United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1026

HAROLD WEISBERG, APPELLANT

v.

U. S. DEPARTMENT OF JUSTICE

Appeal from the United States District Court
for the District of Columbia

Decided February 28, 1973

Bernard Fensterwald, Jr., with whom *James H. Lesar* was on the brief, for appellant.

Alan S. Rosenthal, Attorney, Department of Justice, for appellee. *L. Patrick Gray, III*, Assistant Attorney General at the time the brief was filed, *Thomas A. Flannery*, United States Attorney at the time the brief was filed, *Walter H. Fleischer* and *Barbara L. Herwig*, Attorneys, Department of Justice, were on the brief for appellee.

Before BAZELON, *Chief Judge*, DANAHER, *Senior Circuit*

Judge, and KAUFMAN,* *United States District Judge* for the District of Maryland.

Opinion for the Court filed by KAUFMAN, District Judge.

Dissenting opinion by DANAHER, Senior Circuit Judge at p. 14.

KAUFMAN, *District Judge*: After unsuccessfully seeking on several occasions to obtain administrative disclosure, Harold Weisberg[1] brought this action to compel the disclosure under 5 U.S.C. § 552(a)(3), popularly known as the Freedom of Information Act, by the Department of Justice (the Department) of the following spectrographic analyses and other items (hereinafter referred to as the "records") compiled by the F.B.I. in connection with that agency's investigation for the Warren Commission[2] into the assassination of President Kennedy:

> 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 of Governor Connally.

The Department moved in the alternative to dismiss or for summary judgment on the ground that the records sought were investigatory files compiled for law enforcement purposes and were thus exempt from disclosure under 5

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

[1] Weisberg alleges that he is a professional writer who has published a number of books dealing with political assassinations and is researching the subject. In the motion context in which this case was decided below, all of plaintiff's allegations are considered as established for purposes of this appeal.

[2] The Warren Commission was established pursuant to Executive Order 11130, November 29, 1963 (28 F.R. 12789, Dec. 3, 1963) to "ascertain, evaluate, and report upon the facts relating to the assassination of the late President Kennedy and the subsequent violent death of the man charged with the assassination." The purposes of the Commission were to "examine the evidence developed by the Federal Bureau of Investigation and any additional evidence that may hereafter come to light or be uncovered by federal or state authorities; to make such further investigation as the Commission finds desirable; to evaluate all the facts and circumstances surrounding such assassination, including the subsequent violent death of the man charged with the assassination, and to report to me [President Lyndon B. Johnson] its findings and conclusions."

U.S.C. § 552(b)(7).[3] In support of its summary judgment motion, the Department filed the following affidavit by F.B.I. Special Agent Marion E. Williams:

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[3] 5 U.S.C. § 552(b)(7) provides that the disclosure provisions of 5 U.S.C. § 552(a)(3) do not apply to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." That latter exception is not applicable herein since Weisberg is not entitled to the information he seeks as a party to any action other than the within suit. *See* Bristol-Myers Company v. F.T.C., 424 F.2d 935, 939 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970); Cooney v. Sun Shipbuilding & Drydock Company, 288 F. Supp. 708, 711, 712 (E.D. Pa. (1968); Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591, 593, 594 (D. P.R. 1967). *See also* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), hereinafter cited as House Report. Whether the word "party", as used in 5 U.S.C. § 552 (b)(7), includes someone other than Weisberg and thus someone other than the particular party seeking the information, raises a question (*cf.* DAVIS, ADMINISTRATIVE LAW TREATISE, 1970 Supp., §§ 3A.21, 3A.23, pp. 157-58, 165) which this court need not resolve herein because the record does not indicate that any other person has received or is entitled to receive under any law other than the Freedom of Information Act, or under any discovery rule, the information Weisberg seeks herein. If this information had been disclosed to a "party", need for further secrecy would seem substantially diminished. However, this is not that case.

Weisberg specifically seeks disclosure under 5 U.S.C. § 552

1. I am [an] official of the FBI Laboratory and as such I have official access to FBI records.
2. I have reviewed the FBI Laboratory examinations

(a) (3) which provides that except for agency records (which exception is not relevant in this case),

> . . . each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available *to any person.* On complaint, the district court of the United States in the district in which the complainant resides, or has his principle place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case *the court shall determine the matter de novo* and *the burden is on the agency to sustain its action.* In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. 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. [Emphasis supplied.]

