IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

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

APPELLANT'S OPPOSITION TO APPELLEE'S
MOTION FOR RECONSIDERATION OF AWARD OF COSTS

On March 29, 1979 appellant Harold Weisberg ("Weisberg") served and filed a motion for award of costs in the above-entitled cases. Attached to his motion was a bill of costs in the amount of $522.06. He also filed an opposition to the bill of costs submitted by appellee General Services Administration ("GSA").

Weisberg's motion was made pursuant to a provision of the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) and Rule 39 of the Federal Rules of Appellate Procedure.

In his motion Weisberg argued that he had "substantially prevailed" because GSA had released two of the three Warren Commission executive session transcripts at issue on the very day its brief in

Case No. 78-1731 was due in this Court. GSA had previously maintained that the release of these transcripts would jeopardize national security by disclosing intelligence sources and methods in violation of 50 U.S.C. § 403(d)(3). On the basis of falsely sworn affidavits to this effect, the District Court held that these transcripts were protected by Exemption 3.

Weisberg noted in his motion for an award of costs that this is the second time that GSA has forced hin to expensive and time-consuming litigation by fraudulently claiming that Warren Commission executive session transcripts were properly classified pursuant to Executive order when in fact they were not. (The earlier case was Weisberg v. General Services Administration, Civil Action No. 2052-73, in which Weisberg sought the January 27, 1964 transcript.) In each instance GSA avoided appellate reveiw by releasing the transcript(s) after it had procured a decision that they were exempt by misrepresenting facts to the District Court.

On April 9, 1979 GSA filed an opposition to Weisberg's motion for an award of costs. GSA argued that Weisberg had not "substantially prevailed." (See Appellee's Opposition to Appellant's Motion for an Award of Costs, ¶¶1, 2, and 4) GSA also noted that when Weisberg, acting pursuant to this Court's order of March 31, 1978, had filed a motion for new trial on grounds of newly discovered evidence, the District Court found that "no newly discovered evidence, fraud or misrepresentation warrants a new trial herein." Then GSA argued against Weisberg's equitable argument for

an award of costs based on the government's fradulent conduct and "bad faith" by stating that it was based upon "factual assertions which were completely discredited in District Court after a full adversary hearing."

This is false. In the first place, there was no hearing on Weisberg's new trial motion, much less a "full adversary hearing." When GSA opposed Weisberg's new trial motion on grounds that the materials he had submitted in support of it were irrelevant and of an unsworn, double hearsay hature, Weisberg noted the depositions of two CIA officials able to provide first-hand testimony as to the truth and accuracy of his allegations. GSA promptly opposed this effort to subject the new trial evidence to adversarial testing and the District Court obliged by granting its motion to quash.

Secondly, not all the examples of "bad faith" or "fraudulent" conduct on the part of the GSA were addressed by the District Court when it considered the motion for new trial. Indeed, the prime example of the government's fraudulent conduct in this case is the fact that the texts of the January 21 and June 23 transripts plainly show that there never was any basis to withhold them under a claim of national security. But the District Court did not have these transcripts available at the time it decided the new trial motion. The District Court did have an affidavit from a CIA official, Mr. Charles A. Briggs, which declared that: "The manner in which Mr. Nosenko's security is being protected by the CIA is serving as a model for potential future defectors." (December 30, 1976 Briggs

Affidavit, ¶9) The District Court had no way of knowing, however, that the CIA had "protected" Mr. Nosenko's security by storing him in a "bank vault" for several years while it subjected him to physical and mental torture.

By order dated April 12, 1979, this Court awarded Weisberg costs in the amount of $492.54.1/ Presumably this Court understood the implications of its own act. Nevertheless, on April 24, 1979, GSA filed a motion for reconsideration of the award of costs. GSA'S main concern is that:

> Because the same statutory provision [of the Freedom of Information Act] authorizes both attorney's fees and costs, the plaintiff may well cite this Court's ruling on costs as precedent. (Opposition, ¶5)

GSA's concern is well-founded. In fact, on April 24, 1979 Weisberg did file a motion for award of attorney's fees in the District Court and did bring this Court's award of costs in his favor to its attention.

However, for the reasons stated below, Weisberg opposes GSA's motion for reconsideration.

1/ Weisberg filed a bill of costs in the amount of $522.06 and attached it to his motion for an award of costs. The discrepancy between Weisberg's bill of costs and the sum of $492.54 which this Court awarded him is attributable to a typographic error in Weisberg's bill of costs. Thus, under the heading of "Case No. 78-1731" Weisberg listed the cost of 12 copies of his 123 pp. appendix xeroxed at $0.04 per page (1,476 total pages) as $88.56. However, unlike the other items on his bill, the appendix was xeroxed at Panic Press at $0.06 per page. Thus the dollar figure was correct. The Clerk, however, multiplied $0.04 times 1,476 and credited Weisberg with a cost of only $59.04 for the appendix.

