COMMENTS

THE "INVESTIGATORY FILES" EXEMPTION TO THE FREEDOM OF INFORMATION ACT

Weisberg v. U.S. Department of Justice, 489 F.2d 1195 (D.C. Cir. 1973)

Appellant Weisberg, author of a series of books on political assassinations, sought disclosure of the spectrographic analyses[1] compiled by the Federal Bureau of Investigation (FBI) during its investigation of the assassination of President Kennedy. After exhausting administrative remedies,[2] Weisberg sued to compel disclosure pursuant to the Freedom of Information Act.[3] The Department of Justice contended that the records were investigatory files compiled for law enforcement purposes and exempt from disclosure under the statute.[4] The Court of Appeals for the District of Columbia[5] *held*: Records properly classi-

1. Appellant sought "[s]pectrographic 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 of Governor Connally." Weisberg v. U.S. Dep't of Justice, 489 F.2d 1195, 1197 n.3 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). Spectrographic analysis is a common scientific technique by which the precise composition of minute quantities of material can be determined. Bullet and bullet fragments can be determined to be from a particular batch from a specific manufacturer. Brief for Appellant, App. at 2, Weisberg v. U.S. Dep't of Justice, *supra*.

2. Weisberg repeatedly sought release of the information orally and in writing, for a period of four years before initiation of this action. Brief for Appellant, App. at 3-27, Weisberg v. U.S. Dep't of Justice, 489 F.2d 1195 (D.C. Cir. 1973). Exhaustion of administrative remedies is required under the Freedom of Information Act, 5 U.S.C. § 552 (1970). *See, e.g.*, Tuchinsky v. Selective Serv. Sys., 294 F. Supp. 803 (N.D. Ill.), *aff'd*, 418 F.2d 155 (7th Cir. 1969).

3. 5 U.S.C. § 552 (1970).

4. *Id.* § 552(b) provides:

> This section does not apply to matters that are—
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> . . . .
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> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
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> . . . .

5. The district court dismissed without opinion, but a three-judge panel of the court of appeals remanded, stating that the agency had not sustained the burden of proving either specific harm as a result of disclosure or anticipated use of the file for law en-

fied as investigatory files are exempt from public disclosure, even after enforcement proceedings are no longer contemplated, without proof that disclosure would result in specific harm to the investigatory function.[6]

The first statutory plan to provide public access to governmental information, section three of the Administrative Procedure Act,[7] proved largely ineffectual.[8] The Freedom of Information Act,[9] passed in 1966 after a decade of congressional inquiry,[10] was an attempt to create an

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forcement purposes. The instant decision was rendered by the court of appeals on rehearing en banc. A petition for a second rehearing en banc was denied. The Supreme Court denied certiorari. 416 U.S. 993 (1974).

6. Weisberg v. U.S. Dep't of Justice, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

7. Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946). Section 3, entitled "Public Information," exempted from disclosure records "requiring secrecy in the public interest" or "relating solely to the internal management of an agency," final opinions and orders required "for good cause to be held confidential," and official records sought by persons not "properly and directly concerned." There was no remedy provided for an individual wrongly denied access to the Government's records.

8. Agencies used the ambiguous language of the statute to withhold information generally. In a frequently cited example, the Secretary of the Navy ruled that "telephone directories fall in the category of information relating to the internal management of the Navy," citing § 3 of the Administrative Procedure Act as statutory authority. H.R. REP. No. 1257, 87th Cong., 1st Sess. 77-82 (1962). In addition to executive classifications such as "Top Secret," "Secret," and "Confidential," used in matters of national defense, twenty-four separate terms were created ranging from a succinct "Nonpublic" to an imposing "Limitation on Availability of Equipment Files for Public Reference." H.R. REP. No. 1497, 89th Cong., 2d Sess. 5 (1965). The Senate Committee on the Judiciary stated:

> It is the conclusion of the committee that the present section of the Administrative Procedure Act is of little or no value to the public gaining access to the records of the Federal Government. Indeed, it has 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. 5 (1965) [hereinafter cited as SENATE REPORT]. For further criticism of the Act, see H.R. REP. No. 918, 88th Cong., 1st Sess. 5 (1963). *See also* Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261 (1970); Moss, *Public Information Policies, the APA, and Executive Privilege*, 15 AD. L. REV. 111 (1963); Comment, *The Freedom of Information Act: Access to Law*, 36 FORDHAM L. REV. 765 (1968); Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO. L.J. 18 (1967).

