

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF COLUMBIA

3 ----- x  
4 HAROLD WEISBERG, :  
5 Plaintiff :  
6 v. : Civil Action 75-1448  
7 GENERAL SERVICES ADMINISTRATION, :  
8 Defendant :  
9 ----- x

10 Washington, D. C.

11 Wednesday, October 17, 1979

12 The above-entitled cause came on for hearing on  
13 pending motions before the Honorable AUBREY E. ROBINSON, JR.,  
14 United States District Judge, at 9:45 a.m.

15 APPEARANCES:

16 On behalf of the Plaintiff:

17 JAMES HIRAM LESAR, ESQ.

18 On behalf of the Defendant:

19 PATRICIA J. KENNEY, AUSA,  
20 LAUNIE ZIEBELL, CIA, and  
21 STEPHEN GARFINCKEL, GSA

22 EVA MARIE SANCHE  
23 Official Court Reporter

24 VOLUME: A  
25 PAGES: 1 - 40

FOR:  
The Plaintiff.

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P R O C E E D I N G S

1 THE DEPUTY CLERK: Harold Weisberg v. General  
2 Services Administration, Civil Action 75-1448.

3 MR. LESAR: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. LESAR: James H. Lesar representing the  
6 plaintiff Harold Weisberg.

7 Does the Court have any preference as to how it  
8 wants to proceed this morning?

9 THE COURT: No. I think, as I indicated in the  
10 notice, we will hear all the motions. Whichever way you want  
11 to approach them, I think we can do it that way and I will let  
12 the Government respond in between so that we can have all the  
13 arguments at the same time.

14 MR. LESAR: Do you want me to take both motions at  
15 the same time?

16 THE COURT: Well, let's have the first motion and  
17 then I will have the Government respond to that and hear what  
18 they have to say about it, and then we will take up the second  
19 motion.

20 MR. LESAR: Fine, Your Honor.

21 ARGUMENT IN SUPPORT OF PLAINTIFF' MOTION FOR  
ATTORNEY'S FEES

22 MR. LESAR: The first matter before the Court is  
23 plaintiff's motion for attorney's fees in this case.

24 This case arose under the Freedom of Information  
25 Act. The plaintiff originally sought copies of three Warren

1 Commission executive session transcripts. This Court initially  
2 ruled in favor of the government with respect to all three  
3 transcripts. An appeal was taken.

4 While the appeal was pending, additional materials  
5 became available to plaintiff which he thought disputed the  
6 government's contention in the case and he filed those materials  
7 with the Court of Appeals. The Court of Appeals ordered him to  
8 present the newly discovered materials to this Court first. He  
9 did so. This Court again upheld the government's contention  
10 and a separate appeal was taken to the Court of Appeals.

11 On the day that the government's brief was due in  
12 the second of the two cases which had been consolidated in the  
13 Court of Appeals, the government elected to make two of the  
14 three transcripts at issue available to Mr. Weisberg.

15 The Court of Appeals subsequently upheld this  
16 Court's determination with respect to the status of the third  
17 transcript.

18 Mr. Weisberg contends that the release of the two  
19 transcripts -- the two purportedly classified transcripts of  
20 January 21 and June 23, 1964 -- entitles him to attorney's fees  
21 under the Freedom of Information Act because he has substantially  
22 prevailed. He contends in support of this that the documents  
23 should have been provided to him at the time that he requested  
24 them, that they were never properly classified.

25 THE COURT: Well, of course, that is his contention.

1 Obviously, his contention wasn't valid with respect to one  
2 transcript, was it?

3 MR. LESAR: That is correct.

4 THE COURT: So, he didn't prevail as to that.

5 MR. LESAR: That is correct.

6 THE COURT: All right. So, we are talking about  
7 two transcripts.

8 MR. LESAR: We are talking about two transcripts.

9 THE COURT: All right.

10 MR. LESAR: With respect to those, he contends that  
11 they were not properly classified and that the government  
12 spuriously withheld them.

13 THE COURT: Well, that doesn't add anything. He  
14 contended he was entitled to them by virtue of his request.

15 MR. LESAR: I understand that but there are two  
16 things that do add to it: One is that we have the transcripts  
17 themselves. Under the Freedom of Information Act, any portions  
18 of the transcripts which are segregable would have had to  
19 have been released, and you can read the transcripts. In our  
20 view, you can read page after page until you finish all of the  
21 material withheld without discerning any basis for their having  
22 been withheld.

23 THE COURT: But that's only half of it. I can  
24 read report after report from the CIA and FBI and everywhere  
25 else and can see nothing in it that would suggest -- I have no

1 way of knowing how to put two and two together and get four.

2 MR. LESAR: The other half of it is that there is  
3 no competent affidavit from the agency stating that these  
4 materials were properly classified. The Owen affidavit, which  
5 has been submitted in support of the government's opposition  
6 to the motion for attorney's fees, fails to state that they were  
7 ever properly classified, fails to state what the big secret  
8 was that required them to be withheld all these years. So  
9 that the government has not made out its case.

10 In addition, the alleged bases for the declassifi-  
11 cation is that it was necessitated by the hearings before the  
12 House Select Committee on Assassinations. However, Mr. Weisberg  
13 has filed an affidavit and submitted materials which make it  
14 quite plain that there is no reference in the House Committee's  
15 proceedings to these transcripts or to their contents. The  
16 Owen affidavit does not so state, nor did the House Select  
17 Committee make these materials or their contents available.  
18 Therefore, the government's claim simply doesn't stack.

19 Now, under the law in this Circuit, this Circuit  
20 has adopted basically the decision of Vermont Low Income  
21 Advocacy Council v. Usery, and there are two criteria set forth  
22 there for determining whether or not a plaintiff has substan-  
23 tially prevailed: One, whether or not the prosecution reason-  
24 ably could be regarded as having been necessary. Well, I think  
25 there is absolutely no doubt that the record is quite clear that

1 plaintiff requested these transcripts time and again over a  
2 period of a decade or more. He was vigorously opposed in this  
3 Court at all levels up to the very moment that the transcripts  
4 were released.

