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

CENTER FOR NATIONAL POLICY REVIEW ON RACE AND URBAN ISSUES, et al.,

Plaintiffs-Appellees,

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare,

Defendants-Appellants.

No. 73-1090

MEMORANDUM CONCERNING THE EFFECT OF WEISBERG v. DEPARTMENT OF JUSTICE

On August 22, 1973, this Court ordered that further consideration of this case be held in abeyance pending the decision by the Court en banc in Weisberg v. U.S. Department of Justice (No. 71-1026), and Committee to Investigate Assassinations, Inc. v. U.S. Department of Justice (No. 71-1829). Weisberg was decided in an opinion filed October 24, 1973. 1/ On November 14, 1973, the Court ordered the parties herein to file supplementary memoranda setting forth their views on how the disposition of this case is affected by the Court's opinion in Weisberg. This

1/ Appellant's petition for rehearing in Weisberg was denied on November 19, 1973.

Committee to Investigate Assassinations was decided in an order also filed October 24, 1973.

memorandum is submitted pursuant to that order.

A. The Principles of Weisberg.

1. The district court in the instant case rejected the government's invocation of Exemption 7 on the sole ground that it had "not made a sufficient showing that the prospect of enforcement proceedings is concrete" (App. 14). As elaborated by plaintiffs, "Where there is no concrete or imminent prospect that adjudicatory proceedings will be commenced by an agency, the pre-disclosure concern of exemption (b)(7) is not presented and there is no reason for applying its limitation on the general right to disclosure under the statute" (Brief for Plaintiffs-Appellees, p. 14).

Weisberg clearly rejects the foregoing interpretation of the Freedom of Information Act, which would rewrite Exemption 7 to read "investigatory files compiled for concrete or imminent adjudicatory proceedings." Weisberg held, instead, that "the statute speaks for itself" and that the sole issue in an Exemption 7 case is whether the agency's files: (1) "were investigatory in nature; and (2) were compiled for law enforcement purposes." "When that much shall have been established * * * such files are exempt from compelled disclosure" (Opin. 6). 2/

2/ The basis for plaintiffs' reading of Exemption 7 is the assumption that "the concern of exemption (b)(7) is only to preclude pre-disclosures to a defendant in 'litigation and adjudicative proceedings'" (Brief for Plaintiffs-Appellees, p. 16). But this constricted reading of the purposes underlying Exemption 7 was clearly rejected by Weisberg (Opin. 7). See also Aspin v. Department of Defense, C.A.D.C., No. 72-2147,

(continued on page 3):

Again, Weisberg makes it unmistakably clear that Exemption 7 applies when the court determines that the head of the Executive Department correctly designated "investigatory files as having been compiled for law enforcement purposes." "The Freedom of Information Act requires no more." When the reviewing court makes that limited determination, "his duty in achieving the will of Congress under the Freedom of Information Act" is "at an end" (Opin. 13, 14-15).

Applying the foregoing principles, the Court in Weisberg held that Exemption 7 protected the investigatory files in question there even though, as the dissent pointed out, no criminal or civil action pertaining to the investigation "is pending nor is it indicated by the Government that any such future action is contemplated by anyone" (Opin. 19). In short, the majority of the Court in Weisberg squarely rejected the engrafting of additional requirements to the explicit provisions of Exemption 7 itself. Instead, as noted above, the sole issue under Exemption 7 is whether the agency's

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(footnote 2 continued):

November 26, 1973, pp. 12-13. There the Court stated, in applying Exemption 7 to investigatory files where enforcement proceedings had terminated (Slip Opin., p. 13):

> It is clear that if investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired. Few persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings. Further, the investigative techniques of the investigating body would be disclosed to the general public.

files: "(1) were investigatory in nature; and (2) were compiled for law enforcement purposes." "When that much shall have been established * * * such files are exempt from compelled disclosure" (Opin. 6). 3/

2. We do not ignore the statement in the Court's opinion in Weisberg that: "We are not discussing any problem except that of compelled disclosure of Federal Bureau of Investigation investigatory files compiled for law enforcement purposes" (Opin. 8-9). The context of this statement is:

> We are not here speaking of trade secrets, or personnel and medical files, or patent information or internal revenue returns, or yet other material which, by statute (see, e.g., 41 CFR § 105-60.604, 1972), had been specifically exempted from disclosure. We are not treating

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3/ In refusing to engraft additional requirements onto the explicit provisions of Exemption 7, Weisberg also rejected the holding of the original Weisberg panel majority that the government must establish "the nature of some harm which is likely to result from public disclosure of the file" (Opin. 22). It should be noted, however, that our Main Brief for the Appellants did establish (pp. 25-30) that the purposes of Exemption 7 would be frustrated by public disclosure of the records in question.