9. 5 U.S.C. § 552 (1970) (originally enacted as Act of June 5, 1967, Pub. L. No. 90-23, § 1, 81 Stat. 54). The major changes incorporated in the Act were (1) providing access to any person, (2) shifting the burden of proof to the agency to justify nondisclosure, (3) providing district court de novo review when exemptions are granted, and (4) creating specific exemptions from disclosure.

10. *See generally Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the*

enforceable right of access to the records of government agencies. To implement this purpose, the Act was designed to provide mandatory disclosure, limited only as "specifically stated" in nine exemptions.[11]

The seventh exemption, section 552(b)(7), protects "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."[12] Although this exemp-

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Judiciary, 89th Cong., 1st Sess. (1965); *Hearings on H.R. 5012-21, 5237, 5406, 5520, 5583, 6172, 6739, 7010, and 7161, Federal Public Records Law, Before the Subcomm. of the House Comm. on Governmental Operations*, 89th Cong., 1st Sess. (1965); *Hearings on S. 1663, Administrative Procedure Act, Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. (1964); *Hearings on Government Information, Plans and Policies, Before a Subcomm. of the House Comm. on Government Operations*, 88th Cong., 1st Sess. (1963); *Hearings on S. 1160 and S. 1663, Freedom of Information, Before a Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963); *Hearings on S. 921, Freedom of Information and Secrecy in Government, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess. (1958).

11. *See* H.R. REP. No. 1497, 89th Cong., 2d Sess. (1966) [hereinafter cited as HOUSE REPORT]; SENATE REPORT. 5 U.S.C. § 552(b) (1970) provides:

> This section does not apply to matters that are—
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> (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
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> (2) related solely to the internal personnel rules and practices of an agency;
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> (3) specifically exempted from disclosure by statute;
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> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
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> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency;
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> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
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> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
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> (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
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> (9) geological and geophysical information and data, including maps, concerning wells.

Section (c) of the Act states that the Act "does not authorize withholding of information or limit the availability of records to the public, except as *specifically stated* in this section." *Id.* § 552(c) (1970) (emphasis added). *See generally* Note, *The Freedom of Information Act—The Parameters of the Exemptions*, 62 GEO. L.J. 177 (1973).

12. 5 U.S.C. § 552(b)(7) (1970). The phrase "except to the extent available by law to a party other than an agency" underwent several changes during the legislative debate and codification. *See* S. REP. No. 248, 90th Cong., 1st Sess. 1-2 (1967); H.R. REP. No. 125, 90th Cong., 1st Sess. 1-2 (1967). The phrase is capable of two interpretations: (1) records available by law to any individual must be disclosed to the public, and (2) any independent right of access to a litigant is merely preserved by the clause.

tion was included in the Act to prevent the compromise of government investigations and enforcement proceedings,[13] its vague language[14] and cursory and conflicting legislative history[15] have forced the courts to de-

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The first alternative is advocated in Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 800 (1967), *reprinted and updated*, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A (3d ed. 1972); the second alternative is adopted by the U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT III, at 307 (1967) [hereinafter cited as ATT'Y GEN. MEMO.]. The former interpretation would provide public access to all discoverable documents, while the latter would operate in the manner of the Jencks Act, 18 U.S.C. § 3500 (1970), permitting discovery by a litigant but not requiring public disclosure.

Weisberg contended that had Lee Harvey Oswald lived he would have had a legal right to the spectrographic analyses, and thus Weisberg was entitled to disclosure as a matter of right. The appellate court rejected the argument, construing the phrase to grant a right "only to the extent that the wanted material could have been 'available by law' and then only to himself as a party . . . ." 489 F.2d at 1203 n.15.

