BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 80-1380

MARK A. ALLEN,

Plaintiff-Appellant

v.

CENTRAL INTELLIGENCE AGENCY, ET AL.,

Defendants-Appellees

On Appeal from the United States District Court for the District of Columbia, Hon. John Lewis Smith, Jr., Judge

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MARK A. ALLEN, Plaintiff-Appellant v. CENTRAL INTELLIGENCE AGENCY, ET AL., Defendants-Appellees	:	Case No. 80-1380

CERTIFICATE REQUIRED BY RULE 8(c) OF THE GENERAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned, counsel of record for Mark A. Allen, certifies that the following listed parties and amici (if any) appeared below:

Mark A. Allen (Plaintiff)

Central Intelligence Agency (Defendant)

Adm. Stansfield Turner (Defendant)

These representations are made in order that judges of this Court, inter alia, may evaluate possible disqualification or recusal.

JAMES H. LESAR
Attorney for Appellant

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BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF ISSUES

1. Whether agency affidavit was sufficient basis for awarding summary judgment with respect to materials withheld under 5 U.S.C. § 552(b)(1) and 5 U.S.C. § 552(b)(3).

2. Whether District Court abused its discretion in denying discovery sought by plaintiff.

3. Whether there were genuine issues of material fact in dispute which precluded summary judgment.

4. Whether filing instructions are exempt under 5 U.S.C. § 552(b)(2).

5. Whether agency can excise classification markings for which no claim of exemption is made.*

STATUTES AND REGULATIONS

The Freedom of Information Act, 5 U.S.C. § 552, provides in pertinent part:

> (b) This section does not apply to matters that are--
>
> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

50 U.S.C. § 403(d)(3) provides that:

> . . . the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.

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*This case has not previously been before this Court, or any other Court (other than the Court below), under this or any other title.

Executive Order 12065 provides in pertinent part:

* * *

1-103. "Secret" shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

1-104. "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security.

* * *

1-301. Information may not be considered for classification unless it concerns:

(a) military plans, weapons, or operations;

(b) foreign government information;

(c) intelligence activities, sources or methods;

(d) foreign relations or foreign activities of the United States;

(e) scientific, technological, or economic matters relating to the national security;

(f) United States Government programs for safeguarding nuclear materials or facilities; or

(g) other categories of information which are related to national security and which require protection against unauthorized disclosure as determined by the President, by a person designated by the President pursuant to Section 1-201, or by an agency head.

1-302. Even though information is determined to concern one or more of the criteria in Section 1-301, it may not be classified unless an original classification authority also determines that its unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security.

* * *

> 3-303. It is presumed that information which continues to meet the classification requirements in Section 1-3 requires continued protection. In some cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head, a senior agency official with responsibility for processing Freedom of Information Act requests or Mandatory Review requests under this Order, an official with Top Secret classification authority, or the Archivist of the United States in the case of material covered in Section 3-503. That official will determine whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure.

REFERENCES TO PARTIES AND RULINGS

The parties to this lawsuit are Mark A. Allen ("Allen"), plaintiff-appellant; and the Central Intelligence Agency ("the CIA") and Admiral Stansfield Turner, defendants-appellees.

The opinion of the District Court (Judge John Lewis Smith, Jr.) was filed on February 6, 1980, and entered on February 7, 1980. It is reproduced in the Appendix at 115-118.

On February 6, 1980, the District Court also entered an order denying plaintiff's motion to compel discovery and granting defendants' motion for a protective order. This order is reproduced in the Appendix at 113-114.

