

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

RECEIVED

MAR 29 1979

CLERK OF THE UNITED
STATES COURT OF APPEALS

.....
HAROLD WEISBERG,

Plaintiff-Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Defendant-Appellee
.....

Case No. 77-1831
Case No. 78-1731
Consolidated

APPELLANT'S MOTION FOR AWARD OF COSTS

Comes now the appellant, Mr. Harold Weisberg, and pursuant to Federal Rule of Appellate Procedure 39, and section (a)(4)(E) of the Freedom of Information Act, 5 U.S.C. §552, moves the Court for an award of costs in the amount of \$ 522.06. As grounds for his motion, appellant states to the Court as follows:

The above cases arise out of the same Freedom of Information Act case in district court, Civil Action No. 75-1448, and are inextricably bound together. At issue in the district ^{court} and in Case No. 77-1831 were three Warren Commission executive session transcripts. When Weisberg filed his Reply Brief he attached some new evidence materials bearing on the government's claims that two transcripts--those of January 21 and June 23, 1964--were properly

classified pursuant to Executive order and therefore exempt from disclosure under 5 U.S.C. § 552(b)(1). After appellee moved to strike these nonrecord materials, this Court ordered Weisberg to move in district court for a new trial. (See Attachment 1)

The district court denied the motion for new trial and Weisberg took a separate appeal from this denial. On August 4, 1978, this Court ordered this new appeal, Case No. 78-1731, consolidated with the original appeal, Case No. 77-1831.

However, at the time its brief was to be filed in Case No. 78-1731, the government released the two purportedly classified Warren Commission transcripts to Weisberg. At the same time the government moved to dismiss Case No. 78-1731 in its entirety as moot, and to dismiss Case No. 77-1831 as moot insofar as the January 21 and June 23 transcripts were concerned. Ultimately, this Court granted that motion. (See Attachment 2) This left only the unclassified May 19, 1964 transcript at issue. Shortly after oral argument on this question, the Court issued a brief order affirming the district court's determination that it is exempt under Exemption 5. On this basis the government has filed an affidavit of costs with respect to Case No. 77-1831.

Under the Freedom of Information Act, litigation costs reasonably incurred may be assessed against the government if the the FOIA plaintiff "substantially prevails." It is Weisberg's position that he has "substantially prevailed" because he obtained

two out of the three transcripts, and the two which had been withheld under a claim of jeopardy to the national security at that. Therefore, under the terms of the Freedom of Information Act, Weisberg qualifies for an award of costs.

In addition to having "substantially prevailed" by obtaining two out of the three transcripts he sought, the equities overwhelmingly favor an award of costs to Weisberg. In the first place, this is the second time that the General Services Administration has forced Weisberg to resort to expensive and time-consuming litigation by fraudulently claiming that Warren Commission transcripts were properly classified pursuant to Executive order when in fact they were not. (The earlier case was *Weisberg v. General Services Administration*, Civil Action No. 2052-73, in which Weisberg sought the January 27, 1964 Warren Commission Executive session transcript.) In each instance the GSA managed to avoid appellate review by releasing the transcript(s) after it had procured a decision that they were exempt by misrepresenting facts to the district court.

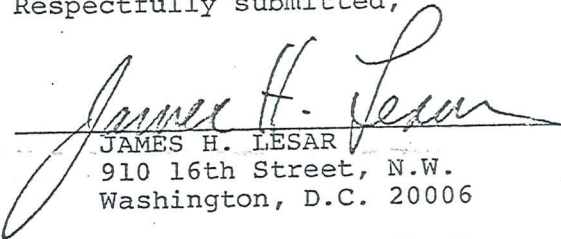
There are numerous other examples of GSA's bad faith in withholding nonexempt materials from Weisberg. For example, the GSA and the Secret Service conspired, with the assistance of the Department of Justice, to deprive him of an admittedly nonexempt copy of a record in the possession of the Secret Service. (See Attachments 3-4) The GSA has also withheld simply to keep him from making more requests for information. (See Attachment 5)

Finally, Weisberg has made an enormous contribution both to the development of the Freedom of Information Act and to our

national heritage by his persistent efforts in the face of all odds to obtain information about the assassinations of President Kennedy and Dr. King. The Freedom of Information Act envisioned that ordinary citizens would be able to make just such contributions as these if the government's oppressive information policies could be changed. However, because of his meager financial resources, Weisberg could not afford to litigate under the Freedom of Information Act if he had to pay the government's costs each time he lost an appeal--or, as in this case, a part of an appeal. Nor could other citizens who are not among the wealthy.