13. "These are files prepared by government agencies to prosecute law violators. The disclosure of such files, except to the extent they are available by law to a private party, could harm the government's case in court." SENATE REPORT 11. The House reiterated this purpose, but expanded law enforcement to cover "investigatory files related to enforcement of all kinds of laws, labor and securities as well as criminal laws." HOUSE REPORT 7-11. Courts and commentators have agreed with the House that the exemption covers law enforcement activities of every nature, administrative as well as criminal. *See, e.g.*, Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); Clement Bros. Co. v. NLRB, 407 F.2d 1027 (5th Cir. 1969); Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D.P.R. 1967); ATT'Y GEN. MEMO. at 38; K. DAVIS, *supra* note 12, § 3A.2. *See also* note 15 *infra*.

14. The entire Freedom of Information Act has been vigorously attacked as being so poorly drafted that agencies can employ the confusing legislative history and ambiguous language to circumvent the disclosure purpose of the Act. *See generally* H.R. REP. No. 92-1419, 92nd Cong., 2d Sess. 20 (1972); Fellmuth, *The Freedom of Information Act and the Federal Trade Commission: A Study in Malfeasance*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 345 (1969); Huard, *The 1966 Public Information Act: An Appraisal Without Enthusiasm*, 2 PUB. CONTRACT L.J. 213 (1969); Katz, *supra* note 8; Nader, *Freedom of Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970).

15. *Compare* SENATE REPORT *with* HOUSE REPORT. The conflict over the interpretation of § (b)(7) is accentuated by the cursory treatment in the House and Senate Reports. *See* HOUSE REPORT 11; SENATE REPORT 9. Under the Senate view, an agency seemingly would have to intend to prosecute, but not under the House approach. A more explicit tentative draft of the exemption stated that files were exempted only "until they are used in or affect an action or proceeding or a private party's effective participation therein." 110 CONG. REC. 17666-68 (1964).

The *Attorney General's Memorandum* adopts the view of the *House Report*, and is most often relied on by the agencies, presumably because the Department of Justice functions as the attorney for the agencies in litigation. The *Senate Report* has been characterized as the more faithful to congressional intent. *See* Getman v. NLRB, 450 F.2d 670, 673 n.8 (D.C. Cir.), *stay denied*, 404 U.S. 1204 (1971); Benson v. General

fine its substantive meaning and application. Since a broad reading of the exemption might defeat the disclosure purpose of the statute,[16] the courts have attempted to impose limitations on the protection afforded by the exemption. The two approaches[17] used by the circuit courts to give meaning to the section reflect disagreement over the purpose of the exemption,[18] and have resulted in conflicting decisions.[19]

Under the temporal approach, adopted in the District of Columbia and Fourth Circuits,[20] the courts have viewed the purpose of the seventh exemption as prevention of premature disclosure of the Government's case in court.[21] Thus, when the investigation and

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Servs. Administration, 415 F.2d 878, 880 (9th Cir. 1969); Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298, 1304 (D.D.C. 1973); Consumers Union of the United States v. Veterans Administration, 301 F. Supp. 796, 801 (S.D.N.Y.), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971); Davis, *supra* note 12, at 763:

> In general, the Senate Committee is relatively faithful to the words of the Act, and the House Committee ambitiously undertakes to change the meaning that appears in the Act's words. The main thrust of the House Committee remarks . . . is always in the direction of nondisclosure.

16. K. DAVIS, *supra* note 12, § 3A.1.

17. *See* notes 21 & 28 *infra* and accompanying text.