On March 5, 1980, and order denying plaintiff's motion for reconsideration was filed and entered. [App. 150A]

STATEMENT OF THE CASE

A. Freedom of Information Act Request

At the time he brought this lawsuit, appellant Mark A. Allen ("Allen") was a law student at the University of Virginia. Since 1974 he has engaged in extensive research concerning the events surrounding the murder of President John F. Kennedy, with particular emphasis on the activities of Lee Harvey Oswald in Mexico City seven weeks before the President's assassination. In August, 1977, he briefed staff members of the House Select Committee on Assassinations on Oswald's Mexican activities. He also prepared numerous memoranda on this topic for the Committee. While preparing a memorandum for the Committee during the summer of 1977, it became apparent to him that virtually all of the information in a document identified as CIA Item No. 509-803 had been previously released. Affidavit of Mark A. Allen, ¶¶2-4. [App. 119]

As a result, on July 24, 1978, Allen made a request for this document under the provisions of the Freedom of Information Act, 5 U.S.C. § 552. In making his request, Allen pointed out that another CIA document, Item No. 498-204, states that Item No. 509-803 was prepared for the Warren Commission in a way that would protect the CIA's "sources and techniques," and that in Item No. 829-358 the CIA's then Deputy Director for Plans, Richard Helms, had approved the publication of Item. No. 509-803 if it were first "modified". Allen also stated that numerous citations to Warren

Commission Document 347, which he asserted is identical to Item No. 509-803, "show that there is virtually no substantive information in this item which cannot be found in publicly available CIA and Warren Commission documents." [App. 7]

By letter dated August 8, 1978, the CIA denied Allen's request. [App. 8] Subsequently, on September 18. 1978, Allen filed a complaint under the Freedom of Information Act for disclosure of CIA Item No. 509-803 ("the document").

B. Proceedings in District Court

On October 19, 1978, the CIA filed an answer which asserted several boilerplate defenses and alleged that Allen's claim was foreclosed because in another case, Bernard Fensterwald, Jr. v. CIA, Senior United States District Court Judge John J. Sirica had ruled that the same document was exempt from disclosure. [App. 11-12]

On November 8, 1978, Allen filed ten interrogatories. The first interrogatory asked whether CIA Item No. 509-803 is identical with Warren Commission Document 347. Three of the interrogatories requested the following basic information:

> 6. Does CIA item #509-803 specifically mention any CIA sources and methods not already mentioned in publicly available Warren Commission or CIA documents?
>
> 7. Does CIA item #509-803 in fact specifically mention any CIA source or method?
>
> 8. Does CIA item #509-803 contain any information on Lee Harvey Oswald's activities in Mexico City which is not available in publicly released CIA or Warren Commission documents?

[App. 13]

On December 8, 1978, the CIA moved for a protective order, stating that the interrogatories sought irrelevant information and that in light of its intent to file a dispositive motion before the January 3, 1979, status hearing, it would be an undue burden and expense to respond to the interrogatories. On January 3, 1979, the District Court filed an order directing that the CIA need not answer the interrogatories "until further order of this Court." [App. 15]

On January 15, 1978, the CIA filed a motion to dismiss which was supported by the affidavit of Mr. Robert E. Owen. [App. 16-47] Mr. Owen's affidavit attached and incorporated the April 14, 1977, affidavit of Mr. Charles A. Briggs that had been filed on May 20, 1977, in Fensterwald v. CIA, Civil Action No. 75-897. [App. 22-38]

On January 10, 1979, Allen filed an affidavit opposing the CIA's motion to dismiss. [App. 39-47] Two days later the District Court issued its opinion granting the motion to dismiss on the grounds that (1) the requested document had previously been held to be exempt in Fensterwald v. CIA, (2) the CIA had re-reviewed the document "in light of the new, more stringent, criteria set forth in Executive Order 12065" and determined that it was classified Secret and should be withheld from disclosure, and (3) agency affidavits concerning the classification of documents are entitled to "substantial weight." [App. 62]

C. Appeal

On March 26, 1979, Allen filed a notice of appeal. [App. 65] On September 10, 1979, after Allen had filed his appeal brief, the CIA requested that the Court of Appeals remand the case for purposes of supplementing the record. By order dated October 31, 1979, the Court of Appeals vacated the District Court's order and remanded for proceedings not inconsistent with Founding Church of Scientology of Washington, D.C., Etc. v. Bell, 195 U.S.App.D.C. 363, 603 F.2d 945 (1979). [App. 65A]

D. Proceeding on Remand

On remand, Allen again initiated discovery. On November 15, 1979, he filed a single request for admission which sought to establish that the document at issue, CIA Item No. 509-803, is "substantially identical" to Warren Commission Document 347, the January 31, 1964, CIA report to the Commission on Lee Harvey Oswald's activities in Mexico City. [App. 66] On November 19, 1979, he filed interrogatories. [App. 78-79] On December 3, 1979, he also filed a request for production of documents which sought, inter alia, the cover sheet or first page of all copies of the document, minus any exempt material. [App. 67] The purpose of this request was to obtain the classification markings required to be placed on the face of the document.

