UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MOTION FOR AWARD OF ATTORNEY FEES AND OTHER LITIGATION COSTS

Comes now the plaintiff, Mr. Harold Weisberg, and moves the Court, pursuant to 5 U.S.C. § 552(a)(4)(E) for an award of attorney's fees in the amount of $28,560.

Pursuant to 5 U.S.C. § 552(a)(4)(E), plaintiff further moves the Court for an award of "other litigation costs" in the amount of $1,438.41.

For the reasons set forth in the Memorandum of Points and Authorities attached hereto, plaintiff further moves the Court to increase the award of attorney's fees and the award for "other litigation costs" by 100%.

Affidavits by Harold Weisberg and James H. Lesar in support of this motion are attached hereto.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case arises out of plaintiff's Freedom of Information Act ("FOIA") suit for the disclosure of two entire Warren Commission executive session transcripts and eleven pages of a third. In a letter to Mr. Weisberg dated June 21, 1971, the National Archives asserted that the May 19, 1964 transcript was being withheld under exemptions 1 and 6; it also claimed that the June 23, 1964 transcript and the eleven withheld pages of the January 21, 1964 transcript were protected by exemptions 1 and 7. (Exhibit 1)

When Mr. Weisberg renewed his request in 1975, the Archives dropped its exemption 1 claim for the May 19 transcript, reasserted the exemption 6 claim, and added an entirely new exemption 5 claim. With respect to the January 21 and June 23 transcripts, the Archives initially added an exemption 5 claim but did not mention the exemption 7 claim it had invoked in its 1971 letter to Weisberg. (Exhibit 2) However, when Weisberg appealed, the Archives invoked exemption 3 for the first time. (Exhibit 3) The statute said to specifically require that these transcripts be withheld under exemp-

tion 3 was 50 U.S.C. § 403(d)(3), which provides that:

> . . . the Director of Central Intelligence shall be responsible for protecting intelligency sources and methods from unauthorized disclosure.

By its order of March 10, 1977, this Court awarded summary judgment on behalf of the GSA with respect to all three transcripts. On the basis of it in camera inspection, the Court found that the May 19, 1964 transcript was exempt because "it reflects deliberations on matters of policy with respect to the conduct of the Warren Commission's business. These discussions are not segregable from the factual information which was the subject of the discussion." With respect to the January 21 and June 23 transcripts, the Court found only that it appeared that the GSA was entitled to summary judgment "on the basis of exemption 3 of the Freedom of Information Act." (Exhibit 4) Subsequently, by order dated June 7, 1977, the Court amended its March 10, 1977 order to read as follows:

> The statute relied upon by Defendant as respects Exemption 3 is 50 U.S.C. § 403(d). That this is a proper exemption statute is clear from a reading of Weissman v. CIA, No. 76-1566 (D.C.Cir. Jan. 6, 1977). The agency must demonstrate that the release of the information can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods. Upon such a showing, the agency is entitled to invoke the statutory protection accorded by the statute and Exemption 3. Phillipi v. CIA, No. 76-1004 (D.C. Cir. Nov. 16, 1976). On the basis of the affidavits filed by the Defendant it is clear that the agency has met its burden and summary judgment is appropriate. (Exhibit 5)

Weisberg took an appeal from the Court's orders, and this became Case No. 77-1831 in the Court of Appeals. While this case was pending in the Court of Appeals, Weisberg obtained new materials which undermined the credibility of the affidavits which the GSA had filed in support of its national security claims in district court. When Weisberg sought to bring these materials to the

attention of the Court of Appeals by attaching them to his Reply Brief, it directed him to file a motion for a new trial in the district court. When this Court denied Weisberg's motion for a new trial on the grounds of newly discovered evidence, Weisberg took a separate appeal from this order. This second appeal became Case No. 78-1731 in the Court of Appeals. On Weisberg's motion this second case was consolidated with the earlier appeal, Case No. 77-1831.

On October 16, 1978, the day on which the GSA's brief was due to be filed in Case No. 78-1731, the GSA made copies of the January 21 and June 23 transcripts avaible to Weisberg. On that same date it moved to dismiss Case No. 78-1731 in its entirety, contending that the disclosure of the transcripts mooted all issues in that case. In addition, the GSA also contended that Case No. 77-1831 had been rendered moot with respect to all issues pertaining to the January 21 and June 23 transcripts. By order dated January 12, 1979, the Court of Appeals granted GSA's motion. However, the Court of Appeals ordered this Court to vacate its prior orders concerning those transcripts and stated that: "The District Court may still consider any post-dismissal matters, upon motion, as the District Court deems appropriate." (Exhibit 6)

The only issues remaining before the Court of Appeals were those in Case No. 77-1831 which pertained to the May 19 transcript. That case was argued before the Court of Appeals on February 13, 1979. Subsequently, by order dated March 15, 1979, the Court of Appeals affirmed the decision of this Court with respect to the May 19 transcript "for the reasons stated by the District Court." (Exhibit 7)

Given the fact that plaintiff has obtained two of the three transcripts he sought after lengthy and arduous legal proceedings, plaintiff contends that he is entitled to an award of attorney fees

and costs as provided by statute.

ARGUMENT

I. PLAINTIFF QUALIFIES FOR AN AWARD OF ATTORNEYS' FEES BECAUSE HE HAS "SUBSTANTIALLY PREVAILED" IN THIS LITIGATION

The Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), provides:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

In order to qualify for an award of attorney fees and costs under this section, a complainant need not obtain an actual judgment in his favor as to some or all of the materials sought. Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F. 2d 509 (C.A. 2, 1976). The fact that the government, after commencement of the litigation, acts to moot it by supplying the requested documents, does not preclude the recovery of attorney fees and litigation costs. Kaye v. Burns, 411 F. Supp. 897 (D.C.N.Y. 1976). The cases arising in the District of Columbia Circuit support this view. Cuneo v. Rumsfeld, 553 F. 2d 1360 (D.C.Cir. 1977); Goldstein v. Levi, 415 F. Supp. 303 (D.D.C. 1976).

Plaintiff has obtained two of the three transcripts he sought in this lawsuit. After the Court of Appeals issued its March 15, 1979 order in Case No. 77-1831 affirming this Court's decision that the May 19 transcript is protected by exemption 5, the GSA filed a bill of costs pursuant to Federal Rule of Appellate Procedure 39. Weisberg opposed an award of costs to GSA and filed his own motion for an award of costs in both Case No. 77-1831 and Case No. 78-1731 on the grounds that he had "substantially prevailed" when the GSA had belatedly provided him with the January 21 and June 23 transcripts rather than risk an adverse decision in the Court of Ap-

peals. Although GSA strongly opposed an award of costs to Weisberg and claimed that he had not "substantially prevailed," on April 12, 1979, the Court of Appeals issued an order which decreed that "costs in the amount of $492.54 are awarded in favor of appellant and taxed against appellee." (Exhibit 8) In view of this order, it is apparent that plaintiff has "substantially prevailed" in this action and therefore qualifies for an award of attorney fees and litigation costs under 5 U.S.C. § 552(A)(4)(E).

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO AWARD ATTORNEY FEES IN THIS CASE

The provision for a discretionary award of attorneys' fees in Freedom of Information Act cases was added when the Act was amended in 1974. The Senate Report on the 1974 Amendments describes the purpose of the attorneys' fees provision as follows:

> Such a provision was seen by many witnesses as crucial to effectuating the original congressional intent that judicial review be available to reverse agency refusals to adhere strictly to the Act's mandates. Too often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law. "If the government had to pay legal fees each time it lost a case," observed one witness, "it would be much more careful to oppose only those areas that it had a strong chance of winning." (Hearings, Vol. I, at 211)
>
> The obstacle presented by litigation costs can be acute even when the press is involved. As stated by the National Newspaper Association:
>
> > An overriding factor in the failure of our segment of the Press to use the existing Act is the expense connected with litigating FOIA matters in the courts once an agency has decided against making information available. This is probably the most undermining aspect of existing law and severely limits the use of the FOI Act by all media, but especially smaller sized newspapers. The financial expense involved, coupled with the inherent delay in obtaining the information means that very few community newspapers are ever go-

> ing to be able to make use of the Act unless changes are initiated by the Committee. (Hearings, Vol. II at 34)
>
> The necessity to bear attorneys' fees and court costs can thus present barriers to the effective implementation of national policies expressed by the Congress in legislation.
>
> * * *
>
> The bill allows for judicial discretion to determine the reasonableness of the fees requested. Generally, if a complainant has been successful in proving that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating an important public policy. In such cases it would seem tantamount to a penalty to require the wronged citizen to pay his attonreys' fee to make the government comply with the law. S. Rep. 93-854, 93d Cong., 2d Sess. 17-19. ("Senate Report")

The attorneys' fees provision in the Senate bill to amend the Freedom of Information Act contained four criteria to guide a court in making its decision whether to award attorneys' fees: (1) the benefit to the public, if any, deriving from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) whether the agency's withholding had a reasonable basis in law. Senate Report, at 19.

However, these specifically enummerated criteria were deleted from the final version of the bill. The Report of the House-Senate conferees explained:

> By eliminating these criteria, the conferees do not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria. Instead, the conferees believe that because the existing body of law on the award of attorney fees recognizes such factors, a statement of the criteria may be too delimiting and is unnecessary. H.R.Rep. No. 93-1380, 93d Cong., 2d Sess. 10 (1974). (Hereinafter "Conference Report")

While it is obvious that Congress intended the courts to exercise their discretion more liberally than would have been allowed under the Senate criteria, it is also readily apparent that, even under those more restrictive criteria, plaintiff is entitled to an award in this case.

First, by initiating this lawsuit and forcing the GSA to comply with the Freedom of Information Act, Weisberg has acted as a private attorney general vindicating the strong Congressional commitment to a national policy of full disclosure. (See Senate Report at 19) As soon as the January 21 and June 23 transcripts were made available to him, Weisberg held a press conference at which he distributed copies of the transcripts to the news media and answered questions concerning their significance. As a result of these disclosures the public learned, inter alia, that the Warren Commission had failed to make an investigation that it should have made of a Soviet defector's information concerning Lee Harvey Oswald, the alleged assassin of President Kennedy. (See Exhibit 1 to the attached affidavit of James H. Lesar, an article which appeared in the October 19, 1978 issue of the Washington Post) Thus, Weisberg meets the first criterion under which, the Senate Report stated, "a court would ordinarily award fees . . . where a newsman was seeking information to be used in a publication . . . ." (Senate Report at 19)

The second criterion, which counsels against an award of fees to those who commercially profit from the disclosure, does not apply to journalists seeking information for the public, for the Senate Report expressly states that, "[f]or the purposes of applying this criterion, news interests should not be considered commercial interests." Id. at 19. In this instance Weisberg, while benefiting news interests by providing copies of these transcripts to them, could not and did not benefit commercially from the disclosure.

The Senate Report states that "[u]nder the third criterion a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented . . . ." Id. at 19. Weisberg's interest in the records he obtained is described by each of these qualifications.

He is the foremost scholar of President Kennedy's assassination, having devoted the last 15 years of his life to this subject. He has arranged for his materials on the assassinations of President Kennedy and Dr. Martin Luther King, Jr., as well as some other subjects of historical interest, to be deposited in an archive at the University of Wisconsin-Stevens Point. His study of the assassination of President Kennedy has focused upon the deeply flawed performances of basic American institutions in response to the assassination. His approach has been serious, scholarly, and public-interest oriented. It is an approach which has set him entirely apart from a legion of sensationalists and self-seekers who have endlessly exploited this great tragedy.

The fourth criterion which the Senate bill would have had the courts consider is whether the agency's withholding had a reasonable basis in law, or whether it was intended to cover up embarrassing information. Id. at 19. But even if an agency meets the reasonable basis requirement, attorneys' fees may still be awarded, for "[i]t is but one aspect of the decision left to the discretion of the trial court." Cuneo v. Rumsfeld, 553 F. 2d 1360, 1366 (D.C. Cir. 1977). Indeed, the Senate Report states that "newsmen would ordinarily recover fees even where the government's defense had a reasonable basis in law . . . ." Senate Report at 19-20. In this case Weisberg contends both that there was no reasonable basis in law for withholding the January 21 and June 23 transcripts and that these transcripts were suppressed for fourteen years because they contained information that was embarrassing to the United States government. Specifically, he asserts that although these transcripts were allegedly withheld on the grounds that their release would disclose intelligence sources and methods and thus jeopardize national security, "there never was any possibility that their release to the public would result in the disclosure of any intelli-

source or method." (October 26, 1978 Weisberg Affidavit, ¶5) Nor was there ever any justification for their classification. "There is no intelligence-related content of either record that was unknown to the KGB or to subject experts. There is no 'national security' content at all." (Weisberg Affidavit, ¶6) There is, in fact, no information in the June 23rd transcript relating to Yuri Ivanovich Nosenko, the Soviet defector who is the subject of the transcript, that is not in the Warren Commission staff reports. (Weisberg Affidavit, ¶8) Nor is there any information in the June 23rd transcript that was not made available to Edward J. Epstein for his book Legend. (Weisberg Affidavit, ¶9) Furthermore, as Weisberg states in his October 26, 1978 affidavit:

> 21. It is apparent that the actual reason for withholding these transcripts was to prevent embarrassment and to hide the fact that the CIA virtually intimidated and terrified the Warren Commission. Disclosure of these transcripts also reveals that the CIA misinformed and misled the Commission in order to avoid what was embarrassing to the CIA. The transcripts also reveal that the Warren Commission, a Presidential Commission charged with the responsibility of conducting a full and complete investigation of the assassination, did not do so.
>
> 22. The CIA had an obligation to inform and counsel the Warren Commission wisely and fully. Warren Commission records, including the transcripts just released, show that it did not measure up to its responsibilities.

Under "the existing body of law" which Congress has directed the courts to apply to awards of attorneys' fees under the FOIA (Conference Report at 10), Weisberg is entitled to a strong presumption in favor of an award. Congress had indicated that it considered the the FOIA attorneys' fees provision to be analogous to the fee provisions of such civil rights legislation as Title II of the Civil Rights Act of 1964 and the Emergency School Act of 1972, which, like 5 U.S.C. § 552(a)(4)(E) are discretionary. Senate Report at 18. Under these provisions the Supreme Court has held that fee awards "ordinarily" should be made to succesful plaintiffs "un-

less special circumstances would render an award unjust." Newman v. Piggie Park Enterprises, Inc., 309 U.S. 400, 402 (1968)(construing 42 U.S.C. § 2000a-3(b)); Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427, 428 (1973)(construing 20 U.S.C. § 1617); Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 261-262 (1975). The same presumption should be applied in FOIA cases. The public policies underlying the fee provisions in both civil rights legislation and the FOIA are quite similar. The civil rights statutes provide a mechanism whereby private parties can vindicate rights guaranteed by the Fourteenth Amendment. Similarly, the FOIA provides a mechanism whereby private parties can pursue their First Amendment rights. In this connection it should be noted that the Senate Report on the 1974 Amendments to the Freedom of Information Act states:

> Open government has been recognized as the best insurance that government is being conducted in the public interest, and the First Amendment reflects the commitment of the Founding Fathers that the public's right to information is basic to maintenance of a popular form of government. Since the First Amendment protects not only the right of citizens to speak and publish, but also to receive information, freedom of information legislation can be seen as an affirmative congressional effort to give meaningful content to constitutional freedom of expression. Senate Report at 1-2 (emphasis added).

It should be pointed out that Congress has manifested an unusually strong conviction that FOIA serves an important public purpose. The original Freedom of Information Act passed by an overwhelming vote in both houses of Congress. The 1974 Amendments to the Act were enacted by overriding a Presidential veto. Congress has twice overturned decisions of the United States Supreme Court in FOIA cases, first in EPA v. Mink, 410 U.S. 73 (1973), which had expansively interpreted exemption 1; later in FAA Administrator v. Robertson, 422 U.S. 455 (1975), which broadly interthe Act's third exemption. In addition, Congress expressly over-

turned the decision of the United States Court of Appeals in Weisberg v. U.S. Department of Justice, 160 U.S.App.D.C. 71, 489 F. 2d 1195 (1973)(en banc), cert. denied, 416 U.S. 933 (1974), which had construed exemption 7 as a blanket exemption protecting all investigatory files compiled for law enforcement purposes, when it enacted the 1974 Amendments.

The legislative history of the 1974 Amendments makes it clear that Congress provided for attorneys' fees in FOIA cases so that private citizens acting as private attorneys general could vindicate a national policy favoring the disclosure of information. Congress intended to make it possible for individuals to exercise their rights under the FOIA. At the same time, Congress also recognized that the threat of attorneys' fees would be a powerful incentive deterring noncompliance with the FOIA on the part of government agencies. Congress also intended that journalists and others who benefit the public by revealing how government works would be among the primary users and beneficiaries of the attorneys' fees provision. All of these purposes would be served by an award of attorney fees to Weisberg in this case. Accordingly, this Court should exercise its discretion in favor of an award of reasonable attorneys' fees and other litigation costs in this case.

III. THE SUM OF $28,580 IS A REASONABLE AWARD FOR ATTORNEYS' FEES IN THIS CASE

Plaintiff submits that an award in the amount of $27,455 for attorney fees is reasonable in this case. He also believes it to be consistent with fee awards found to be reasonable in other FOIA cases in this District Court.1/

1/ See, for example, Consumers Union, Inc. v. Board of Governors of the Federal Reserve System, 410 F. Supp. 63, 65 (D.D.C. 1976) (appealed on another ground) ($19,549.19); Cuneo v. Schlesinger, Civ. No. 1826-67 (D.D.C., Sept. 15, 1975), remanded on other grounds sub nom. Cuneo v. Rumsfeld, 553 F. 2d 1360 (D.C.Cir. 1977) ($19,000).

In a recent case the United States Court of Appeals for the District of Columbia described the initial steps for determining the reasonable value of an attorney's services for purposes of a fee award, stating:

> The inquiry begins with a determination of the time devoted to the litigation. This figure in turn is multiplied by an hourly rate for each attorney's work component, a rate which presumably would take into account the attorney's legal reputation and experience. The resulting figure represents an important starting point because it "provides the only objective basis for valuing an attorney's services." National Treasury Employees Union v. Nixon, 521 F. 2d 317, 322 (D.C.Cir. 1975) (footnote omitted), citing Lindy Bros. Builders, Inc. v. American Radiator and Stand. Sanitary Corp., 487 F. 2d 161 (3d Cir. 1973)(hereafter referred to as "Lindy Bros. I").

In this case plaintiff seeks compensation for his attorney at the rate of $85.00 per hour. In a prior FOIA case, Weisberg v. Griffin Bell, et al., plaintiff's attorney sought compensation at this same rate but agreed to a compromise offer of $75.00 per hour because he needed to settle the matter expeditiously. (See Lesar Affidavit, ¶30) Plaintiff's attorney has had extensive experience under the Freedom of Information Act, having handled some twenty FOIA cases in the District Court and the Court of Appeals. (Lesar Affidavit, ¶3) His accomplishments in FOIA cases have been considerable. (See Lesar Affidavit, ¶¶5-31) In view of this experience in handling FOIA matters, and given the prevailing rates for attorney services in the Washington, D.C. area, $85.00 per hour is a reasonable rate of compensation, particularly for a long and hard-fought case such as this, which was initially filed some three and a half years ago.

The base award of $28,580 which plaintiff seeks for attorney fees has been calculated by multiplying the hourly rate of $85.00 times the number of hours worked. (An itemization of the hours worked is attached as Exhibit 2 to the affidavit of James H. Lesar

which is submitted herewith.) This base amount should then be adjusted to take account of the risk involved, the quality of the work, and other relevant factors. Lindy Bros. Builders, Inc. v. American Radiator and Stand. Sanitary Corp., 540 F. 2d 102, 117-118 (3rd Cir. 1976)(hereinafter "Lindy Bros. II"). As the Court of Appeals for the District of Columbia Circuit has explained:

> In turn, this figure may be adjusted upward if there was a risk of non-compensation or partial compensation. In addition, the fees may be adjusted upward or downward on the basis of the quality of the work performed as judged by the District Court. National Treasury Union, supra, 521 F. 2d at 322 (footnotes omitted).

This rule is equally appicable in appropriate FOIA cases. See American Fed. of Government Emp., AFL-CIO v. Rosen, 418 F. Supp. 205, 209 (N.D.Ill. 1976). The District Court must state the factors considered and give a brief statement of the reasons for increasing any fee award. See Lindy Bros. II, supra, 540 F. 2d at 117-118; Lindy Bros. I, supra, 487 F. 2d at 169. Cf. Schwartz v. IRS, 511 F. 2d 1303 (D.C.Cir. 1975).

IV. THIS COURT SHOULD EXERCISE ITS DISCRETION TO INCREASE THE BASE AWARD BY 100%

Once the base amount or "lodestar" has been calculated, the district court must next determine the amount of adjustments warranted by (1) the risk of non-compensation, (2) the quality of counsel's work, and (3) the obdurate or bad faith behavior on the part of the defendant. See National Treasury Employees Union, supra, 521 F. 2d at 322. Plaintiff requests that the base award be increased by 100%.2/

2/ Comparable adjustments upwards have been awarded in other cases. See, e.g., Lindy Bros. II, supra, 540 F. 2d at 115-116 (100% incentive premium); National Association of Regional Medical Programs, Inc. v. Weinberger, 396 F. Supp. 842, 850-851 (D.D.C. 1975) (100% bonus), rev'd on other grounds, 551 F. 2d 340 (D.C.Cir. 1976), cert. den., 431 U.S. 954, (1977); Pealo v. Farmer's Home Administration, 412 F. Supp. 561, 567-568 (D.D.C. 1976)(50% increase).

1. Risks of non-compensation. With regard to the first of these three factors, the risks of non-compensation, there are three primary considerations: (a) the degree of plaintiff's burden at the time the suit was filed, including the factual and legal complexity of the case and the novelty of the issues; (b) the delay in receipt of payment; and (c) the risks assumed, including:

> (a) the number of hours of labor risked without guarantee of remuneration; (b) the amount of out-of-pocket expenses advanced for processing motions, taking depositions, etc.; and (c) the development of prior expertise in the particular type of litigation; recognizing that counsel sometimes develop, without compensation, special legal skills which may assist the court in efficient conduct of the litigation, or which may aid the court in articulating legal precepts and implementing sound public policy. Lindy Bros. II, supra, 540 F. 2d at 117.

It is generally recognized that the burden on a plaintiff in FOIA litigation is very high, for, as one experienced FOIA litigator has put it, "a plaintiff's lawyer is at a loss to argue with precision about the contents of a document he has been unable to see. Not knowing the facts--that is, what the documents say--puts him at a real disadvantage when he is trying to convince a judge that the information should be disclosed instead of kept secret under whatever exemption the government has chosen to assert." R. Plesser, Using the Freedom of Information Act, 1 Litigation Magazine 35 (1975). The United States Court of Appeals for the District of Columbia has recognized this many times, stating that:

> In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. In many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought. Vaughn v. Rosen, 484 F. 2d 820, 823 (1973), cert. den., 415 U.S. 977 (1974).

in order to overcome this disadvantage, plaintiff's counsel had to use ingenuity in developing his case through discovery, to the limited extent it was permitted, and the submission of well-documented affidavits by his client which undermined the credibility of the affidavits submitted by the defendant. Particular attention was paid to building the kind of detailed factual record which would enhance the liklihood of reversal on appeal. Another device employed to increase chances of reversal on appeal was a motion for in camera inspection with the aid of plaintiff's security classification expert, Mr. William G. Florence.

At the time this litigation was commenced, the United States Supreme Court had recently issued its opinion in FAA Administrator v. Robertson, 422 U.S. 255 (decided June 24, 1975), which held that Congress had intended exemption 3 to apply to all statutes which authorized the withholding of information: "no distinction seems to have been made on the basis of the standards articulated in the exempting statute or on the degree of discretion which it invested in a particular government officer." Robertson, supra, at 263-264. Thus, "when an agency asserts a right to withhold information based on a specific statute of the kind described in Exemption 3," the only question "to be determined in a district court's de novo inquiry is the factual existence of such a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be." Concurring opinion of J. Stewart, Robertson, supra, 422 U.S. at 270. Because the GSA had cited 50 U.S.C. § 403(d)3) as an exemption 3 statute justifying the withholding of the January 21 and June 23 transcripts sought by Weisberg, the Supreme Court's decision in Robertson posed a difficult barrier to his access to these transcripts. The risk involved in challenging the government's invocation of exemption 3 based on 50 U.S.C. § 403(d)(3) was amply demonstrated when this Court, relying upon the decisions

of the D.C. Circuit in Weissman v. CIA, 184 U.S.App.D.C. 117, 565 F. 2d 117 (1977), and Philippi v. CIA, 178 U.S.App.D.C. 243, 546 F. 2d 1009 (1976), held that 50 U.S.C. § 403(d)(3) is a proper exemption 3 statute, and that the defendant had met its burden under the Act simply by filing affidavits alleging that "the release of the information can reasonably be expected to lead to the unauthorized disclosure of intelligence sources and methods." (See Exhibit 5) This ruling was made even though this Court had repeatedly expressed doubt that the government could sustain its claim that the transcripts at issue were properly classified pursuant to Executive order.

On appeal Weisberg challenged, inter alia, the government's (and the court's) reliance on 50 U.S.C. § 403(d)(3) as an exemption 3 statute, contending that it cannot qualify as such unless it is read in the light of the applicable Executive order because it it leaves withholding or disclosure at the discretion of the Director of Central Intelligence and does not establish particular criteria for his decision to withhold. Weisberg also contended that the government's exemption 3 claim could not be considered in isolation from its exemption 1 claims and the requirements of Executive Orders 10501 and 11652.

The Court of Appeals manifested an unusual interest in this case while it was pending there. When plaintiff attached newly discovered materials bearing on the credibility of the government's affidavits to his Reply Brief in Case No. 77-1831 and the government moved to strike it, the Court of Appeals ordered plaintiff to file a motion for new trial in the District Court. At the same time it also directed the District Court to act expeditiously on the motion so it could hear oral argument on the case promptly. (See Exhibit 9) The nature of the Court of Appeals' interest in became clear in August, 1978, when it issued its opinion in Ray v.

Turner, ___ U.S.App.D.C. ____, 587 F. 2d 1187. The Ray decision made "obvious and significant" changes "in the light of experience, in the advice given the District Courts in earlier cases, such as Weissman . . . ." Concurring opinion of Chief Judge Wright in Ray, supra, 587 F. 2d at 1199, fn. 1. Specifically, the Court of Appeals modified the Weissman decision by holding that where a claim of national security is involved, (1) "[i]n camera inspection does not depend on a finding or even tentative finding of bad faith; (2) "[w]here the record contains a showing of bad faith, the district court would likely require in camera inspection;" and (3) "[t]he ultimate criterion is simply this: Whether the district judge believes that in camera inspection is needed in order to make a responsible de novo determination of the claims of exemption." Ray, supra, 587 F. 2d at 1195. The concurring opinion of Chief Judge Wright went further. In discussing the 1976 Amendments to the FOIA which overruled the decision of the Supreme Court in Robertson, Judge Wright noted that the Weissman and Philippi decisions, which had held 50 U.S.C. § 403g and 50 U.S.C. § 403(d)(3) to be exemption 3 statutes, had preceded Robertson. He then went on to observe that:

> . . . while the "particular types of matters" listed in Section 403g (e.g., names, official titles, salaries) are fairly specific, Section 403(d)(3)'s language of protecting "intelligence sources and methods" is potentially quite expansive. To fulful Congress' intent to close the loophole created in Robertson, courts must be particularly careful when scrutinizing claims of exemptions based on such expansive terms. A court's de novo determination that releasing contested material could in fact reasonably be expected to expose intelligence sources or methods is thus essential when an agency seeks to rely on Section 403(d)(3). Ray, supra, 587 F. 2d at 1220 (footnotes omitted).

Ray v. Turner set the stage for a possible precedent-setting decision in Weisberg's by now consolidated cases, Case No. 77-1831 and Case No. 78-1731. Rather than risk another adverse precedent,

the government released these transcripts on the day that its brief was due in the Court of Appeals in Case No. 78-1731, plaintiff's appeal from this Court's denial of his motion for a new trial.

As this recitation shows, plaintiff had a very heavy burden at the time he filed suit. Above and beyond the normally heavy burden of any FOIA plaintiff, he also had to overcome the difficulties presented by the existing case law. Furthermore, the case presented factual and legal issues which were both complex and novel. These issues involved, inter alia, whether exemption 3 claims based on 50 U.S.C. § 403(d)(3) can be considered in isolation from exemption 1 where both exemptions are invoked to cover the same information; the circumstances under which in camera inspection is appropriate in national security matters; the bearing, if any, that Executive order 11652 has on the directive of 50 U.S.C. § 403(d)(3) that the Director of Central Intelligence "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure"; the sufficiency of the government's affidavits; and the presence of "bad faith" on the part of the government.

