St. Mary's Law Journal

Volume 4 | Number 2 Article 8

6-1-1972

The Government May Withhold Investigatory Materials Compiled for a Law Enforcement Proceeding Which Has Been Terminated.

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of subrogation should such a solution prevail.[53] Surely the injured employee in *Campbell* took no overt action to compromise the carrier's rights. He was in fact acting within the statutory provisions of an act intended manifestly for his benefit, and which waived limitations on the filing of a claim to ensure the benefit would be received.

Myron E. East, Jr.

FREEDOM OF INFORMATION ACT—INVESTIGATORY FILES EXEMPTION—THE GOVERNMENT MAY WITHHOLD INVESTIGATORY MATERIALS COMPILED FOR A LAW ENFORCEMENT PROCEEDING WHICH HAS BEEN TERMINATED. *Frankel v. SEC*, 460 F.2d 813 (2d Cir. 1972).

The Securities and Exchange Commission inquired into various real estate transactions made by the Occidental Petroleum Corporation to determine whether these transactions had violated governmental regulations. During this investigation the Commission amassed over 7000 pages of testimony and other investigatory material relating to affairs of Occidental. With this information the Commission commenced a civil action against Occidental and its president, Armand Hammer, on March 4, 1971. Action was terminated by a consent decree handed down on March 5, on the basis of which the court entered judgment. On March 22, 1971, the plaintiffs, shareholders in Occidental Petroleum Corporation, initiated an action against Occidental and Hammer, alleging damages as a result of the violations of securities laws. The plaintiffs wished to use as their source of facts the material which the Commission had accumulated concerning the violations. The Commission withheld the documents and the plaintiffs instituted this suit to enjoin the Commission from withholding the material. The plaintiffs alleged that the Commission was withholding the documents in violation of the Freedom of Information Act.[1] The Commission's defense was that this information was exempt from disclosure "by virtue of the 'investigatory files' exemption."[2] The trial court held that the "investigatory files" exemption of the Freedom of Information Act only applies so long as

[53] The injured employee's release, compromise, or settlement of his claim with the third party, thus depriving the carrier of his right to subrogate, would exemplify such a situation.

[1] 5 U.S.C. § 552 (1970).

[2] Frankel v. SEC, 336 F. Supp. 675 (S.D.N.Y. 1971), *rev'd*, 460 F.2d 813 (2d Cir. 1972). The "investigatory files" exemption is cited as 5 U.S.C. § 552(b)(7) (1970). Three other exemptions were used in the defendant's behalf, but are not relevant to this case. They are: the "trade secrets" exemption, 5 U.S.C. § 552(b)(4) (1970), the "inter-agency and intra-agency memorandums" exemption, 5 U.S.C. § 552(b)(5) (1970), and the exemption for documents "specifically exempted from disclosure by statute," 5 U.S.C. § 552(b)(3) (1970). Frankel v. SEC, 460 F.2d 813 (2d Cir. 1972).

the agency is reasonably likely to be involved in litigation or law enforcement proceedings.[3] Held—*Reversed.* The "investigatory files" exemption may be used by a government agency to withhold information which they used in a law enforcement proceeding, even after the proceeding has been terminated.

The question of releasing government files to the public is one which has become increasingly more important and controversial in recent years.[4] The Administrative Procedure Act of 1946 established the basis for this area of the law.[5] That Act allowed for much discretion by the Government in withholding information from the public because it included vague and broad areas within which the Government could classify information as being exempt from disclosure.[6] Information was often withheld improperly under this Act, and at times federal agencies even used the "executive privilege"[7] to keep information bearing on the governmental process from being disclosed.

The Freedom of Information Act was the result of "over ten years of congressional study of the practices and procedures of the executive branch in the administration of national law."[8] The purpose of this Act, according to congressional reports,[9] was to abolish the "loopholes" of the Administrative Procedure Act and actually give the public greater access to the workings and operations of administrative agencies and the federal government in general. For example, one of the House Reports on the bill stated:

> In the time it takes for one generation to grow up and prepare to join the councils of Government—from 1946 to 1966—the law which was designed to provide public information about Government activities has become the Government's major shield of secrecy. S. 1160 will correct this situation. It provides the necessary

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[3] Frankel v. SEC, 336 F. Supp. 675, 678 (S.D.N.Y. 1971), *rev'd*,—F.2d—(2d Cir. 1972). The district judge narrowed the question by limiting the decision only to the "investigatory files" exemption. He eliminated the other exemptions cited above from decision by sending the files to a special master who was to judge how much of the files came under those exemptions. By doing this, the judge preserved all but the "investigatory files" exemption to the SEC.

