UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff, v. GENERAL SERVICES ADMINISTRATION, Defendant	RECEIVED OCT 9 1979 JAMES F. DAVEY, Clerk Civil Action No. 75-1448

PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION FOR A PROTECTIVE ORDER

A. Notice of Depositions Was Not Defective

In moving for a protective order against the discovery which plaintiff seeks to take, defendant has labored to find some defect in the notice of deposition, stating that:

> 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 the GSA, and Mr. Arthur Dooley, formerly with the 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.

[Defendant's Motion for a Protective Order, fn. 1, p. 2]

Elsewhere in the motion defendant's counsel asserts that plaintiff's counsel is "about to vacation in China," a statement based on a remark that on October 18th plaintiff's counsel will be leaving with his wife and 4 year-old daughter for a long-awaited vacation in Singapore at the home of his wife's family. Singapore is, of course, a sovereign state approximately 1,500 miles distant from China.

Defendant's knowledge of the requirements of Rule 30 is as shaky as its knowledge of geography. This is evidenced by the following erroneous assumptions and misstatements:

1. Rule 30 does not require even that a subpoena be issued, much less that it be issued at the same time that a notice of deposition is filed. Rule 30(b)(1) does provide that "[i]f a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice." In this plaintiff had sought to obtain relevant materials well in advance of the deposition through a request for production of documents.

2. That the witnesses are not parties to the action is irrelevant under Rule 30. Rule 30(a) provides that "any party may take the testimony of any person, including a party, by deposition upon oral examination." (Emphasis added) Notwithstanding the unconscionable conduct of some of them in this case, each of the proposed deponents qualifies, as a matter of law, as a "person."

3. Plaintiff is not required to proceed under Rule 30(b)(6), which provides that:

> A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized by these rules. (Emphasis added)

The text alone makes it abundantly clear that the deposition pro-

procedure provided by Rule 30(b)(6) is simply one procedure which a party may use; it "does not preclude taking a deposition by any other procedure authorized in these rules."

The Advisory Committee's Note of 1970 on the "new procedure" established by Subdivision (b)(6) makes its intended purpose clear:

> The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. It will reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a "managing agent." See note, Discovery Against Corporations Under Federal Rules, 47 Iowa L. Rev. 1006-1016 (1962). It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. Cf. Haney v. Woodward & Lothrop, Inc., 330 F.2d 940, 944 (4th Cir. 1964). The provision should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge. Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. E.g., United States v. Gahagan Dredging Corp., 24 F.R.D. 328, 329 (S.D.N.Y. 1958).

The situation which Subdivsion (b)(6) was intended to rectify is not present in this case. Each of the witnesses whose depositions plaintiff seeks to take has personal knowledge of the January 21 and June 23 Warren Commission executive session transcripts. Three of them have submitted affidavits on the classified nature of these transcripts. If the statements they made in those affidavits are defensible, they are the proper persons to make the defense.

Plaintiff noted these depositions in accordance with Rule 30(b)(1), which provides:

> A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state

> the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

Plaintiff met all these requirements. He did not provide the addresses of the proposed deponents because they are unknown to him. There are, for example, three Charles A. Briggs' currently listed in the Virginia telephone directory. On August 14, 1979, plaintiff's counsel phoned defendant's counsel and requested that she provide him with the addresses of persons plaintiff wishes to depose. She flatly refused to do this. The identities of these individuals are, however, well-known to defendant.

B. The Need For Discovery

Defendant claims that plaintiff is not entitled to an award of attorney's fees and costs because he has not "substantially prevailed". This is in turn based on hearsay evidence in the form of a nebulous affidavit which asserts that plaintiff's lawsuit did not have a causative effect on the release of the January 21 and June 23 transcripts. Rather, after three years of litigation the CIA suddenly decided to voluntarily "declassify" and release them.

Plaintiff contends that there never was any proper basis for withholding these transcripts, and that having engaged in what amounts to a fraud upon the court, defendant now seeks to become the beneficiary of its own wrongful conduct and to establish a legal precedent which would totally subvert the Freedom of Information Act by depriving FOIA requesters of their most effective tool for enforcement of the Act, attorneys skilled in FOIA litigation. He further contends that the hearings held by the House Select Committee on Assassinations did not cause the CIA to "declas-

sify" and release these transcripts.

In sum, discovery is needed to develop the facts regarding the the following factual issues:

1. Whether the January 21 and June 23 transcripts were ever properly classified or even classifiable;

2. Whether the hearings held by the House Select Committee on Assassinations caused the CIA to "declassify" these transcripts;

3. Whether the release of these transcripts came as a consequence of the decision of the United States Court of Appeals for the District of Columbia in Ray v. Turner; and

4. Whether the circumstances of this case indicate that the government has acted in good or in bad faith.

Plaintiff takes the position that each of these factual issues is relevant to the award of attorney's fees in this case. While the government argues that no discovery at all should be permitted, it is particularly adamant that "[p]laintiff should not be permitted to use discovery to bootstrap an unsubstantiated claim of "bad faith" or "improper behavior." The reason for the government's opposition to discovery on this point is obvious: it knows that there was no justification for withholding the transcripts at any time since plaintiff first requested them.

