BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 77-1831

HAROLD WEISBERG,

Plaintiff-Appellant

v.

GENERAL SERVICES ADMINISTRATION,

Defendant-Appellee

On Appeal from the United States District Court for the District of Columbia, Hon. Aubrey E. Robinson, Jr., Judge

---

James H. Lesar
910 16th Street, N.W., Suite 600
Washington, D.C. 20006

Attorney for Plaintiff-Appellant

B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff-Appellant, v. GENERAL SERVICES ADMINISTRATION, Defendant-Appellee	No. 77-1831

CERTIFICATE REQUIRED BY RULE 8(c) OF THE GENERAL RULES OF THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMIBA CIRCUIT

The undersigned, counsel of record for Harold Weisberg, certifies that the following listed parties appeared below: Harold Weisberg; the General Services Administration. There were no amici.

The Central Intelligence Agency, a nonparty of whom plaintiff sought discovery, appeared at certain conferences and hearings.

These representations are made in order that Judges of this Court, inter alia, may evaluate possible disqualification or recusal.

James H. Lesar

JAMES H. LESAR
Attorney of Record
For Harold Weisberg

TABLE OF CONTENTS

CASES AND STATUTES

*Case chiefly relied upon

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 77-1831

HAROLD WEISBERG,

Plaintiff-Appellant

v.

GENERAL SERVICES ADMINISTRATION,

Defendant-Appellee

On Appeal from the United States District Court for the District of Columbia, Hon. Aubrey E. Robinson, Jr., Judge

---

BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF ISSUES

1. Are Warren Commission transcripts allegedly withheld under 50 U.S.C. §403(d)(3) to protect the unauthorized disclosure of "intelligence sources and methods" exempt from disclosure under 5 U.S.C. §552(b)(3) where they are not properly classified pursuant to Executive order?

2. Was plaintiff denied discovery essential to effective adversarial testing of agency claim that Warren Commission transcripts are exempt from disclosure where district court refused to allow plaintiff to take tape-recorded depositions of relevant witnesses, then reneged on promise to hold trial on the issues if discovery in the form of interrogatories addressed to non-party proved inadequate?

3. Did district court commit error in refusing to inspect purportedly classified Warren Commission transcripts in camera where plaintiff challanged agency's good faith and record showed that in a previous suit for another Warren Commission transcript agency had fraudulently claimted it was exempt under 5 U.S.C. §552(b)(1)?

4. Does 5 U.S.C. §552(b)(5) apply to the executive session transcript of a defunct presidential commission, particularly where other of the commission's transcripts have been made public even though they contain discussions of policy matters.

5. Was district court required to determine whether agency had abused its discretion in not considering Attorney General's guidelines for review of access restrictions on Warren Commission records?

REFERENCES TO PARTIES AND RULINGS

On March 10, 1977 United States District Judge Aubrey E. Robinson, Jr. issued an order granting summary judgment to the General Services Administration on the grounds that the January 21 and June 23, 1964, Warren Commission executive session transcripts were protected from disclosure under 5 U.S.C. §552(b)(3), while the May 19, 1964 transcript was exempt under 5 U.S.C. §552(b)(5). (JA 344) By order dated June 7, 1977, Judge Robinson amended this order to include additional findings. (JA 376)

Apart from these two brief orders there are some remarks made at the two status calls held on May 5, 1976 and March 4, 1977 which suggest that the summary judgment award may have been based on the court's decision that it could not afford the time and effort required to cope with the obstructionism of the Central Intelligence Agency and its foil, the General Services Administration, and thus would simply pass the buck. See, for example, the court's concluding remarks at the final status call on March 4, 1977: "I understand your problem. I will wrap it up and you can get it to the Court of Appeals as fast as you can, because that's where it's ultimately going to be decided." (JA 333) Compare with other remarks made by the court at the May 5, 1976 hearing (JA 189-196) and at the March 4, 1977 hearing (JA 314, 328-329, 332).

Judge Robinson also made a verbal ruling at the May 5, 1976 hearing that plaintiff would not be allowed to take depositions

of relevant witnesses by tape-recording them but would instead have to proceed on discovery by addressing interrogatories to a nonparty, the Central Intelligence Agency, under whose authority two of the transcripts were purportedly classified. (JA 192-195) He promised, however, that if the record presented factual issues which had not been adequately resovolved by this form of discovery, the relevant witnesses would be called to testify at a trial. (JA 195)

STATUTES OF REGULATIONS

The pertinent parts of statutes and regulations involved in this case are quoted below:

The Freedom of Information Act, 5 U.S.C. §552, provides:

> (a)(3) . . . each agency, upon any request for records which (A) reasonably describes such records, and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> (a)(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its actions.