Weisberg also confirms (Opin. 15, fn. 15) the correctness of our elucidation (Main Brief for the Appellants, p. 13, fn. 5) of the "except to the extent available by law" exception to Exemption 7. This exception, as in Weisberg, has no application to the instant case, since plaintiff is "not engaged in litigation" with the agency.

> of geological information or matter required by Executive order to be kept secret. We are not discussing any problem except that of compelled disclosure of Federal Bureau of Investigation investigatory files */ compiled for law enforcement purposes. Certainly the answer does not depend upon what this appellant desires to accomplish if access be afforded. The Court has told us that the Act does not "by its terms, permit inquiry into particularized needs of the individual seeking the information." EPA v. Mink, 410 U.S. at 86. * * *

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*/ Attorney General Richardson, acting pursuant to Title 28 U.S.C. Section 509, by Order No. 528-73, July 11, 1973, 38 Fed. Reg. No. 136, 19029, [and see 5 U.S.C. §301] has amended earlier regulations relating to materials exempted from compulsory disclosure under the Freedom of Information Act. "Possible releases that may be considered under this section are at the sole discretion of the Attorney General and of those persons to whom authority hereunder may be delegated." The Order provides for access to material within the Department's investigatory files compiled for law enforcement purposes "that are more than fifteen years old" subject to certain deletions which include "(4) Investigatory techniques and procedures." (Emphasis added) Compare text quoted supra, and identified in Frankel v. Securities and Exchange Commission, 460 F.2d at 817-818, n. 9, supra.

We think that the emphasis in the above-quoted language is upon the words "investigatory files compiled for law enforcement purposes." That is made clear not only by the context of the statement, but by the Court's subsequent statement: "[T]his much is certain, * * * the Attorney General, like the heads of other Executive departments, was authorized to refuse disclosure under Exemption 7 if he could

determine as here that the issue involved investigatory files compiled for law enforcement purposes" (Opin. 13; emphasis added).

Certainly, there is no support for the view that Exemption 7 is applicable only to the Federal Bureau of Investigation, and not other Executive Departments, or that Exemption 7 has one meaning when applied to FBI files and an entirely different meaning when applied to files of other Executive Departments. See Soucie v. David, 145 U.S. App. D.C. 144, 448 F.2d 1067, 1078 (1971). Such a distinction would also be contrary to the decisions in Frankel (involving SEC investigatory files), [4] and Evans (involving FAA investigatory files), [5] which this Court expressly relied upon in Weisberg (Opin. 6-7). Similarly, Weisberg recognized (Opin. 6) the authority of the House Committee report, H.Rept. No. 1497, 89th Cong., 2d Sess., which had stated (at p. 11) that the term "law enforcement" in Exemption 7 is not confined to enforcement of criminal statutes, but includes "all kinds

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4/ Frankel v. Securities and Exchange Commission, 460 F.2d 813 (2d Cir.), certiorari denied, 409 U.S. 882 (1972).

5/ Evans v. Department of Transportation, 446 F.2d 821 (5th Cir., 1971), certiorari denied, 405 U.S. 918 (1972).

of laws, labor and securities laws, as well as criminal laws" (emphasis added).

The contention that the principles of Weisberg are limited to FBI files was recently rejected by this Court in Aspin v. Department of Defense, No. 72-2147, decided November 26, 1973, where the Court applied the Weisberg principles to Department of the Army investigatory files. Referring to Weisberg, the Court in Aspin stated (Opin. 13-14):

> [T]he point remains that a § 7 exemption was there upheld as applied to files almost ten years old where no prosecution was ever conducted. This squarely rebuts appellant's broad argument that when there is no longer any prospect for future enforcement proceedings (necessitated in Weisberg by the death of the only suspect) the § 7 exemption from disclosure must terminate as well.

3. We think it clear, in light of the principles set forth in Weisberg, that Bristol-Myers v. F.T.C., 138 U.S. App. D.C. 22, 424 F.2d. 935 (1970), certiorari denied, 400 U.S. 824, must be limited to its particular facts and that it has no application here.

