BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 81-1009

HAROLD WEISBERG,

Plaintiff-Appellant

v.

GENERAL SERVICES ADMINISTRATION,

Defendant-Appellee

On Appeal from the United States District Court for the District of Columbia, Hon. Aubrey E. Robinson, Jr., Judge

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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 appellant Harold Weisberg, certifies that the following listed parties and amici (if any) appeared below:

Harold Weisberg

The General Services Administration

The Central Intelligence Agency, an interested nonparty of whom Weisberg sought discovery, appeared at certain conferences and hearings.

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

JAMES H. LESAR
Attorney of record for
Appellant Harold Weisberg

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BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF ISSUES

1. Whether district court erroneously ruled that plaintiff had not "substantially prevailed" within the meaning of 5 U.S.C. § 552(a)(4)(E) where:

(a) agency "declassified" two Warren Commission transcripts and released them on day its brief was due in Court of Appeals;

(b) transcripts were not properly classified procedurally or substantively and did not disclose intelligence sources and methods not already known to the public, including through official disclosures;

(c) agency affidavits which sought to justify the withholding of these transcripts were speculative, inconsistent, implausible, contradictory, and false;

(d) agency affidavits failed to show that prior to their "declassification" these transcripts contained no segregable non-exempt portions; and

(e) agency responsible for withholding the transcripts had improper motive for suppressing them and a history of bad faith conduct in litigating access to Warren Commission materials.

2. Whether the district court erred in refusing to allow party seeking award of attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) to undertake discovery regarding agency's claim that transcripts were released because of developments unrelated to pending case.

3. Whether district court abused its discretion in not awarding attorney fees where agency acted in bad faith.

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

REFERENCES TO PARTIES AND RULINGS

By order dated July 14, 1980, the district court denied appellant Weisberg's motion for an award of attorney fees and other litigation costs. [App. 781] Previously, by order dated October 17, 1979, the court had stayed indefinitely all of Weisberg's pending discovery requests. [App. 497]

Subsequently, by order dated September 3, 1980, the district court granted Weisberg's motion for reconsideration, vacated its orders of October 17, 1979, and July 14, 1980, and ruled that Weisberg could commence discovery proceedings "on the issue of whether the two transcripts released to him while this case was pending on appeal were released for reasons unrelated to this litigation." [App. 793]

The General Services Administration (GSA) then moved the court to reconsider its ruling on Weisberg's motion for reconsideration, and by order dated October 30, 1980, the court granted that motion, vacated its order of September 3, 1980, and reinstated its orders of October 17, 1979, and July 14, 1980. [App. 803]

Remarks of the district court relevant to its rulings are interspersed throughout the transcript of the hearing held on October 17, 1979. [App. 740-779]

STATUTES OR REGULATIONS

The Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) provides:

> 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.

The FOIA further states:

> (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;
>
> * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that such matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) established particular criteria for withholding or refers to particular types of matters to be withheld;
>
> * * *
>
> 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.

50 U.S.C. § 403(d)(3) provides:

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

The Attorney General's "Guidelines for Review of Materials Submitted to the President's Commission of the Assassination of President Kennedy," as revised by the Attorney General in 1975, with language added by the revision in italics, read as follows:

> 1. Statutory requirements prohibiting disclosure should be observed.
>
> 2. Security classifications should be respected, but the agency responsible for the classification should carefully re-evaluate the contents of each classified document and determine whether the classification can, consistently with the national security, be eliminated or downgraded. See Attorney General's Memorandum on 1974 Amendments, pp. 1-4.

3. Unclassified material which has not already been disclosed in another form should be made available to the public on a regular basis or upon request under the Freedom of Information Act unless such material is exempt under the Act and its disclosure--

(A) Would be detrimental to the administration and enforcement of the laws and regulations of the United States and its agencies;

(B) Might reveal the identity of confidential sources of information and impede or jeopardize future investigations by precluding or limiting the use of the same or similar sources hereafter;

(C) Would be a source of embarrassment to innocent persons, who are the subject, source, or apparent source of the material in question, because it contains gossip and rumor or details of a personal nature having no significant connection with the assassination of the President.

Whenever one of the above reasons for nondisclosure may apply, your department should, in determining whether or not to authorize disclosure, weigh that reason against the overriding policy of the Executive Branch favoring the fullest possible disclosure.

Unless sooner released to the public, classified and unclassified material which is not now made available to the public shall, as a minimum, be reviewed by the agency concerned five years and ten years after the initial examination has been completed, and in addition must be reviewed whenever necessary to the prompt and proper processing of a Freedom of Information request. The criteria applied in the initial examination, outlined above, should be applied to determine whether changed circumstances will permit further disclosure. Similar reviews should be undertaken at ten-year intervals until all materials are opened for legitimate research purposes. The Archivist of the United States will arrange for such review at the appropriate time. Whenever possible provision should be made for the automatic declassification of classified material which cannot be declassified at this time.

Because of their length Executive orders 10501 and 11652 and the National Security Council Directive implementing Executive Order 11652 are printed as addenda to this brief.

STATEMENT OF THE CASE

I. "The Past Is Prologue"

On November 5, 1973, Congressman Gerald Ford, testifying before the Senate Rules Committee on his nomination to be Vice President, was told that it had been stated that "as a member of the Warren Commission you voluntarily accepted constraints which all members of the Commission accepted, providing that you would not publish or release any proceedings of the Commission." He was then asked whether he felt that in publishing his book, Portrait of the Assassin (Simon & Schuster, 1965), and in providing material for a Life magazine article on the Commission's proceedings, he had violated his "agreement." Mr. Ford replied that he could not recall any such agreement but that

> even if there was, the book that I published in conjunction with a member of my staff who worked with me at the time of the Warren Commission work--we wrote the book, but we did not use in that book any material other than the material that was in the 26 volumes of testimony and exhibits that were subsequently made public and sold to the public generally.

"Nomination of Gerald R. Ford of Michigan to be Vice President of the United States," Hearings Before the Committee on Rules and Administration, United States Senate (93rd. Cong., 1st Sess.), p. 89.

Aware that Mr. Ford's book quoted extensively from the transcript of the executive session of the Warren Commission held on January 27, 1964, Warren Commission critic Harold Weisberg had tried for several years to obtain a copy of this transcript from the National Archives. Although Mr. Ford had published parts of this transcript for profit, the Archives adamantly maintained that it could not make the transcript available to Mr. Weisberg because it was classified Top Secret.

