BRIEF FOR PLAINTIFF-APPELLANT
AND JOINT APPENDIX

IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## No. 71-1026

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HAROLD WEISBERG, *Plaintiff-Appellant*

v.

U.S. DEPARTMENT OF JUSTICE, *Defendant-Appellee*

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**On Appeal From the United States District Court for the District of Columbia**

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## BRIEF FOR PLAINTIFF-APPELLANT

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### STATEMENT OF ISSUES

1. Whether court below erred in dismissing complaint which stated a sufficient claim under Rule 8(a) of the Federal Rules of Civil Procedure.

2. Whether court below committed error by not excluding from the record the affidavit by FBI Agent Williams which consisted of argument, opinion, and conclusions of law.

3. Whether, in accordance with the provisions of the Freedom of Information Act, the Government met its burden of justifying the withholding of the spectrographic analyses sought by Plaintiff.

4. Whether the spectrographic analyses suppressed by the Government are, as a matter of law, part of an investigative file compiled for law enforcement purposes.

5. Whether, assuming spectrographic analyses are part of an investigatory file compiled for law enforcement purposes, such analyses would have been available to Lee Harvey Oswald and are therefore presently accessible to Plaintiff under the terms of the Freedom of Information Act.

6. Whether court erred in dismissing Plaintiff's complaint and summary judgment should have been awarded to Plaintiff.

## REFERENCE TO RULINGS

The bases for the decision of the court below in granting the Government's Motion to Dismiss were not articulated. District Judge John Sirica simply dismissed the complaint in an order dated November 17, 1970, reproduced at page JA-52 in the appendix to this brief. The court below issued ~~on~~ no findings of fact or conclusions of law.

This case has not previously been before this court.

## STATEMENT OF THE CASE

### I. Procedural Summary

Plaintiff Harold Weisberg, an author residing at Route 8, Frederick, Maryland, brought this action in the United States District Court for the District of Columbia by filing a complaint against the Department of Justice.

The Complaint [JA-2] seeks to enjoin the Department of Justice from withholding certain specified spectrographic

analyses made in connection with the Warren Commission's investigation into the assassination of President John F. Kennedy.

Defendant Department of Justice filed a Motion to Dismiss the Action or, in the alternative for Summary Judgment, on October 6, 1970. [JA-44] Later, on November 9, 1970, Defendant filed a Supplement to its Motion to Dismiss or, in the alternative, for Summary Judgment, with an affidavit attached.

Plaintiff filed an answer to Defendant's Motion to Dismiss or, in the alternative, for Summary Judgment on October 16, 1970. [JA-27] After Defendant filed the Supplement to his Motion to Dismiss on November 6th, Plaintiff requested a week's extension in the time set for the hearing until November 16, 1970. On November 16, 1970, after hearing the oral arguments on Defendant's Motion, the Honorable Judge John Sirica granted the Motion to Dismiss. The order was entered accordingly on November 17, 1970. [JA-52] On December 7, 1970, Plaintiff filed a Notice of Appeal to this court along with his appeal bond.

### II. The Complaint

The complaint states a cause of action under the Freedom of Information Act, 5 U.S.C. §552(a)(3) for failure of the Department of Justice to make available to Plaintiff records to which Plaintiff is entitled under the terms of said Act.

The complaint alleges that certain spectrographic analyses were performed in connection with the investigation into President Kennedy's assassination; that these spectrographic analyses were requested by Plaintiff according to proper procedure but were denied him by the Defendant Department of Justice; and that the spectrographic analyses are being illegally withheld from him. The complaint requests the court to enjoin the further suppression of the records sought.

### III. Motions

Defendant Department of Justice set forth two grounds in support of its Motion for Summary Judgment:

1. The complaint fails to state a claim upon which relief can be granted, and

2. There is no issue as to any material fact and the defendant is entitled to judgment as a matter of law.

In addition to the above grounds, Defendant Department of Justice claimed that the spectrographic analyses were part of an investigative file compiled for law enforcement purposes and therefore exempt from disclosure under exception (7) of the Freedom of Information Act.

### IV. Facts

President John F. Kennedy was assassinated at Dealey Plaza on November 22, 1963. After the assassination, a bullet and bullet fragments were collected that same day at various places ranging from Dealey Plaza and Parkland Memorial Hospital in Dallas to Bethesda Naval Hospital in Maryland. Subsequently, the President of the United States, Lyndon B. Johnson, requested the FBI to conduct an investigation into the events surrounding the assassination.

