REPLY 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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ARGUMENT

I. DISTRICT COURT ERRONEOUSLY RULED THAT APPELLANT WEISBERG DID NOT "SUBSTANTIALLY PREVAIL" WITHIN THE MEANING OF 5 U.S.C. § 552(a)(4)(E)

In Cox v. United States Dept. of Justice, 195 U.S.App.D.C. 189, 194, 601 F.2d 1, 6 (1979), this Court held that a party in a Freedom of Information Act (FOIA) lawsuit who seeks an award of attorney's fees must show: (1) that prosecution of the action could reasonably be regarded as necessary to obtain the informa-

tion and (2) that a causal nexus exists between that action and the agency's surrender of the information. At oral argument in District Court GSA's counsel, after initially resisting it, eventually agreed with the Court's assertion that GSA could not deny that the litigation was necessary. [App. 750-755] GSA has not contended otherwise on appeal; thus it is conceded that Weisberg met the first requirement.

A. The Owen Affidavits

With respect to the second requirement, GSA argues that the affidavits of CIA official Robert E. Owen establish that there was no causal nexus between this litigation and the release of the January 21 and June 23 transcripts. Owen initially swore that the sole basis for the determination to release the transcripts was "the decision of the Director of Central Intelligence to declassify CIA information requested by the House Select Committee on Assassinations," and "[t]he status of the above-styled litigation played no role in my determination regarding the releasability of the two aforementioned Warren Commission transcripts." July 26, 1979 Owen Affidavit, ¶4. [App. 427]

These self-serving declarations are inadequate to rebut the obvious causal nexus established by the manner and timing of the transcripts' release. Elsewhere in the same affidavit Owen states that on September 22, 1978, he was asked by the Office of General Counsel of the CIA "to review the above-styled litigation to de-

termine whether the transcripts remained exempt from release under Freedom of Information Act exemptions (b)(1) and (b)(3)." (emphasis added) [App. 426] Thus it was this litigation which led the CIA to undertake its review.

This case is somewhat analogous to Church of Scientology of California v. Harris, No. 80-1189 (D.C.Cir. April 17, 1981). That case involved, inter alia, 31 documents which were not identified as responsive to the request until after suit was brought because the agency failed to make the required search. When plaintiff sought attorney's fees, the government maintained that they had been released as a result of a letter by Attorney General Bell, not the litigation. Although this Court agreed that Bell's letter "precipitated release of the documents and was a cause of their release" (emphasis in original), it held that:

> The initiation and prosecution of this litigation, however, was in our opinion the direct cause of their disclosure, for absent this litigation, following the unsuccessful administrative request, the General Counsel's files would never have been searched, the 31 documents would never have been identified as falling within the scope of Scientology's FOIA request, and the documents would never have been evaluated to determine whether they should or could be released under the guidelines set forth in the Attorney General's letter. The timing of the Attorney General's letter does not eliminate the fact that if the litigation had never been brought the documents would never have been disclosed. It was the litigation that produced the 31 documents, not the letter.

(slip op. at 11)(emphasis in original).

The Owen affidavit does not state that the transcript would have been released to Weisberg absent this litigation. The avail-

able evidence contradicts any such claim. For example, although Owen states that the CIA declassified information provided by Nosenko and information concerning Nosenko's credibility for the House Select Committee on Assassinations [App. 426], no such information has been released to Weisberg except where, as here, he brought suit for it. This is true even though his request for such information dates to 1975. [App. 537, 787, 800]

When the District Court made it clear at oral argument on October 17, 1979, that GSA had not established that the transcripts were released for reasons unrelated to this litigation, GSA sought and received permission to submit another affidavit. Owen's November 26, 1979 affidavit sought to explain why the testimony of John L. hart before the House Select Committee on Assassinations (HSCA) had compelled the release of the two transcripts. This was countered by Weisberg's December 22, 1979 afidavit [App. 506-618], which demonstrated in exhaustive detail that these reasons had vanished soon after this suit was filed, if not before, since the CIA itself had released, much earlier, the same information whose disclosure by HSCA in 1978 was said by Owen to require release of the transcripts. See Appellant's Brief, pp. 36-39. In short, the reasons advanced by Owen, when coupled with the facts adduced by Weisberg, help establish that release of the transcripts was causally linked to this litigation, not to the HSCA testimony.

The District Court's ruling consisted of a single finding, that the transcripts were released "for reasons unrelated to this litigation." [App. 781] However, as Weisberg has detailed above, the GSA's affidavits are largely conclusory insofar as they seek to establish that the release of the transcripts was unrelated to this litigation; they simply lack pertinent details need to establish that fact. Moreover, such facts as GSA's affidavits do set forth only help to demonstrate the existence of a causal nexus between this litigation and the release of the transcripts.

For these reasons, the District Court's finding was clearly erroneous.

