IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 77-1831
	)	
GENERAL SERVICES ADMINISTRATION,	)	
	)	
Defendant-Appellee.	)	

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ORIGINAL
(M-2)

MOTION TO LODGE APPELLEES' BRIEF WITHOUT INDEX

Appellees respectfully move for leave to lodge the attached 9 copies of its brief with the Court without index.

Appellees' brief is due today. The brief has been completed and typed, but last-minute delays prevented us from preparing an index in sufficient time to meet the filing deadline. Accordingly, we propose to lodge the attached copies with the Court, minus the index, and to serve the brief in this form upon appellant's counsel. We will prepare our index tomorrow, February 3, and file and serve a complete copy of the brief at that time.

Respectfully submitted,

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MOTION GRANTED
George A. Fisher, Clerk
By First Deputy Clerk
FEB 16 1978

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BRIEF FOR THE DEFENDANT-APPELLEE

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QUESTIONS PRESENTED

1. Whether Exemption 5 to the Freedom of Information Act protects documents that reflect the policy deliberations of an agency that no longer exists.

2. Whether Exemption 3 to the Freedom of Information Act provides a basis for withholding which is independent of Exemption 1. 1/

3. Whether the district court properly refused appellant's request to tape record depositions and properly limited discovery concerning non-dispositive issues.

1/ This issue is currently before the Court in the cases of Hayden v. CIA, No. 77-1849; Fonda v. CIA, No. 77-1989 and Baez v. CIA, No. 77-2039. Because this court sua sponte invited plaintiffs' counsel in the above-named actions to file an amicus memorandum in Ray v. Bush, No. 77-1401, the issue was briefed and argued in that case, even though the point had not been raised by the appellant and is not properly before the Court in that case.

4. Whether the district court properly entered summary judgment under Exemption 3 to the Freedom of Information Act without examining the documents in camera where the government had filed detailed affidavits explaining the basis for withholding them under a well-recognized Exemption 3 statute.

5. Whether the district court made all necessary findings for purposes of the Attorney General's "Guidelines for Review of Materials Submitted to the President's Commission on the Assassination of President Kennedy."

6. Whether in the event that this Court does not decide the case on the basis of Exemptions 5 and 3, it should remand to the district court for consideration of the government's claims under Exemptions 6 and 1.

STATEMENT OF THE CASE

I. The Facts

This suit arises under the Freedom of Information Act, 5 U.S.C. § 552 et seq. Plaintiff-appellant, Harold Weisberg, has written several books about the Kennedy assassination. Defendant-appellee, the General Services Administration, operates the National Archives and Records Service, the principal repository for materials generated by the President's Commission on the Assassination of President Kennedy (the Warren Commission).

The documents at issue are two full transcripts of the Warren Commission's executive sessions and ten pages deleted from a third transcript.

The record shows that the defendant has released well over 90% of the Warren Commission material (JA 50). It has released all of the executive session transcripts with the exception of the three documents at issue in this case. (JA 51-52). In addition, the record establishes the following facts about the contents of each disputed document:

1. The transcript of May 19, 1964 deals solely with the possible discharge of two Commission employees as a result of allegations about their personal lives. (JA 54)

2. The ten pages deleted from the transcript of January 21, 1964 deal with diplomatic techniques for obtaining information from a particular foreign government and with the various sources and methods which the Central Intelligence Agency could use to verify the information so obtained. (JA 65).

3. The transcript of June 23, 1964 deals with the kind of information obtainable from a particular CIA source, a Soviet defector who has been sentenced to death in absentia by the Russian courts and who still consults with the CIA on intelligence matters. (JA 293-94)

Although the name of this particular defector is now a matter of public record, the CIA filed a detailed affidavit with the district court explaining that release of this transcript could jeopardize his safety and would help the Soviet Union validate its assessment of the damage which his defection had done to its intelligence network (JA 294).

earlier than 6/11/75 ltr WWTT p. 8-9. avoid ... to show improvisations in denials. These are relevant ... show claims spurious

II. The Administrative Proceedings

On March 12, 1975, appellant submitted a Freedom of Information Act request to the National Archives for seven ? transcripts of the Warren Commission's executive sessions (JA 8). On April 4, 1975, Assistant Archivist Edward G. Campbell provided the majority of these transcripts. He did, however, withhold the three documents described in the preceeding section. ?

In a letter (JA 9-10) explaining his decision to deny the request in part, Dr. Campbell stated that the May 19 transcript dealt solely with Commission personnel and that its release would constitute a "clearly unwarranted invasion of personal privacy" within the meaning of Exemption 6 to the Act. 5 U.S.C. § 552(b)(6). He further explained that ten pages of the January 21, 1964 transcript and all eleven pages of the June 23, 1964 transcript had been classified pursuant to an Executive Order "in the interest of national defense and foreign policy" and were thus privileged from disclosure under Exemption 1. 5 U.S.C. § 552(b)(1). Finally, he stated that all three transcripts constitute "intra-agency memoranda" within the meaning of Exemption 5. 5 U.S.C. § 552(b)(5).

Appellant sought an administrative review of this denial (JA 11). Pursuant to his request, the Archives re-examined all three transcripts. Deputy Archivist James E. O'Neill concluded that all three transcripts were indeed intra-agency memoranda

within the meaning of Exemption 5 and that the May 19 transcript had been properly withheld under Exemption 6 (JA 12-13). To assist him in evaluating the Exemption 1 issue, he submitted the June 23 and January 21 transcripts to the Central Intelligence Agency for review and possible declassification. This consultation with the CIA was required under § 11 of Executive Order 11652 entitled "Classification and Declassification of National Security Information and Material," 3 C.F.R. 678 (1971-75 Comp.).

Upon reviewing the transcripts, the CIA notified the Archives that the material could not be declassified but it could be downgraded from a "top secret" to a "confidential" level. The CIA further stated that it wanted the documents classified at the confidential level pursuant to its own authority in the event that the Warren Commission's power to classify documents was questioned. Finally, the CIA stated that releasing the transcripts would jeopardize intelligence sources and methods (JA 12-13).

As a result of this consultation with the CIA, the Deputy Archivist sustained the agency's prior refusal to release the transcripts under Exemption 1. Since the CIA had expressed concern for its "sources and methods" and since 50 U.S.C. § 403(d)(3) specifically authorizes the agency to protect such information, the Deputy Archivist noted that Exemption 3 also justified withholding the transcripts (JA 12).

III. The District Court Proceedings

Appellant filed suit to compel disclosure on September 4, 1975. Shortly thereafter, he instituted discovery. By the time the court rendered its decision, appellant had received responses to three lengthy sets of interrogatories and two requests for the production of documents. Most of this information came from the defendant General Services Administration. However, the CIA, a non-party to this lawsuit, also furnished answers in the form of an affidavit. (JA 289-298). Appellant's motion for permission to take 9 tape-recorded depositions was denied on the grounds that appellant could secure adequate discovery by means of properly fashioned interrogatories.

Before deciding the case on the basis of cross-motions for summary judgment, the district court held two hearings and conducted an in camera investigation of one of the three transcripts (dated May 19, 1964). With regard to the May 19 transcript, the district court expressly found that

> [I]t 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. (JA 334)

Having disposed of this document on the basis of Exemption 5, the court did not reach the merits of the government's claim under Exemption 6.

With regard to the January 21 and June 23 transcripts, the court held that

> The statute relied on by Defendant as respects Exemption 3 is 50 U.S.C. § 403(d)(3). 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. (JA 376)

Because the court found these two transcripts deserving of protection under Exemption 3, it did not reach the merits of the government's claim under Exemption 1. Accordingly, it made no effort to resolve the numerous factual disputes between the parties as to the actual classification procedures followed by the Warren Commission.

STATUTES INVOLVED

The pertinent parts of the statutes which are involved in this case are quoted below:

The Freedom of Information Act, 5 U.S.C. § 552, provides:

> (a)(3) . . . each agency, upon any request for records which (A) reasonably describes such records, and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> (a)(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its actions.
>
> (b) This section does not apply to matters that are --
>
> (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> * * * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

* * * * *

> (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;
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

* * * * *

50 U.S.C. § 403(d)(3) provides:

> [t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.