A week after the assassination, President Johnson established a President's Commission on the Assassination of President Kennedy, popularly known as the Warren Commission. The declared purpose of the Commission was to act as a fact-finding body which would uncover the truth about the assassination of President Kennedy. The Commission had no law enforcement powers. The FBI acted as the principal investigative arm of the Warren Commission.

In conjunction with its fact-finding investigation into the assassination, the FBI performed for the Warren Commission, certain spectrographic examinations of a bul-

let and various bullet fragments and other objects, and two FBI agents testified before the Warren Commission in regard to these spectrographic tests.

In a series of letters dated May 23, 1966; March 12, 1967; Jan. 1, 1969; June 2, 1969; April 6, 1970; and May 15, 1970 and a "Request for Access to Official Records under 5 U.S.C. § 552(a) and 28 CFR Part 16," dated May 16, 1970 [JA-5-25], Plaintiff requested various officials of the Defendant to produce for inspection the "spectrographic analyses of bullet, fragments of bullets and other objects, including garments and part of vehicle and curbstone said to have been struck by bullet and/or fragments during the assassination of President Kennedy and wounding Governor Connally." [JA-22]

On June 4, 1970 the Attorney General, John Mitchell, denied Plaintiff's requests on the grounds that the records sought "are part of an 'investigatory file compiled for law enforcement purposes' and therefore exempt from disclosure under the Freedom of Information Act's compulsory disclosure requirements. 5 U.S.C. § 552 (b)(7) ...." [JA-24]

On June 12, 1970, the Deputy Attorney General also denied Plaintiff's request and again cited the investigatory files exemption. [JA-24-26]

## SUMMARY OF ARGUMENT

The District Court erred in granting Defendant's Motion to Dismiss the complaint because, excluding matters outside the pleading, Plaintiff's complaint clearly stated a sufficient claim of relief under Rule 8(a) of the Federal Rules of Civil Procedure.

Further, the affidavit submitted by Defendant in support of his motion should have been excluded by the trial court under Rule 56(e) on the grounds that it consisted of argument and opinion and testified as to conclusions of law.

In granting summary judgment to defendant it was necessary for the court to find both that: (1) the spectrographic analyses sought were compiled for law enforcement purposes; and (2) said spectrographic analyses would not have been available to Lee Harvey Oswald had he lived to be tried, either under the right of discovery or under the duty of prosecutors and investigative agencies to divulge exculpatory evidence. The court below erred if it held either that the spectrographic analyses were compiled for law enforcement purposes or that Lee Harvey Oswald would not have had access to the spectrographic analyses sought by Plaintiff.

In addition, the court erred by inquiring into the reasons why Plaintiff desires access to these spectrographic analyses.

Plaintiff also contends that if there were no genuine issues of material fact in dispute, the court below erred in not awarding summary judgment to Plaintiff rather than to Defendant.

### I. TRIAL COURT ERRED BY FAILING TO EXCLUDE DEFENDANT'S AFFIDAVIT FROM THE RECORD.

In the court below, the Government moved to dismiss Plaintiff's action, or in the alternative, for summary judgment:

> ". . . on the grounds that the complaint and the exhibits attached thereto . . . demonstrate there is no claim upon which relief can be granted, there is no issue as to any material fact and the defendant is entitled to judgment as a matter of law."

The district court granted the motion to dismiss. However, the Government moved, in the alternative, for summary judgment, and Plaintiff Weisberg contends that under Rule 12(b) of the Federal Rules of Civil Procedure the

court was required to treat the motion as one for summary judgment. The last sentence of Rule 12(b) states:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment. . . ."

In the instant case, matters outside the pleadings were presented to but not excluded by the court, so that the Government's motion was required to be treated as one for summary judgment under Rule 56 of the Federal Rules.

In turn, the provisions of Rule 56 lay down certain restrictions on the materials added to the pleadings. Thus, 56(e) provides:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

In conjunction with a supplement to its Motion to Dismiss or for Summary Judgment, the Government submitted an affidavit by FBI Agent Marion Williams. [JA-50-51] Weisberg contends that this affidavit failed to meet any of the qualifications contained in the quoted part of Rule 56(e): the affidavit was not made on personal knowledge, set forth some facts such as would not be made admissible in evidence, and failed to show affirmatively that the affiant was competent to testify to the matters stated in the affidavit.