5           The second criteria set forth by the Vermont case  
6 is whether or not the litigation had a substantial causative  
7 effect on the release of the information. Mr. Weisberg con-  
8 tends that it did, that they would not have been released but  
9 for this litigation.

10           It is important to understand the context of the  
11 case at the time the release was made. The United States Court  
12 of Appeals had just handed down a landmark decision in Ray v.  
13 Turner which, in plaintiff's view, made a reversal inevitable  
14 because it substantially modified, if not overturned, the  
15 Weissman decision upon which this Court had relied. In addition,  
16 there would have been a new Executive Order which would have  
17 taken effect shortly, which also would have changed the legal  
18 status of the transcript.

19           The government has cited the lower court decision  
20 in the Vermont case for the proposition that when the government  
21 voluntarily releases a transcript, the mere fact that the  
22 plaintiff had to file suit for it does not mean that he has  
23 substantially prevailed. However, this case presents an  
24 entirely different issue. In that case, the Court found that  
25 the delay in releasing the material was excusable delay and



1 that the government had proceeded in good faith.

2 Here, we contend that neither of those is true:  
3 That the release of the transcripts has been delayed for years,  
4 and that the government submitted affidavits to this Court  
5 which misrepresented and misled the Court about the justifica-  
6 tion for withholding the transcripts.

7 Now, plaintiff has submitted a bill for legal fees.  
8 It is approximately \$30,000 at this point, plus about \$1,438.00  
9 in expenses and costs. Plaintiff contends that the amount  
10 requested is reasonable under the circumstances. The number of  
11 hours has been documented. The government has made some objection  
12 to some of the hours. Plaintiff agrees that the government is  
13 correct with respect to approximately 21-1/2 -- I think exactly  
14 21-1/2 of the 55 hours that the government objected to and has  
15 agreed to eliminate that time.

16 The rate of \$85.00 an hour is reasonable. It is  
17 the rate which other attorneys of comparable experience under  
18 the Freedom of Information Act have charged. Plaintiff has  
19 submitted copies of court records in other cases in which  
20 attorneys have been awarded at rates between \$65.00 an hour and  
21 \$90.00 an hour from 1975 to the present time, so we would submit  
22 that that is a reasonable rate.

23 Plaintiff has requested that the Court, in exercis-  
24 ing its discretion, increase the amount of the basic award for  
25 several reasons: one is the long delay in payment. Much of the

1 work was done in 1974 and 1975; that there has been a loss of  
2 as a result  
3 income for a period of four or five years/for much of the work  
4 and lesser periods of time for more recent work and that is  
5 one risk factor that ought to be taken into account. There  
6 was, of course, at the very beginning an enormous risk of no  
7 compensation whatsoever as evidenced by the fact that this  
8 Court twice found against plaintiff with regard to the status  
9 of these transcripts and had that been upheld, the entire  
10 amount of time expended would have been lost.

11 THE COURT: Why? Did you take it on up?

12 MR. LESAR: I took it without any payment from  
13 Mr. Weisberg, yes. That's correct.

14 THE COURT: That is a risk you were prepared to take.

15 MR. LESAR: Yes, I understand --

16 THE COURT: That is a decision you can make: I  
17 expect to get compensated but I am certainly going to put it on  
18 the government if the government is supposed to pay.

19 MR. LESAR: Yes, I understand. But under the law,  
20 the Court may, in its discretion, award additional sums taking  
21 into consideration the fact that counsel did risk a loss of  
22 income as a result of agreeing to undertake the work. In this --

23 THE COURT: I see. I misunderstood the point you  
24 made.

25 MR. LESAR: In this case -- to give an example  
directly from this case -- a portion of the time that was

1 risked has already been lost because we did not prevail with  
2 respect to the May 19 transcript and we concede that we are  
3 not entitled to recover for that time, so that is lost time.  
4 That is one of the risk factors that has to be taken into the  
5 case.

6           Basically, I think I would like to call the Court's  
7 attention to the fact that in the conclusion to the reply to  
8 the government's opposition, I stated the amount of attorney's  
9 fees requested but I neglected to add to that sum the amount  
10 of \$1,438.41 which is for the expenses of cost of litigation.  
11 That had been previously included with the original motion but  
12 I neglected to include it with the reply.

13           In conclusion, I would like to stress the  
14 importance of an attorney fee award in this case. The Freedom  
15 of Information Act is a uniquely American law. It is a law  
16 that was in gestation for a very long period of time. The  
17 revelations which have resulted from it have been of primary  
18 importance to the public life of this country to congressional  
19 legislation. It has revealed innumerable scandals that had  
20 been previously suppressed and enabled the citizens of this  
21 country to hold more informed views as to public policies and  
22 to the workings of their government.

23           I think that without the incentive of attorney's  
24 fees, the Freedom of Information Act would soon be turned into  
25 a shambles. There are few citizens who can afford the time or

1 the expense that it costs to hire an attorney experienced in  
2 handling this kind of litigation and if the Act is going to be  
3 made to work, it requires that attorney's fees be awarded where  
4 appropriate. This, we think, is an appropriate case and that  
5 Congress intended that it was precisely this kind of situation,  
6 where the government unjustifiably withheld and delayed access  
7 to nonexempt information, that attorney's fees should be  
8 awarded.

9 Thank you, Your Honor.

10 ARGUMENT IN OPPOSITION

11 MISS KENNEY: Your Honor, we are opposing the  
12 motion for attorney's fees and costs primarily because we  
13 maintain that plaintiff has not prevailed in this action and  
14 that to deem plaintiff a prevailing party under these circum-  
15 stances would leave the words in the statute meaningless.

16 THE COURT: Well, what happens when somebody  
17 litigates for years and then the government caves in? Do you  
18 just wipe out the attorney's fees and say, Well, we fought him  
19 for four or five years and we are tired, or we want to cut off  
20 counsel fees? Here it is. We made you wait four years, but  
21 now here it is.

