UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff	
v.	Civil Action No. 2052-73
UNITED STATES GENERAL SERVICES ADMINISTRATION, Defendant	

MOTION TO STRIKE AFFIDAVIT
OF DR. JAMES B. RHOADS

Plaintiff moves the court to strike the affidavit of Dr. James B.
B. Rhoads, dated January 10, 1974, attached to defendant's Motion to Dismiss Or, In the Alternative, For Summary Judgment, on the ground that said affidavit does not comply with Rule 56(e) of the Federal Rules of Civil Procedure, in that said affidavit was not made on personal knowledge, does not set forth such facts as would be admissible in evidence, and does not show affirmatively that Dr. Rhoads is competent to testify to the matters stated in the affidavit.

JAMES HIRAM LESAR
1231 Fourth Street, S. W.
Washington, D. C. 20024

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff v. UNITED STATES GENERAL SERVICES ADMINISTRATION, Defendant	Civil Action No. 2052-73

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE AFFIDAVIT OF DR. JAMES B. RHOADS

In support of its motion for summary judgment the defendant has submitted Government Exhibit 1, an affidavit by Dr. James B. Rhoads, Archivist of the United States. The only pertinent part of this affidavit, paragraph 3, reads:

> 3. In accordance with Executive Order, at all times since the document in question, the transcript of the January 27, 1964 executive session of the Warren Commission, has been in the custody of the National Archives and Records Service, General Services Administration, it has been and continues to be classified "Top Secret."

Rule 56(e) of the Federal Rules of Civil Procedure requires that affidavits made in support of a summary judgment motion:

> . . . 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.

Plaintiff contends that Dr. Rhoads' affidavit should be stricken because if fails to meet the standards set forth by Rule 56(e). In the first place, Dr. Rhoads' affidavit does not affirmatively show that he is competent to state that the January 27 transcript has been classified Top Secret "in accordance with Executive Order." Dr. Rhoads does not state that he is the person who classified the January 27 transcript or even that he is authorized to classify documents Top Secret. It is clear that under Executive Order 10501, upon which the defendant relies, Dr. Rhoads has no such authority. Executive Order 10501 provides:

> Sec. 2. Limitation of Authority to Classify. The authority to classify defense information or material under this order shall be limited in the departments and agencies of the executive branch as hereinafter specified. Departments and agencies subject to the specified limitations shall be designated by the President:
>
> (a) In those departments and agencies having no direct responsibility for national defense there shall be no authority for original classification of information or material under this order. [Emphasis added.]

Similarly, under Executive Order 11652, also relied upon by the defendant, the National Archives is omitted from the list of federal agencies and departments authorized to classify information Top Secret.

Plaintiff contends that only persons with authority to classify documents Top Secret under Executive Order 10501 or 11652 are competent to assert that the January 27 transcript has been classified Top Secret in accordance with executive order. Dr. Rhoads does not state in his affidavit that he has such authority and Executive Orders 10501 and 11652 eliminate the possibility.

Plaintiff also contends that Dr. Rhoads' affidavit is not made on personal knowledge and does not set forth facts such as would be admissible in evidence. Dr. Rhoads' affidavit does not state that he viewed the January 27 transcript. Nor does Dr. Rhoads state that the transcript bears on its face a Top Secret stamp. Nor does Dr. Rhoads name the person or persons who classified the transcript or the dates on which it was classified Top Secret. If the transcript was in fact classified Top Secret by authorized persons acting pursuant to Executive Order 10501 and Executive Order 11652, such facts are easily ascertainable by any National Archives file clerk. However, Dr. Rhoads' affidavit attests not to facts admissible in evidence, but only to a conclusion. Since Dr. Rhoads did not attach a copy of the cover or face sheet of the January 27 transcript to his affidavit, as required by Rule 56(e), it is not possible to tell from the text of the affidavit itself whether Dr. Rhoads' conclusion is based upon personal knowledge of admissible facts or upon hearsay or fraudulent misrepresentation. Rule 56(e) forbids the use of such affidavits in support of a motion for summary judgment:

> When affidavits are offered in support of a motion for summary judgment, they must present admissible evidence, and must not only be made on the personal knowledge of the affiant, but must show that the affiant possesses the knowledge asserted. When written documents are relied on, they must be exhibited in full. The statement of the substance of written instruments or of affiant's interpretation of them or of mere conclusions of law or restatements of allegations of the pleadings are not sufficient. Walling v. Fairmont Creamery Co., 139 F. 2d 318, 322 (CA 8, 1943).

