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APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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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Attorney for Appellant

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Pursuant to Rule 40 of the Federal Rules of Appellate Procedure and Rule 14(a) of the Rules of this Court, appellant respectfully petitions the Court for a rehearing of its October 9, 1981, judgment in this case and suggests a rehearing en banc.

CONCISE STATEMENT OF ISSUE AND ITS IMPORTANCE

The panel held that the District Court's ruling that Harold Weisberg did not "substantially prevail" in this Freedom of Infor-

mation Act case within the meaning of 5 U.S.C. § 552(a)(4)(E) was not "clearly erroneous," and that the District Court did not abuse its discretion in denying Weisberg discovery on his motion for attorney fees. It also found that it was not required "to conduct an extensive review of the record or go beyond determining that the trial court's findings of fact were not clearly erroneous."

But the panel overlooked Weisberg's contention that there is a genuine issue of material fact in dispute which precluded judgment in the Government's favor; namely, whether the proceedings of the House Select Committee on Assassinations ("HSCA"), rather than this litigation, caused the release of two Warren Commission executive session transcripts which were disclosed to Weisberg while this case was pending on appeal.

This case raises a question of exceptional importance. At issue is whether traditional summary judgment principles apply to motions for attorney's fees in Freedom of Information Act ("FOIA") cases. If they do not, then FOIA plaintiffs will often be relatively helpless when confronted with intelligence agency affidavits which assert that the materials in question were released for reasons unrelated to the litigation, regardless of how self-serving, inaccurate, or untruthful such affidavits might be. And if, as here, the reviewing court declines to carefully review the record but rests its decision on the untested hearsay of interested intelligence agency officials, the prospect of attorney's fees in such cases is well nigh hopeless.

The panel decision threatens another judicial evisceration of the Freedom of Information Act.[1/] It is at odds with the legislative history of the Act. Contrary to the panel's memorandum, which slights the issue of fees in FOIA cases as "a subsidiary question under the statutory scheme," the legislative history of the 1974 Amendments shows that Congress enacted this provision because it was necessary to effectuate a national policy of disclosure of government information.[2/]

The panel also failed to address the issue of whether Weisberg should be entitled to an award of fees because of the Government's bad faith conduct. The Government's brief argued that relief under this theory was unavailable because barred by sovereign immunity. However, this barrier was removed by the Equal Access to Justice Act, P.L. No. 481, §§ 201-208, 94 Stat 2325-30 (1980),

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1/ Congress has thrice overriden judicial decisions which restrictively interpreted the FOIA. EPA v. Mink, 410 U.S. 73 (1973); Weisberg v. Department of Justice, 160 U.S.App.D.C. 71, 489 F.2d 1195 (1973), cert. denied, 416 U.S. 933 (1974); FAA Administrator v. Robertson, 422 U.S. 255 (1974).

2/ Congress heard testimony that the expense of obtaining information "is probably the most undermining aspect of existing law and severely limits the use of the FOIA Act by all media, but especially smaller sized newspapers." Accordingly, Congress added the provision for payment of litigation costs and attorney fees for successful FOIA plaintiffs to "insure that the average citizen can take advantage of the law to the same extent as the giant corporation with large legal staffs." See S.Rep. No. 93-854, 93d Cong., 2d Sess., p. 17, reprinted in Staffs of Senate Comm. on the Judiciary and House Comm. on Government Operations, Freedom of Information Act and Amendments of 1974 (P.L. 93-502); Source Book: Legislative History, Texts, and Other Documents (Comm. Print 1975), at p. 170.

effective October 1, 1981.[3/] The bad faith conduct alleged here includes obstructionist tactics and the procuring of a favorable decision in the trial court by submission of a false affidavit. Such conduct gives this case additional importance because it necessarily subverts the integrity and independence of the courts and undermines enforcement of the FOIA.

STATEMENT OF THE CASE

In 1975 Weisberg filed this suit for three Warren Commission executive session transcripts. Two transcripts were withheld at the behest of the Central Intelligence Agency ("CIA"). The District Court did not credit claims that the latter were properly classified [App. 258], but did rule that they were protected by Exemption 3 and 50 U.S.C. § 403(d)(3). [App. 126, 253]

In February-March, 1978, while Weisberg's appeal was pending, there was massive publicity concerning matters which the CIA had sworn in this case were required to be kept secret in the interest of national security. When Weisberg tried to present this evidence to this Court, the Court directed him to file a motion for new trial in the District Court. [App. 356] The Government vigorously resisted the new trial motion, and the District Court denied it.

3/ A copy of 28 U.S.C. § 2412, as amended, is appended to this brief. Counsel for the Government brought the amendment to the attention of the Court at oral argument. Counsel for Weisberg was not aware of the amendment until informed by Government counsel shortly before the oral argument.

[App. 348-340]

Weisberg appealed the District Court's May 12, 1978, order denying his motion for new trial. On August 24, 1978, this Court issued its opinion in Ray v. Turner, 190 U.S.App.D.C. 1287, 587 F.2d 1187 (1978), a decision which the CIA acknowledged in its 1979 report to Congress forced it to justify its claims of exemption on a deletion-by-deletion rather than document-by-document basis, as it had been doing. [App. 782] On September 12, 1978, Weisberg filed his brief in this Court. On September 15, 1978, the House Select Committee on Assassinations heard testimony from a former CIA official regarding Yuri Nosenko, a Soviet defector who is the subject of one of the transcripts withheld by the CIA.