18. In Cowles Communication, Inc. v. Department of Justice, 325 F. Supp. 726, 727 (N.D. Cal. 1971), the court stated:

> If [Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970), Wellford v. Hardin, 315 F. Supp. 175 (D. Md. 1970), and Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708 (E.D. Pa. 1968)] are authority for the proposition that any investigatory file becomes the subject of private discovery when it is demonstrated that the file will not be used in a law enforcement proceeding, then I do not follow them. The language of the Act is clear. It protects investigatory files compiled for law enforcement purposes. A file is no less compiled for law enforcement purposes because after the compilation it is decided for some reason there will be no law enforcement proceeding. I think no resort to legislative history is needed to clarify what the language of the Act itself makes clear. But if the legislative history is considered, in my opinion it confirms the existence of the privilege.

19. *Compare* Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971), *and* Bristol-Myers v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), *with* SEC v. Rankel, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 73 (1972), *and* Evans v. Department of Transp., 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

20. Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971); Bristol-Myers v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

21. Getman v. NLRB, 450 F.2d 670 (D.C. Cir.), *stay denied*, 404 U.S. 1204 (1971); Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971); Bristol-Myers v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); *accord*, Philadelphia Newspapers, Inc. v. HUD, 343 F. Supp. 1176 (E.D. Pa. 1972); M.A. Shapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708 (E.D. Pa. 1968); *see* Clement Bros. Co. v. NLRB, 407 F.2d 1027 (5th Cir. 1969) (documents obtained by NLRB in investigation of alleged unfair labor practice not disclosed to employer in pending proceeding); Barceloneta Shoe Corp. v. Compton,

enforcement proceeding for which the records were compiled have concluded, or if there is no realistic prospect of an enforcement proceeding, the records cease to be protected. In *Bristol-Myers v. FTC*,[22] the District of Columbia Court of Appeals stated that the district court must determine "whether the prospect of enforcement proceedings [was] concrete enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the company [were] nevertheless discoverable."[23] The Fourth Circuit concluded in *Wellford v. Hardin*[24] that since the purpose of the exemption was "to prevent premature discovery by a defendant in an enforcement proceeding,"[25] records of past enforcement proceedings were not exempted even if included in current investigatory files.[26]

In the second approach, a functional analysis employed by the Second and Fifth Circuits,[27] the courts have read the purpose of the

271 F. Supp. 591 (D.P.R. 1967) (investigatory files compiled by NLRB for unfair labor practice hearing exempted to protect pending litigation and names of employees providing information).

22. 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

23. *Id.* at 939-40.

24. 444 F.2d 21 (4th Cir. 1971). A case of the same style and substantially similar facts was before the District Court for the District of Columbia. Although the court granted access to some of the requested documents, it refused to disclose information containing the names of companies previously cited for violations of Department of Agriculture pesticide regulations despite conclusion of the litigation. Wellford v. Hardin, 315 F. Supp. 768 (D.D.C. 1970).

25. 444 F.2d at 23.

26. *Id.* at 24-25. *Wellford* indicates that the exemptions as "specifically stated" are the statutory limit on nondisclosure, *accord*, Getman v. NLRB, 450 F.2d 670, 677 (D.C. Cir.), *stay denied*, 404 U.S. 1204 (1971); Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971), and the scope of the exemptions cannot be enlarged through the exercise of equity jurisdiction. *See* Wellman Indus., Inc. v. NLRB, 490 F.2d 427, 429 (4th Cir. 1973); Robles v. EPA, 484 F.2d 843, 847 (4th Cir. 1973); Hawkes v. IRS, 467 F.2d 787, 792 n.4 (6th Cir. 1972); Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 661-62 (6th Cir. 1972). *Contra*, Benson v. General Servs. Administration, 415 F.2d 878, 880 (9th Cir. 1969); Consumers Union of the United States v. Veterans Administration, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

The balancing of interests was one of the loopholes in the 1946 version of the Act since rarely will an individual's interest outweigh that of the Government. The committee reports give some evidence that a congressional balancing was used when drafting the Act, thus preempting judicial equity jurisdiction. HOUSE REPORT 6; SENATE REPORT 3. A more recent report criticizes judicial balancing. H.R. REP. No. 92-1419, 92d Cong., 2d Sess. 76-77 (1972).

