

NOT TO BE PUBLISHED - SEE LOCAL RULE 8 (f)

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1009

September Term, 1981

Harold Weisberg, Appellant

Civil Action No. 75-01448
United States Court of Appeals
for the District of Columbia Circuit

v.

FILED OCT 9 1981

General Service Administration

GEORGE A. FISHER
CLERK

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

Before: WRIGHT, WALD and MIKVA, Circuit Judges

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court is affirmed, for reasons set forth in the attached memorandum.

Per Curiam
For the Court

George A. Fisher
George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

MEMORANDUM

Harold Weisberg appeals from a decision of the district court that he was not entitled to attorney's fees and costs because he did not "substantially prevail" in his action under the Freedom of Information Act within the meaning of 5 U.S.C. § 552(a)(4)(E). The district court's finding was not clearly erroneous, and we therefore affirm.

Weisberg sought to obtain certain transcripts of the Warren Commission's executive sessions, but the district court ruled that the transcripts were exempt under the Act. On September 15, 1978, while Weisberg's appeal was pending, the House Select Committee on Assassinations held hearings that required the declassification of much of the information sought by Weisberg. The Central Intelligence Agency shortly thereafter reviewed the classification of the transcripts, and on October 16, 1978 determined that copies could be given to Weisberg. The government then successfully asked that portions of Weisberg's appeal be dismissed as moot.

Even this brief outline of the facts illustrates why the district court was not clearly erroneous in concluding that Weisberg did not substantially prevail in his FOIA action. Without the consequences of the hearings held by the congressional committee, Weisberg would not have received the transcripts. Nothing in Vermont Low Income Advocacy Council v. Usery, 546 F.2d 509 (2d Cir. 1976), requires a reviewing court to conduct an extensive review of the record or go beyond determining that the trial court's findings of fact were not clearly

erroneous. Moreover, this is merely a threshold question; even had the district court found that Weisberg substantially prevailed, it would still have been within the court's discretion to deny the award of attorney's fees. Church of Scientology v. Harris, 653 F.2d 585, 587 (D.C. Cir. 1981). It was similarly within the trial court's discretion whether to allow discovery on Weisberg's motion for fees, and to what extent such discovery should be permitted. Kyle Engineering Co. v. Kleppe, 600 F.2d 226, 331 (9th Cir. 1979). The question of fees in a FOIA case, a subsidiary question under the statutory scheme, need not needlessly be mushroomed into a separate imbroglio where the judges, both trial and appellate, are impelled to create a whole new body of law and procedures for determining when and whether fees are to be awarded.

On consideration of the foregoing, it is ORDERED that the judgment of the district court is affirmed.