BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

81-1009

HAROLD WEISBERG, Appellant,

v.

GENERAL SERVICES ADMINISTRATION, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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I N D E X

TABLE OF CASES

*Cases or authorities chiefly relied upon are marked by asterisks.

Pages

OTHER REFERENCES

ISSUES PRESENTED */

In the opinion of appellee, the following issues are presented:

I. Whether the District Court properly determined that appellant was not entitled to attorney's fees and costs because he did not substantially prevail in a Freedom of Information Act case, when the District Court and this Court determined that one of the three documents at issue was properly withheld, and when the other two were voluntarily released for reasons unrelated to the litigation, following entry of judgment for the Government and at the time an appeal was pending.

II. Whether the District Court abused its broad discretion to control discovery by allowing the General Services Administration to provide information only by affidavits on the issue of whether this litigation caused the release of the two documents disclosed.

III. Whether the District Court erred by rejecting the request for attorney's fees based solely on allegations of bad faith conduct on the part of the General Services Administration.

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*/ This case was before this Court on the merits in appellant's two previous appeals, Weisberg v. GSA, Nos. 77-1831, 78-1731.

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COUNTERSTATEMENT OF THE CASE

This appeal challenges the District Court's decision that appellant Harold Weisberg did not substantially prevail within the meaning of the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), and therefore was not entitled to attorney's fees. To address appellant's contentions adequately, it is necessary to recite in some detail the protracted procedural history of this case.

On September 4, 1975, appellant brought this FOIA suit to obtain the release of three transcripts of Warren Commission executive sessions: 11 pages of the transcript of January 21, 1964, and the entire transcripts of May 19 and June 23, 1964. 1/ At the request of the Central Intelligence Agency, the Archives of the General Services Administration had withheld the January 21 and June 23 transcripts under Exemptions 1, 3 and 5 of the FOIA, 5 U.S.C. § 552(b)(1), (3), and (5). Those transcripts contain information about Soviet defectors which the CIA had provided to the Warren Commission. On its own initiative, the Archives had withheld the May 19 transcript under FOIA Exemptions 5 and 6, 5 U.S.C. § 552(b)(5) and (6). That transcript involved the possible discharge of Warren Commission employees as a result of allegations about their personal lives (R. 17). 2/

On cross-motions for summary judgment, the Honorable Aubrey E. Robinson, Jr. ruled, on the basis of affidavits filed by the CIA, that the January 21 and June 23 transcripts were properly

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1/ The first five pages of appellant's Statement of the Case relate to an executive session transcript from January 27, 1964 (Brief for Plaintiff-Appellant at 6-10). That transcript is not now nor has it ever been responsive to the FOIA request underlying this litigation.

2/ Citations to the Record ("R."), which refer to the document numbers on the docket sheet transmitted to this Court by the District Court, will be used only where the reference cited was not included in appellant's two volume, 804-page Appendix ("App."), or where the material cited in the Appendix is only an excerpt of what was filed in the District Court.

withheld from disclosure under Exemption 3. On the basis of an in camera inspection, the court ruled that the May 19 transcript was lawfully withheld under Exemption 5 (Order filed March 10, 1977 (App. 126), as amended June 7, 1977 (App. 253)). The first of appellant's three appeals in this litigation ensued. Weisberg v. GSA, No. 77-1831 (Weisberg I).

The parties' briefs were filed in Weisberg I as of February 22, 1978. On that date, however, appellant attempted to file a fifty page addendum with his reply brief, consisting entirely of extra-record material which allegedly proved his contention that the transcripts of January 21 and June 23 were improperly withheld. Appellee opposed appellant's motion to file the reply brief and moved to strike the extra-record material, a magazine article, because it was improperly before this Court; because it was a classic example of triple, perhaps quadruple hearsay, which could not have been properly brought before the District Court on a Rule 60(b) motion seeking consideration of newly discovered evidence; and because it was irrelevant (Weisberg I, Appellee's Motion to Strike, filed March 2, 1978, and Appellee's Response, filed March 17, 1978).

On March 31 this Court entered an order permitting Mr. Weisberg to move in the District Court for a new trial, which he did on April 18 (R. 50). The motion for a new trial challenged GSA's previously filed affidavit of Charles I. Briggs, Chief,

Information and Services Staff, Directorate of Operations, CIA, on the basis of information in a magazine article, a book and a newspaper clipping--all attached to an affidavit of Mr. Weisberg. The Government opposed the motion on grounds that the information was unsworn and rife with hearsay problems, and also irrelevant to the proceeding (R. 51). Mr. Weisberg also filed a motion to hold Mr. Briggs and government counsel in contempt, and sought to depose Mr. Briggs (R. 52-53). The Government opposed the motion and moved to quash the deposition subpoena (R. 54).

