BRIEF FOR PLAINTIFF-APPELANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 79-1454

MARK A. ALLEN,

Plaintiff-Appellant

v.

CENTPAL INTELLIGENCE AGENCY
and STANSFIELD TURNER,

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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Appellant pro se

ALLEN v. CENTRAL INTELLIGENCE AGENCY, STANSFIELD TURNER
79-1454

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, appellant pro se, certifies that the following listed parties appeared below:

Mark A. Allen Pro Se Appellant

Central Intelligence Agency
Stansfield Turner Appellees

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REFERENCE TO PARTIES AND RULINGS

The only decision at issue is Judge John Lewis Smith's January 12, 1979 Memorandum Order and Opinion found on pages 87-88 of the Appendix.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in giving binding precedential effect to the vacated July 12, 1978 order in Fensterwald v. C.I.A. ?
2. Did the District Court err in dismissing plaintiff's case for lack of subject matter jurisdiction ?
3. Was it error for the District Court to have blocked plaintiff's attempt at discovery ?
4. Did the defendants meet their burden of showing there were no reasonably segregable portions given the circumstances of this case ?
5. Was it error for the District Court not to have granted plaintiff's motion for in camera inspection given the circumstances of this case ?
6. Did the District Court give excessive weight to the defendants' affidavits ?

This case has not been before any court other than the district court below. (Allen v. C.I.A. , Stansfield Turner, Civil Action No. 78-1743, (D.D.C. 1978)) Appellant is aware of certain FOIA suits filed by Mr. Harold Weisberg and Mr. James Lesar in the District of Columbia District Court but is not aware whether they involve the same issues as the case at bar.

STATEMENT OF THE CASE

This case arose under the Freedom of Information Act, 5 U.S.C. §552. On September 18, 1978 plaintiff filed his complaint in the U.S. District Court for the District of Columbia seeking to enjoin defendants from withholding the document denominated by them as item number 509-803. Defendants answered on October 19. Plaintiff served the defendants with interrogatories on November 8 and the following December 8 defendants moved for a protective order. At the January 3, 1979 status call, the Honorable John Lewis Smith presiding, a protective order was granted. On the same day plaintiff filed a motion to vacate the protective order. Six days later, on January 9, defendants filed a motion to dismiss pursuant to 12(b)(1) of the Federal Rules of Civil Procedure, alleging lack of subject matter jurisdiction. Oral argument was heard on the motion the following day. On January 12, defendants motion was granted. Plaintiff then filed a motion for reconsideration on January 24 and a motion for in camera inspection with the assistance of a classification expert on February 5. Defendants opposition to the motion for reconsideration was filed February 7 and on February 22 plaintiff's motion for reconsideration was denied.

STATEMENT OF THE FACTS RELEVANT TO THE ISSUES PRESENTED

Plaintiff instituted this action to obtain a January 31, 1964 C.I.A. report to the President's Commission on the Assassination of President Kennedy entitled "Information Developed by the C.I.A. on the Activity of Lee Harvey Oswald in Mexico City, 28 September - 3 October 1963". Plaintiff was reasonably certain that the document he requested (C.I.A. item 509-803) was substantially identical to this report.

On November 8, 1978 plaintiff served defendants a set of interrogatories consisting of ten questions (Appendix, pg. 1) concerning the documents at issue. On December 8, 1978 defendants moved for a protective order (Appendix

pg. 3) claiming that the questions were irrelevant and that it would be an undue burden and expense to respond to the interrogatories in light of their pending dispositive motion. At the January 3, 1979 status call argument was heard on the discovery dispute. Defendants counsel first informed the court that he would be attending a meeting at the Department of Justice the following monday where possible defenses to this litigation would be discussed. (January 3 Transcript, pg. 2) Plaintiff then inquired about the status of the protective order, erroneously believing that the proposed order defendants has attached to their motion was genuine. The Court corrected plaintiff's mistaken belief, but then informed him that unless he had a "good reason", the protective order would be granted. (January 3 Transcript, pg. 4) The defendants then argued that the questions were either irrelevant or would be answered in their motion to dismiss. (Jan. 3 Transcript, pg. 7-8) Plaintiff then attempted to argue the relevancy of his questions, but before he had completed his arguments on this question, the Court decided to grant the protective order. When plaintiff informed the Court he had not completed his arguments, he was told that the Court was merely staying the matter until after the defendant counsel's meeting at the Department of Justice. (Jan. 3 Transcript, pg. 11) Plaintiff immediately filed a motion to vacate the protective order, specifying in some detail why the interrogatories were relevant to the pertinent issues. The Court took no action on this motion before granting defendants' motion to dismiss under 12(b)(1).