With respect to the second consideration involved in assessing the risks on non-compensation, the delay in receipt of payment, three and a half years have passed since this suit was filed. Given the high rate of inflation which has prevailed since this suit was instituted, this delay has effectively worked a 25-35% loss of value for work performed in 1975; an 18-25% loss of value for work performed in 1976; and so on.

The third consideration in assessing the risks of non-compensation includes such risks assumed as the number of hours of labor expended without guarantee of remuneration, the amount of out-of-pocket expenses, and the development of prior exptertise. To date plaintiff's counsel has expended nearly 350 hours of time on this case. There is, as yet, no guarantee that he will be remunerated

for any of the work he has done. Plaintiff has incurred large out-of-pocket expenses. He submitted a bill of costs in the Court of Appeals in the amount of $522.06.[3/] Additional costs in the amount of $1,438.41 are set forth in Exhibit 3 to the attached affidavit of James H. Lesar. Thus, the total costs of this action approach $2,000. Since records were not kept of all costs, the total actually exceeds this figure.

Finally, plaintiff's counsel had developed expertise in FOIA cases prior to the institution of this lawsuit. (See Lesar Affidavit, ¶¶5-31) In fact, he had handled an earlier FOIA case, Weisberg v. General Services Administration, Civil Action No. 2052-73, in which plaintiff sought another Warren Commission executive session transcript also said to be exempt from disclosure for reasons of national security. During the course of that lawsuit, plaintiff's counsel became familiar with the law, regulations, and Executive ordres pertaining to the classification of national security information. Although plaintiff did obtain the January 27, 1964 Warren Commission executive session transcript as a result of that lawsuit, his counsel received no award of attorney's fees for litigating the case because the attorneys' fees provision of the FOIA had not yet been enacted. In fact, to date plaintiff's counsel has received attorney's fees from the government in only one FOIA case, Weisberg v. Bell, et al., Civil Action No. 77-2155, which involved only the question of whether Mr. Weisberg should be granted a waiver of copying costs for the records on the assassination of President Kennedy being released from the FBI's Headquarters' files.

3/ The Court of Appeals awarded Weisberg costs in the amount of $492.54. The discrepancy between this figure and the bill of costs submitted by Weisberg, a discrepancy of $29.52, is due to a typographic error in the bill of costs which Weisberg was submitted, which erroneously listed the copying costs for the 123 page appendix filed in Case No. 78-1731 as $.04 per page rather than $.06 per page, which it was. Because all other copying charges were listed at the rate of $.04 per page, the Clerk assumed, erroneously, that the total figure given for appendix ($88.56) was wrong, not the per page rate.

2. Quality of counsel's work. The second consideration enunciated by the Court of Appeals in National Treasury Employees Union was the quality of the counsel's work. 521 F. 2d at 322. In Lindy Bros. I, the Third Circuit explained that the adjustment "for the quality of work is designed to take account of an unusual degree of skill, be it unusually poor or unusually good." 487 F. 2d at 168. Plaintiff is of the opinion that his counsel resourcefully presented facts and issues to the Court of Appeals in such a manner that the government recognized that its alternatives were limited to releasing the transcripts or risking a highly damaging precedent that might come from the almost certain reversal. The issues raised by plaintiff presaged those addressed by the Court of Appeals in Ray v. Turner, even though that case did not resolve all such issues.

Ultimately, the evaluation of the work done by plaintiff's counsel in this case must be left to the informed judgment of the Court, recognizing that:

> A judge is presumed knowledgeable as to the fees charged by attorneys in general and as to the quality of legal work presented to him by particular attorneys; these presumptions obviate the need for expert testimony such as might establish the value of services rendered by doctors or engineers. National Treasury Employees Union v. Nixon, supra, 521 F. 2d at 322, n. 18, quoting Lindy Bros. I, supra, 487 F. 2d at 169.

In forming its judgment, the Court may properly take cognizance of the fact that the government itself has offered to pay plaintiff's counsel $75 per hour for work done in an FOIA case, and did in fact pay him at that rate.

3. Obdurate behavior by the defendant. In considering the degree of upward adjustment of the fee award in this case, the Court may properly take into account the obdurateness of the defendant's behavior. In fact such behavior may justify a court in ex-

ercizing its equitable powers to make an award of attorneys' fees even where such an award is not expressly provided for by statute:

> . . . it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted in "bad faith, vexatiously, wantonly, for for oppressive reasons." 6 J. Moore, Federal Practice ¶54.77[2] p. 1709 (2d Ed. 1972); see e.g. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, n. 4 (1968); Vaughan v. Atkinson, 369 U.S. 527 (1962); Bell v. School Bd. of Powhattan County, 321 F. 2d 494 (CA4 1963); Polex v. Atlanta Coast Line R. Co., 186 F. 2d 473 (CA4 1951). In this class of cases, the underlying rationale of "fee shifting" is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of "bad faith" on the part of the unsuccessful litigant. Hall v. Cole, 412 U.S. 1, 5 (1973)

Plaintiff's strong and detailed criticisms of the way in which government agencies and officials handled the investigations into the assassinations of President Kennedy and Dr. King have earned him a great deal of enmity among many government officials. For example, an October 20, 1969 memorandum from Al Rosen to Cartha "Deke" DeLoach shows that the highest levels of the FBI approved a policy of not answering Weisberg's FOIA requests. (Exhibit 10) Another FBI memorandum shows that when Weisberg finally prevailed in a suit for public court records on the extradition of James Earl Ray, the Department of Justice informed the FBI that the same materials would be made available to the press and others because the Department "did not wish Weisberg to make a profit from his possession of the documents . . . ." (Exhibit 11)

Records obtained by Weisberg and others within the past two years show that the GSA has been involved in bad faith efforts to deny Weisberg records to which he was entitled. Thus, a November 15, 1968 memorandum by Archivist James B. Rhoads notes a decision not to supply Weisberg with portions of the January 27 transcript published by Congressman Gerald Ford because it would encourage him "to increase his demands for additional materials from the

transcript and from other withheld records." (Exhibit 12) In fact, the Archives colluded with the Secret Service and the Justice Department to withhold from Weisberg a copy of the so-called "Memorandum of Transfer" by transferring it from the Secret Service, which admitted it had no basis for refusing to make it available to Weisberg (Exhibit 13), to the National Archives, which was willing to contrive one. (Exhibit 14)

The instant lawsuit is the second which plaintiff has filed for Warren Commission executive session transcripts. In the first, Weisberg v. General Services Administration, Civil Action No. 2052-73, the government contended that the January 27, 1964 transcript was protected from disclosure because it had been classified on grounds of national security. It took this position even though Gerald Ford had published parts of it in his book Portrait of the Assassin. (See Exhibit 12) Initially, GSA won a victory in the District Court. Although the court ruled against GSA's exemption 1 claim, it went on to find that the transcript was protected under exemption 7 as an investigatory file compiled for law enforcement purposes. However, before Weisberg could appeal the decision, GSA "declassified" the Janaury 27 transcript, ignored its just-procured ruling that it was exempt under exemption 7, and released it. The contents of the transcript made it plain, however, that GSA had proceeded in bad faith. The transcript was embarrassing to the government but there never had been any basis for withholding it on grounds of national security. Yet Weisberg had been forced to the expense of litigating its status in order to compel its disclosure.

The instant case provides a second example of the GSA's abusive "bad faith" behavior in its litigation with Weisberg. Once again the GSA procured a favorable decision in the District Court by employing false affidavits. These affidavits proclaimed that

that the January 21 and June 23 transcripts were properly classified under Executive order 11652 and that their release "would jeopardize foreign intelligence sources and methods . . . ." (See Exhibit 16, December 30, 1976 affidavit of Charles A. Briggs, ¶2) Indeed, they went so far as to assert that the release of the June 23 transcript would disclose the identity and whereabouts of a Soviet defector, Yuri Ivanovich Nosenko, and thus "put him in mortal jeopardy." (See Exhibit 16, December 30, 1976 affidavit of Charles A. Briggs, ¶¶7-9) The GSA persisted in these false representations even after it became public knowledge that the CIA had itself sent Nosenko to authors who wrote books and magazine articles about him, and who in the process revealed important details about where he had resided, what he did, how much he earned, etc. (See Exhibits 17-19) In fact, the GSA continued to adhere to the cock-and-bull fabrications of the CIA's Mr. Briggs even after the Washington Post printed a photograph of Nosenko in its April 16, 1978 issue. (Exhibit 20)

Yet Mr. Briggs' representations were false. They can now be checked against the facts, including the contents of the January 21 and June 23 transcripts. (The transcripts are reproduced as Exhibits 1 and 2 to the attached affidavit of Harold Weisberg) And as Mr. Weisberg states, " . . . there never was any possibility that [the release of the January 21 and June 23 transcripts] would result in the disclosure of any intelligence source or method." (October 26, 1978 Weisberg affidavit, ¶5) Nor was there ever any justification for their classification. "There is no intelligence-related content of either record that was unknown to the KGB or to subject experts. There is no 'national security' content at all." (Weisberg Affidavit, ¶6)

In addition to the blatant fraud of maintaining that these transcripts were being withheld to protect the national security

when in fact there had never been any basis for their classification at all, there are many other examples of bad faith on the part of the GSA in this lawsuit. They encompass such matters as:

1. Refusing to identify Nosenko as the subject of the June 23 transcript on the grounds that this information was security classified when in fact the National Archives had itself written the New Republic Magazine that Nosenko was the subject of this transcript;

2. Withholding the declassified copy No. 3 of the January 21 transcript at the time it made its response to Weisberg's request for production of documents.

3. Repeatedly delaying response to Weisberg's interrogatories for months at a time, thus forcing him to move time and time again to compel answers;

4. Refusal on the part of the CIA to answer Weisberg's third set of interrogatories and invocation of the provision of Rule 33 which says that interrogatories may be addressed only to a party after this Court had instructed GSA to obtain such information from a non-party, the CIA, and GSA's counsel had assured this Court it would do so;

5. Massive refusal to answer interrogatories and the filing of evasive responses to interrogatories.

6. Invocation of exemptions in response to this suit which were not invoked at the time Weisberg requested the records.

These examples show that bad faith conduct has characterized the government's responses to Mr. Weisberg's efforts to obtain the January 21 and June 23 transcripts since he first made written request for them in 1968. The government agencies who contrived to withhold these transcripts have been the beneficiaries of their own wrongful conduct. As Mr. Weisberg states in his October 26, 1978 Affidavit:

74. If it had been public knowledge at the time of the investigation of the assassination of the President that the CIA had, by the devices normally employed by such agencies against enemies, arranged for the Presidential Commission not to conduct a full investigation, there would have been considerable turmoil in the country. If, in addition, it had been known publicly that there was basis for inquiring into a CIA connection with the accused assassin and that the CIA also had frustrated this, the commotion would have been even greater.

75. At the time of my initial requests for these withheld transcripts, there was great public interest in and media attention to the subject of political assassinations. If the CIA had not succeeeded in suppressing these transcripts by misuse of the Act throughout that period, public and media knowledge of the meaning of the contents now disclosed would have directed embarrassing attention to the CIA. There is continuing doubt about the actual motive in suppressing any investigation of any possible CIA connection with the accused assassin. If such questions had been raised at or before the time of the Watergate scandal and disclosure of the CIA's illegal and improper involvement in it, the reaction would have been strong and serious. This reaction would have been magnified because not long thereafter the CIA could no longer hide its actual involvement in planning and trying to arrange for a series of political assassinations.

76. One current purpose accomplished by withholding these transcripts from me until after the House Committee held its Nosenko hearings was to make it possible for the Committee to ignore what the Commission ignored. With any prior public attention to the content of these transcripts, ignoring what Nosenko could have testified to, especially suspicion the accused assassin was an agent of American intelligence, would have been impossible. A public investigation would have been difficult to avoid.

The Freedom of Information Act was enacted so that the people could learn what their government is doing, and so that the popular will could then be expressed. The actions of the CIA and the GSA in this case have thwarted those goals to a considerable extent. In so doing, they have subverted the Freedom of Information Act. As Weisberg told the Court of Appeals in his October 26, 1978 affidavit:

> 82. This is the second time GSA and the CIA have bled me of time and means to deny me nonexempt Warren Commission executive session transcripts. They dragged me from court to court to delay and withhold by delaying. In each case, both stonewalled until the last minute before this Court would have been involved. In each case, rather than risk permitting this Court to consider the issues and examine official conduct, I was given what had for so long and at such cost been denied me. This is an effective nullification of the Act, which requires promptness. It becomes an official means of frustrating writing that exposes official error and is embarrassing to officials. It thus becomes a substitute for First Amendment denial. They can and they do keep me overloaded with responses to long and spurious affidavits with many attachments. With the other now systematized devices for noncompliance, these effectively consume most of my time. At my age and in my condition, this means most of what time remains to me. My experience means that by use of federal power and wealth, the executive agencies can convert the Act into an instrument for suppression. With me they have done this. My experience with all these agencies makes it certain that there is no prospect of spontaneous reform. As long as the information I seek is potentially embarrassing or can bring to light official error or misconduct relating in any way to the aspects of my work that are sensitive to the investigative and intelligence agencies, in the absence of sanctions their policy will not change and the courts and I will remain reduced to the ritualized dancing of stately steps to the reptitious tunes of these official pipers.

In addition to the fact that the government's bad faith conduct in this case has subverted the FOIA, procuring decisions on the basis of false representations such as were made in this case inevitably errodes the independence and integrity of the judiciary. Thus, in another FOIA case involving the CIA, a District Court Judge was recently heard to complain in public that he had been "made sport of" and "compromised." (See records in Military Audit Project v. Bush, et al., Civil Action No. 75-2103)

Because of the egregious conduct of the defendant in this case and the serious implications any sanctioning of it would have both for the viability of the FOIA and integrity of the judiciary, plaintiff has proposed a 100% increase in the base award of attor-

ney fees. It may be that this proposed increase is not large enough to have the punitive effect that is intended. Should that be the case, this Court has the power to make whatever additional adjustment upward it thinks is necessary to accomplish this purpose. Given the fact that plaintiff has spent an enormous amount of his own time assisting his attorney in the conduct of this case, time which he has expended at the expense of his writing, it would seem appropriate that any additional adjustment upward should go directly to plaintiff rather than his attorney. While plaintiff is unaware of any case in which a client has been compensated for his own time, as well as that of his attorney, this would be in line with those decisions which have awarded attorney fees to individuals who appear pro se in FOIA cases. See Holly v. Acree, 72 F.R.D. 115, 116 (D.D.C. 1976); Cuneo v. Rumsfeld, 553 F. 2d 1360, 1366 (D.C.Cir. 1977).

V. THIS COURT SHOULD EXERCISE ITS DISCRETION TO AWARD PLAINTIFF $1,438.41 IN "OTHER LITIGATION COSTS" AND TO INCREASE SAID AWARD BY 100%

In addition to the award of attorneys' fees sought in this case, plaintiff also requests an award of his costs. These costs, which total $1,438.41 (exlcuding the $522.06 which plaintiff filed as his bill of costs in the Court of Appeals), come with the provision of 5 U.S.C. § 552(a)(4)(E), which allows the District Court to assess, in addition to attorneys' fees, "other litigation costs reasonably incurred."

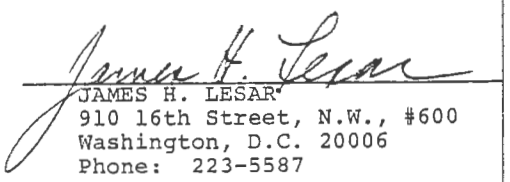
For the reasons set forth in the discussion of the award of attorneys' fees, it is suggested that the Court should also increase the award of litigation costs by 100%.

CONCLUSION

In view of the above, plaintiff's request for an award of attorney's fees in the amount of $28,580 is reasonable and should be

granted. Furthermore, the Court should exercise its discretion to adjust the award upward by 100%. To this figure should be added plaintiff's other litigation costs, in the amount of $1,438.41, a figure which should also be increased by 100%.

Respectfully submitted,



JAMES H. LESAR
910 16th Street, N.W., #600
Washington, D.C. 20006
Phone: 223-5587

Attorney for Plaintiff

Exhibit 1

C.A. No. 75-1448

GENERAL SERVICES ADMINISTRATION

National Archives and Records Service
Washington, D.C. 20408

June 21, 1971

Mr. Harold Weisberg
Coq d'Or Press
Route 8
Frederick, Maryland 21701

Dear Mr. Weisberg:

This is in reply to your letter of May 20, 1971.

The following transcripts of proceedings of executive sessions of the Warren Commission and parts of these transcripts are withheld from research under the provisions of the "Freedom of Information Act" (5 U.S.C. 552) which are cited for each item:

Transcripts

1.	December 6, 1963	5 U.S.C. 552, subsection (b) (6).
2.	January 27, 1964	5 U.S.C. 552, subsections (b) (1) and (b) (7).
3.	May 19, 1964	5 U.S.C. 552, subsections (b) (1) and (b) (6).
4.	June 23, 1964	5 U.S.C. 552, subsections (b) (1) and (b) (7).

Parts of Transcripts

1.	Dec. 5, 1963, pages 43-68	5 U.S.C., subsection (b) (6).
2.	Dec. 16, 1963, pages 23-32	5 U.S.C., subsection (b) (6).
3.	Jan. 21, 1964, pages 63-73	5 U.S.C., subsection (b) (1) and (b) (7).

As we have previously informed you, the transcripts withheld from research have not been made available to any researcher since they have been in our custody.

No additional material has been made available for research since the completion of the 1970 review, of which we informed you in our letter of February 5, 1971.

Sincerely,

Herbert E. Angel

HERBERT E. ANGEL
Acting Archivist
of the United States

Exhibit 2 C.A. No. 75-1448

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
National Archives and Records Service
Washington, DC 20408

EXHIBIT B

APR 04 1975

James H. Lesar, Esquire
1231 Fourth Street, SW
Washington, DC 20024

Dear Mr. Lesar:

This is in reply to your letter of March 12, 1975, requesting disclosure of certain Warren Commission documents on behalf of Mr. Paul Hoch and Mr. Harold Weisberg and citing the Freedom of Information Act (5 U.S.C. 552, as amended).

The following is in response to your requests:

1. Enclosed is a copy of the executive session transcript of December 6, 1963, of the Commission with deletions of names and identifying details of persons discussed in connection with the choice of the General Counsel of the Commission. The deleted information and your request for disclosure of the executive session transcript of May 19, 1964, which deals solely with a discussion of Commission personnel, are denied under 5 U.S.C. 552, subsection (b)(5) "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"; and subsection (b)(6), "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Your request for disclosure of the executive session transcript of June 23, 1964, is denied under 5 U.S.C. 552, subsection (b)(1)(A) and (B) matters "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of the national defense or foreign policy and are in fact properly classified pursuant to such Executive Order" and subsection (b)(5), "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

2. Enclosed is a copy of pages 43 and 46-58 of the executive session transcript of December 5 (the correct date, instead of December 6), 1963, with deletions, including all of pages 44 and 45, of names and other identifying information concerning persons named or discussed in connection with

the choice of the General Counsel of the Commission. The information deleted is denied under 5 U.S.C. 552, subsection (b)(5), "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" and subsection (b)(6), "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

3. Enclosed is a copy of pages 23-32 of the executive session transcript of December 16, 1963. On page 29 there are deletions under the same exemptions of 5 U.S.C. 552 stated in item 2 above.

4. Your request for disclosure of pages 63-73 of the executive session transcript of January 21, 1964, is denied under 5 U.S.C. 552, subsection (b)(1)(A) and (B), matters "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to each Executive order" and subsection (b)(5), "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

5. Copies of a transcript of the reporter's notes of the executive session of January 22, 1964, have been sent to you, to Mr. Hoch, and to Mr. Weisberg.

You have a right to file an administrative appeal with respect to the material denied you. Such an appeal should be in writing and addressed to the Deputy Archivist of the United States, National Archives and Records Service, Washington, DC 20408. To expedite the handling of an appeal, both the face of the appeal and the envelope should be prominently marked, "Freedom of Information Appeal."

Sincerely,

EDWARD G. CAMPBELL
Assistant Archivist

Enclosure

Exhibit 3 C.A. No. 75-1448

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
WASHINGTON, DC 20405

EXHIBIT D

MAY 22 1975

James H. Lesar, Esquire
1231 Fourth Street, SW
Washington, DC 20024

Dear Mr. Lesar:

This is in response to your Freedom of Information appeal of April 15, 1975, on behalf of Harold Weisberg and Paul Hoch, seeking access to those portions of Warren Commission executive session transcripts denied your clients by Edward G. Campbell, Assistant Archivist for the National Archives, in his letter to you of April 4, 1975. We received your appeal in this office on April 17, 1975.

As a result of your appeal, we have reexamined the documents denied you, which included the transcript of June 23, 1964, pages 63-73 of the transcript of January 21, 1964, and the transcript of May 19, 1964. Our review of the first two of these documents, which remained at the time of the appeal security classified at the "Top Secret" level, involved consultation with the Central Intelligence Agency. We requested that the CIA review the transcripts to determine if they could be declassified. The CIA response, issued under the authority of Charles A. Briggs, Chief of the Services Staff, requested that the records remain security classified at the "Confidential" level and that they be exempted from the General Declassification Schedule pursuant to Subsections 5 (B)(2) and (3) of Executive Order No. 11652. The CIA further requested that should the authority of the Warren Commission to classify these documents be called into question, the documents were to be marked at the level of "Confidential" pursuant to the authority of the CIA to classify national security information.

Therefore, we have determined to uphold Dr. Campbell's decision to deny your clients access to the transcript of June 23, 1964, and pages 63-73 of the transcript of January 21, 1964, pursuant to the first, third and fifth exemptions to mandatory disclosure under the Freedom of Information Act, i.e., "matters that are . . . specifically authorized under criteria established by an Executive order to be kept secret in the interest of national

defense or foreign policy and are in fact properly classified pursuant to such Executive order . . .; specifically exempted from disclosure by statute . . .; inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . . ." (5 U.S.C. 552(b)(1), (3) and (5), respectively).

The statute which specifically exempts these transcripts from disclosure provides, "That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure . . . ." (50 U.S.C. 403(d)(3)). Further, we have invoked the fifth exemption from mandatory disclosure on the basis that these transcripts reflect the deliberative process of the Warren Commission, and are not the written record of a Commission decision or opinion. To encourage free and full expression in the deliberative process, the Congress provided in the fifth exemption to mandatory disclosure a mechanism by which these records could be sheltered.

As stated in Dr. Campbell's letter, the transcript of May 19, 1964, is limited to a discussion of the background of Commission personnel. Therefore, we have determined to uphold Dr. Campbell's decision to deny your clients access to this transcript pursuant to the fifth and sixth exemptions to mandatory disclosure under the Freedom of Information Act, i.e., "matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," and "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . ." (5 U.S.C. 552(b)(5) and (6), respectively).

This letter represents the final administrative consideration of your request for access to the withheld records. You have the right to seek judical review of this decision by filing an action in the Federal District Court for the District of Columbia, or in the Federal District Court in which either of your clients resides or has his principal place of business.

Sincerely,

James E. O'Neill

JAMES E. O'NEILL
Deputy Archivist of the United States

Exhibit 4 C.A. No. 75-1448

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, :

Plaintiff, :

v. : CIVIL ACTION 75-1448

GENERAL SERVICES ADMINISTRATION, :

Defendant. :

FILED

MAR 10 1977

JAMES F. DAVEY, CLERK

ORDER

Upon consideration of the parties cross motions for summary judgment and upon consideration of the arguments advanced by counsel at oral hearing and it appearing to the Court that with respect to the May 19, 1964 transcript the in camera inspection reveals that it reflects deliberations on matters of policy with respect to the conduct of the Warren Commission's business. These discussions are not segregable from the factual information which was the subject of the discussion. To disclose this transcript would be to impinge on and compromise the deliberative process. Exemption 5 of the Freedom of Information Act (5 U.S.C. §552(b)(5)) is therefore applicable and the Defendant is entitled to Summary Judgment on this transcript.

It further appearing to the Court as regards the January 21, 1964 and June 23, 1964 transcripts the Defendant is entitled to Summary Judgment on the basis of exemption 3 of the Freedom of Information Act

(5 U.S.C. §552(b)(3)).

It is therefore this 10th day of March, 1977, ORDERED, that the Plaintiff's Motion for Summary Judgment be and it is hereby DENIED; and it is

FURTHER ORDERED, that the Defendant's Motion for Summary Judgment be and it is hereby GRANTED and that the action be and it is hereby DISMISSED.

Aubrey E. Robinson, Jr.
United States District Judge

Exhibit 5

C.A. No. 75-1448

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, :

Plaintiff :

v. : CIVIL ACTION 75-1448

GENERAL SERVICES ADMINISTRATION, :

Defendant :

FILED

JUN 7 1977

JAMES F. DAVEY, CLERK

ORDER

Upon consideration of Plaintiff's Motion for Reconsideration and upon consideration of the Opposition filed thereto; it is by the Court this 7th day of June, 1977,

ORDERED, that the Order entered March 10, 1977, be amended to read as follows:

"The statute relied on by Defendant as respects Exemption 3 is 50 U.S.C. §403(d). That this is a proper exemption statute is clear from a reading of Weissman v. CIA, No. 76-1566 (D.C. Cir. Jan. 6, 1977). The agency must demonstrate that the release of the information can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods. Upon such a showing the agency is entitled to invoke the statutory protection accorded by the statute and Exemption 3. Phillippi v. CIA, No. 76-1004 (D.C. Cir. Nov. 16, 1976). On the basis of the affidavits filed by the Defendant it is clear that the agency has met its burden and summary judgment is appropriate."

The Plaintiff's Motion in all other respects is DENIED.

Aubrey E. Robinson

AUBREY E. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE

Exhibit 6

Civil Action No. 75-1448

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1831

September Term, 1978

Harold Weisberg,
Appellant

v.

General Services
Administration

Civil Action No. 75-1448

And Consolidated Case No. 78-1731

BEFORE: Bazelon*, Circuit Judge; Fahy, Senior Circuit Judge and Leventhal, Circuit Judge

O R D E R

On consideration of appellee's motion for partial dismissal of appeal in No. 77-1831 and for complete dismissal of the appeal in No. 78-1731 on grounds of mootness, and responses thereto, and the record on appeal, it is

ORDERED by the Court that the order of the District Court on appeal in No. 77-1831 relating to the January 21, 1964 and June 23, 1964 transcripts, and the entire order of the District Court on appeal in No. 78-1731 are dismissed as moot. As to those matters, the cases are remanded to the District Court with directions to vacate its orders. See United States v. Munsingwear, Inc., 340 U.S. 36 (1950). All other issues on appeal in 77-1831 before this Court remain for consideration. The District Court may still consider any post-dismissal matters, upon motion, as the District Court deems appropriate.

Per Curiam

*Circuit Judge Bazelon did not participate in the foregoing order.

Exhibit 7 Civil Action No. 75-1448

NOT ... RULE 8 (f)

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1831 September Term, 1978

Harold Weisberg,
Appellant

v.

General Services Administration

Civil Action No. 75-1448
United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 15 1979

GEORGE A. FISHER
CLERK

BEFORE: Bazelon, Tamm and Robinson, Circuit Judges

ORDER

Upon consideration of the briefs and the entire record on appeal herein, and of appellee's motion for permission to lodge affidavit, and of appellant's response to appellee's motion for permission to lodge affidavit, it is

ORDERED by the Court, sua sponte, that this Court's order of March 7, 1979 granting appellee's motion for permission to lodge affidavit is vacated. The Clerk is directed to return appellee's affidavit and also the affidavit of appellant, and other material attached to appellant's response. It is

FURTHER ORDERED by the Court that the order of the District Court on appeal herein, with respect to the May 19, 1964 Warren Commission transcript, is affirmed for the reasons stated by the District Court.

Per Curiam

For the Court:

George A. Fisher

GEORGE A. FISHER
Clerk

Bills of ... 14 days after entry ... disfavor upon motion ... time.

Exhibit 8

Civil Action No. 75-1448

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1831 September Term, 19 78

Harold Weisberg,
Appellant

v.

General Services Administration

And Consolidated Case No. 78-1731

BEFORE: Bazelon, Tamm, and Robinson; Circuit Judges

O R D E R

Upon consideration of appellant's motion for award of costs, of appellant's affidavit of costs, of appellee's bill of costs, and of appellant's opposition to award of costs to appellee, it is

ORDERED, by the Court, that costs in the total amount of $492.54 are awarded in favor of appellant and taxed against appellee.

Per Curiam

FOR THE COURT:

George A. Fisher

GEORGE A. FISHER
Clerk

Exhibit 9

C.A. No. 75-1448

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1831

September Term, 19 77

Harold Weisberg,
Appellant

Civil Action 75-1448

v.

