UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	:	
Plaintiff,	:	
v.	:	C.A. No. 75-1448
GENERAL SERVICES ADMINISTRATION,	:	
Defendant	:	

OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON PLAINTIFF'S MOTION FOR RECONSIDERATION

BACKGROUND

On July 14, 1980, the Court issued an order denying plaintiff's motion for an award of attorney fees. The Court based its ruling on a finding that the January 21 and June 23, 1964 Warren Commission executive session transcripts were released to plaintiff "for reasons unrelated to this litigation."

On July 24, 1980, plaintiff moved the Court to reconsider its July 14 order, vacate its order of October 17, 1979 staying discovery on the attorney fees issue, and permit plaintiff to undertake discovery on the issue of whether the transcripts were in fact released to him "for reasons unrelated to this litigation." In the memorandum of points and authorities submitted in support of his motion, plaintiff argued that the Court should reconsider its ruling in light of two considerations: First, plaintiff's extensive experience in litigating under the Freedom of Information Act shows that it is necessary to file suit in order to obtain information he wants even if that information has already been officially released and even if it has been released to other requesters. Second, the CIA's annual report to the President of the Senate for 1978 shows that the CIA was well aware that the decision of the

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United States Court of Appeals in Ray v. Turner, 190 U.S.App.D.C. 290, 587 F.2d 1187 (1978), would affect its pending cases because it required the CIA to describe "on a deletion-by-deletion basis (as opposed to a document-by-document basis), the nature of the material being withheld and the legal justification for its denial." Because the CIA had not asserted that no segregable, nonexempt portions of the transcripts were being withheld, Ray v. Turner required reversal of this Court's decision. Unable to justify withholding the transcripts in their entirety under this standard, the CIA mooted the case by releasing them the day its brief was due in the Court of Appeals.

On September 3, 1980, defendant not having filed any opposition thereto, the Court granted plaintiff's motion for reconsideration, vacated its orders of October 17, 1979, and July 14, 1980, and authorized plaintiff to commence discovery on the issue of whether the transcripts were in fact released to him "for reasons unrelated to this litigation."

On September 11, 1980, defendant moved for reconsideration of the Court's September 3, 1980, order. For the reasons set forth below, defendant's motion should be denied.

ARGUMENT

I. DEFENDANT'S FAILURE TO TIMELY OPPOSE PLAINTIFF'S MOTION FOR RECONSIDERATION WAS NOT OCCASIONED BY EXCUSABLE NEGLECT

Plaintiff filed his motion for reconsideration on July 24, 1980, and served it on defendant by mail that same day. Defendant concedes that the motion was received by "the middle of the next week, the week of July 28 - August 1, 1980." Defendant's counsel admits that she began preparation of a "one line response" to plaintiff's motion "but never carried through with getting it typed

and filed due to inadvertance and neglect . . . ." She then speculates that defendant's failure to file an opposition to plaintiff's motion may have misled the Court into believing "that the government was abdicating its previously adhered to position that plaintiff had not prevailed."

The "one line response" which defendant's counsel prepared, while somewhat jumbled, was not of Faulknerian length and complexity. According to defendant, had it been typed and filed, it would merely have stated that: "defendant opposes plaintiff's motion for reconsideration which raises no new arguments for the reasons previously stated in the opposition to plaintiff's motion for attorneys' fees which is on file."

The rules of this Court provide that if an opposing party does not serve and file a statement of points and authorities in opposition to a motion within ten days of the service of the motion, or such other time as the Court may direct, the Court may treat the motion as conceded. Local Rule 1-9(d). By its own account, defendant had more than four weeks after receipt of plaintiff's motion within which to file its "one line response" or request an extension of time. Although defendant's counsel points to a busy schedule, this not explain or excuse the failure to have the response typed and filed, particularly since the events which she describes all ended prior to August 13, 1980, and her absence from the office did not begin until August 22, 1980, more than a week later. In addition, it must be pointed out that at least two other government attorneys are assigned to this case and, if necessary, could have assisted in seeing that an opposition to plaintiff's motion was timely filed.