SUMMARY OF THE ARGUMENT

The district court properly held that Exemption 5 protects the transcript of May 19, 1964 from disclosure. The fact that the National Archives has chosen to release some transcripts which arguably qualify for protection under Exemption 5 does not constitute a waiver as to all such transcripts because the Freedom of Information Act permits the discretionary release of technically exempt items. The fact that the Warren Commission is no longer functioning does not rob its deliberations of protection under Exemption 5 because the policy reasons which gave birth to the exemption apply equally to temporary and permanent agencies.

The district court properly exempted the transcripts of January 21 and June 23, 1964 from disclosure under Exemption 3. Prior decisions of this Court have established that 50 U.S.C. § 403(d)(3), the statute invoked in the instant case, is precisely the sort of statute contemplated by Exemption 3. Moreover, the affidavits filed with the district court provide the sort of detailed analysis required under the recent decisions of this Circuit. Appellant's contentions that Exemption 3 of the FOIA should be made to depend on Exemption 1 and that the interpretation of 50 U.S.C. § 403(d)(3) should hinge upon subsequent Executive Orders are contrary to the legislative history and to settled principles of statutory construction.

The district court followed proper procedures both with regard to discovery and to his in camera inspection of one of the contested documents. The National Archives followed proper procedures as set down in the Attorney General's "Guidelines for Review of Materials Submitted to the President's Commission on the Assassination of President Kennedy."

The issues pertaining to Exemptions 6 and 1 are unnecessary to the disposition of this case. However, if this Court disagrees, it should remand for the development of an adequate record rather than decide these questions now.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY EXEMPTED THE MAY 19 TRANSCRIPT FROM DISCLOSURE UNDER 5 U.S.C. § 552(b)(5)

The May 19 transcript records a discussion of whether the Warren Commission should continue to employ two individuals despite certain allegations as to their private lives (JA 54). In the court below, the government justified its refusal to release the transcript on the basis of two exemptions to the Freedom of Information Act, 5 U.SC. § 552(b)(5) pertaining to intra-agency memoranda and 5 U.S.C. § 552(b)(6) pertaining to personnel and similar files. The district court examined the transcript in camera and concluded that the entire document qualified for exemption under 5 U.S.C. § 552(b)(5):

> 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 (JA 334).

Because it was able to dispose of the case on the basis of Exemption 5, the court did not decide whether Exemption 6 would also protect the transcript.

The district court's handling of the Exemption 5 issue clearly comports with the leading cases on the subject. See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Vaughn v. Rosen, 173 U.S. App. D. C. 187, 523 F. 2d 1136 (1975); Ash Grove Cement Co. v. F.T.C., 167 U.S. App. D.C. 249, 519 F. 2d 934 (1975); Wu v. National Endowment for the Humanities, 460 F. 2d 1030 (5th Cir. 1972), certiorari denied 410 U.S. 926 (1973). Nevertheless, appellant seeks a reversal on three essentially frivolous grounds.

First, appellant argues that the district court's decision to grant the motion for summary judgment on the basis of Exemption 5 rather than Exemption 6 took him by surprise thereby depriving him of an adequate opportunity for rebuttal (at brief 31). Since the government has consistently relied upon exemptions throughout the administrative and judicial proceedings in this case, appellant cannot fairly make this claim (JA 9, 13, 47 and 101).

Second, appellant argues that the government has waived its right to invoke Exemption 5 with regard to all of the Warren Commission transcripts because it has released some transcripts which contain policy deliberations in the past (at brief 31). The short answer to this contention is that Exemption 5 allows, but does not require, an agency to keep its internal memoranda confidential. Mead Data Central v. Air Force, No. 75-2218 (C.A.D.C. August 30, 1977). On prior

occasions, the National Archives and Record Service has reviewed individual Warren Commission transcripts and decided that their release would not be "injurious to the consultative functions of government." In the instant case, NARS reviewed the May 19 transcript and concluded that its release would inhibit the deliberative process. The district court has upheld the reasonableness of this decision; consequently, appellant has no grounds for complaint.

Finally, appellant argues that the purpose of Exemption 5 is to protect the policy deliberations of on-going agencies. Because the Warren Commission is "defunct", appellant contends that Exemption 5 should not apply to its deliberations (at brief 31). The problem with this syllogism is that it proceeds from a false premise. Neither the legislative history nor the decisions of this Court support such a narrow approach to Exemption 5.

Congress included Exemption 5 when it passed the Freedom of Information Act because it believed that

> there are certain governmental processes relating to legal and policy matters which cannot be carried out efficiently if they must be carried out "in a goldfish bowl." Government officials would be most hesitant to give their frank and conscientious opinion on legal and policy matters to their superiors and co-workers if they knew that, at any future date, their opinions of the moment would be spread on the public record. The Committee is of the opinion that the Government cannot operate efficiently or honestly under such circumstances.

S. Rep. No. 1219, 88th Cong., 2d Sess., 13-14 (1967). Similarly, this Court has held that

> The basis of Exemption (5), as of the privilege which antedated it, is the free and uninhibited exchange and communication of opinions, ideas, and points of view -- a process as essential to the wise functioning of a big government as it is to any organized human effort. In the Federal Establishment, as in General Motors or any other hierarchical giant, there are enough incentives as it is for playing it safe and listing with the wind...

Ackerley v. Ley, 137 U.S. App. D.C. 133, 138, 420 F. 2d 1336, 1341 (1969). Accord, Mead Data Central, Inc. v. Department of the Air Force, No. 75-2218 (C.A.D.C. August 30, 1977). Such policy considerations apply to the deliberative processes of all duly constituted governmental entities, regardless of their life expectancies. To hold otherwise would be to hamstring all ad hoc committees, blue ribbon panels and Presidential Commissions existing now and in the future.

What little case law there is on this issue rejects appellant's position. For example, the Seventh Circuit has squarely held that 5 U.S.C. § 552(b)(5) protects the internal memoranda of the now defunct Watergate Special Prosecution Force. Niemeier v. Watergate Special Prosecution Force, No. 76-2296, 5 (C.A. 7, November 9, 1977). This Circuit has handed down an analogous line of decisions dealing with the applicability of § 552(b)(7) and the executive privilege to closed investigative files. The cases and their rationales

are nicely summarized in the following passage from Black v. Sheraton Corporation of America, Inc., No. 75-2039, 28-29 (C.A.D.C., August 22, 1977):

> We reject plaintiff's contention that the public interest in nondisclosure can be disregarded simply because the principal investigation involved here has apparently been concluded. After this issue was argued to the district court, but before its decision, this Court rendered its en banc decision in Weisberg v. Department of Justice, 160 U.S. App. D.C. 71 489 F. 2d 1195 (1973), cert. denied, 416 U.S. 993 (1974). We there upheld the application of the investigatory files exemption of the FOIA to materials concerning the assassination of President Kennedy, even though the dissent argued that "there is no indication that the Government contemplates the use of the information for law enforcement purposes. 489 F. 2d 1204. In Aspin v. Department of Defense, 160 U.S. App. D.C. 231, 491 F. 2d 24 (1973), we adhered to this holding, with the following explanation:
>
> > It is clear that if investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired. Few persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings. Further, the investigative techniques of the investigating body would be disclosed to the general public.
>
> Id. at 237, 491 F. 2d at 30; Accord, Frankel v. SEC, 460 F. 2d 813, 817 (2d Cir.), cert. denied, 409 U.S. 889 (1972); Rural Housing Alliance v. United States Dep't of Ag., 162 U.S. App. D.C. 122, 128, 498 F. 2d 73, 79 (1974).

The analogy between closed investigative files and defunct deliberative bodies is sound. The same reasoning which led this Court to preserve confidentiality in the one situation should lead it to do so in the other.

II.

THE DISTRICT COURT PROPERLY EXEMPTED THE JANUARY 21 AND THE JUNE 23 TRANSCRIPTS FROM DISCLOSURE UNDER 5 U.S.C. § 552(b)(3) AND 50 U.S.C. § 403(d)(3).

Section 552(b)(3) of the Freedom of Information Act states that the mandatory disclosure provisions do not apply to matters that are

> specifically exempted from disclosure by statute (other than § 552(b) of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Section 403(d)(3) of the National Security Act provides that

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

The district court properly held that these two statutes taken together, protect the January 21 and June 23 transcripts from disclosure.