On November 13, 1973, Weisberg filed suit for the January 27 transcript. In responding to that suit, Weisberg v. General Services Administration, Civil Action No. 2052-73, GSA continued to maintain that it was exempt from disclosure under Exemptions 1 and 7 to the Freedom of Information Act (FOIA). Initially argument focused upon the claim that the transcript was properly classified Top Secret pursuant to Executive Order 10501. The government produced an affidavit by Dr. James B. Rhoads, Archivist of the United States, which asserted that. It also procured an affidavit from Mr. J. Lee Rankin, formerly the General Counsel for the Warren Commission, who stated that the Warren Commission had instructed him to security classify Commission records, that the Commission's "authority to classify its records and its decision to delegate that responsibility to me existed pursuant to Executive Order 10501, as amended," and that he ordered that the January 27 transcript be classified Top Secret. [App. 43-44]

Weisberg filed counteraffidavits which branded these representations as false. He attached to his affidavits detailed documentation, such as receipts from Ward & Paul, the Warren Commission's reporter, which supported his assertions. Weisberg's evidence demonstrated that for internal bureaucratic reasons Ward & Paul had routinely classified Warren Commission transcripts (and other Warren Commission records) totally without regard to their content. On the basis of his intimate knowledge of the Commission's records, Weisberg asserted that they did not support Mr. Rankin's claim that he had been ordered to security classify Warren Commission records pursuant to Executive Order 10501. He further pointed out that the Warren Commission had no authority to classify records pursuant to Executive Order 10501, as amended, and that among other violations of security classification procedures, the Warren Commission allowed witnesses and reporters to buy copies of security classified transcripts. [App. 63-77]

The end result of this "battle of the affidavits" was a memorandum and order dated May 3, 1974, in which Judge Gerhard Gesell stated:

> Initially, the Court probed defendant's claim that the transcript had been classified "Top Secret" under Executive Order 10501, 3 C.F.R. 979 (Comp. 1949-53), since such classification would bar furhter judicial inquiry and justify total confidentiality. 5 U.S.C. § 552(b)(1); EPA v. Mink, 410 U.S. 73 (1973). However, defendant's papers and affidavits, supplemented at the Court's request, still fail to demonstrate that the disputed transcript has ever been classified by an individual authorized to make such a designation

> under the strict procedures set forth in Executive Order 10501, 3 C.F.R. 979 (Comp. 1949-53), as amended by Executive Order 10901, 3 C.F.R. 432 (Comp. 1959-63).

[App. 77]

Having rejected GSA's claim that the January 27 transcript was properly classified, Judge Gesell held, however, that it was exempt under 5 U.S.C. § 552(b)(7) as an investigatory file compiled for law enforcement purposes by virtue of the decision in Weisberg v. Department of Justice, 160 U.S.App.D.C. 71, 489 F.2d 1195 (en banc 1973). But before Weisberg could appeal this decision the Archives "declassified" what had never been properly classified and released the transcript to Weisberg and the public, all the while ignoring the fact that it had just procured a court decision holding it exempt under Exemption 7.

Once the January 27 transcript was made public it was immediately apparent that there never had been any basis for suppressing it under either exemption. It contained no information even remotely qualifying for consideration as being classifiable for reasons of national defense or foreign policy. The claim that it was properly classified under Executive Order 10501 was a fraud. (The transcript is reprinted in the Appendix at App. 165-252)

Subsequently, during the course of this lawsuit for other Warren Commission executive session transcripts, Weisberg learned that by letter dated December 22, 1972, the Central Intelligence Agency (CIA) had requested that the January 27 transcript remain

classified to protect "sources and methods." [App. 157-160] Yet disclosure of the transcript revealed no CIA "sources and methods" and no "sources and methods" that needed protection in the interest of national security. Affidavit of William G. Florence, ¶17 [App. 137]; March 21, 1977 Affidavit of Harold Weisberg, ¶¶30-32 [App. 153-154]

As will be seen, history repeated itself in this case. Again the CIA claimed the need to protect intelligence "sources and methods"; again the GSA "declassified" the transcripts after procuring a favorable decision in district, then released them to Weisberg while this case was pending on appeal.

II. PROCEDURAL HISTORY OF THE CASE

A. Initial Proceedings in District Court

On September 4, 1975, Weisberg filed suit under FOIA for two entire Warren Commission executive session transcripts, those of May 19 and June 23, 1964, and eleven pages of a third, that of January 21, 1964. Weisberg brought suit only after he had spent several years trying to obtain copies of these documents from their custodian, the National Archives and Records Services ("the Archives").

The reasons given for withholding the transcripts varied over the years. Thus, in its June 21, 1971 letter to Weisberg the Archives claimed that the June 23 transcript and the eleven

withheld pages of the January 21 transcript were immune from disclosure under Exemptions 1 and 7. When Weisberg renewed his request in 1975, the Archives initially added a new claim that both transcripts were protected by Exemption 5 but did not mention the Exemption 7 claim it had made in its 1971 letter. [App. 82] However, when Weisberg appealed, Deputy Archivist James E. O'Neill added Exemption 3 to the list of exemptions said to shield the January 21 and June 23 transcripts. [App. 17] The Exemption 3 statute said to specifically require that these transcripts be withheld is 50 U.S.C. § 403(d)(3).

On March 26, 1976, GSA moved for summary judgment. It submitted two affidavits in support of its motion, one by Dr. James B. Rhoads, the National Archivist, the other by Mr. Charles A. Briggs of the CIA. See App. 43, App. 289, respectively. In response Weisberg filed a lengthy counteraffidavit and numerous exhibits. [App. 63]

The motion for summary judgment and Weisberg's opposition to it dealt in large measure with the Exemption 1 claim. At a status hearing held on May 25, 1976, the district court also focused on this issue, indicating that it was not convinced by GSA's Exemption 1 claim:

> But I don't think that this record as it is now constructed will sustain my hearing the motion for summary judgment. I don't intend to decide the motion for summary judgment because I don't think the plaintiff has had full opportunity to probe, for example, this classi-

> fication question. It's a weird set of circumstances that have been disclosed in the record to date.

[App. 91]

Before the May 25th hearing Weisberg had attempted to undertake discovery in the form of interrogatories. When two months passed without response, Weisberg filed a motion to compel. Only then did the GSA respond. The response indicated, however, that GSA was determined to stonewall discovery to the extent possible. For example, Weisberg's 15th interrogatory inquired whether Yuri Invanovich Nosenko was the subject of the June 23 transcript. GSA, in the person of Dr. Rhoads, objected to this interrogatory on the grounds that "it seeks the disclosure of information which the defendant maintains is security classified and which defendant seeks to protect on this and other bases in the instant action." [App. 28] The truth, as GSA was later forced to admit under oath, was that this information was already public knowledge. In fact, the Archives itself had just recently written a letter to The New Republic in which it identified Nosenko as the subject of the June 23rd transcript. [App. 60]

At the May 25, 1976, hearing the district court authorized Weisberg to file additional interrogatories in lieu of taking the depositions he had noticed. When Weisberg's counsel noted that he needed to obtain information from the CIA, which as a nonparty was not subject to the provisions of Federal Civil Rule 33 for interrogatories on parties, the court brushed this problem aside: "Let me suggest, Mr. Lesar, that Mr. Ryan has enough work to do not to

play games in this case." [App. 97] When Weisberg's counsel continued to express his apprehensions, the court assured him that if the factual issues could not be resolved through interrogatories, he would hold a trial on the issues and fill his jury room with the witnesses. [App. 97]

What followed proved the rightness of Weisberg's apprehensions. On July 28, 1976 Weisberg filed a lengthy set of interrogatories. Some were intended for GSA, others for the CIA. Many were expressly directed to Mr. Charles A. Briggs, Chief of the CIA's Services Staff and the officer directly responsible for "classifying" the January 21 and June 23rd transcripts under Executive Order 11652.

On October 15, 1976, two and a half months after Weisberg filed his third set of interrogatories, there still had been no response to them from either CIA or GSA, so Weisberg filed yet another motion to compel.

On November 12, 1976, the GSA finally filed a response in which it objected to most of the interrogatories. [App. 98-125] The CIA made no response whatsoever.

