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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MARK ALLEN, :  
 :  
 Plaintiff, :  
 :  
 vs. : Civil Action No. 78-1743  
 :  
 CENTRAL INTELLIGENCE :  
 AGENCY, et al., :  
 :  
 Defendants. :  
 :  
 - - - - -

Washington, D. C., January 29, 1980

BEFORE THE HONORABLE JOHN LEWIS SMITH, Jr., United  
States District Court Judge, Motion for Summary Judgment.

APPEARANCES:

MARK ALLEN, pro se, for Plaintiff.  
DENNIS DUTTERER, Esq., for the Defendants.

- - -

Dawn T. Copeland,  
Official Court Reporter

PREPARED FOR: *Mr. Lear*  
PAGES: 1-11

P R O C E E D I N G S

1  
2 THE DEPUTY CLERK: Allen versus the CIA. Civil  
3 Action No. 78-1743.

4 Mr. Mark Allen and Mr. Dennis Dutterer.

5 MR. DUTTERER: Good morning, Your Honor. I am  
6 Dennis Dutterer, United States District Attorney.

7 THE COURT: Mr. Allen.

8 MR. ALLEN: Good morning, Your Honor.

9 (Argument by Mr. Dutterer.)

10 MR. ALLEN: Your Honor, first with respect to the  
11 discovery matters, I did not understand the Court's statement  
12 to be -- during the last status conference, to be an oral pro-  
13 tective order, and as I recall, Your Honor stated that I was  
14 not entitled to discovery at that time and I had hoped at a  
15 future time Your Honor would determine that I was. Therefore,  
16 I --

17 THE COURT: You determined that you were entitled?

18 MR. ALLEN: That I had hoped that at a later time you  
19 would determine that I was entitled to discovery.

20 THE COURT: You are a law student at this time?

21 MR. ALLEN: Yes, I am, Your Honor.

22 THE COURT: What year?

23 MR. ALLEN: The third year.

24 THE COURT: Was there any misunderstanding in your  
25 mind as to what I said at the last hearing?

1           Didn't I mention that this case was here for a very  
2 limited purpose on remand and that no discovery would be taken?

3           MR. ALLEN: No, Your Honor, I didn't -- I don't  
4 recall that.

5           THE COURT: I think the record supports that.

6           In any event, you have got to learn to follow the  
7 instructions of the Court.

8           Now, these other filings are completely unnecessary  
9 and improper.

10          You may proceed.

11          MR. ALLEN: Your Honor, if I may state one point on  
12 that: I did not understand this to be a limited remand because  
13 the decision had been vacated.

14          THE COURT: The remand speaks for itself.

15          MR. ALLEN: Very well, Your Honor.

16          There are several genuine issues of material fact  
17 in this case, Your Honor.

18          The first one is that there is a genuine issue as to  
19 whether the proper procedures were followed pursuant to  
20 the Executive Order. That is dealing with the B-1 issue.

21          There is a genuine issue as to whether the material  
22 that is presently being withheld would jeopardize CIA sensitive  
23 sources and methods.

24          There is a genuine issue as to whether the material  
25 that is being withheld under B-2 is subject to a genuine public

1 interest.

2 With respect to the B-1 procedural issue, that is,  
3 whether defendants properly classified this document, whether  
4 they went through the required procedures of the Executive Order,  
5 which ever Executive Order that was, and they haven't told us  
6 which one it is.

7 The defendants in their affidavit simply haven't  
8 made the showing and what I tried to do through discovery was  
9 to determine whether the proper procedures had been followed.  
10 That is all I was trying to do and when I submitted the request  
11 for production of documents, Your Honor, which I did before  
12 the status call, if I recall correctly, I was trying to get  
13 the first page of this document because I knew that under all  
14 previous classification Executive Orders certain information  
15 had to appear on the first page of each document.

16 So I asked for the first page minus any properly  
17 exempt material including those classification markings so I  
18 could determine if the proper classification markings -- procedure  
19 had been followed.

