

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

No. 71-1026

HAROLD WEISBERG,

Plaintiff-Appellant

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

ISSUES PRESENTED

1. Whether the FBI investigation of the assassination of President John F. Kennedy was an investigation for law enforcement purposes, so that the FBI file thereon is exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(7).
2. Whether the possible availability to a defendant in a criminal case of material contained in an investigative file compiled for law enforcement purposes, makes that information available to the public at large under the Freedom of Information Act.

	<u>Page</u>
<u>Statutes and Regulations</u>	
Administrative Procedure Act 5 U.S.C. 552 -----	2, 5-6
Freedom of Information Act 5 U.S.C. 552 -----	2, 3
* 5 U.S.C. 552(b)(7) -----	1,2,3,5
Jencks Act 18 U.S.C. 3500 -----	5,6
Federal Rules of Civil Procedure Rule 56(e) -----	7
<u>Miscellaneous</u>	
* Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, p. 38 -----	5-6
Cong. Rec. 13659, Vol. 112, Part 10 (1966) -----	4
House Report 1497, 89th Cong., 2d Sess., p. 11 -----	6

	<u>Page</u>
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Administrative Procedure Act 5 U.S.C. 552 -----	2, 5-6
Freedom of Information Act 5 U.S.C. 552 -----	2, 3
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Jencks Act 18 U.S.C. 3500 -----	5,6
Federal Rules of Civil Procedure Rule 56(e) -----	7
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 1971, I served
the foregoing motion upon counsel for the appellant by causing a copy
to be mailed, postage prepaid, to:

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/s/ Barbara L. Herwig
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STATEMENT OF THE CASE

This suit was brought under the Public Information Section of the Administrative Procedure Act, 5 U.S.C. 552, to compel disclosure by the Department of Justice of certain information contained in the FBI file on the investigation of the assassination of President John F. Kennedy. The specific information sought by the complaint consisted of the results of spectrographic analyses of various bullets and metal fragments connected with the assassination.

In a letter dated June 4, 1970, the Attorney General denied appellant's requests on the ground that the documents sought from the FBI's files are "part of an 'investigatory file compiled for law-enforcement purposes' and are therefore exempt from the Freedom of Information Act's compulsory disclosure requirements." 5 U.S.C. 552(b)(7). (App. 23-24) In a letter dated June 12, 1970, the Deputy Attorney General also denied appellant's request for the documents on the ground they are exempt under 5 U.S.C. 552(b)(7). (App. 24-26)

Appellant then filed a complaint in the United States District Court for the District of Columbia seeking production under 5 U.S.C. 552 of the specified spectrographic analyses. (App. 2-26) Appellee filed a Motion to Dismiss or, in the alternative, for Summary Judgment, which was granted by the Court. (App. 44, 50-51, 52)

Appellant thereupon took this appeal. (App. 52)

STATUTE INVOLVED

5 U.S.C. 552:

(b) This section does not apply to matters that are -

* * * * *

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

* * * * *

ARGUMENT

I. The Investigation Conducted By The Federal Bureau Of Investigation Into The Assassination Of President John F. Kennedy Was An Investigation For Law Enforcement Purposes, And Therefore The File Compiled On That Investigation Is Exempt From Disclosure Under The Freedom Of Information Act, 5 U.S.C. 552(b)(7).

It is not open to contest that the spectrographic analyses sought are part of the file compiled by the FBI on the investigation into the assassination of President John F. Kennedy. Appellant does contest that the investigation in question was conducted for law enforcement purposes.

Appellant's position is without merit. Although the FBI, in the unusual and urgent circumstances of a Presidential assassination, specially investigated an event which constituted a crime under the laws of the State of Texas, and not under the laws of the United States (App. 28-29), it clearly was acting for "law enforcement purposes" within the meaning of the Public Information Act. A purpose of that investigation, which was

requested by President Johnson within 24 hours of the event (App. 29), was to ascertain who had killed the President so that he or they could be apprehended and brought to justice. To say that the FBI was not acting for law enforcement purposes in investigating the crime is specious.

To be sure, ordinarily the agency charged with enforcing the law violated would conduct such an investigation. In this case that agency, the Dallas police force, was joined by agents of the Federal Bureau of Investigation. The FBI's undertaking to investigate did not change the purpose of the investigation: to apprehend the assassin or assassins.

The Information Act exempts from its disclosure requirements "investigative files compiled for law enforcement purposes except to the extent available by law to a party other than the agency." The file on the investigation into the assassination of President Kennedy, and the spectrographic analyses contained therein are therefore exempt from disclosure provided the exception does not apply.