(b) This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

50 U.S.C. §403(d)(3) provides:

> [t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.

Executive Order 10501 provides in part:

> Section 1. Classification Categories. Official information which requires protection in the interest of national defense shall be limited to three categories of classification, which in descending order of importance shall carry one of the following designations: Top Secret, Secret, or Confidential. No other designation shall be used to classify defense information, including military information, as requiring protection in the interests of national defense, except as expressly provided by statute. These categories are defined as follows:
>
> (a) Top Secret. Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.
>
> (b) Secret. Except as may be expressly provided by statute, the use of the classification Secret shall be authorized, by appropriate authority, only for defense information or

material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromizing important military or defense plans, scientific or technological developments important to the national defense, or information revealing important intelligence operations.

(c) Confidential. Except as may be expressly provided by statute, the use of the classification Confidential shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation.

Sec. 2. Limitation of Authority to Classify. The Authority to classify defense information or material under this order shall be limited in the departments and agencies of the executive branch as hereinafter specified. Departments and agencies subject to the specified limitations shall be designated by the President.

(a) In those departments and agencies having no direct responsibility for national defense there shall be no authority for original classification of information or material under this order.

Sec. 3. Classification. * * * *

(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 reveeal classified defense information shall not be classified.

Sec. 4. Declassification, Downgrading, or Upgrading. * * * * * * *

(a) Automatic changes. To the fullest extent practicable, the classifying authority shall indicate on the material (except telegrams) at the time of original classification that after a specified event or date, or upon the removal of classified enclosures, the material will be downgrade or or declassified.

Sec. 5. Marking of Classified Material.
* * * * * * * *

(i) Material Furnished Persons not in the Executive Branch of Government. 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, in addition to the assigned classification marking, shall whenever practicable be placed on the material, on its container, or on the written notification of its assigned classification:

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.

Sec. 6. Custody and Safekeeping. * * *

(g) Loss or Subjection to Compromise. Any person in the executive branch who has knowledge of the loss or possible subjection to compromise of classified defense information shall promptly report the circumstances to a designated official of his agency, and the latter shall take appropriate action forthwith, including advice to the originating department or agency.

Executive Order 10901 amended Sec. 2(c) of Executive Order 10501 in pertinent part as follows:

(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.

Executive Order 10964 amended Sec. 4 of Executive Order 10501 in pertinent part by deleting paragraphs (a), (e), (g), (h), and (i) and inserting the following:

(a) Automatic changes. In order to insure uniform procedures for automatic changes, heads of departments and agencies having authority for original classification of information or material, as set forth in section 2, shall categorize such classified information or material into the following groups:

(1) Group 1. Information or material originated by foreign governments or international organizations and over which the United States Government has no jurisdiction, information or material provided for by stattues such as the Atomic Energy Act, and information or material requiring special handling, such as intelligence and cryptography. This information and material is excluded from automatic downgrading or declassification.

(2) Group 2. Extremely sensitive information or material which the head of the agency or his designees exempt, on an individual basis, from automatic downgrading and declassification.

(3) Group 3. Information or material which warrants some degree of classification for an indefinite period. Such information or material shall become automatically-downgraded at 12-year intervals until the lowes classification is reached, but shall not become automatically declassified.

(4) Group 4. Information or material which does not qualify for, or is not assigned to, one of the first three groups. Such information or material shall become automatically downgraded at three-year intervals until the lowest classification is reached, and shall be automatically declassified twelve years after date of issuance.

To the fullest extent praticable, the classifying authority shall indicate on the information or material at the time of original classification if it can be downgraded or declassified at an earlier date, or if it can be downgraded or declassified after a specified event, or upon the removal of classified attachments or enclosures. The heads, or their designees, of departments and agencies in possession of defense information or material classified pursuant to this order, but

> not bearing markings for automatic downgrading or declassification, are hereby authorized to mark or designate for automatic downgrading or declassification such information or material in accordance with the rules or regulations established by the department or agency that originally classified such information or materials.

Executive Order 11652, promulgated March 10, 1972, reads in pertinent part as follows:

> Section 1. Security Classification Categories. Official information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States (hereinafter collectively termed "national security") shall be classified in one of there categories, namely "Top Secret," "Secret," or "Confidential," depending upon the degree of its significance to national security. No other categories shall be used to identify official information or material as requiring protection in the interest of national security, except as otherwise expressly provided by statute. These classification categories are defined as follows:
>
> (A) "Top Secret." "Top Secret" refers to that national security information or material which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionallly grave damage to the national security. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreing relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security. This classification shall be used with utmost restraint.
>
> (B) "Secret." "Secret" refers to that national security information or material which requires a substantial degree of protection. The test for assigning "Secret" classification

> shall be whether its unathorized disclosure could resonably be expected to cause serious damage to the national security. Examples of "serious damage" include disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of significant scientific or technological developments relating to national security. The classification "Secret" shall be sparingly used.
>
> (C) "Confidential." "Confidential refers to that national security information or material which requires protection. The test for assigning "Confidential" classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security.