20 Now, as it turns out, the government gave me the  
21 first page of the document and then deleted all the markings,  
22 Your Honor, so I couldn't determine whether the proper pro-  
23 cedures had been followed, and to complicate matters, to make  
24 matters worse, they made no exemption claim for this material  
25 which you will see in the Owen affidavit, the exemption "F"



1 material. The government made no exemption claim for this  
2 material and I needed this material to determine whether the  
3 proper procedures had been followed.

4 So just summing up this issue and not to belabor it,  
5 the government has not made a showing that proper procedures  
6 had been followed. I tried to determine whether they were and  
7 I made a good faith effort to determine whether proper pro-  
8 cedures had been followed and the government -- this Court  
9 decided that I wasn't entitled to find out, but I do think,  
10 Your Honor, that is a genuine issue as to whether the proper  
11 procedures were followed pursuant to a valid Executive Order.

12 Now, with respect to the B-1 and the B-3 issues, they  
13 both amount to the same thing, Your Honor, in that the CIA  
14 is contending that the release of the withheld material would  
15 jeopardize sensitive sources and methods and they say that  
16 qualifies under B-1 because the information would be properly  
17 classified if that were the case and it qualifies under B-3  
18 because it would lead to the unauthorized disclosure of  
19 intelligence source or method.

20 I am sorry, Your Honor. I should have offered this  
21 to the Court.

22 THE COURT: What is this?

23 MR. ALLEN: This is my opposition to the motion.

24 THE COURT: This has not been filed.

25 MR. ALLEN: No, it hasn't been. I am sorry. I was

1 just going to go downstairs and file the other two copies. I  
2 have already given a copy to Mr. Dutterer.

3 THE COURT: This motion for summary judgment was  
4 filed on January 17. This is January 29.

5 MR. ALLEN: Your Honor --

6 THE COURT: You are out of time on any filing of  
7 opposition.

8 MR. ALLEN: Your Honor, I didn't receive the govern-  
9 ment's motion for summary judgment until almost a week -- I am  
10 trying to think when I did receive it.

11 I received it over five days later because of some  
12 unknown delay in the mail. It wasn't possible to prepare an  
13 opposition as detailed as this until today.

14 THE COURT: This was mailed to you on the 17th of  
15 January. I will let it be filed for what it is worth.

16 MR. ALLEN: Thank you, Your Honor.

17 As I was stating, the B-1 and the B-3 claims are  
18 the same, that is, that the release of this withheld material  
19 would jeopardize sensitive sources and methods.

20 Now, the two facts that should be kept in mind,  
21 which I have demonstrated in my brief, and the first is that  
22 there are no sensitive sources or methods mentioned in this  
23 material and this is stated quite explicitly in the report  
24 of the House Select Committee on assassinations which discusses  
25 this report in some detail.

1           The second point is that this document was written  
2 in a special way so as to protect the sources and methods.

3           The CIA was anxious about even the members of the  
4 Warren Commission knowing about -- knowing what these sources  
5 were, and so this document was written in a particularly  
6 special way so as to protect the CIA's sources and methods.

7           Third, I presented in the brief extensive documentary  
8 evidence that this material is already in the public domain  
9 in all but form. In other words, substantively all the  
10 information is in the public domain and it is in documents  
11 which have been previously released with the government's  
12 approval and I see no need to go into all the particular  
13 documents that I have.

14           One in particular I think the Court should take note of  
15 and that is it is a February 14, 1964 Warren Commission internal  
16 memorandum and this particular document was written very short-  
17 ly after the receipt of the document that is at issue in this  
18 particular memo. It was written very shortly after the  
19 document in issue and I checked the Commission document listings  
20 and at that date -- at the time this memo was written, the  
21 Warren Commission had no other information on Lee Harvey Oswald's  
22 activities in Mexico City with respect to this contact with the  
23 Cuban and Soviet embassies but this document.