At a status hearing held on December 7, 1979, Allen raised the issue of his pending discovery requests. The District Court

ruled, however, that: "You are not entitled to discovery at this time." [App. 77] The District Court based its ruling on (a) the fact that the remand order directed further proceedings not inconsistent with Founding Church of Scientology, Etc. v. Bell, a case which it thought was devoid of any authorization for discovery, and (b) language in the remand order recommending that the District Court conduct the new proceedings expeditiously. [App. 71-73]

On December 31, 1979, Allen filed a second set of interrogatories which sought to learn details about the classification procedures that had been followed, such as who classified the document, when and under which Executive order it was classified, and whether a date or event had been set for automatic declassification or classification review. [App. 80A-80C] On January 11, 1980, Allen filed a motion to compel discovery. At oral argument on January 29, 1980, the District Court again ruled that the case had been remanded "for a very limited purpose" and that no discovery would be permitted. [App. 104] On February 6, 1980, he filed an order denying Allen's motion. [App. 113]

At the December 7th hearing, the CIA stated that it would submit a new public affidavit and might prepare an in camera affidavit. [App. 74-75] Subsequently, on January 11, 1980, the CIA filed a supplemental affidavit by Robert E. Owen. [App. 86-94] At the same time the CIA disclosed approximately half of the fourteen page document that it previously had withheld in toto on the

on the grounds that it was classified Secret. [See App. 136-150 for a copy of the document as released by the CIA]

The Supplemental Owen Affidavit sought to justify the remaining excisions in the document on the grounds that they are protected from disclosure under Exemptions 1, 2, and 3. On the basis of the representations made by Owen in this affidavit, the CIA filed a motion for summary judgment on January 17, 1980.

In his opposition to the CIA's summary judgment motion, Allen noted that the record was devoid of any evidence that proper classification procedures had been followed. With respect to the substantive aspects of the CIA's national security claims, he put forward documentary evidence that: (1) the document at issue had been written so as to protect the CIA's "sources and techniques"; (2) a staff report of the House Select Committee on Assassinations found that all sensitive sources and methods were "deleted completely" from the document; and (3) members of the Warren Commission staff who read the document were apparently unable to tell what the CIA's sources and techniques were. [App. 101A-101D] In addition, Allen also made a showing, again based on documentary evidence, that information excised from the document already had been officially released.

On February 6, 1980, the District Court filed a Memorandum Opinion and Order granting summary judgment in favor of the CIA. The Court upheld the CIA's Exemption 2 claim for "filing instructions," asserting that "the matters withheld pursuant to this ex-

emption are merely intra-agency matters in which the public could not be reasonably expected to have a legitimate interest." [App. 116]

With respect to Exemption 1, the District Court stated that it had made a de novo review of the agency's classification and, giving "substantial weight" to the agency's affidavits, concluded that the portions of the document not released had been properly classified. [App. 117]

Lastly, the Court held that the CIA had properly withheld under Exemption 3 material "describ[ing] intelligence sources and methods." [App. 118]

On February 15, 1980, Allen filed a motion for reconsideration. In an affidavit filed in support of his motion, Allen noted that in an earlier, pre-remand affidavit, he had set forth a detailed summary of information in the document that was already in the public domain by virtue of having been officially released by U.S. Government agencies. He stated that after having examined the released portions of the document and compared them with CIA and Warren Commission records made public between 1964 and 1976, virtually all of the substantive information in the document at issue that originally was withheld had in fact been released to the public at least three years earlier, well before he brought this lawsuit. [App. 120] He also asserted that documentary evidence shows that the CIA continues to withhold portions of the document that contain information which has already been officially released. [App. 121]