1. Section 403(d)(3) constitutes a valid exempting statute under the Freedom of Information Act.

Appellant argues that, unless § 403(d)(3) is read to incorporate the classification criteria set forth in the applicable

Executive Order, it cannot qualify as a (b)(3) statute because it vests too much discretion in the Director of Central Intelligence (at brief 25). Based upon its own analysis of the legislative history, this Court has twice rejected such contentions. In Phillippi v. Central Intelligence Agency, 178 U.S. App. D.C. 243, 546 F. 2d 1009 (1976), the Court noted that

> The District Court's order relied on the third exemption to the FOIA and on 50 U.S.C. §§ 403(d)(3) and 403g. Appellant contends that § 403(d)(3) is not a statutory authorization to withhold information within the meaning of 5 U.S.C. § 552(b)(3). We reject this argument. See S. Rep. No. 93-854, 93d Cong., 2d Sess., 16 (1974); H.R. Rep. No. 93-1380, 93d Cong., 2d Sess., 12 (1974). If the Agency can demonstrate, see 5 U.S.C. § 552(a)(4)(B)(Supp. V 1975), that release of the requested information can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods, it is entitled to invoke the statutory protection accorded by 50 U.S.C. § 403(d) and 5 U.S.C. §552 (b)(3).

Id. at 1015, n. 14. Similarly, in Weissman v. Central Intelligence Agency, No. 76-1566 (C.A.D.C., January 6, 1977, as amended, April 4, 1977) the Court observed that "the legislative history clearly demonstrates that both § 403(d)(3) and § 403(g) are precisely the type of statutes comprehended by exemption (b)(3)." Slip Op. at 4-5.

These precedents effectively dispose of appellant's argument. Nevertheless, it is worth nothing that the language

of 50 U.S.C. § 403(d)(3) comes squarely within the terms of 5 U.S.C. § 552(b)(3). It provides that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." (emphasis added). The statute is not discretionary. The CIA Director must protect his sources and methods in order to discharge his statutory obligation. Moreover, § 403(d)(3) establishes a particular criterion for withholding, the criterion of harm to intelligence sources or methods. Most importantly, the statute specifies the type of material to be withheld, namely material which would reveal intelligence sources and methods. Thus, 50 U.S.C. § 403(d)(3) satisfies all three of the tests set forth in 5 U.S.C. § 552(b)(3). Since these tests are stated in the disjunctive, Irons v. Gottschalk, ___ U.S. App. D.C. ___, 548 F. 2d 992 (1976), it is clear beyond cavil that § 403(d)(3) constitutes a valid exempting statute for purposes of § 552(b)(3).

2. The affidavits filed with the district court meet the standards set by this Court.

To support its claims under 50 U.S.C. §403(d)(3) and 5 U.S.C. § 552(b)(3), the Central Intelligence Agency filed two affidavits with the district court. The first[2/] explains the

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2/ One page of this affidavit was inadvertently omitted from the Joint Appendix. The full text is given at pp. 1a-3a of the Addendum.

decision to withhold pages 63-73 of the January 21 transcript as follows:

> 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, reevaluation 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 the United States relations with that country

The second affidavit provided an even more detailed explanation of the decision to withhold the June 23 transcript (JA 293-295). Briefly stated, the affidavit explains that the pages in question cannot be released without compromising a currently active intelligence source, that the source is a Soviet defector, that he has been sentenced to death in absentia by the Soviet courts, and that any disclosures as to his whereabouts could endanger him. The affidavit also explains, that even though the name of this particular defector has surfaced, revelation of the actual transcript would assist the Soviet Union in assessing the extent of the information provided and in taking measures to neutralize its value. Finally,

the affidavit states that the defector in question cooperated with the Central Intelligence Agency with the "clear understanding" that any information he provided would be properly safeguarded. Failure to uphold this understanding could deter potential defectors, thereby drying up a unique and irreplaceable source of information.

Plainly, these affidavits provide the sort of "relatively detailed analysis" contemplated by this Court in Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F. 2d 820, 826 (1973), certiorari denied, 415 U.S. 977 (1974). Taken together, they provide ample support for the district court's determination that appellee is entitled to refuse disclosure.

3. Exemption 3 provides a wholly independent ground for withholding documents from Exemption 1

Appellant argues that the government cannot rely on 50 U.S.C. § 403(d)(3) and 5 U.S.C. § 552(b)(3) unless it first establishes that the materials sought are properly classified under the applicable Executive Order (at brief 25-26). Since such materials would be fully exempt under 5 U.S.C. § 552(b)(1), appellant is in effect asking this Court to read Exemption 3 out of the Freedom of Information Act, whenever the Director of Central Intelligence attempts to protect his sources and methods from compulsory disclosure. Appellant would have this Court do so despite the fact that the legislative history of the FOIA and the prior decisions of this Circuit

specifically recognize 50 U.S.C. § 403(d)(3) as a valid exempting statute. S. Rep. No. 93-854, 93d Cong., 2d Sess., 16 (1974); H.R. Rep. 93-1380, 93d Cong., 2d Sess., 12 (1974); Weissman v. Central Intelligence Agency, No. 76-1566 (C.A.D.C. January 6, 1977, as amended, April 4, 1977); Phillippi v. Central Intelligence Agency, 178 U.S. App. D.C. 243, 546 F.2d 1009 (1976).

Appellant's reading of Exemptions 1 and 3 also flies in the face of the Supreme Court's admonition, delivered in the course of interpreting the FOIA, that "all parts of an Act 'if at all possible are to be given effect.'" FAA Administrator v. Robertson, 422 U.S. 255, 261 (1975), citing Weinburger v. Hynson, Westcott & Dunning, 412 U.S. 609, 633 (1973). Consequently, when squarely faced with the argument advanced by the appellant, one district court has concluded "that the two exemptions are independent rather than interdependent and where exemption 3 has been properly invoked exemption 1 need not be considered." Marks v. Central Intelligence Agency, 426 F. Supp. 708, 710-11, n. 5 (D. D.C. 1976).[3/]

3/ The Marks case is presently before this Court on appeal (No. 77-1225). However, the plaintiff therein does not contest this aspect of the district court's ruling.

To shore up his sagging claim that Exemption 3 can add nothing to Exemption 1 in cases involving the CIA, appellant cites the following passages from the legislative history and from a prior decision of this Court:

> Restricted Data (42 U.S.C. 2162), communication information (18 U.S.C. 798), and intelligence sources and methods (50 U.S.C. 403(d)(3) and (g), for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act. When such information is subjected to court review, the court should recognize that if such information is classified pursuant to one of the above statutes, it shall be exempted under this law. (Conference Report No. 93-1380, 93rd Cong., 2d Sess., p. 12) (emphasis added).

> On remand the District Court may also consider the applicability of the FOIA's first exemption, which applies to classified information. The Agency claimed this exemption in its first response to appellant and at all subsequent stages of this proceeding. Since information which could reasonably be expected to reveal intelligence sources would appear to be classifiable, see Executive Order 11652 . . . and since the Agency has consistently claimed that the requested information has been properly classified, inquiries into the applicability of the two exemptions may tend to merge. Phillippi v. Central Intelligence Agency, 178 U.S. App. D.C. 243, 249-50 n. 14, 546 F. 2d 1009, 1015-16 n. 14 (1976) (emphasis added).

Clearly, neither of these passages stands for the proposition claimed. At most, they reflect an awareness on the part of Congress and the Court that material which is protected under Exemption 3 may also be protected under Exemption 1.

4. The term "unauthorized disclosure" as used in 50 U.S. C. § 403(d)(3) should not be defined with reference to Executive Orders 10501 and 11652.

Appellant argues that the disclosure of material which has not been properly classified pursuant to an Executive Order can never be "unauthorized" within the meaning of 50 U.S.C. § 403(d)(3) (at brief 25). This argument does violence to the intentions of both the President and the Congress. Executive Orders 10501 and 11652 simply establish a uniform system for classifying documents within the Executive branch of the government. They apply to all departments and do not purport to reflect the Executive's views as to the proper implementation of specific statutory directives such as 50 U.S.C. § 403(d)(3). That Congress never intended for the phrase "unauthorized disclosure" to be defined in terms of the Executive Orders governing classification is clear from the fact that 50 U.S.C. § 403(d)(3) antedates the first such Order by four years.[4/] Thus, appellant is asking this Court to impose the terms of an Executive Order as a gloss upon an Act of Congress despite the fact that neither the Order nor the Act was specifically formulated with the other in mind.