Six days later on January 9, 1979 defendants filed a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defendants argued that the document at issue was properly withheld under exemptions (b)(1), (b)(2) and (b)(3) of the Freedom

of Information Act, 5 U.S.C. §552. (Appendix, pgs. 9-14) The defendants also urged the Court to follow the July 12, 1978 order of Judge John J. Sirica in the case Fensterwald v. C.I.A., Civil Action No. 75-0897 (D.D.C. 1978) which granted the defendants partial summary judgment for some 1,264 documents, of which the report at issue was one. (See Appendix, pg. 54)

Plaintiff pointed out to the Court that the July 12 order relied on by the defendants was vacated by the issuing District Court sixteen days later. (Appendix, pg. 61) The defendants argued that the circumstances surrounding the Fensterwald case dictated that it be used as a precedent nevertheless. They emphasized that after the issuance of the July 12 order granting partial summary judgment to the defendants and partial summary judgment to the plaintiff Fensterwald, the latter moved for a voluntary withdrawal with prejudice. In the same July 28 order where the Court vacated its order of July 12, it also granted plaintiff's motion to withdraw with prejudice. Defendants then moved to have Judge Sirica restore that part of the July 12 order favoring them (which included the document at issue), but their motion was rejected in the Court's order of September 18, 1978. (Appendix, pg. 62)

In support of their argument that the document at issue was properly withheld under exemptions (b)(1), (b)(2) and (b)(3) of the Act, defendants resubmitted a one paragraph description of the document which they had given judge Sirica in the Fensterwald case,(Appendix, pg. 10) and supplemented it with affidavits from two C.I.A. officials, Information Review Officer Robert E. Owen and his predecessor Charles Briggs. In the former affidavit Mr. Owen stated that he had TOP SECRET classification authority and had determined that the document at issue was classified SECRET pursuant to Executive Order 12065. Mr Owen also incorporated by reference the affidavit

of his predecessor Charles Briggs, which was submitted in the Fensterwald case. (Appendix, pg. 16,21) Mr. Briggs' affidavit dealt generally with the 1,264 documents involved in the Fensterwald litigation and did not specifically mention the document in dispute.

The plaintiff pointed out that by the defendants' own admission over one half of the substantive information in the document in question is already in the public domain. (Appendix, pg. 10) Defendants contended that this information was "inextricably mixed" with operational details which would compromise intelligence sources and methods if released. (Ibid) Plaintiff countered with one of defendants own documents, which stated that the document at issue was written in a special way, so as to protect the agency's sources and methods. (Appendix, pg. 75) He further demonstrated how the defendants had been able to successfully delete operational details from previously released C.I.A. documents, (Appendix, pg. 65, para. 10; pg. 76) and introduced evidence calling into question the credibility of the C.I.A. officials relied on by the defendants to establish the document's security classification. Plaintiff showed that in a previous Freedom of Information case, which involved the exact same subject matter as the document at issue, C.I.A. official Robert Owen had found certain material to be properly classified when in fact it had been in the public domain for over five years. (Appendix, pgs. 65-66, para. 11; pgs. 77-76) Plaintiff also called into question the reliability of affiant Charles Briggs. (Appendix, pgs. 89-90)

After the January 10, 1979 oral argument on defendant's motion to dismiss, the District Court granted defendants' motion two days later. (Appendix, pg. 87) The Court held that the document at issue had been found properly withheld in the Fensterwald case, and presumably invoked the doctrine of stare decisis. The Court further held that the document was properly class-

ified and hence exempt under exemption (b)(1) of the Act, relying on the affidavit of C.I.A. official Robert Owen and noting that agency affidavits are entitled to substantial weight. (Ibid) The (b)(2) and (b)(3) claims of the defendants were not ruled on.