In Nichols v. United States, 460 F.2d 671 (10th Cir. 1970), the Tenth Circuit affirmed the District Court's grant of summary judgment against a plaintiff in a suit instituted under the Freedom of Information Act seeking to compel the disclosure or submission for analysis of certain items relating to the assassination of President Kennedy (at 672 n.1). In *Nichols*, the governmental agencies involved were the General Services Administration (GSA), the National Archives and Record Service, and the Department of the Navy (Navy). The District Court (325 F. Supp. 130, 135, 136, 137 (D. Kan. 1971)) held that certain items were not "records" for purposes of Section 552 and thus were not

> referred to in the suit entitled "Harold Weisberg v. Department of Justice USDC D.C., Civil Action No. 2301-70," and more specifically, the spectro-

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subject to disclosure under that Section. The District Court also concluded that certain of the items had either been donated by an authorized representative of the Estate of John F. Kennedy or acquired, subject to restrictions on access, which restrictions prohibited the desired examination and inspection. Thus, those donated and acquired items were exempted from disclosure under Section 552(b)(3) either by virtue of 44 U.S.C. §§ 2107, 2108(c) which authorizes the Administrator of GSA to accept for deposit papers, documents, and other historical materials of a President of the United States subject to the restrictions imposed by the donors as to their availability and use, or by virtue of P.L. 89-318, 79 Stat. 1185. That law gives the Attorney General authority for one year from the date of its enactment, November 2, 1965, to acquire certain items of evidence considered by the Warren Commission, and provides that all right, title, and interest in those items acquired by the Attorney General vest in the United States. Section 4 of Public Law 89-318 provides that all items acquired by the Attorney General "be placed under the jurisdiction of the Administrator of General Services for preservation under such rules and regulations as he may prescribe."

5 U.S.C. § 552(b)(3) provides that the disclosure provisions of 5 U.S.C. § 552(a)(3) do not apply to matters "specifically exempted from disclosure by statute."

Additionally, the District Court found that the following item sought by plaintiff from the Navy, although properly a record within the meaning of Section 552 was not in the Navy's custody or control, and thus as to it the District Court granted summary judgment in favor of the Navy;

> The written diagnosis of findings made by the Bethesda Hospital radiologist from his X-ray study of X-ray films taken at the autopsy of the late Prestident. [At 137.]

On appeal, the Tenth Circuit affirmed the District Court's conclusions that the donated and acquired items sought were exempted from disclosure, and that the summary judgment

graphic 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 examinations 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

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record was sufficient to establish that none of the items requested from the Navy were in the Navy's custody or control and that therefore summary judgment in favor of the Navy was proper. The Tenth Circuit found it unnecessary to decide the question of whether the District Court properly concluded that certain of the items sought were not "records" under Section 552 because all of those items whether records or not, were exempt from disclosure.

Unlike *Nichols*, in this case there is no allegation or indication by the Government that the "analyses" Weisberg seeks were acquired pursuant to any statute or regulation which exempts them from disclosure. Furthermore, Weisberg does not seek disclosure of any tangible evidence of the type requested in *Nichols*. Weisberg seeks disclosure only of spectrographic analyses which are similar in kind to the "diagnosis" sought from the Navy in *Nichols* and which the District Court held to be a record within the meaning of Section 552. 325 F. Supp. at 137.

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.

Weisberg did not submit any counteraffidavit or any other Rule 56 documents. After hearing oral argument from both parties, the District Court, without setting forth its reasons, granted the Department's motion to dismiss.

In *Bristol-Myers Company v. F.T.C.*, 424 F.2d 935, 939-40 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), Chief Judge Bazelon, in reversing the grant of a motion to dismiss the plaintiff's Freedom of Information Act complaint, and in commenting upon the 5 U.S.C. § 552(b)(7) exemption, wrote:

> * * * [T]he agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files with the label "investigatory" and a suggestion that enforcement proceedings may be launched at some unspecified future date. Thus the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the company are nevertheless discoverable.