22 MISS KENNY: I think we indicated in our brief  
23 that there are certain circumstances under which a plaintiff,  
24 even if the plaintiff does not obtain a judgment in his favor,  
25 could be awarded attorney's fees but this is not one of those

1 cases.

2           The standard is that the plaintiff must show that  
3 the prosecution was reasonably regarded as necessary to the  
4 release of the documents; also, that the action has substan-  
5 tial causative effect on the release of the information.

6           THE COURT: You have no question but what the  
7 prosecution was necessary to get the Warren Commission reports,  
8 is there?

9           MISS KENNEY: This prosecution?

10          THE COURT: Yes.

11          MISS KENNEY: As to those --

12          THE COURT: Yes.

13          MISS KENNEY: -- those two reports, those two  
14 transcripts?

15          THE COURT: Yes.

16          MISS KENNEY: No. We maintain --

17          THE COURT: Why didn't you turn them over when he  
18 first asked for them, then?

19          MISS KENNEY: We maintain that the reason --

20          THE COURT: No, no. That is not my question.

21          There wasn't any doubt that there was a stonewall  
22 as far as Mr. Weisberg was concerned with respect to these  
23 transcripts.

24          MISS KENNEY: There wasn't any doubt that they  
25 were classified documents, the basis on which we defended the

1 action, along with the assertion of the (b) (3) argument which  
2 was based on the CIA's need to protect its intelligence  
3 sources and methods; but the reason that these two particular  
4 transcripts were withheld was primarily because of their  
5 ability-- They wanted an ability to be able to authenticate  
6 information concerning activity within the USSR of the KGB and  
7 that was why they were withheld.

8           The first transcript, the January 21st transcript,  
9 which was released dealt with how to put questions to the  
10 Soviets with regard to Oswald, and how to authenticate whether  
11 or not the answers which were provided were accurate.

12           The second transcript, the June 23rd transcript,  
13 was whether and how to use Nosenko in connection with determin-  
14 ing whether Oswald was in fact a KGB agent.

15           The ability of the CIA to protect its intelligence  
16 sources and methods was at stake in both of these transcripts,  
17 and it was so held below by yourself earlier.

18           THE COURT: I understand that, but that is just  
19 the point I am making: Mr. Weisberg had to sue. You were not  
20 going to give him any portion of it for that reason, isn't that  
21 correct?

22           MISS KENNEY: I respectfully disagree because in  
23 September when the information was used before the Committee  
24 in testimony by two gentlemen, that information, up to that  
25 time, had not been released publicly.

1 THE COURT: That is exactly right, so Mr. Weisberg  
2 had to sue. He had to sue long before that.

3 MISS KENNEY: No. The information brought before  
4 the Committee was the information which was declassified.  
5 After that testimony came in, then the transcripts were com-  
6 pared with the testimony and the transcripts were released.

7 Now, are you suggesting that --

8 THE COURT: I don't think you understand what I am  
9 saying.

10 Point one is that from the very beginning, the  
11 government's position had never changed up until the time that  
12 it went before the House Subcommittee that he was not entitled  
13 to this information, and that is what this Court held. So  
14 then, in that sense, Mr. Weisberg had to sue because the  
15 government contended he wasn't entitled to any of them. That  
16 is point one, the litigation was necessary in that sense.

17 MISS KENNEY: Well, had Mr. Weisberg not requested  
18 the information but had he made it after September 15th, 1978,  
19 he wouldn't have had to sue.

20 THE COURT: No. That is not the way the Act works.

21 MISS KENNEY: True.

22 The point is that the Committee's use of the  
23 information --

24 THE COURT: That is the second point that you are  
25 making. Point number one is that litigation was necessary. You

1 can't deny that. At no time did the government say they were  
2 going to give him any portion of those transcripts, at no  
3 time.

4 MISS KENNEY: Correct.

5 THE COURT: I am talking about Mr. Weisberg now.

6 MISS KENNEY: Right.

7 THE COURT: All right. So, in that sense, the  
8 litigation was necessary, isn't that correct?

9 MISS KENNEY: In that sense, it is correct; but the  
10 point that I was trying to make --

11 THE COURT: Now, there came a time, the government  
12 contends step two: that his action was not the primary motive  
13 for the government eventually giving him the two transcripts.  
14 That is the second point you make.

15 MISS KENNEY: Yes. But the point that I was  
16 trying to make is that over a period of time -- these  
17 transcripts dated from 1964, information --

18 THE COURT: Over a period of time, there wouldn't  
19 be any necessity. But the Act doesn't work that way. The Act  
20 doesn't say, Well, look, you can get a request and you can sit  
21 around and wait long enough so that the information is meaning-  
22 less. So if we can stonewall somebody for ten or fifteen years,  
23 then we will give him the whole thing; but the Act doesn't work  
24 that way. There will come a time when all this stuff is just  
25 down the drain. The next generation won't care about the



1 Warren transcripts, this one does.

2 MISS KENNEY: The need for classification does  
3 change.

4 THE COURT: Of course, it does; but the Act  
5 doesn't say that. The Act doesn't say that you can stonewall  
6 an applicant until you decide later on that there is no need  
7 for any of the information to be classified and then you can  
8 give him the whole shebang. That is not the way the Act works.  
9 Certainly, a lot of this stuff will be declassified. In the  
10 Year 2050, most of it; but the Act doesn't work that way. No.  
11 It is today that they are entitled to it under the existing  
12 statute.

13 MISS KENNEY: Well, if one acknowledges that there  
14 are changes in the need for classifying information, then it  
15 can also be said that if you sue before the need for classify-  
16 ing the information has changed, you are not going to get the  
17 information; but if you sue afterwards, you will get the  
18 information.

19 THE COURT: You may, or you may not. That is just  
20 the point Mr. Weisberg makes. It doesn't necessarily follow  
21 that you get it. The government has a way of giving it out  
22 to A and withholding it from B. It depends upon who is asking  
23 for it and what the circumstances are at a particular time.