In accord with this decision is the opinion of the United States Court of Appeals for the District of Columbia Circuit in Jameson v. Jameson, 176 F. 2d 58 (1949). Thus, there is clear authority

supporting plaintiff's motion to strike the affidavit of Dr. James B. Rhoads.

JAMES HIRAM LESAR
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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Motion to Strike Affidavit of Dr. James B. Rhoads and the Memorandum of Points and Authorities in support of that motion has been made upon the defendant by mailing a copy thereof to its attorney, Assistant United States Attorney Michael J. Ryan, United States Courthouse, Room 3421, Washington, D. C. 20001, on this _____ day of March, 1974.

JAMES HIRAM LESAR

supporting plaintiff's motion to strike the affidavit submitted by Dr. Rhoads.

Government affidavits are of critical importance in Freedom of Information Act suits. Recognizing this, the United States Court of Appeals for the District of Columbia Circuit discussed the problem at great length in Vaughn v. Rosen, 484 F. 2d 820 (1973). In recommending that the district court take certain measures to safeguard against "governmental obfuscation and mischaracterization," the Court of Appeals said:

> The problem of assuring that allegations of exempt status are adequately justified is the most obvious and the most easily remedied flaw in current procedures. It may be corrected by assuring government agencies that courts will simply no longer accept conclusory and generalized allegations of exemptions . . . but will require a relatively detailed analysis in manageable segments. [Emphasis added] Vaughn, supra, at 826.

Plaintiff believes that implementation of the Vaughn decision in this case can best be achieved by granting his motion to strike the Rhoads' affidavit.

JAMES HIRAM LESAR
1231 Fourth Street, S. W.
Washington, D. C. 20024

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Motion To Strike Affidavit of Dr. James B. Rhoads and the Memorandum of Points and Authorities in support of that motion has been made upon the defendant by mailing a copy thereof to its attorney, Mr. Michael J. Ryan,

Assistant United States Attorney, United States Courthouse, Room 3421, Washington, D. C. 20001, on this 7th day of March, 1974.

JAMES HIRAM LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff	
v.	Civil Action No. 2052-73
UNITED STATES GENERAL SERVICES ADMINISTRATION, Defendant	

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

This action involves a suit brought under the provisions of the Freedom of Information Act, 5 U.S.C. §552, for disclosure of the transcript of an Executive Session of the Warren Commission held on January 27, 1964. The Complaint stated that the defendant, the General Services Administration, was withholding the January 27 transcript on the grounds that it was protected by two exceptions to the Freedom of Information Act, 5 U.S.C. §552(b)(1), which exempts from disclosure information "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," and 5 U.S.C. §552(b)(7), which exempts "investigatory files compiled for law enforcement purposes except

to the extent available by law to a party other than an agency." Plaintiff alleged, however, that the transcript was improperly classified, and that even if it had been properly classified, any justification for the continued suppression of the transcript was negated by the extensive use of verbatim quotes from this transcript by Warren Commission member Gerald Ford in his book Portrait of the Assassin.

Three months later the General Services Administration responded by filing a Motion To Dismiss Or, In The Alternative, For Summary Judgment. The GSA attempted to justify its suppression of the transcript by invoking three of the Act's exemptions, (b)(1), (b)(5), and (b)(7). The newly added ground for withholding, (b)(5), exempts 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."