In the within case, no criminal or civil action relating to the death of President Kennedy is pending nor is it indicated by the Government that any such future action is

contemplated by anyone. Nor is Weisberg the subject of any investigation. He simply asks for information which he alleges he is entitled to have made available to him under 5 U.S.C. § 552(a)(3). The language of Section 552, supported abundantly by the legislative history of the Freedom of Information Act,[4] places the burden on the Government to show why non-revelation should be permitted, and requires that exemptions from disclosure be narrowly construed and that ambiguities be resolved in favor of disclosure. *See generally Getman v. N.L.R.B.*, 450 F.2d 670, 672 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971); *Wellford v. Hardin*, 444 F.2d 21, 25 (4th Cir. 1971); *Bristol-Myers Company v. F.T.C., supra* at 938-40; *M. A. Schapiro & Co. v. Securities & Exchange Comm'n*, 339 F. Supp. 467, 469, 470 (D. D.C. 1972); *cf. LaMorte v. Mansfield*, 438 F.2d 448 (2d Cir. 1971) (Friendly, J.). In *Wellford v. Hardin, supra* at 25, Judge Butzner commented that 5 U.S.C. § 552(c) provides that the Act " 'does not authorize withholding of information or limit the availability of records to the public, except as specifically stated' " and noted Professor Davis' emphasis upon " '[t]he pull of the word "specifically". . . .' " K. Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 783 (1967). It follows that the exemption set forth in 5 U.S.C. § 552(b)(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. *See Bristol-Myers Company v. F.T.C., supra* at 939, 940.

The Court below granted the Government's motion to dismiss, not its motion for summary judgment. Thus, it seemingly accorded no weight to the affidavit of Agent

[4] S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), hereinafter cited as Senate Report. House Report at 5.

Williams.[5] But even if that affidavit is given full consideration, it is a document which is most general and conclusory and which in no way explains *how* the disclosure of the records sought is likely to reveal the identity of confidential informants, or to subject persons to blackmail, or to disclosure the names of criminal suspects, or in any other way to hinder F.B.I. efficiency.[6] The conclusions that the disclosure Weisberg seeks will cause any of those harms is neither compelled nor readily apparent, and therefore does not satisfy the Department's burden of proving under 5 U.S.C. § 552(b)(7), as the Department must, some basis for fearing such harm.[7] Neither the

[5] Weisberg contends that certain parts of the Williams' affidavit do not qualify for consideration under Federal Civil Rule 56. Those contentions, on remand, should, if Weisberg desires, be brought to the attention of the District Court.

[6] An F.B.I. investigatory file may generally relate to organized or other crime and may not have been originally intended for use in the prosecution of any named individuals, or, even if so originally intended, may no longer be intended for such use. The data contained in such a file may, however, require the protection of secrecy so as not to dry up future sources of information or to pose a danger to the persons who supplied the information or to prevent invasion of personal privacy. 5 U.S.C. § 552(b)(7) would appear sufficiently flexible to include within its protection such an investigatory file when and if such protection is required. Frankel v. Securities & Exchange Commission, 460 F.2d 813 (2d Cir. 1972); Evans v. Department of Transportation, 446 F.2d 821, 823-24 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726, 727 (N.D. Calif. 1971). In such instances, *in camera* inspection by the District Court might be appropriate. See discussion *infra* at p. 11, n.10.

[7] "The burden of proof is placed upon the agency which is the only party able to justify the withholding." House Report at 9. *And see* the specific wording of 5 U.S.C. § 552(a)(3) set forth in n.3, *supra*. While it may be that the introductory

F.B.I. nor any other governmental agency can shoulder that burden by simply stating as a matter of fact that it has so done, or by simply labelling as investigatory a file

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words of Section 552(b) make the burden of proof provisions of Section 552(a)(3) inapplicable in determining whether the Section 552(b) exceptions apply (*but see* the contrary approach taken in all opinions, majority, concurring and dissenting, in Environmental Protection Agency, et al. v. Mink, et al., —— U.S. —— (January 22, 1973), and the Ninth Circuit's seeming assumption to the contrary in Epstein v. Resor, 421 F.2d 930, 932 (9th Cir. 1970)), that contention in no way compels any different conclusions than those expressed in this opinion. The underlying philosophy of Section 552 favors disclosure. *See* Senate Report at 3. Section 552(c) provides that Section 552 "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." *See* the discussion *supra* at pp. 7-8 re Wellford v. Hardin, *supra*. The thrust of Section 552(c) is that exceptions from the disclosure provisions of Section 552 are to be carefully construed. *See* House Report at 11; Senate Report at 10. To place the burden of proof on the plaintiff to prove the nonapplicability of a Section 552(b) exception when the Government as a rule has knowledge of nearly all the facts relevant to such an exception would be contrary to the disclosure philosophy of all of Section 552 and specifically of Section 552(c). Moreover, placing the burden of proof on the plaintiff would also seemingly run contrary to the underlying philosophy set forth in the House Report which, in explaining why the burden of proof was placed on the agency to justify the withholding of information in Section 552(a)(3), stated (at 9): "A private citizen cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action." *See also* Senate Report at 8. That same reasoning would seem equally applicable in determining the relationship among 552(a)(3), 552(b)(7) and 552(c).