In short, the failure to timely file an opposition was not attributable to excusable neglect. Given the long history of repeated government delays in this case, the Court would have been

amply justified in treating defendant's failure to respond to the motion within five weeks of the time it was filed as having conceded it. To do otherwise would be to allow defendant to continue to benefit, as it has in the past, from its own dilatory conduct, a matter which is of proper concern to the Court regardless of whether such conduct is attributable to intentional obstructionism or "inadvertance and neglect." And, as will be argued below, regardless of whether the Court's decision was influenced by the government's failure to file an opposition, the Court reached the correct decision when it granted the motion to reconsider.

II. THE COURT'S DECISION TO GRANT PLAINTIFF'S MOTION FOR RECONSIDERATION WAS THE CORRECT DECISION

Defendant's motion for reconsideration, like its never filed "one line response," argues that plaintiff's motion for reconsideration advanced no new arguments and presented no new facts which in any way impugned or undermined the Court's July 14, 1980 order. (Defendant's Motion for Reconsideration, p. 3) This is not true. Plaintiff's motion for reconsideration did raise points that he had made previously, yet it also provided the Court with new information.

Specifically, plaintiff submitted a copy of pertinent pages of the CIA's annual report to the United States Senate regarding its administration of the Freedom of Information Act during calendar year 1978. That report makes it clear that prior to Ray v. Turner, which was decided August 24, 1978, the CIA, in violation of the clear provisions of the Freedom of Information Act, had been asserting exemptions on a document-by-document basis rather than a deletion-by-deletion basis. This raises a question as to whether the release of the transcripts in October, 1978, on the day the government's brief was due in the Court of Appeals, was precipi-

tated by the government's recognition that its case in the Court of Appeals had been fatally weakened by the recent Ray v. Turner decision, and thus decided to release them on account of litigation related developments rather than because of the proceedings of the House Select Committee on Assassinations, as the CIA contends. Thus, contrary to defendant's representation (defendant's motion for reconsideration p. 3), the record does not "fully support[] without contradiction that the release of the two transcripts to the plaintiff was unrelated to this litigation."

The Court's July 14, 1980 order was, in essence, an award of summary judgment on the issue of whether plaintiff had substantially prevailed in this case. It is axiomatic that summary judgment is properly granted only when no material fact is genuinely in dispute, and then only when the movant is entitled to prevail, and then only when the movant is entitled to prevail as a matter of law. Fed.R.Civ.P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Bourchard v. Washington, 168 U.S.App.D.C. 402, 405, 514 F. 2d 824, 827 (1974); Nyhus v. Travel Management Corp., 151 U.S.App.D.C. 269, 271, 466 F.2d 440, 442 (1972). In assessing the motion, all "inferences to be drawn from the underlying facts contained in [the movant's] materials must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The movant must shoulder the burden of showing affirmatively the absence of any meaningful factual issue. Bloomgarden v. Coyer, 156 U.S.App.D.C. 109-113-114, 479 F.2d 201, 206-207 (1973). That responsibility may not be relieved through adjudication since "[t]he court's function is limited to ascertaining whether any factual issue pertinent to the controversy exists [and] does not extend to the resolution of any such issue." Nyhus, supra, note 32, 151 U.S.App.D.C. at 271, 466 F.2d at 442.

Thus, regardless of whether plaintiff's motion for reconsideration "advance[d] no new arguments" and "present[ed] no new facts," the Court's decision to grant the motion and vacate its July 14th order was correct. There is very plainly a disputed issue of material fact as to whether the release of the transcripts was related to this litigation. On this record, for the Court not to have vacated its July 14th order would only have invited reversal on appeal.

III. PLAINTIFF'S CONTENTION THAT HE IS REQUIRED TO FILE SUIT TO OBTAIN CIA RECORDS IS NOT IRRELEVANT

In his motion for reconsideration, plaintiff maintained that he is required to file suit to obtain information from the CIA, that the CIA does not treat him the same as other requesters but even refuses to give him information that it has already made available to others. Defendant disputes this, saying that the CIA "believes the statement is unfounded." (Defendant's motion, footnote at bottom of p. 3)

Defendant does not provide any under oath affirmation that Weisberg's charges are not true. Instead it resorts to innuendo and argues that his affidavit is merely hearsay. In addition, it complains that it cannot devote its limited resources to responding to these "irrelevant and immaterial" allegations.