Moreover, the sole purpose of the Williams affidavit is to show that the spectrographic examinations sought by Weisberg are part of an investigatory file which was compiled for law enforcement purposes. Weisberg con-

tends that the central point of whether or not a file is an investigative file for law enforcement purposes is a question of law, not of fact, and therefore not properly contained in an affidavit supporting a motion for summary judgment.

Thus, the court in *Welling* v. *Fairmont Creamery Co.*, 139 F.2d 318 (C.A. 8, 1943) ruled:

> ". . . affidavits which contain mere conclusions of law or restatements of allegations of the pleadings are not sufficient to support a motion for summary judgment."

The affidavit offered by the Government in support of its motion for summary judgment was precisely this, an attempt to invoke the authority of an FBI Agent to reach a conclusion of law which merely restated the allegations in the Government's pleadings.

While this is the primary and fatal defect in the affidavit executed by FBI Agent Williams, it is not the only one. Much of the affidavit is argument, much is opinion. Thus, paragraph 5 of the Williams affidavit states:

> "The release of raw data from such investigative files to any and all persons who request them would 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." [JA-51]

There is no doubting the fact that this recital catalogs an impressive list of horrors. It is clear, however, that in addition to being meretricious, these assertions constitute argument and opinion and could not properly support a motion for summary judgment, and therefore should not have been considered by the court.

In fact, there was no part of the Williams affidavit which would be admissible in evidence or could properly be considered on a motion for summary judgment and therefore the affidavit should have been stricken by the court. Because the court made no finding of facts or conclusions of law, and because the court failed to exclude this affidavit from the record, the possibility that this affidavit helped determine the motion for summary judgment cannot be discounted.

## II. IN GRANTING SUMMARY JUDGMENT, TRIAL COURT COMMITTED ERROR BY APPLYING LEGAL CONCEPTS WHICH ARE NOT PROPER OR GERMANE UNDER THE PROVISIONS OF THE FREEDOM OF INFORMATION ACT.

### A. Under the Freedom of Information Act, Complainant Does Not Have To Establish a Need To Know or a Direct Interest in the Records Sought.

Prior to the enactment of the Freedom of Information Act, the availability of agency records was governed by Section 3 of the Administrative Procedure Act. Subsection (c) of that Act read:

> "(c) *Public records.*—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

The availability of Records under the current Act is governed by 5 U.S.C. § 552 (a)(3), which states:

> ". . . every agency shall upon request for identifiable records made in accordance with published rules . . . make such records promptly available *to any person.*" (emphasis added).

When S. 1160, the bill which became the Freedom of Information Act, was reported to the Senate, the Chairman of the subcommittee on the Judiciary, Senator Edward V. Long, submitted a report on the bill. In that report, Senator Long stated that the existing statute had "serious deficiencies." One of these serious deficiencies related to the provisions of the above quoted section 3(c) of the Administrative Procedure Act:

> "As to public records generally, subsection (c), requires their availability 'to persons properly and directly concerned except information held confidential for good cause found.' This is a double-barrelled loophole because not only is there the vague phrase 'for good cause found,' there is also a further excuse for withholding if persons are not 'properly and directly concerned.'" [S. Rep. No. 813, 89th Cong., 1st Sess., p. 5 (1965)]

The Senate Report makes it quite clear that the Senate took a dismal view of the existing law:

> "It is the conclusion of the committee that the present section 3 of the Administrative Procedure Act is of little or no value to the public in gaining access to records of the Federal Government. Indeed, it has had precisely the opposite effect: it is cited as statutory authority for the withholding of virtually any piece of information that an official or an agency does not wish to disclose." [S. Rep. No. 813, 89th Cong., 1st Sess., p. 5 (1965)]

More specifically, the Senate Report asserted that:

> "S. 1160 would emphasize that section 3 of the Administrative Procedure Act is not a withholding statute but a disclosure statute by the following major changes:
>
> * * * * * * * * *
>
> (2) It eliminates the test of who shall have the right to different information. For the great majority of different records, the public as a whole has a right to know what its Government is doing." [S. Rep. No. 813, 89th Cong., 1st Sess., p. 5 (1965)]

The Congressman who floor-managed the Freedom of Information Act in the House was Representative Moss, a long-time champion of the legislation and Chairman of the Foreign and Government Information Subcommittee of the Committee on Government Operations, which handled the legislation.

