IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	:	
	:	
Plaintiff-Appellant	:	
	:	
v.	:	Case No. 77-1831
	:	Case No. 78-1731
	:	
GENERAL SERVICES ADMINISTRATION	:	
	:	
Defendant-Appellee	:	

OPPOSITION TO APPELLEE'S MOTION TO DISMISS

The above two cases have been consolidated by order of this Court dated August 4, 1978. On the day that appellee's brief was due in Case No. 78-1831, appellee informed appellant's counsel that two of the Warren Commission executive session transcripts at issue in this case were being released and would be mailed to Weisberg at his home in Frederick, Maryland, a procedure which ensured that he would receive his copies after the transcripts were made available to the general public. That same day appellee filed a motion requesting partial dismissal of the appeal in Case No. 77-1831 and complete dismissal of the appeal in case No. 78-1731.

Appellee's motion for dismissal is founded upon claims that the release of the June 23, 1964 Warren Commission executive session transcript and eleven pages of the January 21, 1964 transcript has mooted all of the issues in 78-1731 and all issues in 77-1831 ex-

cept those pertaining to the remaining undisclosed transcript of May 19, 1964.

For the reasons set forth below, appellant vigorously opposes the motion to dismiss.

I. INTRODUCTION

The two transcripts which appellee has just released have been withheld from appellant Weisberg for over a decade. Originally they were withheld from Weisberg on the grounds that they were exempt under (b)(1) because their release would endanger the national security. Subsequently, after the Freedom of Information Act was amended in 1974, appellee also claimed that they were exempt under (b)(3) pursuant to a statute, 50 U.S.C. §403(d)(3) which requires the Director of Central Intelligence to protect against the unauthorized disclosure of "intelligence sources and methods."

Now that these transcripts have been released, it is evident, as Weisberg has claimed all along, that an enormous fraud was being perpetrated by appellee. The transcripts themselves prove that appellee's claims about their national security content were not only baseless but fabricated. There never was any classifiable national security information in either of the withheld transcripts, nor did their release disclose any intelligence sources and methods not already well known. The affidavit of appellant Weisberg which is reproduced in the addendum to this Opposition removes any possible

doubts about the fraudulent nature of appellee's representations to the district court about the nature of these transcripts. Despite its length, the Weisberg affidavit is not exhaustive. Much more evidence could be adduced to show the falsity of appellee's affidavits and pleadings. (The entire June 23, 1964 Warren Commission executive session transcript is attached as Exhibit 1 to the Weisberg affidavit. Pages 63-73 of the January 21, 1964 transcript are attached as Exhibit 2)

This is not the first time that this defendant and its ally, the Central Intelligence Agency, have engaged in this pattern of deceiptful and abusive conduct. In an earlier lawsuit for the January 27, 1964 Warren Commission executive session transcript, Weisberg v. General Services Adminstration, Civil Action No. 75-1448, the GSA lost on its claim that the transcript was properly classified but won on an equally spurious claim that it was exempt under (b)(7) as "an investigatory file compiled for law enforcement purposes" even though the answers to interrogatories showed that it had never been seen by any law enforcement official until at least three years after the Warren Commission went out of existence, and arguably not even then. Before Weisberg could appeal, the CIA "declassified" what never qualified for classification and the GSA forgot about its exemption 7 claim and released the transcript. Like the January 21 and June 23 transcripts just released, the January 27 transcript had been withheld at the behest of the CIA purportedly to protect "intelligence sources and methods." As with the present transcripts, the text of January 27 transcript proved

the government's representations of its contents false.

The concluding paragraph of Weisberg's attached affidavit relate some of the consequences of this pattern of conduct:

> 82. This is the second time GSA and the CIA have bled me of time and means to deny me nonexempt Warren Commission executive session transcripts. They dragged me from court to court to delay and withhold by delaying. In each case, both stonewalled until the last minute before this Court would have been involved. In each case, rather than risk permitting this Court to consider the issues and examine official conduct, I was given what had for so long and at such cost been denied me. This is an effective nullification of the Act, which requires promptness. It becomes an official means of frustrating writing that exposes official error and is embarrassing to officials. It thus becomes a substitute for First Amendment denial. They can and they do keep me overloaded with responses too long and spurious affidavits with many attachments. With the other now systematized devices for noncompliance, these effectively consume most of my time. At my age and in my condition, this means most of what time remains to me. My experience means that by use of federal power and wealth, the executive agencies can convert the Act into an instrument for suppression. With me they have done this. My experience with all these agencies makes it certain that there is no prospect of spontaneous reform. As long as the information I seek is potentially embarrassing or can bring to light official error or misconduct relating in any way to the aspects of my work that are sensitive to the investigative and intelligence agencies, in the absence of sanctions their policy will not change and the courts and I will remain reduced to the ritualized dancing of stately steps to the repetitious tunes of these official pipers.