Plaintiff then moved for reconsideration (Appendix, pg. 89) and additionally for in camera inspection with the assistance of a classification expert. (Appendix, pgs. 89-92) Plaintiff contended that defendants had not met their burden of showing there were no segregable portions under the circumstances described above and that in camera inspection should be granted to resolve this critical issue. (Appendix, pgs. 91-92) On February 22, 1979 plaintiff's motion for reconsideration was denied. (Appendix, pg. 93).

ARGUMENT

The District Court Erred in Dismissing Plaintiff's Suit For Lack of Subject Matter Jurisdicion

The District Court dismissed plaintiff's suit for lack of subject matter jurisdiction, Federal Rules of Civil Procedure 12 (b)(1). (Appendix, pg. 9,87) Yet clearly the District Court had and even exercised subject matter jurisdiction. The Freedom of Information Act, 5 U.S.C. §552(a)(4)(B) provides that:

" On complaint, the district Court of the United States .... has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaintaint. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its actions. (emphasis added)

While the defendants did not elaborate on why a 12(b)(1) motion was proper under these circumstances, presumably their reasoning is that if the material is properly withheld the District Court has no power to order its release and therefore lacks subject matter jurisdiction. But theact itself and its legislative history make clear that jurisdiction is predicated on alleged wrongful withholding and not on the plaintiff actually proving that documents are improperly withheld. As noted above, the act provides that the appropriate district court is required to review de novo any agency determination and that in camera inspection may be granted to "determine whether such records or any part thereof shall be withheld." 5 U.S.C. §552(a)(4)(B). Further confirmation that jurisdiction is predicated on alleged wrongful withholding and not on the actual proof of such is found in the act's legislative history. As stated in the Senate Report concerning the act prior to its revisions: "Subsection (c) contains a specific court remedy for any alleged wrongful withholding of

of agency records by agency personnel." (emphasis added)

Subject matter jurisdiction pertains to the "authority or competence (of a court) to hear and decide a case." 5 C. Wright and A. Miller, Federal Practice and Procedure §1350, pg. 543 (1969). Since the plaintiff properly alleged wrongful withholding, the District Court clearly had subject matter jurisdiction to determine whether plaintiff's allegations were correct. In fact, the District Court exercised subject matter jurisdiction by holding that the document was properly withheld under (b)(1) and because of a previous district court decision. (Appendix, pg. 87)

It further should be noted that there are two other compelling reasons why Congress could not have intended Freedom of Information suits to be simply subject matter jurisdiction questions. The first involves the settled doctrine that the party who asserts subject matter jurisdiction must prove it when challenged. 5 C. Wright and A. Miller, Federal Practice and Procedure §1350, pg. 555 (1969) citing Thompson v. Gaskill, 315 U.S. 442, 62 S.Ct. 673, 86 L.Ed. 951 (1942); Gibbs v. Buck, 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111 (1939). If Freedom of Information cases are to be subject matter jurisdiction questions, the result is to place on FOIA plaintiffs the burden of showing that the documents they seek are improperly withheld. This directly contradicts the explicit language of the act which provides that the burden is on the agency to prove that any withheld documents are properly restrained. 5 U.S.C. 552(a)(4)(B) Furthermore, since subject matter jurisdiction is essentially a procedural defect, any freedom of information decision would be deprived of res judicata effect. A 12(b)(1) motion is basically one in abatement and is not a decision on the merits. 5 C. Wright and A. Miller, Federal Practice and Procedure, §1350, pg. 554 (1969) citing Tyler Gas Serv. Co. v. F.P.C., 101 U.S.App.D.C.

184, 247 F.2d 590, cert. den. 355 U.S. 895 (1957).