Addressing the House after he had moved that S. 1160 be passed, Chairman Moss reiterated the conclusion of the Senate Report. Noting that S. 1160 would make three major changes in the existing law, Moss stated:

> "First. The bill would eliminate the 'properly and directly concerned' test of who shall have access to public records, stating that the great majority of records shall be available to 'any person.' " (Cong. Rec., June 20, 1966 p. 13007).

Thus, the Congressional intent in employing the phrase 'to any person' is clear; it reflected a deep-seated congressional dissatisfaction with a specific provision in the existing law.

Unfortunately, neither the express language of the Act on this point nor its legislative history have been given due regard by some courts. In the instant case, the hearing transcript reflects that the judge thought it relevant to inquire: "For what purpose does your client seek this information?" [JA-59]

Under the law which the judge was obligated to apply to the motion for summary judgment before him, this inquiry was both irrelevant and improper. As the trial judge issued no conclusions of law, it is impossible for appellant to know to what extent this improper inquiry influenced his decision to dismiss the complaint.

**B. Unsubstantiated Claim That Attorney General Had Determined It Is Not in the National Interest To Divulge Spectrographic Analyses Presented Court With an Erroneous Construction of the Freedom of Information Act.**

On oral argument following Plaintiff's presentation, counsel for the Government rose to make the following statement:

> "Primarily, however, we must recognize that the exemptions which are contained in this Act are in part discretionary exemptions in that the administrative party may make a determination not whether the information should not be released because of national security, but I believe the President's comments say national interest as well. In this instance the Attorney General of the United States has determined that it is not in the national interest to divulge these spectrographic analyses." [J.A.60]

Government Counsel failed to produce any affidavit or statement to substantiate his claim that the Attorney General had determined that the release of such scientific studies would be against the national interest, nor did he explain how revelation of such information could be detrimental to the best interests of the country.

Had the Government counsel produced an affidavit to substantiate his statement, it would have been irrelevant in any case. Prior to the enactment of the Freedom of Information Act, "national interest" might have been synonymous with "public interest" and thus susceptible to being used as a pretext for the suppression of these spectrographic analyses. However, the text of the Freedom of Information Act makes no mention of "national interest" or "national security" or even "public interest" in providing that certain classes of materials be exempt from disclosure. The closest language to those expressions contained in the

Act is found in 5 U.S.C. § 552(b)(1), which provides an exemption for matters that are:

> "specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy."

The determination attributed to the Attorney General by Government counsel is only said to have referred to "national interest," which certainly does not bring it within the ambit of the specific and more narrow exceptions laid down in (b)(1).

The legislative history makes it very clear what Congress intended to do by changing the wording in the old law. The Senate Report carefully describes the scope of the "national defense or foreign policy" exemption:

> "Exemption No. 1 is for matters specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy. The change of standard from 'in the public interest' is made both to delimit more narrowly the exemption and to give it a more precise definition. The phrase 'public interest' in section 3(a) of the Administrative Procedure Act has been subject to conflicting interpretations, often colored by personal prejudices and predilections. It admits of no clear delineations, and it has served in many cases to defeat the very purpose for which it was intended—the public's right to know the operations of its Government. Rather than protecting the public's interest, it has caused widespread public dissatisfaction and confusion. Retention of such an exception in section 3(a) is, therefore, inconsistent with the general objective of enabling the public to readily gain access to the information necessary to deal effectively and upon an equal footing with Federal Agencies." [S. Rep. No. 813, 89th Cong., 1st Sess., p. 8 (1965)]

It should be pointed out here, that in addition to being narrowly drawn, the exceptions for national defense or foreign policy are, by the express wording of this very

subsection, capable of being invoked only by Executive Order. Exemption (1) cannot be invoked at the discretion of the Attorney General, or any other Cabinet Officer, nor on the say-so of his deputy.