27. SEC v. Frankel, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 73 (1972); Evans v. Department of Transp., 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

exemption as protection of agency investigatory techniques and the identity of informants.[28] Under this rationale, investigatory files are protected even after the termination of enforcement proceedings because compelled disclosure might impair future law enforcement efforts. The Fifth Circuit, in *Evans v. Department of Transportation*,[29] exempted from disclosure files that would reveal the name of an informant in a case that had appeared before the Federal Aviation Administration eleven years earlier.[30] In *SEC v. Frankel*,[31] the Second Circuit refused disclosure of an investigatory file compiled by the SEC despite resolution of the proceedings in a consent decree. The court noted that the SEC relied on the voluntary cooperation of informants, and disclosure would thus hinder the law enforcement function of the agency.[32]

In *Weisberg v. U.S. Department of Justice*,[33] the District of Columbia Court of Appeals foreclosed either a temporal or a functional approach by restricting judicial review to a determination of whether the records[34] were properly classified.[35] The court did not discuss *Bristol-Myers* and,

28. SEC v. Frankel, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 73 (1972); Evans v. Department of Transp., 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726 (N.D. Cal. 1971).

29. 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

30. After *in camera* inspection, the court released all but one document containing an informant's name. *Id.* at 825. The court also relied on § (b)(3), which exempts from disclosure information protected by another statute. 5 U.S.C. § 552(b)(3) (1970). 49 U.S.C. § 1504 (1970) requires secrecy for information concerning the safety of airline passengers.

31. 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 73 (1972), *noted in* 51 TEXAS L. REV. 119 (1972).

32. 460 F.2d at 817. In *Frankel*, the investigatory file was in excess of 7,000 pages. The entire file was exempted despite the fact that the names of the witnesses sought to be protected had already been disclosed. *Id.* at 819 n.3 (Oakes, J., dissenting). Compare *Frankel* with Wellford v. Hardin, 441 F.2d 21, 24 (4th Cir. 1971) in which the court stated that since all possible defendants had access to the documents sought, protection of investigatory techniques or informants was inapposite.

33. 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

34. Throughout the opinion the court, somewhat misleadingly, referred to the spectrographic analyses sought by Weisberg as materials or "records" (court's quotation marks). In fact, the actual physical evidence from which the reports were compiled was never requested, and appellant did not seek to conduct tests on the materials themselves. *See* note 1 *supra*. In Nichols v. United States, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972), the petitioner sought the actual evidence of the Kennedy assassination in order to conduct neutron activation analysis, a similar but more sophisticated technique than spectrographic analysis. The court denied disclosure since physical evidence is not discoverable under the Act.

35. Section (a)(3) of the Act authorizes the district court to determine de novo

although the *Frankel* decision was cited as authority,[36] the court did not attempt a functional analysis. Rather, the court cited *EPA v. Mink*,[37] in which the Supreme Court, denying disclosure under subsection (b)(1),[38] stated that executive security classifications would not be subjected to judicial scrutiny[39] and specifically rejected the use of *in camera* inspection.[40] Thus, the court in *Weisberg*, documenting the massive investiga-

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that the information is within one of the exemptions. Most courts have determined through *in camera* inspection that records were properly classified as exempt. *See* note 40 *infra*. In Vaughn v. Rosen, 484 F.2d 820, 826-27 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), the court of appeals stated that conclusory and generalized allegations would not be sufficient, particularly where exemption was sought for a large quantity of material under three separate exemptions. The court remanded for *in camera* inspection to separate and disclose factual material not protected by the claimed exemption.

Crucial to the determination is whether records not otherwise entitled to protection are exempted solely by their presence among legitimately classified records. "Commingling," *i.e.* innocently or ingenuously placing documents not compiled for law enforcement purposes, or otherwise not privileged, in an investigatory file, has been cited by commentators as a present loophole in the statute. *See generally* Fellmuth, *supra* note 14; Katz, *supra* note 8; Nader, *supra* note 14.

