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

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

APPELLEE'S OPPOSITION TO APPELLANT'S
MOTION FOR AN AWARD OF COSTS

Appellant, Harold Weisberg, has moved for an award of costs in this Freedom of Information Act suit, claiming that he has "substantially prevailed" on the merits and that various "equitable" factors warrant imposing his costs upon the government. Appellee, the General Services Administration, opposes the motion on the grounds that the government prevailed on the merits of this suit. In addition, Appellee notes that the "equitable" considerations presented in Appellant's motion are without basis in fact.

1. The sole legal issue which was presented to this Court was whether the District Court had erred in holding that the Warren Commission transcript of May 19, 1964 was properly withheld under Exemption 5 to the Freedom of Information Act. On March 15, 1979, this Court affirmed the judgment below "for the reasons stated by the District Court." It is thus clear that the government prevailed on the merits of that issue.

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2. The legal issues which were presented to the District Court also involved the Warren Commission transcripts of January 21 and June 23, 1964. The District Court ruled that the government had properly withheld those transcripts from disclosure under Exemption 3 to the Freedom of Information Act. During the pendency of this appeal, the Central Intelligence Agency made voluntary disclosure of those two transcripts and the Department of Justice moved to dismiss the issues relating to those documents as moot. The Motion for Partial Dismissal, the Reply to Appellant's Opposition to the Motion for Partial Dismissal and the supporting exhibits clearly demonstrate that the release of these transcripts had nothing to do with Appellant's FOIA request and subsequent lawsuit. Rather, the documents were released in response to an independent request for assistance from the Congress of the United States, a request which was personally considered and acted upon by Director Stansfield Turner. On January 12, 1979, this Court granted the government's motion to dismiss over the Appellant's objections.

3. The contention that the government "fraudulently" withholds material from the Appellant on a systematic basis was first raised in the Reply Brief. To support his contention, Appellant made reference to a 49 page addendum of factual material which had never been submitted to the District Court. The government moved to strike the reply brief. This Court agreed with the government's position that new factual material

could not properly be presented on appeal and that the appropriate course of action would be for Appellant to file a motion for a new trial under Rule 60(b) on grounds of newly discovered evidence. Accordingly, on March 31, 1978, this Court remanded the case to the District Court for consideration of Appellant's allegations and his "newly discovered evidence." The District Court considered the question and concluded that "no newly discovered evidence, fraud or misrepresentation warrants a new trial herein." Order dated May 12, 1978, p. 2. The Court further stated that it did not find "any 'disinformation campaign' or discrimination against plaintiff by government agencies relating to plaintiff's FOIA requests which would warrant disclosure of the documents contested herein." Order dated May 12, 1978, p. 3. Accordingly, Appellant's equitable argument based upon the government's "fraudulent" conduct and "bad faith" is based upon factual assertions which were completely discredited in District Court after a full adversary hearing.

4. Appellant's contention that the government should always pay his costs, win or lose, because of his financial status runs directly counter to the provisions of Rule 39 F.R.A.P. It also runs directly counter to the provision of the Freedom of Information Act which only authorizes the recovery of costs against the United States by litigants who have "substantially prevailed" on the merits of the suit. 5 U.S.C. § 552(a)(4)(E).

For the foregoing reasons, Appellant's Motion For An Award Of Costs should be denied. Costs should be awarded to the Appellee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 1979, I served the foregoing Motion upon counsel by mailing a copy, postage prepaid, to:

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