UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff,	:	
v.	:	Civil Action
U.S. DEPARTMENT OF JUSTICE, Defendant	:	No. 2301-70

ANSWER OF PLAINTIFF TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Plaintiff denies that there are no issues of material fact and that there is no claim upon which relief can be granted.

I.

QUESTIONS OF FACT AND MIXED QUESTIONS OF FACT AND LAW.

In its "Preliminary Statement" on page 1 of its "Memorandum of Points and Authorities," defendant states that plaintiff "has requested permission to inspect certain spectographic analyses of bullets and bullet fragments recovered from the scene of the assassination of President John F. Kennedy in Dallas, Texas on November 23, 1963."

Bullets and bullet fragments may have been "recovered" in Dealey Plaza, the "scene" of the assassination, on November 23, 1963. However, if so, plaintiff is unaware of them; a fragment or fragments were "recovered" from a piece of curbing in Dealey Plaza, but it is plaintiff's belief that this was as late as July, 1964.

The bullets and bullet fragments, spectographic analyses of which are sought by plaintiff, were "recovered" primarily on November 22nd, the date of the assassination, but some were "recovered" on November 23rd and at later times. They were "recovered" generally not at the "scene" but at Dallas' Parkland Hospital, Bethesda Naval Hospital in Maryland, and at other places, including Washington, D.C.

More important, defendant states as a matter of fact (see page one of his Statement of Material Fact) that the records sought "are part of an 'investigatory file compiled for law enforcement purposes.'" It is plaintiff's contention that this is incorrect and that the records in fact were not compiled for any law enforcement purpose but exclusively as part of an investigation requested by President Lyndon B. Johnson on November 24, 1963; Executive Order 11130; and S. J. Res. 137, 88th Congress... none of which involved "law enforcement."

The remainder of this answer will deal with this latter question which appears to be a mixed question of fact and law.

II.

LAW ENFORCEMENT?

On page two of its Memorandum of Points and Authorities, defendant properly cites exemption (b)(7) correctly as "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." Plaintiff then adds: "The thrust of the exemption is to protect from disclosure all files which the government compiles in the course of law enforcement investigations which may or may not lead to

formal proceedings." [underscoring added.]. The thrust may or may not be in accordance with the underscored clause, but it is clear that there are two explicit limitations on the exemption for "investigatory files":

1) they are exempt only if compiled for law enforcement purposes, and

2) they are exempt only if they would not be available by law to a private party.

As to whether there was a "law enforcement purpose" in compilation of the sought spectographic analyses, no better witness can be found than FBI Director J. Edgar Hoover. In testimony before the Warren Commission on May 14, 1964, the following colloquy took place between Mr. Hoover and Mr. J. Lee Rankin, General Counsel to the Commission:

> " Mr. Rankin. You have provided many things to us in assisting the Commission in connection with this investigation and I assume, at least in a general way, you are familiar with the investigation of the assassination of President Kennedy, is that correct?
>
> Mr. Hoover. That is correct. 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 the 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, p. 98. Underscoring added.]

Thus, according to the FBI's Director, there was no law and, hence, there could be no "law enforcement purpose." In fact,

according to Mr. Hoover, when the investigation was undertaken, there was no federal jurisdiction for it at all, except a request by the President.

Lest the argument be made that perhaps the missing law was a law of the State of Texas, it should be noted that the spectographic analyses were not given to either the Texas or Dallas authorities.

In brief, the spectographic analyses were made as part of an investigation requested by the President and by the FBI as the investigative arm of the Warren Commission. Backing up the lack of any "law enforcement purpose" is the following quote from the foreword to the Commission's Report (at p. XIV):

> " The Commission has functioned neither as a court presiding over an adversary proceeding nor as a prosecutor determined to prove a case, but as a fact finding agency committed to the ascertainment of the truth."

This contention is further strengthened by the Commission's Tenth Recommendation:

> " The Commission recommends to Congress that it adopt legislation which would make the assassination of the President and Vice President a Federal crime. A state of affairs where U.S. authorities have not clearly defined jurisdiction to investigate the assassination of a President is anomalous. [Page 26 of the Report]

"Law enforcement purposes" requires a law of some kind. Therefore, the burden is on the defendant, if he wishes to avail himself of exemption (b)(7), to state specifically (with citation) the law or laws in pursuance of which the spectographic analyses were made. So far, he has not met that burden.