In the interim Weisberg received notice that his October 15 motion to compel would be heard before a United States Magistrate on November 18, 1976. What ensued was a series of off-the-record conferences in the chambers of the Magistrate which resulted in one delay and obstruction after another. After three such con-

ferences over a two-month period with another conference set for a month later, Weisberg made an effort to halt the stalling and get the case back in front of the district judge who had promised that it would be handled expeditiously. As a result, the court scheduled a hearing on Weisberg's motion to compel for February 28, 1977, which was then postponed until March 4, 1977. At that hearing, however, the court decided to "put the cart before the horse" [App. 257] and have an argument on summary judgment first. As he had at the hearing held the previous year, the court indicated that the focus of his concern was the Exemption 1 claim and expressed doubt that GSA could meet its burden of demonstrating that the transcripts had been properly classified. When the GSA's counsel began to argue that the January 21 and June 23 transcripts were properly classified, the court bluntly stated:

> Well, I don't think we are going to get very far arguing about the Confidential classification because you have some problems about that, don't you?

[App. 258]

At the conclusion of the March 4 hearing, the court took the pending motions under advisement. On March 10, 1977 he issued an order ruling that the May 19 transcript was protected by Exemption 5, and that the January 21 and June 23 transcripts were covered by Exemption 3. [App. 126] After Weisberg filed a motion for reconsideration, clarification, and in camera inspection with aid of plaintiff's security classification expert, the district court amended his March 10 order to state that on the basis of

of the affidavits submitted by GSA, GSA had met its burden of demonstrating that "the release of the information can reasonably be expected to lead to the unauthorized disclosure of intelligence sources and methods." Order of June 7, 1977. [App. 253]

B. Proceedings in the Court of Appeals--First Case

Weisberg appealed the district court's decision on all three transcripts. While that case, Weisberg v. General Services Administration, Case No. 77-1831, was pending, Weisberg sought to present evidence to this Court which had not been presented to the district court. By order dated March 31, 1978, this Court directed Weisberg to file a motion for new trial in the district court. [App. 356]

In accordance with this order, on April 18, 1978, Weisberg moved for a new trial pursuant to Rule 60(b)(2) and (3). Weisberg's newly discovered materials raised two points. First, they directly undercut the credibility of the affidavits upon which the district court had relied in making its determination that release of the January 21 and June 23 transcripts could reasonably be expected to lead to the unauthorized disclosure of intelligence sources and methods. For example, Mr. Charles A. Briggs had sworn that any disclosure of the identity or whereabouts of Yuri Ivanovich Nosenko, the subject of the June 23 transcript, would put him in "mortal jeopardy"; and that therefore, "[e]very precaution

has been and must continued to be taken to avoid revealing his new name and whereabouts." Indeed, Mr. Briggs also swore in this affidavit that "[t]he manner in which Mr. Nosenko's security is being protected is serving as a model to potential future defectors." December 30, 1976 Briggs Affidavit, ¶9. [App. 298]

Weisberg's newly discovered evidence included: (a) an interview in the February 28, 1978 issue of New York Magazine with Edward Jay Epstein, author of Legend, a just-published book which dealt largely with Nosenko [App. 317-325]; (b) an excerpt from Legend [App. 326-327]; and (c) an article in the April 16, 1978 issue of the Washington Post which included a photograph of Nosenko [App. 328]. These materials revealed facts totally at odds with the concern for Nosenko's security alleged by Mr. Briggs. The Epstein interview stated that in 1968 the CIA decided to give Nosenko $30,000 a year as a consultant to the CIA, a new identity, and a new home in North Carolina. Epstein also stated that Nosenko was in Washington, D.C. handling 120 cases for the CIA. Furthermore, he asserted that in exchange for the house in North Carolina, an allowance from the CIA of about $30,000 a year, employment, and United States citizenship, Nosenko had agreed "not to talk to any unauthorized persons about his experiences with the CIA." [App. 327] Yet it was the CIA which Epstein said "sent" Nosenko to him. [App. 321]

Secondly, Weisberg's newly discovered materials showed that he had been discriminated against by government agencies in regard

to his Freedom of Information Act requests, and that government agencies, including GSA, had conspired with one another to unlawfully deny him access to nonexempt government records. For example, a November 15, 1968 memorandum by Dr. James B. Rhoads, the United States Archivist, shows that the National Archives made a decision not to furnish Weisberg with portions of the January 27, 1964 Warren Commission executive session transcript published by Congressman Gerald Ford because doing so "would encourage him to increase his demands for additional material from this transcript and from other withheld records." [App. 335] In addition, these materials also show that the Archives colluded wtih the Secret Service and the Justice Department to withhold from Weisberg a copy of the so-called "Memorandum of Transfer" by transferring it from the Secret Service, which admitted it had no basis for refusing to make it available to Weisberg, to the Archives, which was willing to contrive one. [App. 358, 336]

GSA opposed Weisberg's motion for a new trial, in part on the grounds that the alleged new evidence was of an "unsworn, double hearsay nature." Weisberg sought to counter this objection by taking the depositions of two CIA officials, Mr. Charles A. Briggs and Mr. Gene F. Wilson, who he believed would have personal knowledge of the facts asserted in some of the new evidence materials. However, the district court quashed the depositions and denied the motion for new trial on the grounds that however accurate the information contained in the newly discovered evidence

might be, it "has no bearing on this Court's central inquiry under 5 U.S.C. § 552(b)(3) and 50 U.S.C. §403(d)(3) whether disclosure of the Warren Commission transcripts would compromise CIA sources and methods. The Court is satisfied that the Government has established a threat to intelligence sources and methods, and is not persuaded to the contrary by the 'new evidence' which plaintiff has adduced." [App. 349]

C. Proceedings in the Court of Appeals--Second Case

Weisberg appealed from the May 12, 1978 order denying his motion for new trial. The new case, Weisberg v. General Services Administration, Case No. 78-1731, was then consolidated with its predecessor, Weisberg v. General Services Administration, Case No. 77-1831.

Weisberg filed his brief in the consolidated case on September 12, 1978. On October 16, 1978, the day GSA's brief was due in Court, GSA moved for partial dismissal of Case No. 77-1831 and complete dismissal of Case No. 78-1731 on grounds of mootness due to the "declassification" of the January 21 and June 23 transcripts by the CIA and their imminent release to Weisberg by GSA. By order dated January 12, 1979, this Court granted GSA's motion to dismiss. [App. 353] Oral argument on the remaining issue, the status of the May 19 transcript, was held on February 13, 1979. By order dated March 15, 1979, the Court of Appeals affirmed the district court's decision that it was properly exempt under Exemption 5. [App. 354]

D. Motion for Award of Attorney Fees and Costs

On April 12, 1979, this Court awarded Weisberg the costs of his appeal. [App. 355] Four days later Weisberg moved in district court for an award of attorney fees and other litigation costs. Affidavits by Weisberg [App. 379-423] and his counsel [App. 359-378] were filed in support of the motion.

On August 10, 1979, GSA filed an opposition to Weisberg's motion. The opposition, which was supported by the affidavit of Robert E. Owen [App. 424-444], contended that the January 21 and June 23 transcripts had been declassified as a result of revelations made by the House Select Committee on Assassinations and released independently of any court litigation.

On September 12, 1979, Weisberg filed a reply which was again supported by his own affidavit [App. 445-476] and another by his counsel [App. 477-484]. The following day he filed a request for production of documents [App. 485] and noticed the depositions of Messrs. James B. Rhoads, Charles A. Briggs, Robert E. Owen, and Arthur Dooley. [App. 487-489] He also issued subpoenas duces tecum. [App. 490-496] In response, GSA moved for a protective order and to quash the subpoenas.