[4] Most illustrative of this point are the scandalous "Pentagon papers," files of the United States Army which were released in 1971 by one Daniel P. Ellsberg.

[5] Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238 (now 5 U.S.C. § 552 [1970]).

[6] *See* H.R. REP. No. 1497, 89th Cong., 2d Sess. 12 (1966). Several commentaries also discuss the deficiencies of the Administrative Procedure Act, *e.g.*, Comment, *The 1966 Freedom of Information Act—Early Judicial Interpretations*, 44 WASH. L. REV. 641 (1969).

[7] This is a constitutional power which almost every President has asserted in order to withhold records when they felt it was necessary for national security. *See* Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 763-65 (1967) for a more exhaustive treatment of the subject.

[8] Frankel v. SEC, 460 F.2d 813, 815 (2d Cir. 1972).

[9] S. REP. No. 813, 89th Cong., 1st Sess. (1965); H.R. REP. No. 1497, 89th Cong., 2d Sess. (1966).

> machinery to assure the availability of Government information necessary to an informed electorate.[10]

It appears to be clear from these authorities that the basic purpose of the Act was to provide the electorate more information on the processes of the government which makes policy decisions affecting their everyday lives.

Several commentaries have been written about the Freedom of Information Act since it was passed. One of the earliest comments upon the Act is an analysis.[11] In this article, Professor Davis[12] goes into great detail on certain parts of the Act, often pointing out deficiencies in draftsmanship.[13] A very recent article states that the Act "has not fulfilled its advocates' most modest aspirations."[14]

The specific area of law discussed in the case involves one of the exemptions against disclosure of information which the federal government is accorded under the Freedom of Information Act. This exemption reads:

> (b) This section (of the Administrative Procedure Act) requiring agencies to make information available to the public does not apply to . . . (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.[15]

Senate and House Reports have examined the "investigatory files" exemption.

> This would include files prepared in connection with related Government litigation and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings.[16]

A Senate Report further states:

> Exemption No. 7 deals with "investigatory files compiled for law enforcement purposes." These are the files prepared by Government agencies to prosecute law violators. Their 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.[17]

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10 H.R. REP. No. 1497, 89th Cong., 2d Sess. 6 (1966).
11 Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967).
12 Kenneth Culp Davis is the John P. Wilson Professor of Law, University of Chicago Law School.
13 Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967).
14 Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261, 1262 (1970).
15 5 U.S.C. § 552(b)(7) (1970).
16 H.R. REP. No. 1497, 89th Cong., 2d Sess. 11 (1966).
17 S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965).

Thus, the legislative history of exemption (7) of the Freedom of Information Act indicates that its purpose was to allow the Government to withhold files which they are using in adjudicatory proceedings and which are not available to another party by law.[18] An eminent jurist bears this out when she explains, "Once litigation is concluded, disclosure is impliedly required."[19]

The majority holding in the case of *Frankel v. SEC*[20] appears to contrast somewhat with the legislative intent as set out above. In applying the legislative intent to the facts in the *Frankel* case, the court reasoned that Congress had two basic purposes in enacting the exemption for investigatory files. These were: (1) to prevent information used in litigation from being given out prematurely so that the government might present as strong a case as possible in court and (2) to keep secret the means and procedures by which the government obtained its information and conducted its investigation. "Both these forms of confidentiality are necessary for effective law enforcement."[21] The majority cites *Evans v. Department of Transportation*[22] as authority for their holding that the "investigatory files" exemption applies even when adjudicatory proceedings and all investigations have been terminated.

In *Evans*, the plaintiff tried to obtain possession of letters which had been written to the Federal Aviation Administration alleging him to be mentally unfit for service as a commercial airlines pilot. The suit was not filed until approximately six years after he had been examined and had been proven competent. He brought action to find out the identity of the letter writer.[23] The court denied the request, stating:

> We are of the further opinion that Congress could not possibly have intended that such letters should be disclosed once an investi-

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18 The phrase "which are not available to another party by law" concerns itself with the procedural process of discovery in an enforcement proceeding. Attorney General Clark explained this fairly well in discussing the Act:

> 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 a prior statement given to an FBI agent or an S.E.C. investigator by a witness who is testifying in a pending case; but since such statements might contain information unfairly damaging to the litigant or other persons, the new law, like the Jencks Act, does not permit the statement to be made available to the public.

ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE APA 38 (1967), *as quoted in* Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261, 1283 (1970).

19 Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261, 1279 (1970).

20 460 F.2d 813 (2d Cir. 1972).

21 *Id.* at 817.

22 446 F.2d 821 (5th Cir. 1971), *cert. denied*, — U.S. —, 92 S. Ct. 944, 30 L. Ed.2d 788 (1972).

23 *Id.* at 822.

> gation is completed. If this were so, and disclosure were made, it would soon become a matter of common knowledge with the result that few individuals, if any, would come forth to embroil themselves in controversy or possible recrimination by notifying the Federal Aviation Agency of something which might justify investigation.[24]

This reasoning provides the basis for one last argument which the majority makes in the *Frankel* case. The *Frankel* court contends that if an agency's investigatory files were given out, without limitation, after law enforcement proceedings had terminated, it would hinder the agency's law enforcement efforts in the future.[25] The court's reasoning is that if investigatory techniques and the names of informants were disclosed to the public, informants would be less likely to come to the agency with information in the future (knowing they might be revealed).[26] The majority concludes by saying that disclosure would not defeat the general purpose of The Freedom of Information Act, but would defeat important purposes of the exemption.[27]

The dissent attacks the majority's reasoning by explaining that the legislative intent behind the Freedom of Information Act in general is one of disclosure. In dissenting, Judge Oakes states:

> I think the Act contains an underlying recognition that disclosure of the workings of a government bureaucracy, which long since has suffered the 'curse of bigness,' can benefit the agency by increasing its sense of responsibility to the public. The Freedom of Information Act has as its aim, in other words, a delegation by Congress to the federal courts of the power to subject agency operations to public perusal. Behind this policy are some of the same considerations which underpin freedom of the press. . . .[28]

The dissent cites several cases to support its argument that the "investigatory files" exemption is not meant to apply after litigation has been completed involving those files.[29] Most of these cases explain that the purpose of the exemption is to prevent disclosure of investigatory material while law enforcement proceedings are in progress or are sure to be forthcoming, not after proceedings have been completed.[30]

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24 *Id.* at 824.
25 Frankel v. SEC, 460 F.2d 813, 817 (2d Cir. 1972).
26 *Id.* at 817.
27 *Id.* at 818.
28 *Id.* at 819.
29 *E.g.*, Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824, 91 S. Ct. 46, 27 L. Ed.2d 52 (1970); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708 (E.D. Pa. 1968).
30 *See, e.g.*, Wellford v. Hardin, 444 F.2d 21, 23 (4th Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir. 1970); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 711 (E.D. Pa. 1968).

Judge Oakes concludes by saying that through *in camera* examination of investigatory files, a district judge may safeguard informants and agency techniques.[31] This, he claims, makes the majority's argument concerning fear of exposure practically groundless and reduces the SEC's argument to the contention that files should not be disclosed to just "any person." Judge Oakes points out that plaintiffs are in litigation with Occidental and do not come under that category.[32]

An analysis of the reasoning of the majority in the *Frankel* case makes it clear that the Court of Appeals for the Second Circuit feels that the "investigatory files" exemption of the Freedom of Information Act is one which is to be construed broadly, giving the governmental agencies much discretion and a large area in which to declare information exempt. Under the court's interpretation of the exemption it appears that a federal agency might withhold investigatory files indefinitely after the litigation for which they were used has terminated. The Court of Appeals for the Fifth Circuit is cited as authority for this holding through the *Evans* case and *NLRB v. Clement Bros.*[33]

The court in the *NLRB* case states that in an earlier case they decided that files need not be disclosed after litigation has terminated. The court quotes from *Texas Industries, Inc. v. NLRB*[34] for most of their reasoning:

> It would seem axiomatic that if an employee knows his statements to Board agents will be freely discoverable by his employer, he will be less candid in his disclosures. The employee will be understandably reluctant to reveal information prejudicial to his employer when the employer can easily find out that he has done so. . . . In order to assure vindication of employee rights under the Act, it is essential that the Board be able to conduct effective investigations and secure supporting statements from employees. We feel that preserving the confidentiality of employee statements is conducive to this end.[35]

This appears to be very sound reasoning at first glance. However, the argument for safeguarding informants was refuted by Judge Oakes in his dissent in the *Frankel* case by his argument for the judge's *in camera* examination.[36] Another very interesting point is that the *Texas Indus-*

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[31] Frankel v. SEC, 460 F.2d 813, 818 (2d Cir. 1972). The Freedom of Information Act provides for a district court judge to take information or files of the government into his chambers (*in camera*) in order to decide whether they should be disclosed or not. Judge Oakes makes the point that if, in the judge's opinion, disclosure of the information would be harmful, he may forbid it.

