UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S MEMORANDUM
PURSUANT TO ORDER OF THE COURT

In its order of April 4, 1974, the Court directed the defendant to file with the Court "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."

In response to the Court's order, the defendant submitted an affidavit by Mr. J. Lee Rankin, former General Counsel for the Warren Commission, which asserts that in accordance with instructions given him by the Commission, he ordered "certain" Executive Session transcripts classified, including that of January 27, 1964, which is sought by plaintiff. Mr. Rankin also alleged that the Warren Commission had authority to classify its records under Executive Order 10501, as amended.

The defendant made no attempt to show that the transcript at issue has been properly classified under Executive Order 11652. Nor did defendant explain why Executive Order 11652 is not relevant to the present action.

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Plaintiff disputes that the transcript was ever classified pursuant to Executive 10501. Attached hereto are the Supplemental Affidavit of Harold Weisberg and several exhibits which contradict the assertions of Mr. J. Lee Rankin.

Plaintiff maintains, however, that in addition to showing valid classification under Executive Order 10501, defendant also has the burden of demonstrating that the transcript is properly withheld under the guidelines set forth in the Attorney General's Memorandum of April 13, 1965, [see Memorandum Exhibit H] and the provisions of Executive Order 11652. The reasons for this are elaborated upon below.

I. THE WARREN COMMISSION DID NOT HAVE AUTHORITY TO CLASSIFY ITS RECORDS PURSUANT TO EXECUTIVE ORDER 10501

The defendant represents that the Warren Commission had authority to classify documents pursuant to "Executive Order 10501, as amended," and Mr. Rankin has executed an affidavit to that effect. The defendant has not specified which amendments to Executive Order 10501 authorized the Warren Commission to classify its records.

Executive Order 10901 amended Section 2 of Executive Order 10501 as follows:

> Sec. 2. Limitation of authority to classify. The authority to classify defense information or material under this order shall be limited in the departments, agencies, and other units of the executive branch as hereinafter specified.
>
> * * * * * * * *
>
> (c) Any agency or unit of the executive branch not named herein, and any such agency or unit which may be established hereafter, shall be deemed not to have authority for original classification of information or material under this order, except as such authority may be specifically conferred upon any such agency or unit hereafter. [Emphasis added]

The defendant has not claimed that the authority to classify defense information or material under Executive Order 10501 was

specifically conferred upon the Warren Commission by the Executive. There is no mention of any such authority in Executive Order 11130 which created the Commission. [See Opposition Exhibit J] Nor do the Commission's own Rules of Procedure refer to any such authority. [See Memorandum Exhibit C] Indeed, in suggesting that "In view of the subject matter of its undertaking, the Warren Commission plainly had authority to classify documents pursuant to Executive Order 10501," [See Defendant's Memorandum Pursuant to Order of the Court, p. 1] defendant in effect admits that no such authority was ever specifically conferred upon the Warren Commission.

Four days before plaintiff's Memorandum was due, counsel for plaintiff received a "Supplement to Defendant's Memorandum" which cited "as additional evidence of the authority of the Warren Commission to classify documents pursuant to Executive Order 10501" a letter from President Johnson to Earl Warren dated November 23, 1964. Since the defendant did not attach a copy of this letter, plaintiff quotes the text of it here:

> The procedures set forth in Section 5(i) of Executive Order No. 10501 with respect to the declassification of material shall have no application to the Report of the President's Commission on the Assassination of President Kennedy and the exhibit volumes thereto.

The heading above this letter in the Federal Register is "Non-applicability of Declassification Procedures," and that aptly sums up the essence of Section 5(i) to which the letter refers. Since agencies which do not have authority to originally classify defense information do sometimes have authority to declassify, the National Archives being one such, no inference can be drawn that, ergo, the Warren Commission had authority to classify defense information under 10501. All this letter did was to protect the Warren Commission against the charge that in publishing its Report and exhibit volumes the Commission had released information validly classi-

fied by federal agencies authorized to so classify it without following the declassification procedures prescribed by Executive Order 10501. Having been drafted for that purpose, the President's letter specified only the Commission's Report and exhibit volumes, not the remaining volume of the Commission's records, including its Executive Session transcripts.

II. CLASSIFICATION PROCEDURES REQUIRED BY EXECUTIVE ORDER 10501 WERE NOT FOLLOWED IN THE CLASSIFICATION OF DOCUMENTS GENERATED BY THE WARREN COMMISSION

Executive Order 10501 sets forth numerous guidelines and procedures for classifying defense information. Some of the most important are set forth in the following provisions:

> Sec. 3. Classification. Persons designated to have authority for original classification of information or material which requires protection in the interests of national defense under this order shall be responsible for its proper classification in accordance with the definitions of the three categories in section 1, hereof. Unnecessary classification and over-classification shall be scrupulously avoided. The following special rules shall be observed in classification of defense information or material:
>
> (a) Documents in General. Documents shall be classified according to their own content and not necessarily according to their relationship to other documents. References to classified material which do not reveal classified defense information shall no be classified.