24 MISS KENNEY: It is clear to the government, at any  
25 rate, that plaintiff was not a substantial cause in the release

1 of the information. We believe that the affidavit submitted  
2 in connection with our opposition demonstrates that. It  
3 demonstrates it by attaching to it documents contemporaneous  
4 with the decision to declassify. The actual decision to give  
5 up the transcripts was made extraordinarily quickly for any  
6 agency. The testimony was heard on September 15th. By  
7 September 22nd, a request was made from the General Counsel's  
8 office at the CIA to Mr. Owen to determine whether or not the  
9 need to withhold this information under the exemptions could  
10 be justified. Mr. Owen, on September 26th of 1978, determined  
11 that there was no longer a tenable basis for holding the  
12 documents.

13 THE COURT: Well, what changed all of a sudden?

14 MISS KENNEY: The testimony before the House. The  
15 public release of information as a result of the House Committee.

16 THE COURT: The public release of what information?

17 MISS KENNEY: There was testimony -- for the  
18 details of the testimony, I will let Mr. Ziebell speak because  
19 there was approximately, as I understand it, two days of  
20 testimony which --

21 THE COURT: What part of that testimony tracks  
22 anything in the Warren Commission report? That is the issue.

23 MISS KENNEY: What part of that testimony --

24 THE COURT: Of the testimony before the House  
25 Subcommittee. In fact, anything that can be related to the

1 Warren Commission report.

2 MISS KENNEY: Well, as I understand it, they were  
3 talking about defectors; in particular one defector, Yuri  
4 Nosenko. The June 23rd transcript related to the use of  
5 Nosenko, who was a defector, in connection with determining  
6 whether Oswald was a KGB agent.

7 It wasn't clear, perhaps, at that time whether  
8 Nosenko could be believed or not, whether his judgment could be  
9 believed or not believed, but more importantly, it may not be  
10 apparent from the transcripts themselves, either their reason  
11 for classification or their impact on intelligence sources  
12 because what happens in these situations is that, presumably,  
13 the Soviets see what we know and are able to determine how  
14 accurate our intelligence-gathering sources are. That in  
15 itself is information which they would not otherwise have if  
16 these types of documents were withheld.

17 In turn, by releasing certain information, the  
18 KGB, the Soviets do know the strength and the weaknesses of  
19 our intelligence-gathering ability.

20 THE COURT: Well, that is a calculated risk that  
21 Congress took when it wrote this statute and that is what we  
22 have every time we are confronted with a national security  
23 problem. The courts are in no position to second-guess --

24 MISS KENNEY: But, Your Honor, that's the error  
25 that plaintiff makes. We aren't confronted with that in this

1 motion; we are confronted with whether or not he was a  
2 prevailing party and whether or not his action was a causative  
3 factor in the release of the documents in question, and it is  
4 clear from the affidavit, from the documents submitted in  
5 connection with the affidavit that the transcripts were  
6 released not because of plaintiff's action but because of what  
7 was transpiring in the House, in the Subcommittee, in testimony  
8 before the Subcommittee.

9 But more importantly, plaintiff places great emphasis  
10 on the fact that Ray v. Turner was a precedent-setting opinion,  
11 one which this case was following in the wake of and that this  
12 case had the potential for being in itself a precedent-setting  
13 opinion. But the fact of the matter is that Ray v. Turner  
14 essentially gives guidance and direction for the affidavits  
15 that the agency must submit in connection with this kind of  
16 case, and also suggests that when the Court is in doubt on a  
17 de novo review, an in camera inspection is available.

18 Even if the affidavits, as plaintiff implies, did  
19 not meet the standards set by Ray v. Turner, the appropriate  
20 thing would have been on appeal -- had the Court found that --  
21 to remand and to supplement the affidavits, to have an in camera  
22 inspection, whatever. There is no guarantee that plaintiff  
23 would have won even if the standards of Ray v. Turner had  
24 applied to this case and if the affidavits were not up to those  
25 standards.

1           Moreover, in Ray itself, that is exactly what  
2 happened: The case was remanded to the District Court, supple-  
3 mental affidavits were filed, an in camera inspection ensued  
4 and the Court still found for the government below. So,  
5 plaintiff's emphasis on Ray v. Turner is misplaced because  
6 even if Ray v. Turner standards were not met by the affidavits  
7 in this case, it would not have automatically meant that the  
8 plaintiff would have been the prevailing party. There would  
9 have still ensued District Court proceedings and there was no  
10 guarantee that the plaintiff would have won. Consequently,  
11 plaintiff's suggestion that he might have been the prevailing  
12 party is purely speculative and totally unfounded.

13           We have argued in our opposition that the Court  
14 shouldn't exercise its discretion to award attorney's fees even  
15 were this Court to find that plaintiff prevailed.

16           Additionally, we have noted that the amounts  
17 requested by plaintiff are unreasonable. There has been no  
18 evidence of plaintiff's hourly rate during any of the years in  
19 question. Moreover, the number of hours included initially all  
20 the hours relating to the May 19th transcript. Plaintiff has  
21 now said at least 21 of those hours spent on appeal after the  
22 other portions of the case were dismissed as moot should not be  
23 counted in but plaintiff made no attempt to distinguish the  
24 hours spent below on the May 19th transcript, and the burden is  
25 on plaintiff to establish precisely how many hours he should be

1 compensated for, should he be compensated.

2 Plaintiff dismisses this by saying he spent  
3 virtually no time below, and yet he spent some 21 hours on  
4 something that he had spent no time on below when the case was  
5 on appeal. So, we submit that at the very minimum, plaintiff  
6 has not established the number of hours for which he should be  
7 compensated accurately.

8 In sum, we think that to award attorney's fees in  
9 this case would be to render meaningless the words in the  
10 statute relating to a prevailing party, and requiring that  
11 plaintiff be a prevailing party in order to be entitled to  
12 award of attorney's fees. We think that to award attorney's  
13 fees would be a disincentive to any agency to give up short of  
14 pursuing each case to a complete and final judgment.

