

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

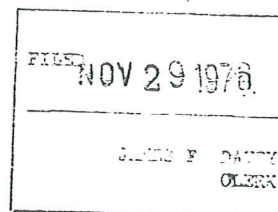
Plaintiff,

v.

GENERAL SERVICES ADMINIS-
TRATION,

Defendant

Civil Action No. 75-1448



PLAINTIFF'S MEMORANDUM ON DEFENDANT'S
OBJECTIONS TO THIRD SET OF INTERROGATORIES

On July 28, 1976, plaintiff filed his third set of interrogatories on the defendant. On October 15, 1976, the defendant not having answered or objected to the interrogatories within the time provided by Rule 33 of the Federal Rules of Civil Procedure, plaintiff filed a motion to compel answers. Shortly before a scheduled November 18, 1976, hearing on this motion before the United States Magistrate, the defendant finally served answers to approximately 20 percent of the 150 numbered interrogatories submitted by plaintiff. Many of the interrogatories not answered were addressed to the Central Intelligence Agency. Although the District Court ordered at a May 25, 1976, hearing that the Central Intelligence Agency would either respond to appropriate interrogatories or else this case would go to trial, plaintiff's interrogatories were not responded to by that agency.

As a result of the conference with the Magistrate held on November 18, the defendant was given until November 30 to obtain answers or objections to plaintiff's interrogatories from the Cen-

tral Intelligence Agency. On November 24, 1976, counsel for plaintiff phoned defendant's counsel and was informed that the Central Intelligence Agency would respond in affidavit form to approximately half of plaintiff's third set of interrogatories, but not to the rest. Defendant's counsel promised to send a copy of a letter he had received from the CIA listing the interrogatories which will and will not be responded to by the Agency. As of November 29, plaintiff's counsel has not yet received this letter. Consequently, plaintiff is unable to address the CIA's refusal to answer interrogatories at this time.

Defendant General Services Administration has itself already registered belated objections to many of the third set of interrogatories which were addressed to it. Specifically, the GSA has refused to answer interrogatories 64-69, 76-77, 83, 87, 92-94, 102-103, 110, 187, 196, and 201-210.

Defendant objects to answering interrogatories 64-69, 76-77, 83, 87, 187, and 196 on the ground that they are not relevant to the present suit because they relate to the transcript of the January 27, 1964, Warren Commission executive session which was made public in 1974 as the result of a previous Freedom of Information lawsuit by plaintiff, Civil Action 2052-73.

While the January 27 executive session transcript is not the subject of this suit, it is clearly related to issues which are present in this action. For example, defendant maintains that the Warren Commission executive session transcripts were classified pursuant to Executive order 10501 and has submitted sworn affidavits to that effect by Dr. James B. Rhoads, the Archivist, and Mr. J. Lee Rankin, General Counsel for the Warren Commission. Plaintiff asserts that this is false. Plaintiff seeks to impeach the credibility of these affiants by compelling the GSA and the CIA to answer questions relating to the classifiability of the January

27 transcript and the determinations that it was to be kept classified. Matters that affect the credibility of a deponent or that might be used at trial in impeaching or cross-examining a witness may be inquired into on discovery. Broadway & Ninety-Sixth St. Realty Co. v. Loew's, Inc., 21 FRD 347 (S.D. N.Y. 1958); Da Silva v. Moore McCormack Lines, Inc., 47 FRD 364 (E.D. Pa. 1969); United States v. 364.82 Acres of Land, More or Less, In The County of Mariposa, State of California, 38 FRD FRD (N.D. Calif. 1965).