The GSA did not address the question of whether any or all of these defenses were waived by use of quoted material from the transcript in Portrait of the Assassin. Nor did the GSA submit any affidavits or other evidentiary materials in support of its claim that the transcript is protected from disclosure by Exemptions 5 and 7. However, the defendant did submit an affidavit in support of its Exemption 1 claim of immunity. For that reason, plaintiff begins with a discussion of that claim.

I. THE DEFENDANT HAS NOT MET ITS BURDEN OF DEMONSTRATING THAT THE TRANSCRIPT IS ENTITLED TO PROTECTION UNDER EXEMPTION 1

A. THE DEFENDANT HAS NOT SHOWN THAT THE TRANSCRIPT IS CLASSIFIED TOP SECRET PURSUANT TO AN EXECUTIVE ORDER

The Freedom of Information Act, 5 U.S.C. §552, provides:

> (a)(3) . . . each agency on request for identifiable records . . . shall make the records prompt-

> ly available to any person. On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. [Emphasis added]

In Environmental Protection Agency v. Mink, 410 U.S. 73 (1973), the Supreme Court discussed the agency's burden and the Act's provision for de novo review as they relate to claims of Exemption 1 immunity. EPA v. Mink involved a suit for the disclosure of recommendations and a report made by an inter-departmental committee on the advisibility of conducting an underground nuclear test at Amchitka Island, Alaska. In response to the complaint, the EPA moved for summary judgment on the grounds that the documents sought were protected by Exemptions 1 and 5. In support of its summary judgment motion, the EPA submitted a detailed affidavit by Under Secretary of State John N. Irwin. The affidavit firmly established the competency of Mr. Irwin to invoke the protection of Exemption 1, reciting that he had been appointed by President Nixon as Chairman of an "Under Secretaries Committee" which was part of the National Security Council system organized by the President "so that he could use it as an instrument for obtaining advice on important questions relating to our national security." In discussing the Irwin affidavit, the Supreme Court said:

> The Irwin affidavit stated that each of the six documents for which Exemption 1 is now claimed "are and have been classified" Top Secret and Secret "pursuant to Executive Order 10501" and as involving "highly sensitive matter that is vital to our national defense and foreign policy." The fact of those classifications and the documents characterizations have never been disputed by respondents. Accordingly, upon such a showing and in such circumstances, petitioners had met their burden

> of demonstrating that the documents were entitled to protection under Exemption 1, and the duty of the District Court under §552(a)(3) was therefore at an end. [Emphasis added] EPA v. Mink, supra, at 84.

The italicized portions of the quoted passage distinguish this case from Mink. The plaintiff in Mink did not dispute the government's claim that the documents sought had been lawfully classified pursuant to Executive Order 10501. Nor did the plaintiff in Mink dispute the characterization of the suppressed documents as "highly sensitive matter that is vital to our national defense and foreign policy." But in the present case plaintiff denies both the government's assertion that the January 27 transcript was originally classified Top Secret pursuant to Executive Order 10501 and that this transcript can be fairly characterized as involving "highly sensitive matter that is vital to our nation-defense and foreign policy."

The basis for plaintiff's denials is established by his affidavit and its exhibits, which are attached hereto. The Weisberg affidavit and its exhibits show that the January 27, 1964 transcript was originally classified Top Secret by Ward & Paul, a pri-
vate/ court reporter which was hired to provide stenographic services for the Warren Commission. Plaintiff's affidavit and exhibits further show that, for internal bureaucratic reasons having nothing to do with the content of the Warren Commission transcripts or their putative danger to "national defense" or "foreign policy", Ward & Paul routinely classified all Commission transcripts Top during the period from January 21 through March 4, 1964. [See attached affidavit of Harold Weisberg and Exhibits A through H]