Appellant's argument must fail for another reason. Nothing in 50 U.S.C. § 403(d)(3) suggests that the CIA director can only

4/ 50 U.S.C. 403(d)(3) was enacted in 1947 whereas Executive Order 10290 was promulgated on September 24, 1951. Prior to 1951, Executive Branch agencies developed their own classification procedures.

exercise his power to protect sources and methods by classifying documents. Yet, if this Court accepts appellant's argument that disclosure of unclassified or improperly classified material can never be unauthorized, it will have effectively read such a limitation into the statute. Such a reading of the statute would hurt the agency on a generalized level. Foreign intelligence sources, including foreign governments, expect absolute guarantees of confidentiality in exchange for their cooperation. If they come to believe that the Director cannot protect them whenever a court finds a technical defect in the classification procedures used, they will become understandably reluctant to place themselves at risk. Congress made a considered decision to grant the CIA Director the power necessary to allay these fears. Appellant offers no persuasive reason for cutting that power back.

III.

THE DISTRICT COURT FOLLOWED PROPER PROCEDURES BOTH WITH REGARD TO DISCOVERY AND TO IN CAMERA INVESTIGATION

Appellant argues that the district court should have (1) allowed him to take nine tape-recorded depositions, (2) compelled the government to answer his interrogatories, (3) inspected the January 21 and June 23 transcripts in camera, and (4) allowed appellant's security classification "expert" to assist with the in camera investigation (at brief 28-30). In appellant's view, the district court's refusal to do these four things constitutes reversible error. However,

the district court has broad power to control the form and scope of discovery and broad discretion over whether to conduct in camera proceedings. See, e.g., Associated Metals and Minerals Corp. v. S.S. Geert Howaldt, 348 F.2d 457, 459 (C.A. 5, 1965); Weissman v. Central Intelligence Agency, (C.A.D.C., No. 76-1566, January 6, 1977, as amended April 4, 1977). It is clear that the district court exercised its power judiciously in the instant case.

1. The district court permitted ample discovery on the dispositive issues.

The district court decided this case on the basis of cross motions for summary judgment. Thus, appellant can only argue that his discovery was inadequate if he can show that there were material questions of fact left unexplored. Moreover, these unexplored factual questions would have to pertain to the dispositive issues in the case -- i.e., to the claims based on Exemptions 3 and 5.

Appellant utterly fails to make the necessary showing. He cannot point to a single disputed or disputable fact regarding either issue. Indeed, he concedes that most of his discovery requests focused on the government's Exemption 1 claim (at brief 28). Since the district court properly concluded that resolution of the Exemption 1 issue was unnecessary to the resolution of the case (see pp. 20-22 , supra), appellant was not prejudiced by a lack of full discovery on this point. Moreover, as a matter of hornbook law, the district court can properly limit discovery to dispositive issues:

> The court may order that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters. Ever since the days of the former equity bill of discovery there has been applied to discovery "the principle of judicial parsimony," by which, where one issue may be determinative of a case, the court has discretion to stay discovery on other issues until the critical issue has been decided.

Wright, Handbook on the Law of Federal Courts, 2d ed. (1970) at 371, citing Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U.S. 689 (1933).

The district court was also within its rights to deny appellant's motion for leave to take tape-recorded depositions. Under the Federal Rules of Civil Procedure, the distinct judge has broad power to control the manner of discovery. See, e.g., Rule 26(c). He need not allow the parties to proceed by deposition if he concludes that another method of discovery is more appropriate under the circumstances. See, e.g., Associated Metals & Minerals Corp. v. S. S. Geert Howaldt, 348 F. 2d 457, 459 (C.A. 5, 1965).

In the instant case, the district court could well have concluded that interrogatories were a preferable method of discovery. Depositions are not well-suited to FOIA cases. For example, Rule 30(c) contemplates that "evidence objected to shall be taken subject to objections." The deponent is expected to note his objection, then testify anyway secure in the knowledge that his statement will be inadmissible if the court sustains the objection. Such a procedure is manifestly inadequate where the subject of the litigation is the extent

of the disclosure to be made. Indeed, because disclosure is the central issue in FOIA cases, the government often needs time to formulate a considered response to pretrial inquiries. Otherwise, it is possible for a litigant to obtain more information during discovery than he would be entitled to receive after judgment. In light of these considerations it cannot be argued that the district court abused its discretion in requiring appellant to proceed by interrogatory.

Finally, it should be noted that appellant did obtain extensive discovery. During the pendency of this case, he submitted over 200 interrogatories and two requests for the production of documents to James E. Rhoads, Archivist of the United States. Appellant also submitted interrogatories to the Central Intelligence Agency. The vast majority of his questions were answered.

2. The district court properly declined to inspect the January 21 and June 23 transcripts.

The decision whether to examine requested material in camera is a matter for the sound discretion of the trial judge. 5 U.S.C. § 552(a)(4)(B), H.R. Rep. 93-876, 93d Cong., 2d Sess., 7 (1974); Weissman v. Central Intelligence Agency, No. 76-1566, January 6, 1977, as amended April 4, 1977); Bell v. United States, 563 F. 2d 484 (C.A. 1, 1977). Indeed, Weissman and Bell expressly upheld a district court's refusal to conduct such an examination of records involving the national security.

Moreover, the courts in this Circuit have been acutely sensitive to the fact that in camera examination of documents withheld under 5 U.S.C. § 552(b)(1) and (b)(3) frequently does not assist the court very much:

> Obviously, a Court aided only by an in camera document examination does not have the training or competence to make a judgment as to the national security implications of classified material. An ex parte hearing with Agency personnel would be required, resulting in a distasteful Star Chamber-like proceeding from which the guarantees of trustworthiness achieved by confrontation and cross-examination are absent. There is, moreover, no guarantee that such a hearing could, in the last analysis, give adequate guidance. The national security issue is necessarily speculative. Intelligence deals with possibilities. Our knowledge of the attitudes and of information held by opponents is uncertain. Determinations of what is and what is not appropriately protected in the interests of national security involves an analysis where intuition must often control in the absence of hard evidence. This intuition develops from experience quite unlike that of most Judges.

Klaus v. Blake, 428 F. Supp. 37, 38 (D. D.C. 1976).

Given the inherent difficulties with the in camera approach to (b)(1) and (b)(3) material, this Court has cautioned "that in camera proceedings are particularly a last resort in 'national security' situations." Weissman v. Central Intelligence Agency, No. 76-1566, 10 (C.A.D.C., January 6, 1977, as amended April 4, 1977, citing Phillippi v. Central Intelligence Agency, 178 U.S. App. D.C. 243, 546 F. 2d 1009 (1976). In light of these cases, it is clear that the district court did not abuse its discretion in refusing to examine the January 21 and June 23 transcripts in camera. The court disposed of the case on the basis of detailed affidavits placed

on the public record. Under Weissman and Phillippi, this method of handling the (b)(3) issue was not merely permissible. It was preferable.

Appellant, however, contends that, because he alleged bad faith on the part of the government, Weissman requires the district court to examine the transcripts[5/] (at brief 30). The government does not argue that it is entitled to have its representations taken at face value where the record contains evidence of bad faith. It simply argues that appellant's allegations of bad faith are frivolous.[6/] If such unsupported -- and unsupportable -- allegations are held to

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5/ To support his argument, appellant quotes a passage from the original Weissman decision. In its Order of April 4, 1977, this Court amended that particular passage to read as follows:

> If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated. In deciding whether to conduct an in camera inspection it need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.

6/ For example, appellant argues that the government wrongfully withheld the Warren Commission transcript of January 27, 1964 (at brief 20). In a prior lawsuit between appellant and appellee, the court found that this transcript was legitimately--not wrongfully -- withheld. Weisberg v. General Services Administration, No. 73-2052 (D. D.C., May 3, 1974)(JA 167-8). That judgment is res judicata in the present case. Moreover, the transcript of the March 4, 1977 hearing reveals that the (continued on next page)

require in camera review, they will soon become a boilerplate element of every FOIA complaint and the district courts will find themselves conducting such reviews in every case. Both the Congress and the Court have carefully avoided imposing such a burden on the lower federal courts. Weissman at 10.