The difference between having a case dismissed for lack of subject matter jurisdiction and on a motion for summary judgment is more than just a nice procedural distinction. Under Rule 56 the moving party must show there is no genuine issue as to any material fact. In effect the government's 12(b)(1) motion is an attempt to obtain the best of both worlds, by depriving the plaintiff of his summary judgment protections while obtaining the precedential effect of a trial on the merits. There is no reason for allowing the defendants to escape their summary judgment burdens in this fashion.

The District Court Erred in Giving Binding Precedential Effect to a Vacated Order

The District Court's ruling on defendant's motion to dismiss gave as a reason for granting that order the fact that a previous District Court had found the document at issue properly withheld from disclosure. (Appendix, pg. 87) Yet the decision relied on, Judge John J. Sirica's July 12, 1978 order in Fensterwald v. C.I.A., Civil Action No. 75-0897 (D.D.C. 1978) was vacated by Judge Sirica 16 days after he issued it. (Appendix, pg. 61) The defendants efforts to have this vacated order reinstated were flatly rejected by the District Court in its order of September 19, 1978. (Appendix, pg. 62) The defendants did not appeal. These facts were pointed out to the court below in plaintiff's brief, (Appendix, pg. 68) and in oral argument (January 9, 1979 Transcript, pg. 13)

The doctrine of stare decisis, with its twin goals of "security" and

"certainty" in the law (Black's Law Dictionary, 1578 (4th Ed. 1951) citing Otter Tail Power Co. v. Von Bank, 72 N.D. 497, 8 N.W.2d 599,607 (1942)) requires that courts follow the prior decisions of equal or higher tribunals where the facts of the cases are substantially the same. Blacks, supra, 1578 citing Moore v. City of Albany, 98 N.Y. 396, 410 (1884). But such a policy necessarily assumes that there is some decision to follow. Yet the effect of vacating an order is to make that order as if it never existed. As noted in Corpus Juris Secundum: "where a judgment is vacated or set aside, it is as though no judgment had ever been entered ...." 49 C.J.S. Judgments §306 (1940).

When Judge Sirica vacated his order involving the document at issue, he left no order for the District Court in this case to follow. Therefore it was error for the court to have given it binding stare decisis effect.

Defendants contend however, that certain facts surrounding the Fensterwald case dictate that Judge Sirica's vacated order be used as a precedent nevertheless. The pertinent facts are as follows:

Plaintiff Fensterwald was seeking all of the C.I.A.'s files on the assassination of President Kennedy, a request which involved some 1,363 documents. At plaintiff's suggestion Judge Sirica agreed to review [illegible] in camera a "representative sample" of about 50 of the items sought. The document at issue was not examined. After conducting this inspection the Court, on July 12, 1978, awarded partial summary judgment to the defendants as to all documents where they had claimed (b)(1), (b)(2),(b)(3), (b)(5) or (b)(7)(D) exemptions, or any combination thereof, and partial summary judgment to the plaintiff as to all items where only (b)(6) or

(b)(7)(F) claims were made. (Appendix, pg. 54) On July 18, plaintiff moved for a voluntary withdrawal with prejudice, while at no time asking the court to vacate its July 12 order. Plaintiff simply believed that the documents he would receive would be of no use to him. (Appendix, pg. 56) Entirely on his own initiative Judge Sirica vacated the July 12 order which the Court in this case cited as precedent on July 28., while at the same time granting plaintiff Fensterwald's motion to withdraw with prejudice. (Appendix, pg. 61) The defendants then asked Judge Sirica to restore that part of the July 12 order favoring them so that the case might be used as a precedent, but the Fensterwald court denied defendant's motion on September 19, 1978. (Appendix, pg. 62) The defendants did not appeal this order.

While Judge Sirica did not comment on why he decided to vacate the July 12 order, it is a mistake to assume, as defendants seem to, that the District Court in no way intended to vitiate its findings when it vacated the order. It is easy to see how Judge Sirica might have had second thoughts about a procedure which resulted in the indefinite withholding of hundreds of documents which he had never seen, especially on a matter of such intense public interest as the assassination of President Kennedy.