General Services
Administration

BEFORE: Tamm and Robinson, Circuit Judges

O R D E R

On consideration of appellant's motions to expedite oral argument and for leave to file reply brief with addendum, appellee's motion to strike portions of reply brief, and the oppositions thereto, we grant the motion for expedition and hold in abeyance the other motions.

Appellant seeks to present evidence to this Court which has not been presented to the District Court. The sound course is for appellant first to present his alleged new evidence to the District Court in a motion for a new trial. See Smith v. Pollin, 194 F.2d 349, 350 (D.C. Cir. 1951). In light of 5 U.S.C. §552(a)(4)(D), we direct the District Court to act expeditiously on such a motion so that we may hear oral argument on the appeal promptly if no remand under Smith v. Pollin is recommended. Accordingly, it is

ORDERED by the Court that appellant shall move in the District Court for a new trial, and that the District Court shall rule on such a motion within thirty days after it is filed, and it is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1831 September Term, 19 77

FURTHER ORDERED by the Court that the Clerk is directed to schedule oral argument during the June sitting period of the Court, and it is

FURTHER ORDERED by the Court that the motions to file reply brief with addendum and to strike shall be held in abeyance pending the District Court's disposition of a motion for new trial.

Per Curiam

Exhibit 10

Civil Action No. 75-1448

Addendum 3

UNITED STATES GOVERNMENT

Memorandum

TO : Mr. DeLoach

DATE: October 20, 1969

FROM : A. Rosen

SUBJECT: MURKIN

1 - Mr. DeLoach
1 - Mr. Rosen
1 - Mr. Malley
1 - Mr. McGowan
1 - Mr. McDonough
1 - Mr. Bishop
1 - Mr. W. C. Sullivan

This is the case involving the murder of Martin Luther King, Jr.

Weisberg is apparently identical with Harold Weisberg an individual who has been most critical of the Bureau in the past. He is the author of several books including one entitled, "Whitewash - The Report of the Warren Report" and has been critical of the FBI, Secret Service, police agencies and other branches of Government.

Weisberg by letter in April, 1969, requested information on the King murder case for a forthcoming book. It was approved that his letter not be acknowledged. (100-35138)

Enclosures (2)

EJM:jmv
(8)

REC 62

CONTINUED - OVER

70 NOV 6 - 1969

Exhibit 11 Civil Action No. 75-1448

Addendum 4

UNITED STATES GOVERNMENT

Memorandum

TO : Mr. DeLoach DATE: 6/24/70

FROM : T. E. Bishop

SUBJECT: ASSASSINATION OF DR. MARTIN LUTHER KING

By way of background, on 4/27/70 Assistant Attorney General William Ruckelshaus, Civil Division, Department of Justice, advised the Director that Harold Weisberg, the author of the books "Whitewash I" and "Whitewash II" has filed a civil action against the Department of Justice and Department of State demanding copies of all the papers which were employed in the extradition in the James Earl Ray matter. These documents were used in the extradition proceedings against James Earl Ray in England and were thereafter returned to the State Department and were transferred to the Department of Justice. Included in the documents were a considerable number of affidavits of FBI Agents, affidavits covering fingerprints, ballistics' examinations, etc. Ruckelshaus asked if the release of these documents to Weisberg would in any way prejudice the work of the FBI. It is noted that Weisberg is an author who has been extremely critical of the FBI, the Secret Service and other police agencies in books which he has written about the assassination of President Kennedy.

By memorandum of April 30th the Director advised Ruckelshaus that the determination as to the release of the pertinent documents is within the province of the Department of Justice and the FBI interposes no objection. It was suggested, however, that the Civil Division communicate with the Civil Rights Division of the Department on this matter since Federal process was still outstanding against Ray charging a violation of a Federal Civil Rights Statute.

The Bureau is in possession of a copy of a letter dated May, 1970, from Jerris Leonard, Assistant Attorney General, Civil Rights Division, to Ruckelshaus stating that any release of any information in the files pertaining to the investigation regarding James Earl Ray would be inimicable to the investigation.

Enc. 1 - ENCLOSURE

1 - Mr. DeLoach
1 - Mr. Bishop (CONTINUED-OVER)
1 - Mr. Rosen
1 - Mr. Sullivan
1 - Mr. Jones

REC-3 5888

6/25/70 JUN 29 1970

JUN 29 1970

UNRECORDED COPY FILED IN

Memorandum to Mr. DeLoach
Re: Assassination of Dr. Martin Luther King
Current Developments

On 6/24/70 Bill King in the Information Office, Department of Justice, advised that the Department subsequently decided that it would not be possible for the Government to successfully defend the civil action by Weisberg against the Department for the release of the documents in question. Accordingly, copies of these documents were furnished to Weisberg. King advised that in view of the fact that the Department had released the documents to Weisberg the Department did not wish Weisberg to make a profit from his possession of the documents and, accordingly, has decided to make similar copies available to the press and others who might desire them. King stated that the documents to be released consist of approximately 200 pages of copies of affidavits, autopsy reports, affidavits with regard to fingerprint examinations and ballistics tests, and copies of other documents which serve to link Ray with the assassination of Martin Luther King. At Bishop's request King furnished the attached set of the documents being released. King stated that these documents will be released to the press at 3 p.m. on 6/24/70.

The General Investigative Division has been orally advised of the above information.

RECOMMENDATION

None. For information.

Rusk TB WBS
Did you get a written instruction from Dept. confirming conversation King had with you?
K

- 2 -

5a

Exhibit 12 Civil Action No. 75-1448

Addendum 5

November 15, 1968

N

Correspondence with Harold Weisberg, Coq d'Or Press, Route 8, Frederick, Maryland 21701

L

The transcript of the executive session of January 27, 1964, of the Warren Commission requested by Mr. Harold Weisberg in the attached letter was reviewed by GSA, the CIA, and the Department of Justice. Mr. Martin Richman of the Office of Legal Counsel of the Department recommended that the entire transcript be withheld from research, and we have withheld it.

As Mr. Weisberg says, there are certain quotations, presumably taken from a copy of the transcript in Congressman Ford's possession, that are published in Portrait of the Assassin (New York: Simon and Schuster, 1965) by Gerald R. Ford and John R. Stiles (pages 19-25). Some material is deleted from the quotations without any indication of the deletions, and there are other variances from the text of the transcript. The quoted material does not consist of a continuous passage, but of various passages chosen from different pages. Only one complete page (page 158) of the transcript is included in the quoted material. We feel that to tell Mr. Weisberg this, or to supply him with a copy of the page that has been completely published, would encourage him to increase his demands for additional material from the transcript and from other withheld records.

JAMES B. RHOADS
Archivist of the United States

cc: Official File - NND
Reading File - NNDC
N

MMJohnson/mc NNDC 69-89
Ext. 23171 11/15/68

NND NWE NN

Addendum 6

CO-2-34,030

November 13, 1970

Mr. James B. Rhoads
Archivist of the United States
National Archives and Records Service
Washington, D. C. 20408

Dear Mr. Rhoads:

In connection with the civil action Weisberg vs The National Archives, Civil Action 2589-70, Mr. Weisberg called at this office recently and displayed a copy of the proceedings in the case. He stated that since the Government's answer reflected that the Archives should not have been a party to some of the requests being made by Weisberg, he was notifying us that under the Freedom of Information Act he was requesting a copy of the Memorandum of Transfer to the Archives dated April 26, 1965, covering material then in the possession of the Secret Service, which memorandum reflected that Mrs. Evelyn Lincoln had receipted for the material set out in the Memorandum of Transfer.

There may be some validity in Mr. Weisberg's contention that since this paper is in the possession of the Secret Service, we are the proper people for him to sue or to subpoena to produce the item. However, since another Government agency has declined to furnish him a copy of the item, we are seeking advice as to what action we should take if a suit is brought seeking to force us to produce the document, or if a subpoena is received to produce the document for his examination.

The position of the Secret Service is that we have no grounds upon which to refuse making the item available to Mr. Weisberg if he should invoke the provisions of the Freedom of Information Act.

Very truly yours,

Thomas J. Kelley
Assistant Director

Exhibit 14 Civil Action No. 75-1448

Addendum 7

DEC 8 1970

Mr. Harold Weisberg
Coq d'Or Press
Route 8
Frederick, Maryland 21701

Dear Mr. Weisberg:

This is in reply to your letter of November 10, 1970, appealing from prior decision of the Archivist of the United States, not to make available to you a copy of the Government's copy of the "memorandum of transfer" of the materials relating to the autopsy of President Kennedy.

On August 19, 1970, you were advised by the Acting Archivist of the United States that this copy was withheld from research under the terms of 5 U.S.C. 552, subsection (b)(6), as a part of "medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" of the family of the late President Kennedy.

A careful review of the document in question, in the light of the cited statute, its legislative history and subsequent interpretations, has failed to adduce any grounds to warrant upsetting the considered judgment of the Acting Archivist.

Under the circumstances, I have no recourse but to advise that your appeal is denied. However, in the event the Kennedy family or its authorized representative should advise me that release of the "memorandum of transfer" does not constitute an unwarranted invasion of their personal privacy, I will reconsider my decision.

Sincerely,

(Signed) W. L. Johnson, Jr.

W. L. JOHNSON, JR.
Assistant Administrator for Administration

cc: Burke Marshall
Tom Kelly, Secret Service
Official File - LC
Mr. Yock - A
Asst. Adm. for Admin. - B
Mr. Vawter - ALI
General Counsel - LI
Mr. Marion Johnson - NND
Deputy Gen. Csl. - LL
Asst. Gen. Csl. - LR
Mr. Fauper - Dept. Justice
Mr. Axelrad - Dept. Justic

LC:RFWilliams:afh: 11-25-70
Retyped:LL:mta 11/25/70

L _____ ALI _____

Exhibit 15

Civil Action No. 75-1448

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff

v. Civil Action No. 75-1448

NATIONAL ARCHIVES AND RECORDS SERVICE,

Defendant

/

AFFIDAVIT

Charles A. Briggs being first duly sworn, deposes and says:

1. I am Chief of the Services Staff for the Directorate of Operations of the Central Intelligence Agency and am familiar with the contents of the complaint in this case and make the following statements based on personal knowledge obtained by me in my official capacity.

2. Pages 63-73 of the transcript record an executive session of the President's Commission on the Assassination of President Kennedy which session was held on 21 January 1964. I have determined that the information contained in these pages is classified, and that it is exempt from the General Declassification Schedule pursuant to section 5(B)(2) of Executive Order 11652.

3. This portion of the transcript deals entirely with the discussion among the Chairman of the Commission, Chief Justice Warren; the General Counsel of the Commission, Mr. Rankin; and Messrs. Dulles, Russell, Boggs, McCloy,

Govt Ex. 2

and Ford, Commission members. The matters discussed concerned tactical proposals for the utilization of sensitive diplomatic techniques designed to obtain information from a foreign government relating to the Commission's investigation of the John F. Kennedy assassination. The specific question discussed concerned intelligence sources and methods to be employed to aid in the evaluation of the accuracy of information sought by diplomatic means. To disclose this material would reveal details of intelligence techniques used to augment information received through diplomatic procedures. In this instance, revelation of these techniques would not only compromise currently active intelligence sources and methods, but could additionally result in a perceived offense by the foreign nation involved with consequent damage to United States relations with that country.

4. Pages 7640-7651 of the transcript record an executive session of the President's Commission on the Assassination of President Kennedy which was held on 23 June 1964. I have determined that the information contained in these pages is classified, and that it is exempt from the General Declassification Schedule pursuant to section 5(B)(2) of Executive Order 11652.

5. This portion of the transcript deals with a discussion among the Chairman of the Commission, Chief Justice Warren; the General Counsel of the Commission, Mr. Rankin; and Messrs. Ford and Dulles, Commission members. The matters discussed concern intelligence methods used by the CIA to determine the accuracy of information held by the Commission.

Disclosure of this material would destroy the current and future usefulness of an extremely important foreign intelligence source and would compromise ongoing foreign intelligence analysis and collection programs.

Charles A. Briggs

STATE OF VIRGINIA)
) ss.
COUNTY OF FAIRFAX)

Subscribed and sworn to before me this 5th day of November, 1975.

L. Helen Conner
Notary Public

My commission expires: March 15, 1977.

Exhibit 16 Civil Action No. 75-1448

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v. Civil Action No. 75-1448

GENERAL SERVICES ADMINISTRATION,

Defendant.

AFFIDAVIT

Charles A. Briggs, being first duly sworn, deposes and says:

1. I am the Chief, Information Services Staff of the Directorate of Operations, Central Intelligence Agency (CIA) and hold the rank of GS-18. As Chief of that staff, I am responsible for maintaining record systems within the Directorate of Operations and for establishing secure procedures and systems for handling intelligence documents. I have ready access to intelligence experts versed in the technical requirements of the pertinent Executive orders, National Security Directives and other regulatory issuances, as well as experts in the substance of a wide variety of classified documents and records for which I am responsible; and in my deliberations, I made full use of such experts. The statements made herein are based on my personal knowledge, upon information made available to me in my official capacity, upon conclusions reached therewith and in my deliberation I made full use of this.

2. Through my official duties I have become acquainted with the Freedom of Information Act (FOIA) request submitted to the National Archives by the plaintiff in the above-captioned litigation and I have read the two documents at issue; pages 63-73 of the transcript record of an executive session of the President's Commission on the assassination of President Kennedy of 21 January 1964 and the transcript of a similar session of 23 June 1964. I have concluded that the documents are properly withheld from the plaintiff pursuant to exemptions (b)(1) and (b)(3) of the FOIA, as amended. These exemptions have been asserted in that the documents are currently properly classified pursuant to Executive Order 11652 and contain information which, if released, would jeopardize foreign intelligence sources and methods which the Director of Central Intelligence Agency is responsible for protecting from unauthorized disclosure pursuant to the National Security Act of 1947, as amended (50 U.S.C.A. 403(d)(3)).

3. My authority to classify documents, up to and including TOP SECRET, is set forth in Exhibit A attached.

4. Classifying documents under Executive Order 11652 is not an exact science. Classification determinations are not susceptible to some form of precise mathematical formula. The Executive Order requires a judgment as to the likelihood that an unauthorized disclosure of a document could reasonably be expected to result in damage to the national security. A judgement involving probabilities, not certainties. The Executive Order provides a listing of examples of categorical areas in which it is possible to anticipate damage to the national security. The listing is varied and general; it suggests

concern over hazards to the national security in the fields of foreign relations, military or defense activities, scientific and technical developments, communications security systems, as well as intelligence activities. The list is illustrative, not exhaustive. In the case of classified intelligence documents, current international developments are usually prominent among the classification determinants. The classification decision usually is a function of the relationship between U.S. national security interests and the foreign development. Usually, there are a number of interrelated factors which, in the flow of events, are constantly changing in terms of their relative significance and their interrelationships. An individual document is usually a short-term glimpse of a moving chain of related events. The national security significance of a document cannot usually be judged in isolation. The judgment must take into account what events preceded those recorded, as well as those likely to follow. Consequently, a classification judgment is not valid indefinitely. The circumstances which justify classification may change, sometimes without warranting a change in the classification. Likewise, a classification judgment which is amended at a later date is not thereby proven to have been initially in error. Changes in classification typically result in a lower level of classification. Such a change is usually, as in this case, a result of a judgment that the hazard anticipated has been reduced in magnitude or likelihood with the passage of time.

5. The prime purpose of an intelligence organization is to protect its country from hostile foreign surprises. Concealing such knowledge of hostile intentions and capabilities of foreign countries is a prime role of the

classification system as applied to intelligence documents and information. Concealing the methods and sources used in acquiring such knowledge is also an essential requirement in maintaining such capabilities. Using the classification system to protect intelligence sources and methods, as well as the substantive content of documents, can result in documents which, on their face, bear no apparent justification for classification. In such cases, it is often essential to have access to other classified information to be able to recognize the reason for the classification. For example, an intelligence report detailing a policy decision by a foreign government might not appear to warrant classification unless the reader also knows that the policy decision is a violation of a secret mutual defense commitment that country has made with the U.S., a decision that country intended to keep secret from the U.S. The reader recognizing that, would also recognize that the report proved that the reporting intelligence organization possessed the means of learning of such "secret" policy decisions. The latter fact alone would warrant classification under Executive Order 11652. In sum, a document can warrant classification without the justification being apparent from the text of the document.

6. The transcript of the 21 January 1964 executive session, pages 63-73, is currently classified CONFIDENTIAL and is exempt from the General Declassification Schedule pursuant to section 5(B)(2) of Executive Order 11652. As I stated in my affidavit of 5 November 1975, the matters discussed in the transcript concerned tactical proposals for the utilization of sensitive diplomatic

techniques designed to obtain information from a foreign government relating to the Commission's investigation of the John F. Kennedy assassination. The specific question discussed concerned intelligence sources and methods to be employed to aid in the evaluation of the accuracy of information sought by diplomatic means. In this instance, revelation of these techniques would not only compromise currently active intelligence sources and methods but could additionally result in a perceived offense by the foreign country involved with consequent damage to United States relations with that country. A more detailed delineation of the nature of the intelligence methods and sources involved in this document would, in effect, defeat the protective intentions of the classification. In arriving at the classification determination, I employed the professional disciplines described in earlier paragraphs and made full use of the professional experts available to me. I have determined, by repeating the review of the document for purposes of this affidavit, that the classification determination was and is valid.

7. The transcript of the 23 June 1964 executive session, pages 7640-7651, is currently classified CONFIDENTIAL and is exempt from the General Declassification Schedule pursuant to section 5(B)(2) of Executive Order 11652. In my earlier affidavit, I indicated that the document discussed intelligence methods used by CIA to evaluate the accuracy of information available to the Warren Commission. Since that time, the information on the public record has been supplemented to the extent that it has been revealed that the subject of the document is Yuriy Nosenko. Nevertheless, the contents of this document may not be disclosed for the following reasons: Mr. Yuriy Nosenko is a former counterintelligence officer in the Second Chief Directorate of the KGB (Soviet Committee for State Security) who defected to the United States in February 1964

and has, since this defection, provided intelligence information of great value to the United States. When Mr. Nosenko first agreed to provide this Agency with information, it was with the clear understanding that this information would be properly safeguarded so as not to endanger his personal security and safety. He has maintained clandestine contact with the CIA since his defection and continues to maintain such contact. After his defection, Mr. Nosenko was tried in absentia by the Soviet Union and was condemned to death as a result thereof. Any disclosure of his identity or whereabouts would put him in mortal jeopardy. He is now, in fact, a naturalized American citizen and his name has been legally changed. Every precaution has been and must continue to be taken to avoid revealing his new name and his whereabouts.

8. At present, there is no way the Soviet Union can determine exactly what information has been provided by Mr. Nosenko. Until such disclosures are made, the Soviet Union can only guess as to how much information the defector, Mr. Nosenko, had within his possession at the time of his defection, how much he disclosed to the CIA and, consequently, to what degree its security has been compromised by Nosenko's defection. Revealing the exact information which Mr. Nosenko -- or any defector -- has provided can materially assist the KGB in validating their damage assessment and in assisting them in the task of limiting future potential damage. Moreover, the disclosure of the information provided by Mr. Nosenko can only interfere with American counterintelligence efforts since the KGB would take control measures to negate the value of the data. Finally, any information officially released may be expolited by the KGB as propaganda or deception.

9. A guarantee of personal security to a defector is of utmost importance in the maintenance of a vital intelligence service. Every precaution must continue to be taken to protect the personal security of Mr. Nosenko. The manner in which Mr. Nosenko's security is being protected by the CIA is serving as a model to potential future defectors. If the CIA were to take any action which would compromise the safety of Mr. Nosenko by release of this information or would take any action to indicate that the CIA cannot safeguard information provided by a defector, future defectors might, consequently, be extremely reluctant to undertake the serious step of defection. Defection from intelligence services of nations that are potential adversaries of the United States constitutes an invaluable source of intelligence and counterintelligence information. Any action by the CIA that would result in an unwillingness of persons like Mr. Nosenko to defect in the future would have a serious adverse effect on this nation's ability to obtain vital intelligence. The suggestion that Mr. Nosenko's identification as the subject of the document means the whole document must be declassified, fails to recognize that factors other than simple identity combine to warrant the classification of the document. Likewise, the suggestion that since intelligence exploitation of defectors is admitted, all information received from such defectors and the manner in which they are treated must consequently be declassified. The invalidity of such a position would be more obvious if the suggestion were similarly made that since the U.S. admits possession of tactical nuclear weapons, details of the design and disposition of such weapons must consequently be declassified.

10. In response to plaintiff's specific concerns, I further depose that I determined that the classification of the two documents at issue should be reduced from TOP SECRET to CONFIDENTIAL. The determination was cited in Mr. Robert S. Young's letter of 1 May 1975. My determination was based on both classified and unclassified information available to me. I determined that the magnitude and likelihood of damage to the national security reasonable to be expected, should the documents be subject to an unauthorized disclosure, had been reduced to a point which justified a CONFIDENTIAL classification. The potential for damage continues to exist; consequently, the documents remain classified. The kind of damage most likely is in the area of foreign intelligence operations (sources and methods) with a somewhat less threatening possibility of damage in the field of foreign relations.

11. There is nothing in either document that is embarrassing to the CIA.

12. It is not possible to determine a date on which the documents may be declassified because it is impossible to predict, with any certainty, when the potential threats to the intelligence sources and methods involved will no longer exist. Consequently, the documents have been designated as exempt from the General Declassification Schedule pursuant to section 5(B)(2) of Executive Order 11652.

13. In his letter of 1 May 1975, Mr. Young of the CIA uses the phrase "our operational equities." In Agency parlance, that phrase compares closely with "sources and methods." The phrase normally encompasses a wide variety of things which the Agency may "invest in an intelligence

operation. It may cover such things as agents, case officers, cover facilities and similar kinds of entities which have been committed to an intelligence operation and which are, consequently, at some risk as a result of that involvement should the operation be exposed.

14. CIA does not have records from which it is readily possible to calculate an average time it takes to review the classification of an eleven-page document. As indicated earlier, however, the review of classification of a single document cannot be done in isolation without regard to all other documents concerned with the same development or sequence of developments. Frequently, the retrieval of other pertinent documents and information is complex and time consuming and not likely to be apparent to individuals not involved in the process. The amount of time required will thus vary.

15. There are no readily available records reflecting that the two documents were ever handled in a manner inconsistent with their classification.

16. It is normal for the "clandestine branch," known as the Directorate of Operations, to classify documents originated within the Directorate. Classification is not an exclusive function of the "intelligence branch."

17. In determining the classification of the documents at issue, I did take into account the policy of the executive branch that, "If the classifier

has any substantial doubt as to which security classification category is appropriate or as to whether the material should be classified at all, he should designate the less restrictive treatment."

Charles A. Briggs

COMMONWEALTH OF VIRGINIA)
) ss.
COUNTY OF FAIRFAX)

Subscribed and sworn to before me this 30th day of December 1976.

Notary Public

My commission expires My Commission Expires March 17, 1977

76-32

DDA 76-4276

25 AUG 1976

MEMORANDUM FOR: Director of Central Intelligence

FROM : John F. Blake
Deputy Director for Administration

SUBJECT : Delegation of Authority to Classify Top Secret

1. Action Requested: Reaffirmation of Top Secret classifying authority.

2. Basic Data:

a. The provisions of Executive Order 11652 require that Top Secret classifying authority be delegated by the head of an Agency in writing.

b. Per HN 10-110 dated 31 May 1972 (attached), Mr. Charles A. Briggs, Director of Planning, Programming and Budgeting, was delegated Top Secret classifying authority.

c. The need has developed for the Top Secret classifying authority delegated to Mr. Charles A. Briggs, as noted in paragraph 2(b), to be reaffirmed.

Name	Position	Position No.
Charles A. Briggs	Chief, Services Staff	CT 36

3. Recommendation: It is recommended that Top Secret classifying authority be reaffirmed for Mr. Briggs.

/s/ John F. Blake
John F. Blake

Attachment: a/s

APPROVED (✓) DISAPPROVED ( )

/s/ George Bush
George Bush
Director

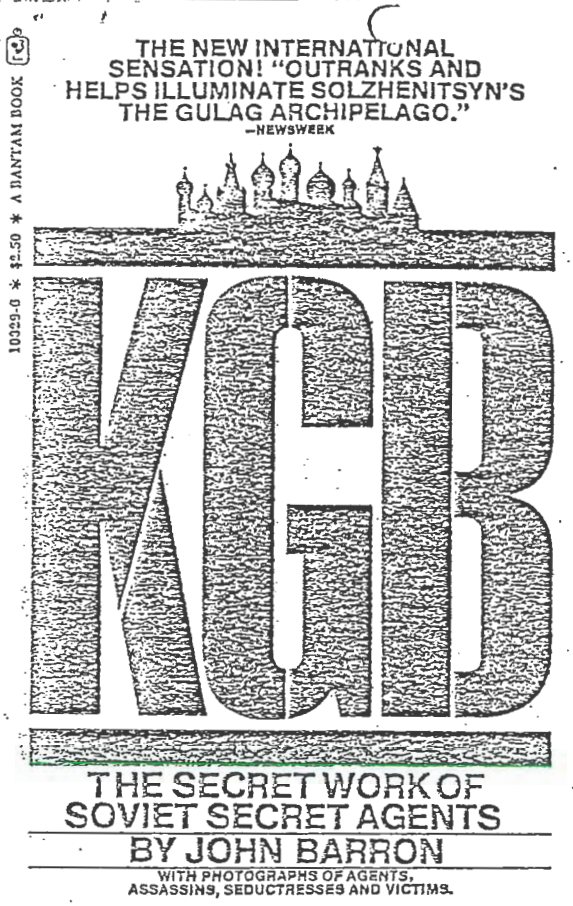
29 AUG 1976
Date

This document becomes UNCLASSIFIED when separated from attachment.

-CONFIDENTIAL-

EXHIBIT A

Addendum 11



"How the KGB functions, how it uses its unchallenged, arbitrary power is the subject of Mr. Barron's book. He has produced a remarkable work . . . It is based on evidence supplied by several non-Communist security services and 'all post-war KGB defectors except two.' It is authenticated by Mr. Robert Conquest, one of the greatest authorities on Russian affairs. I have no doubt that it is as accurate a general study of the KGB's secret activities as we are likely to get."

—Hugh Trevor-Roper,
The New York Times Book Review

"Authoritative exposé of the pervasive, international spy network."

—Rowland Evans and Robert Novak,
The Washington Post

"An explosive new book . . . Discloses many hitherto unpublished espionage cases."

—The Toronto Sun

"THE KGB IS THE WORLD'S GREATEST SPY MACHINE

. . . Whole sections of this book read like spy fiction, with secret agents, double agents, writings in invisible ink and parcels of foreign currency left attached to bridges by powerful magnets. Yet this is no fictionalised account of the KGB activity. Every fact has been checked and substantiated . . . Few of the KGB's secrets are left untold in John Barron's remarkable book."

—Noel Barber, London Daily Mail

"The most authoritative account of the KGB I have ever seen."

—Ray S. Cline, former Director,
Bureau of Intelligence and Research,
U.S. Department of State

ABOUT THE AUTHOR

JOHN BARRON is a Senior Editor of the *Reader's Digest*. He received bachelor and master degrees from the University of Missouri School of Journalism before serving in the U.S. Navy. Mr. Barron attended Naval Intelligence School, specializing in the Russian language, and was assigned to Berlin for two years as an intelligence officer. Upon release from the Navy in 1957, he went to work for the Washington *Star*, where his articles gained him national attention. Mr. Barron is the recipient of the Raymond Clapper Award; the George Polk Memorial Award for national reporting; the Washington Newspaper Guild Front Page Award for national reporting and the Newspaper Guild's grand award. He lives with his wife and two daughters in Falls Church, Virginia.

some measure, and the contributions of several have been immense.

We believe we have interviewed or had access to reports from all postwar KGB defectors except two. Fearful of provoking retaliation against relatives in the Soviet Union, several have insisted upon anonymity. Those who may be thanked publicly are identified in the Acknowledgments on page 587.

Two of the most important former KGB personnel now in the West came to us of their own initiative. One was Yuri Ivanovich Nosenko, a KGB major who escaped to the United States through Switzerland in 1964. Although Nosenko testified in secret before the Warren Commission investigating the assassination of President Kennedy, he subsequently declined to grant any press interviews, and his considerable revelations have remained unknown outside the Western intelligence community. But in May 1970 Nosenko walked unannounced into our Washington offices, stated he had read of our project in the *Reader's Digest*, and offered his assistance. (Later I was told that the KGB long has hunted Nosenko with the intention of killing him. By coming unguarded to our offices, less than four blocks from the Soviet embassy, he created consternation among American authorities responsible for his safety. Nevertheless, we were able to interview Nosenko extensively on numerous occasions.)