On March 5, 1980, the District Court denied the motion for reconsideration. [App. 150A] On April 4, 1980, Allen noted this appeal. [App. 151]

ARGUMENT

I. AGENCY AFFIDAVIT WAS INSUFFICIENT BASIS FOR AWARD OF SUMMARY JUDGMENT

In Hayden v. National Sec. Agcy./Cent. Sec. Serv., ___ U.S. App.D.C. ___, 608 F.2d 1381, 1387 (1979), this Court addressed the standard for determining when affidavits suffice as a basis of decision without in camera review of documents, stating:

> As this court has expressed this standard, the affidavits must show, with reasonable specificity, why the documents fall within the exemption. The affidavits will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping. If the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without in camera review of the documents. (citations omitted)

In this case the District Court granted summary judgment without in camera review and without allowing Allen to undertake discovery. Allen contends that the Supplemental Affidavit of Robert E. Owen which the CIA submitted in support of its motion for summary judgment does not measure up to the standard expressed in Hayden; hence, for this reason alone, summary judgment was inappropriate.

A. Exemption 1

5 U.S.C. § 552(b)(1) exempts from disclosure matters that are:

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.

The legislative history of the 1974 amendments to the Freedom of Information Act makes it clear that material qualifies under Exemption 1 only if it is "in fact properly classified" pursuant to both procedural and substantive criteria contained in such Executive order. H.Rep. No. 93-1380, 93d Cong., 2d Sess., at 12. Failure to comply with the proper procedures can make Exemption 1 inapplicable. Halperin v. Department of State, 184 U.S.App.D.C. 124, 565 F.2d 699 (1977); Schaffer v. Kissinger, 164 U.S.App.D.C. 282, 505 F.2d 389 (1974). Indeed, if material does not qualify for Exemption 1 because of failure to follow proper classification procedures it must be disclosed unless the government alleges that disclosure would constitute grave danger to national security and the court determines after in camera inspection that it may be withheld under the exacting standard employed in First Amendment cases involving prior restraint. Halperin, supra, 184 U.S.App. D.C. at 131-132, 565 F.2d at 706-707; Ray v. Turner, 190 U.S.App. D.C. 290, 318, note 62, 587 F.2d 1187, 1215 (1979)(concurring opinion of Chief Judge Wright).

The CIA did not meet its burden in this case because the supplemental affidavit of Mr. Robert E. Owen did not set forth any details regarding the classification procedures followed. Rather, he simply made the conclusory allegation that the document is "currently and properly classified" under Executive Order 12065. The document in question here originated in 1964. The Executive order in effect at that time was E.O. 10501. The CIA made no showing that the document had even been classified under that Executive order, much less that the proper procedures had been followed. There is, in fact, not even any evidence in the record that shows it was classified before rather than after it was requested under the Freedom of Information Act. In addition, the CIA resisted Allen's attempt to learn details about the classification procedures on discovery and then excised all classification markings from the document when it released the redacted version, even though it could find no exemption to claim for such excisions. Under these circumstances there was no basis upon which the District Court justifiably could find that the document was properly classified procedurally.

Owen's affidavit was also deficient in other respects. Section 3-303 of Executive Order 12065 acknowledges that in some cases the need to protect information which meets classification standards may be outweighed by the public interest in the disclosure of the information. It provides that when such questions arise the appropriate official "will determine whether the public

interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure." The need to make this determination is obvious, particularly in light of Owen's claim that the decision to release portions of the document was due to the cumulative impact of the disclosures made by various congressional investigations that "have concerned themselves with the assassination of President Kennedy" in recent years. [App. 87-88]

There is an overriding public interest in disclosing all that properly can be disclosed about the President's assassination. This was the very premise upon which the Warren Commission was founded. And the public interest has been enhanced in recent years by official findings that government agencies, including the Central Intelligence Agency, withheld relevant information from the Warren Commission, and (2) by the conclusion of the House Select Committee on Assassinations that the Warren Commission was wrong in finding that there had been no conspiracy to assassinate the President. In short, if ever an occasion requires the public interest to be balanced against the alleged damage to national security that may result from disclosure, this is it. Especially this document, since Kennedy assassination scholars believe that it is being withheld because its complete disclosure would reveal that the CIA did not disclose to the Warren Commission, in timely fashion, the full story of its reaction to Oswald's pre-assassination trip to Mexico City. See Affidavit of Dr. Paul L. Hoch, ¶21.