On May 12 the District Court rejected all of Mr. Weisberg's motions and quashed the subpoena, concluding again after thorough reconsideration of the issues that the January 21 and June 23 transcripts were lawfully and properly withheld within the meaning of 5 U.S.C. § 552(b)(3) (R. 55-56). Appellant's second appeal followed. Weisberg v. GSA, No. 78-1731 (Weisberg II). Weisberg I and Weisberg II were consolidated in this Court, and appellant filed his opening brief in the consolidated cases on September 11.

At about the same time, events were occurring which were independent of and unrelated to this action and which resulted in the release of the January 21 and June 23 transcripts. On September 15, 1978, the House Select Committee on Assassinations held a hearing at which it summarized its report dealing with the Soviet defector Yuriy Nosenko (Affidavits of Robert E. Owen, filed on August 10 and December 3, 1979 (R. 72, 87)). Because

this report was based upon classified information which the CIA had provided to the Committee under a pledge of confidentiality, it was submitted to the agency before the hearing with a request that the CIA declassify certain information provided by Nosenko and information concerning Nosenko's credibility (Id). After reviewing the report, the Director of Central Intelligence agreed to declassify information in the draft. The Director also made Mr. John L. Hart, an expert in Soviet intelligence and counter-intelligence, available to testify before the Committee at the September 15 hearing. The CIA took these actions because of congressional pressure and "because the congressionally-assured benefit to the general public outweighed the damage which could reasonably be expected to national security interests" (Owen affidavits filed August 10, 1979 at ¶ 2 and December 3, 1979 at ¶ 11 (R. 72, 87)). The Committee's report and the transcript of the hearings of the Committee at which the report was summarized are contained in Exhibit C to the Owen affidavit filed on December 3, 1979 (R. 87).

As a result of the Director's decision concerning the scope of the disclosures to be made at the September 15, 1978 hearing, the CIA on its own initiative conducted a classification review on September 22 of the January 21 and June 23 transcripts (Owen affidavits (R. 72, 87)). On October 11 the CIA informed the

Department of Justice and GSA that, in view of the testimony given at the hearing, the agency no longer deemed it appropriate to withhold the transcripts (Id).

On October 12 the General Services Administration informed the Department of Justice that it had withheld the transcripts of January 21 and June 23 solely at the request of the CIA and that it had no independent reason to contest the disclosure. The GSA, however, did inform the Department that it would continue to withhold the May 19 transcript (Opposition to Plaintiff's Motion for an Award of Attorney's Fees and Other Litigation Costs, filed August 10, 1979 at 4 and Exhibit 2 (R. 72)). On October 16 appellant was given copies of the January 21 and June 23 transcripts. The same day, the Government requested this Court to dismiss as moot that portion of the consolidated appeal relating to the transcripts which had been released.

On January 12, 1979, this Court dismissed as moot that portion of the appeal in Weisberg I relating to the January 21 and June 23 transcripts, and the entire appeal in Weisberg II. Subsequently, on March 15 this Court concluded that GSA had properly withheld the May 19, 1964 transcript on the basis of Exemption 5.

The events which precipitated this third appeal began on April 16, 1979, when Mr. Weisberg moved in the District Court for an award of attorney's fees and other litigation costs. The

Government opposed the award on the basis that Mr. Weisberg had not prevailed, that an exercise of the District Court's discretion to award attorney's fees was unjustified, and that the actual request made was unreasonable (R. 72). The first affidavit of Robert E. Owen was filed on August 10 as part of the Government's opposition to establish that the release of the January 21 and June 23 transcripts was the direct result of actions taken by the House Select Committee on Assassinations and its request to the CIA.

When appellant replied on September 13 to the Government's opposition to an award of attorney's fees and costs, he noted depositions of Dr. Rhoads, Mr. Briggs, Mr. Owen, and Mr. Dooley, and requested that documents be produced on an expedited basis (R. 74-76). Appellant requested documents which related to (1) the classification and declassification of the January 21, 1964 transcript, (2) the classification and declassification of the June 23, 1964 transcript, (3) the classification and declassification of the January 27, 1964 transcript [3/] and (4) Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978) (R. 76).

