LEGISLATIVE INTENT--HARM TO LITIGATION AS BAR TO DISCLOSURE

The House Foreign Operations and Government Information Subcommittee took a statement from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, Department of Justice, at its hearing on March 30, 1965. Pages 27 and 28 are relevant to whether exemption 7 was intended to be a blanket exemption for all investigative or FBI files and what was the nature of the harm that the Justice Department was worried about.

/p. 27/ (Schlei):

Evidence is factual matters, and yet they really are the kind of thing that I think that all members of the committee and every-/p. 28/ one here would agree on--that litigation files relating to pending or prospective litigation should not be readily available to the opposites in the litigation; the newspapers or interested citizens.

Mr. Kass. Especially for the Department of Justice and the FBI, would that not fall under No. 7--"investigatory files compiled for law enforcement purposes except to the extent available by law to a private party?" This deals specifically, as I understand it, with the rules of disclosure.

Mr. Schlei. Well, I do not think you could call law enforcement a Lands Division suit about how much the Government is going to pay somebody in a condemnation situation, or perhaps a suit against the Federal Government in the Tort Claims Act field. That

would not be law enforcement.

I think law enforcement connotes an investigative, a police, criminal law enforcement effort. Would you not agree?

Mr. Kass. I won't comment. If the Department of Justice had internal memorandums or internal working papers dealing solely with facts, would you then have any objection to making them available? In other words, facts compiled by your agency or given to you by others for investigatory or litigation purposes? Would you object to that information being made available?

Mr. Schlei. Yes; because it would disclose the litigation position of the United States in a way that--

Mr. Kass. Would not the litigation position, Mr. Schlei, be based on the policy, not the facts which create the policy? Not the facts which create the litigation position? I am talking solely of the facts.

If you could, in your compiling of this information, separate it on the basis of facts on the one hadn; law and policy on the other--and I would interpret "policy" as meaning your litigation position; whether to go to court or not; whether to press charges; what your attack is going to be--would you then be willing to release that information?

Mr. Schlei. No, Mr. Kass. I think that the evidence that you have, the facts that you have, are terribly confidential in prelitigation, during a litigation situation. You make possible all kinds of perjury if the opposition knows exactly what you are able to prove and what you are not able to prove. They can construct a

story that is consistent with what they know you are limited to and go between your evidence. But if they try to construct a story not knowing what your evidence may be, they are under compulsion to tell the truth or face the possibility of being very badily impeached.

Mr. Kass. But have we not gone away from the concept of surprise?

Mr. Schlei. Well, we have to some extent, but there are limits to discovery, and there are privileges, and there is this concept that the work product of a lawyer is immune from discovery, and that would include a lot of factual material.

I have read a number of cases, incidentally, where the possibility of perjury is spoken of by the courts as a reason for restricting discovery of matters that could be discovered by independent investigation.