remanding in connection with the application of 5 U.S.C. 552(b)(5) exempting "inter-agency or intra-

> agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency", Mr. Justice White in the Environmental Protection Agency case placed the burden of showing entitlement to the (b)(5) exemption upon the Government. (Slip opinion, fn. 7, p. 12)

Rather than being a blanket exemption as the Government contends, exemption 7 is at least as susceptible to de novo judicial review as is exemption 5, and perhaps more so.

CONCLUSION

The Freedom of Information Act and the case law construing it require that in order for the Government to meet its burden of proof in justifying the suppression of the spectrographic analyses sought by Weisberg, the Government must establish that some harm to its law enforcement operations will be forthcoming as a result of their disclosure. The Government has failed to establish that harm. If on remand to the district court the Government still cannot establish a concrete prospect of harm, then, as a matter of law, Weisberg is entitled under the Freedom of Information Act to have the spectrographic analyses he seeks disclosed to him.

Respectfully submitted,

Bernard Fensterwald, Jr.
910 16th Street, N. W.
Washington, D. C. 20006
Attorney for Plaintiff-Appellant

Of Counsel:

Jim Lesar
1231 4th Street, S. W.
Washington, D. C. 20024

CERTIFICATE OF SERVICE

This is to certify that I have this 20th day of July, 1973, served a copy of the foregoing Supplemental Brief for Plaintiff-Appellant on United States Attorney Harold H. Titus, Jr. by mailing it to him at his office in the Department of Justice, Washington, D. C.

JAMES H. LESAR