The Attorney General's "Guidelines For Review of Materials Submitted to the President's Commission on the Assassination of President Kennedy," as revised by the Attorney General in 1975, with language added by the revision in italics, read as follows:

> 1. Statutory requirements prohibiting disclosure should be observed.
>
> 2. Security classifications should be respected, but the agency responsible for the classification should carefully re-evaluate the contents of each classified document and determine whether the classification can, consistently with the national security, be eliminated or downgraded. See Attorney General's Memorandum on 1974 Amendments, pp. 1-4.
>
> 3. Unclassified material which has not already been disclosed in another form should be made available to the public on a regular basis or upon request under the Freedom of Information Act unless such material is exempt under the Act and its disclosure--
>
> (A) Would be detrimental to the administration and enforcement of the laws and regulations of the United States and its agencies;

(B) Might reveal the identity of confidential sources of information and impede or jeopardize future investigations by precluding or limiting the use of the same or similar sources hereafter;

(C) Would be a source of embarrassment to innocent persons, who are the subject, source, or apparent source of the material in question, because it contains gossip and rumor or details of a personal nature having no significant connection with the assassination of the President.

Whenever one of the above reasons for nondisclosure may apply, your department should, in determining whether or not to authorize disclosure, weigh that reason against the overriding policy of the Executive Branch favoring the fullest possible disclosure.

Unless sooner released to the public, classified and unclassified material which is not now made available to the public shall, as a minimum, be reiveiwed by the agency concerned five years and ten years after the initial examination has been completed, and in addition must be reviewed whenever necessary to the prompt and proper processing of a Freedom of Informaton request. The criteria applied in the initial examination, outlined above, should be applied to determine whether changed circumstances will permit further disclosure. Similar reviews should be undertaken at ten-year intervals until all materials are opened for legitimate research purposes. The Archivist of the United States will arrange for such review at the appropriate time. Whenever possible provision should be made for the automatic declassification of classified material which cannot be declassified at this time.

STATEMENT OF THE CASE

I. "The Past Is Prologue"

On November 5, 1973, Congressman Gerald Ford, testifying before the Senate Rules Committee on his nomination to be Vice President, was told that it had been stated that "as a member of the Warren Commission you voluntarily accepted constraints which all members of the Commission accepted, providing that you would not publish or release any proceedings of the Commission." He was then asked whether he felt that in publishing his book, Portrait of the Assassin (Simon & Schuster, 1965), and providing material for a Life magazine article on the Commission's proceedings, he had violated his "agreement." Mr. Ford replied that he could not recall any such agreement but that

> even if there was, the book that I published in conjunction with a member of my staff who worked with me at the time of the Warren Commission work--we wrote the book, but we did not use in that book any material other than the material that was in the 26 volumes of testimony and exhibits that were subsequently made public and sold to the public generally. ("Nomination of Gerald R. Ford of Michigan to be Vice President of the United States," Hearings before the Committee on Rules and Administration, United States Senate (93rd Cong., 1st Sess.), p. 89)

Aware that Mr. Ford's book quoted extensively from the transcript of the executive session of the Warren Commission held on January 27, 1964, Warren Commission critic Harold Weisberg had tried for several years to obtain a copy of this transcript from the National Archives. Although Mr. Ford had published parts of

this transcript for profit, the Archives adamantly maintained that it could not make the transcript available to Mr. Weisberg because it was classified Top Secret.

On November 13, 1973, Weisberg filed suit for the January 27, 1964 Warren Commission executive session transcript. (Weisberg v. General Services Administration, Civil Action No. 2052-73, District Court for the District of Columbia)

In responding to the suit for the January 27 transcript, the General Services Administration continued to maintain that it was exempt from disclosure under Exemptions 1 and 7 to the Freedom of Information Act. Initially the argument focused upon the claim that the transcript was properly classified Top Secret pursuant to Executive Order 10501. The government produced an affidavit by Dr. James B. Rhoads, Archivist of the United States, which asserted that. The government also procured an affidavit from Mr. J. Lee Rankin, formerly the General Counsel for the Warren Commission, who stated that the Warren Commission had instructed him to security classify Commission records, that the Commission's "authority to classify its records and its decision to delegate that responsibility to me existed pursuant to Executive Order 10501, as amended," and that he ordered that the January 27 transcript be classified Top Secret. (JA 55)