Again, as the court issued no findings of fact or conclusions of law, it is impossible to know to what extent he was influenced in his decision to grant summary judgment by this irrelevant statement that the Attorney General had decided to withhold the spectrographic analyses, "at his discretion," as a matter of "national interest."

### III. THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT ON THE GROUNDS THAT THE MATERIAL SOUGHT HEREIN WAS EXEMPT FROM DISCLOSURE UNDER 5 U.S.C. § 552(b)(7).

In the proceeding below, the Government moved to dismiss Plaintiff's action, or in the alternative, for summary judgment. One of the two grounds claimed was that "the complaint and the exhibits attached thereto . . . demonstrate there is no claim upon which relief can be granted . . ."

Rule 8(a) of the Federal Rules of Civil Procedure sets down the requirements which a pleading must contain in order to state a valid claim of relief:

> "(a) *Claims for Relief.* A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . ., (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled."

It is readily apparent that Weisberg's complaint fulfilled each of the three prerequisites for a sufficient claim laid out by Rule 8(a). Because of this, and because Rule 12(b)(6) required the Government's motion to be treated as a motion for summary judgment, Appellant proceeds directly now

to a discussion of the grounds for granting summary judgment.

The crucial issue presented by the Government's Motion for Summary Judgment is whether, as a matter of law, the spectrographic analyses sought by Weisberg are part of an agency file which receives protection under 5 U.S.C. § 552(b)(7). That section establishes an exemption from disclosure for 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."

Appellant contends that there are several substantial reasons why this provision does not exempt from disclosure the materials sought in this case. These reasons are discussed in the sections which follow.

### A. The Records Sought Were Not Compiled for Law Enforcement Purposes.

On oral argument, the Government took the position that there could be a law enforcement purpose even though there was no statutory law granting the agency jurisdiction:

> "Plaintiff's argument therefore goes to two points. The first of which is that since there is no statutory law on assassinating presidents nothing that the FBI did subsequent to the assassination could be for a law enforcement purpose. I think that the fallacy of the argument is in the statement of the argument, that there must be some law enforcement purpose to be served by the FBI investigating a cold-blooded murder of an American President."
>
> "We know now that there is a statutory law, but does that mean basically as we as lawyers understand that because there wasn't any statutory explication of the crime, that there wasn't any law, natural or human, to our basic society that wasn't violated before. So, I say the fallacy of the argument is in this statement." [JA-60]

Government counsel need not have labored so with these abstractions. When the President was assassinated a crime was committed; but it was committed in Texas and the State of Texas had jurisdiction over the crime. No agency of the Federal Government, nor the Warren Commission, did have jurisdiction over the criminal act, as Defendant admitted was the case in 1963.

As to the concepts of "natural and human law," the actual legislative history of exemption (b)(7) indicates that its sweep is somewhat less ecumenical than government counsel would have us believe. The note on exemption (7) which is contained in the House Report explains:

> "This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws." [H.R. No. 1497, 89th Congress, 2nd Session, p. 11 (1966)]

The language used in the legislative history indicates that the files contemplated were those compiled in conjunction with the *enforcement* of *specific laws*. There is not the slightest suggestion that Congress intended that the concept be extended to include the enforcement of anything so indeterminate as "natural or human law." Nor does the legislative history even indicate Congressional intent to include certain less abstract, more specific systems of law within the compass of protected law enforcement files; for example, the legislative note refers to securities laws but says nothing whatsoever about canon law. Congress seems to have framed the provisions of the Freedom of Information Act upon the supposition that the lawsuits brought under it would be argued in American courts, not in the Pope's chambers.

There are, in addition, strong reasons for adhering to the express wording used in the House Report Note on Exemption (7). As this court noted in *American Mail Line, Ltd.* v. *Gulick*, 411 F.2d 696 (C.A.D.C., 1969):

133 U.S. App. D.C. 352

> ". . . the legislative history behind [the Freedom of Information Act] reveals that the premier purpose of

> the Act was to elucidate the availability of Government records to the American citizen. In addition, Congress sought to eliminate much of the vagueness of the old law . . ." (411 F.2d 696, at 699)

Government's position that there need only be a violation of "natural or human law" in order to fulfill the requirement that there be a law enforcement purpose would restore to the law governing access to Government records "much of the vagueness of the old law." Indeed, if Government's criteria were read into the Act as the standard, it would tend to occlude rather than "elucidate" the availability of Government records. Such a "standard" would enable governmental agencies to claim the investigative file exemption for virtually all documents in their possession. This would be at least a partial reversion to the status quo ante where, as the Senate Report said:

