UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

V.

Civil Action No. 78-0249

CLARENCE M. KELLEY, et al.,

Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff seeks by this motion to compel the defendants to provide him and this Court with a detailed and specific justification, itemization, and indexing of all documents, or portions thereof, which are within the scope of his FOIA request but which have not been given to him. This is required by law. Vaughn v.

Rosen, 484 F. 2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). See Ash Grove Cement Co. v. FTC, 5111 F. 2d 815 (D.C.Cir. 1975); Pacific Architects & Engineers, Inc. v. Renegotiation Board, 505 F. 2d 383 (D.C.Cir. 1974); Cuneo v. Schlesinger, 484 F. 2d 1086 (D.C.Cir. 1973), cert. denied sub nom. Rosen v. Vaughn, 415 U.S. 977 (1974).

The Freedom of Information Act provides for <u>de novo</u> review by the district court of agency claims that requested information is nondisclosable. Moreover, the burden of proof rests on the government. The government cannot meet this burden merely by filing conclusory allegations that the materials sought are exempt. Rather, as the Court of Appeals has stated, this requires a thorough and specific justification for the withholding of requested records:

... the $\underline{\text{Vaughn}}$ and $\underline{\text{Cuneo}}$ decisions mandate more than $\underline{\text{mere indexing of}}$ allegedly exempt documents. They contemplate a procedure whereby

the agency resisting disclosure must present a "detailed justification" . . . for application of the exemption to the specific documents in dispute. Pacific Architects & Engineers, Inc. v. Renegotiation Board, supra, 505 F. 2d at 385 (citation omitted).

Vaughn recognized that "it is anomalous but obviously inevitable that the party with the greatest interest in obtaining
disclosure is at a loss to argue with desirable legal precision
for the revelation of the concealed information . . . 484 F.

2d at 823-824. To avoid shifting the burden of proof from the
agency to the plaintiff, the Vaughn court mandated a procedure
which allows the lawsuit to proceed efficiently in the traditional
adversary manner.

The need to use the <u>Vaughn</u> procedure in order to properly resolve the issues present in the instant case has become especially apparent since the government filed the affidavit of Bradley Benson and since plaintiff has filed the affidavits and exhibits which he attached to his motions for reconsideration and to vacate this Court's order of October 25, 1978 and set a schedule for discovery. In the first place, it now cannot be denied that there are records which are plainly within the scope of plaintiff's request which the defendants have not provided him. Secondly, plaintiff has demonstrated that the affidavits which the defendants have submitted to the Court are obfuscatory, misleading, and untrue.

Plaintiff has shown this most thoroughly with respect to the defendants' Exemption 1 claims, where it is now apparent that the purportedly classified information which has been withheld from him was not classified at the time of origination as required by Executive Order 11652. Other records have been withheld under other claims of exemption. However, these claims also require

that the government make specific factual showings. For example, defendants' reliance on Exemption 7(D) requires detailed proof of a number of points with respect to records which are claimed to fall within this exemption: (1) that disclosure would disclose the identity of a confidential source; (2) that the source is in fact a confidential source; and (3) if defendants allege that the record was compiled in the course of a criminal investigation or a lawful national security intelligence investigation, (a) that there was an actual criminal investigation or lawful national security intelligence investigation in progress; (b) that the information in the record is in fact confidential; (c) that such confidential information was furnished only by a confidential source; and (d) that the source was in fact a confidential source. A Vaughn showing is necessary if the government is to meet its burden on these point, especially since its affidavits have now been discredited. Such information is also essential if plaintiff is to have any opportunity to effectively subject the government's claims to adversarial testing.

Respectfully submitted,

JAMES H. LESAR 910 16th Street, N.W., #600

Washington, D.C. 20006

Phone: 223-5587

Attorney for Plaintiff

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1	
	HAROLD WESIBERG,
	Plaintiff,
Same and deposit	v. Civil Action No. 78-0249
The same of the same of	CLARENCE M. KELLEY, et al.,
	Defendant :
Contract when the said	Defendant
-	
-	
-	<u>ORDER</u>
STATE OF STREET, ST.	Upon consideration of Plaintiff's motion to require a detaile
department of the last	justification, itemization and indexing under Vaughn v. Rosen,
	484 F. 2d 820 (D.C.Cir. 1973), defendants' opposition thereto, and
and the same of the same	the entire record herein, it is by the Court this day
The last own resident	of, 1979, hereby
-	ORDERED, that defendants shall file in this Court and deliver
Comment of the local	to plaintiff and his counsel no later than, 1979, a
A COMPANDED BOOK	detailed justification of each document, or portion thereof, not
-	heretofore provided to plaintiff which defendant alleges to be
-	exempt from disclosure under the Freedom of Information Act,
State President	5 U.S.C. § 552, as amended, including an itemized index of the
Total season or the Persons with	records, or portions thereof, which are claimed to be exempt, cor-
the second second second	relating specific statements in such justification with actual
Accession in passages	portions of the requested documents as required by Vaughn v. Rosen
CANADA MANAGEMENT CONT.	484 F. 2d 820 (D.C.Cir. 1973).
Character Spirit Sales in William	
-	

UNITED STATES DISTRICT COURT