

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

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

MOTION FOR LEAVE TO FILE
REPLY BRIEF WITH ADDENDUM

On February 22, 1978, appellant lodged copies of his reply brief with the Clerk of the Court. Because the reply brief contains an addendum, appellant's counsel was advised by the Clerk's Office that he would have to file a motion for leave to file the brief with an addendum.

Accordingly, for the grounds set forth below, appellant hereby moves the Court for leave to file his reply brief with the addendum which is presently affixed to the copies lodged with the Court and served on opposing counsel.

This case is a Freedom of Information Act suit by author-critic Harold Weisberg for disclosure of two Warren Commission executive session transcripts and eleven pages of a third. The June 23, 1964 transcript and pages 63-73 of the January 21, 1964 transcript were

found to be nondisclosable under Exemption 3 as the result of CIA affidavits alleging that their release would endanger the national security by disclosing "intelligence sources and methods" required to be protected by the Director of Central Intelligence under 50 U.S.C. §403(d)(3). Weisberg contends that the affidavits, which were accepted by the District Court at face value, are not credible. He points out that in a previous suit for the January 27, 1964 Warren Commission executive session transcript the GSA claimed that it was exempt under 5 U.S.C. §552(b)(1) and submitted affidavits which swore that it was properly classified under Executive Order 11652. When the District Court ruled that the GSA had not shown that the transcript had been properly classified but that the transcript was exempt from disclosure under Exemption 7, the GSA dropped the Exemption 7 claim before Weisberg could appeal the case and made the transcript public. Once public its text showed that there never was any basis for classifying it Top Secret but that it was embarrassing to the CIA because, among other reasons, the former Director of the CIA, Allen Dulles, told the Warren Commission that CIA agents would lie to everybody, even if placed under oath.

Weisberg argued in the District Court that the available evidence indicates that the claims that the release of the June 23 and January 21 transcripts are fraudulent in this case as well. He points out that during the limited discovery he was accorded in this case he learned, for the first time, that the January 27 transcript had been withheld by the CIA on the same grounds, to protect "intelligence sources and methods," which are now asserted in this case.

The District Court denied Weisberg his most effective means of discovery, depositions and instructed him to proceed with interrogatories. However, the GSA and the CIA (the real-party-in-interest in this case) obstructed and evaded the discovery Weisberg sought to obtain through interrogatories and the District Court, instead of proceeding to trial as it had originally promised Weisberg it would if the discovery obtained by interrogatories proved inadequate, simply accepted the ipse dixit of the CIA and awarded the GSA summary judgment with respect to the June 23rd and January 21 transcripts.

On appeal Weisberg contends he was denied the opportunity to effectively test the government's affidavits. He contends, among other things, that the discovery he tried to obtain would show that the government's affidavits were untrue and that both the GSA and the CIA are suffused with personal antagonism against him to the extent that they deliberately withhold nonexempt government records from him. The personal bias against him permeates the responses of these two agencies to his information requests to such an extent that their affidavits are suspect on that grounds alone.

Many of the addendums attached to Weisberg's reply brief are government records which have been obtained by Weisberg and another requestor, Mr. Howard Roffman, now law clerk to Fifth Circuit Court of Appeals' Judge Bryan Simpson, since the District Court granted summary judgment in favor of the GSA. These records show, inter alia, that the GSA and other government agencies have colluded to violate Weisberg's rights by denying him access to records which were not exempt under the Freedom of Information Act.

Because of the varied nature of the addendums, a brief explanation of each is set forth below.

Addendum 1 is a newspaper clipping from the Washington Star on a new book on the assassination of President Kennedy which claims that a Russian defector, Yuri Ivanovich Nosenko, who is the subject of the June 23rd transcript sought by Weisberg, was believed by the CIA to have been a phony sent to cover up Oswald's links to Soviet intelligence and that the CIA's suspicions were "smothered" by FBI Director J. Edgar Hoover. In an affidavit submitted to the District Court several months ago, Weisberg informed it that this disinformation operation was in the works and suggested that it might well explain the extraordinary lengths to which the GSA and CIA have gone to delay, obstruct, and deny him access to the June 23rd transcript. In the Court below the GSA initially refused to identify the subject of the June 23rd transcript on the grounds that it would reveal security classified information. The GSA admitted that this was untrue after Weisberg produced proof that Nosenko was known to be the subject, and the GSA had in fact so written the New Republic.

Addendum 2 is a newspaper clipping from the Washington Post of February 19, 1978 which reports that the CIA conducted experiments which show that people can be hypnotized to commit murder. Although Weisberg made a FOIA request for these records long ago, they have not been provided him. Weisberg had intended to cite this as an example of the discrimination against him by the CIA, but because of

the time pressure under which the reply brief was written, his counsel forgot to mention it.

Addendum 3 is a recently obtained FBI memorandum to Cartha DeLoach, then the Number 3 man in the FBI hierarchy, which shows that the FBI's policy of not responding to Weisberg's information requests was approved at the highest levels.

Addendum 4 is another memorandum to DeLoach which shows that when the Department of Justice finally conceded that it could not successfully defend against Weisberg's Freedom of Information Act suit to obtain copies of public court records, the Department advised the FBI that because it "did not wish Weisberg to make a profit from his possession of the documents," it decided to make "similar copies available to the pre-s and others who might desire them." Thus, the personal antipathy against Weisberg extends not only the FBI, but the Department of Justice as well.