In Environmental Protection Agency, et al. v. Mink, et al., *supra*, Mr. Justice White, in the majority opinion, held that under 5 U.S.C. § 552(b)(1), exempting "matters that are (1) specifically required by Executive order to be kept secret in

which it neither intends to use, nor contemplates making use of, in the future for law enforcement purposes, at least not without establishing the nature of some harm which is likely to result from public disclosure of the file. Something more than mere edict or labelling is required if

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the interest of the national defense or foreign policy", once an Executive order to that effect issues, the exemption applies without the Government being required to do more. In other words, the Government's burden is met by simply showing that an Executive order issued and that national defense or foreign policy was involved. Earlier, in 1970, in Epstein v. Resor, *supra*, Judge Merrill wrote (at 932-33):

> The appeal presents a question as to the scope of judicial review. Section 552(a)(3) provides that "the court shall determine the matter de novo and the burden is on the agency to sustain its action."
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> Appellees insist, however, that this subsection does not apply here. They point to § 552(b) which states that "[t]his section does not apply to matters" in nine enumerated categories. Appellees contend that agency determination that the material sought falls within one of the nine exempted categories takes the case out of subsection (a)(3) and precludes the broad judicial review provided by that subsection. They assert that we are here faced with an agency determination that the (b)(1) exemption applies.
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> Unquestionably the Act is awkwardly drawn. However, in view of the legislative purpose to make it easier for private citizens to secure Government information, it seems most unlikely that it was intended to foreclose an (a)(3) judicial review of the circumstances of exemption. Rather it would seem that (b) was intended to specify the bases for withholding under (a)(3) and that judicial review de novo with the burden of proof on the agency should be had as to whether the conditions of exemption in truth exist. * * *
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> This being so, appellant argues, the District Court should have taken the file for a determination *in camera* as to whether, under (b)(1) and the applicable executive standards, this file should, after twenty-four years,

the Freedom of Information Act is to accomplish its "primary purpose, i.e., 'to increase the citizen's access to government records.'" [8] This would be just as true in a

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still be classified as "top secret" in the interests of the national defense or foreign policy.

Here we part company with appellant.

Section (b) (1) is couched in terms significantly different from the other exemptions. Under the others (with the exception of the third) the very basis for the agency determination—the underlying factual contention—is open to judicial review. * * * Under (b) (1) this is not so. The function of determining whether secrecy is required in the national interest is expressly assigned to the executive. The judicial inquiry is limited to the question whether an appropriate executive order has been made as to the material in question. [Footnote omitted; citations omitted.]

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.

[8] Getman v. N.L.R.B., 450 F.2d *supra* at 672, in which Judge Wright quoted from Judge Bazelon's opinion in *Bristol-Myers*. *See* Philadelphia Newspapers, Inc. v. Department of H & U.D., 343 F. Supp. 1176, 1180 (E.D. Pa. 1972); Cowles Communications, Inc. v. Department of Justice, *supra* at 727.

"For the great majority of different records, the public as a whole has a right to know *what its Government is doing*" (emphasis supplied), Senate Report at 5-6. And *see also* the "conclusion" in House Report at 12: "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic so-

case in which the public appetite for further information has been fully met as it is in this case in which the disclosure sought relates to a national tragedy concerning which discussion and debate continue.

This case is hereby remanded to the District Court for further proceedings in accordance with this opinion. If on remand the Government is fearful that in order to satisfy its burden of proof, it will of necessity disclose information, the revellation of which will cause the type of harm 5 U.S.C. § 552(b)(7) seeks to avoid, the District Court will always have the right, in its "informed discretion, good sense and fairness" [9] to conduct the proceedings in such a way, either by *in camera* inspection or otherwise, as to give the Government the opportunity to meet its burden and at the same time to preserve such secrecy as is warranted.[10]

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ciety in the United States is the fact that such a political truism needs repeating. * * *"

[9] Alderman v. United States, 394 U.S. 165, 185 (1969).