On October 17, 1979, the district court heard arguments on the motion for attorney fees and GSA's motion for a protective order and to quash the subpoenas. At the conclusion of the hearing the court issued an order staying Weisberg's discovery indefi-

nitely and granting GSA permission to file a supplemental affidavit as it had requested at the end of the hearing. [App. 497]

On December 3, 1979, GSA filed a Supplemental Affidavit by Robert E. Owen. [App. 498-505] Weisberg responded with a counter-affidavit. [App. 506-594] On January 29, 1980, Weisberg filed a memorandum to the court and another affidavit. [App. 619-739]

On July 14, 1980, the district court issue an order concluding that Weisberg had not "substantially prevailed" within the meaning of 5 U.S.C. § 552(a)(4)(E). [App. 781] Weisberg moved the court to reconsider its ruling in light of two considerations: First, his extensive experience showed that it is necessary for him to file suit in order to obtain information he has requested even if that information has already been officially released to other requesters. Second, the CIA's annual report to the President of the Senate for 1978 shows that the CIA was well aware that the decision of this Court in Ray v. Turner, U.S.App.D.C. , 587 F.2d 473 (1978), which was handed down shortly before the CIA released the two Warren Commission transcripts, would affect its pending cases because it required the CIA to describe "on a deletion-by-deletion basis (as opposed to a document-by-document basis), the nature of the materials being withheld and the legal justification for its denial." [App. 783] Because the CIA had not done that in this case, Ray v. Turner foreshadowed a reversal.

When GSA failed to respond in timely fashion to Weisberg's motion for reconsideration, the district court granted it and authorized Weisberg to proceed with discovery on the issue of "whe-

ther the two transcripts released to [Weisberg] while this case was pending on appeal were released for reasons unrelated to this litigation." [App. 793]

However, GSA then moved the court to reconsider its order granting Weisberg's motion to reconsider. On October 30, 1980, the court granted GSA's motion, vacated its order of September 3, 1980, and reinstated its orders of July 14, 1980, and October 17, 1979.[1/] [App. 803]

On December 29, 1980, Weisberg filed a notice of appeal. [App. 804]

SUMMARY OF ARGUMENT

In this case Weisberg seeks an award of attorney fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E) because he obtained, but only after long and bitterly-contested litigation, copies of two Warren Commission executive session transcripts he had sought for more than a decade. In order to qualify for such an award, Weisberg must be held to have "substantially prevailed" in this litigation. Weisberg contends that he did.

In order to "substantially prevail," the party seeking an award of attorney fees must show that the prosecution of the action could reasonably be regarded as necessary, Vermont Low Income Advocacy Council v. Usery, 546 F.2d 509 (2d Cir. 1976), and

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1/ The district court's October 30 order incorrectly gives the date of the latter order as October 19, 1979.

that the action had a causative effect on the agency's surrender of the information, Cuneo v. Rumsfeld, 180 U.S.App.D.C. 184, 189, 553 F.2d 1360, 1365 (1977).

Weisberg brought suit some seven years after he first requested these transcripts. See Answer to Interrogatory 83. [App. 109] On March 12, 1975 he made a new request under the amended Freedom of Information Act. After his request was denied, he appealed; after his appeal was also denied, he waited six months before filing suit in district court. Under these circumstances it is clear that prosecution of the action "could reasonably be regarded as necessary."

It is equally clear that there is a casual nexus between the lawsuit and the release of the transcripts. Both the manner and timing of the release show this. After five years of bitterly contested litigation the CIA "declassified" the transcripts, not as part of a general declassification but in direct response to this litigation, and the GSA released them to Weisberg on the day its brief was due in this Court. In addition, GSA failed to carry its burden of demonstrating that the transcripts were properly exempt at all times prior to their actual disclosure, and that they contained no nonexempt segregable portions. Instead, GSA filed a series of affidavits that were by turns vague, speculative, inconsistent, contradictory, and false. The reasons given to justify withholding before the transcripts were released differed from those given after they were disclosed, and in both instances the reasons were neither credible nor true. Moreover,

the attempt to attribute the declassification and release of the transcripts to the proceedings of the House Select Committee on Assassinations is ludicrous because the information allegedly sought to be protected was publicly available years earlier, including through official CIA disclosures. That this is nothing more than a pretext seized upon by the CIA/GSA to avoid attorney fees is shown by the fact that the same justification was advanced for disclosing part of a document after a remand from this Court in another case, Allen v. CIA, Civil Action No. 78-1743, even though the "declassification" and release in that case was more than a year later than the disclosure in this case, and also more than a year after the House Select Committee on Assassinations ceased to exist.

Weisberg also argues that the district court abused its discretion in denying him the opportunity to take discovery regarding GSA's claim that the transcripts were released for reasons unrelated to this lawsuit. One point on which discovery was sought was the impact of this Court's decision in Ray v. Turner, 190 U.S. App.D.C. 290, 587 F.2d 1187 (1978), on the decision to release the transcripts in this case. Ray v. Turner was issued on August 24, 1978, less than two months before the release of the transcripts in this case, and in its 1979 Report to the Senate the CIA acknowledge that it would change CIA procedures and require it to justify withholdings on a deletion-by-deletion rather than a

document-by-document basis. [App. 783]

Finally, Weisberg contends that he is also entitled to an award of attorney fees, and an increase in attorney fees, because of bad faith conduct on the part of the government in this case. Hall v. Cole, U.S. 1, 5 (1973).

ARGUMENT

I. WEISBERG "SUBSTANTIALLY PREVAILED" IN THIS LITIGATION

The Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), provides that district courts "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." For the reasons set forth below, Weisberg contends that he has "substantially prevailed" in this case.

A. This Action Could Reasonably Be Regarded As Necessary

In construing the attorney fees provision, it has been held that in order to "substantially prevail" the party seeking the award must show that the prosecution of the action could reasonably be regarded as necessary. Vermont Low Income Advocacy Council v. Usery, 546 F.2d 509 (2d Cir. 1976). The circumstances surrounding the bringing of this action leave no doubt that it was.

Weisberg first requested these transcripts at least as early as August and September of 1968. See answer to interrogatory 83. [App. 109] On March 12, 1975, he filed a new request for them under the amended Freedom of Information Act. When his request was denied, he appealed. After his appeal was denied, he waited five months before filing suit.

In short, Weisberg's only alternative to filing suit was to wait for their voluntary disclosure at some unspecified date probably beyond his lifetime. In this regard it may be recalled that in 1965, in response to citizen protest over the announced plan of the National Archives to keep certain Warren Commission records secret for 75 years, the White House, noting "the very special nature of the Warren Commission and the desirability of the fullest possible disclosure of all the findings," directed the Justice Department to make a study of the feasability and advisability of changing this procedure insofar as Warren Commission records were concerned. See McGeorge Bundy's "Memorandum for Acting Attorney General Katzenbach." [App. 31] As a result, the views of interested federal agencies were solicited. The CIA's response was to assert that it had "cooperated fully with the President's Commission and made every effort to release material furnished to the Commission for the public record," and that "very little of the material furnished by the Agency is now withheld from the public." The CIA believed that the national security required the continuance of restrictions on withheld documents and

that this interest outweighed all other considerations. Accordingly, it recommended that "at the end of the 75-year period another security appraisal be made before such documents are disclosed." [App. 34-35]

Given this mindset and the CIA's ample motive for withholdmaterials embarrassing to it and other government agencies, Warren Commission critics have found it necessary repeatedly to file suit under FOIA to obtain materials withheld by the CIA or at its behest. This suit is but one of several that have been filed by different requesters. Although Warren Commission materials are to be reviewed periodically for release to the public, and although the Attorney General's Guidelines specify that the overriding policy of the Executive Branch favors the fullest possible disclosure of Warren Commission materials, such requesters still find it necessary to file suit in order to obtain information. (The Attorney General's 1975 Guidelines are reprinted at pp. 4-5, supra.)

