

IN THE 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 AND ORDER

Plaintiff brought this action under the Freedom of Information Act, 5 U.S.C. § 552, seeking disclosure of the transcript of the January 27, 1964, executive session of the Warren Commission, which is presently in the custody of the United States General Services Administration and its National Archives and Records Service. Defendant G.S.A. has moved for dismissal or summary judgment on the ground, inter alia, that the transcript is exempted from disclosure as a document "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. § 552(b)(1). In support of its motion, defendant has filed the affidavit of Dr. James B. Rhoads, Archivist of the United States, who states under oath that the disputed transcript "has been and continues to be classified 'Top Secret.'" Plaintiff opposes summary judgment and has moved to strike Dr. Rhoads' affidavit on the ground that it contains information beyond the personal knowledge of the affiant.

The Court finds that the affidavit is perfectly proper -- as far as it goes. Dr. Rhoads clearly has personal knowledge of the transcript's present classified status, and his statement with regard to that issue can be considered by the Court in deciding defendant's motion. Although Dr. Rhoads may well lack personal knowledge as to whether or not the transcript was properly classified under the procedures set forth

in Executive Order 11652, his affidavit contains no assertions on that issue. Plaintiff's motion to strike is therefore denied.

As plaintiff notes, however, procedural irregularities may well be an issue in this case. While the Court will not review the wisdom or propriety of an Executive decision classifying a particular document for national defense or foreign policy reasons, Environmental Protection Agency v. Mink, 410 U.S. 73 (1973), it can require the Government to make the elementary showing that such classification was ordered by an individual authorized to do so under duly prescribed procedures. See Wolfe v. Froehlke, 358 F. Supp. 1318, 1320 (D.D.C. 1973); Epstein v. Resor, 296 F. Supp. 214, 217-18 (N.D. Cal. 1969), aff'd, 421 F.2d 930 (9th Cir. 1970), cert. denied, 398 U.S. 965 (1970). The affidavit of Dr. Rhoads, while perfectly proper in and of itself, does not fully satisfy defendant's burden of establishing procedural regularity.

Defendant shall therefore file with the Court by April 17, 1974, proof competent under Rule 56 of the Federal Rules of Civil Procedure that the transcript at issue has been properly classified under Executive Order 11652. Past classification procedures need not be considered unless they are relevant to the legality of the present classification. Plaintiff will have until April 26, 1974, to reply. The Court will then decide defendant's motion for dismissal or summary judgment on the record before it.

SO ORDERED.

  
UNITED STATES DISTRICT JUDGE

April 4, 1974.