9/24/79

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff,	)	
v.	)	Civil Action No. 75-1448
GENERAL SERVICE ADMINISTRATION, Defendant.	)	

DEFENDANT'S MOTION
FOR A PROTECTIVE ORDER

Pursuant to Rule 26(c), Federal Rules of Civil Procedure, the defendant respectfully request that this Court enter a protective order which precludes plaintiff from taking the depositions of Dr. James B. Rhoads, Charles A. Briggs, Robert E. Owen and Mr. Arthur Dooley which plaintiff noted for October 10, 1979 and relieves defendant of any obligation to produce the documents sought in plaintiff's request for production of documents served on September 13, 1979.

The sole remaining issue in this case is whether the plaintiff's attorney is entitled to costs and attorney's fees. After the Court of Appeals issued its decision in this case on January 12, 1979 and March 15, 1979, plaintiff served a motion for costs and attorney's fees on April 24, 1979. The defendant, after obtaining an extension of time, filed its opposition on August 10, 1979. Plaintiff replied on September 13, 1979.

The plaintiff's motion, defendant's opposition and plaintiff's reply have been submitted. The discovery which plaintiff seeks is therefore unnecessary and burdensome.

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For these reasons and those stated in the attached memorandum, the defendants respectfully request that the Court issue a Protective Order precluding discovery and decide the plaintiff's motion for attorney's fees as soon as possible.

Respectfully submitted,

CARL S. RAUH
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

Patricia J. Kenney

PATRICIA J. KENNEY
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff,	)	
v.	)	Civil Action No. 75-1448
GENERAL SERVICE ADMINISTRATION, Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR A PROTECTIVE ORDER AND IN OPPOSITION TO PLAINTIFF'S MOTION TO SHORTEN TIME FOR RESPONDING TO PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS

After the Court of Appeals decided this case in orders dated January 12, 1979 and March 15, 1979, plaintiff filed a motion for costs and attorney's fees on April 24, 1979. The defendant filed its opposition on August 10, 1979, afterwhich plaintiff filed a reply on September 13, 1979.

Plaintiff claims entitlement to costs and attorney's fees in a FOIA case in which three Warren Commission transcripts were in issue. The District Court held that the three transcripts were properly withheld (reconsidering its decision on two separate occasions) and the Court of Appeals upheld the District Court decision with respect to one transcript. The agency voluntarily, on its own initiative, released the other two transcripts while the case was on appeal as the result of disclosure of information contained in the transcripts to a Congressional subcommittee in testimony before it.

The defendant respectfully suggests that if, on this showing a plaintiff can obtain costs and attorneys' fees because plaintiff is "a prevailing party," that the words "prevailing party" are hollow and meaningless.

Plaintiff, after filing its reply to defendants' opposition, has filed a defective notice of depositions [1] to depose four persons. Plaintiff also moved for an order directing the production of documents on an expedited basis. The plaintiff has sought discovery after his motion for costs and fees has been submitted without offering any justification for the discovery sought, or for seeking it on an expedited basis (other than that he will be on a month's vacation from October 20, 1979).

The defendant respectfully requests that the Court enter an Order prohibiting discovery on the basis that it is unnecessary and burdensome in that plaintiff's motion is submitted and that further factual development of whether plaintiff is a "prevailing party" is unnecessary.

ARGUMENT

A. No Further Factual Development is Necessary to Determine the Issue of Whether Plaintiff is a Prevailing Party.

Plaintiff once again in typical manner recklessly and wantonly accuses the government of providing a false affidavit attached to its opposition to plaintiff's motion for costs and fees. In this case, the plaintiff at every turn has accused the defendant, and all associated with the defendant, of lying under oath and of conspiring to personnally deprive him of documents. In the past, he has freely made such accusations without substantiating information, other than his own belief. His current accusations are as hollow as the foundation upon which they rest.

In determining whether plaintiff is a "prevailing party," the inquiry must focus on whether this litigation has had a causative effect on the release of two transcripts to plaintiff. The CIA has

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1/ Plaintiff simply filed a notice without subpoenaing the witnesses. The witnesses are not parties to the action; at least two of them Dr. James B. Rhoads, formerly with GSA, and Mr. Arthur Dooley, formerly with CIA, are retired and no longer employees. The proper means of obtaining deposition testimony, if testimony is appropriate, on a given topic is by naming the agency in the notice and specifying with reasonable particularity the matters on which examination is requested so as to enable the agency to designate and authorize a person to testify. Rule 30(b)(6), Federal Rules of Civil Procedure.

set forth its reasons for the release of the two transcripts while this case was before the Court of Appeals in the July 26, 1979 affidavit of Robert E. Owen. These reasons were not conjured up or imagined as a means of avoiding attorney's fees as plaintiff seems to suggest: the reasons were fully articulated to the Court of Appeals in October, 1978, when the defendant moved for dismissal of the case as it related to the two released transcripts. See Weisberg v. GSA, App. Dkt. Nos. 77-1831, 78-1731, "Motion for Partial Dismissal of the Appeal in No. 77-1831 and for Complete Dismissal of the Appeal in No. 78-1731 on Grounds of Mootness," filed October 16, 1978.

The plaintiff advances no evidence to establish that the Owen Affidavit contains any untruth. Rather, plaintiff without the facts or the law on his side makes an ad hominem argument that he believes the Owen affidavit is false because of an August decision in the Court of Appeals. Plaintiff speculates that the Court of Appeals would have found in his favor had it had the opportunity. Plaintiff further speculates that the defendant anticipating a likely reversal, threw up its hands and coughed up the transcripts.