On February 1, 1972, I received an unsolicited letter from Vladimir Nikolaevich Sakharov, who identified himself as a former Soviet diplomat and KGB agent. He suggested that he possessed information of possible interest. His story, which is told in Chapter II, proved to be one of the most significant of all.

In most cases, we have succeeded in verifying from security services or other independent sources the essence of information acquired from former KGB personnel. In those cases where a defector is the sole source of given information, we so indicate in the Chapter Notes that explain the basis upon which each chapter is written.

At the outset of our research, we were fortunate enough to engage the services of Katharine Clark, who

and headed for the safes. The locksmiths, photographers, and specialists in opening sealed documents emerged in about an hour, their work done and undetected. The dog caused the only slight difficulty. The officer feeding him kept calling for more meat, complaining, "This dog is eating by the kilo."

Nosenko pinpointed for the State Department the location of forty-four microphones built into the walls of the American embassy when it was constructed in 1952. They were outfitted with covers that shielded them from electronic sweeps periodically made by U.S. security officers. American diplomats, of course, were instructed to be guarded in their talk because of the possibility of undetected listening devices. Nevertheless, the everyday conversations the microphones relayed for twelve years told the KGB much about what the embassy was reporting to Washington as well as about U.S. interests, concerns, and reactions to international events.

While apprehensive about alien ideas that foreigners may introduce, the leadership also fears propagation of dissident ideas by Soviet intellectuals whose access to the people is not so easily interdicted. Accordingly, the KGB infests the arts and sciences with officers and informants in an effort to police thought and creativity among the intelligentsia. The secretary of the Soviet Writers' Union from 1946 to 1956, Aleksandr Aleksandrovich Fadeyev, was a notorious collaborator who consigned at least six hundred intellectuals to concentration camps. After Khrushchev confirmed Stalin's mass murder and enslavement of innocent people, some of Fadeyev's surviving victims were rehabilitated and appeared in Moscow. Haunted by the reincarnation of men he had doomed, Fadeyev shot himself in 1956. He stated in his suicide note that he no longer could bear life in the Soviet Union. In September 1972 the Central Committee announced the appointment of Aleksei V. Romanov as editor of *Soviet Culture*, the Party publication that tells intellectuals what they are supposed to think. Romanov is the informant who caused the imprisonment of the author Aleksandr Solzhenitsyn back in 1945. Other methods by which

locks to the vault. Inside, he stuffed envelopes—some eleven by thirteen inches, others eight by eleven—into the blue flight bag. Locking the vault and then the outer door of the center, he ran to his Citroën and drove off to meet Feliks. All went precisely as rehearsed. At 3:15 A.M. Johnson recovered the envelopes by the cemetery and replaced them in the vault. By the time he reached home Sunday morning, a mass of American cryptographic and military secrets—some so sensitive they were classified higher than top secret—were already en route to Moscow.

The next Saturday night, December 22, Johnson again looted the vault without the least difficulty. This time he selected new envelopes that had arrived during the preceding two or three days. About a third contained cryptographic materials.

The day after Christmas, Feliks greeted Johnson jubilantly: "On behalf of the Council of Ministers of the U.S.S.R., I have been directed to congratulate you on the great contribution you have made to peace. I am told that some of the material we sent was so interesting that it was read by Comrade Khrushchev himself. In appreciation, you have been awarded the rank of major in the Red Army. I also have been authorized to give you a bonus of $2,000. Take a holiday and go to Monte Carlo and live it up."

The supposed rank of major of course represented a fictitious award bestowed to stimulate Johnson's ego and motivate him further. But there is independent testimony to the effect that an excited Khrushchev did study the materials Johnson purveyed. Yuri Nosenko, who in 1963 was still stationed at the Center, states that the arrival of the first documents from the vault created such a sensation that rumors of a momentous new penetration in France spread through the upper echelons of the KGB. According to what he was told, the documents were adjudged so important that immediately after translation, copies were rushed to Khrushchev and certain Politburo members. Nosenko also heard that some of the stolen data disclosed numbers and locations of American nuclear warheads stored in Europe.

Clearly, the documents from the vault were extraordinary, not only because of their content but also because of their indisputable authenticity. Anyone studying them might as well have been admitted to the highest councils of the United States and been allowed to take notes. Some of the ultrasecret papers outlined major modifications or additions to the basic American strategic plan for the defense of Western Europe. No one document, by itself, provided an overall blueprint of the plan, but collectively they laid it bare to the KGB. The Soviet Union could now identify with certainty strengths to be countered and vulnerabilities that could be exploited. Great and decisive battles have been won with less intelligence than these first two penetrations yielded. And this was only the beginning.

Indeed, the initial yield was so spectacular that the Soviet Union adopted further precautions to safeguard the operation. Nosenko says that all subsequent entries into the vault required direct approval from the Politburo, and that with the approach of each, an air of tension and excitement pervaded the KGB command. This corresponds with instructions Johnson received in January 1963 from Feliks, who advised that henceforth the vault would be looted only at intervals of from four to six weeks, and that each entry would be scheduled a minimum of fourteen days in advance. "We must bring people in specially from Moscow," Feliks said. "The arrangements are very complicated."

A team of technicians was required to process the documents Johnson removed, but the KGB dared not station them permanently in Paris. It knew that French security would eventually recognize them as the specialists they were, and realize that their presence signified a leakage of considerable importance. The KGB also knew the technicians probably would be detected if they shuttled in and out of Paris too often. Therefore it chose to reduce the frequency of their journeys and to have them come to Paris individually and by various routes—via Germany, Algeria, Belgium, or Denmark.

Additionally, the KGB recognized that although Johnson had twice taken documents from the vault with ease, each penetration still entailed high risks. If

will hour after hour. Having cut countless trees in his youth, he now derives satisfaction from planting and nurturing them.

In his community he is known as a moderate Republican, an occasional churchgoer and the personification of respectability. The same disarming grin and manner that sustained him in Moscow, at Tiffany's, and on the New York waterfront have helped fill his new life with good friends.

In spite of the excellence of Tuomi's abilities as a spy, mysteries remain in this story that he knew and lived. How did the FBI know he was coming? How did it know who he was? Tuomi has never been able to ascertain the answers. Neither, it would appear, has the KGB.

The Russians for years evidently were uncertain about what actually happened to Tuomi. Certainly they must have suspected that he had changed allegiance. But they could not be sure that he had not died an anonymous death, the victim of a street thug or an automobile accident. Between 1964 and 1971 his name never appeared on the list of men and women whom the KGB hunts throughout the world. This list, published in a secret book bound in a blue cover, is distributed to all KGB Residencies abroad and all KGB offices in the Soviet Union. It provides brief biographical detail about the wanted man, a statement of his crime, and the sentence pronounced on him, either at a trial or in absentia. The current list, for example, shows that Yuri Nosenko has been sentenced in absentia to the "highest measure of punishment." So have most of the other KGB officers now in the West.

In 1971, after the *Reader's Digest* had published in slightly different form an excerpt from this book manuscript containing the story of Tuomi, the FBI warned him that the KGB now was hunting him. His name had been added to the official list of those upon whom the KGB seeks, by any means it can, to inflict the "highest measure of punishment."

Their sensitivity is well illustrated by the abject fear shown by the KGB leadership after Lee Harvey Oswald was arrested as the assassin of President Kennedy. The reaction has been disclosed by Yuri Nosenko, who, as deputy director of the American section of the Seventh Department, became involved with Oswald when he requested Soviet citizenship in 1959. Nosenko states that two panels of psychiatrists independently examined Oswald at KGB behest, and each concluded that though not insane, he was quite abnormal and unstable. Accordingly, the KGB ordered that Oswald be routinely watched, but not recruited or in any way utilized. Oswald returned to the United States in June 1962, then in September 1963 applied at the Soviet embassy in Mexico City for a visa to go back to Moscow. On instructions from the KGB, the embassy blocked his return by insisting that he first obtain an entry visa to Cuba, through which he proposed to travel. The Cubans, in turn, declined to issue a visa until he presented one from the Russians. Shunted back and forth between the two embassies, Oswald finally departed Mexico City in disgust and on November 22 shot the President.

With news of his arrest, the KGB was terrified that, in ignorance or disregard of the headquarters order not to deal with him, an officer in the field might have utilized Oswald for some purpose. According to Nosenko, the anxiety was so intense that the KGB dispatched a bomber to Minsk, where Oswald had lived, to fly his file to Moscow overnight. Nosenko recalls that at the Center officers crowded around the bulky dossier, dreading as they turned each page that the next might reveal some relationship between Oswald and the KGB. All knew that should such a relationship be found to have existed, American public opinion would blame the KGB for the assassination, and the consequences could be horrendous.

Concern over foreign opinion has produced some major restrictions of KGB operations. The revulsion caused by confessions of the KGB assassin Bogdan Stashinsky in 1962 influenced the Politburo to curtail the political murders which the Soviet Union had been

Exhibit 18

C.A. No. 75-1448

ATTACHMENT 1: February 27, 1978 issue of New York Case No. 77-1831

Becoming Atlantic City by Nicholas Pileggi

A King in New York—The Ultimate One-Night Stand

ONE DOLLAR

FEBRUARY 27, 1978

NEW YORK

Russian Spies Inside the CIA and the FBI

The War of the Moles

By Edward Jay Epstein

NEW YORK

The War of the Moles

An interview with Edward Jay Epstein by Susana Duncan

"...We are left with the irksome suspicion that there is still a mole burrowing up through the ranks of the CIA and the FBI..."

In 1961, a KGB major named Anatoli Golitsin defected to the United States and informed the CIA that the Soviets had penetrated the CIA and the FBI. Thus began a frantic search for the "moles"—agents who work for one intelligence agency while secretly passing information to a hostile agency.

The Golitsin episode is the first of several interlocking spy stories that Edward Jay Epstein turned up while researching a new book on Lee Harvey Oswald.

It seems difficult to believe that anything new about the assassination of President Kennedy could be uncovered fourteen years after the event, the FBI, the Warren Commission, and a host of critics having already investigated it. Yet Epstein not only unearths numerous spies we've never heard about before—with intriguing code names, like "Foxtrot," "Fedora," "Komarov," and "Stone"—but also introduces 74 new witnesses to Oswald's life.

Twelve years ago, Epstein published *Inquest*, the first and most damaging critique of the Warren Report, a book which severely reduced the commission's credibility. His new book, which will be published by Reader's Digest Press in the spring and serialized by *Reader's Digest* beginning in March, is titled *Legend*, the term used in the intelligence business to denote a cover story or false biography constructed by a government for a secret agent. This new book is not about Kennedy's assassination or bullets or ballistics. Rather, its thesis is that the Soviets recruited Lee Harvey Oswald in Japan to steal secrets about the U-2, and then, upon his return from Russia to the United States, constructed a legend for Oswald's stay in Russia so that he could hide his intelligence activities there. The Soviets never intended for Oswald to kill President Kennedy, but when he did, they sent a fake defector, Yuri Nosenko, to the United States to tell a story that would corroborate Oswald's legend. Nosenko's legend, in turn, was reinforced by the story told by *another* Soviet disinformation agent, code-named "Fedora," who had volunteered his services two years earlier as a double agent to J. Edgar Hoover (while still remaining under Soviet control). The idea, apparently, was for Nosenko to go before the Warren Commission and assert that the KGB files showed that Oswald had never had any connection with Soviet intelligence.

Everything began to unravel for the Russian moles when a code-breaking team from the National Security Agency intercepted the cable traffic between Moscow and the delegation in Geneva from which Nosenko said he had defected. And under cross-examination, Nosenko admitted that he had lied on key elements of his story. Fedora was the next domino to fall. He had confirmed parts of Nosenko's story which he now admitted were false. As far as CIA counterintelligence was concerned, both Fedora and Nosenko were "blown" as Soviet agents. Richard Helms personally warned Chief Justice Earl Warren against accepting Nosenko's information. J. Edgar Hoover, however, having based most of his counterespionage operations on Fedora, refused to accept this assessment.

Meanwhile, back at the CIA, Nosenko was locked up in a detention center

Photographed by Don Rodan

"...J. Edgar Hoover was feeding secret information to the Soviets through a supposed double agent, 'Fedora,' for over a decade..."

for intensive questioning. Attention focused on an earlier Nosenko mission: to hide the tracks of a Soviet mole who was presumably burrowing his way into the heart of the CIA. At least that was the view of James Jesus Angleton, the chief of CIA counterintelligence. After all, the Soviets had planted a mole in British intelligence—Kim Philby—and a mole in West German intelligence—Heinz Felfe. Why not expect to find one in the CIA or FBI? Pretty soon, the hunt for a mole within the CIA and the attempts to solve the Nosenko-Fedora issues raised by the Oswald case led to a morass of confusion and to warfare between the FBI and the CIA.

The unnerving implications of Epstein's book go far beyond the events of 1963. The book ends with the firing of most of the CIA's counterintelligence staff in 1976, and we are left with the irksome suspicion that Fedora is still a trusted contact for the FBI's New York office and that there is still a mole burrowing his way up through the ranks of the CIA or the FBI. *New York* Magazine arranged an exclusive interview with Epstein in which he talked to senior editor Susana Duncan about his Oswald book and about the Russian moles. He also agreed to write four of the new spy stories, giving many details that he omitted from the book.

Question: The Warren Commission, FBI, and many other sleuths over the past fifteen years have investigated the Oswald case. How can you hope to come up with any new facts or different answers?

Answer: I began by rejecting the idea that there was something new to be found out about bullets, wounds, or the grassy knoll. Instead I asked: Why did Lee Harvey Oswald defect to the Soviet Union in 1959? It seemed incredible to me that a twenty-year-old marine would suddenly decide to leave his family and friends and go live in a strange country. I became interested in the question of motive.

Q. How did you begin your investigation?

A. I knew the starting point had to be finding all the witnesses to areas of Oswald's life which had been missed or neglected by previous investigations.

Q. Is that why you interviewed the marines who had served with him in Japan?

Edward Jay Epstein: *Born in New York City in 1935, Epstein has just completed a two-year investigation into Lee Harvey Oswald's relationships with the intelligence services of three nations—Russia, America, and Cuba. Epstein has a Harvard Ph.D. and has taught political science at Harvard, MIT, and UCLA. He is the author of several books, including* New From Nowhere *and* Agency of Fear.

A. Right. I was interested in knowing what happened to Oswald in the Marine Corps. The Warren Commission had questioned only one marine who served with Oswald at the Atsugi air base in Japan. With the help of four researchers, I found 104 marines who had known Oswald or had worked with him in Japan. It then became possible to reconstruct Oswald's activities in the Marine Corps before he defected to the Soviet Union.

Q. What did you learn from the marines?

A. Oswald was a radar operator who, along with the other men in his unit, frequently saw the U-2 taking off and landing and heard its high-altitude requests for weather information on the radio.

Q. How was this important?

A. I didn't know how valuable this information was at the time. But I questioned the designer of the U-2 at Lockheed, Clarence Johnson, and Richard Bissell, former special assistant to the director of the CIA, who was in charge of the U-2 program in 1958, and found out that acquiring detailed information about the altitude and flight patterns of this novel spy plane was the number-one priority of Soviet intelligence. I also questioned Francis Gary Powers, the U-2 pilot who was shot down over Russia in 1960.

Q. What did Powers tell you?

A. Powers was shot down in May—about six months after Oswald had defected to the Soviet Union. He was interrogated by the Soviets for about six months, and he recalled being asked numerous questions about Atsugi air base, other pilots at the base, and the altitude and flight characteristics of the plane. Powers told me that he suspected that an American with some technical knowledge of the U-2 had provided a great deal of the information behind the questions he was asked in Moscow. Now, under the CIA's mail-opening program, the agency intercepted a letter written by Oswald in Moscow to his brother in which Oswald said that he had seen Powers. No one had ever explained where he would have had the opportunity to see Powers.

Q. Are you saying that Oswald saw Powers in Russia at the time of Powers's interrogation?

A. Yes, and Powers also thought that Oswald was involved in his being shot down over Russia. He explained to me in great detail how the secret of the U-2 was the plane's electronic capability to confuse Soviet radar. As long as the radar couldn't get a precise reading on the U-2's altitude, Soviet missiles couldn't be adjusted to explode on target. The Soviets had the missile power—they had already sent Sputnik into space—but they didn't have the guidance system. Oswald, working at Atsugi air base, was in a position to ascertain the altitude at which the U-2 flew. If the Soviets had this information they could have calculated the degree of the U-2's electronic countermeasures and adjusted their missiles accordingly.

Q. Powers died in the summer of 1977, when a helicopter he was flying ran out of gas over Los Angeles. Didn't two other witnesses you interviewed die violent deaths?

A. Yes, William C. Sullivan, former head of counterintelligence for the FBI, who was killed in a hunting accident in 1977, and George De Mohrenschildt, a close friend of Oswald's, who shot himself after the second day of a prearranged four-day interview. It is tempting to see a connection between these deaths, but I don't. After all,

I interviewed over 200 witnesses.

Q. De Mohrenschildt became a good friend of Oswald's after Oswald returned from Russia. What did he tell you about him?

A. He arranged a good part of Oswald's life in Dallas after Oswald returned from the Soviet Union in 1962, but said he never would have done so had he not been encouraged to by a CIA officer in Dallas named J. Walter Moore. Moore was the head of the Domestic Contact Service in Dallas, a CIA unit which interviewed individuals who had returned from Eastern Europe and the Soviet Union. De Mohrenschildt said that he had discussed Oswald with Moore and Moore had told him that Oswald was "harmless." But De Mohrenschildt strongly suggested that Moore was interested in what Oswald had to say. De Mohrenschildt didn't, however, detail any specific arrangement he had with Moore.

Q. The CIA denied in the Warren Report and in every proceeding that it had ever had any interest in Oswald. What did Moore or other members of the CIA make of De Mohrenschildt's allegation?

A. Moore refused to speak to me for the reason that he was still a CIA officer and CIA officers were not allowed to be interviewed. The CIA public-relations man—whom I reached when I tried to speak to Admiral Turner—refused comment on the allegation. Finally, I asked Melvin Laird, now a Washington editor for the *Reader's Digest*, if he would try to contact Admiral Turner and ask him about the charge. Turner apparently consulted with his P.R. people and then coined a new verb by replying, "We're no-commenting it."

Q. What did William C. Sullivan, the former FBI counterintelligence chief, tell you?

A. He was undoubtedly one of the most valuable witnesses that I found. He told me all about Fedora, the Soviet intelligence officer who volunteered his services to the FBI in 1962 and became enmeshed in the Oswald case.

Q. Your book suggests that Fedora was a Soviet agent all along, sent to misinform the U.S. government by passing along false or misleading information. Why did Hoover accept Fedora?

A. For reasons of competition between the CIA and the FBI. According to Sullivan, most of the United States' intelligence about the Soviet Union's intentions comes from Soviet intelligence agents who volunteer to be double agents for the United States. It is virtually impossible for the United States to establish its own agent inside Russia since only Soviet intelligence agents, Soviet diplomats, or Soviet military officers have access to Soviet secrets. Therefore, since World War II the CIA has concentrated on recruiting Soviet intelligence officers as spies or double agents. The FBI, however, had no such sources and therefore it couldn't compete with the CIA in international intelligence. When Fedora, who was a Soviet intelligence officer, volunteered to work for the FBI and supply it with the same sort of secrets the CIA was getting, J. Edgar Hoover was able to expand the activities of the FBI.

Q. In your book, you state that Hoover was providing Fedora with classified information about United States intelligence in order to promote him and keep him alive within the KGB. Is this really so?

A. Yes. Hoover was feeding secret information to the Soviets through Fedora. Hoover couldn't let him go back to Moscow empty-handed. He was supposed to be an ace Soviet intelli-

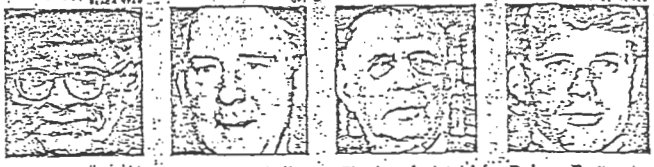
'Stone': The Man Who Warned About the Moles

In December 1961, Major Anatoli Golitsin, a senior officer in the KGB, met secretly with a CIA officer in Helsinki, Finland. Golitsin had already established his *bona fides* with the CIA by providing it with top-secret Soviet documents, and now he wanted to defect. Once in Washington, he was assigned the code name "Stone" and was turned over to James Jesus Angleton, the chief of CIA counterintelligence, for debriefing.

What Stone revealed in the months ahead was staggering. He told how he had heard from the head of the northern-European section of the KGB that the Soviets had planned to kill a leader of an opposition party in his area. Since Hugh Gaitskell, Harold Wilson's rival in Britain's Labor party, was the only opposition leader to die at this time, and he died of a very rare virus infection, counterintelligence officers in the CIA suspected that the Soviets had done away with Gaitskell in order to promote Harold Wilson, but the facts never could be established. Stone also intimated that some of de Gaulle's top advisers were working for the Soviets. This led to a major rift—one which has never been healed—between American and French intelligence. Leon Uris's *Topaz* is a fictionalization of this case.

What most concerned Angleton was Stone's suggestion that the Soviets had planted one mole deep within the CIA and another within the FBI, with the objective of promoting and advancing them to positions of leadership in American intelligence. Stone said that he didn't know the mole's identity but that in late 1957 V. M. Kovshuk, one of the key executives of the KGB, had come to Washington under the code name "Komarov," presumably to activate the mole. Since the FBI had had Komarov under surveillance, Angleton decided to find out who Komarov or Kovshuk had seen during this trip. He was unable, however, to determine whether the mole was among the numerous people Kovshuk was observed to have seen while making his social and business rounds.

A personal interview was quickly arranged between Stone and Attorney General Robert F. Kennedy during which Stone reportedly asked for $30-million to run his own intelligence operation against the Soviets. Richard Helms, then running the clandestine part of the CIA, gave Angleton carte blanche to use whatever resources were necessary to "develop" Stone, and for the next thirteen years, up until the day he was peremptorily fired, Angleton had his suspicions and made every attempt to ferret out the CIA and FBI moles to whom Stone had alluded. —EJE



James Jesus Angleton: *Ex-chief of CIA's counterintelligence, he believes there is still a mole in the CIA.*

Hugh Gaitskell: *A rival of Harold Wilson's in Britain's Labor party, he is believed murdered by the KGB.*

Charles de Gaulle: *His Cabinet was said to contain a Soviet mole and so lost America's trust.*

Robert F. Kennedy: *Was asked by defector "Stone" for $30-million to run an operation against Russia.*

"...Powers thought that Oswald was involved in his being downed over Russia..."

gence agent and therefore Hoover had to provide him with some information. Fedora would bring in the KGB's shopping list, and the FBI would take it to the other agencies of the government to be cleared before the information went to the Soviets.

An enormous amount of classified information was handed to Fedora over a decade. Sullivan also feared that the Soviets had their own mole within the New York office of the FBI, one who had a part in clearing the information. The Soviets would then find out not only what the United States had cleared for them but also possibly what wasn't cleared.

Q. You discussed Fedora with numerous other former CIA and FBI officers, including some of the top executives in the CIA in the period when Fedora was supplying information. What did you learn from them?

A. They all believed that Fedora was nothing more than a Soviet disinformation agent.

Q. It's odd that CIA and FBI officers were willing to give you almost all the facts about his case. How did you get them to talk?

A. The CIA officers I approached were former officers, retired or fired from the CIA. I would usually begin by writing them a letter stating either that someone else had discussed the case they were involved in, and that I needed clarification from them, or that I had received some documents under Freedom of Information which mentioned them or their case. Usually I found this piqued their curiosity. If they would agree to see me, I would usually do most of the talking, telling them what other people told me or what I had found out in documents.

Q. But why *did* they talk?

A. One device that almost always worked was showing them Freedom of Information documents mentioning their name or operational details of a case. Predictably their first reaction was fury that the CIA would ever release this information. Their second reaction was to be offended that someone in the present CIA had it in for them. They were soon eager to correct the record or fill out the context of a case. Their reasoning was that if the government could release information under Freedom of Information, why should they keep their lips sealed.

Q. Is this how you got the CIA officer who handled Nosenko to speak about his case?

A. Yes. He is now living in retirement in Europe, and when I first phoned him and wrote him he refused to see me. Finally, after I had written a draft of my book, I tried again. This time I wrote stating the facts I was about to divulge, facts which included his name and his involvement in the case. He then agreed to see me.

We met at the Waterloo battlefield in Belgium, and I showed him about a hundred pages of documents that involved him. I had acquired these documents under Freedom of Information. He then told me that I was "deeply wrong" because I was missing a crucial element of the Nosenko case, but he was not sure that he was willing to provide it. A few weeks went by and he agreed to meet me again, this time at Saint-Tropez in France. We then spent three weeks together, going mainly to the Club 55, a beach club, where he gave me what he considered to be the crucial context on the case, which was what Nosenko had done in 1962.

Q. And what was that?

A. Nosenko had been sent by the Soviets to the CIA to paint false tracks away from the trail of a Soviet mole in the CIA.

Q. Did you ever get to see Nosenko? And if so, how?

A. Yes. The CIA put me onto him.

Q. How do you explain that?

A. I presume that it found out I was writing a book on Lee Harvey Oswald and it wanted me to put Nosenko's message in it. Nosenko's message was that Oswald was a complete loner in the Soviet Union and never had any connection or debriefing by the KGB. I spent about four hours interviewing Nosenko.

Q. Your book strongly suggests that Nosenko is a fake. Do you believe the CIA was trying to mislead you by sending you to him?

A. Yes. It sent me Nosenko as a legitimate witness to Oswald's activities in the Soviet Union without telling me that Nosenko had been suspected of being a Soviet disinformation agent.

Q. When did you first become suspicious *(Continued on page 36)*

Photographed by Henri Dauman

Nosenko: The Red Herring

In June 1962, Yuri Ivanovich Nosenko, a KGB officer attached to the Soviet delegation at the Geneva disarmament conference, met two CIA officers in a "safe house" and offered to become a double agent. He had information about two spies. One was Colonel Peter Popov, a mole working for the Americans inside the Soviet military; his capture by the Soviets in 1959 had baffled the CIA. The other was "Andrey," a Soviet mole in American intelligence. Nosenko also said that Finland's President Urho Kekkonen was the Soviets' "man in Finland." Later, however, he denied ever having said this.

During the 1960s, Nosenko gave information about four people of great interest to American intelligence: Popov, "Andrey," Lee Harvey Oswald, and a Soviet official named Cherepanov.

Nosenko's Popov story: After Popov was caught in 1959, the KGB sent him to meet his American contact in Moscow with a message written on six sheets of toilet paper, stating that he had been captured by the KGB through routine surveillance. Now, since most moles are betrayed by inside agents, and since Popov was known to have been under KGB control at the time he delivered the toilet-paper message, it seemed that the message was fabrication meant to conceal the real means by which Popov was betrayed—by a Soviet mole in American intelligence.

Nosenko, however, stated categorically that Popov was caught through a KGB surveillance device whereby a chemical painted onto a target's shoes made it possible for him to be followed without his knowledge. According to Nosenko, no Soviet mole had betrayed Popov.

Nosenko's "Andrey" story: Nosenko then added to defector Stone's story (see box, page 31) about the Soviet mole who had penetrated the CIA. Stone had suggested that Kovshuk, a high KGB official, had activated a Soviet mole during his trip to Washington. Nosenko explained that he was Kovshuk's deputy and knew that Kovshuk had gone to see the most important agent ever recruited by the Soviets, a man given the code name "Andrey." He then provided a set of clues to the identity of Andrey. Nosenko was given the code name "Foxtrot" and told to continue collecting information for United States intelligence. When James Jesus Angleton, the counterintelligence chief in Washington, heard the full context of the case, he decided that Nosenko was probably no more than a KGB disinformation agent sent over by the Russians to lead false tracks away from the mole within the CIA. The Andrey clues, once followed, led to a motor mechanic somewhere in the Washington, D.C., area.

Nosenko's Oswald story: For the next eighteen months, there was no word from Nosenko. Then, in January 1964, only weeks after President Kennedy was assassinated, Nosenko again appeared in Geneva with a bombshell for the CIA. He claimed that he was the KGB officer who had superintended Lee Harvey Oswald's file during his three years in Russia prior to the assassination and by coincidence had also conducted the post-assassination investigation into Oswald's activities in Russia. Nosenko stated categorically that Oswald had had no dealings with the KGB. He had never been debriefed by any organ of Soviet intelligence. He had not been recruited by the Soviets prior to his defection to Russia or ever trained or even spoken to by Soviet intelligence agents. The KGB was, according to Nosenko, completely innocent in the Oswald case. Nosenko then insisted that he be allowed to defect because he had received a recall telegram from Moscow; which meant the KGB probably knew of his contact with the CIA and would kill him if he returned.