[App. 112D] Yet Owen failed to make the required determination.

Under Executive Order 12065 the test for substantive classification is whether unauthorized disclosure of the information "reasonably could be expected to cause at least identifiable damage to the national security." E.O. 12065, § 1-302. Although Owen does assert that disclosure of some of the portions withheld under Exemption 1 could reasonably be expected to cause identifiable damage to the national security, he omits this claim for other portons of the document for which an Exemption 1 claim is made. For example, no claim of identifiable harm is made for the deletions designated with the letters "A & B" on pages 4 through 9 of the document, in paragraphs 5 through 12. Supplemental Owen Affidavit, ¶12. [App. 93] Four of these six pages remain withheld in toto and only three and a half sentences of another were released. [App. 139-145] Similarly, no claim of identifiable harm is made for deletions designated with the letter "A" on pages 12 and 13 of the document, in paragraphs 21 through 25.

Another deficiency of the Supplemental Owen Affidavit is its failure to state that the withheld portions of the document contain no segregable, nonexempt portions. This failing repeates the same flaw in Owen's pre-remand affidavit.

The several deficiencies in the Supplemental Owen Affidavit spelled out above render it insufficient as a basis for awarding summary judgment on the CIA's Exemption 1 claims.

Hayden stated that even if an agency's affidavit does not suffer from such deficiencies and does provide specific informa-

tion placing the withheld material within the exemption category, it still may not suffice for purposes of summary judgment where the record contains contradictory information. Hayden, supra, 608 F.2d at 1387. The record in this case is replete with evidence that the CIA continues to withhold information under Exemption 1 even though that information already has been officially released.

For example, the CIA states that deletions designated with the letter "B" in paragraphs 1 and 4 of the document "show where material was deleted to protect against the disclosure of several intelligence methods," and asserts that "[t]he deleted remarks tended to characterize certain factual data in a way in which the nature of the method used to collect the information is made obvious." Supplemental Owen Affidavit, ¶11. [App. 92] "He [Oswald] had spoken [deletion under "B"] to the Soviet Embassy guard, Ivan Ivanovich OBYEDKOV, to whom he said he had visited the Embassy two days earlier." [App. 136] The context in which this excision occurs gives some clue as to what has been deleted. A February 12, 1964, internal Warren Commission memorandum which summarizes information contained in the document at issue affords circumstantial evidence that the deleted phrase describes the manner in which Oswald spoke to the Soviet Embassy guard. It says: "Oswald went to the Russian Embassy and spoke to the guard in what is descbribed as 'halting' Russian, saying he had been there two days earlier, that there had been a telegram, etc., and asking whether there had

been a reply to the telegram." [App. 101H] Coincidentally, the phrase "in halting Russian" appears exactly to fit the space excised in the document. This phrase could give rise to an inference that the method used to collect this information was electronic surveillance. However, inasmuch as this infernece can already be made from what is contained in the February 12, 1964, Warren Commission memorandum, identifiable damage to the national security cannot reasonably be expected from the release of the same information in the document at issue. Whatever damage might be done by the disclosure of this information, already has been done.

In this regard, it should be pointed out that officially released CIA documents provide facts from which an inference can be made that the CIA tapped the phones at the Soviet Embassy in Mexico City. This is shown by Exhibit 7 to Allen's opposition to the CIA's motion for summary judgment, which reveals the content of a telephone call Oswald made to the Soviet Embassy on October 1, 1963. [See App. 101G] If the Soviet Union was not previously aware of this fact, it certainly must have become aware of it in September, 1975, when the New York Times News Service carried a story saying that the CIA had secretly taped two conversations that Oswald had with the Cuban and Soviet Embassies in Mexico City; and again in November, 1976, when the Washington Post ran a story on the contents of the transcripts of the taped conversations. [App. 101T-101V] In light of these highly-publicized

stories, it is highly unlikely that there remains any identifica-able harm which could reasonably be expected to result from disclosure of facts in the document at issue that suggest such surveillance.