15 THE COURT: What is that argument again?

16 MISS KENNEY: Well, had the information in the  
17 transcripts -- Had the CIA not undertaken to evaluate whether  
18 or not the information in the transcripts could be released in  
19 view of the testimony, none of this would have occurred.

20 THE COURT: None of what would have occurred?

21 MISS KENNEY: In other words, what plaintiff is  
22 arguing for essentially is a determination as of the date the  
23 court case is filed as to whether or not the information should  
24 be released. He argued that on appeal in arguing against  
25 dismissing as moot a portion of the case because he felt that

1 he was entitled to a determination, and to award attorney's fees  
2 in cases such as this would be a disincentive to the agency to  
3 make the kind of review that it did effectively and efficiently  
4 as it did because there would be no incentive. They under-  
5 took a review immediately of the transcripts.

6 THE COURT: Yes, there would be an incentive  
7 because if they didn't do it and he eventually got the material,  
8 they would have to pay for it. That is just the point that he  
9 is making. If they didn't turn it over right away, there  
10 wouldn't be any possibility that they are going to avoid being  
11 stuck with counsel fees, because it would have been perfectly  
12 apparent that they should have given it to him in September, as  
13 they did.

14 So, they have no alternative in those circumstances  
15 to release the material. They can play games if they want to,  
16 but they knew they were going to lose on the attorney's fees  
17 question; but I understand your argument.

18 MISS KENNEY: Well, we disagree.

19 Thank you, Your Honor.

20 THE COURT: Nobody has agreed about anything  
21 throughout this entire litigation.

22 MR. LESAR: Given my experience under the Freedom  
23 of Information Act, that is not entirely surprising.

24 THE COURT: Well, you have gained considerable  
25 experience and expertise with this case alone, with this client

1 alone.

2 MR. LESAR: That is correct, Your Honor.

3 REBUTTAL ARGUMENT

4 MR. LESAR: Just a couple of brief things I want  
5 to call to the Court's attention:

6 One, in the August 20, 1979 affidavit which  
7 Mr. Weisberg submitted, he states that the Owen affidavit,  
8 which is the basis for the government's opposition, does not  
9 state what information -- that is, the Owen affidavit states  
10 that some CIA information was declassified in response to the  
11 House Select Committee on Assassinations but Owen "does not  
12 state what information or that it includes these transcripts or  
13 their content." There has been no rebuttal to that, nor has  
14 there been any rebuttal to the statements in the October 31,  
15 1978 affidavit which Mr. Weisberg originally filed with the  
16 Court of Appeals but which has also been submitted in support  
17 of this motion.

18 Paragraph 8 of that affidavit says: "Having read  
19 the June 23rd transcript and this and other Warren Commission  
20 staff reports, I state that there is no information in this  
21 transcript relating to Nosenko that is not in the staff reports.  
22 This is one of many available records ..."

23 Then in paragraph 9, he states: "Having read the  
24 June 23rd transcript, I further state that it contains no infor-  
25 mation relating to Nosenko that was not made available to



1 Edward J. Epstein for his book Legend, his magazine articles  
2 and interviews and his extensive use on nationwide TV and  
3 other forums."

4           There has been no rebuttal to those statements, so  
5 that it seems quite --

6           THE COURT: I am not going to get dragged off in  
7 that quagmire.

8           MR. LESAR: All right. Fine.

9           THE COURT: It is relatively simple. We have  
10 transcripts of two days of hearings before the Select Sub-  
11 committee, and we have the Warren Commission reports that were  
12 issued as a result of whatever went on before the House. The  
13 government's contention is that once we went to the Select  
14 Committee, the information that was in the Warren Commission  
15 reports, we declassified as a result of those hearings. That  
16 is their position.

17           MR. LESAR: That is their position but they  
18 provide no specifics and there is no correlation between the  
19 two.

20           THE COURT: That can be done very easily, can it  
21 not?

22           MR. LESAR: Yes, it can.

23           One final point, with respect to whether or not I  
24 made any attempts to distinguish the work done in the District  
25 Court on the May 19th transcript, in my affidavit I did find

1 two hours that were clearly spent on that and that alone and  
2 I have eliminated that. There may have been a couple of  
3 additional hours scattered throughout the case. I made a  
4 review of the documents and it is very difficult to pinpoint  
5 any appreciable time without spending more time making the  
6 examination than the amount of time involved.

7 The May 19th transcript was not the central reason  
8 we brought the suit and just in terms of pages, if you go back  
9 and read the opposition to the government's motion for summary  
10 judgment, there are only a couple pages that are addressed to  
11 that issue. None of the interrogatories or discovery materials  
12 were addressed to the status of the May 19th transcript, so I  
13 really think it is not a significant issue. I did make an  
14 attempt to segregate the material that was clearly segregable  
15 the work that was clearly spent on the May 19th transcript.

16 That, I guess, is the end of my presentation on  
17 this motion.

18 THE COURT: All right.

19 ARGUMENT IN SUPPORT OF MOTION OF PLAINTIFF FOR  
20 DISCOVERY

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21 MR. LESAR: Plaintiff has attempted to take dis-  
22 covery in various forms, one being a request for production of  
23 documents and the second being a notice of depositions.

24 The government has vigorously opposed all discovery  
25 in this case.

It is plaintiff's position that the Court can

1 decide this case in his favor without the necessity of dis-  
2 covery, but that the Court cannot decide the case against him  
3 without allowing further discovery. The reason for that is  
4 that there are certain factual claims made by the government  
5 on which the government's position rests. Plaintiff disputes  
6 them and in order to gain the necessary materials to fully  
7 present his position, he would need to take further discovery;  
8 but if the Court feels that the materials on file would justify  
9 an award in plaintiff's favor, then there is no need for dis-  
10 covery. If it is uncertain about the outcome, then discovery  
11 is necessary in order to pin down the specifics of the govern-  
12 ment's claims.