Given Nosenko's status as an Oswald witness, the CIA had no choice, and Nosenko came to the United States. Fedora (see box, page 36), who was presumed to be a double agent for the FBI at that time, confirmed for the FBI that Nosenko was indeed a KGB agent who had defected, that Nosenko had been a lieutenant colonel, and that Nosenko had received a recall telegram from Russia. Meanwhile, the CIA discovered that Nosenko had told three lies: (1) A special unit of the National Security Agency had intercepted telegram traffic received by the Soviet mission in Geneva and found that no recall telegram for Nosenko had been received on the day he'd said; (2) the CIA had determined that Nosenko had not held the rank of lieutenant colonel as he'd claimed; and (3) the Soviet defector code-named "Stone" had told the CIA that Nosenko could not have been in the section of the KGB he claimed to have been in, since Stone would have known him if he had been.

Under intensive cross-examination, Nosenko broke down. He admitted that he'd only been a captain, not a colonel; that the travel document he had carried with him identifying him as a colonel had been "in error"—although how an official document could misidentify his rank was never explained—and that he had fabricated the story about the recall telegram to convince the Americans to allow him to defect. This meant that Fedora, who had confirmed Nosenko's rank of colonel and his recall-telegram story, had also been giving false information.

James Angleton and the Soviet Russia Division of the CIA concluded that Nosenko's cover story or legend had been prepared by the KGB in Moscow and that Fedora had been fed the cover story in order to "confirm" it.

The CIA made one final attempt to break Nosenko.

In a suburb of Washington, D.C., Nosenko was confined in a padded basement room with a television camera in the ceiling to observe his activities and make sure that he did not attempt to injure himself. As there was no natural light in the room, the clock was set back in an attempt to confuse Nosenko's biological clock. He was given cigarettes for a period of time and then suddenly denied them in the hope of inducing a nicotine dependency. For three years, a team of interrogators worked over and over the contradictions in his story. At one point only did it seem Nosenko was about to crack, but he never did.

Finally, in 1967, the CIA's Soviet Russia Division was asked to produce a report on Nosenko. The report, which ran 900 pages in length, virtually indicted Nosenko as a Soviet agent. The CIA now faced a dilemma. If it officially denounced Nosenko as a disinformation agent, the Warren Commission's conclusions about Oswald's connections with the KGB would have to be reconsidered, and the American public would lose confidence in all documents and evidence furnished by Soviet defectors.

It was finally decided in 1968 to give Nosenko $30,000 a year as a "consultant" to the CIA, a new identity, and a new home in North Carolina.

Nosenko's Cherepanov story: This is Nosenko's fourth story and is contained in a separate box (page 37).

Seven years later, after the Angelton firing, Nosenko was rehabilitated. He's now in Washington handling 120 cases for the "new" CIA. —EJE

'Fedora': The Spy Who Duped J. Edgar Hoover

In March 1962, a Soviet official attached to the U.N. told the FBI office in New York that he was actually a senior officer of the KGB, assigned to gather information from Soviet espionage networks on the East Coast about developments in American science and technology. He said that he was disaffected with the KGB and offered to provide the FBI with information about Soviet plans and agents. He was assigned the code name "Fedora."

Up to this point, the CIA more or less monopolized reporting to the president on the inner workings of the Soviet government. J. Edgar Hoover saw that with Fedora he would now be able to compete with the CIA, and although the FBI at first labeled Fedora's first few reports "According to a source of unknown reliability," Hoover personally ordered that the "un" be deleted. Moreover, under Hoover's personal orders, the reports were not to be passed to the CIA but sent directly to the president.

From 1962 until 1977, Fedora, although still a KGB officer at the U.N., provided the FBI with information on a wide range of subjects. Almost from the very beginning, however, the CIA was suspicious of Fedora. In 1964, in another case involving Lee Harvey Oswald, the CIA intercepted Soviet cable traffic which revealed that Fedora had given false information about another Soviet agent (see box, page 35). This led the CIA's counterintelligence staff to suggest that Fedora was most probably a Soviet agent feeding "disinformation" to the FBI. Indeed, over the years, Fedora misled the FBI on a number of crucial matters.

Fedora's disinformation:

☐ The Profumo scandal. Fedora said it was all a French setup. In fact, it turned out to have been a Soviet-intelligence operation.

☐ The ABM. Just when the American government was engaged in a debate over whether to build an antiballistic-missile system, Fedora told the FBI that the United States was ten years ahead of the Soviets in missile technology. In fact, we were behind.

☐ The "Pentagon papers." At the height of the furor over the Pentagon papers, which the New York *Times* was printing in 1971, it was Fedora who poisoned the atmosphere further by telling the FBI that the papers had been leaked to Soviet intelligence. This report, when presented by Hoover, provoked Nixon into setting up the "plumbers."

☐ The American Communist party. Fedora helped Hoover carry on his lifelong crusade against the American Communist party by presenting him with the information that it was engaged in espionage activities for the Soviet Union. Hoover was able to use this data in support of his massive campaign against the party. (The information was never confirmed.)

Eventually, even senior FBI officials began to doubt the validity of Fedora. William C. Sullivan, the deputy director of the FBI under Hoover, became convinced that Fedora was acting under Soviet control and tried to persuade Hoover of this, but to no avail. Furthermore, tensions between Hoover and the CIA, exacerbated by the Fedora case, came to a head in 1971, when Hoover all but cut communications between the FBI and the CIA. The FBI was becoming increasingly dependent on Fedora. Indeed, it was estimated by one CIA official that 90 percent of all the FBI anti-Communist cases in New York came from Fedora (and two other Soviets who joined Fedora in supplying the FBI with information). If Fedora was a fake, the FBI would have to re-evaluate all the cases and information it had acted on since 1962. Hoover was not prepared to do this, and thus Fedora lingered on as an FBI "double agent," possibly to this day. —EJE

J. Edgar Hoover: *Believed "Fedora" was a true double agent and gave him secret U.S. information.*

William C. Sullivan: *Head of FBI counterintelligence division suspected that "Fedora" was a Soviet spy.*

Gus Hall: *U.S. Communist-party leader. "Fedora" told Hoover that the American Communists were spying for Russia.*

John Profumo: *"Fedora" tried to place blame for the Profumo scandal on the French, not on the Soviets.*

(Continued from page 32) of Nosenko?

A. A few weeks after I interviewed Nosenko, I had lunch in Washington at the Madison Hotel with the Soviet press officer, a man named Igor Agou. I had set up the meeting in the hope of persuading the Soviets to allow me to go to Russia to interview the Soviet citizens who had known Oswald during the three years he spent there. Agou, however, made it clear to me very quickly that the Soviets would not be receptive to such an idea. Mr. Agou then said in a very quiet voice, "Perhaps I shouldn't be saying this . . . but you might be interested in knowing that there is someone in America who could help you . . . a former KGB officer named Yuri Nosenko, who had handled the Oswald case and who knows as much about Oswald as anyone in the Soviet Union."

Q. You mean that this Soviet Embassy officer was actually recommending that you see Nosenko?

A. Yes. I was a bit dumbfounded. Here was an official from the Soviet Embassy recommending that I see someone who was a traitor. And I couldn't believe that Mr. Agou was just trying to be helpful to me.

Q. Your book makes frequent references to James Angleton, the former head of counterintelligence for the CIA. Why did he agree to see you?

A. Because I had already interviewed Nosenko. Angleton knew that since Nosenko was working for the CIA, he wouldn't have seen me unless the CIA had sent him. Angleton, who had been fired from the CIA by Colby, wanted to know why, after keeping Nosenko in isolation for thirteen years, the CIA would suddenly send him to see a journalist doing a story about Oswald.

Q. Well, what did Angleton tell you?

A. For the first three meetings we had in Washington, he refused to discuss anything about Nosenko, Oswald, the CIA, or anything else bearing on what I was writing. He was far more interested in finding out what I knew than in telling me anything, and so I decided to look up the members of his staff.

Q. How do you know that these former CIA officers weren't misinforming you?

A. Of course, I have to assume that they had axes to grind. A number of CIA officers whose careers rested on the Nosenko case wanted to see it resolved in one way or another. I also realized that I could never be sure

"...The Warren Commission questioned one marine who knew or worked with Oswald in Japan. Epstein found another 104..."

that crucial facts were not withheld.

Q. What did you consider the greatest failure in your investigation?

A. The failure to run down a lead concerning Pavel Voloshin. Voloshin's name turns up both in Oswald's address book and on a letter (from the Patrice Lumumba University in Moscow) found among Oswald's effects after he was dead. I got a CIA "trace" on Voloshin, and he turned out to be a KGB officer who had been in the Far East at the same time Oswald was there with the marines, and who had visited California in 1959 when Oswald was preparing to defect. He had been in Moscow when Oswald was there, and finally had been in Amsterdam when Oswald passed through on his way back to the United States in 1962. One former CIA counterintelligence officer suggested to me that Voloshin might have been the person who recruited Oswald or arranged for his defection.

Q. What was Voloshin doing in California?

A. He was supposedly working as a press officer for a Russian dance troupe that was passing through California. I asked Oswald's fellow marines who served with him in California whether Oswald had ever talked about this dance troupe. None of them remembered. One of his friends, Nelson Delgado, remembered, however, that Oswald had talked to a man in a raincoat for an hour and a half one night when he was on guard duty. Another marine also remembered this incident. They were impressed by the man's raincoat because it was about 90 degrees that night in California.

I wanted to show these marines a photograph of Voloshin to see if he could conceivably be the man they had seen. I knew that the FBI had Voloshin under surveillance, and that the CIA had a photograph of him in its file, but they refused to turn it over to me.

Q. You mention the CIA's misleading you over Nosenko's *bona fides;* did they try to mislead you anywhere else?

A. When we were checking the book, my researcher was told by the CIA that the CIA headquarters building was only six stories high—a small detail. Later I found out that Richard Helms's office was on the seventh floor and that it was common knowledge that the office was on the seventh floor. I still wonder why the CIA was giving me inaccurate information. Possibly it was to make it appear that my own research was slipshod.

Q. What about the FBI?

A. It provided me with very little information, but what they did give me was generally straightforward, and I think they tried to be as helpful as they could.

Q. Were there any witnesses that you were unable to find?

A. Yes. I had hoped to interview James Allen Mintkenbaugh, an American who admitted spying for the Soviets and who was subsequently tried and imprisoned. He went to Moscow in the same month that Oswald did and the Soviets tried to arrange to have him marry a Soviet agent, whom he would bring back to the United States. I was curious to know what he thought of Oswald, and if he ever met him or Marina in the Soviet Union. I wish I had also interviewed a number of other defectors who were in the Soviet Union at the same time as Oswald, including one named Robert E. Webster, whom Oswald reportedly once asked for on a visit to the Moscow American Embassy.

Q. Are there other questions you would like to see resolved.

A. Yes. For example, I found four marines who remembered being interviewed after Oswald defected to the Soviet Union and were asked about Oswald's access to classified information. One remembered giving a written statement and the others remembered being questioned orally. This implied that the Marine Corps did an investigation to see what information Oswald had brought to the Russians.

Cherepanov: The Would-Be Mole

In the fall of 1963, an American businessman visiting a Soviet ministry in Moscow was hurriedly handed a pack of papers by an official named Cherepanov. He was told to take these papers to the American Embassy. The embassy had never heard of Cherepanov and, suspecting it all might be a Soviet trap aimed at the American businessman, photocopied the papers and gave them to the Soviet ministry. The fact that Cherepanov's name was on the distribution ladder with the papers clearly identified him as a traitor. When the CIA heard about the papers being given back, they realized that the embassy might have signed Cherepanov's death warrant.

The Cherepanov story became more curious, however, when the papers were found to include a document on Colonel Popov, a former American agent in Russia, supporting a highly suspect version of Popov's arrest by the KGB (see box, page 35). This finding caused the CIA to suspect that the Soviets were repeatedly attempting to protect some mole in the CIA who'd betrayed Popov.

These suspicions were soon confirmed by Iame Soviet attempts to make the United States believe that Cherepanov was actually trying to defect, that his documents were bona fide, and that by handing them back, the American Embassy had ensured Cherepanov's death. The Soviets called upon Yuri Nosenko—a KGB agent who defected in January 1964 (see box)—to carry disinformation to American officials. Nosenko told the CIA that he'd been sent to Gorki in Russia to search out Cherepanov for the KGB. He had travel documents that supported this. But much of Nosenko's tale seemed too farfetched. Nosenko claimed that a "Cherepanov" who the CIA files showed had offered himself as a double agent for the British in Yugoslavia in the early 1950s was the same Cherepanov who had recently tried to defect to America. In effect, the CIA was being asked to believe that a Russian KGB agent had survived one attempt to defect and had gone on to try a second time. He would almost certainly have been executed. Nosenko's account of what happened instead was even more difficult to swallow. He said that in Yugoslavia, Cherepanov had been working for that part of the KGB responsible for foreign espionage, and that when he had gotten "into trouble" for offering to betray his country, he had simply been thrown out of his department. He maintained that Cherepanov had then been *rehired* by the KGB, this time by that department responsible for internal affairs. The CIA found this story unbelievable. Cherepanov hasn't been heard of since.—EJE

"...Since Angleton and his counterintelligence staff were fired, the 'new' CIA's policy is to believe that moles do not exist..."

A Warning From the 'Old' CIA

This is an excerpt from a letter to Edward J. Epstein, written by a former operations chief of the CIA's counterintelligence.

The 1976 exoneration or official decision that Nosenko is/was bona fide is a travesty. It is an indictment of the CIA and, if the FBI subscribes to it, of that bureau too. The ramifications for the U.S. intelligence community, and specifically the CIA, are tragic.

Acceptance of Nosenko as a reliable consultant about Soviet intelligence and general affairs will cause innumerable problems for incumbent and future intelligence collectors and any remaining counterintelligence (CI) officers. Acceptance of his information inevitably will cause the acceptance of other suspect sources whose information has dovetailed with Nosenko's proven lies.

Acceptance of Nosenko throws the entire perspective about Soviet intelligence out of focus. His information tells us things the present détente devotees want us to hear and cumulatively degrades our knowledge (and the sources of this knowledge) of Soviet intelligence capabilities, policies, and effectiveness.

In a very unfortunate sense the United States and the CIA are fortunate because William Colby virtually destroyed CI in the CIA. In 1975 the CIA turned away from CI and—significantly—from the program which was the basis for analyzing the mass of material collected from Nosenko and comparing it with other information. Even if the CIA had the inclination to restore resources to CI, it would be difficult to resurrect the program to disseminate Nosenko's misinformation effectively. Nevertheless, there is still a great danger that Nosenko's misinformation will now be disseminated without review or analysis to reconcile its internal inconsistencies. To use Nosenko's information is to build on sand. Let us hope that the CIA's anti-CI policy doesn't permit anyone to use Nosenko's information until wiser heads prevail and true CI is restored to the CIA and government.

But the navy, Defense Department, Office of Naval Intelligence, Marine Corps, and everyone else denied that any such investigation had been conducted, though it would have been automatic. I was told, off the record, that even had the Marine Corps investigated Oswald in 1959, the records might have been destroyed.

Q. You suggest in your book that the FBI had an interest in covering up the KGB's connections with Oswald. Isn't that a little perverse?

A. The FBI failed to keep tabs on Oswald after his return from the Soviet Union, even though it had reason to suspect he was an agent.

Now, if after killing Kennedy or after the Kennedy assassination it turned out that Oswald was simply a lone crackpot, the FBI would not be revealed as irresponsible, but if it turned out that he had indeed been a Soviet agent, even on some petty mission, the FBI would be guilty of a dereliction of duty. The only way J. Edgar Hoover could be sure of avoiding this accusation was to show that Oswald had not been a Soviet agent nor had he had connections with the Soviets upon his return from the Soviet Union.

Q. Which of the spies that you mention in your book have never been discussed in print?

A. All the stories are almost totally new. Fedora has never been mentioned to my knowledge. Neither has Stone. The breaking of Nosenko's story has never been mentioned, and it leads one to wonder how much is still left to uncover.

Q. Do you think the mole that Stone pointed to is still tunneling his way up through American intelligence?

A. He hasn't been caught yet, and it is entirely conceivable that one was planted. We know that the Soviets placed so many moles in West German intelligence that they effectively took it over, but more important, the CIA is particularly vulnerable to penetration since so many of its agents recruited after World War II are individuals of East European origin. As Angleton pointed out to me, the odds are always in favor of recruiting one mole.

Q. Is the hunt that Angleton started for the mole still on?

A. The former CIA officers who were involved in the hunt tell me that the "new" CIA has now made a policy decision to believe moles do not exist. All speculation on this subject has been officially designated "sick think."

Q. Was James Angleton fired because he was onto the mole Stone had talked about?

A. Not directly. According to his former aides, Angleton and his counterintelligence staff, whose job it was to be sure that sources were not planting disinformation, were too strongly challenging Colby's sources in Russia. Accordingly, Colby got rid of Angleton and his key staffers, one of whom, Newton Miler, told me that Colby wanted to close down or drastically revise the role of counterintelligence in the CIA.

Q. Might there be a mole in the FBI?

A. Yes. Indeed, Sullivan was convinced that the Soviets had penetrated at least the FBI's New York office. And the former deputy chief of the CIA's Soviet Russia Division told me that there was absolutely no way the Soviets could run the Fedora operation without the aid of a mole in the New York office.

Q. Does James Angleton really know who the mole in the CIA is?

A. Angleton refuses to say, but one of his ex-staff members told me with a wry smile, "You might find out who Colby was seeing in Rome in the early 1950s." When I pressed him about Rome, he changed the subject to Vietnam and told a long story about Colby's having dined with a Frenchman who turned out to be a Soviet agent. Colby should have reported the contact but didn't, and when Angleton raised the issue, Colby became enraged. I asked Angleton about this confrontation, and he mentioned some CIA inspector general's report. He then switched to one of his favorite subjects—the cymbidium orchid.

Epstein has two more episodes to tell: the story of Lee Harvey Oswald and that of George De Mohrenschildt; what Oswald was doing after his return from the Soviet Union, and what De Mohrenschildt told Epstein during an extraordinary interview in Palm Beach, just two hours before committing suicide. These will appear in next week's issue of *New York*.

Exhibit 21 Civil Action No. 75-1448

Addendum 1

The Washington Star Monday, February 20, 1978

Book Says Hoover Tried to Cover Up Doubts About Soviet Defector

United Press International

The CIA strongly suspected that a Russian spy who defected in 1964 was a phony sent to cover up Lee Harvey Oswald's links to Soviet intelligence, according to a new book on the Kennedy assassin's life.

It claims the CIA's suspicions were effectively smothered by J. Edgar Hoover, who allegedly feared the Russian might disgrace the FBI by testifying that Oswald, in truth, had been an unwatched Soviet agent.

The allegations appear in Edward Jay Epstein's "Legend: The Secret World of Lee Harvey Oswald," which begins serialization in the March issue of Reader's Digest.

The Digest said Epstein, author of previous works critical of the Warren Commission's John F. Kennedy murder investigation, drew his new account from more than 10,000 pages of previously classified documents and 400 interviews with Oswald's acquaintances.

IN THE FIRST installment, Epstein says the Warren panel never questioned the purported defector — Yuri Ivanovich Nosenko — because it was under deadline pressure by the time the CIA advised it, secretly, that Nosenko might be hiding damaging information on Oswald.

Nosenko's name never appears in the Sept. 24, 1964, Warren Report.

Dealing with Oswald's period as a defector to Russia from 1959 to 1962, the report concludes: "There is no credible evidence that Oswald was an agent of the Soviet government."

According to Epstein, Nosenko defected to the CIA in Switzerland in January 1964, two months after Kennedy's assassination, and identified himself as the Soviet KGB intelligence officer who had handled Oswald's defector case file — Moscow's top expert on what the disgruntled ex-Marine radarman had done during his Russian sojourn and whether he fulfilled his boast to tell every military secret he knew.

The book says Nosenko stated immediately that the KGB ignored Oswald; never even interrogated him — a practice considered routine with any defector — and told him he should go home.

THIS INFORMATION, Epstein says, delighted Hoover, because it confirmed his assertion Oswald was a lone crank and not a Soviet spy who bore watching.

But Epstein says CIA counterintelligence chief James Angleton doubted Nosenko's story from the outset.

"Both Angleton and the CIA's Soviet Russia division," he writes, "began independently to explore the possibility that the man called Nosenko was actually a Soviet agent dispatched by the KGB to pose as a defector. . . .

"And if Nosenko was not sincere, it suggested that the Soviet government was building a legend meant to deceive the Warren Commission about Oswald. But in what way?

"Neither Angleton nor the Soviet Russian Division believed that Oswald was acting under the control of Soviet intelligence when he assassinated President Kennedy. It seemed far more likely . . . that the relationship Nosenko was attempting to protect might be a prior connection Oswald had had with the KGB."

EPSTEIN ALLEGES that Hoover, on the other hand, advised the Warren Commission on March 1 that Nosenko was a genuine defector and his tale about Oswald seemed authoritative.

"As long as the public could be convinced that Oswald was a lone crackpot, uninvolved in any espionage . . . ," Epstein says, "the FBI wouldn't be held accountable for not keeping him under surveillance."

The book claims Hoover at first exerted exclusive FBI control over Nosenko and isolated him from CIA interrogators in America.

Later, he says, the CIA got Attorney General Robert Kennedy's personal approval to put Nosenko under high-pressure "hostile interrogation" in a barren CIA detention cell.

He allegedly made one contradictory statement after another but never admitted he was a KGB plant or that his Oswald story was a hoax.

Epstein said the CIA found especially incredible his claim that the KGB never even de-briefed Oswald in Moscow.

Oswald was a trained Marine radar air-traffic controller in the Pacific, who knew about the technical limitations of such military radar, about radio frequencies, codes and other matters.

BUT EPSTEIN SAYS his interviews with Oswald's old Marine Corps colleagues indicates he would have been irresistible to the Russians for a much more dramatic reason — they had all observed the operations of the then invincible U-2 spy plane at their top-security base in Atsugi, Japan.

At the time Oswald defected, the U-2s were still sweeping high over Russia with impunity. The Soviets were still six months away from bagging Francis Gary Powers' plane.

"At Atsugi," Epstein says, "Oswald could have witnessed repeated takeoffs of . . . the still supersecret U-2, and, from visual, radar and radio observation, could have established its rate of climb, performance characteristics and cruising altitude."

Exhibit 19 C.A. No. 75-1448

LEGEND:
THE SECRET WORLD OF LEE HARVEY OSWALD

EDWARD JAY EPSTEIN

Reader's Digest Press

McGRAW-HILL BOOK COMPANY
New York St. Louis San Francisco
Mexico Toronto Düsseldorf

Admiral Taylor instantly agreed with this recommendation. It would cost the CIA very little and enabled the agency to avoid the possibility of a very destructive flap. All the others seated around the table nodded their assent—except for the members of the counterintelligence staff. They explained that they were still fully convinced that Nosenko was a disinformation agent. And while they agreed that there was no alternative but to release him, they insisted that all the information received from him in the past, as well as in the future, be labeled "from a source that allegedly had access but whose bona fides are not established."

Although the inspector general appeared visibly angry over the unwillingness of Angleton's staff to award Nosenko his bona fides, he managed to get agreement on how Nosenko was to be "distanced" from the CIA in the immediate future.

Shortly thereafter the Office of Security made arrangements to buy Nosenko a house in North Carolina. He would also receive from the CIA an allowance of about $30,000 a year, employment would be found for him and he would be granted United States citizenship. In return, he would agree not to talk to any unauthorized persons about his experiences with the CIA. His three years of confinement, his indictment for being a messenger from Moscow and the subsequent reversal all were to be a closely held secret.

In the winter of 1969 Yuri Nosenko, under a new name, took up a new life for himself. Sometime later he was married (Solie was the best man at his wedding).

The years passed, but Angleton continued to be intrigued by one aspect of the Nosenko case. In his ongoing interviews with the FBI Nosenko brought up certain cases that he had not mentioned previously. One concerned a KGB officer who had tried to defect to the Americans in the summer of 1959 but failed. In the position that Nosenko claimed to have had in the KGB, he should have been intimately familiar with the details of this particular case, yet he had avoided mentioning it during his initial debriefings. What made this omission seem to Angleton both significant and sinister was that the blank had been filled in by Nosenko only in 1967 after the Russians had reason

SUNDAY, APRIL 16, 1978

The Mysterious Soviet Defection At the U.N.

Did Moscow Suspect He Had Ties to Former FBI 'Deep Plant'?

Arkady N. Shevchenko

By Tad Szulc

AS HE SCURRIES under federal protection from hideaway to hideaway along the eastern seaboard of the United States, a 47-year-old Soviet diplomat of exalted rank named Arkady N. Shevchenko is writing one of the most unusual chapters in the annals of postwar political defections.

The most improbable of defectors, the scholarly and self-effacing Shevchenko served as under secretary general of the United Nations for political and Security Council affairs, the No. 2 political job in the world organization under Secretary General Kurt Waldheim, when he made up his mind sometime on Thursday, April 6, to defy a sudden order from Moscow to return home at once.

No Soviet official of Shevchenko's stature had ever defected to the West.

The initial Soviet charge that Shevchenko had been "coerced" by American intelligence into defecting and is being kept in the United States against his will is patent nonsense. Heavy hints dropped by Communist sources in New York that he had a "drinking problem" seem to fit under the heading of character assassination. The defection obviously was an acute political and propaganda embarrassment for the Kremlin.

And this embarrassment may deepen and turn into considerable discomfort for the Soviets if Shevchenko agrees, as may well happen, to share his knowledge of Moscow's diplomatic and disarmament policy secrets with the U.S. government. It would be particularly important at a time when Moscow and Washington are entering the final phase of negotiations for a SALT II agreement.

Nothing would be more valuable to the United States at this difficult juncture in the talks than to acquire through Shevchenko an inside understanding of how the Russians plan and formulate their negotiating positions. In this sense, Shevchenko is potentially the richest prize in diplomatic intelligence ever handed the United States.

Contrary to Soviet charges, however, Shevchenko's willingness to submit to what are euphemistically called here "debriefings" — if this is the case — would not necessarily suggest that he was recruited by the CIA or the FBI.

This is not the way intelligence operates. CIA specialists who have handled Soviet-bloc defectors since the late 1940s say that recruitment of defectors is exceedingly rare. The vast majority — such as KGB officers Yuri I. Nosenko and Anatoli M. Golitsin — defect on their own, for whatever reasons, and intelligence co-option comes later, often as part of a *quid pro quo* for protection and asylum in the United States and the chance to build a new life here. In situations of this type, the first concern — a concern that has never been fully resolved after 14 years in Nosenko's controversial case — is whether the defector is a KGB "deep plant" or a possible double agent.

See DEFECTOR, Page B5

Szulc is a Washington writer whose latest book, "The Illusion of Peace," a diplomatic history of the Nixon years, will be published in May.

None of these considerations would apply to Shevchenko. Traditionally, the CIA prefers to recruit "agents in place" — Col. Oleg Penkovsky and Col. Peter Popov, U.S. covert agents who were executed by the Russians, were classical examples — who may serve indefinitely as deep-penetration intelligence sources unless they are caught.

Defections are encouraged only rarely and when there are reasons to suspect that the situation is ripe for it in a given case. And when it came to Shevchenko, the political and diplomatic risks in approaching him to defect would have been unacceptable to the United States. One simply doesn't urge senior ambassadors to defect.

Now that Shevchenko has taken the plunge, however, he becomes an object of intense interest to the Inter-Agency Defector Committee, which is composed of representatives of the CIA, the FBI, military intelligence services and the State Department. And this probably explains why FBI agents have been discreetly protecting Shevchenko since he decided not to return to the Soviet Union and spent the last week hopping between motels in Pennsylvania's Pocono mountains (surprisingly registering under his own name at a White Haven, Pa., motel last Monday morning) and friends' homes in New York City.

American officials, of course, have refused comment on any aspect of the Shevchenko affair, obviously an exceedingly sensitive one, except to say that he is free to stay in the United States, go home, or choose some other place of exile in the world.

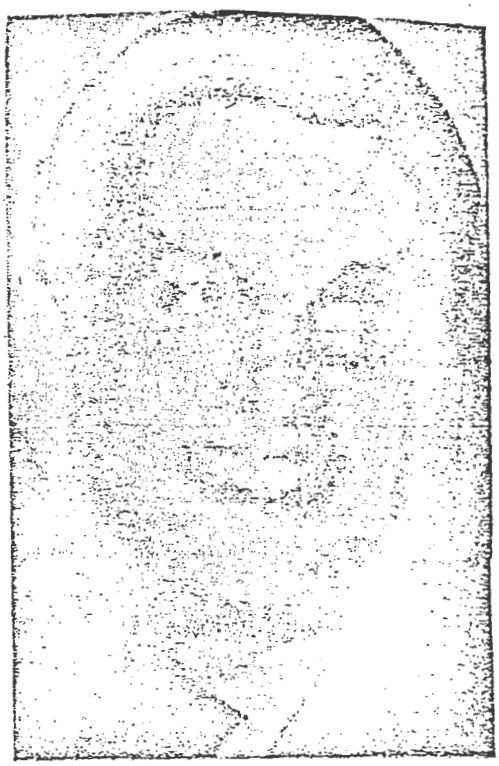
A Rising Star

TEN DAYS after his dramatic decision, Shevchenko's motivations remain wholly mysterious. All he said through his American lawyer before vanishing from his luxurious apartment on New York's East 65th Street late last Sunday — the defection was kept secret for nearly three days — was that he had political "differences" with the Soviet government.