First, the allegations are not "irrelevant and "immaterial". If Weisberg has to file suit to obtain the same information that is provided others, of if he is not provided requested information until he sues for it, this bears on the issue of whether or not he "substantially prevailed" in this lawsuit.

Secondly, in view of defendant's claim that the CIA's resources are too limited to permit response to plaintiff's various affida-

vits, plaintiff suggests that defendant provide the Court with sworn affidavits responsive to the following two matters:

1. In 1975 and 1976 plaintiff made FOIA requests for records pertaining to Yuri Nosenko. These requests were assigned CIA numbers F-75-4765 and F-76-143. The CIA should indicate what records responsive to these requests have been provided to plaintiff and whether any such records have been provided to any other requester. The CIA should explain why such records have not been provided to plaintiff.

2. On April 30, 1980, CIA official Gerald L. Liebenau executed an affidavit which revealed that the CIA had not provided at least one document which should have been released to Mr. Weisberg in another lawsuit, Weisberg v. Central Intelligence Agency, et al., Civil Action No. 77-1997. Mr. Liebenau stated that this document, which he described as "an informal three-page biographic statement, stamped Secret, concerning one individual apparently received by the FBI from the CIA on 17 April 1968," "is currently being reviewed for possible release under FOIA to plaintiff Weisberg, who will be advised directly of the determinations." Affidavit of Gerald L. Liebenau, ¶3. (Attachment 1) The CIA should state whether the CIA has yet advised plaintiff of its "determinations" concerning this document. Why has it not done so after a passage of five months? Is it going to be necessary for Mr. Weisberg to file suit to learn the determination that the CIA said five months ago it was going to advise him of directly?

Plaintiff is currently hospitalized as a result of arterial by-pass surgery and is thus unable to respond directly to some of defendant's assertions at this time. However, with respect to the footnote appearing at the bottom of page four of defendant's motion, which states that the CIA has indicated that plaintiff's

current unpaid bill for duplication at the CIA is over $1400, plaintiff informs the Court that on March 1, 1978, he wrote the CIA in regard to this bill. In that letter he explained that he did not have enough money in the bank to cover a $1,435.70 check, but that as soon as possible he would arrange this. He also called to the CIA's attention the fact that he had requested a waiver of the duplication fees and noted that: "It would be much more convenient for me if you will agree to postpone payment until there is a final decision on the request for a waiver." He promised, "I do assure you of a check after I hear from you following your receipt of this letter." (A copy of this letter is found at Attachment 2)

To the best of plaintiff's knowledge and recollection, the CIA did not write him in response to this letter and there has been no determination of his fee waiver request.

Respectfully submitted,

James H. Lesar

JAMES H. LESAR
2101 L Street, N.W., Suite 203
Washington, D.C. 20037

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of September, 1980, hand-delivered a copy of the foregoing Opposition to Defendant's Motion for Reconsideration of the Court's Ruling on Plaintiff's Motion for Reconsideration to the office of Ms. Patricia J. Kenney, United States Courthouse, Washington, D.C. 20001.

James H. Lesar

JAMES H. LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	:	
Plaintiff,	:	
v.	:	Civil Action No. 75-1448
GENERAL SERVICES ADMINISTRATION,	:	
Defendant	:	

O R D E R

Upon consideration of defendant's motion for reconsideration of the Court's ruling on plaintiff's motion for reconsideration, plaintiff's opposition thereto, and the entire record herein, it is by the Court this _____ day of _____, 1980, hereby

ORDERED, that defendant's motion for reconsideration be, and the same hereby is, DENIED.

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UNITED STATES DISTRICT COURT

ATTACHMENT 1

C. A. 75-1448

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff, v. DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 75-1996

AFFIDAVIT

GERALD L. LIEBENAU, being first duly sworn, does hereby depose and say:

1. I am the Information Review Officer for the Directorate of Operations (DO) of the Central Intelligence Agency (CIA). I am responsible for the review of DO documents which are the object of Freedom of Information Act (FOIA) litigation involving the CIA. I make the following statements based upon my knowledge, upon information made available to me in my official capacity and upon advice of the CIA Office of General Counsel.