Finally, the necessity of filing suit is further indicated in Weisberg's case by the fact that the CIA has not complied with his requests even though they date back years. For example, he has requests for CIA materials on Nosenko that date back to 1975 and 1976. Although the CIA did declassify and disclose such information for the use of the House Select Committee on Assassinations, it has not yet been divulged to Weisberg. December 22, 1979 Weisberg Affidavit, ¶121. [App. 537]

B. Release of Transcripts Related to Litigation

In Cuneo v. Rumsfeld, 180 U.S.App.D.C. 184, 189, 553 F.2d 1360, 1365 (1977), this Court held that a party seeking an award of attorney fees under FOIA must also show that bringing the action had a causative effect on the agency's release of the information. This does not mean, however, that there can be no award of attorney fees where the government acts to moot the case by providing the materials before judgment. Kaye v. Burns, 411 F. Supp. 897 (D.C.N.Y. 1976). Nor does it mean that there can be no attorney fees where the agency acts to moot an appeal after it has procured a judgment in its favor in the court below.

The very fact that GSA released the transcripts to Weisberg only after four years of bitterly-contested litigation had taken place is prima facie evidence of a causal nexus between this lawsuit and their release. The manner and timing of the release strongly reinforces this conclusion. On September 12, 1978, Weisberg filed his brief in this Court in Case No. 78-1731. On October 16, 1978, the day GSA's brief was due, GSA moved to moot the case and announded the "declassification" and release of the transcripts. Because Weisberg was denied discovery of relevant records, he cannot know all the circumstances surrounding the decision. However, the CIA did put into the record a September 26, 1978 memorandum from Robert E. Owen to Launie M. Ziebell, the CIA's Assistant General Counsel. The subject of that memorandum

is: Warren Commission Transcripts Regarding Yuriy Nosenko in FOIA Litigation." [App. 440] This indicates that the CIA was responding to the pending lawsuit, not to the proceedings of the House Select Committee on Assassinations. This is further confirmed by the memorandum's first sentence, which reads: "The Warren Commission transcripts which accompany your memorandum of 22 September . . . may be released to FOIA requesters, including the litigant in the civil action cited in your memorandum." (Emphasis added) Although CIA/GSA did not provide Weisberg or the court with a copy of the September 22, 1979 Ziebell memorandum, and the court did not allow Weisberg to obtain it through discovery, Owen's response makes it clear that the point of reference was Weisberg's lawsuit. In view of this and the timing of the release, it is obvious that it was the lawsuit which precipitated the release.

C. GSA Failed to Demonstrate Transcripts Were Exempt

Weisberg contends that in order for GSA to succeed in arguing that he did not "substantially prevail" it must demonstrate that the January 21 and June 23 transcripts were exempt at all times prior to their "declassification" and release. This GSA has failed to do.

1. Classification--Procedural

GSA resisted disclosure of the January 21 and June 23 transcripts by claiming that their release would endanger the national

security. The FOIA provides that in order to qualify for nondisclosure under Exemption 1 the withheld material must be classified in accordance with both the substance and procedure of the applicable executive order. 5 U.S.C. § 552(b)(1). The Conference Report on the 1974 amendments explicitly states that material withheld under Exemption 1 must be properly classified "pursuant to both procedural and substantive criteria contained in such Executive order." H.Rep. No. 93-1200, 93d Cong., 2d Sess. 12 (1974). (Emphasis added)

GSA initially asserted that the transcripts were classified by the Warren Commission under the provisions of Executive order 10501, as amended by Executive order 10901. However, Section 2(c) of the order required original classification authority to be specifically conferred upon any agency or unit exercising it. Original classification authority was never conferred upon the Warren Commission. This determination was made by Judge Gerhard Gesell in Weisberg v. General Services Administration, Civil Action No. 2052-73. [App. 78] In November, 1975, a House of Representatives Subcommittee held a hearing on security classification problems involving Warren Commission records in the custody of the National Archives and reached the same conclusion. The Subcommittee found that the Warren Commission did not have original classification authority, and that in the absence of evidence that the President had delegated classification authority to the Commission any clas-

sification marking assigned by the Commission to information which it originated was not a valid classification. The Subcommittee also concluded that "any information originated by the Warren Commission which was not properly classified by an authorized classifier while the Commission was in existence should be viewed as having been nonclassifiable since the date the Commission ceased to exist." See "Subcommittee Findings Regarding Validity of Classification Markings on Original Commission Records," reprinted in Hearing, National Archives--Security Classification Problems Involving Warren Commission Files and Other Records, Government Information and Individual Rights Subcommittee, Committee on Government Operations, House of Representatives, 94th Cong., 1st sess. (1975), p. 61. [App. 596.] See also Affidavit of William G. Florence, ¶15, Attachment 3. [App. 136, 143]

In addition to the lack of classification authority on the part of the Warren Commission, the purported classification of the January 21 and June 23 transcripts was flawed in other ways as well. Although Section 3(a) of E.O. 10501 provided that [d]ocuments shall be classified according to their own content and not necessarily according to their relationship to other documents," all Warren Commission executive session transcripts were routinely classified Top Secret by the reporter, Ward & Paul, without regard to content or considerations of national security. May 5, 1976 Weisberg Affidavit, ¶¶10-18. [App. 65-68]

Thus, at the time of Weisberg's 1975 FOIA request, these transcripts had lain unclassified for eleven years after the Warren

Commission ceased to exist. As the House Subcommittee on Government Information and Individual Rights concluded, the information had become nonclassifiable as of the date the Warren Commission ceased to exist.

Nevertheless, after the CIA was notified of Weisberg's March 12, 1975 request for the transcripts, it instructed GSA to classify them pursuant to E.O. 11652. However, this was not authorized by E.O. 11652, since the directive implementing it provided that: "At the time of origination, each document or other material containing classified information shall be marked with its assigned security classification and whether it is subject to or exempt from the General Declassification Schedule." National Security Council Directive of 17 May 1972 Governing the Classification, Downgrading, Declassification and Safeguarding of National Security Information IV(A), 37 Fed. Reg. 10053, 10056-10075 (1972).

Moreover, other classification procedures required by Executive Order 11652 were not followed. In Schaffer v. Kissinger, 164 U.S.App.D.C. 282, 284, 505 F.2d 389, 391 (1974), a case involving a claim that not all copies of the Red Cross reports sought by plaintiff were stamped Confidential and that the classification was made in order to avoid disclosure and only after plaintiff had requested the documents, this Court held that the timing of the alleged classification under E.O. 11652 and whether the Red Cross reports were in fact classified "Confidential" were facts that the district court must determine in order to decide whether the agency

had complied with the requirements of the executive order.