The Government responded by requesting the District Court to enter a protective order on the basis that because the sole remaining issue in the case was whether appellant was entitled to

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3/ This transcript was not responsive to the FOIA request of appellant which is the subject of this litigation.

an award of attorney's fees and costs, the discovery sought was irrelevant and unnecessarily burdensome (R. 77). The Government also noted that appellant had again recklessly accused the GSA of providing a false affidavit; that at every turn, he had accused the agency and all those associated with it of lying under oath and of conspiring to deprive him personally of documents; and that such accusations had been made without any substantiating information, other than appellant's own belief (Id). The Government argued that Mr. Weisberg could not create a fact issue by disbelieving the Owen affidavit; that he was not entitled to probe the mental process of the decision-maker; and that, if the District Court concluded discovery was necessary, a means less burdensome than depositions should be designated (Id). After a hearing and by order dated October 17, 1979, the District Court determined that discovery should be held in abeyance except for the submission of a supplemental affidavit by the Government (See transcript of October 17, 1979 hearing, filed May 15, 1980).

Subsequently, on December 3, the Government filed the second Owen affidavit which contained as exhibits the January 21 and June 23 transcripts and the volume of proceedings before the House Committee in September of 1978. This second Owen affidavit explained in great detail the considerations which caused the classification of the transcripts but which would not be immediately apparent from the face of the transcripts. It also explained

why, after the House Committee hearing on September 15, 1978, the transcripts were given a classification review and declassified (R. 87).

The District Court ruled on July 14, 1980, that Mr. Weisberg was not entitled to an award of attorney's fees or costs under the Freedom of Information Act because he had not "substantially prevailed," finding that the release of the two transcripts was made for reasons unrelated to this litigation while the case was on appeal (App. 781, 803). 4/ This appeal followed.

To summarize, appellant seeks an award of attorney's fees for the release of two of the three transcripts at issue. He asks this Court to ignore that those two documents were released after the District Court concluded that they were properly exempt under Exemption 3, and reaffirmed that conclusion on remand when the plaintiff submitted "new evidence." Moreover, the release was for reasons unrelated to this litigation. Appellant also asks this Court to ignore that both the District Court and this Court determined that the third document was lawfully withheld under Exemption 5.

4/ The District Court vacated the July 14, 1980 order but reinstated it on October 30 (R. 106A).

Appellant sought reconsideration of the July 14 order on July 24 (R. 101), which was granted on September 3 when the Government failed to oppose it (R. 102). Appellee thereupon requested and received reconsideration because it inadvertently failed to file an opposition to appellant's motion to reconsider due to oversight and excusable neglect (R. 102A, 104).

SUMMARY OF ARGUMENT

Appellant did not substantially prevail and therefore is not entitled to an award of attorney's fees or costs under the Freedom of Information Act. Of the three transcripts at issue in this case, only two were ever released. Appellant's efforts were not causally related to the release of those two transcripts, which were disclosed for reasons unrelated to the litigation. First, the information was declassified and released because it overlapped with information previously provided to the House Select Committee on Assassinations which was declassified at the Committee's request. Second, the information was declassified over 14 years after it originated. The reasons for retaining a particular classification simply erode over time. In fact, the transcripts released had previously been reviewed and, as a result, were classified at a lower classification.

Without citing any authority or providing any rationale, appellant attempts to graft a wholly new and unwarranted requirement on the standards which this Court has set for determining whether a party has "substantially prevailed." Although the transcripts were lawfully withheld, the government does not have to prove, as appellant contends, that the transcripts were properly exempt under the FOIA until the time of their disclosure in order to defeat an application for attorney's fees and costs.

The District Court did not abuse its broad discretion to control discovery by allowing only affidavits on the issue of whether this litigation caused the release of the two transcripts disclosed. Appellant failed to submit evidentiary affidavits based on first hand knowledge to dispute that the reasons given by the Central Intelligence Agency for releasing the transcripts were the actual reasons. Under the circumstances, discovery cannot be used as a tool to develop a claim of "bad faith" or improper behavior.

Appellant also unpersuasively argues that he is entitled to attorney's fees and costs on the basis of alleged bad faith conduct on the part of GSA and CIA. Not only has appellant failed to prove such claims, but the doctrine of sovereign immunity would preclude such an award even if appellant were able to provide hard evidence of abuse.

ARGUMENT

I. The District Court properly ruled that appellant did not "substantially prevail" within the meaning of 5 U.S.C. § 552(a)(4)(E).

Appellant contends that he "substantially prevailed" and is entitled to attorney's fees and costs, because he claims that his FOIA lawsuit had a causal effect upon release of two of the three

documents at issue, and that appellee failed to demonstrate the documents were exempt under the FOIA up to the time of disclosure. His contentions are wholly without merit.

Subsection 552(a)(4)(E) of the Freedom of Information Act states:

> The Court may assess against the United States reasonable attorney's fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed (emphasis supplied).

