LAW ENFORCEMENT PURPOSE

In M. A. Schapiro & Co. v. SEC a request was made for an SEC Staff Study on the off-board trading problem raised by the New York Stock Exchange's original Rule 394 and all transcripts made and documents received in the course of the SEC investigation. The SEC cited exemptions 3, 4, 5, 7, and 8.

" . . . . although arguably these documents are investigatory files compiled for law enforcement purposes, the agency has not proffered any facts that would show it contemplated with the reasonably near future, a law enforcement proceeding based upon the materials sought. Six (6) years ahve elapsed and these documents have not been, nor is it alleged that they will be, the basis for either a criminal or civil action against anyone."

M. A. Schapiro v. SEC, Civil Action No. 2243-70, District Court for the District of Columbia, Judge Aubrey E. Robinson, Jr., at p. 6 of the opinion filed on February 25, 1972.

Getman v. National Laborations Board

The request in Getman was for the names of employees kept on a list of persons eligible to vote in certain representation elections. The NLRB cited exemptions 4, 6, and 7.

Nor is the Board's refusal to disclose justified by Exemption (7), which covers "investigatory files compiled for law enforcement purposes except to the extent available by law to a (private) party." According to Senate Report No. 813 on S. 1160, 89th Cong., 1st Sess., at 9 (1965), "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." The Excelsior lists are not files prepared primarily or even secondarily to prosecute law violators, and even if they were to be used for law enforcement purposes, it is impossible to imagine how their disclosure could prejudice the Government's case in court. Even if this court had not held that specific exemptions from disclosure in the Act are to be narrowly construed,[9] on a simple reading of the plain language of Subsection (b)(7) we would be constrained to hold that it provides appellant with no justification for its withholding of the Excelsior lists sought by appellees.

[9] Bristol-Meyers Co. v. F.T.C., 138 U.S. App. D. C. 22, 424 F. 2d 935 (1970)

"INFORMER" DEFINED

. . . an informer is an undisclosed person who confidentially volunteers material information of violations of the law to officers charged with enforcement of that law. As we understand the term, persons who supply information only after being interviewed by police officers or who give information as witnesses during the course of an investigation are not informers. Moreover, a distinction is often made in the federal cases based on whether the person is an active participant in the offense with which the defendant is charged or is a "mere infomer" who only supplies a "lead" to law enforcement officers for their investigation of the crime. According to this distinction, a participant in the transaction upon which the charge against the accused is based often is not treat as an informer.
Gordon v. United States (5th Cir., 1971), 438 F. 2d 858 at 876.

NOTE: By this definition of "informer", most of the documents comprising the ten volume FBI investigation into the RFK assassination probably contain no names of "informers".

THE INFORMER'S PRIVILEGE

The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. Roviaro v. United States, 353 U. S. 53 (1957) at 59.

The scope of the privilege is limited by its underlying purpose. Thus where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable. Roviaro v. United States, 353 U. S. 53 at 60.

On reargument the Government is likely to again urge that all it has to do to meet the standards of exemption 7 is to put in an affidavit claiming that the documents are part of an investigatory file for law enforcement purposes. There are several arguments against this position:

1. This position allows the government to prevail in all cases simply by submitting perjurious affidavits. Carried out ridiculo ad absurdum it allows the Justice Department to suppress documents which are a matter of public record on the grounds that they are part of an investigatory file, as in fact the Justice Department did when Weisberg sought the London Extradition Documents. Numerous instances of Judtice Department perjury have recently come to light. Indeed, the affidavits submitted in connection with these Freedom of Information lawsuits are perjurious or at the very least, highly deceptive.

2. The Government's position denies the de novo review specified in the Freedom of Information Act. This emasculates the Court, giving it no more power than the hapless citizen who requested the documents.

3. The Government position misinterprets the legislative history by asserting that in noting that its purpose was to protect "sensitive files, such as FBI files" the House Report declares a total exemption for all FBI files. If this interpretation were correct, it would either eliminate the files of all other agencies performing investigative functions from the purview of the exemption or else it would require the investigative files of all other agencies to be accorded the same treatment as the FBI files are supposed to be given.

4. The language of the statutes requires that there must be a concrete prospect of law enforcement. Since the court must interpret and judge whether or not such a concrete purpose does in fact exist (See Bristol Meyers), it is clear the court can go behind the text of the affidavit submitted by the Government.

5. The fact that the language of the statute requires concrete prospect of law enforcement action to be demonstrated indicates that the Congress was looking to the harm to be done by releasing Government investigatory files and that only by citing a harm can the Government meet its burden of judtifying suppression.

6. As the Government interprets the statute, all FBI files are closed for all time to the public.