Even assuming that the January 21 and June 23 transcripts could have been validly classified under Executive Order 11652, the timing of the classification was highly irregular. On July 26, 1972 the National Archives asked the CIA to review the security classification of Warren Commission documents, including these transcripts, under the provisions of E.O. 11652. [App. 598] However, the cover sheets of the transcripts which were obtained on discovery show that they were not marked classified as a result of the 1972 review. Nor were they marked classified pursuant to E.O. 11652 as a result of another classification review which culminated in October, 1974. See Attachments 5-7 to Plaintiff's Response to Supplemental Affidavit of Robert E. Owen, filed January 11, 1980.

On March 12, 1975, plaintiff requested the transcripts under the amended FOIA. Nine days later the National Archives sent the transcripts to the CIA for yet another classification review. See Answers to Interrogatories 10 and 20. [App. 28, 29] Although both transcripts were purportedly classified "Confidential" by Mr. Charles A. Briggs of the Central Intelligence Agency on May 1, 1975, neither transcript was so marked until after Weisberg filed this suit on September 4, 1975. Even then, only the file copies of these transcripts were initially marked "Confidential." All extra copies in the possession of the Archives, of which there were sev-

eral of each transcript, were not marked "Confidential" until "the date of receipt" of Weisberg's interrogatories inquiring about this. Answer to interrogatory 57. [App. 52] Moreover, since the originals and several copies of each transcript were "missing," they could not be so marked. See answers to interrogatories 81 and 89. [App. 99-100, 113]

Without question these facts establish a violation of Section 6(B) of Executive Order 11652, which required that: "All classified information and material shall be appropriately and conspicuously marked to put all persons on clear notice of its classified content."

In view of the facts set forth above it is apparent that the procedural requirements of Executive Orders 10501 and 11652 were violated. Because proper classification procedures were not followed, the transcripts could only have been properly withheld if GSA had been able to show that disclosure would cause grave damage to the national security. But since the transcripts were allegedly reclassified "Confidential" prior to Weisberg's lawsuit, GSA could not show this.

2. Exemption 1--Substantive

Under Executive Order 11652 the test for substantive classification was whether unauthorized disclosure of the information "could reasonably be expected to cause damage to the national security." Weisberg contends that this standard could not have been

met at any time during the pendency of his lawsuit.

The first CIA affidavit submitted to justify the withholding of the transcripts was brief. With respect to the substance of the June 23 transcript it asserted:

> The matters discussed concern intelligence methods used by the CIA to determine the accuracy of information held by the Commission. Disclosure of this material would destroy the current and future usefulness of an extremely important foreign intelligence source and would compromise ongoing foreign intelligence analysis and collection programs.

November 5, 1975 Affidavit of Charles A. Briggs, ¶5. [App. 290]

In a subsequent affidavit, Briggs swore that the June 23rd transcript was properly classified for the following reasons:

A. When Nosenko defected to the U.S. in February, 1964, he agreed to provide the CIA with information but did so "with the clear understanding that this information would be properly safeguarded so as not to endanger his personal security and safety. December 30, 1976 Briggs Affidavit, ¶7. [App. 296-297]

B. After his defection, Nosenko was tried in abstentia by the Soviet Union and condemned to death; consequently, "[a]ny disclosure of his identity or whereabouts would put him in mortal jeopardy." Because of this, "[e]very precaution has been and must continue to be taken to avoid revealing his new name and whereabouts." December 30, 1976 Briggs Affidavit, ¶7. [App. 297]

C. There is "no way the Soviet Union can determine exactly what information has been provided by Mr. Nosenko." However, "[r]evealing the exact information which Mr. Nosenko--or any

defector--has provided can materially assist the KGB in validating their damage assessment and in assisting them in the task of limiting future potential damage." It could also "only interfere with American counterintelligence efforts since the KGB would take control measures to negate the value of the data." Moreover, "any information officially released may be exploited by the KGB as propaganda or deception." December 30, 1976 Briggs Affidavit, ¶8. [App. 297]

D. Potential defectors will be dissuaded from defecting if the security of prior defectors is compromised. Therefore, "[e]very precaution must continue to be taken to protect the personal security of Mr. Nosenko." Finally, "[t]he manner in which Mr. Nosenko's security is being protected is serving as a model to potential future defectors." December 30, 1976 Briggs Affidavit, ¶9. [App. 298]

The Briggs Affidavits affidavits attempted to frighten and intimidate the district court into believing that release of the transcripts would endanger national security, even jeopardize the life of an intelligence sources. But the affidavits contained misrepresentations, falsehoods. The release of the June 23rd transcript in no way endangered Nosenko's personal safety and security. His defection was public knowledge as of the time of the Warren Commission's June 23, 1964 executive session, as the transcript of that meeting itself shows. Not only was his identity known, but the uncontradicted evidence in the record of this case shows that the CIA itself made Nosenko available to writers who

published details about his identity, employment and whereabouts. See March 21, 1977 Weisberg Affidavit, ¶¶24-29 [App. 152-153]; April 17, 1978 Weisberg Affidavit, ¶¶21-25 [App. 284-286].

That there "is no way the Soviet Union can determine exactly what information has been provided by Mr. Nosenko," Mr. Briggs' justification for suppressing the June 23 transcript, is shown by the text of the transcript to have been a deliberate canard, since the transcript does not reveal any such information.

Mr. Briggs' most outrageous statement was his pious declaration that "[t]he manner in which Mr. Nosenko's security is being protected is serving as a model to potential future defectors." The testimony of CIA official John Hart before the House Select Committee on Assassinations revealed in detail the way in which the CIA subjected Nosenko to torture. This included depositing him in a specially constructed steel vault for three years and depriving him of all amenities. Indeed, one CIA official toyed with the choices of driving Nosenko permanently insane and killing him without leaving a trace. See December 22, 1979 Weisberg Affidavit, ¶¶86, 98-99 [App. 526-530]; August 20, 1979 Weisberg Affidavit, ¶¶15, 26-28 [App. 447-449]

After the transcripts were released to Weisberg and he moved for an award of attorney fees, the justification for withholding the transcripts changed. The new claims were set forth at length in the Supplemental Affidavit of Robert E. Owen. With respect to the June 23 transcript, the key part of is claim that it had to be withheld because the discussion it contains "is primarily concerned

with expressions of concern about the inability of the government agencies, principally the CIA, to establish the bona fides of Nosenko as a credible Soviet defector and the negative consequences of this uncertainty for the Commission's hope to use Nosenko's information." Supplemental Owen Affidavit, ¶8. [App. 503]

If this was the real reason for refusing to release the June 23 transcript, it disappeared at least as long ago as the disclosure of CIA Document 498, which states at the bottom of page three that: "This agency has no information that would specifically corroborate or disprove NOSENKO's statements regarding Lee Harvey OSWALD." See December 22, 1979 Weisberg Affidavit, ¶48, Exhibit 5. [App. 518, 551] That this information was public knowledge soon after this lawsuit was filed is shown by the fact that a San Francisco newspaper carried a story in its March 23, 1976 issue which stated that:

> A recently released CIA memo shows that James Angleton, then head of CIA counterintelligence, to the [Warren] Commission that the CIA had no information that would either prove or disprove Nosenko's story.

See December 22, 1979 Weisberg Affidavit, ¶93. [App. 528-529]

On May 9, 1975, four months before this lawsuit was filed, CBS-TV carried an interview with former CIA Director John McCone in which he stated of Nosenko:

> It is traditional in the intelligence business that we do not accept a defector's statements until we have proven beyond any doubt that the man is legitimate and the information is correct. It took some time to prove the bona fides of the

man, which were subsequently proven.

