IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

MARK ALLEN, Appellant,	:	
v.	:	Case No. 79-1454
CENTRAL INTELLIGENCE AGENCY and STANSFIELD TURNER, Appellees	:	

AFFIDAVIT OF JAMES HIRAM LESAR

I, James Hiram Lesar, first having been duly sworn, depose and say as follows:

1. I am an attorney engaged in the practice of law in the District of Columbia. I have had extensive experience litigating Freedom of Information Act (FOIA) cases. In all I have handled some twenty FOIA cases in District Court and the Court of Appeals for records pertaining to the assassinations of President John F. Kennedy and Dr. Martin Luther King, Jr.

2. I have some familiarity with the above-entitled case, having read some of the pleadings in the case. In addition, because District Court Judge John Lewis Smith scheduled oral argument in this case on the same date that he scheduled oral argument in one of my cases, I happened to catch the oral argument on the government's motion to dismiss in this case, too.

3. I have read the Motion to Remand filed by the government in this case. Having successfully argued in District Court that a vacated court order entered in Fensterwald v. CIA, Civil Action No. 75-897, barred plaintiff from obtaining the sole document at issue in his lawsuit, the government now argues that the "interests of justice" would best be served by a remand so that (1) the government can supplement the record "in a manner which focuses more particularly on the document at issue here," and (2) the district court can "evaluate the supplemented record in light of the applicable law and . . . exercise its discretion to determine whether additional steps, including in camera inspection of the document, should be taken."

4. In my judgment the government's motion fits into a pattern of abuse of the judicial process in Freedom of Information Act cases seeking records pertaining to the assassination of President John F. Kennedy which are being withheld at the behest of the Central Intelligence Agency (CIA).

5. For example, in Weisberg v. General Services Administration, Civil Action No. 2052-73, the plaintiff sought access to the January 27, 1964 Warren Commission executive session transcript, a record which GSA withheld because the CIA allegedly claimed that its release would disclose "intelligence sources and methods." The government claimed it was exempt from disclosure under 5 U.S.C. § 552(b)(1) and (b)(7). The District Court ruled that the government had not shown that it was properly classified under Executive

Order 11652. However, it went on to hold that it was protected by Exemption 7, as part of an "investigatory file compiled for law enforcement purposes," even though the government's answers to plaintiff's interrogatories established that it had not been seen by any law enforcement official until at least three years after the Warren Commission went out of existence, and arguably not even then. However, before Weisberg could note an appeal the CIA "declassified" the transcript and the GSA, ignoring the decision it had just procured declaring that it was exempt under (b)(7), released it. The contents of the January 27 transcript showed that there never had been any basis for classifying the document in the interests of national security, nor was there any basis for a claim of exemption on either (b)(1) or (b)(7). Although Weisberg had been put to a costly legal struggle to obtain the government, the government avoided appellate review by making it public.

6. Similarly, in Weisberg v. General Services Administration, Civil Action No. 75-1448, the government falsely claimed that the January 21 and June 23, 1964 Warren Commission executive session transcripts were protected by Exemptions 1 and 3. Once again, the CIA alleged that their release would result in the unauthorized disclosure of "intelligence sources and methods" in violation of 50 U.S.C. 403(d)(3). On the basis of false affidavits the government procured a favorable decision from the Distirct Court. On the day that the government's brief was due in the

Court of Appeals in the second of the two appeals that the case had spawned, the government released these transcripts and mooted the case with respect to them. Weisberg v. General Services Administration, Case No. 77-1831 and Case No. 78-1731 (consolidated). The decision to release these transcripts followed hard on the heels of the just-released decision of this Court in Ray v. Turner, 587 F.2d 1187 (1978), a decision which virtually ensured reversal in the Weisberg case. Having put Weisberg to a protracted and expensive legal battle and delayed his access to documents as long as it safely could, the government once again avoided appellate review by releasing the records he had requested.

7. The same tactics are being employed in this case. The government does not profess that the District Court erred in accepting its argument that the vacated order in the Fensterwald case prohibited disclosure of the document sought by appellant Allen. In fact, it expressly avers that "the district court was correct in relying on the holding in Fensterwald."

8. What the government seeks is not "the interests of justice" but an opportunity to bolster an extremely weak--if not frivolous--case by resubmitting it to a complaisant judge. Since the case will be remanded to a judge who has recently ruled that the initials "RCMP," standing for "Royal Canadian Mounted Police" are exempt from disclosure under Exemption 1 when placed on FBI worksheets, even though they were previously made public in connection with the release of the underlying documents in which they were used, the proposed remand is a safe bet for the government.

And it will, in any event, further delay the ultimate disclosure of the document at issue and drive up the costs of litigation for plaintiff, a law student.

9. Apart from this, the issue of whether or not the vacated order in Fensterwald bars challenges to the allegedly exempt status of documents covered by that order is one of public importance. Renewed efforts to obtain those documents are inevitable, particularly since the promulgation of Executive Order 12065 has changed the law with respect to those withheld under a claim of national security classification. The issue should be decided as soon as possible, not put off simply because the government realizes it is likely to lose the case on its present record.

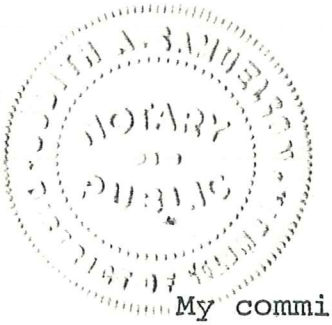
10. For the reasons stated above, I do not believe that a remand prior to a decision by this Court on the merits of the present appeal is "in the interests of justice." The effective and speedy implementation of the Freedom of Information Act which was intended by Congress requires that this Court to put a stop to the government's persistant efforts to play games with and to make sport of both FOIA plaintiffs and the courts. This can be achieved in this case by requiring the government to defend its actions in the court below and to live with their consequences, whatever they may be.

James H. Lesar

JAMES H. LESAR

DISTRICT OF COLUMBIA

Subscribed and sworn to before me this 18th day of September, 1979.



Judith A. Samuelson
NOTARY PUBLIC IN AND FOR
THE DISTRICT OF COLUMBIA

My commision expires July 31, 1984.