In Bristol-Myers, the Court held that the files in question had not been shown on the record in that case to be investigatory files compiled for law enforcement purposes. This ruling was based upon several considerations: (1) the agency had made "a conscious decision" not to maintain any enforcement proceeding and to convert the files into ordinary agency files pertinent to rulemaking (see Aspin, supra, opin., 11); (2) Bristol-Myers was demanding studies and reports "which the Federal Trade Commission had cited as the basis for a proposed rule. If the investigative files withheld by the Commission were among the documents thus publicly cited it could be argued that they had lost their protected status" (Aspin, supra, opin. 11, fn. 28); and (3) no enforcement proceedings had ever been commenced, and there was nothing else in the record to show the existence of "investigatory files compiled for law enforcement purposes" so that the agency's invocation of Exemption 7 amounted to no more than "the bare assertion by an agency that the files were compiled for law enforcement purposes" (Aspin, supra, opin. 11).

In the instant case, by contrast, neither of the first two special circumstances of Bristol-Myers is present, i.e., there was no "conscious decision" to convert the materials into rulemaking proceedings and the materials did not lose their protected status by being "publicly cited" as the basis for a proposed rule. Cf. American Mail Line, Ltd. v. Gulick, ___U.S. App. D.C.___, 411 F.2d 696 (1969). Moreover, in the instant case, as we now demonstrate, the agency's invocation of Exemption 7 does not rest upon "bare assertion" but upon detailed affidavits and testimony in the record which demonstrate the genuineness of the government's invocation of Exemption 7 in this case.

B. The HEW Files at Issue on this Appeal are Protected by Exemption 7, under the Principles of Weisberg, since they are (1) "Investigatory in Nature" and (2) "Were Compiled for Law Enforcement Purposes."

In the instant case, detailed affidavits and testimony in the record clearly show "how and under what circumstances" the HEW files at issue on this appeal "were compiled" and that indeed "they were 'investigatory files compiled for law enforcement purposes'". Therefore, under the principles of Weisberg (opin. 15), those files are protected by Exemption 7.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pursuant to this statute, 42 U.S.C. 2000d-1, and implementing HEW regulations, 45 C.F.R. 80.8 (1972), procedures for "effecting compliance" are set forth, including fund termination through adjudicatory hearings and "any other means authorized by law," such as reference to the Department of Justice with a recommendation that appropriate litigation be brought by it. See Adams v. Richardson, ___U.S. App. D.C.___, 480 F.2d 1159 (1973).

The HEW files at issue on this appeal are clearly "investigatory in nature" and were clearly "compiled for law enforcement purposes," i.e., effecting compliance with the prohibitions in Title VI through the procedures and sanctions available under the statute and regulations. Therefore, under the principles of Weisberg, the files are protected by Exemption 7.

The detailed affidavits and testimony of responsible HEW officials in the record establish that the files were compiled by HEW investigators and attorneys for the purpose of uncovering evidence of, and proving, illegal discrimination by school districts in violation of Title VI (App. 38, 40, 49-51). Mr. Cioffi, HEW's Coordinator for Northern and Western Desegregation Programs, stated in an affidavit that (App. 40):

> In order to prove a violation of Title VI, some culpability must be established on the part of a State or local agency. The fact that segregation exists is not enough in itself to prove such culpability. Evidence must be gathered by our investigators.

To obtain evidence establishing the necessary "culpability" to prove a violation of Title VI, the HEW investigators in the cases at issue on this appeal visited the sites of possible violations, collected and analyzed data, much of it

confidential, [6] and interviewed witnesses, including persons and organizations that had made complaints (App. 38-39, 49-51). Since HEW has no subpoena power to assist it in this process, Mr. Cioffi explained, much of the investigations (App. 40):

> are based upon good faith understandings between our investigators and their sources, and it is absolutely crucial that our investigators be able to assure potential informants that their participation and sometimes their evidence be kept confidential. These matters arouse strong emotions and informants are often subject to social pressures not to speak to our investigators. Occasionally, our informants have been threatened with physical violence. Our information often comes from extremely vulnerable people. For instance, in the Ferndale, Michigan case, we were able to partially establish culpability through the questioning of an eighty-four year old witness. Our first interviews with her were given under assurances of confidentiality because of her fear of possible harassment.

6/ The confidential nature of data in the files is set forth by Mr. Cioffi's affidavit (App. 42-43). Referring to HEW's "closed" files, the district court, after in camera inspection, noted that they contained (App. 28):

> * * * individual students' names coupled with test scores, attendance records, behavioral patterns, and the like. * * *

The Court also noted that the files contained (ibid.):

> the 'rough' work product of an investigator; * * * inter- and intra-office memoranda * * * other documents of a confidential nature, i.e., complaints by named parents * * *.