13 THE COURT: Well, the specifics of the government's  
14 claims, it seems to me, would be revealed by the transcripts  
15 of the Senate Select Subcommittee.

16 MR. LESAR: There are several things that are  
17 dependent on the government's claim. We think, for example,  
18 that they have got to establish that the transcripts were  
19 properly classified to begin with at the time Mr. Weisberg  
20 requested them, and they would have to go through the transcripts  
21 page by page and say what was in the transcripts that would  
22 have jeopardized national security, what would have revealed  
23 an unknown source or method of the CIA. So that, if there is  
24 any validity to their claim, we would be entitled to subject  
25 it to --

1 THE COURT: You mean start the litigation all  
2 over again.

3 MR. LESAR: I would do that only if the government  
4 were to --

5 THE COURT: Well, we would be right back to round  
6 zero. We would start all over again with affidavits and  
7 counter-affidavits as to what exemptions under the statute  
8 could be claimed.

9 MR. LESAR: I think we can avoid the affidavits by  
10 going simply directly to deposition testimony.

11 THE COURT: No way. No.

12 MR. LESAR: Well, the government's position is  
13 that as the material is now public, it has been declassified  
14 so there is no national security problem. So that now, there  
15 is no jeopardy in our seeking to learn what there was in the  
16 transcripts that they considered previously warranted classifi-  
17 cation, and we would be entitled to test them on that and also  
18 to test on what it was about the House Select --

19 THE COURT: Well, the way you are proceeding, these  
20 cases would never end.

21 MR. LESAR: Well, it is not a position that -- I  
22 would prefer to get the matter over with. The government has  
23 forced it on me by making claims that I think are clearly un-  
24 substantiated. The fact that they are clearly unsubstantiated,  
25 to me, does not lessen my obligation to my client to make sure

1 that the Court has been provided with all the relevant  
2 information. If they are making a claim that the House Select  
3 Committee's proceedings caused the release of these transcripts,  
4 then I want the right to cross-examine them and see precisely  
5 what information was revealed at the hearings that caused the  
6 release of the transcripts.

7 THE COURT: Well, why do you have to cross-examine  
8 somebody?

9 MR. LESAR: Well, the reason is abundant experience  
10 indicates that you cannot rely on the government's affidavits  
11 to establish the truth, particularly not where they are as con-  
12 clusory and vague as they are in this instance.

13 THE COURT: Well, you are never going to get any-  
14 thing but conclusory and vague affidavits out of them when they  
15 start talking about national security and that kind of business.  
16 That is why we go through the process of waning it down and  
17 ultimately get into in camera inspections and, even then, they  
18 can snow you.

19 MR. LESAR: I think they have reached the end of  
20 the tether as to how much they can snow this particular  
21 plaintiff on this particular case. This is not the normal  
22 situation where the plaintiff is utterly in the dark. Mr.  
23 Weisberg has a vast fund of information and if they make claims  
24 that are bogus, I think he will be able to establish that they  
25 are bogus.

1 THE COURT: Well, if he has that much information,  
2 he ought to be able to establish that right now.

3 MR. LESAR: Well, I think he has done that in his  
4 affidavits --

5 THE COURT: No. I am talking about in response  
6 to this question about the relationship, if any, between the  
7 Senate Select Committee and their affidavits.

8 MR. LESAR: He stated in his affidavits that there  
9 is none.

10 Thank you, Your Honor.

11 THE COURT: I think the government definitely has  
12 the burden to show what the relationship is; it is just a  
13 question of what we are going to go through to make them carry  
14 the burden.

15 MR. LESAR: Yes. Thank you, Your Honor.

16 ARGUMENT IN OPPOSITION

17 MISS KENNEY: The reason we requested this hearing  
18 today, Your Honor, was that after noticing four depositions  
19 earlier in September and finding that he had not subpoenaed  
20 certain witnesses and after we had submitted a request for a  
21 protective order, plaintiff went out, re-noted the depositions  
22 and also issued four subpoenas.

23 We contend that no discovery is necessary.  
24 Plaintiff seems to center his request for discovery on whether  
25 or not the transcripts were properly classified at the outset.  
That is not an issue in this proceeding, nor is it relevant to

1 this proceeding. The issue is whether or not plaintiff  
2 prevailed. Plaintiff has the burden of establishing that.

3 There has been no dispute that there were hearings  
4 before the House Subcommittee. There is no dispute that the  
5 CIA on its own initiative immediately thereafter analysed the  
6 documents that they had previously withheld under Exemptions  
7 1 and 3, determined that they should be released and did seek  
8 their release.

9 THE COURT: But there has to be a relationship  
10 between the two before you can cut Mr. Weisberg off. That is  
11 all that he is contending. Otherwise, the government is in a  
12 position to use any subterfuge, any excuse. Something can  
13 happen over here and say, Oh, by the way, we have got this  
14 case tethered over here, now is the time to get rid of it so  
15 we will relate the two. Relating the two in their own minds  
16 is one thing. That is why I say we have to focus on what is  
17 the relationship between the two; and if there is none -- if  
18 they are talking about apples on the Hill and he has got  
19 oranges over here, that doesn't mean anything.

20 They decide after the hearings on the Hill. Why?  
21 Was it convenient for them? That is not the issue. What was  
22 there about the Senate Select Subcommittee testimony as it  
23 related to the Warren Commission transcript that induced the  
24 CIA to go back and declassify them. That is the issue, not  
25 that they did it. What is the relationship between the two

1 things? He contends there is none.

2 Now, isn't that the issue?

3 MISS KENNEY: I think the affidavit that we have  
4 submitted of Mr. Owen establishes that he undertook the review  
5 at the specific behest of the General Counsel's Office, that  
6 the review resulted in his releasing the documents. There is  
7 no suggestion --

8 THE COURT: If that is true, then Mr. Weisberg's  
9 contention is right. They never should have been classified  
10 in the first instance if that is all there is to it and, in  
11 that sense, he prevails because they are conceding. They  
12 should have given it to him years ago if that is your position.