24           So this Warren Commission internal memoranda includes  
25 information that was taken directly out of the document at issue,



1 and I think if this Court were to ever view this document in  
2 camera, you could see that all the information, virtually, in  
3 pages 4 through 9 in this document that have been withheld are  
4 in this memoranda and the pertinent pages of the memoranda,  
5 pages 7 through 10, and that, of course, is included as an  
6 exhibit.

7           So when you consider the fact that no sensitive source  
8 is mentioned in this document, that the document was written in  
9 special ways so as to protect those sources and methods, and when  
10 you view the plaintiff's documentary evidence, that this  
11 material is virtually, completely, in the public domain, I  
12 think that presents a genuine issue of material fact to see  
13 whether this document, the release of the withheld materials  
14 in this document would jeopardize the CIA's sensitive sources  
15 and methods.

16           Moving on to the B-2 issue, I just have a brief  
17 comment there and as I stated, I believe, before when we were  
18 in the Court, I believe these Warren Commission -- I am sorry--  
19 the CIA's filing instructions are particularly of use to the  
20 Warren Commission scholars in determining the nature and the  
21 extent of the CIA's files on the assassination of President  
22 Kennedy.

23           I know they would certainly help me in determining  
24 whether there is any material that should be in the public  
25 domain on the subject of intent, public interest, and I think



1 because of that this is a matter of genuine public interest  
2 and that the B-2 exemption does not apply given the case of  
3 the Department of the Air Force v. Rose.

4 Now, I might add there is other material that I  
5 mentioned earlier and that is the exemption "F" material  
6 where no exemption claim is made, Your Honor, and I feel that  
7 this material should be provided me.

8 The Freedom of Information Act provides that material  
9 must be released unless it fits into one of the <sup>NINE</sup> nonexemption  
10 categories and the defendants have made no attempt to claim  
11 and I fail to see how they can justify not providing this in-  
12 formation to me.

13 I think as far as the exemption "F" material, which  
14 will be of considerable use to me in determining whether  
15 proper classification procedures were followed, and I think  
16 there is certainly a genuine issue of material fact as to  
17 whether this material is withheld properly.

18 Now, Your Honor, I have done considerable study on  
19 this subject and the study I have done, I think, is as exten-  
20 sive as anyone else outside the government has done, and you  
21 will see the affidavit of Mr. <sup>HOLH</sup> Hoke, who is probably one of the  
22 leading Warren Commission scholar's in the country, and he  
23 vouches for my expertise in this particular area.

24 Now, I simply have to be taken a back by Mr. Owen's  
25 statement that there have been significant events between the

1 time of his first affidavit when he said the document had to be  
2 completely withheld and the time of the second affidavit where  
3 he released half of it.

4 I have looked at the material and it had been in the  
5 public domain for at least three years and most of it for at  
6 least eight years, and had I known they were seriously going  
7 to contend that anything had happened between June 1979 and  
8 today, Your Honor, that would cause this material not to be --  
9 not to be released, I would have brought the documents in here  
10 today that have been in the public domain for several years  
11 and shown that this material has been there.

12 One of the reasons I sued for this document was  
13 because I knew this material was in the public domain and I was  
14 just appalled that the CIA was continuing to withhold it.

15 The credibility of Mr. Owen, and I certainly don't  
16 doubt his honesty, but he has shown that he does not know what  
17 information is in the public domain. He is just simply  
18 not familiar and does not have the expertise in this subject  
19 that some of the Warren Commission scholars in this field does  
20 and he doesn't know.

21 What I was trying to do through my most recent discover  
22 was to determine the extent of his knowledge of what was in the  
23 public domain. That was all I was trying to do and I think if  
24 Mr. Owen looked at this February 12 memoranda that I talk about  
25 and certain other documents which would only amount to about

1 ten pages, Your Honor, I think his judgment might be changed  
2 considerably about whether this information is to be with-  
3 held.

4 (Balance of transcript not ordered)

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This record is certified by the undersigned to be the  
official transcript of the above-entitled matter.

  
Dawn T. Copeland, Official Court Reporter