Jim, the government's spectro petition is faithful to its dishonesty and to nothing else. It lies, distorts, misquotes, misrepresents, exaggerates - almost anything in legal and factual corruption is here. Again I think that there should be some mechanism for calling to the attention of the court these lies, such as that what I seek is part of a "investigatory file for law enforcement purposes". They actually sayx this is "conceded". They say that all FBI files are exempt when only those for law-enforcement purposes are, and the language could not be more explicit. I think they misquote the decision, too, saying it compels in camera inspection. I think it merely permits it in the government's interest, in the event its lies were truth. It avoid the language of Fink in slective quotation. Fink is specific in saying an affidavit does not suffice. How, then, can a perjurious one? That awful garbage about informants and secret processes is also in here. I think we should be preparing for a rehearing and devote our efforts to establishing governmental criminality in this case. The rest is done. If they got a rehearing, let us be ready to clobber them. All their chins are out mx if we want to slug. I don't think there is a single point at which this petition is in contact with legal or factual reality. They have to be desperate to pull this. I think they are looking to Burger, Rehnquist et al, not the immediate. So, I think it behoves us to make the position of such Ughs as intolerable as possible as soon as possible. They have to be as close to unable to face what is expected of them as can be. Especially if El Lider has by then added to their number. HW 3/31/73

No. 71-1026

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

APPELLEE'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

HARLINGTON WOOD, JR.,
Assistant Attorney General,

HAROLD H. TITUS, JR.,
United States Attorney,

WALTER H. FLEISCHER,
MICHAEL H. STEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

I N D E X

Page:

I. The Facts ---------- 2
II. Reasons For Granting Rehearing ---------- 4

C I T A T I O N S

Case:

Environmental Protection Agency v. Mink, U.S. 41 L.W. 4205 ---------- 5

Evans Department of Transportation, 446 F. 2d 821 (C.A. 5), certiorari denied, 405 U.S. 918 ---------- 4

Frankel v. Securities and Exchange Commission, 460 F. 2d 813 (C.A. 2) ---------- 4

Statutes:

Freedom of Information Act:

5 U.S.C. 552 ---------- 2
5 U.S.C. 552(b)(7) ---------- 3

Miscellaneous:

S. Rept. 813, 89th Cong. 1st Sess. 3 -------- 5

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

APPELLEE'S PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

The Appellee United States Department of Justice respectfully petitions for rehearing and suggests rehearing en banc on the grounds that the majority decision of the Court involves a question of exceptional importance, and is contrary to both the plain wording of the statute and its legislative history. Moreover, the Court's majority included a District Judge sitting by designation.

In this case, the panel has determined that material from an FBI investigatory file, concededly compiled for law enforcement purposes, must be disclosed under the Freedom of Information Act, 5 U.S.C. 552, unless the government can prove that disclosure will cause certain specified types of harm to its interests. This ruling is inconsistent with the clear language of the Act -- which exempts "investigatory files compiled for law enforcement purposes" -- and its legislative history, which clearly indicates that Congress intended that FBI files be exempt from disclosure under the Act. The Court further suggests that in its discretion the district court may review FBI files in camera to make determinations necessary under its ruling. Slip op. 13, also p. 9, n. 6. This is an obviously serious breach in the protection Congress intended to give the files of the FBI and other law enforcement files.

I. THE FACTS

This is a suit to compel disclosure of certain information contained in the FBI file on the investigation of the assassination of President John F. Kennedy. The specific information sought consists of spectrographic analyses of various bullets and metal fragments connected

with the assassination. The United States resisted disclosure on the ground that the requested information was contained in the FBI investigatory file on the Kennedy assassination, and was therefore exempt from disclosure under Exemption 7 of the Act (5 U.S.C. 552(b)(7))which excludes "investigatory files compiled for law enforcement purposes" from the reach of the disclosure provisions of the Act. The district court dismissed the complaint, and a panel of this Court reversed, with Senior Judge Danaher dissenting. Writing for the panel, District Judge Kaufman, with whom Chief Judge Bazelon concurred, held, inter alia, that, notwithstanding its language, exemption 7 "applies only when the withholding agency sustains the burden of proving that disclosure of the files sought is likely to create a concrete prospect of serious harm to its law enforcement efficiency either in a named case or otherwise." (Slip opinion, p. 8).

Senior Judge Danaher dissented on the ground that there being no dispute that the information sought was contained in an FBI investigatory file compiled for law enforcement purposes, it therefore is exempt from disclosure by virtue of Exemption 7 of the Act.

II. REASONS FOR GRANTING REHEARING

For the reasons stated in Judge Danaher's dissenting opinion, we believe that the decision of the panel is contrary to both the plain language of the Information Act and its clear legislative history. Exemption 7 by its terms exempts from disclosure "investigatory files compiled for law enforcement purposes * * *." It is conceded that the information here requested falls squarely within that description. Nonetheless, the panel decision would require that the particular file here involved be considered by the district court to determine whether disclosure of the information would harm the FBI's law enforcement mission. 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." 1/

1/ The panel decision is unclear as to whether it covers open as well as closed investigatory files. If designed to apply only to closed FBI files, so that current files are automatically exempt, we believe the decision nonetheless is in error. There are at least four essential reasons why FBI files should remain confidential. First, disclosure of current files could prejudice an ongoing investigation by alerting the subject. Second, disclosure could prejudice informers. Third, disclosure could reveal investigatory techniques. Fourth, disclosure could invade the privacy of persons involved in an investigation. We note that only the first of these reasons applies to open and not closed files. Thus Congress could rationally determine that all investigatory files, not simply open files, should remain confidential. At least two other circuits have concluded that this is exactly what Congress did. Frankel v. Securities and Exchange Commission, 460 F. 2d 813 (C.A. 2); Evans v. Department of Transportation, 446 F. 2d 821 (C.A. 5), certiorari denied, 405 U.S. 918. There is no reason to assume that disclosure of material from current files will be any more harmful than disclosure of similar material from closed files.

That Congress, when passing the Information Act, determined that FBI investigatory files would be exempt from disclosure, is clear beyond dispute. As the Senate Report explained (S. Rept. 813, 89th Cong., 1st Sess. 3):

> It is also necessary for the very operation of our government to allow it to keep confidential certain material such as the investigatory files of the Federal Bureau of Investigation. (emphasis supplied).

There is no exception for non-harmful material. It is the files themselves which are exempted.

Thus it is clear both from the language of the Exemption 7 and its legislative history that Congress balanced the need for confidentiality 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. 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. Environmental Protection Agency v. Mink, ___ U.S. ___, 41 L.W. 4201, 4205.

In short, the panel decision would open FBI files to disclosure after inspection by district judges who are not experts in law enforcement techniques and therefore not equipped to determine whether certain information contained in the files might be harmful, to the clear detriment of

the FBI's law enforcement efforts. Since such disclosure is unwarranted under the Information Act, the panel decision should be reconsidered, if necessary en banc.

CONCLUSION

For the reasons stated, it is respectfully requested that the Court grant rehearing and reverse the judgment of the district court. Alternatively, the Court should consider this case en banc.

Respectfully submitted,

HARLINGTON WOOD, JR.,
Assistant Attorney General,

HAROLD H. TITUS,
United States Attorney,

WALTER H. FLEISCHER,
MICHAEL H. STEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

MARCH 1973