13 MISS KENNEY: That is not our position, Your Honor.

14 THE COURT: State your position, then.

15 MISS KENNEY: Our position is that Mr. Owen has,  
16 in an affidavit to this Court, stated the exact process that  
17 he went through in making his decision to recommend that the  
18 documents be declassified.

19 Declassification decisions in and of themselves  
20 entail knowledge of classified information. It is our position  
21 that no more than what was presented should have to be pre-  
22 sented in order to refute their allegation, unsubstantiated,  
23 that plaintiff is a prevailing party.

24 THE COURT: All right.

25 MISS KENNEY: Plaintiff did not win the case below.



1 In fact, on two separate occasions this Court upheld the (b) (3)  
2 exemption --

3 THE COURT: That is not the test, whether he won  
4 the case or not. Did he get what he wanted? When did he get  
5 it? And, why did he get it?

6 He got two out of the three things he wanted.

7 MISS KENNEY: The plaintiff said under oath that  
8 they gave the documents over as a result of examining in  
9 connection with that testimony before the House. What you're  
10 suggesting, Your Honor, is that there should be some mental  
11 process exposed to the Court and to the parties --

12 THE COURT: No. I am suggesting that they have to  
13 say more. I am suggesting that more has to be said than, Oh,  
14 by the way, we had two days of testimony up on the House and  
15 because of the two days of testimony on the House, they went  
16 back and reviewed and declassified. There has got to be more  
17 than that I think.

18 That is why I say, What went on before the House?  
19 Not just that there was a hearing but what was there in those  
20 hearings. It was the content of the hearings, not the fact of  
21 the hearings that I think is the focal point of the contention  
22 between the parties here at the moment.

23 MISS KENNEY: We maintain that the discovery that  
24 is sought in the forum that it is sought would be totally  
25 inappropriate. For one thing, to --

1 THE COURT: No -- Well, that is the second  
2 argument that you have. I have some questions about that, too.

3 MISS KENNEY: For one thing, documents have been  
4 subpoenaed from, for example, Mr. Owen and Mr. Briggs over  
5 which they have no control. They aren't even within their  
6 domain.

7 Secondly, the breadth of the request is important.  
8 Mr. Lesar has requested documents relating to classification  
9 decisions which may be twenty or more years old. Were we ever  
10 to have to comply with such a request, it would entail an  
11 enormous search of documents at this time, many of which would  
12 be in the Archives or often government files someplace,  
13 government old files someplace.

14 Apart from that, we don't maintain that additional  
15 information is necessary for the resolution of this particular  
16 motion because in order to determine that additional discovery  
17 is necessary, the Court and the plaintiff simply would choose  
18 to disbelieve the affidavits which have been presented and  
19 which establish that the plaintiff did not cause the release  
20 but, rather, that the release was due to the testimony before  
21 the House.

22 THE COURT: What testimony before the House? That  
23 is all I am asking. What testimony? I wasn't there before  
24 the House. I do not know. There has been no statement as to  
25 what testimony.

1                   MISS KENNEY: May I ask Mr. Ziebell to address  
2 that?

3                   THE COURT: Yes.

4                   MR. ZIEBELL: Good morning, sir.

5                   THE COURT: Good morning.

6                   MR. ZIEBELL: The Congressional Record contains  
7 the transcript of the testimony given by John Hart, a former  
8 Agency employee who was brought back as a consultant, who did  
9 a review of the Agency records and the handling of a defector  
10 named Nosenko.

11                   His testimony on the 15th was concerned principally  
12 and almost exclusively with his appraisal of the manner in  
13 which Nosenko became available to the Agency; the manner in  
14 which the Agency treated Nosenko; the difficulties faced in  
15 trying to authenticate and establish the credibility of  
16 Mr. Nosenko as a source of information on the Soviet KGB, the  
17 Soviet Intelligence Service; and on matters relating to the KGB  
18 awareness of what Mr. Oswald's activities in the USSR were.  
19 Whether or not, for example, there was a relationship establish-  
20 ed between the KGB and Mr. Oswald while he lived in the USSR,  
21 and whether or not Mr. Oswald was in fact controlled by the KGB  
22 when he came back to the United States.

23                   In the process of this discussion, Mr. Hart, who  
24 was a long-time senior intelligence officer with considerable  
25 operational experience, expressed a number of professional

1 opinions based on his experience in the business of  
2 intelligence. That experience, if you will, sir, is part of  
3 what goes into any officer's judgment on whether or not  
4 information is classified, whether damage could ensue from  
5 the disclosure, and how much damage and with what certainty  
6 or what degree of probability the damage would fall. Such  
7 opinions, obviously, vary from one officer to another because  
8 our experiences are not uniform. Each one of us has been  
9 burned in a different way as a consequence of some kind of a  
10 leak.

11 Mr. Hart expressed a number of opinions about the  
12 probable validity of the judgments of the Agency. The various  
13 components of the Agency is therefore in conflict as to  
14 whether or not you could or could not believe what Mr. Nosenko  
15 said. Their opinions and their judgments reflect an awareness  
16 that comes from experience with the kind of operational  
17 practices, the kind of operational procedures and the kind of  
18 intelligence sources the KGB uses.

19 This, in turn, reflects CIA's ability to be aware  
20 of how the KGB functions. Our willingness to believe or doubt  
21 a particular allegation regarding the likelihood of the Soviet  
22 involvement with someone as an intelligence agent is dependent  
23 in part on our knowledge of how the KGB works, what it does do  
24 and what it does not do.

25 If, for example, in the process of recruiting an

1 agent, one of the practices of the KGB for years was to  
2 insist on a written receipt for all payments of money. Not  
3 only that, they insisted on payment of money to establish a  
4 bond between the officer of the KGB and the person who was  
5 working with him.

