

12/23/71

Dear Bud and Jim,

I have read through the brief in C.A. 71-1829, the suit for the FBI Sirhan file, and I think that by and large it is a first-rate job.

Where I have doubts, I am aware that they may be a layman's doubts formed by his lack of knowledge of the law. One such example is my feeling that law-enforcement purposes requires the enforcing of a law, and there is no specification of any law the FBI was enforcing. Thus it was easy for Judge Robison to hold that the investigative-file exemption held. Everybody just assumes the FBI enforces the law. However, aside from there to be the need for it to have a specific law to enforce, and that is not asked by you or offered by the government, there is the possibility that there is license for the FBI to help local authorities. Without this license, where the hell did they get the authority to spend so much of the taxpayers' money when there was no federal law violation?

Although to my reading the law does not say anything other than that federal law is being enforced, for how can the Congress legislate otherwise on federal public information or on federal files? If it is assumed that Congress visualized that federal agencies would be either enforcing non-federal statutes, which seems impossible, or merely helping local authorities, I just don't see how, if only non-federal law is being enforced, the federal power can be stretched to encompass what local authorities will do with federal files. I don't think your argument on losing effective control was adequate to cover this.

The FBI could not have compiled its file for law-enforcement purpose. It may have the legal right to help local authority, but if it does, then its purpose is not enforcement of law but help to local authority, and there is no such exemption in 5 U.S.C. 552.

Perhaps I do not really understand the exemption, but it has what I consider an exemption to the exemption. That is, "except to the extent" provision. This means not that a litigant other than an agency must ask for the file but no more than that it be available to such a litigant. Clearly, this file was available to a litigant, and it was therefore made available, to the extent for which he made request, to such a litigant, Sirhan. That, to me, constitutes waiver of the entire exemption, for it has been held that the file was so available. The law does not say except to the extent a litigant asks for it. If the file was available to Sirhan, I think it must be available on that basis alone to everyone.

The government's affidavits remind me of what I have said before, that we should have gone after the FBI agents executing cute affidavits, as I asked with Williams in the spectro suit, charge him with perjury, which he did commit. Here you are confronted with deviousness, not perjury, the execution of an affirmation beyond the capacity of the affiant to affirm. Nolan, for example, says not that to his knowledge and limited by his knowledge, the file was not made available to anyone. He says the FBI made no dissemination. I submit he has no way of so swearing. Richards swears to the same thing (17b & d). What is lacking is what is required, LeJeunesse's affidavit.

The Government's Memorandum is, I think, wrong in claiming that the law "does not permit the information to be made available to the general public"(25). Mitchell himself has ruled that he has authority to waive the exemptions, and he did in my case. Therefore, this is false. The most they can say is that the law can be interpreted to authorize withholding....And I think you missed a point (37) in not arguing that this has the effect of giving "under a federal copyright on federal ("public") information, to your detriment. He does, you know, have such a federal copyright and on this public property.

Best,

Harold Weisberg