Since appellant was not entitled to in camera review, he clearly was not entitled to have his security classification "expert" participate in that review. Moreover, the purpose of FOIA litigation is to determine whether certain documents are privileged from disclosure. To allow the plaintiff or his agent to see those documents prior to judgment would necessarily destroy the privilege, moot the case and savage the statutory scheme for balancing the public's right to know against the government's need for confidentiality. Cf. Phillippi v. Central Intelligence Agency, 178 U.S. App. D.C. 243, 546 F.2d 1009, 1012-13 (1976).

6/ (continued) district court in this action understood and was unimpressed with appellant's claim of wrongful withholding (JA 321-322).

Appellant also argues that the government exhibited "bad faith" in refusing to answer "obviously relevant interrogatories" and in persistently claiming that the Warren Commission had authority to classify documents (at brief 30). In short, appellant argues that the government is guilty of bad faith because its legal conclusions differ from his own.

IV.

THE DISTRICT COURT MADE ALL NECESSARY FINDINGS OF FACT BASED ON THE ATTORNEY GENERAL'S "GUIDELINES FOR REVIEW OF MATERIALS SUBMITTED TO THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY"

Appellant argues that the Attorney General's "Guidelines for Review of Materials Submitted to the President's Commission on the Assassination of President Kennedy" are broader than the Freedom of Information Act, that he was entitled to take advantage of this extra breadth and that the district court was required to make specific findings regarding the government's compliance with its guidelines (at Brief 32). Appellant's argument has two major flaws.

1. The Guidelines do not expand the provisions of the Act.

The Attorney General set the original standards governing the disclosure of Warren Commission material in 1965. Because passage of the Freedom of Information Act raised questions as to the validity of prior disclosure criteria, the Office of Legal Counsel of the Department of Justice revised the Guidelines in 1975 with the avowed purpose of conforming them to the amended version of the FOIA (Addendum, p. 6a). For the convenience of the Court, both the original and the revised Guidelines 7/ are set forth in full in the Addendum.

7/ Neither set of Guidelines was ever published in the Federal Register. Accordingly, neither has ever had the status of regulations or the force of law. 44 U.S.C. § 1505(a); Andrews v. Knowlton, 509 F. 2d 898, 905 (2d Cir. 1975), cert. denied 423 U.S. 873 (1976).

Even a cursory reading of the Guidelines reveals that they do not expand the disclosure requirements of the Freedom of Information Act. Indeed, they expressly incorporate the very exemptions upon which the government relies in this case: the exemptions based upon statutory requirements and security classifications and the exemptions based upon the administrative needs of the government and the privacy needs of the individual. (Addendum, p. 6a-9a).

2. The district court implicitly found that the government has complied with the Guidelines.

Because the exemptions to the Guidelines track the exemptions to the FOIA so closely, a finding that a document is privileged from disclosure under the one necessarily entails a finding that it is privileged from disclosure under the other. For example, § 552(b)(3) states that the disclosure provisions of the FOIA do not apply to matters that are "specifically exempted from disclosure by statute." The parallel provision from the Guidelines states that "statutory requirements prohibiting disclosure should be observed." The district court found that release of the January 21 and June 23, 1964 transcripts would lead to the unauthorized disclosure of intelligence sources and methods in violation of 50 U.S.C. § 403(d)(3). (JA 376) This finding plainly justifies withholding the documents under either the statute or the Guidelines.

Similarly, 5 U.S.C. § 552(b)(5) provides that intra-agency memoranda need not be disclosed under the FOIA. The parallel section of the Guidelines states that

> Unclassified material . . . should be made available to the public . . . unless such material is exempt under the Act and its disclosure --
>
> Would be detrimental to the administration and enforcement of the laws and regulations of the United States and its agencies.

The district court's finding that release of the May 19 transcript would "compromise the deliberative process" (JA 334) clearly satisfies both the FOIA and the Guidelines.

Appellant does quote one sentence from the Guidelines directing the agency to weigh its reasons for maintaining confidentiality against "the overriding policy of the Executive Branch favoring the fullest possible disclosure." (At brief 32) Assuming arguendo that this brief sentence does impose a higher obligation upon the custodian of Warren Commission material than the FOIA imposes upon custodians of government records generally, it is clear that the Archives has met that obligation. Appellant himself notes that the Archives has released other Warren Commission transcripts which would technically fall within the very exemptions now being claimed. (At Brief 31) Thus, the record clearly shows that the Archives does perform the sort of interest balancing contemplated in the Guidelines. The only possible justiciable issue for the district court, then, would be whether the Archives had abused its discretion in carrying out the dictates of the Guidelines. Mead Data Central, Inc. v. Department of the Air Force, No. 75-2218, 26-27 (D.C. Cir. Aug. 30, 1977). Given the extremely favorable findings of fact (JA 334, 376), it seems clear that the district court saw no abuse.

V.

IN THE EVENT THAT THIS COURT DOES NOT AFFIRM ON THE BASIS OF EXEMPTIONS 3 AND 5, IT SHOULD REMAND THE CAUSE TO THE DISTRICT COURT FOR CONSIDERATION OF THE GOVERNMENT'S CLAIMS UNDER EXEMPTIONS 6 AND 1

In the court below, the government argued that the transcript of May 19, 1964 was not only an "intra-agency memorandum" for purposes of Exemption 5 but a personnel or similar file the "disclosure of which would constitute a clearly unwarranted invasion of personal privacy" within the meaning of Exemption 6. Similarly, the government argued that the transcripts of January 21 and June 23, 1964 were not only privileged from disclosure by statute within the meaning of Exemption 3 but were also specifically authorized to be withheld under an Executive Order for purposes of Exemption 1. The district court did not reach the merits of the government's claims under Exemptions 6 and 1 because it found Exemptions 5 and 3 to be dispositive. The government strongly agrees with the district court that this case can be resolved (and the judgment below affirmed) solely on the basis of those issues. However, if this Court holds to the contrary the government requests that the cause be remanded to the district court for consideration of its other claims.

Remand is necessary in connection with the Exemption 6 issue because that provision only protects against clearly unwarranted invasions of personal privacy. It thus contemplates that the district judge will balance the degree of individual harm against the degree of public good that would result from

disclosure. Department of the Air Force v. Rose, 425 U.S. 352, 378-381 (1976). In the instant case, the district court found it unnecessary to engage in this sort of balancing. Accordingly, the record is not appropriately developed for resolution of this issue.

Remand would also be appropriate with regard to the government's claim under Exemption 1. Essentially, the government argues that Executive Order 11130 which created the Warren Commission -- as it was contemporaneously construed by the President, the Chief Justice and several high ranking members of Congress -- also authorized it to classify its records. Appellant argues that Executive Order 11130 does not contain a specific grant of classifying authority within the meaning of Executive Order 10901, promulgated by President Eisenhower. Both arguments are lengthy and complex. For present purposes, it is enough to show that the confusion over the Warren Commission's classification authority plagues the Johnson Administration generally:

> The authority of the Warren Commission to classify documents originally is clouded by an apparent oversight of the Johnson Administration. At the time the transcripts at issue were classified "Top Secret", security classifications were governed by Executive Order 10501, as amended (3 CFR 1949-1953 Comp., p. 979, November 5, 1973). While the original order contained no provision listing the agencies having classification authority, a subsequent amendment to E. O. 10501 listed these agencies and further stated that future additions or modifications must be specifically spelled out by Executive

> order (E. O. 10901, 3 CFR 1959-1963 Comp., p. 432, January 9, 1961). While this provision was complied with for the remainder of the Eisenhower Administration and the Kennedy Administration, a search of materials within the National Archives of the United States and the Lyndon Johnson Presidential Library has uncovered no evidence that it was ever complied with during the Johnson Administration, or that the President or his aides were familiar with this provision. (JA 66-67) (emphasis added)

Because a decision of this Court upholding or denying the Warren Commission's authority to classify documents could thus affect an as yet undetermined number of classification decisions made during the Johnson years, it ought to be made on the basis of a fully developed district court record. 8/

Similarly, this Court should not decide whether the Warren Commission followed proper classification procedures with regard to the specific documents at issue for the simple reason that the district court never resolved important factual disputes between the parties as to what the Warren Commission's procedures were. 9/ For example, appellant submitted invoices from the

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8/ In the court below, the government also argued that the transcripts are properly classified pursuant to the CIA's authority. Appellant argued that the CIA cannot now invoke its own classification power to rectify alleged classification errors of the past. The validity of a belated classification for purposes of Exemption 1 to the FOIA is now pending before the Third Circuit. Cervase v. Department of State, No. 77-1637. Cf. Halperin v. Department of State, No. 76-1528 (D.C. Cir. Aug. 16, 1977).