Weisberg filed counteraffidavits which branded these representations as false. He attached to his affidavits detailed documentation, such as receipts from Ward & Paul, the Warren Com-

mission's reporter, which supported his assertions. Weisberg's evidence demonstrated that for internal bureaucratic reasons Ward & Paul had routinely classified Warren Commission executive session transcripts (and other Warren Commission records), totally without regard to their content. On the basis of his intimate knowledge of the Warren Commission's reocrds, Weisberg was able to assert, without contradiction, that the Warren Commission's records did not support Mr. Rankin's claim that he had been ordered to security classify Warren Commission records pursuant to Executive Order 10501. He further pointed out that the Warren Commission had no authority to classify records pursuant to Executive Order 10501, as amended, and that among other violations of security classification procedures, the Warren Commission allowed witnesses and reporters to buy copies of security classified transcripts. (These same facts have been put into the record in this case through a new affidavit by Weisberg. See JA-110, et seq.)

The end result of this "battle of the affidavits" was a memorandum and order dated May 3, 1974 in which Judge Gerhard Gesell stated:

> Initially, the Court probed defendant's claim that the transcript had been classified "Top Secret" under Executive Order 10501, 3 C.F.R. 979 (Comp. 1949-53), since such classification would bar further judcial inquiry and justify total confidentiality. 5 U.S.C. § 552 (b)(1); E.PA. v. Mink, 410 U.S. 73 (1973). However, defendant's papers and affidavits,

> supplemented at the Court's request, still fail to demonstrate that the disputed transcript has ever been classified by an individual authorized to make such a designation under the strict procedures set forth in Executive Order 10501, 3 C.F.R. 979 (Comp. 1949-53), as amended by Executive Order 10901, 3 C.F.R. 432 (Comp. 1959-63). (JA-167)

Having rejected the government's claim that the January 27 transcript was properly classified, Judge Gesell held, however, that it was exempt under (b)(7) as an investigatory file compiled for law enforcement purposes by virtue of this Court's decision in Weisberg v. Department of Justice, 489 F. 2d 1195 (D.C. Cir. 1973). This ruling was undercut, however, by the answers to interrogatories, which established that the January 27 transcript had never been read by any law enforcement official until at least three years after the Warren Commission had gone out of existence, and arguably not then.

But before Weisberg could appeal this decision the Archives "declassified" what had never been properly classified, forgot that it had to be protected as an investigatory file compiled for law enforcement purposes, and released it to Weisberg and the public.

Once the January 27 transcript was made public it was immediately apparent that there never had been any basis for suppressing it under either exemption. It contained no information even remotely qualifying for consideration as being classifiable for reasons of national defense or foreign policy. To state it pure and simple, the claim that it was properly classified pursuant to Executive Order 10501 was a fraud.

As the result of a request for production of documents made under Rule 34 in this case, plaintiff learned that by letter dated December 22, 1972, the Central Intelligence Agency had requested that the January 27 transcript remain classified to protect "sources and methods." (See JA 370-374) Because the January 27 transcript does not reveal any "sources and methods," plaintiff attached ten pages of the transcript to his third set of interrogatories and asked both the General Services Administration and the Central Intelligence Agency to state, among other things, what information in those pages was classifiable, and what sources and methods were revealed by their disclosure. (The ten pages are reproduced in the appendix. See JA 208-218)

Plaintiff has also entered the entire January 27 transcript in the record of this case as an exhibit to his March 21, 1977 Motion for Reconsideration. This is done because it graphically illustrates the spuriousness of the past claims of the General Services Administration and the Central Intelligence Agency with respect to the classified nature of Warren Commission executive session transcripts. In addition, plaintiff has submitted it to make the simple point that if the ruling from which plaintiff now appeals is accepted, documents spuriously classified by the CIA will be exempt from disclosure whenever that agency choses to base its suppression on Exemption 3 and 50 U.S.C. §403(d)(3).

II. NATURE OF THE PRESENT SUIT

The present suit seeks disclosure of two entire Warren Commission executive session transcripts, those of May 19 and June 23, 1964, and ten pages of a third, that of January 21, 1964.