> "Under the present section 3, any Government official can under color of law withhold almost anything from any citizen under the vague standards—or, more precisely, lack of standards—in section 3. It would require almost no effort for any official to think up a reason why a piece of information should be withheld (1) because it was in the 'public interest,' or (2) 'for good cause found,' or (3) that the person making the request was not 'properly and directly' concerned." [S.R. Rep. No. 813, 89th Cong., 1st Sess., p. 5 (1965)]

Finally, such a standard is too abstract to guide a judge and the ensuing confusion would tend to make access to public records an uncertain quest subject to the whim and caprice of individual bureaucrats and judges.

Appellant urges that "law enforcement" requires a law—statutory or common, not "human" or "natural" or "canon" law; therefore, the spectrographic analyses sought in this case were not made for "law enforcement purposes" and are not exempt under exemption (7).

**B. Assuming, Arguendo, That Spectrographic 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.**

In its Memorandum of Points and Authorities in support of its Motion for Summary Judgment, the Government cited the investigatory files exemption and then explained:

> "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.*" (Emphasis added) [JA-46]

This, however, is not true; at least the case law has not construed the investigatory files exemption in that light. The general proposition was faced by this court in *Bristol Myers Company* v. *F.T.C.*, 424 F.2d 935 (C.A.D.C., 1970). In that case the F.T.C. had originally intended to proceed against Bristol Myers for misleading advertising practices but later withdrew the complaint. More than two years after the complaint had been dropped, a Notice of Rulemaking precipitated a request by Bristol Myers for records which the F.T.C. labeled investigatory files under exemption (7). The court conceded that "if further adjudicatory proceedings are imminent, then the Company's request may fall within the category the exemption was designed to control."

However, the court went on to say:

> "But the 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." (*Bristol Myers, supra,* pp. 939-940).

Weisberg notes not only that the Government did not claim there is an imminent prospect of enforcement proceedings, but also that because the Government has consistently maintained that Lee Harvey Oswald was the lone assassin of President Kennedy and he is now dead, there never can be law enforcement proceedings which could invoke this exemption.

**C. Assuming, Arguendo, That the Spectrographic Analyses Are Part of an Investigatory File for Law Enforcement Purposes, Such Analyses Would Have Been Available to Lee Harvey Oswald Had He Been Tried and Are Therefore Available to Plaintiff.**

Exemption (7) provides that investigatory files compiled for law enforcement purposes are not subject to disclosure "except to the extent available by law to a party other than an agency."

Weisberg contends that had Oswald lived and been given a trial according to the usual standards of American justice, he would have had a legal right to the spectrographic analyses here in question. Weisberg takes the position that Oswald's right to the spectrographic analyses could have been effected through any one of several legal routes: the right of discovery in criminal cases; the right of discovery in civil cases; under the due process clause of the U.S. Constitution, and as a result of the duty of the prosecution and the investigative agencies to make available to the defendant in a criminal case any exculpatory information.

A recent decision by this court covering two cases, *U.S.* v. *Bryant,* No. 23,957, and *U.S.* v. *Turner,* No. 24,105 (C.A.D.C., Jan. 29, 1971), directly addressed the ultimate issue involved in discovery:

"The right at stake in the cases before us is defendant's discovery of evidence gathered by the Govern-

> ment, evidence whose disclosure to defense counsel would make the trial more a 'quest for truth' than a 'sporting event.' "

Later in its opinion this court summarized the state of the law on discovery when viewed in terms of due process:

> "In the leading Supreme Court decisions concerning the due process requirement of disclosure, the content of the non-disclosed evidence has always been known. The standard of constitutional coverage thus has turned upon the extent to which the evidence is 'favorable' to the accused. Although the Supreme Court has not yet attempted to define this standard with precision, it is the law in this circuit that the due process requirement applies to all evidence which 'might have led the jury to entertain a reasonable doubt about [defendant's] guilt' and that this text is to be applied generously to the accused when there is 'substantial room for doubt' as to what effect disclosure might have had."

Weisberg contends that the spectrographic analyses would have had to have been disclosed in order for Oswald's trial to have been more a "quest for truth" than a "sporting event."