Plaintiff does not offer any evidence to refute the statements in the affidavit that the CIA did in fact declassify information in September, 1978 for testimony before the House Select Committee on Assassinations, or that Mr. Owen of the CIA compared the testimony before the House with the transcripts, or that it was done on CIA's own initiative, or that Mr. Owen did conclude that considering the declassified information the continued withholding of the transcripts under FOIA exemptions was no longer tenable.

Plaintiff attempts to create a fact issue by disbelieving the government's affidavit. Plaintiff has not offered a scintilla of evidence to substantiate his serious accusations. Discovery cannot be used as a tool to develop a claim of "bad faith" or "improper

behavior." Cf. Braniff Airways, Inc. v. CAB, 379 F.2d 453, 462 (D.C. Cir. 1967). Plaintiff should not be permitted to use discovery to bootstrap an unsubtantiated claim of "bad faith" or "improper behavior." To permit discovery on the issue of whether plaintiff is a "prevailing party" requires disbelieving the agency's sworn statements to both this Court and the Court of Appeals.

B. Plaintiff is Not Entitled to Further Probe the Mental Process of the Decision Maker.

In addition to being unnecessary and burdensome, the discovery plaintiff seeks would be an unwarranted intrusion into the deliberative process of the executive branch. The bar against probing the mental processes of decision makers, except in extraordinary cases, has long been recognized in the context of suits challenging administrative action [Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); United States v. Morgan, 313 U.S. 409, 433 (1941)] and more recently in the context of suits brought under the Freedom of Information Act [EPA v. Mink, 410 U.S. 73 (1973); Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974)]. The whole purpose of plaintiff's discovery request is to determine how the CIA decided the transcripts should be released and to challenge the statements made in the Owen affidavit. Clearly, this is an unwarranted intrusion on the decision maker's mental processes.

C. Plaintiff has Made No Showing the the Information Sought is Available from the Named Officials.

Plaintiff has not stated "with particularity" the areas in which he seeks to examine the witnesses as required by Rule 30(b)(6), Federal Rules of Civil Procedure. It is not at all clear that, even if this Court were to permit discovery, these are the proper parties to be asked whatever questions plaintiff has in mind. Moreover, depositions are burdensome and time consuming. Particularly if

the individuals have no knowledge, or little knowledge, in the areas sought to be developed--the plaintiff has requested documents relating to the classification of information in the two released transcripts which themselves date back to 1964. If this Court concludes discovery is necessary, less burdensome means--such as interrogatories and requests for admissions--ought to be considered.

D. Plaintiff's Request for Expedited Discovery Should Be Denied.

Plaintiff's counsel, about to vacation in China, would have the defendant conduct an intensive and immediate search for documents which in any way pertain to "the classification, review of classification, downgrading, declassification or disclosure" not only of the two Warren Commission transcripts from 1964 which were the subject of this suit--but of a transcript not even involved in this suit. Moreover, in an attempt to develop plaintiff's claim that the defendant caved in--divulging the transcripts rather than face a possible adverse decision in the Court of Appeals--plaintiff seeks all documents relating to the decision in Ray v. Turner and its impact on cases then in litigation.

Such requests for documents on an expedited basis are patently unreasonable. Plaintiff's vacation plans do not justify shortening the time provided in the Federal Rules for defendant's response. As previously stated, defendant does not agree that any discovery is necessary, but certainly no discovery is necessary on the schedule plaintiff's counsel suggests.

E. The Court Should Prohibit Discovery.

Courts have broad discretion to control discovery. When necessary, the Court may grant an order limiting or prohibiting discovery in order to protect a party from annoyance, embarrassment, oppression, undue burden or expense. Rule 26(c), Federal Rules of Civil Procedure.

From the foregoing, and from a cursory look at plaintiff's production requests, it is clear that plaintiff seeks to relitigate this whole case through his motion for costs and attorneys fees. Plaintiff, while this case was on appeal, strenuoulsy opposed dismissal of the case as moot after the two transcripts had been released. The Court of Appeals nevertheless dismissed that portion of the case relating to the two transcripts as moot on January 12, 1979. Plaintiff now seeks to improperly use discovery to reopen and relitigate issues which are unnecessary to the resolution of the attorneys fees question. Accordingly, the defendant respectfully requests this Court to enter an order prohibiting the discovery sought.

Respectfully submitted,

CARL S. RAUH
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

Patricia J. Kenney
PATRICIA J. KENNEY
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Defendant's Motion for a Protective Order, Memorandum in support of Defendants' Motion for a Protective Order and in Opposition to Plaintiff's Motion to Shorten Time for Responding to Plaintiff's Request for Production of Documents and proposed Order upon plaintiff by mailing a copy thereof to plaintiff's counsel, James H. Lesar, Esquire, 910 16th Street, NW., #600, Washington, D. C. 20006, on this 24th day of September, 1979.

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O R D E R

UPON CONSIDERATION of Defendant's Motion for a Protective Order and supporting Memorandum and the entire record herein, it is this day of September, 1979

ORDERED that plaintiff's motion to expedite discovery, be and hereby, is denied; and it is

FURTHER ORDERED that defendant's motion for a protective order be and hereby is granted and that discovery is prohibited in connection with plaintiff's motion for costs and attorney's fees which is under submission.

UNITED STATES DISTRICT JUDGE