It should also be noted that the Fensterwald case was decided under the classification standards of former Executive Order 11652 [illegible] (Fed. Reg. Vol. 37, No. 4) while the case at bar was decided under the more stringent standards of Executive Order 12065 (Fed. Reg. Vol. 43 No. 128) (See affidavit of C.I.A. official Robert Owen stating the standards of E.O. 12065 are more stringent. Appendix, pg. 17) These differing standards

are another reason why the Fensterwald case should not have been used as a precedent for the case at bar.

The District Court Erred in Denying Plaintiff's Attempt at Discovery

On November 8, 1978 plaintiff served the defendants with interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure. (Appendix, pg. 1) The interrogatories consisted of ten questions, all highly relevant to issues in this action. Questions one and two simply sought to establish that the document in question, CIA item 509-803, was in fact the document plaintiff actually sought, Warren Commission Document #347. Plaintiff offered to drop the lawsuit if the documents were not substantially the same. (January 3 Transcript, pgs. 9-10) Questions three and four concerned another C.I.A. document which strongly indicated that the document at issue was written in a special way so as to protect the agency's sources and methods, (See Appendix, pg. 75) information clearly relevant to defendants' (b)(1) and (b)(3) claims. Questions six and seven asked whether there were any sources and methods actually mentioned in this document, also pertinent to the (b)(1) and (b)(3) exclusions. Questions eight through ten dealt with how much of the information in this document was already in the public domain. Such data was clearly relevant to plaintiff's contention that there were segregable portions which the defendants should be required to release.

On December 8, 1978 defendants moved for a protective order. The motion contained the bare allegation that plaintiff's questions were irrelevant and that it would be an "undue burden and expense" to respond to the interrogatories given their "pending dispositive motion." (Appendix, pg. 3)

Argument was heard on the discovery dispute at the January 3, 1979 status call. Prior to the discussion of the protective order motion defendant's counsel informed the court that he would be attending a meeting where a possible defense to the case at bar would be discussed. (January 3 Transcript, pg. 1) When plaintiff pro se rose to oppose the protective order he was cut off by the court, which then announced its intention to grant the order. (January 3 Transcript, pg. 11) When plaintiff informed the court that he had not finished arguing this issue, the court stated that the grant of the protective order was merely a way of staying the discovery issue until defendants' counsel had attended his meeting. (Ibid) But because the court then ordered the defendants to submit theit motion to dismiss by January 9, only six days later, (Ibid) and then scheduled a hearing on the motion the next day, January 10, (Ibid), the net effect was to deny plaintiff any opportunity at discovery. Plaintiff promptly submitted a motion to vacate the protective order the same day it was granted, (Appendix, pgs. 6-8) and said motion set out in detail the reasons the questions were proper and should be answered. However, the District Court never acted on this motion prior to granting defendants' motion to dismiss.

In Ray v. Turner, ___ U.S.App.D.C. ___, 587 F.2d 1187 (1978) summary judgment was granted before any discovery had taken place. Judge Wright, in his concurring opinion noted: "Interrogatories and depositions are especially important in a case where one party has an effective monopoly on relevant information." 587 F.2d at 1218.

In this instance plaintiff's interrogatories were not only highly relevant but important to his case. Plaintiff's interrogatories could have established conclusively that the document at issue was written in a

special way so as to protect the agency's sources and methods, and indeed could have shown there were no sources or methods mentioned in the disputed item. Furthermore, the interrogatories could have shown that a very high percentage of information in this document was already in the public domain. These ten, simple, direct questions were quite relevant under the issues of this case and were in no way a burden on the defendant C.I.A. The District Court's improper denial of discovery prejudiced the plaintiff's case by not affording him a fair opportunity to test defendants' exemption claims.