9/ In addition to requiring this Court to resolve disputed factual issues, a holding that the transcripts had not been properly classified for purposes of Exemption 1 would not obviate the need for a remand. This court's recent decision in Halperin v. Department of State, No. 76-1528, 14-16 (D.C. Cir., Aug. 16, 1977) entitled the government to prove to the district court that release of information would jeopardize the national security even where that information was improperly classified and is accordingly non-exempt under the FOIA.

Warren Commission's official reporter which purport to show that all Commission records were routinely classified. Appellee filed an affidavit in which the General Counsel for the Warren Commission swears that he had supervised the classification of documents submitted to the Commission. This conflict was not resolved in the court below, nor was it resolved in Weisberg v. General Services Administration, No. 73-2052 (D. D.C. May 3, 1974). In that case, as in the present litigation, the trial judge merely observed that the government had not, as of that stage in the proceedings, proved that the appropriate classification procedures has been followed. Such proof was unnecessary in both cases because the court held that the material was privileged under another exemption to the Freedom of Information Act.

Since a remand would be necessary in any case, the principles of orderly adjudication would dictate that the district court address all of the issues pertaining to Exemption 1 and 6 in the first instance.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

EARL J. SILBERT,
United States Attorney,

LEONARD SCHAITMAN,
LINDA M. COLE,
Attorneys,
Appellate Section,
Civil Division,
Department of Justice,
Washington, D.C. 20530.

FEBRUARY 1978

A D D E N D U M

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.

J. Helen Conner
Notary Public

My commission expires: March 15, 1977.

GUIDELINES FOR REVIEW OF MATERIALS SUBMITTED TO THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY

1. Statutory requirements prohibiting disclosure should be observed.

2. Security classifications should be respected, but the agency responsible for the classification should carefully re-evaluate the contents of each classified document and determine whether the classification can, consistently with the national security, be eliminated or downgraded.

3. Unclassified material which has not already been disclosed in another form should be made available to the public on a regular basis unless disclosure--

   (A) Would be detrimental to the administration and enforcement of the laws and regulations of the United States and its agencies;

   (B) Might reveal the identity of confidential sources of information and impede or jeopardize future investigations by precluding or limiting the use of the same or similar sources hereafter;

   (C) Would be a source of embarrassment to innocent persons, who are the subject, source, or apparent source of the material in question, because it contains gossip and rumor or details of a personal nature having no significant connection with the assassination of the President;

(D) Would reveal material pertinent to the criminal prosecution of Jack Ruby for the murder of Lee Harvey Oswald, prior to the final judicial determination of that case.

Whenever one of the above reasons for nondisclosure may apply, your department should, in determining whether or not to authorize disclosure, weigh that reason against the overriding policy of the Executive Branch favoring the fullest possible disclosure.

Unless sooner released to the public, classified and unclassified material which is not now made available to the public shall, as a minimum, be reviewed by the agency concerned five years and ten years after the initial examination has been completed. The criteria applied in the initial examination, outlined above, should be applied to determine whether changed circumstances will permit further disclosure. Similar reviews should be undertaken at ten-year intervals until all materials are opened for legitimate research purposes. The Archivist of the United States will arrange for such review at the appropriate time. Whenever possible provision should be made for the automatic declassification of classified material which cannot be declassified at this time.

Assistant Attorney General
Office of Legal Counsel

Department of Justice
Washington, D.C. 20530

AUG 4 1975

Dr. James B. Rhoads
Archivist of the United States
National Archives and Records Service
General Services Administration
Washington, D. C. 20408

Dear Dr. Rhoads:

This is in response to your letter to the Attorney General of July 3, 1975 concerning the current review of Warren Commission records.

The FBI has designated Mr. Thomas Henry Bresson, Code 175, extension 5581 to participate in this review, and your staff may make arrangements with him to this end.

The guidelines which we furnished you in 1965 for making these reviews have been revised to the extent necessary to conform to the amended Freedom of Information Act, and a copy of the guidelines with these revisions is attached.

Sincerely,

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Enclosure

Note: Revised Guidelines are set forth below. No language has been deleted. Additional language is underscored.

GUIDELINES FOR REVIEW OF MATERIALS SUBMITTED TO THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY
(as reviewed and revised in light of 1974 Amendments to Freedom of Information Act)

1. Statutory requirements prohibiting disclosure should be observed.

2. Security classifications should be respected, but the agency responsible for the classification should carefully re-evaluate the contents of each classified document and determine whether the classification can, consistently with the national security, be eliminated or downgraded. See Attorney General's Memorandum on 1974 Amendments, pp. 1-4.

3. Unclassified material which has not already been disclosed in another form should be made available to the public on a regular basis or upon request under the Freedom of Information Act unless such material is exempt under the Act and its disclosure --

   (A) Would be detrimental to the administration and enforcement of the laws and regulations of the United States and its agencies;

(B) Might reveal the identity of confidential sources of information and impede or jeopardize future investigations by precluding or limiting the use of the same or similar sources hereafter;

(C) Would be a source of embarrassment to innocent persons, who are the subject, source, or apparent source of the material in question, because it contains gossip and rumor or details of a personal nature having no significant connection with the assassination of the President.

Whenever one of the above reasons for nondisclosure may apply, your department should, in determining whether or not to authorize disclosure, weigh that reason against the overriding policy of the Executive Branch favoring the fullest possible disclosure.

Unless sooner released to the public, classified and unclassified material which is not now made available to the public shall, as a minimum, be reviewed by the agency concerned five years and ten years after the initial examination has been completed, and in addition must be

reviewed whenever necessary to the prompt and proper processing of a Freedom of Information request. The criteria applied in the initial examination, outlined above, should be applied to determine whether changed circumstances will permit further disclosure. Similar reviews should be undertaken at ten-year intervals until all materials are opened for legitimate research purposes. The Archivist of the United States will arrange for such review at the appropriate time. Whenever possible provision should be made for the automatic declassification of classified material which cannot be declassified at this time.

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-2296

PAUL J. NIEMEIER,

Plaintiff-Appellant,

v.

WATERGATE SPECIAL PROSECUTION FORCE, and CHARLES F. C. RUFF, Special Prosecutor, Watergate Special Prosecution Force,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois.
No. 76 C 1244—Joseph Sam Perry, *Judge.*

ARGUED OCTOBER 5, 1977—DECIDED NOVEMBER 9, 1977

Before CASTLE, *Senior Circuit Judge,* SWYGERT and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* The primary issue presented in this appeal is whether an undisclosed portion of a memorandum to the Watergate Special Prosecutor from the Counsel to the Special Prosecutor is exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

I

Plaintiff requested from Watergate Special Prosecutor Charles F. C. Ruff a copy of the August 29, 1974, memorandum written by Philip Lacovara, then Counsel to the Special Prosecutor, and addressed to Leon Jaworski, then the Special Prosecutor. This request was denied initially on the ground that the Lacovara memorandum was governed by exemption five of the FOIA, 5 U.S.C. § 552(b)(5), which exempts from disclosure "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. . . ." The plaintiff sought reconsideration of this denial of his request and, upon reexamination, Special Prosecutor Ruff maintained that the memorandum was not subject to disclosure with the exception of one legal citation.[1]

The plaintiff then filed suit in the district court under the Freedom of Information Act seeking disclosure of the Lacovara memorandum. The district court concluded that the memorandum was exempt from disclosure under exemption five and therefore dismissed plaintiff's complaint for want of jurisdiction. Plaintiff appeals from that decision and our jurisdiction derives from 28 U.S.C. § 1291.