In its June 21, 1971 letter to Mr. Weisberg the National Achives withheld the May 19 transcript under exemptions (b)(1) and (b)(6). In the present action it asserted exemptions (b)(5) and (b)(6) only, since this transcript has been declassified. The district court, after conducting in camera inspection of the May 19 transcript, upheld the Exemption 5 claim only. (JA 334)

The June 21, 1971 letter to Mr. Weisberg (JA 171) claimed that the June 23 transcript and the withheld pages of the January 21 transcript were exempt from disclosure under 5 U.S.C. §552 (b)(1) and (b)(7). When Mr. Weisberg renewed his request in 1975, the Archives initially added a (b)(5) claim for both transcripts but did not mention the (b)(7) exemption it had invoked in its 1971 letter. (See JA 9)

When plaintiff appealed, however, Deputy Archivist James E. O'Neill added yet another exemption to the list of those protecting the January 21 and June 23 transcripts, Exemption (b)(3). (JA 12) Although Mr. Weisberg's written requests for these two transcripts date at least to 1968, this was apparently the first

time that the Archives had ever sought to claim that they were exempt under (b)(3). The statute said to specifically require that these transcripts be withheld is 50 U.S.C. §403(d)(3). Ultimately the district court ruled that the January 21 and June 23 transcripts were exempt under (b)(3) and did not consider whether or not the (b)(1) exemption applied.

III. "IT'S A WEIRD SET OF CIRCUMSTANCES THAT HAVE BEEN DISCLOSED ON THE RECORD TO DATE"

On March 26, 1977, the GSA moved for summary judgment. (JA 40) It submitted two affidavits in support of its motion, one by Dr. James B. Rhoads (JA 50), the other by Mr. Charles A. Briggs (JA 64). In response plaintiff filed a lengthy opposition, supported by plaintiff's counteraffidavit and numerous exhibits. (JA 81-175)

The motion for summary judgment and plaintiff's opposition to it dealt in large measure with the Exemption 1 claim. At a status hearing held on May 25, 1976, the court also focused on this issue. (See transcript, JA 176-205) The court also indicated that it was not convinced by the government's Exemption 1 claim:

> But I don't think that this record as it is now constructed will sustain my hearing the motion for summary judgment. I don't intend to decide the motion for summary judgment because I don't think the plaintiff has had full opportunity to probe, for example, this classification question. It's a weird set of circumstances that have been disclosed in the record to date.
>
> Who had the authority to classify?

MR. RYAN: Your Honor, we--

THE COURT: And I don't think that your affidavits in that regard nor your statutory authority is clear. (Transcript, p. 14. JA 189)

IV. DISCOVERY: GAMES AGENCIES PLAY

On October 28, 1975, plaintiff filed his first set of interrogatories on the GSA. As has been his experience in all his Freedom of Information Act suits, the government did not make a timely response. On December 29th plaintiff filed a motion to compel answers to his first set of interrogatories, and on January 9, 1976, defendant finally responded.

The answers to interrogatories gave an indication that once again the defendant was going to try and stonewall it. Most of the interrogatories had been previously addressed to the GSA in connection with the prior lawsuit for the January 27 transcript. Interrogator No. 15 had not. It inquired whether or not Yuri Ivanovich Nosenko was the subject of the June 23, 1964 transcript. The GSA, in the person of Dr. Rhoads, responded:

> 15. Defendant objects to this interrogatory on the grounds that it seeks the disclosure of information which the defendant maintains is security classified and which the defendant seeks to protect on this and other bases in the instant action. (JA 17)

In moving to compel answers to this and other unanswered interrogatories, plaintiff noted that the National Archives had itself recently written the New Republic a letter stating that

Nosenko was the subject of the June 23rd transcript. Faced with the evidence that the Archives had itself publicly identified Nosenko as the subject of the June 23 transcript, the GSA dropped the pretense that it was being required to divulge classified information and admitted it under oath.

On March 1 and 2, 1976, plaintiff filed additional discovery motions. One motion asked that because of his poverty plaintiff be allowed to take tape-recorded depositions of several witnesses who would have knowledge bearing on whether the June 23 and January 21 transcripts had been properly classified pursuant to Executive order.

At the hearing held on May 25, 1976, the court rejected the motion to take tape-recorded depositions. Judge Robinson stated that the information which plaintiff needed could be obtained by properly-fashioned interrogatories. When plaintiff's counsel noted that he needed to obtain information from the Central Intelligence Agency, which, as a nonparty was not subject to the provisions made by Federal Civil Rule 33 for interrogatories on parties, the court brushed aside this problem: "Let me suggest, Mr. Lesar, that Mr. Ryan has enough work to do not to play games in this case." (JA 195) When plaintiff's counsel continued to express his apprehensions, the court assured him that if the factual issues could not be resolved through interrogatories, he would hold a trial on the issues and fill his jury room with the witnesses. (JA 195)

What followed proved the rightness of plaintiff's apprehensions. On July 28, 1976 Weisberg filed a lengthy set of interrogatories. Some were intended to be answered by the General Services Administration and others by the Central Intelligence Agency or by both. Many were expressly directed to Mr. Charles A. Briggs, Chief of the Services Staff, Central Intelligence Agency, the officer directly responsible for "classifying" the January 21 and June 23rd transcripts under Executive Order 11652.