For the foregoing reasons, Weisberg requests that this Court award him litigation costs in the amount of \$522.06 as set forth in the affidavit of costs by his attorney. (See Attachment 6)

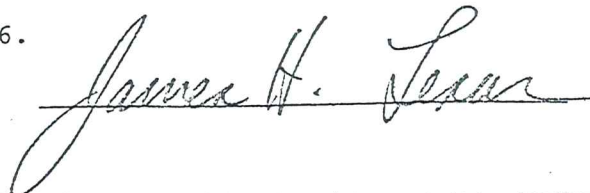
Respectfully submitted,


JAMES H. LESAR
910 16th Street, N.W.
Washington, D.C. 20006

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of March, 1979, mailed a copy of the foregoing Motion for Award of Costs to Ms. Linda Cole, Appellate Staff, Civil Division, U.S. Department of Justice, Washington, D.C. 20006.



ATTACHMENT 1

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1831

September Term, 19 77

Harold Weisberg,
Appellant

Civil Action 75-1448

v.

General Services
Administration

United States Court of Appeals
for the District of Columbia Circuit
FILED 1977 9 1 1978
GEORGE A. FISHER
CLERK

BEFORE: Tamm and Robinson, Circuit Judges

O R D E R

On consideration of appellant's motions to expedite oral argument and for leave to file reply brief with addendum, appellee's motion to strike portions of reply brief, and the oppositions thereto, we grant the motion for expedition and hold in abeyance the other motions.

Appellant seeks to present evidence to this Court which has not been presented to the District Court. The sound course is for appellant first to present his alleged new evidence to the District Court in a motion for a new trial. See Smith v. Pollin, 194 F.2d 349, 350 (D.C. Cir. 1951). In light of 5 U.S.C. §552(a)(4)(D), we direct the District Court to act expeditiously on such a motion so that we may hear oral argument on the appeal promptly if no remand under Smith v. Pollin is recommended. Accordingly, it is

ORDERED by the Court that appellant shall move in the District Court for a new trial, and that the District Court shall rule on such a motion within thirty days after it is filed, and it is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1831

-2-

September Term, 19 77

FURTHER ORDERED by the Court that the Clerk is directed to schedule oral argument during the June sitting period of the Court, and it is

FURTHER ORDERED by the Court that the motions to file reply brief with addendum and to strike shall be held in abeyance pending the District Court's disposition of a motion for new trial.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1831

Harold Weisberg,
Appellant

United States Court of Appeals
for the District of Columbia Circuit
September Term, 1978

FILED JAN 12 1979

v.

General Services
Administration

Civil Action No. 75-1448

GEORGE A. FISHER
CLERK

And Consolidated Case No. 78-1731

BEFORE: Bazelon*, Circuit Judge; Fahy, Senior Circuit Judge and
Leventhal, Circuit Judge

O R D E R

On consideration of appellee's motion for partial dismissal of appeal in No. 77-1831 and for complete dismissal of the appeal in No. 78-1731 on grounds of mootness, and responses thereto, and the record on appeal, it is

ORDERED by the Court that the order of the District Court on appeal in No. 77-1831 relating to the January 21, 1964 and June 23, 1964 transcripts, and the entire order of the District Court on appeal in No. 78-1731 are dismissed as moot. As to those matters, the cases are remanded to the District Court with directions to vacate its orders. See United States v. Munsingwear, Inc., 340 U.S. 36 (1950). All other issues on appeal in 77-1831 before this Court remain for consideration. The District Court may still consider any post-dismissal matters, upon motion, as the District Court deems appropriate.

Per Curiam

*Circuit Judge Bazelon did not participate in the foregoing order.

November 13, 1970

Mr. James B. Rhoads
Archivist of the United States
National Archives and Records Service
Washington, D. C. 20408

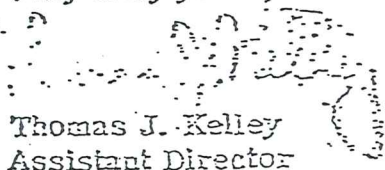
Dear Mr. Rhoads:

In connection with the civil action Weisberg vs The National Archives, Civil Action 2569-70, Mr. Weisberg called at this office recently and displayed a copy of the proceedings in the case. He stated that since the Government's answer reflected that the Archives should not have been a party to some of the requests being made by Weisberg, he was notifying us that under the Freedom of Information Act he was requesting a copy of the Memorandum of Transfer to the Archives dated April 26, 1965, covering material then in the possession of the Secret Service, which memorandum reflected that Mrs. Evelyn Lincoln had received for the material set out in the Memorandum of Transfer.

There may be some validity in Mr. Weisberg's contention that since this paper is in the possession of the Secret Service, we are the proper people for him to sue or to subpoena to produce the item. However, since another Government agency has declined to furnish him a copy of the item, we are seeking advice as to what action we should take if a suit is brought seeking to force us to produce the document, or if a subpoena is received to produce the document for his examination.

The position of the Secret Service is that we have no grounds upon which to refuse making the item available to Mr. Weisberg if he should invoke the provisions of the Freedom of Information Act.