Whatever this meant, the gesture was as stunning as it was unprecedented. Previous defectors had included some fairly senior officers of the KGB, the Soviet secret service; a destroyer commander with a wide and useful knowledge of the inner workings of the Soviet navy; quite a few Mig pilots, and a smattering of lesser diplomats — and that was all western governments ever expected.

But Shevchenko was part of the elite of the Soviet establishment. A career diplomat and protege of Foreign Minister Andrei A. Gromyko — he was his personal adviser on disarmament in the early 1970s when the first Soviet-American agreement on limiting strategic arms (SALT) was negotiated and signed — Shevchenko received an ambassadorial title in 1971 when he was 40 years old, the youngest Soviet foreign service officer to achieve it.

Two years later, an even greater accolade was accorded him: His government recommended him for the United Nations undersecretaryship. This was tantamount to being appointed by Waldheim, since under standing practice the top professional job in New York is reserved for a Russian. Westerners never doubted that Shevchenko was Moscow's eyes and ears at the United Nations, with access to much significant international diplomatic information — no matter what is said about the ostensible independence of international civil servants.



Yuri I. Nosenko

Shevchenko, in other words, was clearly as trusted by the Kremlin as any of its top envoys and, just as clearly, he was a comer. He had spent five years as undersecretary general (he had also lived in New York from 1963 to 1971 as the disarmament expert of the Soviet mission to the United Nations) and his $76,000 annual contract had been renewed for two more years only last Feb. 3.

Given Shevchenko's well-rounded international experience — everything from disarmament to the Middle East, and United Nations peacekeeping forces streamed through his office — he was a likely candidate for a Soviet deputy foreign ministership the next time around. Perhaps someday he could even aspire to succeed Gromyko, his aging patron, as foreign minister.

An Exercise in Discretion

THE GENERAL VIEW is that Moscow will not use Shevchenko as an excuse to let Soviet-American relations deteriorate even further, although Soviet Ambassador Anatolyi F. Dobrynin raised the subject with Secretary of State Cyprus R. Vance last week. The defection, unpleasant as it is

to the Russians, is essentially extraneous to the basic relationship between Moscow and Washington, and there seems to be no reason to add new problems to the differences over SALT and Africa that Vance will be discussing in the Soviet capital later this week.

Nevertheless the administration is handling Shevchenko with extreme care to avoid needless frictions. The hope that the Russian diplomat will allow himself to be debriefed in secret by American officials is a factor in this exercise in utmost discretion.

Another consideration is the approaching trial of the Soviet computer expert Anatoly Shcharansky on charges of spying for the United States. Shcharansky's former roommate, Dr. Sanya L. Lipavsky, had covertly worked for the CIA at one point, and the administration here worries that the trial may be used as an attack on American intelligence operations in the Soviet Union. It thus doesn't want to have the Russians throw the Shevchenko case into the hopper of intelligence accusations.

Meanwhile, it is necessary to sort out the question of Shevchenko's legal status in the United States. He has not yet requested political asylum here and, according to his New York attorney, Ernest A. Gross, a one-time American delegate to the United Nations, he has no intention of doing so.

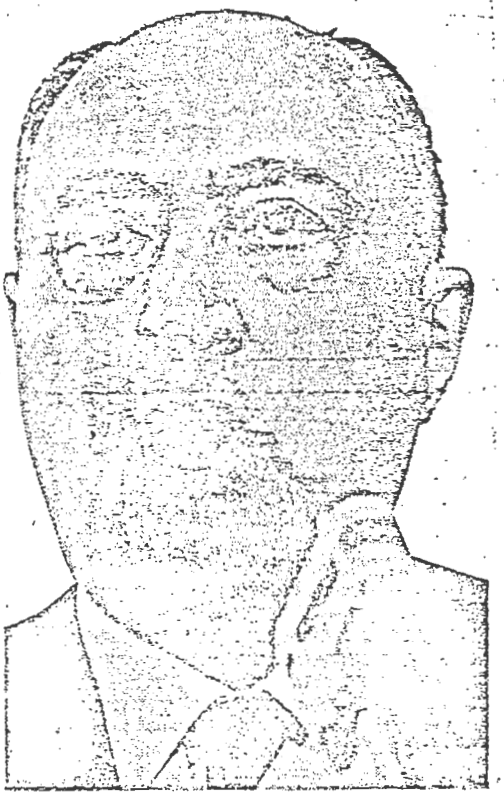
This is one of the many mysterious facets of the Shevchenko story. Gross insists that, strictly speaking, Shevchenko is not a defector because he hasn't asked for asylum. But State Department legal experts say this is a fine point and, possibly, a bargaining chip for the Soviet diplomat. In order to remain in the United States after his United Nations employment is formally ended, Shevchenko must adjust his immigration status, and obtaining refugee status may be the only solution.

The growing impression in Washington is that Shevchenko wants to resolve his employment problems with Waldheim before making an open move in terms of his legal status in the United States.

Approaching his situation with remarkable pragmatism and business acumen, Shevchenko is trying to negotiate his way out of the United Nations job although he has already been placed on leave by Waldheim.

At first, he indicated that he has no plans to resign his post, evidently a bargaining ploy. Yet Waldheim has no choice but to fire him because of the basic arrangement with Moscow governing the undersecretary post. The Russians have demanded his dismissal, and Waldheim has said that henceforth Shevchenko is a question strictly between the United States and the Soviet Union.

Last Thursday, however, a U. N. spokesman said that Shevchenko has asked for "a mixed bag of money and personal security" in order to resign and spare Waldheim a legal test as to whether an international civil servant can be



Ernest A. Gross

fired at the request of his home government. It is understood that Shevchenko wants the equivalent of severance pay covering the two years of his new contract and the return of his contributions to the retirement fund. This could add up to $150,000. He also appears to have a contract for a book he has been writing for a New York publisher.

To protect himself further, Shevchenko claims he wishes to retain his Soviet citizenship. This, however, may be a moot point because Moscow is likely to deprive him of it, as it has done with the cellist Mstislav Rostropovich, now conductor of the National Symphony Orchestra here, and former Soviet Gen. Pyotr G. Grigorenko, a leading dissenter, currently in New York.

Given the way Shevchenko has been acting, the question arises whether he had been preparing his defection all along or acted on the spur of the moment after receiving a recall order and then engaged Gross to help him to make the most of the defection. And it is entirely possible that if the Soviet diplomat had planned to defect for some time, his decision was triggered by instructions to fly home at once.

A Link With "Fedora"?

ON THE SURFACE, there is no plausible explanation for Shevchenko's move. He had one of the best careers in

the Soviet diplomatic service and only last February his government had supported the extension of his U.N. contract. He always appeared to be ideologically in tune with Moscow and he was regarded as a straight, no-nonsense, party-line diplomat.

The question then arises why he had been recalled so abruptly. It isn't even clear if he was asked to go home for good or just for consultations, although the former seems more likely inasmuch as his wife and daughter departed precipitously last Saturday.

One possibility is that Moscow discovered in some fashion that Shevchenko's loyalty might be flagging. There have been unconfirmed rumors that he had an extramarital love affair in New York, and, as CIA experts note, defections are often the result of emotional involvements.

An intriguing but entirely undocumented possibility is that the Soviets might have tied Shevchenko to "Fedora," the FBI's cover name for a Soviet intelligence officer working under diplomatic cover at the United Nations in New York who was regarded by the Bureau as its most important "deep plant" agent.

The story of "Fedora" was first disclosed publicly in a book on Lee Harvey Oswald, the assassin of President Kennedy, written by Edward Jay Epstein and published shortly after Shevchenko's United Nations contract was extended in February. Oswald, according to the book, had KGB links, but "Fedora" — along with Nosenko — had convinced the FBI that it was not so. "Fedora," who had worked for the Bureau from 1962, is believed to have returned to the Soviet Union two or three years ago. While it is impossible to establish a connection between "Fedora" and Shevchenko, speculation has developed in intelligence circles whether the diplomat's sudden recall might have been related to the "deep plant."

There certainly is no other immediate explanation for the Shevchenko mystery and there may never be one. Shevchenko has yet to explain what his "differences" with the Soviet government were.

Moving Fast

IN ANY EVENT, Shevchenko moved fast after he received written orders to return. Late on April 6, after writing a letter to the Soviet U.N. Mission declaring that as an international official he could not be peremptorily summoned to Moscow — an unusual act for a Soviet diplomat — he sealed his office to make sure that no "incriminating" material was planted there.

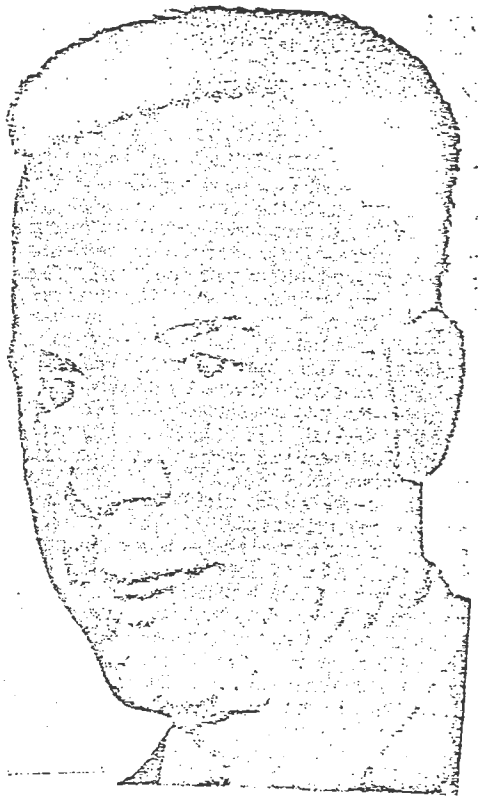
That same evening he telephoned Gross, who lives seven blocks away. He told Gross that he planned to be "temporarily absent" from New York for reasons of health, but that he anticipated legal problems in which he would need assistance. Gross asked him for a letter outlining his situation, and Shevchenko had it delivered the next day, April 7. Quickly, Gross asked the State Department for federal protection for his Soviet client.

Then Shevchenko informed his office by telephone that he was going on leave. He said it in such a tone that both the Soviet and United States delegations were immediately informed of it.

The Russians smelled a defection, for they demanded a confrontation with Shevchenko. This was granted, and last Sunday he met with two Soviet diplomats at Gross's Wall Street office, informing them that he had no intention of returning to the Soviet Union. The Russians expressed shock and dismay. Shevchenko spent Sunday night near New York under FBI protection and, on Monday, was driven to the motel in White Haven.

Last Thursday, Shevchenko was back in New York, having cocktails with Gross and a few of the lawyer's American friends. But as of the end of the week, Shevchenko's whereabouts were again unknown. He wants to meet with Waldheim, who was in Europe at the time of the defection, to discuss the conditions for his resignation, but it is not certain that Waldheim will agree.

As matters now stand, the mystery of this highest-level Soviet defection in history persists. One may have to wait for Shevchenko's book for a full explanation — if he is prepared to provide one.



Oleg Penkovsky

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AFFIDAVIT OF JAMES H. LESAR

I, James Hiram Lesar, first having been duly sworn, depose and say as follows:

1. I am the attorney for plaintiff in the above-entitled cause of action.

2. I received my juris doctor degree from the University of Wisconsin Law School in 1969. I was first admitted to the practice of law in Wisconsin in 1969.

3. I am a member of the bars of the District of Columbia Court of Appeals, the United States Court of Appeals for the District of Columbia, the United States Court of Appeals for the Fifth Circuit, the United States Court of Appeals for the Sixth Circuit, and the Supreme Court of the United States.

4. I have had extensive experience litigating cases under the Freedom of Information Act ("FOIA"). To date I have represented litigants in twelve FOIA cases filed in district court. I was the sole attorney representing the plaintiff in each of these cases. In addition, I have handled eight FOIA cases in the United States Court of Appeals for the District of Columbia and drafted one petition for a writ of certiorari to the United States Supreme Court.

5. My first experience under the Freedom of Information Act came in 1970 when Mr. Harold Weisberg filed suit for the results of the spectrographic analyses made on items of evidence in the assassination of President John F. Kennedy. In this lawsuit, Weisberg v. United States Department of Justice, Civil Action No. 2301-70, Weisberg was represented by Mr. Bernard Fensterwald, Jr. At that time I was associated with Mr. Fensterwald's Committee to Investigate Assassinations. Just prior to oral argument of the case before Judge John Sirica on November 16, 1970, I did some research on the investigatory files exemption for Mr. Fensterwald.

6. When Judge Sirica granted the government's motion to dismiss, Weisberg appealed. (Weisberg v. United States Department of Justice, D.C. Circuit, Case No. 71-1026) On appeal I did all the research and wrote the appeal briefs and memoranda; Mr. Fensterwald presented the oral argument.

7. Because this case involved the then novel and politically sensitive question of whether the Freedom of Information Act applied to the FBI's investigatory files, it required a considerable amount of research and thought. I made a very careful study of the legislative history of the Act as it pertained to the investigatory files exemption, as well as a careful analysis of the holdings in this and other circuits in cases involving the investigatory files exemption. I concluded that Congress had intended that investigatory records would be made public except in those instances where the government could demonstrate that a specific harm to law enforcement procedures would result from disclosure of the materials requested.

8. On appeal, a three-judge panel initially reversed the decision of the district court and remanded the case for further proceedings. Subsequently, however, the Court of Appeals vacated the panel decision and issued an en banc opinion declaring that the FBI

records sought by Weisberg were protected from disclosure by Exemption 7. Weisberg v. Department of Justice, 160 U.S.App.D.C. 71, 489 F. 2d 1195 (1973)(en banc), cert. denied, 416 U.S. 993, 94 S. Ct. 1405, 40 L.Ed. 2d 772 (1974). (This decision is referred to hereafter as "Weisberg I")

9. The precedent set by the en banc decision of the Court of Appeals in Weisberg I had a drastic effect on the implementation of the Freedom of Information Act. The Court of Appeals' decisions in a number of cases cited Weisberg I as the precedent requiring that access to investigatory files be denied. (See, for example, Aspin v. Department of Defense, 160 U.S.App.D.C. 231, 491 F. 2d 24 (1973); Ditlow v. Brinegar, 161 U.S.App.D.C. 154, 494 F. 2d 1073, cert. denied, 419 U.S. 974 (1974); and Center for National Policy Review on Race and Urban Issues v. Weinberger, 163 U.S.App.D.C. 368 (1974).)

10. As a consequence of the sweeping effect that Weisberg I had on access to investigatory records, Congress felt compelled to amend Exemption 7. In so doing, Congress was forced to confront squarely the two primary legal issues raised by the Weisberg I precedent: 1) whether the Freedom of Information Act extended to FBI files; and 2) whether an agency should be required to show that certain specified kinds of harm would result from the release of its records before such records could be withheld under the authority of Exemption 7.

11. In enacting the 1974 Amendments to FOIA into law, Congress expressly overrode Weisberg I. (See 120 Cong. Rec. S 9336, daily ed., May 30, 1974) Congress explicitly stated that the 1974 Amendments reaffirmed the original congressional intent behind the investigatory files exemption. With respect to Exemption 7, the 1974 Amendments set forth criteria for the disclosure of investigatory records similar if not identical to those which Weisberg had urged upon the Court of Appeals when Weisberg I was before it.

12. The Weisberg I case raised and helped resolve an important public issue, and it did so in what was perhaps a more dramatic and effective way than any other case could have. The result was a greatly strengthened and clarified Freedom of Information Act. This has had wide-ranging public benefits, including disclosures about the FBI's illegal and improper activities, such as its various Cointelpro programs. It has also forced disclosures which have greatly enhanced public knowledge of the FBI's performance in investigating the assassinations of President John F. Kennedy and Dr. Martin Luther King, Jr.

13. On February 19, 1975, the day the amended Freedom of Information Act went into effect, I filed Weisberg v. United States Department of Justice, Civil Action No. 75-0226. In this case Mr. Weisberg was seeking spectrographic analyses, neutron activation analyses, and other scientific tests performed on items of evidence in the assassination of President Kennedy. After some records of such tests were produced, the district court dismissed the case as moot. However, the Court of Appeals reversed the district court and remanded the case so that Weisberg could take depositions of FBI agents with personal knowledge of the relevant facts. Weisberg v. Department of Justice, 177 U.S.App.D.C. 161, 543 F. 2d 308 (1976). (Hereafter referred to as "Weisberg II")

14. Weisberg II set a precedent useful to other FOIA litigants and therefore of general public benefit by securing a ruling that an FOIA litigant seeking to establish the existence or non-existence of governmnet records may employ traditional discovery devices, including the taking of depositions of present and former government officials with first-hand knowledge of such matters. The decision in Weisberg II is now frequently cited in briefs in FOIA cases. Its value as precedent is also recognized in a widely-used handbook edited by Christine M. Marwick and published by the

Project on National Security and Civil Liberties of the American Civil Liberties Foundation: Litigation Under the Amended Freedom of Information Act (Fourth edition, August, 1978), pp. 87-88.

14. On remand in Weisberg II, Weisberg took the depositions of four FBI agents who had participated in the scientific testing of items of evidence in the assassination of President Kennedy. These depositions and other discovery information established: 1) that FBI Agent John W. Kilty had submitted an affidavit which falsely stated that certain scientific tests had not been performed on specific items of evidence when in fact they had; and 2) that the FBI had concealed from Weisberg and the Court the fact that crucial records on the testing of a vital evidentiary specimen had not been located and were allegedly destroyed or discarded during "routine housecleaning."

15. Another significant legal victory was achieved in Weisberg v. General Services Administration, Civil Action No. 2052-73. In that case Weisberg sought the 86 page transcript of the Warren Commission executive session held on January 27, 1964. At the time this suit was filed, the January 27 transcript had been withheld from the public for nearly a decade on grounds that it was classified Top Secret pursuant to Executive order 10501. During the course of the lawsuit the government submitted two affidavits, one by former Warren Commission General Counsel J. Lee Rankin, the other by the head of the National Archives, Dr. James B. Rhoads, both swearing that the transcript had in fact been classified pursuant to Executive order 10501. Relying upon exhibits from the Warren Commission's own files, Weisberg was able to demonstrate that this was not so. Ultimately, Judge Gerhard Gesell ruled that the government had not shown that the transcript was properly classified pursuant to Executive order and that thus it was not entitled to protection under the Exemption 1 claim.

16. Judge Gesell's decision in Civil Action 2052-73 ensued that of the United States Supreme Court in EPA v. Mink, 410 U.S. 73 (1973). The Mink decision was generally thought to have all but ended the possibility of successfully using FOIA to obtain records purportedly classified pursuant to Executive order. In enacting the 1974 Amendments to Exemption 1, Congress expressly overrode the Supreme Court's decision in Mink. Because Judge Gesell's decision came after Mink but before the 1974 Amendments to Exemption 1, some law review articles have noted the significance of Judge Gesell's unpublished memorandum opinion. Thus, Professor Elias Clark wrote that Judge Gesell's decision and a subsequent opinion by the District of Columbia Court of Appeals in Schaffer v. Kissinger, 505 F. 2d 389 (1974), had "pecked away at the seemingly absolute bar of Mink . . . ." Elias Clark, "Holding Government Accountable: The Amended Freedom of Information Act," 84 Yale Law Review 741 (1975) at 753, fn. 57. (See also, Comment, "Freedom of Information: Judicial Review of Executive Security Classifications," 28 University of Florida Law Review 552 (1975) at 564, fn. 103.

17. Although Judge Gesell ruled that the government had not shown that the January 27 transcript was entitled to protection under Exemption 1, he went on to rule that it was exempt from disclosure as an investigatory file compiled for law enforcement purposes, citing the decision of the Court of Appeals in Weisberg I. Because the answers to Weisberg's interrogatories showed that the transcript had not been made available to law enforcement authorities until at least three years after the Warren Commission had ceased to exist, and arguably not even then, Weisberg planned to appeal this decision. But before he could do so, the General Services Administration elected to "declassify" the January 27 transcript, ignore its previously asserted exempt status as an in-

vestigatory file compiled for law enforcement purposes, and release the transcript to Weisberg and the public.

18. Once the January 27 transcript was made public, its contents showed that there never was any basis for classifying it in the interests of national security. However, the contents were embarrassing to the government, particularly the Central Intelligence Agency.

19. After releasing the January 27 transcript, the National Archives next made public another Warren Commission transcript requested by Mr. Weisberg, that of the executive session held on January 22, 1964. The January 22 and January 27 transcripts resolved a controversy which had raged throughout this country (and much of the world) for a decade after the Warren Report was issued. That controversy concerned whether the Warren Commission had engaged in a coverup or whitewash. The January 22 transcript deals with a report that Lee Harvey Oswald had been working as a paid undercover agent for the FBI. It reveals that members of the Commission themselves feared that if this report "was true and if it ever came out and could be established, then you would have people think there was a conspiracy to accomplish this assassination that nothing the Commission did or anybody could dissipate." (January 22, 1964 transcript, p. 12) It also reveals that the members of the Commission and its General Counsel were critical of the FBI for reaching its conclusion that Oswald alone killed President Kennedy without running out the leads. Perhaps most important of all, the transcript shows that the Commission was intimidated by the FBI and its Director, Mr. J. Edgar Hoover. The Commission felt that the FBI had boxed the Commission into a position where it had to endorse the FBI's presumption that Lee Harvey Oswald, and Oswald alone, was responsible for the President's murder. As one member of the Commission expressed it: "They [the FBI] would like

to have us fold up and quit." As the Commission's General Counsel put it: "They found the man. There is nothing more to do. The Commission supports their conclusions, and we can go on home and that is the end of it." (January 22, 1964 transcript, pp. 12-13)

20. The revelations of the January 22 and January 27 transcripts had profound and deeply disturbing implications for the integrity of basic American institutions. Their disclosures necessarily undermined the credibility of the Warren Report by showing that the Commission had not conducted a thorough and unobstructed investigation into the President's murder. Indeed, the members of the Commission recognized that the FBI, its principal investigative arm, had not conducted an adequate investigation, and they expressed the deepest misgivings about the FBI's motives. More important yet, the Commission felt intimidated by the FBI.

21. In my judgment the release of these two transcripts undoubtedly contributed in a major way to the changed climate of opinion which made it possible for the House of Representatives to vote, in 1976, to establish a Select Committee to investigate the assassination of President Kennedy, as well as that of Dr. Martin Luther King, Jr. Had these transcripts been released several years earlier, when Weisberg first requested them and when public debate over the validity of the Warren Report was extremely intense, their revelations would have forced a reinvestigation of the President's assassination at a time when the events surrounding it were still relatively fresh and the trail had not grown nearly so cold as it now has.

22. The historical importance of these transcripts and of the lawsuit which resulted in their release has been recognized in a recently published book: The Freedom of Information Act and Polit-Assassinations: The Legal Proceedings of Harold Weisberg v. General Services Administration, Civil Action No. 2052-73 (David R. Wrone, editor, University of Wisconsin-Stevens Point Foundation

Press, Inc., 1978)

23. Something of a legal first was also achieved in Weisberg v. Griffin Bell, et al., Civil Action No. 77-2155, in which Weisberg sought a waiver of copying costs for approximately 100,000 pages of records on the assassination of President Kennedy which the FBI released to the public from its Headquarters' files. On January 16, 1978, Judge Gerhard Gesell ruled that the equities were "substantially and overwhelmingly" in Weisberg's favor and he ordered the FBI to provide Weisberg with a free copy of the 40,000 pages of Kennedy assassination records which the FBI was to release to the public on January 19, 1978.

24. At the time Judge Gesell issued this order in Civil Action No. 77-2155, the same issue was pending in Weisberg v. U.S. Department of Justice, Civil Action No. 75-1996, a suit for records on the assassination of Dr. Martin Luther King, Jr. Shortly after Judge Gesell ruled that the Department of Justice had acted arbitrarily and capriciously in denying Weisberg's request for a complete waiver of copying costs with respect to the FBI's release of the 40,000 pages of JFK assassination records, Judge June L. Green issued an order instructing the Department of Justice to explain the basis for its award of a partial reduction of copying costs which Weisberg had incurred in obtaining records pertaining to the assassination of Dr. King. Ultimately, the Department of Justice determined that Weisberg should receive free copies of all its records on the assassinations of President Kennedy and Dr. King. Because this ruling applied both retrospectively and prospectively, Weisberg to date has obtained more than 175,000 pages of King and Kennedy assassination records without charge. I know of no other FOIA litigant who has achieved a victory of comparable magnitude.

25. Nor do I know of any other FOIA litigant whose efforts have resulted in comparable benefits to the public. The legal

benefits noted above are but one measure of the contribution which Mr. Weisberg's work has made to the public. The full significance of the substantive information made public as a result of Mr. Weisberg's FOIA lawsuits has not yet been apprehended. However, a good example of the importance of the substantive content of these records concerns the "Bronson film" of the assassination of President Kennedy. The records which led to the discovery of this film were released as a result of Weisberg v. Webster, et al., Civil Action No. 78-0322, Mr. Weisberg's suit for the Dallas Field Office files on the assassination of President Kennedy. Although it spent millions of dollars investigating the assassination of President Kennedy, the House Select Committee on Assassinations was unaware of the significance of this film until it was brought to their attention by private citizens who became aware of it as a result of the records released by Mr. Weisberg's suit. The significance of the film is that photographic experts say it shows two images in motion in two adjoining windows on the 6th floor of the Texas School Book Depository at the exact spot and exact time when Lee Harvey Oswald is alleged to have been there alone.

26. The voluminous records received by Weisberg as a result of his FOIA requests are very carefully preserved by him in the original condition in which he receives them. Each volume is labeled and kept in one of the scores of file cabinets which he has bought to store them in his basement. He has installed lighting in the basement so that journalists and scholars can do their own research into these records there. Copies of such records are often provided to members of the press. Ultimately, all of Mr. Weisberg's files are to be deposited in a special archive at the University of Wisconsin-Stevens Point.

27. Mr. Weisberg provides accurate information to the public on the King and Kennedy assassinations in many ways. The most ob-

vious of these is through his books. Mr. Weisberg's books are known for their critical analysis of government documents. Many documents are reprinted in his books in facsimile. This affords his readers a chance to see the actual evidnece, not just his representation of it. The Freedom of Information Act has increased public access to government documents. My Weisberg has published many documents that he has obtained under FOIA. Indeed, one of his books, Whitewash IV: Top Secret JFK Assassination Transcript, reprints the entire January 27, 1964 Warren Commission executive session transcript. Another, Post Mortem: JFK Assassination Cover Up reprints the entire January 27, 1964 Warren Commission executive session transcript and many documents relating to the autopsy and medical evidence.

28. Mr. Weisberg also devotes an enormous amount of time to assisting members of the news media throughout the nation and abroad. His encyclopedic knowledge, superb memory and quick recall make him a uniquely valuable source of information on these events. More importantly, publishers and persons in the news media frequently consult him not just for the information he provides, but for his evaluation of information, potential news stories, or even books. Sometimes this consultation is done on a paid basis, but usually it is not. Such consultations have resulted in the non-publication of much false information which otherwise would have been disseminated to a public that is very susceptible to misinformation and disinformation on these subjects.

29. I believe the foregoing account I have had extensive experience handling Freedom of Information Act lawsuits, that I have achieved several significant accomplishments in litigating these lawsuits, and that the information released to the public as a result has greatly benefited public knowledge about the way in which the American government works.

30. I have received attorney fees in one previous Freedom of Information Act case. In that case, Weisberg v. Griffin Bell, et al., Civil Action No. 77-0692, I requested payment at the rate of $85.00 per hour. However, because I needed to settle the matter as expeditiously as possible, I compromised and agreed to compensation at the rate of $75.00 per hour.

31. On the basis of my experience and expertise in handling FOIA cases, I believe payment at the rate of $85.00 per hour would be proper in this case.

32. The Warren Commission executive session transcripts sought by Mr. Weisberg have long been the subject of great public interest. Demands have frequently been made for the release of these and other Warren Commission records. In this instance, as in many others, it was Mr. Weisberg who spend the time and the money to take the government to court and force their release.

