

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

U.S. Court of Appeals
OCT 10 1978
GEORGE A. FISHER
CLERK

HAROLD WEISBERG,)
)
Plaintiff-Appellant,)
)
v.)
)
GENERAL SERVICES ADMINISTRATION,)
)
Defendant-Appellee.)

No. 77-1831
No. 78-1731
Consolidated

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M-16

MOTION FOR PARTIAL DISMISSAL OF THE APPEAL IN
NO. 77-1831 AND FOR COMPLETE DISMISSAL OF THE
APPEAL IN NO. 78-1731 ON GROUNDS OF MOOTNESS.

Defendant-Appellee, the General Services Administration,
hereby advises the Court that two of the three contested
documents in this Freedom of Information Act litigation have
been declassified and will be released to the Plaintiff-
Appellant as soon as possible. The reasons for the declassifi-
cation are set forth in the attached letters of James E.
O'Neill, Acting Archivist of the United States and from Anthony A.
Lapham, General Counsel to the Central Intelligence Agency.

As a result of the declassification, the General Services
Administration respectfully requests this Court to dismiss the
following portions of the appeal in No. 77-1831 as moot:

1. Whether the newly released documents are
exempt from disclosure under 5 U.S.C.
§552(b)(1).
2. Whether the newly released documents are
exempt from disclosure under 5 U.S.C.
§552(b)(3).
3. Whether 5 U.S.C. §552(b)(3) provides a
basis for withholding which is independent
of 5 U.S.C. §552(b)(1).

4. Whether the District Court abused its discretion in declining to inspect the newly released documents in camera.
5. Whether the District Court abused its discretion in requiring the Plaintiff-Appellant to obtain discovery regarding the newly released documents by means of interrogatories instead of by means of tape recorded depositions.

The General Services Administration also requests this Court to dismiss the appeal in No. 78-1731 in its entirety. The sole issue presented in that appeal is whether the District Court abused its discretion in denying the Plaintiff-Appellant's motion for a new trial on the question of access to the newly released documents.

Finally, the General Services Administration notes that the following issues presented in No. 77-1831 are not moot and should not be dismissed:

1. Whether the third contested document, the Warren Commission transcript of May 19, 1964, is exempt from disclosure under 5 U.S.C. §552(b)(5).
2. Whether the third contested document is exempt from disclosure under 5 U.S.C. §552(b)(6).
3. Whether the District Court made the 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."

All three issues are fully explored in the briefs filed in No. 77-1831.

In support of this motion, the Defendant-Appellee states as follows:

1. This litigation arises under the Freedom of Information Act, 5 U.S.C. §552 et seq. Plaintiff-Appellant, Harold Weisberg, seeks access to three transcripts of the Warren Commission's executive sessions dated January 21, 1964, June 23, 1964 and May 19, 1964. Defendant-Appellee, the General Services Administration, operates the National Archives and Records Service, the primary custodian for materials generated by the Warren Commission.

2. At the request of the Central Intelligence Agency, the Archives withheld the January 21 and June 23 transcripts under Exemptions 1 and 3 to the Freedom of Information Act, 5 U.S.C. §552(b)(1) and (3). Those transcripts contain information about Soviet defectors which the CIA had provided to the Warren Commission.

3. On its own initiative, the Archives withheld the May 19 transcript under Exemptions 5 and 6 to the Freedom of Information Act, 5 U.S.C. §552(b)(5) and (6). That transcript involves the possible discharge of Warren Commission employees as a result of allegations about their personal lives.

4. On the basis of affidavits filed by the CIA, the District Court ruled that the January 21 and June 23 transcripts were privileged from disclosure under Exemption 3. The Court did not rule on the Exemption 1 claim.

5. On the basis of an in camera inspection, the District Court ruled that the May 19 transcript was privileged from disclosure under Exemption 5. The Court did not rule on the Exemption 6 claim.

6. The appeal in No. 77-1831 followed. All of the briefs were filed as of February 22, 1978. However, on that date, the Plaintiff-Appellant also attempted to file a fifty page addendum with his reply brief consisting entirely of extra-record material which allegedly proved his contentions regarding the transcripts of January 21 and June 23.

7. The government objected to the filing of the addendum and suggested that the proper method for bringing extra-record material to the attention of the federal judiciary was by filing a motion for a new trial in accordance with Rule 60(b) Fed. R. Civ. P. This Court agreed and, on March 31, 1978, directed the Plaintiff-Appellant to present his alleged new evidence to the District Court.

8. On April 18, 1978, the Plaintiff-Appellant filed his Motion for a New Trial. The government opposed the motion on the grounds that the material which the Plaintiff-Appellant had brought to the attention of the Court constituted hearsay and was irrelevant to the question of whether the January 21 and June 23 transcripts were privileged from disclosure under Exemption 3. On May 12, 1978, the District Court denied the Plaintiff-Appellant's motion.

9. The appeal in No. 78-1731 followed and was consolidated with the prior appeal. The Plaintiff-Appellant filed his opening brief contesting the District Court's refusal to accord him a new trial on September 11, 1978.

10. On September 15, 1978, the House Committee on Assassinations summarized a report dealing with the Soviet defector Yuri Nosenko. Because this report was based upon classified information which the CIA had provided to the Committee under a pledge of confidentiality, it was submitted to the agency for prior clearance. The Director of Central Intelligence reviewed the report within two days of receipt and agreed to declassify the draft. The Director also made Mr. John Hart, an expert in Soviet intelligence and counter-intelligence, available to testify before the Committee. A partial transcript of the hearings at which the report was summarized and at which Mr. Hart testified is attached to this motion.

11. As a result of the Director's decision concerning the scope of the disclosures to be made at the September 15 hearing, the CIA conducted a classification review of the January 21 and June 23 transcripts at issue in these appeals. On October 11, 1978, the CIA informed the Department of Justice that, in view of the testimony given at the hearing, the agency no longer deemed it appropriate to withhold the transcripts. (Letter dated October 11, 1978).


12. On October 12, 1978, the General Services Administration informed the Department of Justice that it had withheld the transcripts of January 21 and June 23 solely at the request of the CIA and that it had no independent reason to contest disclosure. The GSA did, however, inform the Department that it would continue to withhold the May 19 transcript. (Letter dated October 13, 1978).

13 Both the Central Intelligence Agency and the General Services Administration have assured the Department of Justice that copies of the two newly released transcripts will be forwarded to the Plaintiff-Appellant as soon as possible. (Letters dated October 11 and October 13, 1978).

For the foregoing reasons, the Defendant-Appellee respectfully requests the Court to dismiss the appeal in No. 77-1831 in part and to dismiss the appeal in No. 78-1731 in its entirety.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 1978, I served the foregoing Motion For Partial Dismissal Of The Appeal In No. 77-1831 and For Complete Dismissal Of The Appeal in No. 78-1731 On Grounds Of Mootness upon counsel by mailing a copy, postage prepaid, to:

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