The Defendants Failed to Meet Their Burden of Showing There Were No Segregable Portions in the Document at Issue

The Freedom of Information Act, 5 U.S.C. §552(a)(4)(B) provides that the burden of proof is on the government agency to justify the withholding af any requested record. The Act further states that "any reasonably segregable portion"of a record must be provided to the requestor "after deletions of the portions which are exempt ...." 5 U.S.C. §552(b)(9)

There is undisputed evidence in the record that over one half of the information in the document at issue is already in the public domain. (Appendix, pg. 64) The defendants only response to this uncontroverted fact was to state that the publicly available information was "inextricably mixed with operational details which if exposed, would compromise several sensitive forign intelligence sources as well as a sensitive foreign intelligence operational method." (Appendix, pg. 10)

Defendants' justification is essentially a bare allegation that the

publicly available information is "inextricably mixed" with exempt material. If such a conclusory statement is held sufficient to meet the agency's burden of proof in this instance, little will be left of the Act's segregability provision. All that will be necessary for an agency to meet any segregability challenge is to make the boilerplate assertion that non-exempt material is inextricably mixed with exempt information. As this court observed in Mead v. U.S. Department of the Air Force, 184 U.S.App.D.C. 350, 566 F.2d 242 (1977): "....(U)nless the segregability provision of the FOIA is to be nothing more than a precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA applicants and reviewed by the courts." 184 U.S.App.D.C. at 369; 566 F.2d at 261.

Where the undisputed record shows that over one half of the material in this document is non-exempt (Appendix, pg. 10), an FOIA defendant does not resolve the segregability issue in his favor by the simple assertion that such information is inextricably mixed with sources and methods. Defendants should be required to supply plaintiff with more detailed information or submit to in camera inspection.

The District Court Erred in Not Granting Plaintiff's Motion For In Camera Inspection

On February 5, 1979 plaintiff moved for in camera inspection of the document at issue pursuant to 5 U.S.C. §552(a)(4)(B). (Appendix, pgs. 91-92)

The District Court never ruled on plaintiff's motion.

The legislative history of the act indicates that while the grant of in camera review is largely discretionary, in some cases a court conducted inspection is both "necessary and appropriate." S. Rep. No. 93-1200, 93d Cong., 2d Sess. 12 (1974), U.S. Code Cong. & Admin. News 1974 pg. 6290. The case at bar presents such an occasion.

Plaintiff had demonstrated that over one half of the information in the document at issue was already in the public domain. (Appendix, pg. 64) This presented a critical issue of segregability similar to that in Ray v. Turner, ___ U.S.App.D.C. ___, 587 F.2d 1187,1196 (1978) As noted above, defendants' sole response that the publicly available information was inextricably mixed with exempt material did not meet their burden in this matter.

Furthermore, plaintiff introduced one of defendants' own documents which strongly indicated that the document at issue was especially written so as to protect their sources and methods. (Appendix, pg. 65, para. 8(b); pg. 75) Defendants offered no evidence to refute this showing.

As Judge Wright stated in his concurring opinion in Ray, supra:

"When factual issues are disputed the burden of proof is on the government. If the burden cannot be clearly met by detailed affidavits and testimony, or when there was any indication of bad faith on the part of the agency, the court may not, in my view, sustain the agency's action without conducting an in camera inspection of the matters withheld." 587 F.2d at 1215.

The defendants in the case at bar did not meet their burden through either detailed affidavits or testimony. In fact, defendants' affidavits

did not even include information which this court has required government agencies to supply in every FOIA case. In Vaughan v. Rosen, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973) cert. den. 415 U.S. 977 (1974) this court held that the government in FOIA cases must supply an indexing system which subdivides the document under consideration into "manageable Parts 'cross referenced to the relevant portion of the government's justification." 157 U.S.App.D.C. at 347; 484 F.2d at 827. Furthermore, in Mead Data Cent. v. U.S. Department of the Air Force, 184 U.S.App.D.C. 350, 566 F.2d 243 (1977) this court held that an agency should "describe what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." 566 F.2d at 261. The defendants in this case provided none of this information. Yet all of this data would have been quite useful in determining the segregability issue.

In summary, defendants failed to provide the information which would meet their burden of showing that the document at issue was properly withheld in full, and under these circumstances in camera inspection was clearly necessary and appropriate. It was an abuse of discretion for the District Court not to have granted it.