Weisberg further contends that the spectrographic analyses would have been available to Oswald as exculpatory evidence.[1] Weisberg here asserts that the existing ballistics and photographic evidence so strongly tends to exculpate Oswald that it is virtually certain that the spectrographic analyses would have done likewise. There can be no question, therefore, but that the spectrographic analyses "might have led the jury to entertain, a reasonable doubt" about Oswald's having shot the President.

From the language of exemption (7) it is apparent that if Oswald had a legal right to the spectrographic analyses here in question, then Plaintiff would also have an equal right to these records.

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[1] Weisberg relies here on *Brady* v. *Maryland*, 373 U.S. 83 (1963) and the long line of recent cases following that decision on the duty of divulging exculpatory information.

Attempts by defense counsel to claim that a party who is not in privity with a litigant would not have a right under this provision to records claimed as a matter of law by a litigant only reveals an unfamiliarity with the legislative history of exemption (7). That history is quite explicit on this point:

> "S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have had directly in such litigation or proceedings." [H.R. No. 1497, 89th Cong., 2d Sess., 11 (1966)]

The Government's contention that ". . . even Mr. Oswald would not have been entitled to [the spectrographic analyses] had they not been introduced in evidence against him misses the point. The primary reason for withholding witness and other evidence from the defendant in a criminal case is to maintain an element of surprise so that defendant will be less tempted to commit perjury, less inclined to fabricate a story consistent with the known facts. Obviously, this consideration does not apply to the case where a putative defendant was gunned down prior to his trial, if indeed it ever applies to the kind of scientific tests performed here.

The Freedom of Information Act requires the agency claiming an exemption to justify its suppression of requested records. The opinion of the court in the recent case of *Wellford* v. *Hardin*, 315 F.Supp. 175 (D.C., Md., 1970) strongly indicates that the considerations behind exemption (7) do not apply in the instant case:

> "In *Bristol Myers* v. *F.T.C., supra,* the investigatory files exception was characterized as 'intended to limit persons charged with violative of the federal regulatory statutes to the discovery available to persons charged with violations of federal criminal law . . . with this policy in mind, it is clear that the specific material sought in this action is not within the exception for investigatory files compiled for law-enforcement pur-

poses. Disclosure of material already in the hands of potential parties to law enforcement proceedings can in no way be said to interfere with the agency's legitimate law enforcement functions. This conclusion is based on this court's reading of the legislative history surrounding this exception which reveals that its purpose was to prevent premature discovery by a defendant in an enforcement proceeding. Whatever valid policy reasons there may be for extending this exception to other situations cannot serve to alter this court's result. Such a judgment must be made by Congress." (315 F. Supp., at 178).

Weisberg contends, therefore, that the death of Oswald negated any plausible justification for withholding such records, and we note once again that the Freedom of Information Act puts the burden of justifying the withholding of records upon the agency claiming an exemption. Defendant has not met that burden.

Finally, Weisberg notes that although Oswald did not live to receive a trial in an American court, he was, in effect, tried and pronounced guilty by a special tribunal, the President's Commission on the Assassination of President Kennedy. Weisberg contends that in a civil action against the Commission, Oswald would have had a right of civil discovery of the spectrographic analyses. More importantly, Appellant contends that references to the spectrographic analyses made by two FBI agents who testified in regard to them before the Warren Commission requires disclosures of the spectrographic analyses themselves. Weisberg relies here upon the case of *American Mail Line, Ltd.* v. *Gulick*, 411 F.2d 696 (C.A.D.C., 1969), where the court held that an agency which had publicly disclosed part of a memorandum would be required, under the Freedom of Information Act, to disclose the whole memorandum and the claimed intra-agency memoranda exception was not valid. Weisberg urges that in this regard, the claimed investigatory file exemption in this case is equally invalid, and for the same reasons.

## CONCLUSION

Wherefore, Appellant requests that the order of the District Court be vacated and that the court order that summary judgment be granted Plaintiff.