[32] *Id.* at 820.

[33] 407 F.2d 1027, 1031 (5th Cir. 1969).

[34] 336 F.2d 128 (5th Cir. 1964).

[35] *Id.* at 134.

[36] Frankel v. SEC, 460 F.2d 813 (2d Cir. 1972) (dissenting opinion).

tries case was decided prior to the Freedom of Information Act. This means that the court in *NLRB* relied on a case for authority to explain the court's view of part of an act which had not been passed yet. The Freedom of Information Act appears to have had no effect on the Court of Appeals for the Fifth Circuit.

The dissent in the present case, while not attacking the actual authority which the majority cites as supporting their reasoning, does state:

> It is, therefore, not surprising that other respectable courts have taken a view differing from that of the majority today and of the Fifth Circuit in *Evans v. Department of Transportation* (citations omitted), upon which the majority relies.[37]

The dissenting judge cites *Bristol-Myers Co. v. FTC*,[38] a recent decision by the Court of Appeals for the District of Columbia which spoke of the Fredom of Information Act in general. "The legislative plan [of the Act] creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed."[39] Concerning the specific exemption in question, the court in *Bristol-Myers* wrote:

> 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 . . . .[40]

The *Bristol-Myers* case goes on to explain that the exemption should not be imposed unless "further adjudicatory proceedings are imminent."[41] Further litigation hardly appears imminent in the *Frankel* case. Moreover, in the *Frankel* case, the district court did determine that the prospect of litigation or enforcement proceedings was not concrete enough to apply the exemption.[42] Nevertheless, the majority appeared to ignore this and overruled the district court.[43]

The dissent cites more authority which holds for the proposition that the exemption should not apply after enforcement proceedings have terminated.[44] The Court of Appeals for the Fourth Circuit does not go

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37 *Id.* at 819.
38 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824, 91 S. Ct. 46, 27 L. Ed.2d 52 (1970).
39 *Id.* at 938.
40 *Id.* at 939.
41 *Id.* at 939.
42 Frankel v. SEC, 336 F. Supp. 675, 677 (S.D.N.Y. 1971), *rev'd*, 460 F.2d 813 (2d Cir. 1972).
43 Frankel v. SEC, 460 F.2d 813, 819 (2d Cir. 1972).
44 *E.g.*, Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708 (E.D. Pa. 1968).

specifically to the present question, but in *Wellford v. Hardin*[45] it reasons:

> We agree with the district court that the legislative history of this exemption reveals that its purpose was to prevent premature discovery by a defendant in an enforcement proceeding.[46]

Concerning the Act in general, the court in *Wellford* said:

> The Freedom of Information Act was not designed to increase administrative efficiency, but to guarantee the public's right to know how the government is discharging its duty to protect the public interest.[47]

A federal district court used much of the same language as *Wellford* in stating that the purpose of the "investigatory files" exemption is to "avoid a *premature* disclosure of an agency's case when engaged in law enforcement activities."[48]

In summary, the *Frankel* case has decided against the great weight of authority concerning the Freedom of Information Act and the "investigatory files" exemption under that Act. By protecting this government agency's information, the majority is going against the trend of cases and commentaries which interpret it as being enacted to give the public greater access to government operations. Specifically, the majority made it virtually impossible for a person to obtain any investigatory material from a governmental agency so long as the material was used in conjunction with law enforcement proceedings at any one time. Unfortunately, the majority refused to take into account the provision in the act for *in camera* examination by a district judge of the files. The dissenting judge used this provision most effectively to break down the majority's arguments against disclosure. Considering the recent emphasis on protection of the public and individual's rights,[49] this decision appears inconsistent with popular trends.

George Aaron Taylor

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45 444 F.2d 21 (4th Cir. 1971).
46 *Id.* at 23.
47 *Id.* at 24.
48 Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 711 (E.D. Pa. 1968) (court's emphasis).
49 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963); Brown v. Board of Educ., 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).