Initially, when a motion for attorney's fees and costs in an FOIA suit is made, there are two issues: (1) is the plaintiff eligible for such an award, and if so, (2) is it entitled to such an award? Fund for Constitutional Government v. National Archives & Records Service, Nos. 79-2047, 79-2084, slip. op. at 26-27 (D.C. Cir. June 23, 1981); Church of Scientology v. Harris, No. 80-1189, slip. op. at 8 (D.C. Cir. April 17, 1981); Cox v. United States Department of Justice, 601 F.2d 1 (D.C. Cir. 1979). Eligibility is established by a determination that the moving party has "substantially prevailed" within the meaning of 5 U..C. § 552(a)(4)(E). The exercise of the District Court's discretion to award attorney's fees and costs is thus limited by this mandatory precondition in the statute. Cuneo v. Rumsfeld, 553 F.2d 1360, 1364 (D.C. Cir. 1977).

In Cox v. United States Department of Justice, supra, this Court adopted the standard for determining whether the plaintiff has "substantially prevailed" which is set forth in Vermont Low Income Advocacy Council, Inc. v. Usery 546 F.2d 509, 513 (2d Cir. 1976). See also Church of Scientology v. Harris, supra at 8-9. To be eligible for an award of attorney's fees in this FOIA action, appellant Weisberg must demonstrate at a minimum (1) that the prosecution of the action could be reasonably regarded as necessary to obtain the transcripts and (2) that the action had a substantial causative effect on the delivery of the documents. These are factual determinations to be made by the District Court. Church of Scientology v. Harris, supra at 11; Cox v. United States Department of Justice, supra at 6. Appellant must show something more than post hoc ergo propter hoc. Id.; Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704 (D.C. Cir. 1977); Cuneo v. Rumsfeld, supra at 1366; Vermont Low Income Advocacy Council v. Usery, supra at 513. Appellant cannot merely rely on the fact that documents were released after initiation of litigation.

A. The three transcripts at issue were not released because of this litigation.

Appellant cannot claim that he prevailed as to the May 19, 1964 transcript which has never been released. The District Court held that that transcript was properly withheld under

Exemption 5 (App. 126, 253). That decision was affirmed by this Court on March 15, 1979. Unquestionably, appellant did not prevail and was not eligible for an award of either costs or fees for unsuccessful efforts to obtain the release of that transcript.

Similarly, appellant did not substantially prevail because of the disclosure of the remaining two transcripts after a judgment favorable to GSA, which the district court had an opportunity to and did reconsider on remand. It is true that the release of information after initiation of a court action does not automatically preclude the District Court from determining that the party seeking the information has substantially prevailed. Nationwide Building Maintenance, Inc. v. Sampson, supra at 708-710. It is equally true that a party is not always entitled to attorney's fees when suit is brought and thereafter the information is released. Church of Scientology v. Harris, supra at 8-9; Cox v. United States Department of Justice, supra at 6; Vermont Low Income Advocacy Council v. Usery, supra at 513. The cases in which the release of information occurred have not involved release after a judgment unfavorable to the requestor. In Cox, for example, the appellant claimed that the threat of court-compelled disclosure caused the release just after suit was filed. Consequently, appellant Weisberg's claim that he "substantially prevailed" is undermined by the District Court's holding that the transcripts were exempt.

As the District Court correctly concluded, the decision to release the January 21 and the June 23 transcripts was based on reasons unrelated to this litigation. The two affidavits of Robert E. Owen, Information Review Officer, Directorate of Operations, CIA, established that the two transcripts were released because of other events occurring on Capitol Hill at the same time that appellant Weisberg was appealing the second unfavorable decision of the District Court.

The House Committee on Assassinations prepared a summary report based, in part, on classified material made available by the CIA and the FBI. The CIA was asked to declassify the material used in the report for presentation at a September 15, 1978 hearing. The CIA also made available Mr. John L. Hart to testify at that House Committee hearing. One subject of particular interest to the Committee related to the Soviet defector, Yuriy Nosenko. Nosenko had formerly been an Intelligence Officer in the Soviet KGB who was aware of certain facts concerning Lee Harvey Oswald's experiences as an American defector to the Soviet Union. As a result of the Committee's interest in information provided by Nosenko and information concerning Nosenko's credibility, the Committee requested that the CIA declassify information in these areas. The Director of Central Intelligence determined that certain portions of information would be declassified because

the congressionally-assured benefit to the general public outweighed the damage which could reasonably be expected to national security interests as a result of such disclosures (Owen affidavits, filed August 10 and December 3, 1979 (R. 72, 87)).