B. Timing of the Release

GSA contends that no causal nexus between this litigation and the release of the transcripts can be inferred from the timing of the release. (Appellee's Brief, p. 17) But GSA also asserts that: "The Owen affidavits make clear . . . that the process which resulted in the declassification of information provided to the House Committee and, ultimately, in the release of the two transcripts . . . was ongoing for a substantial period prior to October 16, 1978." Ibid. This, however, cuts against GSA's argument. For once 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"

(Appellee's Brief, pp. 15-16, citing Owen affidavits), there could be no justification for withholding the transcripts from the public any longer. It was precisely to enable public participation in matters of such great public importance that FOIA was enacted.

The longer it took to release the transcripts after such a determination as that made by the Director of Central Intelligence, the more obvious it becomes that the timing of the release of the transcripts relates not to the HSCA proceedings but to this litigation. The nebulous Owen affidavits fail to state when that determination is made, but it is obvious that it must have been made a good while in advance of September 15, 1978, the day Hart testified to the HSCA.

Assuming, arguendo, that Hart's testimony was a cause of the transcripts release, Weisberg has still substantially prevailed. A plaintiff substantially prevails where the action is shown to have had an effect on the timing of disclosure, at least where the agency offers no explanation for its delay in making the information available. Marschner v. United States, 470 F. Supp. 196 (D.Conn. 1979) As was held in Exner v. Federal Bureau of Investigation, 443 F.Supp. 1349, 1353 (S.C.Cal. 1978):

> The key is whether there is a substantial causative relationship between the lawsuit and the delivery of information. When the information is delivered may be as important as what information is delivered.

(emphasis in original).

The FOIA specifies that an agency has but ten working-days to respond to a request. In this case GSA did not release the transcripts within ten-working days of Hart's testimony, or even with ten working-days of the date on which Owen reviewed them for "declassification" and release. GSA has offered no explanation for this delay. This indicates that this litigation had a causative effect on the timing of the transcripts' release.

C. Effect of District Court's Ruling That Transcripts Were Exempt

GSA asserts that Weisberg's claim that he substantially prevailed is undermined by the District Court's ruling that the transcripts were exempt. (Appellee's Brief, p. 14) In Cuneo v. Rumsfeld, 180 U.S.App.D.C. 83, 90, 559 F.2d 1360, 1367 (1977), this Court held that an agency should not be permitted to moot a claim for attorney's fees through voluntary disclosure because permitting it to do so would create an incentive for agencies to assert boilerplate defenses, knowing that the claims for attorney's fees could be mooted by voluntary disclosure prior to judgment. What GSA proposes here simply adds one level of sophistication to the scenario outlined in Cuneo. It would mean that after an agency has delayed disclosure by procuring a favorable district court decision on the basis of false, misleading, or inadequate affidavits, it could then "voluntarily" make disclosure while an appeal was pending, thereby evading appellate review and thwarting attorney's fees and sanctions. This, of course, would subvert both the FOIA and judicial integrity. For policy reasons, therefore, the position taken by GSA cannot be countenanced.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT ALLOWING WEISBERG TO TAKE DISCOVERY

Weisberg first sought to initiate discovery by noticing the depositions of three persons who had submitted affidavits in this case and serving each with a subpoena duces tecum. This discovery was stayed by the Court pending consideration of the motion for attorney's fees. When the Court denied Weisberg's motion, Weisberg moved for reconsideration. In so doing, he made a new request for discovery. When the Court granted Weisberg's motion for reconsideration on September 3, 1980, it also authorized him to 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] Subsequently, however, the Court vacated that Order and reinstated its earlier Order. [App. 803]

Weisberg contends that the District Court abused its discretion by not allowing him to take discovery pertinent to his motion for attorney's fees. GSA argues, however, that the Court acted properly in "[l]imiting discovery to affidavit form," and in ruling in its favor on the basis of affidavits alone." GSA further contends that "[a]fter 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." (Appellant's Brief, pp. 27-29)

Weisberg contends that if the facts before the Court were not sufficient to entitle him to a ruling that he had substantially prevailed, then his counteraffidavits at least established the existence of a disputed issue of material fact with respect to whether or not the transcripts were released for reasons unrelated to this litigation. For this reason he argues that judgment in GSA's favor was improper and that at a minimum he should have been allowed discovery on the issue specified in the District Court's September 3, 1980 Order; viz., whether the two transcripts were released for reasons unrelated to this litigation.

This issue is substantially the same as the second of the four issues specified in Weisberg's deposition notices, which was "whether the hearings held by the House Select Committee on Assassinations caused the declassification and public release of the January and June 23 transcripts." In discussing this issue, GSA argues that District Courts have broad discretion to control, limit, and prohibit discovery, and that because depositions are burdensome and the form of discovery most likely to intrude upon the mental processes of the decision-maker, the Court properly limited discovery on this issue to affidavits. (Appellee's Brief, pp. 26-27)

The District Court, if it concluded that depositions were burdensome and likely to infringe upon the mental processes of administrators, could also have limited discovery to interrogatories and requests for production of documents. The so-called "affidavit form" of discovery was totally unsatisfactory, as well as a misnomer.

Weisberg did not seek this form of discovery, the District Court was not acting upon his discovery requests when it authorized GSA to file a supplemental affidavit, and that affidavit did not address all or even many of the questions pertinent to the issue of whether Weisberg had substantially prevailed.