Very truly yours,


Thomas J. Kelley
Assistant Director

ATTACHMENT 4

DEC 8 1970

Mr. Harold Weisberg
Cog & Or Press
Route 8
Frederick, Maryland 21701

Dear Mr. Weisberg:

This is in reply to your letter of November 10, 1970, appealing from prior decision of the Archivist of the United States, not to make available to you a copy of the Government's copy of the "memorandum of transfer" of the materials relating to the autopsy of President Kennedy.

On August 19, 1970, you were advised by the Acting Archivist of the United States that this copy was withheld from research under the terms of 5 U. S. C. 552, subsection (b)(6), as a part of "medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" of the family of the late President Kennedy.

A careful review of the document in question, in the light of the cited statute, its legislative history and subsequent interpretations, has failed to adduce any grounds to warrant upsetting the considered judgment of the Acting Archivist.

Under the circumstances, I have no recourse but to advise that your appeal is denied. However, in the event the Kennedy family or its authorized representative should advise me that release of the "memorandum of transfer" does not constitute an unwarranted invasion of their personal privacy, I will reconsider my decision.

Sincerely,

(Signed) W. L. Johnson, Jr.

W. L. JOHNSON, JR.
Assistant Administrator for Administration

Burke Marshall
Tom Kelly, Secret Service
cc: Official File - LC
Mr. Yock - A
Asst. Adm. for Admin. - B
Mr. Vawter - ALI
General Counsel - LI
Mr. Marion Johnson - NNE
Deputy Gen. Csl. - LL
Asst. Gen. Csl. - LR
Mr. Fauper - Dept. Justice
Mr. Axelrad - Dept. Justice
LC:RFWilliams:afh: 11-25-70
Retyped:LL:mta 11/25/70

L _____ ALI _____

ATTACHMENT 5

November 15, 1968

N

Correspondence with Harold Waisberg, Coq d'Or Press, Route 8,
Frederick, Maryland 21701

L

The transcript of the executive session of January 27, 1964, of the Warren Commission requested by Mr. Harold Waisberg in the attached letter was reviewed by GSA, the CIA, and the Department of Justice. Mr. Martin Richman of the Office of Legal Counsel of the Department recommended that the entire transcript be withheld from research, and we have withheld it.

As Mr. Waisberg says, there are certain quotations, presumably taken from a copy of the transcript in Congressman Ford's possession, that are published in Portrait of the Assassin (New York: Simon and Schuster, 1965) by Gerald R. Ford and John R. Stiles (pages 19-25). Some material is deleted from the quotations without any indication of the deletions, and there are other variances from the text of the transcript. The quoted material does not consist of a continuous passage, but of various passages chosen from different pages. Only one complete page (page 158) of the transcript is included in the quoted material. We feel that to tell Mr. Waisberg 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.

James B. Rhoads
JAMES B. RHOADS
Archivist of the United States

cc: Official File - NND ✓
Reading File - NNDC
N

MMJohnson/mc NNDC 69-89
Ext. 23171 11/15/68

NND WQE NN

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

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

AFFIDAVIT OF COSTS BY ATTORNEY

CITY OF WASHINGTON
DISTRICT OF COLUMBIA

I, James H. Lesar, attorney for appellant Harold Weisberg,
hereby verify and affirm that the following costs were incurred
by appellant in the above cases.

Case No. 77-1831

Brief: 36 pp. x 20 copies xeroxed at \$0.04 per	
page (720 total pages)	\$ 28.80
Brief covers: photo-offset at \$7.00 per 25	7.00
tax35
Appendix: 380 pp. x 12 copies at \$0.04 per	
page (4,560 total pages)	182.40
Appendix covers: photo-offset at \$7.00 per 25	7.00
tax35

Reply Brief: 77 pp. x 20 copies xeroxed at \$0.04
per page (1,540 total pages) \$ 61.60

Reply Brief covers: photo-offset at \$7.00 per 25 \$ 7.00
tax35

Docketing fee \$ 50.00

Total for Case No. 77-1831 \$344.85

Case No. 78-1731

Brief: 26 pp. x 20 copies xeroxed at \$0.04 per
page (520 total copies) \$ 20.80

Brief covers: photo-offset at \$7.00 per 25 7.00
tax35

Appendix: 123 pp. x 12 copies xeroxed at \$0.04
per page (1,476 total pages) 88.56

Appendix covers: photo-offset at \$10.00 per 25 . . . 10.00
tax50

Docketing fee 50.00

Total for Case No. 78-1731 \$177.21

SUMMARY:

Total for Case No. 77-1831: \$344.85
Total for Case No. 78-1731: \$177.21

GRAND TOTAL \$522.06

James H. Lesar

JAMES H. LESAR
910 16th Street, N.W.
Washington, D.C. 20006

Attorney for Appellant

Subscribed and sworn to before me
this 29th day of March, 1979

William S. Anderson

NOTARY PUBLIC IN AND FOR
THE DISTRICT OF COLUMBIA

My commission expires April 14, 1980