

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

Civil Action No. 2052-73

UNITED STATES GENERAL  
SERVICES ADMINISTRATION,

Defendant.

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION  
TO STRIKE THE AFFIDAVIT OF DR. JAMES B. RHOADS

By this action brought under the Freedom of Information Act, 5 U.S.C. 522, plaintiff seeks to compel disclosure of the transcript of the January 27, 1964 executive session of the Warren Commission. Defendant has filed a motion to dismiss or, in the alternative, for summary judgment which is supported by the affidavit of Dr. James B. Rhoads, Archivist of the United States. In that affidavit, Dr. Rhoads testifies that the transcript in question, during the entire time of its custody by GSA, has been and continues to be classified "Top Secret" pursuant to Executive Order. Plaintiff has now moved to strike Dr. Rhoads' affidavit for non-compliance with Rule 56(e) on the alleged grounds that the 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. Defendant submits that plaintiff's motion is wholly without merit and should be denied.

Initially, defendant notes that Dr. Rhoads' affidavit is not a pleading or part of a pleading and does not contain an insufficient defense, or any redundant, immaterial, impertinent or scandalous matter within the purview of Rule 12(f), Federal Rules of Civil Procedure. Further, as Dr. Rhoads testifies in his affidavit, he is the Archivist of the United States, National Archives and Records Service, General Services Administration, and has held that position at all times relevant to the circumstances of the complaint. Thus, he is particularly competent to testify with respect to the status of documents in the custody of the National Archives and Records Service, for which he serves as the head agency official. Furthermore, it is beyond peradventure that Dr. Rhoads is in a position to have personal knowledge of the status of documents under his control and his affidavit clearly reflects that he has familiarized himself with plaintiff's allegations and that he has personal knowledge of the status of the transcript which plaintiff seeks. Plaintiff is particularly not in a position to deny that Dr. Rhoads has personal knowledge regarding that transcript, and an affidavit may not be controverted by such representations in a legal memorandum. Sardo v. McGrath, 90 U.S.App.D.C. 195, 198, 196 F.2d 20, 23 (1952). Moreover, Dr. Rhoads' personal knowledge of the classification of the documents clearly does not depend upon his own ability to classify the document, nor should the sufficiency of his affidavit depend upon an involved recitation of how his personal knowledge was acquired. In a Freedom of Information Act matter, where it is disclosure of the document itself which is sought, defendant submits that it is not practicable to attach copies of the document to the affidavit.

As the Supreme Court held in Environmental Protection Agency v. Mink, 410 U.S. 73 (1973), the Freedom of Information Act did not intend to permit judicial review of the soundness of executive security classifications, and the only matter to be determined is whether the document sought has been classified pursuant to Executive Order. 410 U.S. at 81. See also Wolfe v. Froehlke, 358 F.Supp. 1318 (D.D.C. 1973).

Vaughn v. Rosen, 434 F.2d 820 (1973), alluded to by plaintiff in his legal memorandum, dealt with different Freedom of Information Act issues and is clearly inapplicable to the First Exemption under the Act.

Conclusion

For the foregoing reasons, defendant respectfully requests the Court to deny plaintiff's motion to strike the affidavit of Dr. James B. Rhoads.

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ARNOLD T. AIKENS  
Assistant United States Attorney

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MICHAEL J. RYAN  
Assistant United States Attorney

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ORDER

Upon consideration of plaintiff's motion to strike the affidavit of Dr. James B. Rhoads, defendant's opposition thereto, and the entire record herein, it is by the Court this \_\_\_\_\_ day of \_\_\_\_\_, 1974,

ORDERED that plaintiff's motion be and the same hereby is denied.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Defendant's Opposition To Plaintiff's Motion To Strike The Affidavit Of Dr. James B. Rhoads and proposed Order has been made upon plaintiff by mailing a copy thereof to his attorney, James H. Lesar, Esquire, 1231 Fourth Street, S.W., Washington, D.C. 20024, on this 20th day of March, 1974.

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