Addendum 5 is a recently obtained internal memorandum of the National Archivist, Dr. James B. Rhoads. The memorandum shows that the Archives withheld from Weisberg parts of the January 27 transcript published in Portrait of the Assassin, coauthored by Gerald Ford, because: "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." Thus, this demonstrates both wrongful withholding by the GSA, the defendant in this case, and improper motive for withholding. It and Addendums 6-10, all obtained by Weisberg since the conclusion

of the proceedings in the District Court, refute the Government's assertion that Weisberg's claims of bad faith are "frivolous" and "unsupportable". (Brief for Appellee, page 29)

Addendums 6 and 7 show that the National Archives, the Secret Service, and the Department of Justice are colluded in denying Weisberg access to the Memorandum of Transfer which he had requested under the Freedom of Information Act. Although the Secret Service admitted in its correspondence with the National Archives that it had "no grounds upon which to refuse making the item available to Mr. Weisberg," it transferred it to the National Archives which then withheld it from him.

Addendum 8 is a recently obtained GSA memorandum which states that Mr. Garfinkel, the GSA's counsel, "apparently feels that it is the better legal procedure to give all possible reasons for withholding documents in the beginning, even if you withdraw one or more documents on appeal, than to be in the position of having to produce an additional reason on appeal." Its significance to this case lies in the fact that when Weisberg originally requested the January 21 and June 23rd transcripts, the government did not assert Exemption 3, the only grounds on which the District Court ordered those transcripts withheld. Similarly, when Weisberg first requested the May 19 transcript, the government did not assert Exemption 5, the only ground on which the District Court, after in camera inspection, found that transcript to be nondisclosable. Thus, this helps demonstrate that the grounds upon which the transcripts at issue have been held to be nondisclosable are pretextual.

Addendum 9 is a recently obtained GSA memorandum which shows the nature of what was discussed at the the May 19, 1964 Warren Commission executive session. Other documents which bear on this were previously made public by the Archives and were made part of the record in the court below. [See JA-237/257]

Addendum 10 is a recently obtained GSA memorandum which shows that the GSA conducted a classification review of Warren Commission materials in 1972 and that this review "revealed that they are generally overclassified when classification is at all warranted." Weisberg sought to take depositions which would exploit a possible difference of opinion as to the classifiability or classification level of the transcripts at issue in this case, but the District Court refused to allow it, while promising a trial if his preferred method, interrogatories, proved inadequate. Weisberg got neither the answers to his interrogatories not the promised trial.

Addendum 11 are a few selections from KGB, by John Barron. KGB is a book about Russian defectors, including the subject of the June 23 transcript, Nosenko, which had the cooperation and assistance of the CIA. The contents of the selected pages cast the severest doubts, indeed refute, the allegations in the affidavits which the CIA submitted to the District Court.

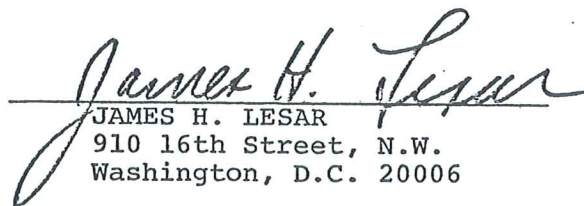
Addendum 12 is the entire transcript of the Warren Commission executive session held on January 22, 1964. The Archives originally denied the existence of a transcript for this transcript. When Weisberg made a Freedom of Information request for it in 1975, under

the Amended Act, the Archives had a transcript typed up from the stenotypist's notes. Like all Warren Commission executive session transcripts, it was originally classified Top Secret without regard to content. Although it never warranted such classification, it is a horrifying transcript because it reveals that the Warren Commission's fear of confronting FBI Director J. Edgar Hoover head on about rumors that Oswald had worked for the FBI caused it to simply endorse the FBI's predetermined "solution" to the crime and go home. The ominous message of this transcript is that none of our institutions can maintain its integrity until this nation can free itself from the tactics of disinformation, blackmail, and unlawful use of power by intelligence agencies. Because the Freedom of Information Act was meant to end this situation, Weisberg felt that the transcript should be brought to this Court's attention and it's import carefully studied. Weisberg contends that uncritical acceptance of the affidavits submitted by intelligence agencies will undermine the integrity of the courts just as effectively as the Warren Commission's integrity was subverted by them. So, too, will the public mind be subverted if citizens cannot avail themselves of the Freedom of Information Act's promise that they will be able to obtain all information which does not endanger the national security.

Addendum 13 is a selection of interrogatories and responses to interrogatories in the case below. Most of these are contained in the Joint Appendix, but a number of interrogatories to which no answers were received but which are not contained in the Joint Ap-

pendix have been reprinted here and are referred to in the Reply Brief. The inclusion of interrogatories and responses to interrogatories which were previously reproduced at different places in the Joint Appendix was done for the convenience of the Court in referring to them. This addendum is the only one which is a part of the record below.

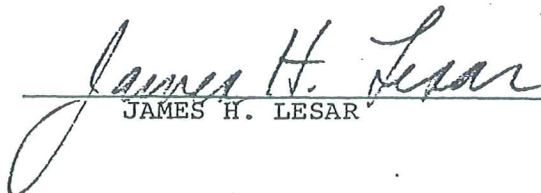
Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of February, 1978 mailed a copy of the foregoing Motion for Leave to File Addendum with Reply Brief to Leonard Schaitman and LINDA M. COLE, attorneys, Appellate Section, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.


JAMES H. LESAR