See December 22, 1979 Weisberg Affidavit, ¶94; Exh. 13. [App. 529, 584]

With respect to the January 21 transcript, Owen claims that it had to be withheld because it made clear that the CIA had briefed the Warren Commission staff on its capabilities and "proposed to use the services of two Soviet KGB defectors in drafting questions to be put to the Soviet government and in reviewing the documents written by Oswald . . . ." This had to be withheld in the interest of national security because "the status of their relationship with the CIA and the manner in which they were proposed for use in support of the Warren Commission suggested a great deal about the level of confidence the CIA had in these defectors." Supplemental Owen Affidavit, ¶6. [App. 735]

As Weisberg pointed out,

> This, obviously, is not true. The CIA, the State Department and/or the Commission could have ignored any and all suggestions made by the defectors in their "support," recommending questions to be asked of the Soviet Government.

December 22, 1979 Weisberg Affidavit, ¶61. [App. 521] Moreover, the KGB had ample evidence of the "level of confidence which the CIA reposed in the defectors. As Weisberg states regarding one of the two defectors, Petr Derjabin:

> It cannot be claimed in late 1979 that there had to be withholding to keep secret the "level of confidence" or lack of it that was reposed in Derjabin when the CIA

> had already disclosed this by having him translate the published Penkovsky Papers, about which, over his name, Derjabin boasted in a letter to the editor of the Washington Post of November 19, 1965. *** Other ways in which his identification and career were public, including by Congressional testimony, are set forth in my earlier affidavits in this instant cause. That the CIA used Derjabin to translate the Penkovsky papers and permitted him to testify to a Congressional committee reflects the CIA's "level of confidence" in him.

December 22, 1979 Weisberg Affidavit, ¶69. [App. 523] Similarly, the fact that the January 21 transcript reveals "a discussion of the problems of how to verify information concerning the activities in the Soviet Union related to Lee Harvey Oswald's personal experiences as a defector," another Owen justification for withholding the transcript, was disclosed long ago when GSA released copies of the agendas of the Warren Commission executive sessions to Weisberg and others. December 22, 1979 Weisberg Affidavit, ¶57. [App. 520-521]

While these are only some of the examples provided by Weisberg in his December 22, 1979 affidavit, they make it quite clear that what the CIA says it was trying to protect was already in the public domain and hence not substantively classifiable. If, as Owen swears in his Supplemental Affidavit, "[t]he declassification and release of the study and testimony provided in [the House Select Committee on Assassinations'] Volume II made the continued classification of the transcripts untenable," (Supplemental Owen Affidavit, ¶11), then the far earlier revelations cited by Weisberg did also.

3. Exemption 3

Although the district court ruled that the transcripts were exempt under Exemption 3 rather than Exemption 1, it is clear that the two claims are interdependent. The Exemption 3 statute relied upon by the CIA, 50 U.S.C. § 403(d)(3) provides:

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

(Emphasis added)

Whether disclosure of intelligence sources and methods constitutes "unauthorized" disclosure is determined by reference to the applicable Executive order governing disclosure of classified information. In addition, the legislative history of the 1974 Amendments to the FOIA makes it clear that Congress intended that records for which an Exemption 3 claim is made based on $ 403(d)(3) must be properly classified. Thus the Conference Report which accompanied the bill which amended Exemption 1 stated:

> Restricted Data (43 U.S.C. 2162), communication information (18 U.S.C. 798), and intelligence sources and methods (50 U.S.C. 403(d)(3) and (g), for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act. When such information is subjected to court review, the court should recognize that if such information is classified pursuant to one of the above statutes, it shall be exempted under this law. (Emphasis added)

(Conference Report No. 93-1380, 93rd Cong., 2d Sess., p. 12)

Therefore, the applicability of Exemption 3 to the tran-

scripts hinged upon their classified status. GSA in effect conceded this in response to an interrogatory which inquired whether the CIA had ever informed GSA that the transcripts were being withheld pursuant to 50 U.S.C. § 403(d)(3), stating: "Presumably, upon declassification of these transcripts at a future date, this statute would not be involved to prevent public access." Answer to interrogatory 100. [App. 115-116] This is in fact what happened in this case. Upon "declassification" of the transcripts, CIA/GSA dropped the Exemption 3 claim and released them to Weisberg.

As Weisberg noted above when discussing the failure of the transcripts to qualify for Exemption 1 status on substantive grounds, all the information which the CIA allegedly wished to keep secret under Exemption 1 was in fact already publicly known long before the transcripts were released. For precisely the same reason, namely, that the intelligence sources and methods sought to be protected had already been disclosed, the information in the transcripts also was not protectible under Exemption 3.

D. Segregable Nonexempt Portions

The Freedom of Information Act provides that "[a]ny reaonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. 5 U.S.C. § 552(b). The burden is on the agency to demonstrate that no segregable, nonexempt portions remain with-

held. Allen v. Central Intelligence Agency, ___ U.S.App.D.C. ___, 636 F.2d 1287, fn. 32 (1980), citing, Ray v. Turner, 587 F. 2d 11987, 1214 (D.C.Cir. 1978)(Wright, C.J., concurring).

In this case GSA did not meet its burden. None of the affidavits submitted by GSA attests that there were no nonexempt, segregable portions in the transcripts. The May 1, 1975 letter of Mr. Robert S. Young of the CIA to Dr. James B. Rhoads in effect acknowledges that there were segregable portions, stating: "We have investigated the possibility of releasing segregable portions of the transcripts, but have concluded that the extensive deletions required would result in an incoherent text." [App. 46]

II. DISTRICT COURT ABUSED DISCRETION IN DENYING WEISBERG DISCOVERY

Confronted with GSA's claim that he had not "substantially prevailed," Weisberg sought to take discovery on four issues: (1) whether the January 21, January 27, and June 23, 1964 Warren Commission executive session transcripts were ever properly classified; (2) whether the hearings held by the House Select Committee on Assassinations caused the declassification and public release of the January 21 and June 23 transcripts; (3) whether the decision of the United States Court of Appeals in Ray v. Turner influenced the decision to "declassify" and release the January 21 and June 23 transcripts; and (4) whether the affidavits submitted by Messrs. Rhoads, Briggs, and Owen were made in good faith.

Each of these issues represents a valid avenue of inquiry into matters which could have a significant bearing on a contested issue of material fact: viz., whether the transcripts were in fact released "for reasons unrelated to this litigation."

There are many questions which must be asked concerning the proceedings of the House Select Committee on Assassinations (HSCA) and the release of allegedly classified information by the CIA. How did HSCA and the CIA work out problems concerning the classification and release of information pertaining to the assassination of President Kennedy? If there were disagreements over disclosure of classified information, how were they resolved? If HSCA wanted to use classified information in connection with its hearings, did the CIA always consent to its use and declassify it? If, as Mr. Owen says, the transcripts were declassified out of "political necessity," why was other classified information not release? How did HSCA and CIA, or the CIA by itself, determine when such information should be "declassified" and released to the public? Did HSCA ever request that the January 21 and June 23 transcripts be declassified? When? If "political necessity" required the release of the transcripts in October, 1978, why did it not require their release in 1976 and 1977, when HSCA's investigation was proceeding in full vigor amidst intense publicity? When did the CIA first know that John Hart would testify regarding Nosenko? When did it first determine that it would have to declassify information as a result of his testimony?