One week after the hearing, on September 22, 1978, the CIA Office of General Counsel on its own initiative requested Mr. Owen to consider the effect of the disclosures made at the hearings on the transcripts of January 21 and June 23, 1964. Mr. Owen concluded after comparing the reports and the testimony with the transcripts that continued assertion of the Freedom of Information Act exemptions was no longer tenable (Id). Mr. Owen advised the Office of General Counsel of his conclusions on September 26, 1978. On October 11 the Office of General Counsel for the CIA advised both the Department of Justice and the Archives that as a consequence of the declassified CIA information regarding Yuriy Nosenko being placed on the public record before the House Committee, the two transcripts should no longer be withheld from Freedom of Information Act requestors.

Mr. Owen stated unequivocably that the sole basis for the determination to release the transcripts was "the decision of the DCI to declassify information requested by HSCA" (Owen affidavit filed August 10, 1979 (R. 72)). Furthermore, he stated under oath that the instant "litigation played no role" in his determination (Id). In the second supplemental affidavit, he gave a

detailed explanation of why and how the CIA determined on its own initiative, unprompted by appellant, that the two transcripts could no longer be withheld after certain information was declassified, and public testimony was given by officials before the House Committee on September 15, 1978. Mr. Owen compared the testimony before the House Committee which was attached to his affidavit with the transcripts which were also attached to his affidavit and gave his analysis for why the information contained in the transcripts had to be declassified.

Appellant suggests that the necessary causal nexus between this litigation and the release of the two transcripts can be inferred from the facts that GSA did not file a brief on the merits in the consolidated appeal on October 16, 1978, and instead announced the "declassification" of the transcripts in its motion to dismiss part of Weisberg I and all of Weisberg II as moot. The Owen affidavits make clear, however, that the process which resulted in the declassification of information provided to the House Committee and, ultimately, in the release of the two transcripts at issue in this litigation was ongoing for a substantial period prior to October 16, 1978. Clearly, appellant engages in speculation bordering on the absurd when he suggests that GSA, rather than filing its brief on the merits in the consolidated appeal and risking an adverse decision, decided hastily to release the two transcripts, thereby mooting the case.

This case is analogous to Vermont Low Income. There, excusable delay in processing the administrative appeal resulted in disclosing the requested information after a district court action was filed, but before judgment was rendered. No attorney's fees were awarded. Here, a House Committee requested the CIA to declassify information, which ultimately caused the release of the transcripts in question, after an action was filed and judgment for the Government was rendered. In both cases, the efforts of the FOIA requestors did not contribute to or cause the disclosure of the documents.

The facts in this case, however, are much stronger than those in Vermont Low Income and not merely because of appellee's favorable District Court ruling. Normally, classified information is automatically and gradually declassified. After certain intervals of time a lower classification is assigned to a particular document. In fact, GSA's answers to interrogatories 1, 2, 19 and 20 demonstrated that this happened with respect to the transcripts at issue (App. 27, 29). Implicit in this process is that over a period of time the reasons for retaining a particular classification erode. If a persistent requestor 5/ of classified information

5/ Appellant concedes he has been trying to obtain the information at issue since 1968, although the FOIA request underlying this litigation was not made until 1975 (Brief for Plaintiff-Appellant at 22; App. 109).

keeps a court action alive long enough, the information will ultimately be released in the normal course of events without regard to the requestor's efforts. This is what happened in this case. Appellant caused substantial delays in litigating this case which kept the case alive and precluded this Court from rendering a decision before September, 1978.

An example of this delay occurred after the District Court concluded that the transcripts were properly exempt and appellant noted his first appeal. On February 22, 1978, after appellant and appellee had filed their main briefs, appellant attempted to include in his reply brief material which was outside the record. The Government promptly moved to strike. This Court agreed that such material had to be considered, if at all, in the first instance in the trial court and directed appellant to make his motion there. When appellant moved for a new trial in the District Court, it was based on his "newly discovered evidence" consisting of a magazine article, a book and a newspaper clipping. Following denial of his motion for a new trial, appellant again appealed. The whole episode took from February until August, 1978. This is just one example of delay caused by appellant which kept the case alive from September, 1975 until September, 1978. In sum, such dilatory and litigious efforts, which did not cause the release of the transcripts, should not be rewarded by payment of attorney's fees.

B. GSA did not have the burden of proving that the transcripts released were exempt under the FOIA until the time of their disclosure.

Approximately one half of appellant's argument on appeal is based on a misunderstanding of the law (Brief for Plaintiff-Appellant at 28-40). He contends that he "substantially prevailed" unless GSA demonstrates that the January 21 and June 23 transcripts were "exempt at all times prior to their 'declassification' and release" (Id. at 28). 6/ The rest of his argument flows from this false assumption. Appellant argues that the two transcripts were never properly classified, either procedurally or substantively, which makes Exemption 1 inapplicable. He also contends that Exemptions 1 and 3 are coextensive. If the transcripts were improperly classified, he urges, then Exemption 3 would be inapplicable as well as Exemption 1. Consequently, appellant concludes, he has "substantially prevailed."