[10] *See* M.A. Schapiro & Co. v. Securities & Exchange Comm'sn, 339 F. Supp. *supra* at 469, in which the Court viewed certain documents *in camera*, and ordered information therein to be disclosed *See also* Evans v. Department of Transportation, 446 F.2d *supra* at 823; Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. *supra* at 727; *cf.* Fisher v. Renegotiation Board, —— F.2d —— (D.C. Cir. November 10, 1972); Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970). The *in camera* inspection technique would appear to accord with a "workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." House Report at 6. *But cf.* Frankel v. Securities & Exchange Commission, *supra*, at n.6 herein. *And see* Judge Oakes' dissenting opinion therein and his references to *in camera* inspections in connection with 5 U.S.C. § 552(b) (4) and (5). Frankel v. Securities & Exchange Commission,

DANAHER, *Senior Circuit Judge,* dissenting:

Quite in keeping with our common purpose correctly to decide the cases presented to us is the desire to achieve unanimity whenever possible, and I had hoped to gain acceptance for my approach. That I now find myself differing from my esteemed colleagues causes me concern. To paraphrase Jefferson, a "decent respect" for the opinions of others requires that I declare the reasons for my doubts concerning the disposition they propose.

This appellant had alleged that he is a professional writer who had published books[1] dealing with political assassinations. Appended to his complaint were exhibits reflecting his correspondence over a four-year period with the late Director J. Edgar Hoover of the Federal Bureau of Investigation, former Attorney General Ramsey Clark, former Attorney General John Mitchell and the [present] Attorney General Richard Kleindienst. Also set out were their replies either to the appellant or to his counsel.

Among the mentioned exhibits attached to appellant's complaint was Exhibit D, appellant's letter of May 16, 1970, addressed to then Deputy Attorney General Kleindienst, from which I quote:

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460 F.2d *supra* at 818. And most importantly *see* Mr. Justice White's discussion of the use of the *in camera* technique in Environmental Protection Agency, et al. v. Mink, et al., *supra,* and his warning that that technique is only one of a number of possible tools available to the District Court for use in determining whether the withholding of documents sought under the Freedom of Information Act is appropriate.

* Sitting by designation pursuant to 28 U.S.C. § 292(c) (1970).

[1] At argument in the district court appellant's counsel represented that appellant had published "four books on the Kennedy assassination" with a fifth on the way.

> With regard to the spectographic analyses, if you are not aware of it, . . . 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.
>
> * * * * *
>
> 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 available pictures can be put that is of any other nature, for they show nothing but his blood."

The appellant's complaint in paragraph 6 had alleged that after the assassination of President Kennedy on November 22, 1963, the Federal Bureau of Investigation had 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.

Appellant's complaint in paragraph 17 made further reference to Exhibit D, the letter of May 16, 1970, above mentioned, alleging that accompanying that letter was a completed form D.J. 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.)"

The Department of Justice, relying upon 5 U.S.C. § 552(b)(7), rejected the appellant's request explaining

> the work notes and raw analysis 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 disclosure as investigatory files compiled for law enforcement purposes. 5 U.S.C. § 552(b)(7) . . . .[3]

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[3] 5 U.S.C. § 552(b)(7) as here pertinent reads:

> (b) This section shall not apply to matters that are—
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> * * * * *
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> (7) investigatory files compiled for law enforcement purposes . . . .

Both the appellant and the Department were well aware that the *results* of the spectrographic tests had been submitted to the Warren Commission and that the appellant wanted, not "results" but the analyses themselves.

President Kennedy was pronounced dead at 1:00 p.m. on Friday, November 22, 1963. That day, at 2:38 p.m., Lyndon B. Johnson was sworn in as the thirty-sixth President of the United States and immediately by plane left Texas for Washington.

Director Hoover testified before the Warren Commission that

> 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 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, page 98.

Clearly the President contemplated collaboration with Texas authorities by representatives of the Secret Service and of the Federal Bureau of Investigation, looking to the early apprehension and ultimately the conviction of the perpetrator of the crime.

Speedily it was developed that the rifle from which the assassin's bullets had been fired had been shipped to one Lee Harvey Oswald. Oswald was placed under arrest and charged with the commission of the crime. Some forty-eight hours later while in the custody of the Dallas Police Department, Oswald was fatally shot by one Jack

Ruby in full view of a horrified national television audience.

