

JL, re DJ Motion for Reconsideration of Award of Costs HW 4/29/79

Because I was tired and perhaps did a bit much outside work today I read a bit after you left, had supper, started to read the Motion and then decided to write you about it. I'll be reading some for the first time when I comment.

They admit that FOIA authorized courts to assess both attorney's fees and other litigation costs if "the complainant has substantially prevailed."

They do not cite any means of establishing how or where or when the complainant "substantially prevails" and the Act does not specify. This means that wherever, however or whenever, as long as complainant substantially prevails.

They pretend that the Act requires that it be "on the merits of their lawsuits."

This cannot be because the Government could negate the Act by capitulating when it becomes apparent that complainant may prevail and this defraud the complainant and the attorney of repayment.

I believe their language is imprecise when they claim that "the only legal issue which was presented for decision" by the appeals court is the 5/19 transcript. The case that went to the appeals court included the two transcripts they gave me on the last day before their brief was due. So the issue present was all the transcripts. They permitted one to remain by capitulation.

By their reasoning 5,000 pages could be provided, the withholding of one page could be appeals, the complainant could lose on that one page and he would not have "substantially prevailed."

They argue next that they have always insisted that they released the two transcripts "in connection with a Congressional inquiry" and that, I add emphasis, "The plaintiff has presented no evidence to the contrary."

I did "present" evidence that there is no connection between the Congressional testimony, every word I heard, and the content of the two transcripts. Whether the affidavit remains in the record or not I did "present" it and they did not make even pro forma denial.

Moreover, my affidavit went into the times, as I recall, and there was no time relationship between the making available of information to the committee and the time of wither decision to disclose or disclosure. If they claims are true then they still did not provide the records at the time of the alleged changing of the situation vis-a-vis HSCA. It was ever so much later. (10-day law.)

There was no "commercial benefit to the plaintiff," as they certainly know. I gave the two transcripts away within a few minutes after getting them, as soon as I could make copies, and gave them to the press and my "competitors." My sole interest under these circumstances quite obviously is a public service interest. In fact I had made this undertaking to the press shortly after I filed the suit.

My recollection of the Government's representations when they disclosed the transcripts is that they do not include any citation of any content that was presented to the committee and there assuredly was none that was used by the committee.

The CIA testimony ~~was~~ limited in a manner you can ridicule beautifully: to confessing that their treatment of Nosenko was the worst thing the CIA ever did. But the Briggs(?) affidavits says his treatment was to be a "model" to attract other defectors hence the transcript could not be disclosed. Besides, it would get him killed, they said. There is no such content in the transcript.

"...the Government's legal basis for withholding the documents in question." This makes them very ~~low~~ vulnerable because it turns out there is and was no legal basis, only fraudulent misrepresentation under oath.

With the content of the transcripts now known it is indecent and an imposition on the trust of the courts for them to claim that by awarding me the return of costs, when the Act provides for it, that such ~~an~~ awards could "spawn otherwise unnecessary appeal." They caused the unnecessary appeal by fraudulently misrepresenting the content of the two transcripts.

They have laid a very fine foundation for asking for attorney's fees and other costs and for discovery and for further appeal in their close on page 4. They say the District court should "conduct the multifaceted inquiry contemplated " in several decisions.

I think you should give serious thought to raising questions about the truthfulness of their representations and the fact that there is no proof of any of their representations whereas I did provide an unquestioned affidavit.