Dear Jim,

10/25/76

On p. 201 of Jaworski's book & I find language he uses relating to the Supreme Court's ruling on Nixon's tapes that seems relevant to some or our present and coming FOIA problems.

I'm talking about a general principle, not the meaning of Rule 17(c), which has to do with subpoenaes in criminal cases.

"...the moving party must show that the documents are evidentiary and relevant, that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; that the party cannot properly prepare for trial without the production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; that the application is made in good faith and is not intended as a general 'fishing expedition.'..." (Three dots, interestingly, his.)

The philosophy appears to me to apply in FOIA matters where there is a party not a defendant, like CIA, which is the authority for withholding what I seek under the law, and where the Act places the burden of proof on the defendant.

They cannot meet the burden of proof without CIA so if they try not to answer the interrogatories on the ground the CIA is not a party they have not met the burden of proof. However, it will do us no good to get a summary judgement.

If we hit this kind of situation I think we should move for the taking of testimony, which seems to be where Robinson is heading, but I think we should have in mind what he may not, direct confrontation with the absent CIA on its withholdings. I'll be able to testify with a truck-load of records.

Nosenko is particularly relevant. Here I think you might want to talk to Florence about his being a witness for us and first examining these various records that I now have that were withhold for more than a decade. They never qualified for any withholding, I'm sure.

I think on Briggs if we hit this kind of situation we can limit ourselves to his competence and qualifications, to his knowledge of what is known and unknown in what he has withheld, a simpler questioning. With what we've done with 5/19 we should be able to make a much better record for later uses. There is nothing we can do to compel them to give us these transcripts now but we can use the situation they'll be creating for our own benefits, to me including making the law more viable and making further preparations for helping the Congress on this. I think we have done, by and large, a good job in 1996 on this.

My hunch is that more than the usual stonewalling is involved in this. They are not merely obstructing to wear requesters down, not merely building statistics in their campaign against the Act. I think in this case it is part of a hiding of the embarrassing.

best,

One of the questions is the misuse of executive power. I believe that applies in all our FOIA cases. There also is very helpful language in Burger's decision where in addressing a claim to confidentiality he says it cannot prevail against the fundamental requirements of due process. Although he used this in the context of a criminal prosecution I believe that as a statement of legal philosophy it has broader applicability.