Thereafter, President Johnson on November 30, 1963, issued Executive Order No. 11130, 28 Fed. Reg. 12789 (1963), appointing a Special Commission under the Chairmanship of the Chief Justice of the United States. (Hereinafter, the Warren Commission, or Commission). The Commission was directed

> to examine the evidence developed by the Federal Bureau of Investigation and any additional evidence that may hereafter come to light or be uncovered by federal or state authorities; to make such further investigation as the Commission finds desirable; to evaluate all the facts and circumstances surrounding such assassination, including the subsequent violent death of the man charged with the assassination, and to report to me [President Johnson] its findings and conclusions.
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> * * * * * * * * * * *
>
> All Executive departments and agencies are directed to furnish the Commission[4] with such facilities, services and cooperation as it may request from time to time.
>
> Lyndon B. Johnson

The President's Commission on the Assassination of President John F. Kennedy in the Foreword of its Report, xii, states

> The scope and detail of the investigative effort by the Federal and State agencies are suggested in part by statistics from the Federal Bureau of Investigation and the Secret Service. Immediately after the assassination more than 80 additional FBI personnel were transferred to the Dallas office on a temporary basis to assist in the investigation. Beginning November 22, 1963, the Federal Bureau of Investigation conducted approximately 25,000 interviews and reinterviews of persons having information of possible relevance to the investigation and by September 11, 1964, submitted over 2,300 reports totaling approximately 25,400 pages to the Commission. During the same period the Secret Service conducted approximately 1,550 interviews and submitted 800 reports totaling some 4,600 pages.

[4] Public Law 88-202, approved December 13, 1963 authorized the Commission to require the attendance of witnesses and the production of evidence.

The appellant had argued that the materials he sought could not have been part of investigatory files "compiled for law enforcement purposes" since in 1963 there had been no statute denouncing as a federal crime, the assassination of a president.[5] He thus contended that he "is entitled to the sought material as a matter of law and not as a matter of grace."

It is my view that (1) the district judge correctly perceived that the materials here sought were part of an investigatory file which had been compiled for law enforcement purposes, and (2) such materials were specifically exempted from disclosure by the express language of the statute. (See note 3, *supra.*)

I respectfully suggest that the documents I have set forth demonstrate beyond peradventure that an investigation had been inaugurated by direction of President Johnson, that it went forward immediately under Director Hoover and attained a scope and wealth of detail by the Federal Bureau of Investigation and other agencies, unequalled within the knowledge of most of us. Thus, there became available an investigatory file which uniquely had been compiled for law enforcement purposes, and the evidence so collected was specifically exempted from disclosure as had been contemplated by Congress. That exemption applies to this very minute and comports fully with the Congressional intent.

[5] *But see* 18 U.S.C. § 1751, P.L. 89-141, August 28, 1965.

Senate Report 813, 89th Cong., 1st Sess., 3 (1965) to accompany the proposed legislation explained:

> 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,

as noted in *Frankel* v. *Securities and Exchange Commission*, 460 F.2d 813, 817 (2 Cir. 1972); *Evans* v. *Department of Transportation of United States*, 446 F.2d 821, 824, note 1, (5 Cir. 1971), *cert. denied* 405 U.S. 918 (1972); cf. *N.L.R.B.* v. *Clement Brothers Co.*, 407 F.2d 1027 (5 Cir. 1969), and *Cowles Communications, Inc.* v. *Department of Justice*, 325 F. Supp. 726 (D.N.D. Calif. 1971). See also *EPA* v. *MINK*, —— U.S. ——, note 6, (Jan. 22, 1973).

To me, it is unthinkable that the criminal investigatory files of the Federal Bureau of Investigation are to be thrown open to the rummaging writers of some television crime series, or, *at the instance of some "party" off the street*, that a court may by order impose a burden upon the Department of Justice to justify to some judge the reasons for Executive action involving Government policy in the area here involved.

In this respect I deem it fundamental that the Attorney General in myriad situations must exercise the discretion conferred upon him by law. He must decide whether to prosecute or not. He must decide whom to prosecute. He must decide when to prosecute. He must evaluate the evidence necessary to an informed judgment. We ourselves have made it clear:

> It is well settled that the question of whether and when prosecution is to be instituted is within the discretion of the Attorney General (citing cases).[6]

[6] Powell v. Katzenbach, 123 U.S.App.D.C. 250, 359 F.2d 234 (1965), *cert. denied*, 384 U.S. 906 (1966). For various instances presenting discretionary problems, *see* Pugach v. Klein, 193 F.Supp. 630, 634-635 (S.D.N.Y. 1961).

