

MEMORANDUM

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April 5, 1996

To: T. Jeremy Gunn, General Counsel

From: Laura Denk, Esq.

Subject: Harold Weisberg FOIA Response

I have incorporated your comments on the Weisberg FOIA response letter, but I wanted to discuss with you which exemption we should use -- law enforcement and/or deliberative process -- before I send the letter.

I was not sure whether we should use the deliberative process exemption which protects from disclosure "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 the agency." I hesitated to use this exemption because I did not know whether the transcripts would qualify as inter-agency memoranda or letters. If they do qualify as intra-agency memoranda, the exemption acts to protect the transcripts to the same extent that they would be protected in the civil discovery context.

Exemption 5 requires that withheld records be both predecisional and deliberative. The transcripts are certainly predecisional in that they may be used to assist the staff in its search for assassination records, but it is not clear whether they are deliberative. We could argue that disclosing the *questions* would reveal the agency's deliberative process. Then, we could also withhold the answers because they would reveal the questions.

The law enforcement exemption [(7)(A)] authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." In the FOIA seminar I attended (and in the accompanying materials), DOJ/OIP explained that every agency has some law enforcement authority. We can withhold information compiled for law enforcement purposes until our investigation is complete, provided that (1) we compiled the information for law enforcement purposes, and (2) disclosure of the information could interfere with an open investigation. Because the medical portion of our work is still in the open investigation phase and because release of the transcripts could interfere with our ability to follow up on violations of Federal law, I thought it made sense to use the law enforcement exemption, but I have no problem changing it to deliberative process -- whatever you think is the most appropriate exemption.

Let me know what you want to do. Thanks.