6/ Appellee does not concede that at any point in time the transcripts were improperly withheld. On the contrary, appellee defended the documents on the basis of the claimed exemptions until the information was declassified at the House Committee's request. Because the merits of the withholding are not at issue in this appeal, appellee does not address appellant's claim that Exemptions 1 and 3 are inapplicable but rests on the record below for the opposite conclusion. See also Lesar v. United States Dept. of Justice, No. 78-2305 (D.C. Cir. July 15, 1980); Halperin v. Dept. of State, 565 F.2d 699 (D.C. Cir. 1977).

In essence, appellant stubbornly attempts to relitigate the merits on his fee application. The attorney's fee provision of the FOIA was not intended to produce that result.

First, appellant is incorrect when he suggests that GSA has the burden of demonstrating that the transcripts at issue were at all times exempt prior to their release. Second, this Court previously refused to consider an appeal from the District Court's decision after the transcripts had been released, when it dismissed as moot that portion of Weisberg I and Weisberg II which related to the January 21 and June 23 transcripts. Weisberg v. GSA, Nos. 77-1831, 78-1731 (D.C. Cir. January 12, 1979). Third, appellant ignores the District Court's conclusion held that the two transcripts were properly withheld under Exemption 3. Instead, the thrust of his argument is that Exemption 1 was inapplicable.

Appellant's contention as to the burden of GSA is legally incorrect for the following reasons. First, appellant asks this Court to graft a wholly new requirement on the standard set forth in Vermont Low Income and Cox as to what constitutes "substantially prevailed", without any citation of authority or consideration of the legislative history of the FOIA. Second, the new requirement is inconsistant with the criteria for deciding whether the District Court should exercise its discretion to make an award after it has concluded that a party has "substantially prevailed."

If a FOIA requestor demonstrates that he or she is a prevailing party eligible for an award of attorney's fees, the District Court still must consider whether or not it should exercise its discretion to make such an award. This Court has listed four factors to be considered in determining whether an award of attorney's fees should be made. Nationwide Building Maintenance, Inc. v. Sampson, supra at 711-12. The fourth factor is whether the government's withholding of documents has a reasonable basis in law. The government does not have the burden of establishing that records withheld are, in fact, exempt in order to persuade the court that a discretionary award of attorney's fees is inappropriate. LaSalle Extension University v. FTC, 627 F.2d 481 (D.C. Cir. 1980), quoting Fenster v. Brown, supra and Cuneo v. Rumsfeld, supra, 553 F. 2d at 1365-66. It is therefore inconceivable that the question of whether a party "substantially prevailed" encompasses a determination of whether the documents withheld are in fact exempt. Moreover, the addition of such a requirement would--as this case reflects--encourage continued litigation, which is not a desirable policy.

This Court previously determined that the question of whether the documents were lawfully withheld was moot. Because of the release, there is no case or controversy on that issue between

the parties, and this Court's ruling becomes the law of the case. See Uniformed Sanitation Men Association v. Commissioner of Sanitation, 426 F.2d 619, 628 (2d Cir. 1970), cert. denied, 406 U.S. 961 (1972); Naples v. United States, 344 F.2d 508, 510 (D.C. Cir. 1964). Appellant is bound by the law of the case and cannot relitigate an issue over which the Court lacks jurisdiction on a motion for attorney's fees.

C. Ray v. Turner did not precipitate the release of the January 21 and January 23 transcripts.

Appellant steadfastly adheres to the argument that Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978), which was decided just before disclosure of the two transcripts, caused the CIA to make the release and moot the appeal. This thesis strains credibility. The decision in Ray v. Turner merely refined the criteria for justifying the withholding of information. Nothing in that case suggests that the CIA improperly withheld information in this case. At most, if this Court had accepted appellant's argument that the justification for withholding the documents at issue in this case failed to meet the criteria in Ray v. Turner, appellant might have been able to obtain a remand.

Appellant suggests that he would have substantially prevailed if this Court determined that the affidavits in this case were inadequate by Ray v. Turner standards, if it overturned the

District Court's ruling and if, on remand, the CIA was unable to justify the withholding of the transcripts. The speculative nature of plaintiff's claim is underscored by the number of "ifs" necessary to describe it.

II. The District Court properly exercised its broad discretion to control discovery by allowing only affidavits on the issue of whether this litigation caused the release of the two documents disclosed.