As plaintiff stated in his first affidavit, Ward & Paul routinely classified all transcripts, whether of witness testimony or of Warren Commission Executive Sessions. Indeed, Ward & Paul even classified transcripts which were sent to it unclassified by the United States Attorney. [See Affidavit of Harold Weisberg, ¶15] Under the terms of Executive Order 10501, this was totally unnecessary classification. Under the terms of the Ward & Paul bureacracy, however, it was vitally necessary. When, on May 1, 1964, Mr.

Rankin ordered the transcripts of witness testimony "declassified" from Top Secret to Confidential "so the printers can handle it," [see Memorandum Exhibit J], it brought internal chaos to Ward & Paul. [See Affidavit of Harold Weisberg, ¶16]

The defendant's own exhibits and answers to interrogatories establish that rather than documents being classified "according to their own content," as required by Executive Order 10501, they were classified in a blanket fashion by Ward & Paul. Transcripts were ordered classified into the indefinite future without exception. [See letter of May 1, 1964, attached to affidavit of Mr. Rankin]

This, of course, defeats the purposes of Executive Order 10501, which requires that the potential damage to the national defense be weighed against the public's right to know and measured against explicit criteria for determining whether defense considerations are present. The United States District Court for the Eastern District of Virginia--Alexandria Division has recently addressed this issue in a case in which the CIA insisted, on national security grounds, that some 339 deletitions be made from Victor Marchetti's book, The CIA and the Cult of Intelligence. In refusing to uphold certain of these deletions, the court said:

> The result of this may be to release some sensitive information; however the rationale underlying the fixing of classification as the dividing line between what could be revealed and what could not was the assumption that, at the time the determination was made to classify, there had been a weighing of the competing interests of national defense and foreign relations on the one hand and the public's right to know on the other hand. Alfred A. Knopf, Inc v. William Colby, et al., Civil Action No. 540-73-A, slip opinion, p. 7.

It is both apparent and undenied by the defendant that no such "weighing" took place at the time the January 27, 1964, Executive Session transcript was classified Top Secret.

Other violations of security regulations make it evident that the Executive Session transcripts were not classified out of a concern for national security. All transcripts of witness testimony and Executive Sessions done by Ward & Paul were classified Top Secret until May 1, 1964. But the firm of Ward & Paul sold copies of Top Secret witness testimony before it was declassified. [See Memorandum Exhibit E] The sale of classified transcripts was authorized by the Commission's rules. [See Memorandum Exhibit C] The Commission was aware that this would enable the press to obtain copies of it. [See Memorandum Exhibit D]

With respect to Executive Session transcripts, one member of the Commission and his campaign manager personally profited from the sale and publication of parts of the classified January 27 transcript which plaintiff seeks. No action was taken to halt the publication of this classified information or to bring sanctions against those who disclosed it. The reason why is obvious: the January 27 transcript was not classified pursuant to Executive Order 10501, did not contain defense information, and the responsible authorities, including Mr. Rankin, knew it.

In this connection, it is noted that Section 4(j) of Executive Order 10501 (as amended) requires that "when classified material affecting the national defense is furnished authorized persons, in or out of Federal service, other than those in the executive branch," the following notation is to be placed on such material:

> This material contains information affecting the national defense of the United States within the meaning of the espionage laws, Title 18, U.S.C., Secs. 793 and 794, the transmission or revelation of which in any manner to an unauthorized person is prohibited by law.

No such notation was placed on the material classified by Ward & Paul.

III. THE DEFENDANT HAS NOT SHOWN THAT IT HAS COMPLIED WITH THE PRESIDENT'S GUIDELINES ON THE PUBLIC AVAILABILITY OF WARREN COMMISSION RECORDS

In January, 1965, in response to a grass roots protest of the National Archives' attempt to suppress Warren Commission records, [see Memorandum Exhibit F], the White House directed the Attorney General to make a study with a view towards changing the announced policy of the defendant. As directed by the White House, the Department of Justice solicited the views of Chief Justice Earl Warren on the public availability of the Commission's records. The Attorney General's Memorandum of April 13, 1965, states:

> The Chief Justice has informed me in a letter dated April 5, 1965, that the President's Commission has concluded, after full consideration, that the public availability of the Commission's records was a matter to be resolved by the Attorney General and the originating agencies in accordance with established law and policies of the Government. According to the Chief Justice, the Commission assumed that these determinations would be made in light of 'the overriding consideration of the fullest possible disclosure.' Moreover, the Commission did not desire to restrict access to any of its working papers except those classified by other agencies. [Emphasis added. See Memorandum Exhibit H.]