On October 15, 1976, two and a half months after Weisberg filed his third set of interrogatories, there still had been no response to them from either the CIA or the General Services Administration, so Weisberg filed yet another motion to compel.

On November 12, 1976, the GSA finally filed a response in which they objected to most of the interrogatories. (JA 258-287) The Central Intelligence Agency made no response whatever.

In the interim plaintiff received notice that his October 15 motion to compel would be heard before a United States Magistrate on November 18, 1976. He later learned that this motion was referred to the Magistrate not by Judge Robinson, to whom the case was assigned, but by Judge Bryant. Thus it was not done in conformity with Local Rule 3-9(a)(1).

What ensued was a series of off-the-record conferences in the chambers of the Magistrate which resulted in one delay and obstruction after another. After three such conferences over a

two month period with another conference set for a month later, Weisberg made an effort to halt the stalling and get the case back in front of the judge who had promised that case would be handled expeditiously. Weisberg, 63 years old, had suffered a serious attack of thrombo-phlebitis the year before. He felt that if the case continued on before the Magistrate, there would be no resolution of it before he died or ceased being able to work effectively. Accordingly, he filed an objection to the Magistrate's January 14 order and demanded a trial. (JA 310-A)

The court scheduled a hearing on Weisberg's motion to compel answers to interrogatories for February 28, 1976, which was then postponed until March 4, 1977. At the hearing, however, the court decided to put the cart before the horse (JA 313) and have an argument on summary judgment first. He continued to indicate that the focus of his concern was the Exemption 1 claim and to express doubt that the government could meet its burden of demonstrating that the transcripts had been properly classified. In fact, when the counsel for the government began to argue that the January 21 and June 23 transcripts were properly classified, the court bluntly stated:

> Well, I don't think that we are going to get very far arguing about the Confidential classification because you have some problems about that, don't you? (JA 314)

This notwithstanding, the Court did not act on Weisberg's motion to compel; instead, he indicated he would decided the summary judgment motions. Six days later he did, on grounds entirely different than those which had been the focus of his concern.

ARGUMENT

I. RECORDS NOT PROPERLY CLASSIFIED PURSUANT TO EXECUTIVE ORDER BUT PURPORTEDLY WITHHELD UNDER 50 U.S.C. §403(d)(3) DO QUALIFY FOR PROTECTION UNDER EXEMPTION 3

The district court ruled that the January 21 and June 23, 1964 Warren Commission executive session transcripts sought by Weisberg are not subject to compulsory disclosure by virtue of 5 U.S.C. §552(b)(3), which exempts records that are:

> (3) specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld

In reaching this determination the district court relied on the CIA's claim that it was withholding these transcripts under the authority of 50 U.S.C. §403(d)(3), which provides:

> [t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.

The district court did not consider whether information never properly classified pursuant to Executive order could be the subject of unauthorized disclosure within the meaning of that statute or what effect the failure to classify these transcripts has on the credibility of the CIA's assertions that it is suppressing them to protect "intelligence sources and methods" from "unauthorized disclosure."

Weisberg contends that whether or not disclosure of intelligence sources and methods constitutes unauthorized disclosure is determined by reference to the applicable Executive order governing disclosure of classified information, Executive Order 10501, as amended, at the time the Warren Commission transcripts came into being, and Executive order 11652 today. He further contends that unless 50 U.S.C. §403(d)(3) is read in light of the applicable Executive order it cannot qualify as a (b)(3) statute because it then leaves withholding or disclosure at the discretion of the Director of Central Intelligence and does not establish particular criteria for his decision to withhold.

That this was the intent of Congress is clear from the passage referring to this statute in the Conference Report which accompanied the bill which amended Exemption 1:

> Restricted Data (42 U.S.C. 2162), communication information (18 U.S.C. 798), and intelligence sources and methods (50 U.S.C. 403 (d)(3) and (g), for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act. When such information is subjected to court review, the court should recognize that if such information is classified pursuant to one of the above statutes, it shall be exempted under this law. (Conference Report No. 93-1380, 93rd Cong., 2d Sess., p. 12)

In Phillippi v. Central Intelligence Agency, 546 F. 2d 1009, 1015-1016, 178 U.S.App.D.C. 243, 249-250 (D.C. Cir. 1976), this Court noted this relationship in its footnote 14:

> On remand the District Court may also consider the applicability of the FOIA's first exemption, which applies to classified information. The Agency claimed this exemption in its first response to appellant and at all subsequent stages of this proceeding. Since information which could reasonably be expected to reveal intelligence sources would appear to be classifiable, see Executive Order 11652 . . . and since the Agency has consistently claimed that the requested information has been properly classified, inquiries into the applicability of the two exemptions may tend to merge.