36. 489 F.2d at 1199. The opinion cites *Bristol-Myers* only in passing, and not in the context of the proper approach to the § (b)(7) exemption. *Id.*

37. 410 U.S. 73 (1973), *rev'g*, 464 F.2d 742 (D.C. Cir. 1971). The Court of Appeals for the District of Columbia had reversed and remanded to the district court for *in camera* inspection to determine

> whether, and to what extent, the file contains documents that are now within the umbrella of a secret file but which would not have been independently classified as secret. Such documents are not entitled to the secrecy exemption of subdivision (b)(1) solely by virtue of their association with separately classified documents.

464 F.2d at 746. The court applied the same criteria to § (b)(5). *See* note 57 *infra*.

38. For the text of § (b)(1), see note 11 *supra*.

39. 410 U.S. 73, 84 (1973). The Court stated that Congress intended the test for exemption under § (b)(1) "to be simply whether the President has determined by Executive Order that particular documents are to be kept secret." *Id.* at 82. In *Mink*, there was no factual dispute that the records had been so classified by Executive Order.

40. *In camera* inspection has been used consistently by the courts in making judgments on disclosure and in determining proper classification. *See* Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); Fisher v. Renegotiation Bd., 473 F.2d 109 (D.C. Cir. 1972); Sterling Drug Co. v. FTC, 450 F.2d 698 (D.C. Cir. 1971); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); Evans v. Department of Transp., 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970); Bristol-Myers v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969); Williams v. IRS, 345 F. Supp. 591 (D. Del. 1972) (*in camera* inspection granted at request of plaintiff); M.A. Shapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972); Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726 (N.D. Cal. 1971). *But see* EPA v. Mink, 410 U.S. 73 (1973); Epstein v. Resor, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970) (refused *in camera* inspection for information sought to be withheld under § (b)(1)).

tion launched by the FBI in the wake of the Kennedy assassination,[41] "deem[ed] it demonstrated beyond peradventure" that the FBI files were investigatory and compiled for law enforcement purposes,[42] and "as such, [were] exempted from the disclosure sought to be compelled."[43]

The decision in *Weisberg* represents a significant departure from the District of Columbia Circuit's prior decisions under the Act,[44] particu-

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The House of Representatives recently passed a bill to amend the Act. H.R. 12471, 93d Cong., 2d Sess. (1974). The bill would amend § (a) of the Act to authorize *in camera* review of records under any of the exemptions in § (b), including classified documents under § (b)(1). *See* note 61 *infra* and accompanying text.

41. Quoting from the Foreword to the *Warren Commission Report*, the court noted that the FBI conducted 25,000 interviews and filed 2,300 reports totalling more than 25,400 pages in the course of its investigation of the assassination of President Kennedy. 489 F.2d at 1198.

42. *Id.* Weisberg also contended that the FBI would have been without jurisdiction to initiate an enforcement proceeding since in 1963 it was not a federal offense to assassinate a President. *See* Act of Aug. 28, 1965, Pub. L. No. 89-141, 79 Stat. 580 (codified at 18 U.S.C. § 1751 (1970)). *See also* Exec. Order No. 11130, 28 Fed. Reg. 12789 (1963) (created Warren Commission). The court, however, stated that the President could authorize the FBI to initiate investigations and cooperate in law enforcement proceedings with state authorities. 489 F.2d at 1197-98.

43. 489 F.2d at 1197. In dissent, Chief Judge Bazelon acknowledged that the requested records were investigatory files compiled for law enforcement purposes, but argued that, without evidence of specific harm or pending law enforcement proceedings, conclusory labelling defeated the disclosure purpose of the Act. Reiterating the test administered in *Bristol-Myers, see* note 23 *supra* and accompanying text, he advocated *in camera* inspection to determine if the records were discoverable.

In camera inspection was also urged since portions of the spectrographic analyses had been published in the *Warren Commission Report*. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 77, 84-85, 91-95, 116 (1964). In American Mail Line, Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1969), the court held that the Government waived its right to claim an exemption under § (b)(5), *see* note 56 *infra*, if it publicly relied upon the records sought to be disclosed. It is questionable whether this reasoning would compel disclosure of the spectrographic analyses in *Weisberg*. Despite government reliance on the *Warren Commission Report*, the records sought in *Weisberg* had not been employed as a final order by an agency, as had the records in *Gulick*. Furthermore, the two cases involved different exemptions.