Appellee has moved to moot most of the issues in 77-1831 and all the issues in 78-1731 because it and the CIA are afraid that these appeals will set precedents which constrain the government's

ability to manipulate court's and court procedures in Freedom of Information Act cases. Both agencies know that this case is one involving particularly egregious conduct and that appellant has taken pains, under very difficult circumstances, to build a solid factual record in his support. From their point of view it is unlikely that there will ever be a worse factual record for this Court to address the legal issues which appellant has raised. Accordingly, as one final act of manipulation they have attempted to deprive this Court of the optimum factual record on which to address those issues by claiming that the release of these two transcripts moots those issues.

There is absolutely no doubt but that the conduct of the GSA and the CIA in this case is subversive of the integrity and independence of the judiciary and makes a mockery of the law which this Court is sworn to uphold. There can be no meaningful implementation of the Freedom of Information Act if this conduct is allowed to persist. If it does persist, the respect of the citizens for the judiciary will also be lost. These are the issues which are ultimately at stake in considering the appellee's motion to dismiss.

II. THE "PUBLIC INTEREST" EXCEPTION TO THE MOOTNESS DOCTRINE APPLIES HERE

In Alton & So. Ry. Co. v. International Ass'n of Mach. & A.W., 150 U.S.App.D.C. 36, 463 F. 2d 872, this Court discussed the mootness

doctrine at some length. In doing so, it referred to the doctrine spawned by what it refers to as "the seminal opinion, in modern jurisprudence" in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911):

> The liklihood of repetition of the controversy and the public interest in assuring appellate review are the key elements of the Southern Pacific Terminal doctrine. The vitality of the Southern Pacific Terminal doctrine is undeniable. Precedents abound . . .. Indeed, if this doctrine identifies an "exception," the exception may have swallowed up the rule--at least where litigation involves actions by or against public officials, and the public interest in assuring enforcement of the legislative will and, of course, constitutional mandates. A cognate "public interest" has also led in recent years to the overhaul of doctrines on matters like standing and ripeness, and to the hearing of controversies from which the courts formerly refrained. (citations omitted) Alton, supra, at 42-43.

This case is one which contains all the elements mentioned in this passage from Alton. The issues raised by Case No. 78-1831 are certain of repetition. This is true, for example, of the issue raised in that case as to whether records allegedly withheld under 50 U.S.C. §403(d)(3) to protect the unauthorized disclosure of "intelligence sources and methods" are exempt under 5 U.S.C. §552 (b)(3) where they are not properly classified pursuant to Executive order. It is appellant's understanding that this issue has been raised in other cases which he believes are presently before this Court. In addition, this issue has been raised in cases now in district court, including in Weisberg v. Central Intelligence Agency, et al., Civil Action No. 77-1997. Other issues, such as the re-

fusal of the district court to examine the purportedly classified transcripts in camera either with or without the aid of a classification expert and the district court's curtailment of discovery are also certain to be raised again in subsequent cases.

Nor is there justification for dismissing the issue raised by Case No. 78-1731 as moot. The issue in this case is whether the district court abused its discretion in denying Weisberg's motion for a new trial on grounds of new evidence and fraud, misrepresentation, or other misconduct. This affords this Court to lay down standards appropriate to the particularly fluid situation which prevails with respect to Freedom of Information Act lawsuits and to engage in innovations which will bring rigid court procedures more in line with the mandate of the Freedom of Information Act that nonexempt information must be made available promptly.

There is a particularly strong public interest involved here. The Freedom of Information Act is a law passed to benefit the public by making all nonexempt federal information available promptly upon demand. But if agencies can delay the release of information for three years, as in this case, merely by stonewalling the case in the courts and forcing the requester to a costly and time-consuming appeal, then the Congressional mandate is defeated and the law becomes a caricature of what it is supposed to be. In addition, as mentioned above, there is an overriding constitutional and public interest in preserving the integrity and independence of the judiciary. All of these considerations strongly argue that this Court should not dismiss any part of either of the two con-

solidated cases but should seize upon the unique factual situation present in them to develope innovative responses to the agencies' attempts to undermine the Freedom of Information Act and the integrity of the courts.

III. THE MOTION TO DISMISS FOR MOOTNESS SHOULD NOT BE GRANTED BECAUSE THE "COLLATERAL CONSEQUENCES" EXCEPTION ALSO APPLIES HERE

In Thompson v. Mazo, 137 U.S.App.D.C., 421 F. 2d 1156 (1970) and other cases this Court has also adopted the "collateral consequences" exception to the mootness doctrine. In this case one of the collateral consequences of granting appellee's motion to dismiss would be to tie-up appellant in endless litigation for the rest of his life, with the government averting decision on the legal issues at the appeal level time and again by mooting the case at the last moment. Any such prospect should be ended by this Court once and for all right now in these two appeals.

In addition, granting the government's motion to dismiss on grounds of mootness may affect such collateral matters as appellant's right under the Freedom of Information Act to attorney's fees and to invoke sanctions against agency employees.

For the reasons aforesaid, appellant asks that the government's motion to dismiss be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of October, 1978 mailed a copy of the foregoing Opposition to Appellee's Motion to Dismiss to Mr. Leonard Schaitman and Mrs. Linda M. Cole, U.S. Department of Justice, Washington, D.C. 20530.

James H. Lesar

JAMES H. LESAR