2. The purpose of this affidavit is to advise plaintiff and the Court regarding CIA's FOIA determinations on ten documents. They are CIA-originated documents retrieved by the Federal Bureau of Investigation (FBI) from its records in response to plaintiff's FOIA request for documents on Martin Luther King, Jr. and James Earl Ray. During the same period, plaintiff Weisberg was also engaged in litigation with the CIA in this district (Weisberg v. CIA, Civil Action No. 77-1997) concerning the FOIA request for documents about the same two individuals in CIA records. Nine of the ten documents retrieved from the FBI files were dealt with in

Plaintiff Weisberg's litigation with CIA. They are discussed in the affidavit of Robert E. Owen of 25 May 1979 and identified in the Document Disposition Index which accompanied the affidavit as Document Nos. 224, 250, 251, 277, 279, 284, 285, 326 and 327.

3. Available records do not establish what disposition was made of the tenth document, an informal three-page biographic statement, stamped Secret, concerning one individual apparently received by the FBI from the CIA on 17 April 1968. The document is currently being reviewed for possible release under FOIA to plaintiff Weisberg, who will be advised directly of the determinations.

GERALD L. LIEBENAU

COMMONWEALTH OF VIRGINIA)
) ss.
COUNTY OF FAIRFAX)

Subscribed and sworn to before me this 23rd day of April 1980.

Notary Public

My commission expires: June 14, 1983

ATTACHMENT 2

C.A. 75-1448

C.A. 77-1997
EXHIBIT 8

Rt. 12, Frederick, Md. 21701
3/1/78

Mr. Gene Wilson, FOIA/PA Coordinator
CIA
Washington, D.C. 20505

Dear Mr. Wilson,

Thank you for your letter of yesterday and the four cartons of records, both of which came today. Are surprised me. Thanks you also for your apology for what you do not exaggerate in describing as your "inordinate delay in responding."

But I do remind you that although this is a two-year delay it is not your record in FOIA/PA matters with me. I await compliance with a 1/1 request.

Because I did not expect this I do not have enough money in the bank to cover a $1,435.70 check. As soon as possible I will arrange to be able to give you a check.

If my letters have reached you personally you are aware that I have requested a waiver under the provisions of the statute which permit that as a matter of administrative action. I meant this to cover all my requests, as I believe I said.

However, I do assure you of a check after I hear from you following your receipt of this letter. By then I will have had a chance to speak to my lawyer, Jim Lesar, who is out of town for the rest of this week. I'll be in Washington on the 7th for a status call in an FOIA case and will be able to speak with him then.

It would be much more convenient for me if you would agree to postpone payment until there is a final decision on the request for a waiver.

I do not recall what I have to d you about this, in general. I have willed all these records to a university in the middleof the country and have made some available as I have been able to. The delay in compliance, which is not exactly as you now represent, has them reaching me at a time when I cannot even look at them for a long time. And as a matter of practise I make all my recor s available to others. On this particular subject this includes one who cannot even repay me the cost of making the copies. He has a proper interest i.. them and I have sent him copies of everything I've received, not just what I have received from you. There are other considerations, including my present situation and condition. If you require more than you have please let me know.

As you will know before you receive this I have just recently written you about another of your "inordinate" delays, one that again gives another an "exclusive" on what I requested earlier and did not receive. In that case it is Edward J. Epstein, of a sycophantic record.

There are by now a large number of requests and a large number of appeals and other reminders and no compliance as a result of them. This reduces my choices to two: accepting what I cannot accept or litigating the matters. I would much prefer voluntary compliance. If I do not have some dependable assurance of it by the time Mr. Lesar can file a suit I will be seeking relief from the courts. I believe that I have asked you for an accounting of the status of these requests and appeals without receiving it. I hope you will provide one promptly. For whatever it is worth to you I report that on its own and after some recent court experiences (a news account of one of which I enclose) the Department of Justice has undertaken to list all my requests and appeals. The result seems to be surprising to the person doing it.

Sincerely,

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Harold Weisberg