II

The Watergate Special Prosecution Force (WSPF) was organized as an independent investigatory and

[1] The pertinent part of Ruff's letter to plaintiff states:

> We have reexamined the memorandum from Mr. Lacovara to Mr. Jaworski which you have requested. Only one portion of that memorandum deals with the question of pre-indictment Presidential pardon, which is the matter discussed in the portion of the Jaworski letter quoted in the *Report*. In addition to the portion of the memorandum quoted in the Jaworski letter, there is one other sentence dealing with that subject. That sentence reads, "see, *e.g.*, *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380-81 (1867)." Thus, this is the only portion of the memorandum which is not exempt from disclosure under § 552(b)(5). If you wish to examine the non-exempt portion of the memorandum, please contact this office.

prosecutive agency[2] within the Department of Justice. The duties and responsibilities of the Watergate Special Prosecutor were set forth in a formal Department of Justice regulation[3] which provided that the Special Prosecutor was delegated by the Attorney General "full authority for investigating and prosecuting offenses against the United States" including "allegations involving the President."[4] Specifically, pursuant to this broad authority, the Special Prosecutor was to determine "whether or not to prosecute any individual . . . ."[5]

Plaintiff is concerned with the decision not to seek the indictment of former President Richard M. Nixon. It is clear that the above quoted regulations gave the Special Prosecutor full authority to press for criminal liability concerning President Nixon. Leon Jaworski, upon his resignation as Special Prosecutor in October of 1974, informed then Attorney General Saxbe of the WSPF decision not to seek indictment of President Nixon in a letter accompanying his letter of resignation. Mr. Jaworski therein stated his reasons for not seeking an

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[2] WSPF is clearly an agency for purposes of the FOIA. 5 U.S.C. § 551(1) defines an "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." WSPF had the requisite independent authority in exercising specific functions to be an agency under the FOIA. *See Koden v. Immigration and Naturalization Service*, No. 77-1500 (7th Cir. October 27, 1977); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

[3] Under authority of 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, the regulations were promulgated and appear at 38 Fed. Reg. 14688 (June 4, 1973). Sometime after the dismissal of Archibald Cox on October 20, 1973, these regulations were retroactively rescinded effective October 21, 1973. *See* 38 Fed. Reg. 29466 (October 23, 1973). The Office of Watergate Special Prosecutor was reinstated less than three weeks later under a regulation which, for our purposes, is identical with the original. *See* 38 Fed. Reg. 30738 (November 7, 1973). All references hereafter will be to this final regulation. The dismissal of Cox was subsequently held to be illegal in *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).

[4] 38 Fed. Reg. 30738 (November 7, 1973) (Appendix).

[5] *Id.*

indictment of President Nixon after Mr. Nixon received a "full, free and absolute" pardon from President Ford on September 8, 1974. Mr. Jaworski based this decision on the memorandum written by Philip Lacovara, which Mr. Jaworski stated was on file in the office of the Special Prosecutor and from which he quoted Lacovara's conclusion to the effect that to seek indictment of President Nixon after the pardon would be futile.[6] Both the Jaworski letter and the same portion of the Lacovara memorandum were subsequently quoted in the final

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[6] The letter from Jaworski to Saxbe provided, in relevant part, as follows:

> Although not appropriate for comment until after the sequestering of the jury in *United States v. Mitchell, et al.*, in view of suggestions that an indictment be returned against former President Richard M. Nixon questioning the validity of the pardon granted him, I think it proper that I express to you my views on this subject to dispel any thought that there may be some relation between my resignation and that issue.
>
> As you realize, one of my responsibilities, not only as an officer of the court, but as a prosecutor, as well, is not to take a position in which I lack faith or which my judgment dictates is not supported by probable cause. The provision in the Constitution investing the President with the right to grant pardons, and the recognition by the United States Supreme Court that a pardon may be granted prior to the filing of charges are so clear, in my opinion, as not to admit of doubt. Philip Lacovara, then Counsel to the Special Prosecutor, by written memorandum on file in this office, came to the same conclusion, pointing out that:
>
> > ". . . the pardon power can be exercised at any time after a federal crime has been committed and it is not necessary that there be any criminal proceedings pending. In fact, the pardon power has been used frequently to relieve federal offenders of criminal liability and other penalties and disabilities attaching to their offenses even where no criminal proceedings against the individual are contemplated."
>
> I have also concluded, after thorough study that there is nothing in the charter and guidelines appertaining to the office of the Special Prosecutor that impairs or curtails the President's free exercise of the constitutional right of pardon.

report of the WSPF of October, 1975, in the section entitled, "Actions Related To President Nixon's Possible Criminal Liability,"[7] which explained the WSPF reasons for not seeking the indictment of President Nixon.

III

We agree with the district court that the Lacovara memorandum must initially be regarded as a "predecisional intra-agency legal memorandum falling within the provisions of 5 U.S.C. § 552(b)(5) and therefore exempt from the compelled disclosure provisions of the Freedom of Information Act, as amended."[8] The decision in this case, however, does not rest there. Rather, plaintiff claims that this exemption is overridden by the fact that the Lacovara memorandum was expressly adopted or incorporated as part of a final disposition of the allegations of criminal liability of President Nixon and is therefore disclosable under 5 U.S.C. § 552(a)(2)(A).[9]

The relationship between exemption five and section (a)(2)(A) of the FOIA was addressed by the Supreme Court in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153-54 (1975):

> [W]ith respect at least to "final opinions," which not only invariably explain agency action already taken or an agency decision already made, but also constitute "final dispositions" of matters by an agency, . . . we hold that Exemption 5 can never apply.

Therefore, the initial question is whether the WSPF Report of October, 1975, can be regarded as such a final opinion.

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[7] WATERGATE SPECIAL PROSECUTION FORCE REPORT 119, 131-33 (October, 1975).

[8] Memorandum Order at 1.

[9] 5 U.S.C. § 552(a)(2)(A) requires an agency to make available for public inspection and copying "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."

The Court in *Sears* considered the question of what constitutes a "final opinion" made in the "adjudication of cases" within the meaning of 5 U.S.C. § 552(a)(2)(A). There, the concern was with Appeals Memoranda sent from the General Counsel to the Regional Director of the NLRB deciding whether or not to issue a complaint on the basis of a "charge" filed by a private party with the Board. The Court analyzed the meaning of "final opinion":

> The decision to dismiss a charge is a decision in a "case" and constitutes an "adjudication": an "adjudication" is defined under the Administrative Procedure Act, of which 5 U.S.C. § 552 is a part, as "agency process for the formulation of an order," 5 U.S.C. § 551(7); an "order" is defined as "the whole or part of a *final disposition* whether affirmative [or] negative . . . of an agency in a matter . . . ," 5 U.S.C. § 551(6) (emphasis added); and the dismissal of a charge, as noted above, is a "final disposition." Since an Advice or Appeals Memorandum explains the reasons for the "final disposition" it plainly qualifies as an "opinion"; and falls within 5 U.S.C. § 552(a)(2)(A).[10]

Concerning the possible criminal liability of President Nixon, the WSPF was given full authority, as quoted above in the regulations, to investigate and determine whether to prosecute allegations specifically involving the President. The Special Prosecutor was guaranteed complete independence and the Attorney General declared that he would "not countermand or interfere with the Special Prosecutor's decisions or actions."[11] The regulations further required that the Special Prosecutor "upon completion of his assignment submit a final report to the appropriate persons or entities of the Congress."[12] Thus, the WSPF Report was a required

[10] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 158 (1975) (emphasis in original).

[11] 38 Fed. Reg. 30738 (November 7, 1973) (Appendix).

[12] *Id.*

culminating act in the mandate of the WSPF to investigate, *inter alia*, allegations involving the President.[13]

The decision contained in the WSPF Report of October, 1975, not to seek indictment of President Nixon was as final a disposition as a decision by the WSPF could be, representing, as it did, an unreviewable decision regarding its mandate to investigate and prosecute allegations involving the President. Under these unique circumstances, we hold that the Watergate Special Prosecution Force Report of October, 1975, is a final disposition, as it relates to the charges concerning President Nixon, within the meaning of 5 U.S.C. § 552(a)(2)(A).[14]

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[13] The mandate of the WSPF from the Congress and the Attorney General regarding his possible criminal liability might be viewed as similar to the filing of a "charge" before the NLRB. The mandate was, at least in that portion, specifically directed and required action on the part of the WSPF to determine whether to seek President Nixon's indictment.

Moreover, the decision *not* to seek the indictment of President Nixon adds support to the claim that the Report is a final disposition. If indictment had been sought, litigation would have ensued, and the conclusion of the matter would have been in a judicial forum. Here, however, there will be no judicial opinion because further litigation has been foreclosed by the decision not to seek indictment. As the Court in *Sears*, 421 U.S. 132, 155 declared:

> In the case of decisions *not* to file a complaint, the Memoranda effect as "final" a "disposition," . . . as an administrative decision can—representing, as it does, an unreviewable rejection of the charge filed by the private party.