It is noteworthy that FBI files were mentioned in the legislative history as the classic example of material which exemption 7 protects from disclosure. As one of the bill's supporters put it, "[t]he FBI would be protected under exemption No. 7 prohibiting disclosure of 'investigatory files'", and the bill "prevents the disclosure of * * * 'sensitive' Government information such as FBI files * * *." Vol. 112, Part 10, Cong. Rec. 13659 (1966).

II. The Possible Availability To A Defendant In A Criminal Case Of Material Contained In An Investigative File Compiled For Law Enforcement Purposes Otherwise Exempt From Disclosure Under 5 U.S.C. 552(b)(7) Does Not Make That Information Available To The Public At Large Under The Act.

Appellant argues that because the spectrographic analyses sought would have been available to Lee Harvey Oswald in his trial for murder, they thereby become available to anyone under the Freedom of Information Act. Assuming arguendo that the analyses would have been available to Oswald, they do not by that fact become available to the general public upon request.

5 U.S.C. 552(b)(7) exempts "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than the agency." The exception for materials available "by law to a party" is a narrow one: it was designed to insure that private parties to whom material in an investigative file is available "by law" do not lose that entitlement by virtue of the seventh exemption. Thus, for example, a defendant who is entitled under the Jencks Act to see an FBI report, does not lose that right by virtue of the seventh exemption. Had the exception not been included, investigative files would not have been available to anyone outside the agency. The exception does not mean that material made available to a private party by law thereby becomes available to the general public.

The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act states at p. 38:

* * * The effect of the language in exemption (7), on the other hand, seems to be to confirm the availability to litigants of documents from investigatory files to the extent to which Congress and the courts have made them available to such litigants. For example, litigants who meet the burdens of the Jencks statute (18 U.S.C. 3500) may obtain prior statements given to an FBI agent or an SEC investigator by a witness who is testifying in a pending case; but since such statements might contain information unfairly damaging to the litigant or other persons, the new law, like the Jencks statute, does not permit the information to be made available to the public.
* * *

See also Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591, 593-94 (D. P.R. 1967). See also Clement Brothers Co. v. NLRB, 282 F. Supp. 540, 542 (N.D. Ga.).^{1/} The correctness of the Attorney General's reading of this exception is supported by the House of Representatives' report on the Information Act (H. Rep. 1497, 89th Cong., 2d Sess., 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.

^{1/} The Fifth Circuit in NLRB v. Clement Brothers Co., 407 F.2d 1027, 1031, has stated that it "fully concurs" in the cited district court decision.

The seventh exemption therefore applies to these spectrographic analyses and they may not be required to be produced. ^{2/}

Appellant vigorously contends that the affidavit of FBI Agent Marion E. Williams should have been excluded from the record because it did not conform to the requirements of Rule 56(e) of the Federal Rules of Civil Procedure. This charge is erroneous, and irrelevant.

The affidavit was clearly based on personal knowledge. Mr. Williams states that he is a Special Agent of the Federal Bureau of Investigation, has official access to FBI records, and has reviewed the file in question. Based on that review he is certainly competent to state for what purpose the file was compiled. The affidavit, moreover, confirms what is evident from common sense alone: the assassination of a President is a crime, and

^{2/} Appellant contends (br. 18-19) that if the analyses were part of an investigative file compiled for law enforcement purposes, "they have now lost that status because there is no prospect of enforcement proceedings in which they could be used." For that proposition appellant relies upon dictum in Bristol Myers Co. v. FTC, ___ U.S. App. D.C. ___, 424 F.2d 935. However, neither Bristol-Myers nor the terms of exemption 7 suggests that FBI files compiled regarding criminal offenses lose their status as "investigatory files compiled for law enforcement purposes" if no further criminal proceedings are contemplated. Appellant's position on this point flies in the face of the literal language of the statute, and is contrary to one of the evident purposes of the provision: to protect such files from public disclosure, which might unfairly reveal raw data about individuals and the investigatory agency's methods of investigation, informants, etc. Bristol Myers merely indicates, in dictum, that information obtained by an agency whose principal function (unlike the FBI) is not criminal law enforcement, may not necessarily be exempt solely because one long abandoned purpose in collecting it was its possible use for enforcement purposes.

records compiled in the FBI's efforts to determine the perpetrator or perpetrators are compiled for law enforcement purposes. The relevance of appellant's attacks upon the affidavit therefore is not apparent.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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APRIL 1971