The importance of this discovery to plaintiff's case is enhanced by the fact that the legislative history to the Amended Freedom of Information Act expressly states that where the government invokes exemption 1 to prevent the disclosure of a record, the district court "will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." H. R. Rep. No. 1380, 93d Cong., 2d Sess. (1974). In this case the only affidavit submitted in support of the claim that the June 23 and January 21 transcripts are presently classified "Confidential" is that of Mr. Charles Briggs of the Central Intelligence Agency. Because the January 27 transcript is now public and its text makes it patently clear that there never was any basis for classifying it, plaintiff seeks to ascertain what role Mr. Briggs or other officials of the Central Intelligence Agency played in wrongfully classifying or suppressing it. In addition, plaintiff seeks to ascertain Mr. Briggs' competency by having him indicate any portions of the January 27 transcript which were properly classified under Executive order. Because the January 27 transcript has been made public, this affords a rare opportunity to test the veracity and judgmental reliability of an affiant who is invoking national defense or foreign policy as a justification for continuing the suppression of documents which are now nearly thirteen years old.

Defendant has also objected to interrogatories 92 and 93 on the grounds that they are irrelevant. These interrogatories seek to learn whether the CIA informed the defendant that the fact that Yuri Ivanovich Nosenko was the subject of the June 23, 1964, executive session transcript. They are relevant to this lawsuit because the credibility of all the CIA's assertions of an exemption 1 claim in this case is suspect if the CIA did make such false representations to the defendant or its counsel.

Defendant objected to interrogatory 94 on the ground that "it seeks the disclosure of information which the defendant seeks to protect pursuant to exemption (b)(5) and other exemptions of the Freedom of Information Act in the instant action." However, plaintiff has not asked for the substance of nature of the advice allegedly given at the January 21 and June 23 Warren Commission executive sessions. Plaintiff has merely asked what policy issue was discussed and who was given the advice. Thus, this interrogatory does not inquire into matters within the ambit of exemption 5. It only seeks to determine whether the assertion that these transcripts are protected by exemption 5 is credible in light of the surrounding circumstances. Plaintiff has asserted that the purpose of the Warren Commission was to ascertain and evaluate facts, not to set policy. If this is correct, then exemption 5 would not apply to transcripts of Warren Commission executive sessions. The burden is on the defendant to establish a basis for invoking exemption 5 by showing that a policy was discussed and advice given as a result. Without affirmative answers to the two parts of this interrogatory, the exemption 5 claim must fail.

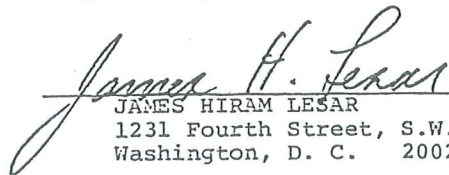
Defendant has objected to interrogatory 102 on the ground that it is not relevant because it relates to two executive session transcripts which are now public. Plaintiff contends that it is relevant because the answer will show that there is no basis for

invoking exemption 5 with respect to the transcripts sought in this action but not not having applied it to other Warren Commission executive session transcripts which have been disclosed in the past. Even assuming that an exemption 5 claim ever existed with regard to any Warren Commission executive session transcripts, unless the defendant can properly distinguish between those transcripts previously released and the ones at issue in this suit, then the exemption 5 claim has been waived.

Defendant has objected to interrogatories 201-210. These interrogatories are relevant because they attack the credibility of those who have sworn out affidavits in support of defendant's attempt to continue suppressing the records which are the subject of this lawsuit. Plaintiff contends that answers to these interrogatories will establish bias and discrimination against him by the General Services Administration and the Central Intelligence Agency and that this gives motive to the efforts of these agencies to continue withholding documents from him even though no basis for the withholding exists under the Freedom of Information Act. Moreover, the defendant has waived any objection to answering this series of interrogatories by stating in answer to interrogatory No. 199 that it has not discriminated against plaintiff in what it has made available to him under the Freedom of Information Act.

In light of the above, plaintiff contends that the defendant General Services Administration should be compelled to answer all of the interrogatories in plaintiff's third set which were addressed to it.

Respectfully submitted,


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Washington, D. C. 20024

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of November, 1976, personally delivered a copy of the foregoing Plaintiff's Memorandum on Defendant's Objections to Third Set of Interrogatories to the office of Assistant United States Attorney Michael J. Ryan, United States Courthouse, Washington, D. C. 20001.


JAMES H. LESAR