The examples given above of the CIA's excising information in the document that already has been officially released are just that, examples. A number of other instances are provided by Allen's opposition to the CIA's motion for summary judgment. To cite just two, Exhibits 9 and 10 to the Opposition provide summaries of information that is contained on pages 6-8 of Warren Commission Document 347, which appears to be identical to the document at issue in conent and is of the same length (14 pages). Yet pages 6-8 of the document at issue are withheld in their entirety. (Exhibits 9-10 are reproduced in the Appendix at 101I-101J; pages 6-8 of the document are found in the Appendix 142-144)

Finally, it must be emphasized that nearly 17 years have passed since the events surrounding Oswald's trip to Mexico City transpired.[1/] The passage of so much time makes it extremely unlikely that identifiable damage to the national security can reasonably be expected to result from the release of the information which remains withheld in the document. Accordingly, it was

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1/ The District Court's opinion gives the date of the document as July 31, 1974. [App. 115] The actual date, which appears on the first page of the document [App. 136], is January 31, 1964. Curiously, the same error in date occurs at page 1 of the Memorandum of Points and Authorities in Support of Defendants Motion for Summary Judgment.

not proper for the District Court to award summary judgment in favor of the CIA on Exemption 1 grounds on the basis of the record before it.

B. Exemption 3

Where the CIA invokes the statutory protection accorded by 50 U.S.C. § 403(d)(3) and 5 U.S.C. § 552(b)(3), it must demonstrate that release of the requested information can reasonably be expected to lead to the unauthorized disclosure of intelligence sources and methods. Phillippi v. Central Intelligence Agency, 178 U.S.App.D.C. 243, 349, 546 F.2d 1015, n. 14 (1976). Allen contends that the CIA has failed to meet that burden.

First, as noted above, the CIA's affidavit failed to make a determination pursuant to Executive Order 12065, § 3-303, as to whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure. This is a necessary predicate to the CIA's Exemption 3 claim because if a determination is made that the public interest does outweigh the damage to national security which might reasonably be expected from disclosure, then such disclosure is not unauthorized disclosure and 50 U.S.C. § 403(d)(3) does not apply.

Second, the failure of the Owen affidavit to state that no segregable, nonexempt portions of the document remain withheld renders the Owen Affidavit defective for sustaining summary judgment on Exemption 3 grounds, just as it does on Exemption 1 grounds.

In addition to these defects in Owen's affidavit, the record contains countervailing evidence that contradicts any claim that release of the withheld information will disclose intelligence sources and methods. This evidence consists of the following. First, CIA Document No. 448-204, a January 29, 1964, cable from the CIA to its Mexico City Station states that on February 1, 1964, the CIA will provide the Warren Commission with a report on Oswald's activities in Mexico, "presented so as to protect your sources and techniques." [App. 101B] Second, a staff report of the House Select Committee on Assassinations found that identification of sensitive sources and methods had been "deleted completely" from the document. [101A] Third, members of the Warren Commission who read the document were apparently unable to tell what the CIA's sources and methods were. [101C]

Finally, to the extent that portions of the document contain information which might lead to the revelation of intelligence sources and methods, the evidence adduced by Allen strongly indicates that such information already has been officially released in other documents, and that the release of the withheld material would not facilitate any inferences as to the CIA's sources and methods that cannot already be drawn from information divulged by the CIA, or by other agencies with CIA approval. Disclosure of information that already has been officially released does not constitute <u>unauthorized</u> disclosure. For this reason, too, summary judgment on Exemption 3 grounds was inappropriate.

II. DISTRICT COURT'S DENIAL OF DISCOVERY SOUGHT BY ALLEN WAS AN ABUSE OF ITS DISCRETION

On remand, Allen sought to obtain discovery from the CIA. His efforts focused primarily on two areas: first, classification procedures, such as when and under which Executive order it was classified, by whom, and whether a date or event had been set for automatic declassification or mandatory classification review; and, second, whether the withheld materials actually would disclose any CIA sources and methods not already mentioned in publicly released CIA and Warren Commission documents. The CIA resisted this discovery and the District Court denied it even before the CIA had filed its motion for summary judgment.