As in many other law enforcement investigations, the HEW investigations here involved turn up evidence of illegality in connected areas, and premature disclosure could harm the investigatory process. For instance, in his affidavit, Mr. Cioffi noted (App. 44, 40-41):

> [I]n 1969, we investigated the Dayton, Ohio School District for discrimination in teacher assignments, and obtained compliance in 1969. We are presently investigating the same district for discrimination in student assignments. Obviously, premature public disclosure of information obtained under assurance of confidentiality during the teacher assignment phase would have complicated our present efforts to obtain voluntary compliance in the second area.
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> Disclosure sometimes enables the subject of our investigators to obstruct our efforts. After we had conducted an investigation of the Tucson, Arizona School District's standards used to determine which students would be sent to the special school for retarded children, some of the information we had uncovered was leaked to the press. All the children in the special school were returned to the regular schools and no record remains of who attended the school for retarded children. After conducting a compliance review of the Uvaldi, Texas School District in the spring and summer of 1970, a letter of noncompliance was somehow prematurely made public through the Mondale Committee. The local press and radio station released the information verbatim. As a result the negotiation has since been hampered and further investigation [made] extremely difficult.

The HEW investigators thus used traditional investigative techniques, such as confidential witness interviews, in order to "establish culpability" and obtain evidence of violations of Title VI. The investigatory files which they, and reviewing attorneys, compiled in this process were plainly directed toward effecting compliance with Title VI by establishing the basis for the sanctions available under the statute and regulations. Mr. Cioffi stated in an affidavit that the files were often returned by HEW's legal staff for further gathering of evidence "necessary to meet the heavy evidentiary burden placed on the Department in showing noncompliance with Title VI in Northern cases" (App. 149-150). As Mr. Cioffi testified in a deposition (App. 151-152):

> * * * the lawyers * * * keep bouncing back and forth for more and additional evidence in the case. They are not satisfied with what is coming out of the field and go back and get additional information.
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> * * * [I]n cases, letters of noncompliance have gone out. In other cases, letters of noncompliance have not gone out because the attorneys feel that there is not enough evidence or evidence sufficient or of a quality to substantiate the allegations or recommendations being made from the field.

While plaintiffs criticize HEW for engaging in allegedly "fruitless" investigations (Brief for Plaintiffs-Appellees, p. 6), there can be no doubt that the files in question are "investigatory in nature" and that they were genuinely "compiled for law enforcement purposes." 7/ The files were compiled for the purpose of supplying the evidentiary basis for the entire arsenal of law enforcement procedures available under Title VI, including adjudicatory hearings and Department of Justice litigation. Indeed, while Weisberg does not impose such a requirement, we pointed out in our earlier-filed briefs that the only files at issue on this appeal are HEW's "open and active" investigatory files which are currently

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7/ Plaintiffs' complaint in this action specifically recognized that "HEW is charged with enforcement of a number of federal civil rights statutes, including Title VI of the 1964 Civil Rights Act"; that this "responsibility requires * * *-[HEW] to undertake factual investigations"; and that the HEW files sought by plaintiff are those "bearing on HEW enforcement of Title VI in Northern school desegregation cases" (App. 7-8).

Mr. J. Stanley Pottinger, then Director of HEW's Office for Civil Rights, stated in an affidavit filed herein that a file is treated as "open" only "so long as the status of the school district concerned in terms of compliance with applicable statutory or regulatory requirements is under active consideration and investigation." (App. 33).

being actively used to achieve compliance with Title VI. 8/

In sum, the detailed affidavits and testimony in the record in this case clearly establish that HEW's "open and active" investigatory files were "compiled for law enforcement purposes." No useful purpose would be served by a remand in order that "the district court shall so determine." (Weisberg, opin. 6). Under the principles of Weisberg, the files in question are clearly protected by Exemption 7.

8/ Since the oral argument of this appeal, one of the twenty-two cases then at issue on the appeal (Mount Vernon, New York) has been brought to an adjudicatory hearing. Two of the other cases (East Chicago, Indiana, and Berkeley, California) have been settled and are considered by HEW to be in compliance with Title VI. Therefore, there are now nineteen "open and active" investigatory files at issue on this appeal.

CONCLUSION

For the reasons stated herein, and in our earlier-filed briefs, the district court's judgment should be reversed and the Court should direct the entry of judgment for defendants with respect to the files at issue on this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 1973, I served the foregoing Memorandum Concerning the Effect of Weisberg v. Department of Justice, by mailing a copy, postage prepaid, to:

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