XIII.

JENCKS

The second qualification in (b)(7) is that "investigatory files" cannot be withheld from the public if they would be "available by law to a party other than an agency."

Plaintiff is not an "agency" and it is his contention that under Jencks the spectographic analyses would certainly have been available to Lee Harvey Oswald. Hence, they cannot be withheld from plaintiff.

As the Warren Commission said in its preface: "If Oswald had lived he could have had a trial by American standards of justice where he would have been able to exercise his full rights under the law."

IV.

LEGISLATIVE HISTORY OF FREEDOM OF INFORMATION ACT (5 U.S.C. 522)

Emphasis is placed in defendant's Memorandum of Points and Authorities to the legislative history of exemption (b)(7), especially in the House of Representatives. Quoted herewith is the sum total of explanation given in the House Report on this exemption (Report No. 1497, House of Representatives, 89th Congress, 2nd Session, at p.11):

> " 7. Investigatory files compiled for law enforcement purposes except to the extent available by law to a private party? This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings."

There is also considerable reference in the defendant's Memorandum to debate on the floor of the House. The quotations are incomplete, out of context, and generally irrelevant in view of the text of Exemption (b)(7). The debate is not very helpful in ascertaining legislative intent. It is true that some members either preferred to omit (b)(7) in its entirety or to amend it in part. However, they did not prevail. (b)(7) stayed in, as reported by the Committee and it stayed in in its present text. The exemptions are carefully drawn in specific terms, and there is no loose exemption for "sensitive" government information as such, as hinted by defendant.

In this regard, FBI files are like those of any other agency. Whether a particular FBI file is exempt from disclosure depends on whether it falls within one of the nine specific exemptions, not whether it is "sensitive." Parenthetically, what could be "sensitive" about spectographic analyses of bullets and bullet fragments made in a fact finding investigation in 1963?

Spectographic analyses, like other scientific pieces of evidence, are not sensitive and should never be withheld. If spectographic analyses can be withheld from a defendant in a criminal case, other scientific evidence, such as autopsies and fingerprints, could also be withheld. This would lead to absurd and patently unfair results.

V.

CASE LAW

The primary allusion in defendant's quotation from Barceloneta Shoe Corp. v. Compton (271 F. Supp. 591) is to the

following sentence from Attorney General Clark's Memorandum of June, 1967:

> "... In addition, the House report makes it clear that litigants are not to obtain special benefits from this provision, stating that S.1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceeding. (H.Report 11)"

In the sense that the Attorney General was speaking, the "litigant" would be Lee Harvey Oswald. The plaintiff in the present case wants no "earlier or greater access" than would have been granted to Oswald, had he lived to be tried; conversely, he wants exactly the same right of access as Oswald. And under Jencks, Oswald would have been entitled to the spectographic analyses.

On page 3 of its Memorandum of Points and Authorities, defendant quotes at some length from Clement Brothers' v. NLRB, 282 F. Supp. 540. Unfortunately, defendant omitted what is probably the most important paragraph in the decision, the one immediately preceding the three quoted:

> " The Court must agree that the determination of the Court in Barcelonata is sound, though not controlling on this Court. In addition to the common sense necessity of protecting the investigatory function and procedures of the Board, the legislative history of the Act itself makes it clear that the exemption in question is not limited solely to criminal law enforcement but rather applies to law enforcement activities of all natures."

Conceding arguendo that this is true, both Barcelonata and Clement are irrelevant in the present case where there is no law enforcement, criminal or otherwise. Further, there is no "common sense necessity" in protecting scientific tests such as spectographic analyses, as compared to protecting witness statements before the NLRB.

Puzzlingly, defendant goes on: "In the instant case, since the records plaintiff seeks havenot been made part of any record

in any agency proceeding he may not obtain them 'absent such use.'" If they had been "part of any record in any agency proceeding" they would automatically be available. Also, the analyses were put to intense use by Warren Commission; as explained below, they were a key to the Commission's basic conclusion of a "single, lone assassin."