Appellant argues that he should have been permitted to take depositions of CIA and GSA officials and have documents produced on four issues: (1) whether the January 21, January 27, [7] and June 23, 1964 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 in

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7/ Not only was this transcript unresponsive to the FOIA request underlying this litigation, but the discovery sought again reflects how appellant unnecessarily multiplied the proceedings below. In litigating the merits, appellant requested the same information relating to the January 27, 1964 transcript which was sought in connection with his attorney's fees application. (Plaintiff's Request for Documents, No. 4 and Plaintiff's Third Set of Interrogatories, e.g., Nos. 64-69, 76, 84-87, 102, 187 (R. 9, 33)). Appellee objected to providing answers (R. 36A), and the District Court granted a de facto stay of discovery by not ruling on appellant's two motions to compel (R. 36, 41) before deciding the merits.

Ray v. Turner influenced the decision to 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 claim will be analyzed seriatim.

Appellant was not entitled to discovery on the issue of whether the January 21, January 27 and June 23, 1964 transcripts were ever properly classified. First, the January 27 transcript was not requested by the FOIA request underlying this litigation. Second, for reasons previously stated, appellant was not entitled to take discovery on the issue of whether the January 21 and June 23 transcripts were properly classified because that issue was not being litigated. 8/ Moreover, appellant had ample opportunity prior to the submission of the parties' motions for summary judgment to take discovery on the classification issues (R. 5, 9, 11, 23, 33).

The District Court properly exercised its discretion to limit the form in which discovery was taken on the issue of whether the hearings before the House Committee caused the declassification. District courts have broad discretion to control discovery and to limit or prohibit it. Fed. R. Civ. P. 26(c); see, e.g., General Dynamics Corp. v. Selb, 481 F.2d 1204, 1212 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974). The court may control discovery by directing that less burdensome means of

8/ See Part1B supra, at 20-23.

discovery be permitted other than depositions which are most likely to intrude upon the mental processes of the decision-maker. See Fed. R. Civ. P. 31, 33, 34; see also Kyle Engineering Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979); United States v. Northside Realty Associates, 324 F.Supp. 287, 293-295 (N.D.Ga. 1971).

In this case, appellee had submitted the first Owen affidavit before the District Court held a hearing on appellee's motion for a protective order and appellant's request to take discovery. At the hearing on October 17, 1979, the District Court made clear that further substantiation was required of appellee's position that the transcripts were released for reasons unrelated to the litigation. The court permitted additional time for appellee to submit a supplemental affidavit (Transcript of October 17, 1979 hearing, filed May 15, 1980). Subsequently, the second and more detailed Owen affidavit was prepared and submitted on December 3, 1979.

Limiting discovery to affidavit form was particularly appropriate in that the discovery appellant sought was not only unnecessary and burdensome, but would have been an unwarranted intrusion into the deliberative process of the executive and legislative branches. The bar against probing the mental processes of decision-makers, except in extraordinary cases, has long been recognized in the context of suits challenging administrative action, Citizens to

Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); United States v. Morgan, 313 U.S. 409, 433 (1941), and more recently in the context of suits brought under the Freedom of Information Act. EPA v. Mink, 410 U.S. 73 (1973); Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974)).

The District Court properly excluded from discovery any information relating to the decision of the Court of Appeals in Ray v. Turner. A reading of that case, as previously stated, demonstrates the speculative nature of appellant's claim that that decision somehow caused the release of the two transcripts at issue.

The District Court also properly determined that depositions of Messrs. Rhoads, Briggs and Owen were unnecessary and burdensome. The only affidavits of Messrs. Rhoads and Briggs submitted in this case were submitted in connection with the earlier motions on the merits for summary judgment. Depositions of those individuals would involve relitigating the case. As to the Owen affidavits, appellant was not entitled to probe as to whether the affidavit was made in good faith. Discovery cannot be used as a tool to develop a claim of "bad faith" or "improper behavior." In Braniff Airways, Inc. v. CAB, 379 F.2d 453, 462 (D.C. Cir. 1967), after considering various allegations of procedural irregularity, this Court stated:

> We do not intend that the attention we have paid to these arguments be interpreted as giving disappointed litigants a license to rummage through the internal processes of an administrative agency, searching for some irregularity or the hint of one on which to base a challenge to the validity of the decision . . . . We cannot allow the recital by an administrative agency . . . to be overcome by speculative allegations.

Until evidence is submitted to the contrary, agencies are entitled to a presumption of administrative regularity and good faith. FTC v. Owens-Corning Fiberglass Corp., 626 F.2d 966, 974-975 (D.C. Cir. 1980); National Nutritional Foods Association v. FDA, 491 F.2d 1141, 1144-46 (2d Cir.), cert. denied, 491 U.S. 874 (1974). Appellant was properly precluded from using discovery to bootstrap a claim of "bad faith" or "improper behavior."