In this case the district court considered the Exemption 3 claim in isolation from the requirements of Executive Orders 10501 and 11652. Yet if it was to properly determine whether or not the Exemption 3 claim based on the responsibility of the Director of Central Intelligence to protect against the unauthorized disclosure of "methods and sources" was credible and justifiable, the court was required to explore and decide whether or not these transcripts had ever been properly classified. This it failed to do.

The record is clear that the Warren Commission never had authority to classify records. This was the decision of Judge Gesell in Weisberg's suit for the January 27 transcript. It was also the conclusion of an investigation into the question made by the House Government Operations Subcommittee on Government Information and Individual Rights. (See "National Archives--Security Classification Problems Involving Warren Commission Files and

Other Records," Hearing before Subcommittee of the Committee on Government Operations, House of Representatives, 94th Cong., 1st Sess., pp. 61-63. The report of a Committee classification expert, Mr. William G. Florence on "Classification Markings on Warren Commission Records" is attached to the affidavit which Mr. Florence submitted on Weisberg's behalf in this case. See appendix at JA 357-359)

The Warren Commission executive transcripts were not properly classified at the time of their origination. They are not subject to after-the-fact classification by the CIA eleven years later. "A non-secret cannot be changed into a secret by applying a classification label to it." (Memorandum of William G. Florence to Timothy Ingram, Staff Director, Subcomittee on Government Information and Individual Rights, at JA 359)

Because the Warren Commission transcripts were never validly classified, their disclosure could not have been unauthorized as that term is used by either Executive Order 11652 or 50 U.S.C. §403(d)(3). Therefore, the attempt of the defendant to invoke this statute in support of its Exemption 3 claim will not stand scrutiny and the district court's determination must be revoked.

II. PLAINTIFF WAS DENIED DISCOVERY ESSENTIAL TO EFFECTIVE ADVERSARIAL TESTING OF GOVERNMENT'S CLAIMS THAT TRANSCRIPTS ARE EXEMPT FROM DISCLOSURE

The need for plaintiff to have adequate discovery in order to be in a position to test the government's claims that these

transcripts are exempt was recognized by the district court at the initial hearing on May 25, 1976. (JA 189) Yet in the face of agency obstruction and delaying tactics, the court caved in and decided the case without Weisberg having obtained the discovery which was promised him.

Weisberg's interrogatories bore most directly on the government's Exemption 1 claims. However, there were interrogatories addressed to the other exemptions claimed by the government and the interrogatories which dealt with the classification issue also dealt, at least by inference, with the validity of the government's (b)(3) claim. For example, the evidence showed that on March 19, 1975 the CIA had requested that the National Archives continue to withhold the January 21 and June 23 transcripts, then classified Top Secret. A month and a half later the CIA instructed to classify them at the Confidential level. Interrogatory No. 74 sought to determine what had occured in this short period to cause the classification level of these eleven-years old transcripts to plummet so drastically. Obviously the response could have a bearing on the credibility of the government's claims to Exemption 1 and Exemption 3. Yet this interrogatory was never answered.

The importance of discovery in Freedom of Information Act cases has been frequently upheld by this Court. National Cable Television Association v. F.C.C., 156 U.S.App.D.C. 91, 479 F. 2d 183 (1973); Vaughn v. Rosen, 523 F. 2d 1136, (1975); Weisberg v. Department of Justice, 177 U.S.App.D.C., 543 F. 2d 308 (1976).

The district court's refusal to allow Weisberg to take depositions and his failure to compel answers to plaintiff's interrogatories deprived plaintiff of the means by which he could adequately subject the government's claims of exemptions to adversarial testing. This, too, requires reversal of the district court's decision.

III. THE DISTRICT COURT SHOULD HAVE EXAMINED THE JANUARY 21 AND JUNE 23, 1964 WARREN COMMISSION EXECUTIVE SESSION TRANSCRIPTS IN CAMERA WITH THE AID OF PLAINTIFF's CLASSIFICATION EXPERT

In moving for reconsideration of the court's order granting the government summary judgment, Weisberg asked that the court examine the January 21 and June 23, 1964 transcripts in camera with the aid of his classification expert, Col. William G. Florence, who submitted an affidavit stating that he had been used by courts in that role in previous cases. (See Florence Affidavit, JA 342-356) This district court ignored this part of Weisberg's motion for consideration. Weisberg respectfully contends that it was an abuse of discretion for him to do so. In its decision in Weissman v. Central Intelligence Agency, et al., No. 76-1566, this Court stated:

> If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, that the claim is not pretextual or unreasonable, and that by its sufficient description the contested document logically falss into the category of the exemption indicated. It need not go further to test the expertise of the agency or to question its veracity when nothing appears to raise the issue of good faith. (Weissman, slip opinion at 11)

This case is distinguishable from Weissman in that a number of facts challenged the good faith of the government, including the general stonewall defense adopted, the refusal to answer obviously relevant interrogatories, the assertion under oath that the fact that Nosenko was the subject of the June 23 transcript was classified and could not be relased when the Archives itself had just disclosed it to a magazine, the persistent attempt to make it appear that the Warren Commission had authority to classify records when in fact it had none, and the history of the defendant in having previously claimed a Warren Commission transcript, that of January 27, 1964, was properly classified pursuant to Executive Order 10501 when it never had been and contained no classifiable information. In view of these facts, not to mention many others, the veracity and good faith of the government in claiming these transcripts to be exempt under (b)(3) and (b)(1) was challenged and there was reason to believe that these claims were pretextual and unreasonable. Therefore, the district court should have granted in camera inspection of these transcripts.

IV. EXEMPTION 5 DOES NOT APPLY TO THE RECORDS OF A DEFUNCT COMMISSION AND IF IT DOES, THE ARCHIVES WAIVED THE RIGHT TO EMPLOY IT BY DISCLOSING OTHER WARREN COMMISSION EXECUTIVE SESSION TRANSCRIPTS WHICH DISCUSSED POLICY MATTERS

The district court inspected the May 19, 1964 Warren Commission executive session transcript in camera to determine whether the government's claimed exemptions applied to it. The court de-

cided that Exemption 5 did apply.

At the time this transcript was submitted to the Court, the argument on whether or not it was exempt focused upon Exemption 6. Plaintiff consented to the in camera insepction on the condition that he would be allowed to submit materials countering the Exemption 6 claim and the court promised to get back to him if it had any doubt about the applicability of the exemption. Although plaintiff did submit an affidavit and exhibits which countered the Exemption 6 claim, the court ruled the transcript exempt on Exemption 5 grounds without allowing plaintiff to address that claim.

Plaintiff contends that the purpose of Exemption 5 is to protect the policy deliberations of an ongoing agency. Where the agency, here the Warren Commission, became defunct immediately after it made its report to the President in September, 1964, nothing is protected by keeping its policy deliberations secret any longer. In addition, the record clearly demonstrates that other Warren Commission executive session transcripts which discussed policy matters have been disclosed to the public. Plaintiff argues that this constitutes a waiver of the Exemption 5 claim. If the agency is allowed to determine which policy deliberations will be relased and which will not, the purpose of the Freedom of Information Act is once again undermined.

V. DISTRICT COURT SHOULD HAVE DETERMINED WHETHER OR NOT AGENCY ABUSED ITS DISCRETION IN NOT CONSIDERING THE ATTORNEY GENERAL'S GUIDELINES FOR WARREN COMMISSION RECORDS IN DETERMINING WHETHER OR NOT TO DISCLOSE TRANSCRIPTS

The Attorney General's Guidelines For Review of Materials Submitted to the President's Commission on the Assassination of President Kennedy," supra, pp. 11-12, require that all reasons for nondisclosure of Warren Commission records, including those which are security classified, be weighed against "the overriding policy of the Executive Branch favoring the fullest possible disclosure."

This goes well beyond the requirements of the Freedom of Information Act. It means that even where records may be non-disclosable under the terms of the Freedom of Information Act, they may still have to be disclosed if the directives of the Attorney General are followed. The district court may no finding as to whether, in view of these guidelines, the government agencies here involved have abused their discretion by withholding the transcripts which plaintiff seeks. Accordingly, the case ought to be remanded for a determination of the bearing of these Guidelines on the disclosure of the transcripts which Weisberg seeks in this action.

CONCLUSION

Plaintiff was not afforded adequate discovery to test the the exemptions claimed by the General Services Administration.

In addition, the court ruled on the Exemption 3 claim without considering whether or not that exemption applied where records allegedly withheld under 50 U.S.C. §403(d)(3) had ever been properly classified. Because this determination is essential to the Exemption 3 claim, the decision must be reversed.

Respectfully submitted,

James H. Lesar

JAMES H. LESAR
910 16th Street, N.W.
Washington, D.C. 20006

Attorney for Plaintiff-Appellant

+6

b7 - disclosure 2-6/77 Q.G. 5/5/77 J, p6, "appropriate authority"

Argument, Pltf emphasize "disclosure" @ time [illegible] of it 30 [illegible] - info public, by FBI