

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

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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 OPPOSITION TO AWARD OF COSTS TO APPELLEE

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 and Case No. 77-1831 in part on grounds of mootness. Ultimately, this Court granted the government's 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 May 19 transcript is exempt under Exemption 5.

On the basis of this order the government has filed an affidavit of costs in Case No. 77-1831. Appellant opposes any award of costs to the government in these cases. Under the Freedom of Information Act, costs may be assessed against the government if the FOIA plaintiff "substantially prevails." 5 U.S.C. §552(a)(4)(E). There is no provision in this Act for awarding costs to the government should it prevail and such an award would clearly run afoul of the Act's purposes, which are to foster citizen participation in government and to require that all government information not specifically exempted by statute shall be made available to the public. Awarding costs to the government could substantially impede citizen efforts to obtain information about the way the government works and thus frustrate the FOIA.

Moreover, Weisberg is the party who has "substantially prevailed" in both of these consolidated cases. Of the three transcripts which were at issue in Case No. 77-1831, Weisberg has obtained two, the two which had been withheld from him for a decade on the pretext that they were classified in the interests of national security. Not only are these the most important of the transcripts which were at issue but virtually all of the content of the briefs and the appendix materials was directed at the government's claims that these transcripts were exempt; very little of the content of the briefs or of the appendix materials pertains to the May 19 transcript. Thus most of the costs which were incurred in these cases resulted from the contest over the two transcripts which the government maintained were security classified. When the government abdicated on these transcripts, Weisberg essentially won both Case No. 77-1831 and Case No. 78-1731.

In addition to the foregoing, the equities overwhelmingly favor an award of costs to Weisberg and even more strongly militate against awarding costs to the government. The General Services Administration, the appellee in these cases, has repeatedly denied Weisberg nonexempt information for years at a time by forcing him to resort to expensive and time-consuming litigation. For example, in *Weisberg v. General Services Administration*, Civil Action No. 2052-73, the GSA denied Weisberg the January 27, 1964 Warren Commission executive session transcript on the spurious grounds that its release would endanger the national security. However, after the district court upheld the GSA's claim that the transcript was exempt under Exemption 7, GSA "declassified" the transcript and



made it public so as to avoid appellate review. The same history was repeated in the instant cases. At the last possible moment the GSA, having put Weisberg to an expensive and time-consuming contest, aborted appellate review by handing over the January 21 and June 23 transcripts for which it had made a fraudulent claim of national security exemption.

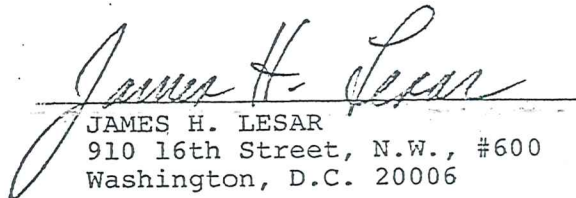
There are numerous other examples of the GSA's bad faith in withholding nonexempt materials from Weisberg. For example, in 1970 the GSA conspired with the Secret Service to deprive Weisberg of an admittedly nonexempt copy of a record in the possession of the Secret Service. (See Attachments 3-4) The GSA has also withheld records simply to keep Weisberg 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. Martin Luther King, Jr. The Freedom of Information Act envisioned that ordinary citizens would be able to make just such contributions as these if the government's information policies were changed. Weisberg's contribution has been all the more significant, and the equities weigh all the more heavily in his favor because his indigency has not kept him from using the Freedom of Information Act to greatly enhance public knowledge in regards to the assassinations of President Kennedy and Dr. King.

But 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 minor part of an appeal. Nor could other citizens who are not among the wealthy.

Finally, Weisberg notes that Rule 39 of the Federal Rules of Appellate procedure provides that ". . . if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court." In its order of January 12, 1979, this Court ordered the district court to vacate its order relating to the January 21 and June 23 transcripts obtained by Weisberg while the appeals in Cases 77-1831 and 78-1731 were pending. (See Attachment 2) For the reasons stated above, this Court should not award costs to the government in this instance.

Respectfully submitted,

  
JAMES H. LESAR  
910 16th Street, N.W., #600  
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 Appellant's Opposition to Award of Costs to Appellee to Ms. Linda Cole, Attorney, Appellate Staff,

Civil Division, U.S. Department of Justice, Washington, D.C. 20530.

  
A handwritten signature in cursive script, reading "James H. Lesar", is written over a horizontal line. Below the line, the name "JAMES H. LESAR" is printed in a simple, sans-serif font.

JAMES H. LESAR

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

BEFORE: Tamm and Robinson, Circuit Judges

## ORDER

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  
FILED 1977 9 1 1977  
GEORGE A. FISHER  
Clerk

# 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



ATTACHMENT 2

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1831

Harold Weisberg,  
Appellant

v.

General Services  
Administration

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

FILED JAN 12 1979

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

## ORDER

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

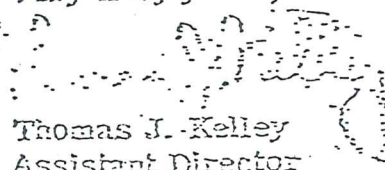
Dear Mr. Rhoads:

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  
Coq d'Or Press  
Route 8  
Frederick, Maryland 21701

Dear Mr. Weisberg:

This is in reply to your letter of November 16, 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 - NNI  
Deputy Gen. Csl. - LL  
Asst. Gen. Csl. - LR  
Mr. Falger - Dept. Justice  
Mr. Axelrad - Dept. Justice  
LC:RFWilliams:afn: 11-25-70  
Retyped:LL:mta 11/25/70

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ATTACHMENT 5

November 15, 1968

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

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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  
Archivist of the United States

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

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

NND W.G.E.                      MH