That such questions are not academic and do have an important bearing on GSA's claim that the transcripts were released independently of this litigation may be seen by recounting developments in the Allen case. (Allen v. CIA, Civil Action No. 78-1743) In that case the plaintiff, Allen, sought a 15 page CIA document on Lee Harvey Oswald's pre-assassination activities in Mexico City. On January 9, 1979, the same Robert E. Owen who appears in this case executed an affidavit in which he affirmed that the document being sought by Allen was still properly classified "SECRET." This was three months after he had filed an affidavit in this case declaring that the transcripts sought by Weisberg had been declassified because of HSCA proceedings. Subsequently, however, this Court remanded the Allen (for the first time), and Owen then executed a new affidavit on January 11, 1980, declaring that because of HSCA proceedings half of the document could be "declassified" and released. See January 23, 1980 Weisberg Affidavit. [App. 619-637] Since HSCA had gone out of existence at the time Owen filed his January 9, 1979 affidavit declaring that the document sought by Allen was still classified Secret, and since HSCA had been out of existence more than a year at the time he executed his second affidavit, dated January 11, 1980, it is obvious that the CIA is simply seizing upon HSCA as a convenient cover for explaining disclosures that in fact must be made because of court litigation. However, in order to demonstrate that in this case, discovery was needed.

It is important to note that just prior to the release of the transcripts in this case, this Court handed down an important

decision, Ray v. Turner (decided August 24, 1978), which Weisberg contends foreshadowed a remand in his pending appeal, Weisberg v. General Services Administration, Case No. 77-1831 (consolidated). If it was that development which nudged the CIA to declassify the transcripts in October, 1978, then their release cannot be said to have been "unrelated" to this litigation. Weisberg was entitled to explore this area on discovery. That it might well have proved fruitful is indicated by the fact that in its 1979 report to the Senate on the administration of FOIA, the CIA acknowledged that the Ray v. Turner decision would force it to justify its claims of exemption on a deletion-by-deletion rather than a document-by-document basis, as it had been doing. [782]

In Vaughn v. Rosen, 157 U.S.App.D.C. 340, 484 F.2d 828 (1973), this Court noted FOIA's "overwhelming emphasis upon disclosure," and commented that:

> In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information.

Id., 157 U.S.App.D.C. at 353, 484 F.2d at 831. In the unique circumstances of this case, Weisberg, the party with the greatest interest in enforcing FOIA polciy through use the attorney fees provision, is similarly disadvantaged. He has been afforded no opportunity to cross-examine the CIA affiant who alleges that the transcripts were released for reasons unrelated to this litigation, nor

has he been allowed to undertake discovery of records relevant to the CIA's claim. For the district court to have decided the attorney fees issue against Weisberg without affording him any opportunity to cross-examine Mr. Owen or to engage in discovery was an abuse of discretion.

III. GSA'S BAD FAITH CONDUCT JUSTIFIES AN AWARD OF, AND INCREASE IN, ATTORNEY FEES

When a losing party has engaged in bad faith conduct, the district court may exercise its equitable powers to make an award of attorney fees, even where such an award is not expressly provided for by statute:

> . . . it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted in "bad faith, vexatiously, wantonly, and for oppressive reasons."

Hall v. Cole, 412 U.S. 1, 5 (1973). (Citations omitted)

This is the second lawsuit which Weisberg has filed against GSA for Warren Commission exective session transcripts. In the first, Weisberg v. General Services Administration, Civil Action No. 2052-73, GSA contended that the January 27, 1964 transcript was protected from disclosure because it had been classified on grounds of national security. It took this position even though Gerald Ford had published parts of the transcript in his book. Although the district court ruled against GSA's exemption 1 claim, it went on to find that the transcript was protected under Exemption 7.

Having just procured a favorable decision on Exemption 7 grounds, GSA then "declassified" the transcript, which contained no classifiable information to start with, and released it.

In this case GSA was again unable to make its Exemption 1 claim stick but succeeded in obtaining a favorable verdict under Exemption 3. When it was faced with appellate review, however, it abandoned this claim of exemption, "declassified" the two transcripts, and then hoked up an explanation that the release was due to the proceedings of the House Select Committee on Assassinations.

In the process GSA submitted false and highly misleading affidavits to the district court. These affidavits declared, for example, that release of the June 23 transcript would disclose the identity and whereabouts of a Soviet defector, Yuri Ivanovich Nosenko, and thus "put him in mortal jeopardy," when in fact the transcript could and did disclose no such thing and it became a matter of public knowledge that the CIA itself had sent Nosenko to authors who wrote books and magazine articles about him, revealing in the process important details about where he had resided, what he did, how much he earned, etc.

In addition, the entire course of litigation was characterized by "obdurate behavior" on the part of GSA. Thus it repeatedly delayed responding to interrogatories until Weisberg had moved to compel answers. When the interrogatories were finally responded to, most were objected to. And when Weisberg asked whether Nosenko was the subject of the June 23 transcript, GSA objected to this

interrogatory on the grounds that this information was security classified, when in fact the National Archives had itself recently disclosed this information to The New Republic.

The CIA, which was responsible for the withholding of these transcripts, had ample motive to supress them and to delay their release for as long as possible. Weisberg addressed this motive in his October 26, 1978 affidavit:

> 74. If it had been public knowledge at the time of the investigation of the assassination of the President that the CIA had, by the devices normally employed by such agencies against enemies, arranged for the Presidential Commission not to conduct a full investigation, there would have been considerable turmoil in the country. If, in addition, it had been known publicly that there was basis for inquiring into a CIA connection with the accused assassin and that the CIA also had frustrated this, the commotion would have been even greater.
>
> 75. At the time of my initial requests for these withheld transcripts, there was great public interest in and media attention to the subject of political assassinations. If the CIA had not succeeded in suppressing these transcripts by misuse of the Act throughout that period, public and media knowledge of the meaning of the contents now disclosed would have directed embarrassing attention to the CIA. There is continuing doubt about the actual motive in suppressing any investigation of any possible CIA connection with the accused assassin. If such questions had been raised at or before the time of the Watergate scandal and disclosure of the CIA's illegal and improper involvement in it, the reaction would have been strong and furious. This reaction would have been magnified because not long thereafter the CIA could no longer hide its actual involvement in planning and trying to arrange for a series of political assassinations.

> 76. One current purpose was accomplished by withholding these transcripts from me until after the House Committee held its Nosenko hearings to ignore what the Commission ignored. With any prior public attention to the content of these transcripts, ignoring what Nosenko could have testified to, especially suspicion the accused assassin was an agent of American intelligence, would have been impossible. A public investigation would have been difficult to avoid.

October 26, 1978 Weisberg Affidavit. [App. 427-428]

Given these circumstances, this case would be an appropriate one in which to award attorney fees on the basis of the bad faith conduct of a party, if even the Court agrees with the district court that Weisberg did not "substantially prevail." And if the Court concludes that Weisberg did "substantially prevail," then it should instruct the district court to consider this bad faith conduct as grounds for increasing the award of attorney fees.

CONCLUSION

For the reasons set forth above the holding of the district court that Weisberg did not "substantially prevail" should be overruled. Alternatively, the case should be remanded to district court to allow Weisberg to cross-examine GSA's affiants and to engage in discovery on the issue of whether release of the January 21 and June 23 transcripts was unrelated to this litigation.

Respectfully submitted

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