33. As soon as he obtained the January 21 and June 23 transcripts, Mr. Weisberg held a press conference at which he made copies of them available to the media at his own cost. By so doing, he served the journalistic interests which the Freedom of Information Act is intended to further. As a result, the public became aware for the first time that the Warren Commission had ignored the claims of a Soviet defector, Yuri Ivanovich Nosenko, even though its members had secretly decided at the June 23, 1964 executive session that his information must be taken into account. (See Exhibit 1, Washington Post article dated October 19, 1978)

34. The release of the January 21 and June 23 transcripts also serves scholarly interests. Mr. Weisberg has made arrangements to donate his archives to the University of Wisconsin-Stevens Point. These transcripts are an important addition to the archival materials on the Warren Commission which Weisberg had previously obtained. As the October 26, 1978 affidavit which Weisberg filed

in the Court of Appeals demonstrates, the June 23rd transcript reveals not only that the Warren Commission failed to investigate what it had the duty to investigate, but when read in the context of information previously made public it shows that the Central Intelligence Agency sought to manipulate the Warren Commission so it would not conduct a thorough investigation of Nosenko's story.

35. The release of the January 21 and June 23, 1974 Warren Commission executive session transcripts leaves but a single such transcript still secret. That transcript, which is of the Commission's May 19, 1964 session, is said to deal solely with a discussion of the continued employment of two Warren Commission staff members, and not with the substance of the Commission's investigation. As a result, it is now possible for scholars to study, analyze, and evaluate the entirety of the Warren Commission's substantive deliberations during its secret conferences. Such work is already underway in American universities.

36. The public benefit from the release of these transcripts is significant. The assassination of President Kennedy has been a matter of paramount interest to the American public for the past fifteen years. During the past several years it has become evident that the federal intelligence agencies which were ordered to assist the Warren Commission in its investigation actually intimidated the Commission and subverted its work by various means, including the withholding of vital information. This, of course, has serious and deeply disturbing implications for the integrity of basic American institutions. That a presidential commission appointed to investigate the murder of the Chief Executive of the United States could be undermined by the very federal agencies encharged with the duty of assisting that investigation is a matter of serious concern to the American public, and any information which aids in understanding what occurred and how it occurred is

of benefit to the public.

37. Attached to this affidavit as Exhibit 2 is an itemization of the time I have spent on this case. Because I did not keep time records during the early stages of this case, I have been forced to estimate the amount of time I spent on the various pleadings and papers which were filed prior to June, 1976. In addition, I occasionally forgot to record my time on later occasions as well. Where work was expended on a particular brief, affidavit, or motion, I have reviewed the documents themselves so as to make as accurate an estimate as possible. While some error is inevitable in this process, I believe I have erred on the side of underestimating the time I actually spent on these occasions. Where the number of hours spent working on the case has been estimated rather than taken from time records, I have placed an asterisk next to the number of hours listed.

38. Attached hereto as Exhibit 3 is an itemization of certain costs of this case other than those costs which have been awarded plaintiff by the U.S. Court of Appeals. While other costs were incurred by Mr. Weisberg, notably a considerable volume of xeroxing done at his residence in Frederick, Maryland, since no records of these costs were kept and it is not possible to estimate them accurately, they have not been included on this itemization.

James H. Lesar
JAMES H. LESAR

WASHINGTON, D.C.

Subscribed and sworn to before me this 20th day of April, 1979.

Dora B. Burns
NOTARY PUBLIC IN AND FOR
THE DISTRICT OF COLUMBIA

My commission expires Dec. 14, 1981.

Exhibit 1 Lesar Affidavit C.A. No. 75-1448

A 14 Thursday, October 19, 1978 THE WASHINGTON POST

Warren Report Ignored Soviet Defector's Claims

By George Lardner Jr.
Washington Post Staff Writer

The Warren Commission ignored the claims of Russian defector Yuri Nosenko in its report on President Kennedy's assassination despite an explicit decision several months earlier to take Nosenko's story into account.

According to a top-secret transcript made public Tuesday by the Justice Department, the commission decided in executive session June 23, 1964, that it could not properly suppress Nosenko's reports about Lee Harvey Oswald's activities in the Soviet Union even if it distrusted Nosenko.

"... [F]or us to ignore the fact that an agency of our government [the Central Intelligence Agency] has a man who says he knows something about Oswald's life in the Soviet Union . . . for us to just ignore the fact . . . would be unfortunate," commission member Gerald R. Ford, then House minority leader, observed at the time.

The commission chairman, Chief Justice Earl Warren, agreed. He said the report should simply make clear "that we cannot vouch for the testimony of Mr. Nosenko."

The day after that meeting, according to published reports, the CIA's then deputy director for plans, Richard M. Helms, requested and obtained a private audience with Warren concerning Nosenko. The subject never came up again at a commission meeting, and the Warren report in September 1964 made no mention of Nosenko's story.

Helms has said he merely told Warren that the CIA could not vouch for Nosenko's credibility. But the transcript shows that the commission was fully aware of this the day before, at its June 23 executive session.

Warren, for instance, said he was "allergic to defectors." Of Nosenko he said that "we cannot corroborate this man at all." Ford said he had been told "by people who I believe know, that there is a grave question about the reliability of Mr. Nosenko being a bona fide defector."

It thus appears doubtful that Helms would have sought a private session with the chief justice the next day simply to tell the commission what it already knew.

A high-ranking KGB official, Nosenko defected to the United States in January 1964, two months after Kennedy's assassination. He told the FBI that he had supervised Oswald's KGB files and he insisted that the Soviet intelligence agency had no interest in Oswald and had not even bothered to debrief him. Nosenko also told the FBI that the Soviets suspected Oswald might have been "an American sleeper agent" when Oswald defected to the Soviet Union in 1959. (The Warren Commission found that Oswald acted alone in killing Kennedy.)

FBI Director J. Edgar Hoover told the commission in the spring of 1964 that he had arranged for Nosenko to testify before the panel if it wanted to hear what he had to say. Before Nosenko could be called, however, the CIA put him in solitary confinement and subjected him to "hostile interrogation" that lasted for more than three years. The FBI never questioned him again.

The transcript of the June 23, 1964, meeting was declassified in response to a freedom-of-information lawsuit filed three years ago by commission critic Harold Weisberg. The litigation is now before the U.S. Circuit Court of Appeals here.

Of the documents made available, Weisberg said: "The Warren Commission was supposed to investigate. The one thing this proves is a determination not to investigate."

Exhibit 2 Lesar Affidavit C.A. No. 75-1448

ITEMIZATION OF ATTORNEY'S TIME

Date	Description	Hours
9/4/75	Preparation of complaint	2*
10/26/75	Motion to substitute party	½*
10/28/75	First set of interrogatories	4*
12/29/75	Motion to compel answers to interrogatories	2*
2/19/76	Letter to Judge Robinson	½*
2/27/76	Request for production of documents	3*
3/1/76	Motion to compel answers to interrogatories	4*
3/2/76	Motion to take tape-recorded depositions	2*
3/2/76	Second set of interrogatories	6*
3/22/76	Stipulation	2*
5/4/76	Request for production of documents	2*
5/4/76	Opposition to defendant's motion for summary judgment	40*
5/25/76	Status call	2*
7/8/76	Preparation of interrogatories	3½
7/9/76	Preparation of interrogatories	6
7/14/76	Preparation of interrogatories	3
7/15/76	Preparation of interrogatories	4½
7/16/76	Preparation of interrogatories	3½
7/18/76	Preparation of interrogatories	2½
7/19/76	Preparation of interrogatories	7½
7/20/76	Preparation of interrogatories	3
7/24/76	Preparation of interrogatories	4½
7/25/76	Preparation of interrogatories	4
7/26/76	Preparation of interrogatories	4
10/8/76	Motion for summary judgment	2
10/10/76	Motion for summary judgment	2
11/4/76	Conference with client	½

Date	Description	Hours
11/18/76	Hearing in front of Magistrate	2*
11/29/76	Memorandum to the Court	2
12/2/76	Hearing before Magistrate	1*
1/6/77	Motion to compel answers to interrogatories	3
1/7/77	Motion to compel answers to interrogatories	3
1/14/77	Hearing before Magistrate	2*
1/19/77	Objection to Magistrate's order and demand for immediate trial	3*
3/3/77	Preparation for hearing on motion to compel answers to interrogatories and on motions for summary judgment	3*
3/4/77	Hearing on motion to compel answers to interrogatories and motions for summary judgment	2*
3/21/77	Motion for reconsideration	15*
10/14/77	Work on appeal appendix	4
10/18/77	Work on appeal appendix	5
10/19/77	Work on appeal appendix	2
10/20/77	Work on appeal appendix	4
10/21/77	Work on appeal appendix	7½
10/22/77	Work on appeal appendix and review of file	2
10/23/77	Work on appeal appendix and review of file	3
10/24/77	Work on appeal brief (writing)	4
10/26/77	Work on appeal brief (writing)	6½
12/31/77	Notes on brief in Weissman case	½
2/15/78	Work on reply brief (research)	3
2/18/78	Work on reply brief	5½
2/19/78	Work on reply brief	4
2/20/78	Work on reply brief	2
2/21/78	Work on reply brief	13½
2/23/78	Motion for leave to file reply brief with addendum	2½
2/24/78	Motion to expedite oral argument	1½
3/6/78	Research on judicial notice	2
3/7/78	Research on judicial notice	2

Date	Description	Hours
3/8/78	Work on opposition to motion to strike reply brief addendum	2½
3/9/78	Work on opposition to motion to strike reply brief addendum	6
4/16/78	Work on Weisberg affidavit for new trial motion	2
4/17/78	Work on Weisberg affidavit for new trial motion	6½
4/18/78	Motion for new trial	2
5/4/78	Notice to take depositions	½
9/1/78	Research for appellant's brief in Case No. 78-1731	3 2/3
9/2/78	Research for appellant's brief in Case No. 78-1731	1 1/6
9/3/78	Research for appellant's brief in Case No. 78-1731	2 2/3
9/4/78	Research for appellant's brief in Case No. 78-1731	1½
9/5/78	Research for appellant's brief in Case No. 78-1731	3½
9/9/78	Research for appellant's brief in Case No. 78-1731	1½
9/10/78	Work on brief in Case No. 78-1731	3
9/11/78	Work on brief in Case No. 78-1731	9½
10/20/78	Research on mootness issue in Case No. 78-1731 and Case No. 77-1831	1
10/21/78	Research on mootness issue	1
10/24/78	Work on opposition to motion to dismiss on grounds of mootness	1½
10/25/78	Work on opposition to motion to dismiss on grounds of mootness	11½
10/26/78	Work on opposition to motion to dismiss on grounds of mootness	8
2/12/79	Preparation for oral argument	3
2/12/79	Preparation for oral argument	4
2/13/79	Oral argument	2
2/13/79	Research on attorney fees	2
2/15/79	Work on affidavit for attorney fees motion	2
2/16/79	work on affidavit for attorney fees motion	2½

Date	Description	Hours
2/17/79	Work on affidavit for attorney fees motion	2
2/29/79	Drafting Weisberg affidavit in 77-1831	1½
3/2/79	Drafting Weisberg affidavit in 77-1831	4
3/3/79	Drafting Weisberg affidavit in 77-1831	1 3/4
3/4/79	Drafting Weisberg affidavit in 77-1831	4½
3/5/79	Work on appellant's response to appellee's motion for permission to lodge affidavit with Court of Appeals	3 1/6
4/7/79	Work on memorandum of points & authorities on motion for attorney fees	2 1/12
4/9/79	Work on affidavit for attorney fees motion	1 ¼
4/15/79	Work on memorandum of points & authorities on attorney fees motion	3¼
4/16/79	Work on memorandum of points & authorities on attorney fees motion	1 5/6
4/17/79	Work on memorandum of points & authorities for attorney fees motion	5¼
4/18/79	Work on memorandum of points & authorities on motion for attorney fees	3

*An asterisk is used where the amount of hours expended is based not upon work records but rather upon counsel's estimate as to the time spent. In the early stages of the case counsel did not keep time records. When he did begin to keep such records, he occasionally forgot to record his time; thus it has been necessary for him to estimate the amount of time required to perform certain items of work he did.

Exhibit 3 Lesar Affidavit C.A. No. 75-1448

ITEMIZATION OF COSTS*

1.	Office xeroxing	$ 173.56
2.	Other xeroxing (Panic Press and Rogers Office Supply)	245.07
3.	Transcripts	95.60
4.	Consultant on national security classification (Mr. William G. Florence)	700.00
5.	Postage	15.38
6.	Telephone (long distance)	200.00
7.	Subpoena service	8.80
	TOTAL:	$ 1438.41

*This itemization of costs does not include the costs included in the bill of costs which was submitted to the U.S. Court of Appeals. The Court of Appeals has awarded plaintiff costs in the amount of $492.54.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

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

AFFIDAVIT OF HAROLD WEISBERG

I, Harold Weisberg, first having been duly sworn, depose and say as follows:

1. I am the appellant in the above-entitled cases. I reside at Route 12, Frederick, Maryland.

2. My prior experience includes that of investigative reporter, investigator and editor for the United States Senate, and intelligence anlalyst. As an intelligence analyst I was authorized to classify records at the "Secret" level.

3. I have read Appellee's motion to dismiss, as well as the attachments thereto, including the letter by CIA General Counsel Anthony A. Lapham dated October 11, 1978 and the letter by Acting Archivist of the United States James E. O'Neill dated October 13, 1978. I have also read the June 23, 1964 Warren Commission executive session transcript and 11 pages of the January 21, 1964 which appellee has just released after withholding them from me and the

American public for more than a decade under a claim that their disclosure would endanger the national security.

4. Mr. Lapham's letter states that these records were withheld "to protect intelligence sources and methods" and "because the documents were classified . . ." It does not state that the alleged "intelligence sources and methods" were secret or in any way not generally known. It does not state that the records were properly classified.

5. Having read these transcripts, I state that based on my knowledge and experience there never was any possibility that their release to the public would result in the disclosure of any intelligence source or method. The only content of these two transcripts that might be alleged to be subject to classification on this ground relates to the use of those who defect from an intelligence agency by the intelligence agency to which they defect. There is no possibility of the "disclosure" of an "intelligence source or method" in this because it has been common practice for as long as there have been intelligence agencies. (A copy of the June 23, 1964 Warren Commission executive session transcript is attached hereto as Exhibit 1. Pages 63-73 of the January 21 transcript are attached as Exhibit 2)

6. On the same basis I also state that there never was justification for classification of these records at any level. There is no intelligence-related content of either record that was unknown to the KGB or to subject experts. There is no "national security" content at all.

7. After this suit was filed in district court, the government refused to confirm that Yuri Ivanovich Nosenko was the subject of the June 23rd transcript. As one of the many available proofs of what has long been public about Nosenko, I attach a Warren Commission staff memorandum entitled "Yuri Ivanovich Nosenko." (See Exhibit 3) It was declassified on April 7, 1975, nearly six months before I instituted suit in district court for the June 23rd transcript.

8. Having read the June 23rd transcript and this and other Warren Commission staff reports, I state that there is no information in this transcript relating to Nosenko that is not in the staff reports. This is one of many available records which establish that the GSA and the CIA have known from prior to the filing of this lawsuit and all during the time that both were making false representations to the district court that both they were withholding what was already in the public domain.

9. Having read the June 23rd transcript, I further state that it contains no information relating to Nosenko that was not made available to Edward J. Epstein for his book Legend, his magazine articles and interviews and his extensive use on nationwide TV and other forums.

10. With respect to pages 63-73 of the January 21st transcript, the December 30, 1976 affidavit of Mr. Charles A. Briggs of the CIA filed in this case states:

> . . . the matters discussed in the transcript concerned tactical proposals for the utilization of sensitive diplomatic techniques designed to obtain information from a foreign government relating to the Commission's investigation of the John F. Kennedy assassination. The specific question discussed concerned intelligence sources and methods to be employed to aid in the evaluation of information sought by diplomatic means. In this instance, revelation of these techniques would not only compromise currently active intelligence sources and methods but could additionally result in a perceived offense by the foreign country involved with consequent damage to United States relations with that country. A more detailed delineation of the nature of the intelligence methods and sources involved in this document would, in effect, defeat the protective intentions of the classification.

11. There was no statement by Mr. Briggs or any other affidant used by the government in this case that the "intelligence source or method" allegedly sought to be protected was secret or unknown. The use of defectors by intelligence agencies is not nor is the use of letters to governments. (See ¶24, infra) secret or unknown/ Any representation to that effect would be false. The CIA knew this. In fact, the CIA's own prior disclosures to me revealed its use of KGB defectors in precisely the manner it recommended to the Warren Commission. (For an example, see Exhibit 4, which also bears neither a classification stamp nor any indication that a classification stamp has been deleted.)

12. The House Select Committee on Assassinations heard testimony about Nosenko on September 15, 1978. If the Committee's narrative introducing that testimony is correct, there were only two KGB defectors to the CIA at the time Nosenko defected. While there is no certain that Peter Derjabin and Anatoli Golitsin are the two defectors over whom, allegedly, the CIA withheld the January 21 transcript,

the readily available public information strongly suggests they are.

13. Page 41 of Warren Commission Document 49 discloses that Peter S. Derjabin is "an admitted former Soviet intelligence officer." This was neither classified nor withheld by the FBI, nor was the fact that he was an FBI source. The release of his testimony before the Senate Internal Security Committee is reported in a Los Angeles Times story printed in the Washington Post of November 22, 1965. It dates his defection as 1955. Three days earlier the Post carried his letter under the heading "Penkovsky Papers Defended." His name in Anglicized to Peter Deriabin. The first sentence of his letter discloses his CIA connection: "As the translator of The Penkovsky Papers . . ." Naturally enough, he defended the authenticity of the manuscript. It has since been established that he and the CIA created it.

14. It is well-known that Anatoli Golitsin is a Soviet KGB defector. His name fits the spaces in Exhibit 4 from which the typing is obliterated. The space in Exhibit 4 for the place from which the defector defected fits "Finland," from which one of the two defectors the CIA wanted to provide "information" to the Warren Commission did defect. According to Legend by Edward Jay Epstein, Golitsin "defected to the CIA from Helsinki, Finland with the rank of "a major in the First Chief Directorate of the KGB." This conforms to the description of the defector whose name is withheld from page 66 of the January 21 transcript, "fairly high

up in the KGB." Legend not only identifies Golitsin by name but also gives his code name, "Stone." (See Exhibit 6)

15. Whether or not Derjabin and Golitsin are the two defectors referred to in the January 21 transcript, the fact that this information and much more is publicly available about them, including their use by the United States, means that on this basis alone the claim to be protecting "intelligence sources and methods" by withholding information pertaining to them is spurious. Then, too, the KGB is only too aware of these defectors. What the CIA has been withholding was not withheld from the KGB.

16. The Lapham letter gives as the reason for the CIA's abandonment of its "previously claimed exemptions for the two Warren Commission transcripts" in order "to protect intelligence sources and methods" the fact testimony "has been given" before the Select Committee on Assassinations.

17. This is pretextual, misleading and deceptive. In the first place, as is detailed above, there never was any basis for classifying these transcripts. Secondly, I know of no development in the past three years that in any way altered the significance or meaning of the content of these transcripts. This includes the testimony of the CIA's John Hart (which is not included in the transcript of a reading of the Committee's press kit which is attached to the motion to dismiss). Most of Hart's testimony dealt with the CIA's barbarous treatment of Nosenko. Nosenko's treatment is not mentioned in the January 21 and June 23 transcripts. The

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

18. On page 5 of its motion to dismiss appellee states: "On September 15, 1978, the House Committee on Assassinations summarized a report . . . submitted to the agency for prior clearance. The Director of Central Intelligence reviewed the report within two days of receipt and agreed to declassify the draft. The Director also made Mr. John Hart, an expert in Soviet Intelligence and counter-intelligence, available to testify before the Committee."

19. The Committee report is based on examination of many CIA records, a number of staff interviews with Nosenko, and Nosenko's testimony at several Committee executive sessions. If the Director could review and declassify all this extensive material "within two days," he certainly could have reviewed the relative few pages of these transcripts in much less time.

20. What the motion to dismiss does not tell the Court is that for a long time, certainly more than a year, the CIA was aware of the Committee's interest in disclosing information relating to Nosenko and the content of the Warren Commission executive sessions. This is not a matter that came to the attention of the CIA on Sep-

tember 15, 1978, and not before then, which is what appellee's motion to dismiss implies. Hart had retired from the CIA after 24 years of service. Long before September 15, 1978, he was recalled by the CIA in anticipation of the September 15 testimony. In his testimony he described months of reading, rereading, and comparing contradictory reports of many hundreds of pages each. During the long period of Hart's inquiries, searching of CIA files and interviewing of CIA personnel, there never was a time, from the very first moment, when it was not known that he would be making extensive disclosure relating to defectors and Nosenko. From the outset it was also known that the content of these transcripts was at most an insignificant part of the coming Hart testimony. It was known to the CIA, even before it recalled Hart from retirement, that it would be making public disclosure of what it was withholding in these transcripts. During all this long time, the CIA was persisting in falsely sworn statements in this case in order to perpetuate withholding them from me and to deny the public the meaning which I as a subject expert could give them.

21. It is apparent that the actual reason for withholding these transcripts was to prevent embarrassment and to hide the fact that the CIA virtually intimidated and terrified the Warren Commission. Disclosure of these transcripts also reveals that the CIA misinformed and misled the Commission in order to avoid what was embarrassing to the CIA. The transcripts also reveal that the Warren Commission, a Presidential Commission charged with the responsi-

bility of conducting a full and complete investigation of the assassination, did not do so.

22. The CIA had an obligation to inform and counsel the Warren Commission wisely and fully. Warren Commission records, including the transcripts just released, show that it did not measure up to its responsibilities.

23. As Nosenko has testified to the House Select Committee on Assassinations, he did not possess all of the KGB's knowledge of Lee Harvey Oswald. Although there were seven or eight volumes relating to Oswald and various surveillances on him and their fruit, Nosenko testified that, during the brief period after the assassination when he had possesion of these volumes, he had time for only a skimming of the first half of the first volume. The only secrecy with regard to Nosenko and what he knew of what the KGB knew about Oswald is what the CIA withholds from the American people. The KGB knows this and more.

24. I have read the questions the CIA proposed having the State Department address to the USSR. I recall no CIA request or recommendation that these KGB volumes be provided to the United States Government. Rather, the CIA's questions were drawn in a manner calculated to give offense, cause resentment, and discourage cooperativeness. The State Department and the Warren Commission did not approve them. In all the many thousands of pages of Commission records which I have read, I recall no single page in which the Commission was informed about these KGB volumes by the CIA.

25. Based on prior experience and knowledge from my services in the State Department, it is my judgment that under the circumstances of President Kennedy's assassination no government would risk appearing to force upon the United States what the United States did not request or indicate it desired to have. With regard to the coexistence of adversary intelligence agencies, this is also axiomatic. This became a matter of extraordinary delicacy because the Russians suspected that Oswald served American intelligence and Oswald was the alleged assassin.

26. The January 21 transcript reflects a Warren Commission paranoia that borders on the irrational. I believe this is one of the actual reasons for withholding it. The purpose of the discussion, in the words of the Chairman, was a CIA offer of assistance: "they would like to have us give them certain of our records so that they can show them to some of their people, namely a couple of persons who have defected from Soviet Russia." Commission General Counsel J. Lee Rankin added: "The material they (i.e., the CIA) have in mind is nothing that is really classified . . . material that Oswald wrote himself . . . diary, letters and things of that kind," what "could mean a good deal to a man who is" a former intelligence expert who had been "fairly high up" in it. (See Exhibit 2) Rankin noted that "[i]t is nothing that normally would be classified," and Former CIA Director Allen Dulles described the information as what the Commission would publish. In fact, it was published in facsimile by the Commission. Within a few days of this discussion, some of it was leaked in a commercial

venture involving about $25,000 and a fixing of the national mind and attitudes toward Oswald.

27. This was the month before Nosenko defected. At that time the CIA was being helpful. It recommended that an official request be presented to the Soviet Government through the State Department. It offered to use its KGB defectors for such purposes as looking for any kind of code in Oswald's writings. Dulles personally endorsed these defectors--before Nosenko defected--in these words: ". . . they have been working very closely with us, one has been working six or seven years and one about two years."

28. Speaking of unclassified information and what the Commission was going to publish, the Commission Chairman wondered aloud about "whether we should do that," meaning let the defected KGB experts examine the unsecret and unclassified material, "without taking some very careful precautions . . ." His reason, suppose these two should redefect or "turn out to be counter-intelligence agents." So, "I myself question the advisibility of showing these records to any defector." Soon thereafter "these records" were published in facsimile in Life magazine and extensively in many newspapers.

29. General Counsel Rankin, who had already described "these records" as not classified or classifiable, sought to reassure the Commission with regard to the Chairman's uneasiness: ". . . the CIA people say they couldn't hardly defect back again without being in plenty of trouble and they don't believe there is any prospect

and they also say that when they have anything like that they have had plenty of notice in advance . . . but they think they could be very helpful because they can interpret these materials and suggest inquiries that we should make to the Soviet . . ." (January 21 transcript, pp. 64-5)

30. If by any chance the formerly high-up KGB official and his associate, after the kind of tough testing given by the CIA before it trusts defectors with its own secrets, still were in any way untrustworthy and would risk being killed by redefecting after having given away KGB secrets, it is obvious that there could be no harm from their examining in private what they would soon enough read in the press.

31. But the paranoid attitude, also fostered by the former CIA Director, Commission member Allen Dulles, continued throughout the transcript. Commissioner Gerald Ford asked (at p. 70 of the transcript, "Does it have to be a matter of record for anybody other than ourselves and the CIA that these individuals within their agency have perused these documents?" Dulles responded, "No, unless they yell." Rankin explained, "He is afraid they might give it away," "it" being the unclassified material that was to be published. Ford stated, "I see."

32. That mature and responsible men could be so terrified of a nonexisting shadow, that a Presidential Commission investigating the assassination of a President could be rendered so impotent by irrationalities and impossibilities, is an unusual glimpse

on the inside, but it is not properly subject to classification, never was, and contains no "national security" secrets.

33. In order that the Court can more fully comprehend the CIA's motivation for withholding the June 23 transcript, I need to summarize certain salient facts which have been developed by and about the investigation of President Kennedy's assassination.

34. What is never stated about Oswald, and to the best of my knowledge is included in my writing only, is that Oswald was anti-Soviet. A reference in the KGB Minsk file that worried KGB Moscow after the President was assassinated is that someone in Minsk had tried to "influence Oswald in the right direction." The KGB Moscow fear was that, despite its orders to watch Oswald and not do anything else, an effort might have been made to recruit him. In the words of Exhibit 3 (p. 4), "It turned out that all this statement referred to was that an uncle of Marina Oswald, a lieutenant colonel in the local militia in Minsk, had approached Oswald and suggested that he not be too critical of the Soviet Union when he returned to the United States." (In the many assassination mythologies, Marina Oswald's uncle's local militia job has been converted into his having a significant KGB intelligence rank.)

35. In my first book, which was completed about February 15, 1965, I concluded from the Commission's own published evidence that Oswald's career in New Orleans, after he returned from the USSR, was consistent only with what in intelligence is called establishing a cover.

36. In my first and third books I go into detail, again from what was made public by the Commission, about Oswald's anti-Soviet and anti-U.S. Communist writing. In his notes, later published by the Commission, Oswald berated the Russians as "fat stinking politicians." The American Communists, he declared, had "betrayed the working class." His favorite book was the anti-Communist class, George Orwell's The Animal Farm.

37. Whether or not it is believed that Oswald was anti-Communist, as from my own extensive work I believe he was, it remains unquestioned that Nosenko stated the KGB suspected that Oswald was an "American agent in place" or "sleeper agent;" that he told this to the FBI, which told the Commission; that on March 4, 1964, the FBI got Nosenko to agree to testify in secret before the Commission; that CIA efforts to abort this are recorded as beginning not later than a week later; that on April 4, 1964, the CIA made Nosenko totally unavailable by beginning his three years of illegal and abusive solitary confinement that day; and that none of this, which is not secret, is included in the June 23 transcript which was held secret and denied to me for a decade.

38. The June 23rd transcript is almost totally void on Nosenko's information. There is only a vague reference to Oswald's life in Russia. If any other information was discussed, it is not recorded in the transcript. The transcript does begin after session began. At the end of what is in the transcript, the Commission did not adjourn. It took a recess. But there is no further text.

39. The doubt created about Nosenko's bona fides permeates the June 23rd transcript. It accounts for the failure of the Warren Commission to question Nosenko or to use the information he provided to the FBI as investigatory leads.

40. The CIA officials who were in a liaison role with the Warren Commission were not of its intelligence component. They were from Plans, the dirty-tricks or operational part, then headed by Richard Helms. The Counterintelligence staff of James J. Angleton, under Helms, handled most of it.

41. Those who created doubts about Nosenko and are responsibile for his barbarous treatment of exceptionally long duration are Angleton and Pete Bagley, Deputy Chief of the Soviet section.