Counsel for plaintiff has attempted to obtain a copy of Chief Justice Warren's April 5, 1965, letter, but the National Archives has stated that it does not have a copy and the defendant's attorney has advised him that he may only obtain a copy through a motion for discovery or a separate Freedom for Information suit. Accordingly, plaintiff will file a discovery motion for this letter. As restated by the Attorney General, however, the letter seems to flatly contradict the defendant's attempts to suppress the January 27 transcript.

Furthermore, the guidelines set by the Attorney General for the disclosure of Warren Commission records were approved by the

White House and the Archives was directed to implement them. In testifying before the House Foreign Operations and Government Information Subcommittee on May 11, 1972, Dr. Rhoads was asked to submit a statement in regard tothe availability of Warren Commission records. In that statement Dr. Rhoads says:

> The reviews of the records provided for in the guidelines were held in 1965, 1967, and 1970. A large number of the documents withheld from research as a result of the 1965 review were made available by the 1970 review. The five year review of the records withheld from research as a result of the 1967 review is now being conducted. This review includes a survey of the security classified documents among the Commission's records to determine whether they should be declassified or downgraded under the provisions of Executive Order 11652 . . . [Emphasis added. Hearings, House Foreign Operations and Government Information Subcommittee, 92nd Cong., 2nd Sess., Part 7, page 2610]

Plaintiff contends that before the defendant can meet the burden of justifying nondisclosure imposed upon it by the Freedom of Information Act it must show that the January 27 transcript has been withheld as a result of the reviews it was required to make and in compliance with the guidelines set forth in the Attorney General's Memorandum. This would include the 1972 review to see whether or not the transcript should be declassified under Executive Order 11652.

IV. DEFENDANT'S MOTION FOR DISMISSAL OR SUMMARY JUDGMENT MUST BE DENIED BECAUSE MATERIAL FACTS ARE IN DISPUTE AND THE DEFENDANT HAS NOT MET ITS BURDEN OF SHOWING THAT IT IS ENTITLED TO INVOKE THE PROTECTION OF EXEMPTION 1

The function of summary judgment is to avoid a useless trial. A trial is not useless, but is in fact absolutely necessary, where there is a genuine issue as to a material fact. As the Supreme Court has stated:

> Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them.

Associated Press v. United States, 326 U.S. 1, 6 (1945). See Adickes v. S. H. Kress & Co., 398 U.S. 144, 153-61 (1970); National Cable Television Ass'n, Inc. v. FCC, 479 F. 2d 183, 186 (1973) (when summary judgment is appropriate in FOIA cases). In this regard, all "inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the [summary judgment] motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). And it is the Government which has the burden of proving the applicability of an exemption from disclosure. 5 U.S.C. $552(a)(3). See Vaughn v. Rosen, 484 F. 2d 820, 823-826 (1973), cert. denied, 42 U.S.L.W. 3523. Furthermore, the courts are entirely in agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to material fact, which under applicable principles of substantive law, entitle him to judgment as a matter of law. Nothing may be assumed, and there may be no real doubt as to any material fact. Adickes, supra, at 157.

The Freedom of Information Act places the burden of proof upon the government to demonstrate not only that a document is classified, but that the procedure of classification was proper. Enviromental Protection Agency v. Mink, 410 U.S at 84, Wolfe v. Froehlke, 358 F. Supp. at 1318. That has not been done in this case. Plaintiff's affidavits and exhibits place in dispute all of the important material facts in this action. That being so, defendant's motion for summary judgment must be denied.

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

DATED: April 26, 1974

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Plaintiff's Memorandum Pursuant to the Order of the Court and its attached exhibits has been made upon the defendant by mailing a copy thereof to its attorney, Mr. Michael J. Ryan, Esq., Assistant United States Attorney, United States Courthouse, Room 3421, Washington, C. D. 20001, on this 26th day of April, 1974.

JAMES HIRAM LESAR

January 4, 1964

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Mr. President:

As one who read and believed the Warren Report on the assassination of President Kennedy I am disturbed and chagrined that you would permit a government agency to dictate to you what will be done with testimony and exhibits for the next 75 years.

Knowing that you believe in the public's right to know - a statement you have often made - it intrigues me that you would permit a 75 year cloak of secrecy to fall over the facts involved in the Kennedy assassination.

The decision of the National Archives Bureau to withhold from the public "off the record testimony and exhibits of the Warren Commission for 75 years" is inexplicable and inexcusable and gives cause to doubt the veracity of the published Warren Commission report.