44. The District of Columbia Court of Appeals has consistently interpreted the Act to facilitate disclosure. *See, e.g.*, Cuneo v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973) (burden on agency to provide specific justification for nondisclosure); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (burden on agency to justify nondisclosure; *in camera* inspection to sever disclosable documents); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 482 F.2d 710 (D.C. Cir. 1973) (disclosure under § (b)(5) exemption not contrary to policy of exemption); National Cable Television Ass'n. v. FCC, 479 F.2d 183 (D.C. Cir. 1973) (agency must share burden of identifying records sought); Fisher v. Renegotiation Bd., 473 F.2d 109 (D.C. Cir. 1972) (*in camera* review by district court to determine disclosure); Sterling Drug Co. v. FTC, 450 F.2d 698 (D.C. Cir. 1971) (*in camera* inspection to determine discoverabil-

larly the court's interpretation of the subsection (b)(7) exemption in *Bristol-Myers*.[45] The failure of the court to discuss *Bristol-Myers* and its stated reliance on *Frankel* leave the proper construction of subsection (b)(7) open to several interpretations.[46] The court may have overruled *Bristol-Myers* sub silentio, and accepted the functional analysis utilized by the Second Circuit as the correct approach.[47] Unlike the *Frankel* decision, however, which applied the functional analysis to the specific records sought,[48] the court in *Weisberg* did not demonstrate how disclosure of the records sought by Weisberg would prejudice agency procedures or informants' confidentiality.[49] The spectrographic analyses, specific identifiable scientific records,[50] seem

ity after deletions); Getman v. NLRB, 450 F.2d 670 (D.C. Cir.), *stay denied*, 404 U.S. 1204 (1971) (documents discoverable unless protected as specifically stated in exemptions); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (documents of executive office discoverable after *in camera* inspection); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970) (*in camera* inspection to determine if records properly classified under § (b)(4)); Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969) (*in camera* inspection to determine if medical records were properly classified under § (b)(6)); American Mail Line, Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1969) (§ (b)(5) documents not exempt if publicly declared to be basis for agency action).

45. *Compare* Weisberg v. U.S. Dep't of Justice, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, — U.S. — (1974), *with* Bristol-Myers v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

46. The court stated: "We need only surmise the consequences to law enforcement if any 'person,' knowing full well that an investigation has been conducted, can ask some federal court to compel disclosure of the Bureau's files." 489 F.2d at 1201. Continued emphasis on the fact that the files in question were FBI files may indicate that the court believed FBI records should be accorded a higher standard of protection. The legislative history does not support this interpretation, although FBI files are mentioned as examples in the legislative reports. HOUSE REPORT 2; SENATE REPORT 3. In Stern v. Richardson, 367 F. Supp. 1316 (D.D.C. 1973), decided while the *Weisberg* en banc decision was pending, the court ruled against the Government on the § (b)(7) exemption after viewing the documents *in camera*.

47. In subsequent cases, the court has treated *Bristol-Myers* only in Aspin v. Laird, 491 F.2d 24 (D.C. Cir. 1974). The court there distinguished *Bristol-Myers* on its facts and limited its future application to situations where no law enforcement proceeding was contemplated and none had been conducted in the past. *Id.* at 29. For additional cases see note 59 *infra*.

48. SEC v. Frankel, 460 F.2d 813, 818 (2d Cir.), *cert. denied*, 409 U.S. 73 (1972).

49. *See* notes 31-32, 36 *supra* and accompanying text. In *Weisberg* the court expressed only a general concern for the protection of FBI files. 489 F.2d at 1201. *See also* note 46 *supra*.