The District Court based its denial of discovery on the remand order of this Court, which directed further proceedings not inconsistent with Founding Church of Scientology of Washington, D.C., Etc. v. Bell, 195 U.S.App.D.C. 363, 603 F.2d 945 (1979). It construed that decision as not containing any authorization for discovery, even though it required the Government to undertake a form of discovery, a Vaughn showing. In addition, the Court pointed to language in the remand order recommending that the District Court conduct the new proceedings expeditiously. [App. 71-73] However, by the date the Court issued its opinion, the normal time for responding to Allen's request for admission, request for production of documents, and two sets of interrogatories had run.

Discovery is particularly useful in determining whether requisite classification procedures have been followed, Ray v. Turner, 190 U.S.App.D.C. 290, 318, 587 F.2d 1187, 1215 (1979) (concurring opinion of Chief Judge Wright), and this Court has expressly authorized for that purpose. Schaffer v. Kissinger, 164 U.S.App.D.C. 282, 505 F.2d 389 (1974). In this case it was absolutely essential to the Exemption 1 claims because the CIA failed to state in any of its affidavits what classification procedures had been followed, or even that it had been classified under E.O. 10501, the Executive order in effect at the time the document originated. Without the discovery sought by Allen, there was no basis for determining the critical question of whether the document was properly classified procedurally. Not to allow discovery for this purpose was an abuse of discretion.

In addition, it was necessary for the Court to determine what the effects of disclosure would be. Without a basis for making this determination, the Court could not properly decide whether the conditions required for Exemption 3 or the substantive provisions of Exemption 1 were present. Allen's interrogatories that were directed toward establishing whether or not the intelligence sources or methods being withheld were already publicly known as the result of officially released information were relevant to the CIA's claims that identifiable harm to the national security and the unauthorized disclosure of sources and methods would result from disclosure of the withheld materials. It was, therefore, an abuse of discretion for the District Court to deny

discovery which sought such information.

In addition, several other factors present in this case make it one that is unusually appropriate for discovery. First, 17 years have passed since the events recounted in the document, thus ineluctably raising questions as to whether disclosure would result in the serious harm to the national security claimed by the CIA. Second, over the years the events surrounding the assassination of President Kennedy have been given extensive, almost unprecedented publicity, and voluminous disclosures of documentary materials pertaining to it have been made by the Warren Commission, the Rockerfeller Commission; several congressional committees, including the House Select Committee on Assassinations; and a number of federal agencies, notably including the CIA, the FBI, and the National Archvies. The publicity and the disclosures considerably decrease the liklihood that either identifiable damage to national security or unauthorized disclosure of intelligence sources and methods can reasonable be expected to result from the disclosure of the withheld materials in the document at issue. Third, the document at issue is one that deals with the very embarrassing topic of the CIA's pre-assassination knowledge of the activities of Lee Harvey Oswald, a returned American defector to the Soviet Union, and may in fact reveal that the CIA withheld information from the Warren Commission that should have been given it. Fourth, the CIA initially withheld the document in its entirety, then, on remand, divulged half of it, showing in the pro-

cess that what it has now released had long been in the public domain by virtue of other disclosures made either by the CIA, or with CIA approval.

The presence of these factors should have alerted the District Court to the need to scrutinize the CIA's claims with particular care in this case, and to permit Allen to undertake the discovery he sought. Failure to allow discovery to go forward under these circumstances was an abuse of discretion and requires the District Court's decision to be reversed.

III. SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE OF THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT

A motion for summary judgment is properly granted only when no material fact is genuine in dispute, and then only when the movant is entitled to prevail as a matter of law. Fed.R.Civ.P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Bouchard v. Washington, 168 U.S.App.D.C. 402, 405, 514 F.2d 824, 827 (1974); Nyhus Travel Management Corp., 151 U.S.App.D.C. 269, 271, 466 F.2d 440, 442 (1972). In assessing the motion, all "inferences to be drawn from the underlying facts contained in [the movant's] materials must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The movant must shoulder the burden of showing affirmatively the absence of any meaningful factual issue. Bloomgarden v. Coyer, 156 U.S.App.D.C. 109, 113-114, 479

F.2d 201, 206-207 (1973). That responsibility may not be relieved through adjudication since "[t]he court's function is limited to ascertaining whether any factual issue pertinent to the controversy exists [and] does not extend to the resolution of any such issue." Nyhus, supra, 151 U.S.App.D.C. at 271, 466 F.2d at 442.

In this case, as the discussion in early parts of this brief has shown, there are at least five issues of material fact in dispute. These are: (1) whether proper classification procedures were followed; (2) whether identifiable harm to the national security will result from disclosure of the withheld portions; (3) whether segregable, non-exempt portions of the document remain withheld; (4) whether the public interest in disclosure outweighs the harm which may reasonably be expected from disclosure of the withheld portions; and (5) whether release of the withheld materials can reasonable be expected to result in the unauthorized disclosure of intelligence sources and methods. The facts pertaining to these issues of material fact have been discussed above. Their existence precluded summary judgment in favor of the CIA.

IV. FILING INSTRUCTIONS ARE NOT EXEMPT UNDER 5 U.S.C. § 552(b)(2)

The District Court ruled that certain filing instructions which the CIA deleted from the document are properly withheld under Exemption 2. That exemption excepts from disclosure matters

"related solely to the internal personnel rules and practices of an agency." The District Court based its decision on this point solely on the finding that "the matters withheld pursuant to this exemption are merely intra-agency matters in which the public could not be reasonably expected to have a legitimate interest." [App. 116]

The Court's ruling is wrong as a matter of law. In Jordan v. United States Dept. of Justice, 192 U.S.App.D.C. 144, 155, 591 F. 2d 753, 764 (1978), this Court held that the phrase "internal personnel" modifies both "rules" and "practices". The CIA's filing instructions constitute neither personnel rules nor personnel practices.

In addition, the District Court's finding that the public could not reasonalby be expected to have a legitimate interest in such filing instructions is erroneous. In Department of Air Force v. Rose, 425 U.S. 352, 369 (1976), the Supreme Court held that Exemption 2 does not apply to matters subject to "a genuine and significant public interest." The CIA's filing instructions for this document are a matter of genuine and significant public interest. First, they may reveal other file locations where the CIA has concealed records relevant to the numerous FOIA requests for Kennedy assassination records that are pending with the CIA. Second, such filing instructions may reveal details that are important to a scholar, such as how widely the document was disseminated within the CIA and to whom it was routed.

V. CIA IMPROPERLY WITHHELD MATERIALS WITHOUT MAKING ANY CLAIM THAT THEY WERE EXEMPT

The CIA excised classification markings and stamps from the document but failed to claim that this withholding falls within any exemption to FOIA. These markings contain information bearing on when the document was classified and whether the proper classification procedures were followed, information also sought by Allen on discovery. If an agency is unable to establish that withheld material meets all the legal requirements necessary to qualify for one of the nine statutory exemptions to FOIA, the material must be released. EPA v. Mink, 410, U.S. 73, 39 (1972). The CIA has failed to meet that burden, so the classification markings must be released.

VI. CONCLUSION

For the reasons set forth above, the District Court's decision should be reversed and the case remanded. On remand Allen should be allowed to undertake reasonable discovery to ascertain details about the classification procedures followed and to explore what effect disclosure of the withheld materials is likely to have on national security. In addition, the CIA should be required to make a determination pursuant to Executive Order 12065, § 3-303, as to whether the public interest in disclosure outweighs the harm to national security which can reasonably be exptected to result from disclosure; and the District Court should be directed to make a de novo review of that determination. Finally, if discovery

fails to provide sufficient information to enable the District Court to make a responsible de novo determination of the issues, the Court should be instructed to conduct an in camera inspection of the document with the aid of an independant national security classification expert.

Respectfully submitted,

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