I believe in national security but I fail to see the relationship between the facts of the Kennedy assassination and the security of the nation at this time.

May I suggest that if there is true justification for withholding from the public the facts of one of the most tragic events of our time, it is also incumbent upon our national leadership to make it clear why.

Franklin D. Roosevelt said: "the only thing we have to fear is fear itself." Secrecy creates fear.

Respectfully submitted,

Robert H. L. Johnson
Mayor

The President
The White House
Washington 25, D. C.

RHLJ/bw

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Copies sent to:

Hubert Humphrey, The Vice-president elect
Earl Warren, Chief Justice
B. B. Hickenlooper, U. S. Senator
Jack Miller, U. S. Senator
John C. Culver, U. S. Congressman
American Society of News Editors
Associated Press Managing Editors Association
National Association of Broadcasters
Director of National Archives
Harry Boyd, Editor, Cedar Rapids Gazette
Kenneth McDonald, Editor, Des Moines Register
Wm. B. Quarton, General Manager, W M T Stations
Redd Gardner, General Manager, K C R G Stations
George Lipper, General Manager, K L W W Station
U. S. News & World Report

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JAN 15 1965

Gordon Chase
The White House

The Acting Administrator

Proposed reply to Mayor Robert Johnson's letter to President Johnson concerning the records of the Warren Commission

As requested I am attaching a draft of a proposed reply to Mayor Robert Johnson's letter to the President, January 4, 1965, in which he objected to restrictions reportedly imposed on the use of the records of the Warren Commission. Mayor Johnson's letter was apparently inspired by press reports (see attached clipping, Washington Post, December 22, 1964) quoting Deputy Archivist, Robert H. Bahmer, to the effect that the Commission records would be closed for 75 years. In point of fact Mr. Bahmer stated that the 75 year limitation was the general policy applied to the reports of investigatory agencies and similar material and would be applied to the records of the Warren Commission unless an exception were made in this particular case.

The Warren Commission records were transferred to the National Archives on November 23, 1964, in accordance with the Commission's decision announced in the final paragraph of the foreword to its Report: "The Commission is committing all of its reports and working papers to the National Archives, where they can be permanently preserved under the rules and regulations of the National Archives and applicable Federal law."

The records consist of some 300 cubic feet of material, much of it consisting of unfiled documents and extra copies of papers duplicated for the Commission's use. Several months will be required properly to arrange the records and prepare an inventory of them. In general the records consist of:

1. The administrative and business files of the Commission.

2. Documentary material gathered by or submitted to the Commission.
   a. Testimony given before the Commission
   b. Depositions taken by officers of the Commission.
   c. Affidavits submitted to the Commission.
   d. Investigatory reports made for the Commission by various investigatory agencies of the Federal Government.
   e. Original documentary materials acquired from other persons as exhibits.
   f. Original photographic materials acquired from other persons.

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These exhibits in the nature of artifacts, such as items of clothing, weapons, and other physical material are still in the custody of the Federal Bureau of Investigation. No restriction on these materials or on the photographic exhibits is contemplated.

The most important of the documentary materials are the transcripts of testimony, the depositions and the affidavits (most of which were published in the 26 volume set, Hearings before the President's Commission on the Assassination of President Kennedy) and the reports of investigations made for the Commission by the FBI, the Secret Service, the CIA and other departments and agencies, many of which were not published in full.

These reports and allied papers are the raw data compiled by the investigators. Many of them reveal the techniques of investigation and the sources that the investigatory agencies rightly insist must not be disclosed. Many of them contain information concerning innocent third parties, information irrelevant to the investigation of President Kennedy's assassination, the release of which would embarrass or injure innocent persons.

Because investigative reports contain unevaluated data the investigatory agencies of the Government have always placed restrictions on their use. The National Archives at the request of these agencies has imposed a 75 year restriction on such materials. We believe that this restriction should be applied to similar materials in the Warren Commission records, and we recommend that the attached draft of a proposed reply to Mayor Johnson embodying this policy be used as a basis for the President's reply.

The attached draft has been concurred in by the following agencies: the U. S. Secret Service; the Department of Defense; the Department of State (in so far as the 75 year restriction is concerned); the Immigration and Naturalization Service; the Central Intelligence Agency; the Internal Revenue Service and the Federal Bureau of Investigation. Mr. Howard P. Willens of the Criminal Division, Department of Justice did not concur. We understand that he has indicated his position to you directly.

Enclosures

Lawson B. Knott, Jr.
Acting Administrator

cc:
Official file - N
A
Day file - N

RHBahmer:fg ND 1-15-65