In short, the situation here is exactly opposite that in Mink. The defendant has not shown that the January 27 transcript

was classified Top Secret pursuant to Executive Order 10501, or that if so classified, the classification was done by an authorized individual. Nor has the defendant asserted that the Warren Commission was authorized to classify documents Top Secret under the terms of Executive Order 10501. True, the defendant has filed a conclusory affidavit by Dr. James B. Rhoads, Archivist of the United States, which asserts that the transcript has been classified Top Secret "in accordance with Executive Order" ever since it came into the custody of the National Archives, but even this inadequate statement is unsupported by any evidence. If the January 27 transcript had been originally and lawfully classified Top Secret in accordance with Executive Order 11652, evidence in support of those claims could have been obtained by the defendant and submitted along with the Rhoads' affidavit. For example, the defendant could have submitted a copy of the transcript's face sheet, which, if properly classified, is required to show, inter alia, the level of classification, the office of origin, the date of preparation and classification, and the identity of the person who classified the transcript. Failure to attach a copy of the transcript cover sheet to the Rhoads' affidavit inevitably arouses the suspicion that this was not done because Dr. Rhoads' and the defendant's attorneys knew that it would reveal that the transcript was not originally or lawfully classified pursuant to Executive Order 10501.

In most Freedom of Information Act cases, this would remain merely a suspicion. But in this case plaintiff has been able to show, through his affidavit and exhibits, that the January 27 transcript was in fact classified Top Secret by a private firm, Ward & Paul, immediately upon the transcription of the stenographic record. Ward & Paul had no authority to classify documents

Top Secret pursuant to Executive Order 10501. Executive Order 10501 is limited to defense information. It further provides:

> Sec. 2. Limitation of Authority to Classify. The authority to classify defense information or material under this order shall be limited in the departments and agencies of the executive branch as hereinafter specified. Departments and agencies subject to the specified limitations shall be designated by the President:
>
> (a) In those departments and agencies having no direct responsibility for national defense there shall be no authority for original classification of information or material under this order. [Emphasis added]

It is clear from this that neither Ward & Paul nor the Warren Commission had authority to classify documents Top Secret pursuant to Executive Order 10501. Since Ward & Paul did classify the January 27 transcript Top Secret, this raises a question as to whether Dr. Rhoads committed perjury when he stated in answer to plaintiff's interrogatory number 2: "The transcript was originally classified under the provisions of Executive Order 10501, as amended (3 CFR, 1949-1953 Comp.)." [Emphasis added] Plaintiff believes that he did.

Perjury is, of course, a very serious offense. Not only can perjury be used to defeat the legal rights of a litigant, it can also subvert the integrity of the judiciary, which our Constitution envisioned as an independent and co-ordinate branch of government. This is particularly true where perjury is suborned by or committed on behalf of the executive branch of government. Plaintiff therefore suggests the appropriateness of an inquiry into whether Dr. Rhoads did in fact commit perjury.

B. PLAINTIFF DENIES THAT THE JANUARY 27 TRANSCRIPT INVOLVES HIGHLY SENSITIVE MATTER THAT IS VITAL TO OUR NATIONAL DEFENSE OR FOREIGN POLICY

The defendant claims that the January 27 transcript is presently classified Top Secret pursuant to Executive Order 11652.

Section 1(A) of Executive Order 11652 defines Top Secret as follows:

> (A) "Top Secret." "Top Secret" refers to that national security information which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security. This classification shall be used with the utmost restraint.

The substance of the January 27 transcript is well-known, in part because it is extensively quoted in Chapter One of Portrait of the Assassin. [Chapter One is attached hereto as Exhibit I] In his affidavit, plaintiff has described the content of this executive session:

> 18. The January 27 executive session dealt with the rumor that Lee Harvey Oswald had been an undercover agent for the FBI. Although this rumor had been withheld from the members of the Commission, it was not news when it reached them on January 27, 1964. This rumor had previously appeared in print in Texas and Pennsylvania. Indeed, both the FBI and the Secret Service had conducted investigations of it a month and a half earlier. The FBI and Secret Service reports pertaining to their investigations of this rumor were never classified or withheld. In fact, affiant has many such reports in his possession. [Emphasis in the original. See attached affidavit of Harold Weisberg]

From these accounts it would seem that the government would have to assert that Oswald was in fact an FBI agent in order to even conceivably justify the Top Secret label. But the Warren Commission expressly denied that Oswald was ever employed by the