To make out a case of the government's bad faith in this case requires, in plaintiff's view, nothing more than a page-by-page review of the transcripts. Although any segregable portions which were not properly classified should have been released immediately upon request, page-after-page can be read without disclosing anything even remotely classifiable in the interest of national security. Indeed, nothing in either transcript should ever have been withheld from plaintiff.

After the Court of Appeals awarded plaintiff costs in this case, the government moved for reconsideration on the grounds that there was an issue of fact as to whether plaintiff had "substan-

tially prevailed." Now that the issue is before this Court, the government does not want to allow plaintiff to properly litigate the issue it has raised. Instead, it arrogantly demands that this Court accept its affidavits at face value, asserting that "[t]o 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." This Court has twice before made the mistake of accepting the defendant's sworn statements at face value. It is hoped that the mistake will not be repeated.

The government in no way substantiates its claim that the discovery sought by plaintiff is burdensome, but simply relies on "testimony" of counsel. Because the issues are fairly narrowly confined to the decisions to "classify" and "declassify" two short transcripts and the government's good or bad faith conduct, these should be relatively short depositions. Any burden on the government is minimal, far less than is required to justify a protective order. Orders to vacate a notice of deposition are "generally regarded by the court as both unusual and unfavorable, and most requests of this kind are denied. Grinell Corp. v. Hackett, 70 F.R.D. 326, 33-334 (1976), citing Investment Properties International, Ltd. v. Ios, Ltd., 459 F.2d 705, 708 (2d Cir. 1972).

The government also contends that if any discovery is to be had, it should be done by a less burdensome means, such as interrogatories or admissions. (Motion, p. 5) The choice of discovery methods is normally up to the litigant who seeks to employ them. Weisberg v. U.S. Dept. of Justice, 177 U.S.App.D.C. 161, 164, 543 F.2d 308 (1976)(decision by Court of Appeals stating that taking of testimony from live witnesses "either by deposition or in court" was preferable to use of interrogatories to establish existence or nonexistence of records sought in FOIA case). In this case depositions will be much less burdensome and a good deal more effica-

cious than interrogatories and admissions. The issue of attorneys' fees has become a matter of critical concern to plaintiff and his counsel because his counsel cannot undertake to represent plaintiff in any new FOIA cases, no matter how much in the public interest they may be, without some assurance that the courts are going to award attorneys' fees when his client substantially prevails. It is, therefore, deeply in plaintiff's interest to have this matter resolved as soon as possible. One of the overridding advantages of depositions is that they are more expeditios than interrogatories and admissions. They also permit less evasion, obfuscation, and obstructionism. Because of the liklihood that the goverment will appeal an adverse decision, the record in this case should be fully developed through discovery before the Court reaches a decision.

C. Depositions Are Being Rescheduled

Plaintiff is rescheduling the depositions in this case for October 17th. This has become necessary because he is now scheduled to take long-postponed depositions in Weisberg v. U.S. Department of Justice, Civil Action No. 75-1996, on October 11, 1979, and possibly October 12, 1979. The depositions in Civil Action No. 75-1996 began on July 5-6, 1979 and have been continued, first, to accomodate the vacation schedule of the FBI agents being deposed, then because the attorney representing the Department quit her job on very short notice. These are the only available dates on which the new government attorney is available to take depositions until after plaintiff's counsel returns from Singapore on November 21, 1979. Because the precarious state of plaintiff's health makes it inadvisible for him to make the trip from Frederick, Maryland to Washington, D.C. three days in a row, the depositions originally scheduled in this case for October 10th

have been rescheduled for October 17th.

Plaintiff is filing a new notice of depositions herewith. This time the notice of depositions is being accompanied by the issuance of two subpoenas duces tecum. The subpoena which is being served on Mr. Steven Garfinkel duplicates the Request for Production of Documents which plaintiff served on defendant on September 13, 1979. Although under the Federal Rules defendant's response to the Request for Production of Documents will be due before the re-scheduled depositions commence, plaintiff anticipates that defendant will not produce the documents requested. Because these documents will be of great assistance in taking the depositions, plaintiff has taken the added precaution of issuing a subpoena to obtain them.

Plaintiff has also issued a subpoena requiring Mr. Robert E. Owen of the Central Intelligence Agency to bring with him certain records pertinent to the issues on which he and other deponents will be examined. Copies of these subpoenaes are attached to the new notice of deposition which is being filed herewith.

Respectfully submitted,

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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of October, 1979, hand-delivered a copy of the foregoing Plaintiff's Opposition to Defendant's Motion for a Protective Order to the office of Ms. Patricia J. Kenney, Rm. 3212, United States Courthouse, Washington, D.C. 20001.

James H. Lesar

JAMES H. LESAR

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O R D E R

Upon consideration of Defendant's Motion for a Protective Order barring the discovery sought by Plaintiff, the Opposition thereto by Plaintiff, and the entire record herein, it is by this Court this _____ day of October, 1979, hereby

ORDERED, that Defendant's Motion be, and hereby is DENIED; and it is

FURTHER ORDERED, that Defendant shall produce the documents specified in Plaintiff's Request for Production of Documents on or before October 17, 1979, and permit plaintiff to inspect and copy them.

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UNITED STATES DISTRICT COURT