The last case cited by the defendant is Black v. Sheraton Corp. 50 F.R.D. 130-133 (D D.C. 1970). Again, the quoted passages are misleading. In the first place, the case concerns the breadth of Rule 26 of the Federal Rules of Civil Procedure, and touches on 5 U.S.C. 552 only in passing. Second, when Commenting on 5 U.S.C. 552, the Court repeats the language of the Congressional exemption, i.e., "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than the agency." Third, the following telling paragraph in the Court's opinion was not quoted:

> " As background for the present motion, the Court notes that the United States has previously made available to the plaintiff copies of all documents in the FBI files which contain information from the surveillance. These include: (1) all logs of the surveillance, which are the actual handwritten notes of the agents who monitored the bugging device; (2) all summary airtels prepared from the logs, which are typewritten summaries of the information in the logs; (3) copies of all portions of reports which contain information obtained from the surveillance; and (4) two memoranda from the Director of the FBI to the Attorney General advising the latter of the information which had been obtained from the surveillance."

Thus, there is certainly no sanctity enveloping all FBI files as implied by defendant. In fact, to the extent that Black is relevant to the present case at all, it would appear to weigh heavily in favor of plaintiff. What was being held back by the Court in Black were certain additional transcribed conversations from an

illegal wiretap; revelation of these could harm innocent persons, divulge the identity of informants, expose leads in other criminal cases, embarass the FBI, etc.; none of these harms could come through making available the spectographic analyses in the instant case.

In summary, none of the cases cited by defendant is directly in point, and to the extent that they are relevant, not a single one passes upon the question of the withholding of records of the nature sought in this case.

VI.

CONCLUSION

In signing the Freedom of Information Act (PL 89-487) into law on July 4, 1966, President Johnson said: "I have always believed that freedom of information is so vital that only national security, not the desire of public officials or private citizens, should determine when it must be restricted." [The Presidential statement in toto is reproduced as Exhibit I hereto.]

In issuing a Guidance Memorandum on the FOI Act in June, 1967, Attorney General Clark stated:

> "This law was initiated by Congress and signed by the President with several key concerns:
> - that disclosure be the general rule, not the exception;
> - that all individuals have equal rights of access;
> - that the burden be on the Government to justify the withholding of a document, not on the person who requests it;
> - that individuals improperly denied access to documents have a right to seek injunctive relief in the courts;
> - that there be a change in Government policy and attitude.
>
> [All of Attorney General Clark's Memorandum is reproduced as Exhibit II hereto.]

A provocative Note in the Harvard Law Review (Vol. 80, 1967, p. 914) suggests that "it seems that such investigatory files could be made available after the enforcement activity in question has been completed." Doubly so where there is no "enforcement activity" but only "fact finding."

In the Conclusion to its Memorandum of Points and Authorities, defendant says that "Congress particularly drafted into the Public Information Act a prohibition against the release to the public of the type of document plaintiff seeks in the instant action. Yet, there is no prohibition, as evidenced in the following quotation from a letter of May 7, 1970 to plaintiff's attorney in respect to another Freedom of Information suit in this Court (718-70):

> " Whether or not the documents you seek are technically exempt under one or more of the provisions of 552(b), I have determined that you shall be granted access to them. The exemptions do not require that records falling within them be withheld; they merely authorize the withholding of such records, by exempting them from the Act's otherwise applicable compulsory disclosure requirements."
>
> [The full text of this letter is printed as Exhibit III hereto.]

When one looks at the history and spirit of 5 U.S.C. 552, one wonders what is the real reason for withholding in the instant case. There is no question of divulging the identities of informants. There is no question of divulging secret investigative processes. There is no question of embarrassment to private persons.

If the spectographic analyses in fact prove what the government witnesses before the Warren Commission imply the/do, i.e., a "common source" for all bullets and bullet fragments, there would appear to be no valid reason why the government should withhold them.... even as a matter of policy. If, on the other hand, they do not prove what the witnesses imply, there is an imperative

reason to wish to withhold them, i.e., the whole Warren Commission Report and its conclusions come tumbling down.

Plaintiff does not ask, however, that these records be made available to him as a matter of policy or grace. It is plaintiff's contention that he is entitled to access to them under 5 U.S.C. 552 as a matter of law.

Therefore, the Court is asked to over-rule defendant's motions to dismiss and for summary judgment and to set the case down for trial near the head of the docket, as provided in 5 U.S.C. 552 (a)(3):

> * 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.

Plaintiff renews his request that the Court enjoin the defendant from further withholding of the records sought.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of this Answer has been made upon Thomas A. Flannery, Joseph M. Hannon, and Robert M. Werdig, Jr., U.S. Courthouse, Washington, D.C., on this 16 day of October, 1970.

BERNARD FENSTERWALD, JR.