50. The records sought must be identified with such specificity that the agency can produce them without inordinate difficulty. 5 U.S.C. § 552(a)(3) (1970). *See* Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 482 F.2d 710 (D.C. Cir. 1973); National Cable Television Ass'n v. FCC, 479 F.2d 183 (D.C. Cir. 1973); Irons v. Schuyler, 465 F.2d 608 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972).

unlikely to contain such information, and their use in an enforcement proceeding seems even less likely.[51]

A second interpretation of the *Weisberg* decision is that the court adopted a literal approach to the subsection (b)(7) exemption, *i.e.* once a court has determined that the records are properly classified as investigatory files compiled for law enforcement purposes, the exemption attaches.[52] This interpretation is supported by the court's reliance on *EPA v. Mink*,[53] since parallel reasoning applied to subsection (b)(7) would obviate either a temporal or functional approach. In *Mink*, the records sought to be withheld under the subsection (b)(l) exemption, which protects information required to be kept secret in the interest of national defense or foreign policy,[54] were given a blanket immunity following classification by Executive Order. The Supreme Court stated that *in camera* inspection would not be employed to determine if records were properly classified under subsection (b)(1).[55] The Court, however, afforded different treatment to the internal memoranda sought to be withheld under subsection (b)(5),[56] remanding to the district court for an *in camera* determination that the records were properly exempt.[57] The *Weisberg* court characterized *in camera* review as permissible, not mandatory, but declined to inspect the documents.[58]

Weisberg has been consistently cited as precedent in subsequent cases for a literal reading of subsection (b)(7).[59] The elimination of

51. Courts have employed *in camera* inspection to separate specific, discoverable documents included in a larger record protected by an exemption. *See, e.g.*, Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); notes 40 & 43 *supra*.

52. *See* note 59 *infra*.

53. 410 U.S. 73 (1973).

54. *See* note 11 *supra*.

55. *See* note 39 *supra*.

56. For the text of § (b)(5), see note 11 *supra*.

57. Under § (b)(5), the District of Columbia Court of Appeals has consistently employed *in camera* inspection to determine if nondisclosure was justifiable. *See* Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); Sterling Drug Co. v. FTC, 450 F.2d 698 (D.C. Cir. 1971); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); Bristol-Myers v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969); American Mail Line, Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1969).

58. 489 F.2d at 1203.

59. Rural Housing Alliance v. United States Dep't of Agriculture, 498 F.2d 73 (D.C. Cir. 1974); Center for Nat'l Policy Review v. Weinberger, Civil No. 73-1090 (D.C. Cir., May 21, 1974); Ditlow v. Brinegar, 494 F.2d 1073 (D.C. Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3668 (U.S. May 28, 1974) (No. 1780); Aspin v.

a temporal or functional approach to the exemption effectively confines the judicial function under the Act to acquiescence in agency labeling.[60] On November 21, 1974, amendments to the Act were passed over the veto of President Ford.[61] Concerning subsection (b)(7), the conference report specifically noted that the exception for investigative techniques and procedures "should not be interpreted to include routine techniques and procedures already well known to the public, such as ballistics tests, fingerprinting, and other scientific tests or commonly known techniques."[62] It remains to be seen whether the newest amendments will avert the impact of *Weisberg* and ensure public access to government-held information.

Laird, 491 F.2d 24 (D.C. Cir. 1974). *But see* Black v. Sheraton, 371 F. Supp. 97 (D.D.C. 1974) (despite disposition of *Weisberg*, court cites *Bristol-Myers* as controlling authority).

60. Conclusory labelling, or the danger thereof, has been criticized. *See* 489 F.2d at 1206 (Bazelon, C.J., dissenting); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969).

61. Act of Nov. 21, 1974, Pub. L. No. 93-502, § 2(b), 88 Stat. 1561, *amending* 5 U.S.C. § 552 (1970). Subsection (b)(7) was amended to read as follows:

> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

U.S. CODE CONG. & AD. NEWS, 93d Cong., 2d Sess. 5761 (Dec. 15, 1974).

62. S. CONF. REP. No. 93-1200, 93d Cong., 2d Sess. 7 (1974).