6 This kind of knowledge is reflected in the judg-  
7 ments made as to whether or not you could believe Nosenko.  
8 How much or how little the Agency knew about the KGB is  
9 reflected in not only the testimony of Mr. Hart, but also in  
10 the two transcripts. There is a good deal of discussion in  
11 there which includes remarks from Mr. Dulles who was on the  
12 Commission, and Justice Warren who had been briefed by  
13 Director Helms on the level of certainty or uncertainty, if  
14 you will, of the Agency and whether or not you could believe  
15 Mr. Nosenko.

16 The Agency, at that point, was not satisfied that  
17 it had established the credibility of Mr. Nosenko as an honest,  
18 valid source of information on the KGB or on Mr. Oswald. The  
19 misgivings and the reasons for them come through. They will  
20 come through much more meaningfully for someone in the KGB who  
21 will understand the basis for the uncertainty or the certainty,  
22 if you will. If they have engaged in operations to convince us  
23 of certain practices and our judgments appear to reflect a  
24 knowledge of their practices, they will know whether or not  
25 we have penetrated their organization to a point where we have

1 found a protected secret of theirs or whether we have been  
2 taken in by a particular red herring they have dragged in front  
3 of us to see if we would follow.

4           It is difficult to discuss the background for  
5 decisions of this kind without exposing more about what we  
6 know. Our perplexity in writing affidavits that are meaning-  
7 ful, persuasive and honest reflections of the facts are com-  
8 pounded. The difficulties expand. The more you know about the  
9 secret background of these things, the more difficult it  
10 becomes to discuss them.

11           Sir, I don't know if I might do better answering  
12 specific questions at this point. I don't want to elaborate  
13 endlessly.

14           There is a relationship, I think. The transcript  
15 is clearly concerned with Nosenko and our ability to judge his  
16 motives: What we went through to establish his credibility;  
17 what he went through in the process. This is clearly reflected  
18 in one of the transcripts where the entire subject of the  
19 discussion is whether or not Nosenko was a credible source and  
20 how he could be used.

21           MISS KENNEY: That is the June 23rd transcript.

22           MR. ZIEBELL: Thank you.

23           The January 21st one is a discussion of how we  
24 might go about trying to validate and authenticate and authen-  
25 ticate information we hoped to get from the Soviet government.

1 The Commissioner at that point was planning to put questions  
2 to the Soviet government; and when you are in that kind of a  
3 circumstance, one of the things you like to try to do, of  
4 course, is to ask questions which you already know the answers  
5 to. The Soviets know that as well as we do. There are ways  
6 of laying out questions that make it less apparent and more  
7 likely that you will get a testable answer. And this was the  
8 sort of background that was in the minds of the people talking  
9 about how to go about written inquiries put to the Soviet  
10 government that had some chance of getting an honest and  
11 accurate kind of response.

12 THE COURT: Thank you, Mr. Ziebell.

13 REBUTTAL ARGUMENT

14 MR. LESAR: Your Honor, it is plaintiff's position  
15 that none of the explanation offered by Mr. Ziebell is relevant  
16 and that if it had been relevant, it should have been stated  
17 under oath and such points should have been made in response to  
18 the affidavits which Mr. Weisberg has filed with this Court.

19 I am informed by my client that the CIA's uncertain-  
20 ty about whether or not Nosenko was a plant or not had long  
21 been publicly known, had been publicly known before this suit  
22 was even brought.

23 So, I think that the claims do not show the  
24 required relationship and have not been made in the proper  
25 form.

1           As to the discovery that is sought, we will leave  
2 it in the Court's judgment. Of course, we feel that if the  
3 Court maintains any doubt about whether or not plaintiff is  
4 entitled to attorney's fees, then the discovery should go  
5 forward; if not, then it need not.

6           THE COURT: Well, it will not go forward tomorrow.

7           MR. LESAR: It cannot because I will be leaving  
8 the country.

9           THE COURT: To the extent that there is any out-  
10 standing request for production or depositions set, I will  
11 issue an order and they will be held in abeyance until I  
12 decide this question. We have ample time to do that without  
13 throwing the government into chaos. They have got hundreds of  
14 Freedom of Information Act requests to process besides  
15 Mr. Weisberg's.

16           MR. LESAR: I understand that, Your Honor.

17           MISS KENNEY: Your Honor, without conceding that  
18 it is necessary, we will -- if you permit us to -- by the time  
19 Mr. Lesar returns, submit an additional affidavit attempting  
20 to further delineate the link between the two transcripts that  
21 were released and the testimony.

22           THE COURT: I would suggest strongly that you do  
23 that because unless it is perfectly apparent to me, I am going  
24 to -- Somebody is going to lay it out for me, put it that way.

25           Now, I don't want to become a CIA agent or a  
specialist, I have no desire to. But I have to make certain  
judgments and there has to be certain basic information from



1 which I have to make those judgments.

2 MISS KENNEY: May we have until Mr. Lesar returns?

3 THE COURT: Well, I don't know how long that will  
4 be.

5 MR. LESAR: I will be returning November 21st.

6 THE COURT: Yes, certainly. I don't see any  
7 reason why you shouldn't have that opportunity.

8 If there is any question about what you really  
9 want -- I haven't gone through all of your affidavits -- if  
10 you want to realign what you figure you are entitled to, you  
11 can have some time to do that too.

12 MR. LESAR: Yes. I will do that.

13 THE COURT: That will be after you return. I am  
14 not putting any time restrictions on you, except I would like  
15 to get this back to the Court of Appeals before the end of the  
16 year.

17 MR. LESAR: Thank you, Your Honor.

18 THE COURT: All right. Fine.

19 (Whereupon, at 10:50 a.m., the hearing on motions  
20 was concluded.)

21

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C E R T I F I C A T E

23 The foregoing is certified to be the official  
24 transcript in the case of Weisberg v. General Services Adminis-  
25 tration, Civil Action 75-1448, held on Wednesday, October 17,  
1979.

  
Eva Marie Sanche  
Official Court Reporter