UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

U. S. DEPARTMENT OF JUSTICE,

Defendant.

Civil Action

No. 2301-70

MOTION OF DEFENDANT TO DISMISS
THE ACTION OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT

The defendant by its counsel, the United States Attorney for the District of Columbia, moves the Court to dismiss the action, or in the alternative, for summary judgment on the grounds that the complaint and the exhibits attached thereto and by reference made a part hereof, 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.

/s/
THOMAS A. FLANNERY
United States Attorney

/s/
JOSEPH M. HANNON
Assistant United States Attorney

/s/
ROBERT M. WERDIG, JR.
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Motion of Defendant to Dismiss the Action or, in the Alternative, for Summary Judgment, Statement of Material Fact as to Which There Is No Genuine Issue together with the Memorandum of Points and Authorities in support thereof has been made upon plaintiff by mailing a copy thereof to Bernard Fensterwald, Jr., Esq., 927 15th Street, N.W., Washington, D.C. 20005, on this 6th day of October, 1970.

/s/
ROBERT M. WERDIG, JR.
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

U. S. DEPARTMENT OF JUSTICE,

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Civil Action

No. 2301-70

STATEMENT OF MATERIAL FACT
AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Rule 9(h) the material facts in the instant action are summarized below.

1. In a series of letters of May 23, 1966; March 12, 1967; January 1, 1969; June 2, 1969; April 6, 1970; and May 15, 1970 and a "Request for Access to Official Record Under 5 U.S.C. 552(a) and 28 CFR Part 16," dated May 16, 1970, plaintiff requested various officials of the defendant to produce for inspection the "Spectographic analysis of bullet, fragments of bullet and other objects, including garments and part of vehicle and curbstone said to have been struck by bullet and/or fragments during assassination of President Kennedy and wounding Governor Connelly."

2. On June 4, 1970 the Attorney General wrote:

> " . . . The Department of Justice has received requests for these documents in the past, and we have taken the position that they 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) . . . "

3. In a letter of June 12, 1970, the Deputy Attorney General wrote plaintiff:

> "I regret that I am unable to grant your request in that the work notes and raw analytical data on which the results of these spectographic

tests are based are part of the investigative files of the FBI and are specifically exempted from public disclosure as investigatory files compiled for law enforcement purposes. 5 U.S.C. 552(b)(7) . . . . "

4. The instant action was filed on August 3, 1970.

/s/
THOMAS A. FLANNERY
United States Attorney

/s/
JOSEPH M. HANNON
Assistant United States Attorney

/s/
ROBERT M. WERDIG, JR.
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION OF DEFENDANT TO DISMISS
THE ACTION OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I.

Preliminary Statement

Plaintiff has attached to his complaint copies of letters written to the Department of Justice over a period of three years in which he 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, 196[illegible]. Also attached to the complaint are two responses from the Department of Justice in which plaintiff's requests are denied on the basis that such analyses are part of an "investigatory file compiled for law enforcement purposes."

II.

Discussion

The sole basis upon which the Court's jurisdiction and the relief sought is evoked is 5 U.S.C. 552, the Public Information Act amendment to the Administrative Procedure Act. The purpose of the Act, as explained by the Attorney General in his "Memorandum on the Public Information Section of the Administrative Procedure Act," June 1967,

is to make "information available to members of the public unless it comes within specific categories of matters which are exempt from public disclosure." p. 1. Among the specific categories of documents which are exempt are:

> "(b)(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." [Emphasis added.]

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. In Barceloneta Shoe Corp. v. Compton the Court stated:

> "In general terms I agree with the Attorney General's analysis of the nature and scope of the exemption, in his Memorandum of the Public Information Section of the Administrative Procedure Act, dated June, 1967, wherein he 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 investigatory 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 statement to be made available to the public. In addition, the House report makes 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 proceedings.' (H. Rept. 11)."
>
> "As I suggested before, Congress could not have intended to grant lesser rights of inspection and copying of witnesses' statements to persons who are faced with the deprivation of their life or liberty, than to persons faced only with remedial administrative orders under regulatory statutes." 271 F. Supp. 591, 592-593 (D.P.R., 1967)

To like effect is the decision in Clement Brothers Co. v. NLRB with which the Fifth Circuit has stated it "fully concurs", NLRB v. Clement Brothers Co., 407 F.2d 1027 (5 Cir., 1969):

"Though the Court does not feel that it is necessary to reiterate an exhaustive documentation of the Act's legislative history, the following statement is exemplary of numerous others which make it clear that the plaintiff's interpretation must be rejected:

> '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. H.R. Report #1497, 89th Cong., 2nd Sess., p. 11"

"In sum, it is clear that the plaintiff could obtain the employees' statements taken by the Board if the employees had been called to testify -- in fact, the plaintiff was given access to the statements, of the employees who did so testify. However, the plaintiff is not entitled to employee statements absent such use." 282 F. Supp. 540, 542 (ND Ga. 1968).

In the instant case, since the records plaintiff seeks have not been made part of any record in any agency proceeding he may not obtai them "absent such use."

It is significant that the language Congress chose, "compiled for law enforcement purposes" was criticised at hearings on the proposed legislation as unduly restrictive. 89th Cong., 1st Session, Hearings on H.R. 5012 before the House Committee on Government Operations, pp. 245-247. Notwithstanding this criticism, Congress enacted exemption 7 as referred to above because it thought the broad protection against disclosure contained therein necessary to effective operation of the agencies which compile investigation reports. In addition, the legislative history of the act states, explicitly: "[t]he FBI would be protected under exemption No. 7 prohibiting disclosure of 'investigator files.'" 89th Cong., 2nd Sess., Cong. Record, p. 13026. The speaker quoted above, Representative Gallagher, a strong supporter of the Act, also stated, the bill containing exemption 7: "prevents the disclosure of . . . 'sensitive' Government information <u>such as FBI files</u> . ... ." [Emphasis added.]

This Court has had occasion only recently to speak on the matter of FBI file disclosure.

> "The public policy in favor of maintaining the secrecy of FBI investigative reports has been recognized by Congress. In passing the Freedom of Information Act, which greatly expanded the information which government agencies must make available to the public, the Congress explicitly exempted from its coverage [5 U.S.C. 552(b)(7)]
>
> * * *
>
> "While these cases [Alderman v. United States, 394 U.S. 165 and Taglianetti v. United States, 394 U.S. 316, both criminal appeals] are not binding in that the scope of discovery in criminal cases is not as broad as in civil cases, they do show the concern of the Supreme Court for the secrecy and sanctity of the FBI investigative files.
>
> "It is thus apparent that the information sought by the plaintiff comes within the government's right to protect information which, if released, might be harmful to the public interest. The results of investigations of alleged criminal activity are by their nature the type of information that the public interest requires be kept secret." Black v. Sheraton Corp. of America, 50 F.R.D. 130, 132-133 (D D.C. 1970). [Emphasis added.]

III

Conclusion

From the foregoing, it is obvious that the 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. The prohibition was enacted after criticism and discussion on the floor of Congress. The Congressional intent has been interpreted by the courts of this and other jurisdictions in unanymity. Plaintiff is not entitled to the spectographic analyses sought and the Court should enter judgment in favor of the defendant and dismiss the action.

/s/
THOMAS A. FLANNERY
United States Attorney

/s/
JOSEPH M. HANNON
Assistant United States Attorney

/s/
ROBERT M. WERDIG, JR.
Assistant United States Attorney