The District Court Erred by Giving Excessive Weight to the Defendants' Affidavits

It has long been established through many decisions of this court that agency affidavits must be accorded "substantial weight" in FOIA cases. Ray v. Turner, ___ U.S.App.D.C. ___, 587 F.2d 1187,1194 (1978) But while this court has not elaborated to any extent as to what "substantial weight

is, it is clear that it does not mean "conclusive weight". Yet after a reading of the Disrtict Court's opinion (Appendix, pg. 87) one can only conclude that such a conclusive weight standard was applied in fact. Plaintiff offered considerable evidence challenging the agency's exemption claims. As noted above, plaintiff showed that over one half of the information in this document was already in the public domain. (Appendix, pgs. 10,64) He offered one of defendants own document showing that the document at issue had been written in a special way, so as to protect the agency's sources and methods. (Appendix, pg. 65, para. 8(b)) He showed that the officials who submitted the agency's affidavits in this case had in the past classified information which was either already in the public domain (Appendix, pg. 66) or was released shortly thereafter. (Appendix, pg. 89) In the former case the material withheld concerned the same subject matter as the document at issue. (Appendix, pg. 65, para. 8(b)) Yet in spite of this evidence the District Court's only comment on the exemption disputes was the following:

....(T)he appropriate office of the CIA has re-reviewed the documents in question in light of the new, more stringent criteria set forth in Executive Order 12065, effective December 1, 1978 and has determined that the material is classified at the SECRET level and should be withheld from disclosure. Agency affidavits concerning the classification of documents are entitled to 'substantial weight'." (Appendix, pg. 87-88)

In view of the District Court's complete disregard for any of the issues raised by the plaintiff, one can only conclude that the court simply took the agency's affidavit at face value and inquired no further into the propriety of the defendants' claims. Such an approach is tantamount to a return of the holding in Environmental Protection Agency v. Mink, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed. 2d 119 (1973) which held that "a court

should not review the substantive propriety of a classification or go behind an agency affidavit stating that the requested documents had been duly classified pursuant to Executive Order." (as characterized in Ray v. Turner, ___ U.S.App. D.C. ___, 587 F.2d 1187, 1190-1 (1978) As the Ray court pointed out, "in 1974 Congress overrode a presidential veto and amended the FOIA for the express purpose of changing this aspect of the Mink case." 587 F.2d at 1190-1. The 1974 amendments provided that the court should determine all exemption claims de novo, 5 U.S.C. §552(a)(4)(B) and specifically provided the plaintiff with an opportunity to challenge the substantive classification of documents by amending exemption (b)(1) to exclude only those documents from disclosure that "are in fact properly classified pursuant to (an) Executive Order." (emphasis added) 5 U.S.C. §552(b)(1).

The 1974 amendments require the district court to balance the evidence offered by the plaintiff with the affidavits offered by the defendants, while according the latter's views substantial weight." In this instanse however, the District Court from all indications ignored the plaintiff's evidence and decided exclusively upon the basis of the agency's affidavits. Such an approach gave the affidavits conclusive weight, a result clearly not intended under the revised version of the act. In granting such excessive weight to the agency's affidavits the District Court used an inaccurate standard in determining whether defendants had met their burden of showing the material was properly withheld.

Relief Sought

The District Court's decision of January 12, 1979 granting defendants' motion to dismiss should be reversed. Further, the District Court should be instructed to compel defendants to answer plaintiff's interrogatories and to provide him with a Vaughan index.

Respectfully Submitted,

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ADDENDUM

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details

Addendum - 1a -

when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under

(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;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E),(F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90–23, § 1, June 5 1967, 81 Stat. 54; Pub.L. 93–502, §§ 1–3, Nov. 21, 1974, 88 Stat 1561–1564; Pub.L. 94–409, § 5(b), Sept. 13, 1976, 90 Stat. 1247.

Historical and Revision Notes

Derivation:	**United States Code** 5 U.S.C. 1002	**Revised Statutes and Statutes at Large** June 11, 1946, ch. 324, § 3, 60 Stat. 238.

any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(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;