ARGUMENT

I. APPELLEE'S MOTION FOR RECONSIDERATION IS UNTIMELY AND SHOULD BE DISMISSED

Rule 6(f) of the General Rules of this Court states:

> (3) Entry of Clerk's Orders on the Docket; Reconsideration. Orders by the Clerk granting motions shall be entered on the docket but shall not be recorded in the minutes of the court. Any interested party adversely affected by an order so entered shall be entitled to reconsideration thereof is such party, within 10 days after entry of the order, serves and files a motion for reconsideration, setting forth the grounds therefore.

The Clerk's Office has advised Weisberg's counsel that the Court's order awarding costs to Weisberg was entered on April 12, 1979. Since GSA's motion for reconsideration was not filed and served until April 24, 1979, 12 days later, it was not timely made and should be dismissed.

II. THIS COURT PROPERLY DETERMINED THAT COSTS SHOULD BE AWARDED TO WEISBERG

The pertinent parts of Rule 39 of the Federal Rules of Appellate Procedure read as follows:

> (a) *** Except as otherwise provided by law . . . if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.
>
> (b) *** In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

In this case the District Court's award of summary judgment was affirmed only in part, only insofar as the May 19 transcript was concerned. This Court ordered the District Court to vacate its orders insofar as they related to the purportedly classified January 21 and June 23 transcripts which the District Court had found to be properly withheld under Exemption 3. In such circumstances, this Court may exercise its discretion to award costs as it sees fit.

Indeed, this appears to have been the practice of this Court in prior Freedom of Information Act cases. For example, in Rural Housing All. v. United States Dept. of Agri., 167 U.S.App.D.C. 345, 511 F. 2d 1347 (1974), this Court awarded costs in favor of the government, which had achieved limited success on appeal by obtaining a remand on certain issues, even though "a close look at the decision reveals no final resolution of the issues in favor of the Government." (Concurring opinion of Chief Judge Bazelon at 167 U.S. App.D.C. 347, fn. 5)

In Wilderness Society v. Morton, 161 U.S.App.D.C. 446, 450, 495 F. 2d 1026, 1030 (1974), on consideration of bills of costs and supporting memoranda, this Court stated:

> It is a paramount principle of equity that the court will go much further both to grant and to withhold relief in furtherance of the public interest than when only private interests are involved.

On this basis, the award of costs to Weisberg is thoroughly justified. The transcripts obtained by Weisberg bear upon significant

public issues. Despite repeated demands for their release by Weisberg and others, they were withheld from the public for some fourteen years. As soon as he obtained these records, Weisberg held a press conference at which he made copies of them available to the news media. Stories on the transcripts were carried in the Washington Post and elsewhere. Because the transcripts were made available to others at the time they were given to Weisberg, and because Weisberg himself released them to the news media as soon as he obtained them, there was no possible commercial benefit to Weisberg. Rather, Weisberg, acting as a private attorney general prosecuting the public interest in full disclosure about how our government works, incurred consideral personal expenses, only a small portion of which are compensated by the award of costs made by this Court.

In enacting the 1974 Amendments which provided for a discretionary award of attorney's fees and other litigation costs reasonably incurred, Congress recognized that the Freedom of Information Act could not be implemented effectively unless individuals and news organizations could qualify for such awards in cases in which they had substantially prevailed. Otherwise, the costs of litigating would discourage full use of the Act.

In addition to these considerations of a policy nature, there can be no doubt but that Weisberg "substantially prevailed" in these cases. All that is needed to reach this conclusion is to compare the affidavits which the GSA submitted to the District Court

with the transcripts themselves. These affidavits made fraudulent claims that the January 21 and June 23 transcripts were properly classified for reasons of national security when in fact their texts reveal that there never was any basis for their classification or withholding on this or any other grounds.