Appellant had ample opportunity to dispute any material question of fact by the evidentiary standards set forth in Rule 56, Federal Rules of Civil Procedure. After the Government established the absence of any genuine issue of material fact, the burden shifted to appellant to come forward with proper evidentiary affidavits to demonstrate that specific material facts were genuinely in dispute. Exxon Corp. v. FTC, No. 79-1995 (D. C. Cir. October 3, 1980). Appellant was not entitled to rest on mere allegations or speculation. Smith v. Saxbe, 562 F.2d 729, 733-734 (D.C. Cir. 1977).

In short, the District Court did not abuse its discretion in limiting the information to be provided on whether the release of the documents was caused by reasons unrelated to the litigation to the affidavit format, and only to matters material to the resolution of the attorney's fees issue. "The District Court has discretion to forego discovery and award summary judgment on the basis of affidavits." Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978). Moreover, this Court recently ruled against an appellant who sought discovery where the District Court relied on agency affidavits:

> [W]e cannot find that the trial court abused its discretion in denying discovery to the appellants when it appeared that discovery would only have afforded an opportunity to pursue a "bare hope of falling upon something that might impugn the affidavit.

Military Audit Project v. Casey, No. 80-1110 (D.C. Cir. May 4, 1981).

III. Neither the GSA nor the CIA acted in bad faith.

Appellant cannot establish a genuine factual issue by disbelieving the appellee's affidavits. "General allegations of Agency bad faith in other instances either hypothetical or actual . . . will not undermine the veracity of the Agency's affidavits." Baez v. Department of Justice, No. 79-1881, slip. op. at 14 (D.C. Cir. August 25, 1980).

Yet, appellant attempts to suggest that notwithstanding any provision in the FOIA, he is entitled to attorney's fees and costs on the basis of unsubstantiated allegations of bad faith conduct on the part of GSA and CIA. Not only has appellant failed to prove such allegations, but he would not be entitled to attorney's fees or costs against the government even if he were able to provide hard evidence of abuse.

Appellant apparently bases his request for attorney's fees on the "bad faith" exception to the American rule barring attorney's fees to a prevailing party. Where litigation involves the federal government, however, it is not the American rule which prohibits the recovery of attorney's fees but the doctrine of sovereign immunity. Fitzgerald v. United States Civil Service Commission, 554 F.2d 1186 (D.C. Cir. 1977); Cuneo v. Rumsfeld, supra, 553 F.2d at 1363.

Congress specifically prohibited the award of attorney's fees in an action against an agency or official of the United States:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in Section 1920 of this Title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity . . . (emphasis supplied).

28 U.S.C. § 2412. This prohibition has been strictly construed, NAACP v. Civiletti, 609 F.2d 514, 518 (D.C. Cir. 1979), cert. denied, 100 S.Ct. 3012 (1980), and applies even if the losing party has acted in bad faith. EEOC v. Kenosha Unified School District, 620 F.2d 1220, 1228 (7th Cir. 1980); Gibson v. Davis, 587 F.2d 280, 281-282 (6th Cir. 1978), cert. denied, 441 U.S. 905 (1979); National Association of Letter Carriers v. United States Postal Service, 590 F.2d 1171, 1180 (D.C. Cir. 1978); Rhode Island Committee on Energy v. GSA, 561 F.2d 397, 404-405 (1st Cir. 1977). Moreover, in the case which recognized the "bad faith" exception, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 (1975), the Supreme Court only acknowledged the inherent power in the courts to allow attorney's fees unless forbidden by Congress. Accordingly, neither GSA nor CIA acted in bad faith as suggested by appellant, but even if they had, appellant would not legally be entitled to an award of attorney's fees under the "bad faith" exception to the American rule.

In summary, the District Court correctly concluded that appellant did not substantially prevail for purposes of an award of attorney's fees and costs. Despite persistent efforts since 1975, appellant was unable to demonstrate that GSA's withholding of the transcripts was improper. In fact, he made his claim for attorney's fees squarely in the face of two separate rulings by the District Court that GSA's actions were lawful and proper.

Moreover, contrary to appellant's assertions, he was not deprived of discovery which would have contributed to the resolution of the attorney's fees issue.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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A D D E D U M

5 U.S.C. § 552 (a)(4)(E) provides:

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

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Xerox Brief of Appellee has been made upon Appellant by mailing a copy thereof to Appellant's counsel, James H. Lesar, Esquire, 2101 L Street, NW., Suite 203, Washington, D. C. 20037, on this 29th day of July, 1981.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing printed Brief For Appellee has been made upon appellant by mailing two copies thereof, postage prepaid, to counsel for appellant, James H. Lesar, Esquire, 2101 L Street, N.W., Suite 203, Washington, D.C. 20037 on this 31st day of July, 1981.

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