[14] An alternative and not unpersuasive claim by plaintiff is that the original letter by Jaworski to Saxbe quoting the Lacovara memorandum and explaining his reasons for not seeking the indictment of Mr. Nixon is itself a final disposition within the meaning of section (a)(2)(A). This letter can be analogized to the Advice Memoranda in *Sears*. Both began as internal communications (in *Sears* between the General Counsel and the Regional Director; here, between the Special Prosecutor and the Attorney General), but both became final dispositions when the decision was made not to proceed with the charges.

We wish to emphasize that we view our conclusion regarding this construction of 5 U.S.C. § 552(a)(2)(A) on the facts presented here to be very narrow. That is, although we hold on the facts of this case that the WSPF Report is a final disposition for purposes of the FOIA, we come to this conclusion "[w]ithout deciding whether a public prosecutor makes 'law' when he decides not to prosecute or whether memoranda explaining such decisions are 'final opinions' . . . ."[15]

IV

Concluding that the WSPF Report is a final disposition does not end our inquiry. Plaintiff does not seek the WSPF Report itself but rather requests the Lacovara memorandum which the WSPF Report quotes and relies on in explaining its decision not to seek President Nixon's indictment. Plaintiff argues that the Lacovara memorandum was expressly adopted or incorporated by reference into the WSPF Report, and must be disclosed as part of the "final disposition" of the allegations concerning Mr. Nixon despite the claim of a section five exemption.[16]

The Supreme Court in *Sears* also addressed the question of exemption from disclosure for memoranda incorporated by reference in non-exempt final disposition documents and the rule set forth there must initially guide us:

> Thus, we hold that, if an agency chooses *expressly* to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground

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[15] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 156 n.22 (1975).

[16] It is clear that the Lacovara memorandum is not merely a factual document which would probably be disclosable in the first place. *See EPA v. Mink*, 410 U.S. 73, 87-93 (1973).

that it falls within the coverage of some exemption other than Exemption 5.[17]

It is not disputed that the WSPF Report expressly adopted the Lacovara memorandum, at least in part, since it is quoted in the Report along with the Jaworski letter stating that the memorandum is on "file in this office."[18] Defendants do not deny that part of the Lacovara memorandum was adopted by the WSPF Report but rather contend that the only portion adopted is the one that is quoted in both the Jaworski letter and the WSPF Report, together with an additional legal citation which was disclosed to plaintiff.[19] On this basis defendants claim that the rest of the memorandum must be regarded as exempt from disclosure under section five. We disagree.

More than the mere quotation of a legal memorandum is involved here.[20] The WSPF Report adopts not only the

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[17] 421 U.S. 132, 161 (1975) (emphasis in original). The same rule would apply if it was determined that the Jaworski letter, not the WSPF Report, must be regarded as the final disposition in this case.

[18] WSPF REPORT at 132.

[19] *See* note 1, *supra*.

[20] Indeed, the cases relied on by defendants do not even involve the quotation of material from agency memoranda. *Fisher v. Renegotiation Board*, 473 F.2d 109, 115 (D.C. Cir. 1972) and *International Paper Co. v. Federal Power Commission*, 438 F.2d 1349, 1359 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971), involved predecisional legal memoranda which had not been relied upon, quoted in, or referred to in the final agency disposition.

The district court cited *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974), as support for its denial of disclosure in this case. The issue raised there, however, did not relate to the incorporation of a legal memorandum into an agency final opinion. Rather, the question was whether evidence summaries prepared by Environmental Protection Agency assistants were "factual" and thereby disclosable under *EPA v. Mink*, 410 U.S. 73 (1973), or "deliberative" and thereby within exemption five.

(Footnote continued on following page)

quotation from the memorandum, but also the statement that the Special Prosecutor's decision was consistent with the conclusions reached by Mr. Lacovara and thereby gained support therefrom. Moreover, the WSPF Report contains the statement that the memorandum was on file in the office of the Special Prosecutor. These circumstances imply that scrutiny of the memorandum as a whole is invited in order to assess the strength of the reasoning that was behind the quoted legal conclusions.

In a case such as this where an underlying memorandum is expressly relied on in a final agency dispositional document, even though only part of it is expressly reproduced, we hold that a presumption in favor of disclosability of the memorandum as a whole is created. This presumption is subject to rebuttal by the agency challenging disclosure upon the showing that other portions of the memorandum fall within the coverage of some exemption other than exemption five. The creation of this rebuttable presumption is consistent with *Sears* and with the purpose of the FOIA to allow maximum disclosure subject only to specified limited exceptions.[21]

In the instant case, defendants do not claim that the material in the remainder of the Lacovara memorandum falls within a separate statutory exemption.

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[20] *continued*

Moreover, in dictum relating to the question of incorporation, the *Montrose* court, 491 F.2d 63, 70 (D.C. Cir. 1974), declared:

> [T]his case is distinctly different from FOIA cases where a decision-maker has referred to an intra-agency memorandum as a *basis* for his decision. In such cases this court has required disclosure of the memoranda, for, once adopted as a rationale for a decision, the memorandum becomes part of the public record.

(Emphasis in original and footnote omitted).

[21] The purpose of the FOIA is "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. REP. No. 813, 89th Cong., 1st Sess., at 3 (1965). *See generally EPA v. Mink*, 410 U.S. 73, 79-80 (1973).

Rather, they contend that further disclosure would impinge the attorney-client privilege and reveal the decision-making process of the WSPF. These are the basic policies that underlie exemption five of the FOIA.[22] We conclude, however, as discussed below, that the policies underlying exemption five are not persuasive in supporting nondisclosure of the remainder of a memorandum which is relied upon in final disposition of a case. This conclusion supports our holding that exemption five must be regarded as inapplicable in the present case.

With regard to the attorney-client privilege, this doctrine applies where litigation is contemplated and the document represents attorney work product.[23] Where litigation is foreclosed as an option and the agency expressly chooses to make use of legal memoranda in its final decision, this choice eliminates any claim of attorney work product privilege for the expressly adopted document.[24] Under these circumstances, such documents "are not the ideas and theories which go into

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[22] Regarding the attorney-client privilege, *see* S. REP. No. 813, at 2; as to preservation of the integrity of the deliberative process, *see* S. REP. No. 813, at 9; H.R. REP. No. 1497, at 10.

[23] Although the attorney-client privilege is broader than simply the work product privilege, this narrower aspect was the focus in *Sears* and relates more closely to the FOIA than the broad privilege for all communications between attorney and client. *See generally Hickman v. Taylor*, 329 U.S. 495 (1947); *Kent Corp. v. NLRB*, 530 F.2d 612 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976). As to the relationship between the broad and narrow aspects of the attorney-client privilege, *see Mead Data Central, Inc. v. U.S. Dept. of the Air Force*, No. 75-2218 (D.C. Cir. August 30, 1977). It is not necessary to decide here, as the Court did in *Mead*, the relationship of the privilege to the work of agency staff attorneys as compared to the work of private attorneys.

[24] *See American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969).

the making of the law, they are the law itself, and as such should be made available to the public."[25]

Likewise, defendants' contention that disclosure will reveal the underlying decision-making processes of the agency, with consequential inhibiting effects, must fail when a memorandum is adopted by an agency as part of its final disposition. The Court in *Sears* answered that claim in this manner:

> The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, *if adopted*, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes *its* responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports [disclosure].[26]

In summary, while we agree with the district court that the Lacovara memorandum must initially be regarded as nondisclosable under exemption five, the memorandum lost this exempt status when it was quoted and expressly adopted or incorporated by reference by the WSPF Report, which must be regarded as the final disposition of the allegations involving former President Nixon. Moreover, since we conclude that the WSPF Report expressly adopts or incorporates the whole Lacovara memorandum, that memorandum must be considered presumptively disclosable, subject to any claim of other applicable exemptions. No other exemptions have been shown to be applicable here. Therefore, the Lacovara memorandum must be disclosed

[25] *Sterling Drug, Inc. v. F.T.C.*, 450 F.2d 698, 708 (D.C. Cir. 1971). *Accord, American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969).

[26] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975).

and the district court is instructed, pursuant to 5 U.S.C. § 552(a)(4)(B), the enjoin defendants from withholding the Lacovara memorandum and to order the production of this memorandum which was improperly withheld from plaintiff.

REVERSED AND REMANDED.

A true Copy:
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Clerk of the United States Court of Appeals for the Seventh Circuit

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