42. What concerned the Angletonian wing of the CIA and caused all the commotion over Nosenko is their political concoction, not intelligence analysis, that Nosenko had been dispatched by the Soviet Union to plant "disinformation" about Oswald, an alleged KGB involvement with him, and the possibility that the KGB was responsible for the assassination through Oswald. The Soviet defector Golitsin argues, in accord with the pretext of the CIA's ultras, that Nosenko was dispatched by the KGB to "disinform" about Oswald and the assassination of President Kennedy. Without any evidence, and contrary to the available evidence, these political paranoids believed that Oswald was a KGB agent sent back to the United States to assassinate the President. Epstein, although he pretends otherwise, says the same thing in the book the CIA made possible for him, Legend.

43. Allegedly, the major doubts about Nosenko's bona fides were over his statement that his partial review of the KGB's Oswald file when flown to MOscow from Minsk disclosed no KGB interest in Oswald and that it had not attempted a formal debriefing. The predominating Angleton-Bagley interpretation is that this was impossible because Oswald possessed important military intelligence information and that therefore Nosenko was lying. Although nobody ever gets around to being specific about what real secrets Oswald knew and could have told the Russians, it is implied that Oswald's radar knowledge included what the Russians did not know. There reason there are no specifics is because this is not true. Oswald's knowledge of what was not secret was of no value to the Russians. His knowledge of radar codes was valueless because it was certain that with Oswald's supposed but never formalized "defection" these codes would be changed immediately, as they were.

44. What it is alleged the KGB did not do--evaluate Oswald's potential usefulness to it--it in fact did do, covertly. One reason there was no overt KGB debriefing is because its preliminary inquiry, which was known to the CIA, disclosed that Oswald was what the Warren Commission also concluded he was, an unstable person.

45. As is shown by Exhibit 3, a June 24, 1964 Warren Commission staff memorandum, the Commission's January paranoia was partly overcome and "Nosenko was shown certain portions of our file on Oswald." (See page 2, final paragraph.)

46. Rather than having no intelligence estimate of Oswald, this staff memo states that the KGB obtained its information by a number of means without subjecting the suspected Oswald to a formal interrogation. A formal KGB questioning would have told Oswald he was suspected. It would not be an abnormal practice if he were to be watched as a suspect without being told he was under suspicion. The Commission staff report discloses how the KGB formed its appraisal of Oswald: "The KGB in Moscow, after analyzing Oswald through various interviews and confidential informants, determined that Oswald was of no use to them and that he appeared 'somewhat abnormal.'" (Emphasis added)

47. The Intourist interpreter assigned to Oswald also was KGB.

48. As early as March 12, 1964, a few days after the FBI arranged for Nosenko to testify, Helms and two CIA associates had already begun to talk the Commission out of any Nosenko interest. All reference to this was suppressed until July 11, 1973, when Exhibit 7 was made available. The excised second paragraph of this memo was withheld until its "declassification" on January 24, 1975. Its restoration disclosed, for the first time, the CIA's "recommendation . . . that the Commission await further developments" on Nosenko. (See Exhibit 8) This "recommendation" does not appear to qualify for "TOP SECRET" withholding.

49. These exhibits also establish that years after the CIA concluded that Nosenko was a legitimate defector, was employing him and had paid him a king's ransom, the CIA was making a "na-

tional security" claim for information that does no more than report the beginning of its successful effort to influence the content of the Commission's work and Report.

50. The CIA is the country's foremost expert in the fabrication of covers. The cover story which the CIA's ultras devised for Nosenko is that the KGB had to misinform the United States about the conspiracy aspect of the assassination. The inference is that, with Oswald having lived in Russia and with Oswald the only official candidate for assassin, the KGB was responsible for the assassination. (The attribution of KGB motive expressed by Gerald Ford in the June 23rd transcript, provided "by people I believe know," is "to extricate themselves from any implication in the assassination.") The cover is diaphanous. If the KGB had been connected with the assassination--and there is no rational basis for even suspecting it from the unquestionable evidence--it still had no need to run the great risk of sending a disinformation agent. The reason is known to subject experts and should have been known to the Commission and its staff, as well as to the FBI and CIA. The most obvious reason is that the official no-conspiracy conclusion had already been leaked and was never altered.

51. Throughout the entire course of the Warren Commission's life, there was systematic leaking of this lone-nut assassin, no-conspiracy predetermination. The first major leak was of the report President Johnson ordered the FBI to make before he decided on a Presidential Commission. This report, which is of five bound

volumes subsequently identified as Commission Document 1, is actually an anti-Oswald diatribe that is virtually barren on the crime itself. This remained secret until after the end of the Commission's life. This report is so devoid of factual content that it does not even mention all the President's known wounds. Nonetheless, because of secrecy and Commission complaceny, it became the basis of the Commission's ultimate conclusions.

52. The basic conclusions of this five-volume FBI report were leaked about December 5, 1963. The next day, at a Commission executive session, then Deputy Attorney General Katzenbach told the Commission members that the FBI itself had leaked the no-conspiracy conclusions of its report. The text of this FBI report did not even reach the Commission until December 9, four days after the leak. The leak, as published, represented the Oswald-alone, no-conspiracy conclusion as the offical FBI conclusion.

53. The CIA's contrivance, which could have incinerated the world, presupposes that the KGB did assassinate the President. If the KGB had not, it had neither motive nor need for the CIA's fabricated cover story on Nosenko, that he had come to spread KGB disinformation about the assassination.

54. But even if the KGB had been responsible for the assassination, from the time of the leak of the FBI's no-conspiracy conclusions the KGB had no reason to believe there would be any other conclusion. Thus, there was no need, in February, 1964, to send a disinformation agent, a project that was at best extemely risky,

when the official "no conspiracy" conclusion had been public knowledge since early December.

55. Nosenko did withstand three years of subhuman abuse in solitary confinement. Despite psychological tortures executed with incredible attention to detail, Nosenko was shown to be not a KGB disinformation agent but an authentic anti-Soviet defector and an extremely valuable expert on Soviet intelligence. It is not likely that any disinformation agent, anyone not genuinely anti-Soviet and truthful, could have survived this intense and continuous abuse and cross-examination. Any intelligence agency attemptiong to plant such a disinformation agent could exptect treatment similar to that accorded Nosenko. It would be tempting almost unimaginable disaster. It would have been the ultimate in foolhardiness and pointlessness.

56. Although the CIA's Nosenko cover story is transparently thin, it succeed with the terrified Warren Commission in 1964. As a result the Warren Commission totally ignored the unresolved question of Oswald as an American rather than a KGB agent. Although this question lingers yet and is still unresolved, the House Select Committee on Assassinations, purportedly conducting an investigation into the failings of the Warren Commission, has also ignored it.

57. The impact of the CIA's Nosenko cover story upon the Warren Commission is readily apparent in the June 23rd transcript. It opens with a speech by Gerald Ford which continues almost with-

interruption for four pages. In it Ford says he has not seen any FBI or CIA reports on Nosenko. This means that not fewer than three FBI reports were not provided to a member of the Commission.

58. Ford did not provide his sources in stating, "I have been led to believe, by people who I believe know, that there is a grave question about the reliability of Mr. Mesenko being a bona defector." (Nosenko's name is misspelled throughout the transcript.) But Ford was determined that the Commission make no use of any information provided by Nosenko even if the information were proven to be accurate:

> Now, if he is not a bona fide defector, then under no circumstances should we use anything he says about Oswald or anything else in the record, and even if he is subsequently proven to be a bona fide defector, I would have grave questions about the utilization of what he says concerning Oswald.

59. Ford stated the Angleton/Bagley view from within the CIA, "that Mr. Mesenko could very well be a plant" for "other reasons" as well as "for the Oswald case." He conceived that this would be "a very easy thing for the Soviet Union." He stated that one reason would be "to extricate themselves from any implication in the assassination." (page 7641)

60. Covering both ways, Ford plowed his furrow in the opposite direction just before the end of the session:

> But for us to ignore the fact that an agency of the Government has a man who says he knows something about Oswald's life in the Soviet Union, we ought to say something about it--either say we are not in a position to say it is reliable, it may develop that he was or wasn't reliable. But for us just to ignore the fact, when we know somebody in the Government has information from a per-

> son who was in Russia and who alleges he knows something about Oswald would be unfortunate. (page 7648)

61. The Chairman agreed, as he had earlier, rephrasing what Ford said and obtaining confirmation for his "idea": ". . . the crux of the whole matter is that the Report should be clear that we cannot vouch for the testimony (sic) of Mr. Mesenko." (Nosenko was not a witness, although the FBI arranged for him to testify in secret.) The "idea" is "clear" in the Report: There is no mention of Nosenko at all, what Ford wanted to begin with and ended up saying would be "unfortunate." Rankin then said, "The staff was very much worried about just treating it as though we never heard anything about it, and having something develop later on that would cause everybody to know there was such information and that we didn't do anything about it . . ." (pages 7648-9)

62. Ford enlarged upon this: "I think you have got to analyze this in two ways. One, if he is bona fide, then what he knows could be helpful. But in the alternative, if he is not bona fide, if he is a plant, we would have to take a much different view at what he said and why he is here."

63. Rankin then stated that this "is one of the things that I inquired into, in trying to find out from the C.I.A., as to whether or not he might have been planted for the purposes of furnishing this information . . .. And they assured me that he had been what they called dangled before them, before the assassination occurred, for several months." (pages 7649-50)

64. This is factually incorrect, an error that Ford re-enforced immediately: "It is my best recollection that he was actually a defector some time in December." In fact, Nosenko was working for the CIA inside the Soviet Union beginning in 1962. He then stated firmly that he would never defect and leave his family behind. His actual defection, not "dangled" but entirely unexpected, was in February, 1964, which is after, not before the assassination.

65. Dulles expressed the view which prevailed: "I doubt whether we should let the name Mesenko get into the printed report." (page 7644)

66. This is not because the Soviet Government did not know about the Nosenko defection. It was very public, as the transcript reflects at several points.

66. Rankin said that "there will be people, in the light of the fact that this was a public defection, that has been well publicized in the press, who will wonder why he was never called before the Commission." (Emphasis added, page 7645) Ford said that "the original press releases were to the effect that he was a highly significant catch . . .. There was great mystery about this defection, because the Soviet Union made such a protest--they went to the Swiss Government, as I recall, and raised the devil about it." (page 7650) Nosenko defected to the CIA in Geneva.

Despite the fact that Nosenko's name was public, Helms did not want it used. He phoned Rankin just a few minutes prior to

this executive session to discuss Nosenko. Rankin told the Commission, "I just received a call from Mr. Helms . . . and he learned that we even had papers that the Commissioners were looking at. And Mr. Helms said that he thought that it shouldn't even be circulated to the Commissioners, for fear it might get out, about the name Mosenko, and what we received." (Emphasis added. Pages 7645-6)

68. The Chairman remarked, "Well, that name has been in the papers, hasn't it?

69. Helms also had a proposal for the Commission as an alternative to performing its duty to investigate leads. In Rankin's words, "And he said would it help if Mr. McCone sent a letter to the Chief Justice as Chairman of the Commission asking that no reference to Mesenko be used. And I said, 'I think that would be helpful to the Commission,' because then the Commission would have this position of the CIA on record . . .." (Pages 7645-6)

70. Rankin had hardly finished repeating the CIA's request for suppression and offer of a letter to cover the Commision when Dulles objected strongly:

> I would like to raise the question whether we would like to have a letter, though, in our files asking us not to use it. It might look to somebody as though this were an attempt by the C.I.A. to bring pressure on us not to use a certain bit of information. (page 7647)

71. Without any CIA incriminating letter in the Commission's files, this is precisely what happened. It began almost as soon

as the FBI arranged for Nosenko to testify before the Commission. It was accomplished in a redraft of the "Foreign Conspiracy" part of the Commission's Report that was written and retyped before July 17, 1964, as the staff memorandum which is attached as Exhibit 9 shows. The editing was by Howard Willens, a respected lawyer then on loan to the Commission from the Department of Justice. He was not assigned to the "foreign conspiracy" team. This memorandum is from the junion member of that team to is senior member. In it W. David Slawson informed William T. Coleman that "all references to the 'secret Soviet Union source' have been omitted. "Eliminated" is more accurate than "omitted" because this part of the Report had been written with Nosenko included.

72. The information which I have related above can be arranged in another manner so as to reflect motive for withholding these transcripts when they did not qualify for withholding and were required to be released to me under the Freedom of Information Act:

A. Nosenko was a productive CIA agent-in place inside the KGB, beginning in 1962. His work was within responsibilities of the Angleton and Bagley part of the CIA.

B. Oswald was accused of assassinating President Kennedy on November 22, 1963.

C. Nosenko defected to the CIA in February, 1964, meaning to the Angleton-Bagley part of the CIA.

D. Nosenko was made available to the FBI in late February and early March, 1964. He told the FBI and the FBI told the Commission that the KGB suspected that Oswald was an American agent-in-place or "sleeper" agent, which would have meant for the Angleton-Bagley part of the CIA.

E. This also meant that the alleged assassin was suspected of a CIA connection, or an Angleton-Bagley connection.

F. Immediately after Nosenko agreed to testify in secret to the Warren Commission, a CIA delegation headed by Helms, then Deputy Director for Plans and Angleton's superior, started to talk the Warren Commission into ignoring Nosenko and what he stated he knew, including that Oswald was suspected of being an American agent.

G. Immediately after this the CIA, under Angleton-Bagley pressure and persuasion, incarcerated Nosenko illegally and for three years under cruel and brutal concitions, making him unavailable to the Warren Commission throughout its life (and for several years thereafter).

H. After this abusive treatment of Nosenko, during which his life and sanity were in danger from the same CIA people, the CIA decided, officially, that Nosenko was genuine in his defection and so valuable and trustworthy an expert that he received a large sum of federal money and remains a CIA consultant.

I. By this time there was no Presidential Commision, no other official investigation of the assassination of President Kennedy, but the CIA withheld all relevant records under claim to "national security" need. What has been forced free of the CIA's false claims to "national security" discloses that there is not and never was any basis for the claim.

J. When there was no official investigation and when for a decade I tried to obtain these records, the same CIA people who are responsible for the catalogue of horrors tabulated above succeeded in withholding these records, including the January 21 and June 23rd transcripts, because these same people were the CIA's "reviewing" authority.

K. This is to say that the CIA people who may have pasts and records to hide are those who were able to misuse the Freedom of Information Act and the courts to hide their pasts and records and any possible involvement with the accused assassin Oswald; and that the CIA on a higher level permitted this

73. Whether or not Nosenko was either dependible or truthful, his allegaton required investigation by the Presidential

Commission charged with the responsibility of making a full and complete investigation of the assassination. The Commission did not have to believe a word Nosenko uttered but it had the obligation of taking his testimony and then, if it believed discounting his testimony was proper, not paying any attention to it. Whether the Commission took Nosenko's testimony and whether or not it then believed anything he said, the Commission had before it--and under CIA pressure and intimidation supppressed--the allegation that the Russians suspected that the only accused assassin had been an American agent. This also required investigation. But there was no investigation. For the CIA there was the substitution of an affidavit by its Director, who stated that Oswald was not his agent. As Dulles told the Commission on January 27, 1964, when perpetual secrecy was expected, both the FBI and the CIA would lie about this. (If Oswald had been connected with the CIA, that would have been when Dulles was Director.)

74. If it had been public knowledge at the time of the investigation of the assassination of the President that the CIA had, by the devices normally employed by such agencies against enemies, arranged for the Presidential Commission not to conduct a full investigation, there would have been considerable turmoil in the country. If, in addition, it had been known publicly that there was basis for inquiring into a CIA connection with the accused assassin and that the CIA also had frustrated this, the commotion would have been even greater.

75. At the time of my initial requests for these withheld transcripts, there was great public interest in and media attention

to the subject of political assassinations. If the CIA had not succeeded in suppressing these transcripts by misuse of the Act throught that period, public and media knowledge of the meaning of the contents now disclosed would have directed embarrassing attention to the CIA. There is continuing doubt about the actual motive in suppressing any investigation of any possible CIA connection with the accused assassin. If such questions had been raised at or before the time of the Watergate scandal and disclosure of the CIA's illegal and improper involvement in it, the reaction would have been strong and serious. This reaction would have been magnified because not long thereafter the CIA could no longer hide its actual involvement in planning and trying to arrange for a series of political assassinations.

76. One current purpose accomplished by withholding these transcripts from me until after the House Committee held its Nosenko hearings was to make it possible for the Committee to ignore what the Commission ignored, which is what the CIA wanted and wants ignored. With any prior public attention to the content of these transcripts, ignoring what Nosenko could have testified to, especially suspicion the accused assassin was an agent of American intelligence, would have been impossible. A public investigation would have been difficult to avoid.

77. All of this and other possible consequences and the reforms they might have brought to pass were avoided--frustrated--by the misrepresentations used to suppress these transcripts and to

negate the purposes of the Act. The purposes include letting the people know what their government is doing and has done so that the popular will may be expressed.

78. I believe that the facts in this affidavit make it apparent that fraud was perpetrated on me and on the courts. I believe that because I am in a public rather than a personal role in this matter, the people also were defrauded.

79. From my experience, which is extensive, I believe that these practices will never end, there being no end to varying degrees of official misconduct, as long as there is official immunity for misrepresenting to or defrauding the courts and requesters.

80. From my experience I also believe that when district courts do not take testimony, when the do not assure the vigorous functioning of adversary justice, and when they entertain summary judgment motions while material facts are in dispute, the Act is effectively negated. The benefits to the proper working of decent society that accrue to the Act are denied. The cost to any person seeking public information becomes prohibitive. The time required for a writer like me makes writing impossible.

81 Perfection is not a state of man but healing is essential to life. A viable, healthy Act can mean a healthier nation and a government more worthy of public faith and trust.

The wrongful purposes of the improper withholding have been accomplished. What has been done cannot be undone. But what the

courts can do can discourage similar abuses in the future.

82. This is the second time GSA and the CIA have bled me of time and means to deny me nonexempt Warren Commission executive session transcripts. They dragged me from court to court to delay and withhold by delaying. In each case, both stonewalled until the last minute before this Court would have been involved. In each case, rather than risk permitting this Court to consider the issues and examine official conduct, I was given what had for so long and at such cost been denied to me. This is an effective nullification of the Act, which requires promptness. It becomes an official means of frustrating writing that exposes official error and is embarrassing to officials. It thus becomes a substitute for First Amendment denial. They can and they do keep me overloaded with responses too long and spurious affidavits with many attachments. With the other now systematized devices for noncompliance, these effectively consume most of my time. At my age and in my condition, this means most of what time remains to me. My experience means that by use of federal power and wealth, the executive agencies can convert the Act into an instrument for suppression. With me they have done this. My experience with all these agencies makes it certain that there is no prospect of spontaneous reform. As long as the information I seek is potentially embarrassing or can bring to light official error or misconduct relating in any way to the aspects of my work that are sensitive to the investigative and intelligence agencies, in the absence of sanctions their policy will not change and the

courts and I will remain reduced to the ritualized dancing of stately steps to the repetitious tunes of these official pipers.

HAROLD WEISBERG

DISTRICT OF COLUMBIA

Subscribed and sworn to before me this 26th day of October, 1978.

NOTARY PUBLIC

My commission expires MY COMMISSION EXPIRES DEC. 14, 1981.

Vol. 55
Copy 9 of 10

PRESIDENT'S COMMISSION

ON THE

ASSASSINATION OF PRESIDENT KENNEDY

Report of Proceedings

Held at

Washington, D.C.

Tuesday, June 23, 1964

PAGES 7640 - 7651

WARD & PAUL
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917 G STREET, N.W.
WASHINGTON, D. C. 20001

AREA CODE 202—628-4266

President's Commission

on the

Assassination of President Kennedy

EARL WARREN, *Chairman*
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JOHN SHERMAN COOPER
HALE BOGGS
GERALD R. FORD
JOHN J. MCCLOY
ALLEN W. DULLES

J. LEE RANKIN, *General Counsel*

Hills-umstead

[redacted]

PRESIDENT'S COMMISSION

ON THE

ASSASSINATION OF PRESIDENT KENNEDY

- - -

Washington, D. C.

Tuesday, June 23, 1964

The President's Commission met, pursuant to notice, at 10:00 a.m., at 200 Maryland Avenue, Northeast, Washington, D. C., Chief Justice Earl Warren, presiding.

PRESENT:

Chief Justice Earl Warren, Chairman

Representative Gerald R. Ford, Member

Allen W. Dulles, Member

- - -

J. Lee Rankin, General Counsel

Albert Jenner, Associate Counsel

[redacted]

(Members present: Chief Justice Warren and Representative Ford.)

The Chairman. On the record.

Rep. Ford. Mr. Chief Justice, I received last Friday a number of these drafts, and I have looked over several of them. And the one entitled "Lee Harvey Oswald's Life in Russia", early preparations and so forth, about 170 some pages -- in the first 120 or 130 pages, I noticed at least 10 references, as I recall, to Mr. Mesenko's views.

First, to my knowledge, we have never had Mr. Mesenko before the Commission, nor have we taken depositions nor have I seen any F.B.I. or C.I.A. reports on him.

If we are going to use what he says -- I will tell you in a minute why I don't think we should -- we ought to have, the members of the Commission, the basis upon which these statements are included in the proposed draft.

Secondly, I have been led to believe, by people who I believe know, that there is a grave question about the reliability of Mr. Mesenko being a bona fide defector.

Now, if he is not a bona fide defector, then under no circumstances should we use anything that he says about Oswald or anything else in our record. And even if he is subsequently proven to be a bona fide defector, I would have grave questions about the utilization of what he says ~~concerning~~ Oswald.

(At this point, Mr. Dulles entered the hearing room.)

Rep. Ford. Now, --

The Chairman. Or anybody else.

Rep. Ford. Or anybody else.

I cannot help -- I feel so strongly about this that I just think that the Commission has got to make a decision on it.

I have a very strong suspicion - and I cannot document it any more than we can document what he says here about the Oswald case -- that Mr. Mesenko could very well be a plant -- not only for other reasons, but for the Oswald case, and if he is unreliable for other reasons, he could be thoroughly unreliable as far as Oswald is concerned. It would be a very easy thing for the Soviet Union to plant him here for a dual purpose -- one for other reasons, and one to extricate themselves from any implication in the assassination.

And, for these reasons, I think the Commission ought to take up, one, whether we ought to get more information about Mesenko -- as far as I know, we have none, except rumor and so forth. And, secondly, whether even if we got more information from him in direct testimony or deposition, whether we ought to use it under any circumstances at the present time.

The Chairman. I agree with you.

Lee, you will remember, I talked to you about that, too, some time ago -- that we should not rely on this man in any way -- certainly not unless the State Department and the C.I.A. vouch for him, which they will not do. And we had that -- that is in

the testimony here. At least it was talked here by the C.I.A. people. I think it was Mr McCone who said that.

Mr. Rankin. That was off the record, Mr. Chief Justice, you remember.

The Chairman. Yes. But I am allergic to defectors, and I just think we shouldn't put our trust in any defector unless it is known absolutely and positively that he is telling the truth -- unless he can be corroborated in every respect. And we cannot corroborate this man at all. And it would be a tragic thing if we were to rely on him to any extent, and then it should later come out that he was a plant or was not a true defector.

So I think exactly as you do, Jerry. I would vote on the Commission not to use his testimony, when we come to discussing it.

Rep. Ford. I just wanted -- I thought at this point that we ought to bring it up. And I wanted you to know, and the other Commission members to know, my strong feelings in this regard.

I am delighted to get your reaction.

When the time comes to make the decision, we will all have to make it. But we should not start out at this point possibly using what we are using of his comments, when in the final analysis it might be completely unreliable and undesirable.

Mr. Dulles. May I just add that I concur in what you said, Mr. Chairman, and in what Jerry said.

Over the weekend I had an opportunity to discuss the Mosenko

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matter in some detail with my former colleagues, and they are not yet in a position to determine his bona fides. And I gathered from what they said that it might be some time before they would reach any conclusions, if they ever can reach conclusions, because in these difficult situations you never can be entirely sure.

So I think the position that you have taken that we ought not to rely upon this testimony -- and I doubt whether we should let the name of Mosenko get into the printed report.

I think there is some question, as I say, as to whether we should in any way refer to Mosenko by name. Whether later we should use some of the information, depending upon their judgment as to bona fides, that is a question to be decided later.

Mr. Rankin. Mr. Chief Justice, I think I ought to report to you about the whole situation as far as the staff is concerned, so you will all -- the Commissioners -- will be familiar with all the facts as I know about it.

We have been trying to get an answer from the C.I.A. as to what they thought of the bona fides of Mr. Mosenko for some time. And, finally, after we waited, recently, for several weeks, they told us they could not come to a conclusion. And we then asked them what we could do about this material.

We have been furnished it by the F.B.I. in a report of an interview some time ago and they said that they didn't think we could rely on it, or at least they were not able to verify his

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bona fides -- that is the C.I.A. And they said they thought we shouldn't use it.

We then have the problem that I think the Commission should decide at the proper time, that we will definitely not use it. I think that you need to have some place in a record that will be put in Archives, but not available to the public generally, except under security precautions, the fact that you did know about him. And that you did have this information that you do have. And that you decided not to use it upon careful consideratio of the problem. So that the record will be complete. Because there will be people, in light of the fact that this was a public defection, that has been well publicized in the press, who will wonder why he was never even called before the Commission.

I think you will recall that we had the question up of whether we would call him for several months now, and we were waiting whether we could get any answer from the C.I.A. as to whether he was considered reliable before making that decision.

Since we could not get any answer in the affirmative, there was no purpose in bringing his testimony in here under these conditions.

Now, I just received a call from Mr. Helms this morning about it, and he learned that we even had papers that the Commissioners were looking at. And the staff felt that the Commissioners should bring to the attention -- or they should bring to the attention of the Commissioners such information as we

had, so that you were not in the dark about that information in considering this whole problem about the life in Russia. And Mr. Helms said that he thought that it shouldn't even be circulated to the Commissioners, for fear it might get out, about the name Mosenko, and what we had received.

The Chairman. The name Mosenko, you say?

Mr. Rankin. Yes.

The Chairman. Well, that name has been in the paper, hasn't it?

Mr. Rankin. As far as the information we have associated with that name, is what he was suggesting. And he said would it help if Mr. McCone sent a letter to the Chief Justice as Chairman of the Commission asking that no reference to Mosenko be used. And I said, "I think that would be helpful to the Commission," because then the Commission would have this position of the C.I.A. on record upon which they could act if they see fit when they consider the matter. And so that is what they propose to do.

The Chairman. Well, my own view is that we should not rely to any extent on Mosenko, that there would be grave danger in doing so, and I would have no confidence in anything I might say about his testimony.

We will just discuss that, and we ought to have a meeting in a day or two, on a number of questions that have arisen.

So we will put that on the agenda.

Rep. Ford. Very fine.

Mr. Dulles. I would like to raise the question whether we would like to have a letter, though, in our file asking us not to use it. It might look later to somebody as though this were an attempt by the C.I.A. to bring pressure on us not to use a certain bit of information. I don't see -- they can perfectly well say there are sensitive reasons for not having this name brought up in this connection -- but I hope they won't say we could not use it.

The Chairman. I wonder if they could not say they are not prepared to vouch for him, and if they don't vouch for him, certainly I am not going to.

Mr. Dulles. That is fine. Then we have a justification for not using it.

Now, the testimony, though, might have certain background interest for us, because there are two possibilities. Either the fellow is a plant, or there are certain bona fides in the case. If he is a plant and saying this, this is highly significant. We wouldn't use it as the truth, but it might influence our thinking on certain points.

Rep. Ford. This, I think, is getting down to the crux of the matter. We cannot pass judgment on the matter of whether he is bona fide or a plant. But it may be desirable for the Commission to indicate that information has been received about Mosenko, and what he alleges to know about Oswald's life in the Soviet Union. And then in our report, we can say we are in no

position to pass judgment on it.

But for us to ignore the fact that an agency of our Government has a man who says he knows something about Oswald's life in the Soviet Union, we ought to say something about it -- either say we are not in a position to say it is reliable, it may develop that he was or wasn't reliable. But for us to just ignore the fact, when we know somebody in the Government has information from a person who was in Russia, and who alleges he knows something about Oswald, would be unfortunate.

The Chairman. I think the crux -- I agree with you. And I think the crux of the whole matter is that the report should be clear to the effect that we cannot vouch for the testimony of Mr. Mosenko.

Isn't that your idea?

Rep. Ford. That is right.

But we perhaps shouldn't ignore the fact that there is some information that the Commission is familiar with. I don't know quite how you would phrase it in the report.

But to ignore it, I think, would be unfortunate.

The Chairman. Yes.

I think Lee has got the feel of that thing, and it can be done.

Mr. Rankin. The staff was very much worried about just treating it as though we never heard anything about it, and having something develop later on that would cause everybody to