As I read the background[7] for the legislation here under consideration, I perceive no evidence of a Congressional intent that the files of a Dillinger, or of criminal hundreds like him, are to be subject to a judicial order for disclosure. In this area we may note that for the fiscal year 1972, the FBI developed more than 345,000 items of criminal intelligence which were disseminated to other Federal, state and local agencies engaged in law enforcement. More than 495,000 examinations of evidence were conducted by the FBI laboratory to be submitted to law enforcement agencies. Organized crime investigations ranged throughout the nation, for example, involving interstate gambling and interstate transportation of securities obtained by fraud, not to mention other federal crimes. Tens of thousands of items of criminal intelligence were otherwise developed by the FBI.[8] Can it be that where the Attorney General decides no prosecution is to be had, the Bureau files are to be subject to court review?

Nor do we have a semblance of a genuine issue of material fact, for the record before us is clear as a bell and there is no need for remand.[9]

[7] *See*, in part, references in footnote 1, Getman v. National Labor Relations Board, 146 U.S. App. D.C. 209, 450 F.2d 670 (1970).

[8] Annual Report of the Federal Bureau of Investigation for 1972.

I dare say neither the Attorney General nor the Federal Bureau of Investigation must meet any burden of proof respecting non-disclosure for the simple reason that Congress itself has exempted such files. I believe there is no basis whatever for a remand in this case.

[9] As Judge Fahy wrote in Irons v. Schuyler, —— U.S.App. D.C. ——, 465 F.2d 608, 613 (1972), *cert. denied*, —— U.S. ——, (Dec. 18, 1972):

"Assuming that the court granted the motion to dis-

I suggest in any event that 5 U.S.C. § 552(a) has no bearing whatever on our problem, and as to the situation proffered by the complaint, subsection (a)(3) has conferred no jurisdiction on the district court. I am satisfied that the district judge was right, and perceiving that the materials here sought were included among investigatory files compiled for law enforcement purposes, his ruling on this phase was governed by Section 552(b)(7).

II

One might reasonably suppose that not even a dedicated sensation-seeker would have claimed the right to compel the Kennedy Estate or the Kennedy family to turn over for inspection portions of the body [10] of the late President, or his personal property or the clothing he had worn November 22, 1963. Yet the public-mindedness of the family was revealed in The New York Times of January 6, 1968 when for the first time the text of a letter was disclosed. That letter, dated October 29, 1966, set forth an

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miss on the basis of insufficiency of the allegations of the complaint, we think the court was justified in doing so. It appears, however, that the court probably relied upon data not limited to the allegations properly considered on a motion to dismiss. If so, this too was justified because the motion to dismiss was joined with a motion for summary judgment. The action of the court may fairly be construed as a grant of the latter motion as warranted by the law as applied to the facts which present no material factual issue precluding the grant of summary judgment."

See Carter v. Stanton, 405 U.S. 669 (1972), and Donofrio v. Camp, —— U.S.App.D.C. ——, —— F.2d —— (Oct. 18, 1972).

[10] The New York Times of August 27, 1972 reported in some detail that one said to be a pathologist was seeking access to a portion of the murdered President's brain.

agreement [11] between Lawson B. Knott, Jr., Administrator of General Services, and Burke Marshall, Esq., acting on behalf of the Executors of the Estate of John F. Kennedy.

The text of the letter agreement as reported by the Times reads in part:

> The family of the late President John F. Kennedy shares the concern of the Government of the United States that the personal effects of the late President which were gathered as evidence by the President's Commission on the Assassination of President Kennedy, as well as certain other materials relating to the assassination, should be deposited, safeguarded and preserved in the Archives of the United States as materials of historical importance. The family desires to prevent the undignified or sensational use of these materials (such as public display) or any other use which would tend in any way to dishonor the memory of the late President or cause unnecessary grief or suffering to the members of his family and those closely associated with him. We know the Government respects these desires.

The agreement further provided for amendment, modification or termination only by written consent of the Administrator and the Kennedy family, with authority reposed in the Administrator to impose such other restrictions on access to and inspection of the materials as he might deem necessary and appropriate.[12]

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[11] *See* 44 U.S.C. § 2107 which provides that the Administrator of General Services, in the public interest, may accept for deposit historical materials of a President or former President of the United States "subject to restrictions agreeable to the Administrator as to their use."