In this regard, the GSA contends in it motion for reconsideration that:

> In the instant case, the United States has consistently maintained that it released the documents as a result of disclosures made in connection with a Congressional inquiry and not as a result of the plaintiff's lawsuit. The plaintiff has presented no evidence to the contrary. Motion for Reconsideration, ¶3. (Emphasis added)

This is false. In his October 26, 1978 affidavit, a copy of which was previously filed in this Court, Weisberg exposed this attempt to flim-flam the Court:

> 16. The Lapham letter gvies as the reason for the CIA's abandonment of its "previously claimed exemptions for the two Warren Commission transcripts" in order "to protect intelligence sources and methods" the fact testimony "has been given" before the Select Committee on Assassinations.
>
> 17. This is pretextual, misleading and deceptive. In the first place, as detailed above, there never was any basis for classifying these transcripts. Secondly, I know of no development in the past three years that in any way altered the significance or meaning of the content of these transcripts. This includes the testimony of the CIA's John Hart (which is not included in the transcript of a reading of the Committee's press kit which is attached to the motion to dismiss.) Most of Hart's testimony dealt with the CIA's barbarous treatment of Nosenko. Nosenko's treatment is not mentioned in

> the January 21 and June 23 transcripts. The CIA's treatment of Nosenko was not unknown before Hart testified. The possibly relevant portion of Hart's testimony also was not secret. This relates to the credibility of what Nosenko said about Lee Harvey Oswald, the only accused assassin of the President. What Nosenko told the FBI about this was not classified, although the GSA withheld it nonetheless until early 1975, when I obtained copies.

The cock-and-bull story contrived by the CIA and its front, the GSA, to "explain" the sudden release of the January 21 and June 23 transcripts on the day the government's brief was due in court are part of a campaign to wear Weisberg and his counsel down through endless needless litigation and grind them into the dirt. As Weisberg stated in his October 26, 1978 affidavit:

> 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 thatn 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 response 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 health, 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 repetious tunes of these official pipers.

The government's campaign to wear Weisberg down through a myriad obstructive tactics in District Court has already had a potent effect in stopping him from making the contribution to public knowledge about the King and Kennedy assassinations that he otherwise would have. For more than a year now, Weisberg has filed no new Freedom of Information Act suits. This is not because there are none left which merit filing. Rather, it is because his counsel has been forced to recognize that the government's obstructive tactics and the consequent delay in receiving compensation for his work have made it impossible for him handle any more Freedom of Information Act cases for Mr. Weisberg at present. This is at least unfortunate, if not tragic, because there are still important records on these subjects which have not been made public, and which Mr. Weisberg may now never have the opportunity to obtain and to scrutinize.

The GSA in effect asks the Court that it be allowed once again to become the beneficiary of its own wrongdoing. In wrongfully denying the January 21 and June 23 transcripts to Weisberg for more than a decade, GSA has violated the Freedom of Informa-

tion Act and prevented Weisberg and other concerned and knowledgeable citizens from effectively raising important questions about the assassination of President Kennedy. Weisberg has noted some of the important public consequences of the GSA's suppression of these transcripts in his October 26, 1978 affidavit:

> 74. If it had been public knowledge at the time of the investigation of the assassination of the President that the CIA had, by the devices normally employed by such agencies against enemies, arranged for the Presidential Commission not to conduct a full investigation, there would have been considerable turmoil in the country. If, in addition, it had been known publicly that there was basis for inquiring into a CIA connection with the accused assassin and that the CIA also had frustrated this, the commotion would have been even greater.
>
> 75. At the time of my initial requests for these withheld transcripts, there was great public interest in and media attention to the subject of political assassinations. If the CIA had not succeeded in suppressing these transcripts by misuse of the Act throughout that period, public and media knowledge of the meaning of the contents now dislosed would have directed embarrassing attention to the CIA. There is continuing doubt about the actual motive in supporessing any investigation of any possible CIA connection with the accused assassin. If such questions had been raised at or before the time of the Watergate scandal and disclosure of the CIA's illegal and imporper involvement in it, the reaction would have been strong and serious. This reaction would have been magnified because not long thereafter the CIA could no longer hide its actual involvement in planning and trying to arrange for a series of political assassinations.
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> 76. One current purpose accomplished by withholding these transcripts from me until after the House Committee held its Nosenko hearings was to make it possible for the Commit-

> tee to ignore what the Commission ignored. With any prior public attention to the content of these transcripts, ignoring what Nosenko could have testified to, especially suspicion the accused assassin was an agent of American intelligence, would have been impossible. A public investigation would have been difficult to avoid.

This Court's award of costs to Weisberg is supported by public policy, equity, and the undeniable fact that he "substantially prevailed" in the above-entitled lawsuits. Accordingly, the Court should either or deny the motion for reconsideration, or, alternatively, should enter a new order stating that Weisberg has in fact "substantially prevailed" within the meaning of the Freedom of Information Act.

Resepctfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 4th day of May, 1979, mailed a copy of the foregoing Appellant's Opposition to Appellee's Motion for Reconsideration of Award of Costs to Ms. Linda M. Cole, Appellate Staff, Civil Division, U.S. Department of Justice, Wash-

ington, D.C. 20530.

James H. Lesar

JAMES H. LESAR