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5/15/71

Dear Jim,

I think we are all in ebt to you and Bon for arguing and arguing persuasively and successfully to file the Reply Brief. By and large it is an excellent job. The only comment I have now relate to court argument, not criticism. Some are intended for your consideration in other such paper. One is the sequence of arguments. I think that arguing first that scientific test and this scientific test in particular and any work done for the President or the Commission does not qualify for the exemption should have come earlier, possibly first, to avoid what a hasty reading can suggest, that there is tacit concession that it can be. In court, I think this should be the beginning, and that Hoover should be wuoted more fully, for in the quote I gave Bud he is specificin saying much more than this, that the FBI had no jurisdiction at all.

On page 2, #2, and II, you should be prepared (and it would have been better to have included here) for the language of the guidelines, secret processes. This also involves no secret process.

As you realize, much of this is not new to me and is in the memos I prepared. That may be true of what I say here. But if I am repetitious, it is becauseII think we ought be better prepared to argue.

On p.4, at the end of the government's arguments quote, this is a correct statement, but a deliberately deceptive one, and the words left out are what is the key. It is "beyond question" that the secptro is part of the FBI's investigation. But that investigation was a) for the President and b) for the Commission neither, as you say elsewhere, having alw-enforcement purposes or authority. I think the emphasis on the deceptions by the government, especially in today's context, can be important.

6, pemult line, I think there should be a distinction prepared to face and argue, that of genuine or real law-enforcement purposes, not those contrived (Ray conspiracy indictment as an example) or invented, as in this case. I think we will be stronger if we appear not to claim that all FBI investigatory reports ought be available. It is in this part that I think the above misreading because of sequence might follow over-hasty reading.

But in this connection, you kight also want to bear in mind that the Department has identified informants(we will not do it in piblic for them although they applied no restrictions) so even their argument on informants is not consistent.

10, middle and 12, III: What Curry published was also published by the Commission. This is a paragrraase, and that in itself ought make American Mail more operative.

11 Why did you omit Wellford?

IV. and conclusion: another alternative is that the spectrographic analyses exculpate Oswald, and I would not be reluctant to include this third consideration in court. I believe this is the only reason they are withheld.

17. Hallagher was the spectrographer in this case, even if he was asked no questions about it. That is in Frazier's testimony.

18, top line, not "of" but on or add"in paraphrase". They , that is the court, may say that if Curry published it we ought be satisfied to quote him. Top of 19, I think it would have helped and you should be ready to point out in court that the spectros are done by FBI experts in FBIlabs, by them alone, there alone, period.

This is much too understated. This Williams affidavit is a deliberat fraud upon the court, by Williams, who has to know better, and by the lawyer, who had to know better. I think that in court this point above all must be made with vigor. It will take an exceptionally corrupt judge to sit still for this gross and deliberate misrepresentation of what a spectrographic analysis is. It must be in every agent's training. It is in the average scientific dictionary, perhps the unabridged. I think that properly used this alone ought be enough to swing a bad court, for this is a serious transgression.

21 On the Commission's examination of the FBI evidence, this meant two things: the evidence developed by the FBI after Presidential order and that developed as the major investigative arm of the Commission. For court I think this should be made clear, for a judge looking for an out could misinterpret this language as quoted. Here again I would sue that part of Hoover's testimony of which I gave Bud a photocopy, I think it is 5H98-9, where he explains with are that he had no authority to do anything at all until the President made up his limited authority to report to the President. Here the papers of that period might be helpful to have, for they make it clear, pre-Commission, that what Hoover told the Commission is precisely accurate. I think it is nice to have Hoover agguing against Hoover.

23. This quotation from the House Report reminds me that it goes into the disposition of government to misrepresent to withhold and supprews about three times in that "national interest" jazz, which could, in this context, be effective.

25. It is much more, as I somewhere explained, I think in the draft of the Complaint, than that the Commission used the spectros. They are basic to the conclusions of the Commission -any conclusion, and they are not in the Commission's files. Let the government argue tha the Commission didn t want them!. Here again also the possibility I believe to be the certainty, that the spectros will establish Oswald's innocence. But I would argue that since they are not investigative reports for law enforcement, since the process is not secret, since they are required to be available under the law, even if none of this were true, why should the government be so anxious to suppress what would prove Oswald the lone assassin, if these spectros are actually consistent with the FBI's representation of them in paraphrase? And I think the point at the end of the first paragrpah should again come from Hoover's testimony, the Government CAN have no law enforcement purpose. No federal crime was involved.

Can there be a better expert on this than Hoover?