Additionally, 44 U.S.C. § 2108(c) provides that accepted historical materials are subject to restrictions stated in writing by the donors, including a restriction that they be kept in a Presidential archival depository.

[12] Further detailed conditions and restrictions relating to

Meanwhile, Congress had not been idle. In support of H.R. 9545, which became Public Law 89-318, approved November 2, 1965, the House considered its H. Report 813. Then pending legislation was described as "vital and needed promptly." [13]

The Senate Report No. 851 filed in due course by the Judiciary Committee noted that the "national interest" "requires" that the Attorney General be in position to determine that any of the critical exhibits considered by the Warren Commission be acquired and be permanently retained by the United States.

Such references are here pertinent as we read *Nichols* v. *United States*, 325 F. Supp. 130, 135, 136 (D. Kan. 1971), where the district judge lists the assassination material

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access to the transferred materials may be seen from the letter itself, Pub. Doc. Exhibit A, Warren Commission for Assassination, National Archives Record Group 272.

See, generally, regulations for the use of donated historical materials, 41 CFR Part 105-61, with provision that public use of such materials is subject to all conditions specified by the donor or by the Archivist of the United States (41 CFR 105-61.202). More specifically, the Archivist has published guidelines for review of materials submitted to the President's Commission on the Assassination of President Kennedy. *See* National Archives Record Group 272.

[13] One private party had previously sought possession of the assassination weapon utilized by Oswald. *See* United States v. One 6.5 mm. Mannlicher-Carcano Military R. 250 F. Supp. 410 (N.D.Tex. 1966), with its detailed stipulation of facts as to the Oswald weapons and with references to the Senate and House Reports concerning P.L. 89-318. *And see* the same case on appeal where the Fifth Circuit in 1969, 406 F.2d 1170, took note that the Attorney General on November 1, 1966 had published his determination that items considered by the Warren Commission should be acquired by the United States. *See* Section 2(a) of P.L. 89-318.

the plaintiff had sought including the Oswald rifle, certain ammunition, the coat and the shirt worn by the President at the time of the assassination, a bullet found at the hospital, empty cartridge cases, metal fragments from the wrist of Governor Connally, metal fragments from the brain of the late President, and various other items comparable to or including the sort of material our appellant had here demanded.[14] On appeal, *Nichols* v. *United States*, 460 F.2d 671, the Tenth Circuit affirmed the summary judgment which had been entered in the district court. Chief Judge Lewis concluded that the requested items fell within the purview of 5 U.S.C. § 552(b)(3) and constituted matter which had been "specifically exempted from disclosure by statute." Relying upon P.L. 89-318, *supra*, the court deemed the rules and regulations of the Archivist to have been clearly within the scope of the Congressional grant of authority.

Before the Supreme Court, the Solicitor General relied upon the opinion of the Court of Appeals. On brief [15] he stated

> The court noted that the materials requested were acquired either under the authority of Public Law 89-318, 79 Stat. 1185, relating to the acquisition of Warren Commission exhibits, or under 44 U.S.C. 2107, 2108(c) . . . .

The Supreme Court denied certiorari, —— U.S. ——, (October 24, 1972, 41 U.S.L.W. 3223).

That is good enough for me, and I see within the ambit of the concern of the various courts which considered *Nichols*, ample precedent for our affirmance of the action of Chief Judge Sirica in the instant case.

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[14] *See* our n. 2, *supra*.

[15] *See* brief for the United States in Nichols v. United States, Supreme Court No. 72-210, October Term, 1972.

The opening paragraph of the Commission's Report to the President read, in part:

> The assassination of John Fitzgerald Kennedy on November 22, 1963, was a cruel and shocking act of violence directed against a man, a family, a nation, and against all mankind. A young and vigorous leader whose years of public and private life stretched before him was the victim of the fourth Presidential assassination in the history of a country dedicated to the concepts of reasoned argument and peaceful political change.[16]

I suggest that whether under 5 U.S.C. § 552(b)(7), Part I hereof, or under § 552(b)(3), specifically exempting from disclosure by statute the materials appellant had sought, Part II hereof, the law, as to the issue before us, forfends against this appellant's proposed further inquiry into the assassination of President Kennedy.

REQUIESCAT IN PACE.

I would affirm the judgment of the district court.

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[16] Report of the President's Commission, Chapter I, page 1.