GSA correctly states that the District Court may forego discovery and award summary judgment on the basis of affidavits. But the circumstances in which this may be done are limited. Such affidavits will not suffice where they are "conclusory . . . or if they are too vague or sweeping." Hayden v. National Sec. Agcy./Cent.Sec.Serv., 608 F.2d 1381, 1387 (D.C.Cir. 1979) The Owen affidavits set forth a conclusion, that this litigation did not impact on the decision to release the transcripts, but there are few details alleged in support of this conclusion. For example, the Owen affidavits are silent as to the date on which the determination was made to "declassify" materials for use by Hart in testifying to HSCA and they make no statement as to whether other materials declassified as a consequence of HSCA proceedings were released to FOIA requesters, or only these transcripts.

In addition, summary judgment on the basis of affidavits is not appropriate where there is evidence in the record of agency bad faith. Hayden, supra, 608 F.2d at 1387. In this case there was evidence of agency bad faith in the record. First, the agency submitted an affidavit falsely alleging a nonexistent basis for withholding the June 23 transcript; second, in a prior related case, Weisberg v. General Services Administration, Civil Action

No. 2052-73, the GSA had engaged in a similar patter of misconduct regarding the January 27, 1964 Warren Commission transcript; third, records obtained under FOIA showed that GSA had withheld information from Weisberg for wrongful reasons and had conspired with another agency to contrive a basis for withholding a non-exempt record from him; and fourth, from the outset the GSA had engaged in delaying tactics on discovery matters and had obstructed discovery by asserting, on behalf of the CIA, a basis for not responding to discovery which the Court had specifically disallowed.

GSA also objects to Weisberg's discovery on the grounds that he sought to probe the mental processes of decision-makers, asserting that this is barred by United States v. Morgan, 313 U.S. 409, 433 (1941) and other cited cases. First, much of the discovery sought by Weisberg would not involve probing of mental processes but would simply seek to elicit factual information not contained in the Owen affidavits. Second, Morgan has been eroded to some extent by more recent decisions of the Supreme Court such as Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Camp v. Pitts, 411 U.S. 138 (1973); and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). Third, the probing of the mental processes of an administrative official was allowed in at least one FOIA case involving issues similar to those raised here, Halperin v. Department of State, 184 U.S.App.D.C. 282, 565 F.2d 699 (1977).

Finally, one exception to the Morgan rule is where there is a showing of bad faith on the part of the agency. In this case the GSA submitted an affidavit which false asserted that release of the June 23rd transcript would disclose the identity and whereabouts of Soviet defector Yuri Nosenko and "put him in mortal jeopardy," when in fact the transcript could and did disclose no such thing. As noted above, this is far from the only instance of bad faith conduct in this case, but inasmuch as this one clearly implicates the integrity of the judicial process, it alone is sufficient to overcome any argument against permitting the probing of the mental processes of those who submitted affidavits affidavits on behalf of GSA in this case. The result of such probing in Halperin, supra, proved both enlightening and useful, and the same result is likely to obtain here.

III. WEISBERG MAY BE AWARDED ATTORNEY'S FEES FOR THE GSA'S BAD FAITH CONDUCT

GSA contends that neither it nor the CIA have acted in bad faith, but it fails to address any of the specific allegations made by Weisberg on this point. GSA also argues that in any event an award of attorney's fees for such conduct is barred by the doctrine of sovereign immunity.

Regarding soveriegn immunity, the first point is that this immunity has been expressly waived by statute in FOIA cases. 5 U.S.C. § 552(a)(4)(E). Moreover, in providing for punitive sanctions against agency officials who obdurately withhold infor-

mation in certain circumstances, Congress clearly expressed an intent that the courts should be fully empowered to take appropriate action against such conduct.

In Aleyeska Pipeline Co. v. Wildnerness Society, 421 U.S. 240 (1975), also cited by GSA, the Court acknowledged that courts have inherent power to allow attorney's fees in particular situations "unless forbidden by Congress." Because Congress has waived sovereign immunity in FOIA cases, the exercise of the inherent power of the courts to award attorney's fees is not barred in this case.

In addition, it should be pointed out that the bar to an award of attorney's fees cited by GSA, 28 U.S.C. § 2412, does not bar an award of costs other than attorney's fees and costs.

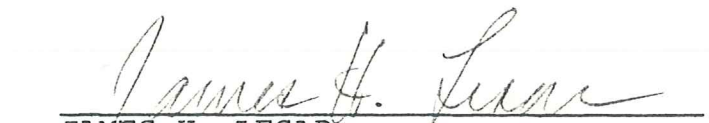
CONCLUSION

For the reasons stated above, the District Court's finding that the transcripts were released for reasons unrelated to this litigation is clearly erroneous. Accordingly, this Court should reverse the District Court's holding that Weisberg has not substantially prevailed and remand the case for a determination as to whether he is entitled to a discretionary award of attorney's fees.

Alternatively, the Court should hold that the District Court abused its discretion by not allowing Weisberg to take discovery on the issue of whether the release of the transcripts was unrelated to this litigation and remand the case for appropriate

discovery proceedings.

Respectfully submitted,



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