Shortly after these three events, the CIA's Assistant General Counsel, Mr. Launie M. Ziebell, sent a memorandum regarding this litigation to Mr. Robert E. Owen, the CIA's Information and Privacy Coordinator.[4/] On September 26, 1978, Mr. Owen responded with a memorandum on "Warren Commission Transcripts Regarding Yuriy Nosenko in FOIA Litigation" which asserted that: "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) [App. 440]

4/ Despite its apparent relevance to the issue of what caused release of the transcripts, the CIA has refused to disclose Mr. Ziebell's September 22, 1978, memorandum.

On October 16, 1978, the day the Government's brief was due in this Court, the two transcripts were released to Weisberg. Weisberg thereafter moved for an award of attorney's fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E). The District Court denied the motion on grounds that Weisberg had not "substantially prevailed" because the transcripts were released to him "for reasons unrelated to this litigation." [App. 793]

ARGUMENT

I. PANEL OVERLOOKED WEISBERG'S CONTENTION THAT DISPUTED ISSUE OF MATERIAL FACT BARRED JUDGMENT IN GOVERNMENT'S FAVOR

In order to "substantially prevail," the party seeking an award of attorney's fees must show 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). The District Court held that the transcripts were released "for reasons unrelated to this litigation. However, Weisberg contended in the trial Court (Opposition to Defendant's Motion for Reconsideration of the Court's Ruling on Plaintiff's Motion for Reconsideration, at pp. 5-6) and in this Court (Reply Brief, pp. 8-9), that there is a disputed issue of material fact which precluded judgment in the Government's favor on this issue: viz., whether the transcripts were in fact released for reasons unrelated to this litigation.

It is axiomatic that summary judgment is properly granted only when no material fact is genuinely in dispute, and then only when the movant is entitled to prevail as a matter of law. Fed. R.Civ.P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Bouchard v. Washington, 168 U.S.App.D.C. 402, 514 F.2d 824, 827 (1974); Nyhus v. Travel Management Corp., 151 U.S.App.D.C. 269, 271, 466 F.2d 440, 442 (1972). In assessing the motion, all "inferences to be drawn from the underlying facts contained in [the movant's] materials must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The movant must shoulder the burden of affirmatively the absence of any meaningful factual issue. Bloomgarden v. Coyer, 156 U.S.App.D.C. 109, 113-114, 479 F.2d 201, 206-207 (1973). That responsibility may not be relieved through adjudication since "[t]he court's function is limited to ascertaining whether any factual issue pertinent to the controversy exists [and] does not extend to the resolution of any such issue. Nyhus, supra, 151 U.S.App.D.C. at 271, n. 32, 466 F.2d at 442.

These principles have been applied to Freedom of Information Act cases dealing with the attorney's fees issue. See Cox v. United States Dept. of Justice, 195 U.S.App.D.C. 189, 195, 601 F.2d 1, 6 (1979). Applied to this case, they demonstrate that the District Court improperly adjudicated a disputed issue of material fact. Viewing the inferences to be drawn from the facts in the light most favorable to Weisberg, it would be perfectly plausible

to conclude that the proof might ultimately show that the transcripts would not have been released to Weisberg but for the pendence of this case. The record shows that the transcripts were not released as part of a general release of materials reviewed by the CIA as a consequence of the HSCA proceedings but rather in direct response to CIA counsel's inquiry regarding this litigation made shortly after Weisberg filed his brief. It also contains claims by Weisberg that the CIA does not release any materials responsive to his requests absent a lawsuit, and that he has requests dating to 1975 and 1976 which the CIA has not acted upon. Furthermore, the record discloses that in the Allen case, the CIA has employed the identifical justification--the HSCA proceedings--to declassify materials witheld until this Court remanded the case, even though that occurred more than a year after the HSCA went out of existence. Lastly, the reasons which the CIA now gives for having withheld the transcripts differ from those originally given, and the credibility of the present reasons is undercut by the fact that, if true, the basis for withholding information on those disappeared in 1975 and 1976 when the CIA itself disclosed the information in the transcripts which it puportedly had to protect. (See Appellant's Brief, pp. 37-40)

Because summary judgment in the Government's favor was improper, rehearing should be granted and the case sent back to the District Court for an evidentiary hearing on the issue of whether

the transcripts were in fact released for reasons unrelated to this litigation.

II. SOVEREIGN IMMUNITY NO LONGER BARS AN AWARD OF ATTORNEY'S FEES FOR BAD FAITH CONDUCT IN A FOIA CASE

As Weisberg has noted above, the Government had relied upon 28 U.S.C. § 2412 as a bar to his contention that he could obtain an award of attorney's fees because of the Goverment's bad faith conduct. Because 28 U.S.C. § 2412 was amended effective October 1, 1981, to remove this bar, the Court should grant a rehearing on this issue. Since neither side has had an opportunity to brief the issue of the effect of the amendment on this litigation, the Court should direct that briefs on it be submitted by the parties.

CONCLUSION

For the foregoing reasons appellant Weisberg respectfully requests the Court to grant his petition for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of November, 1981, mailed two copies of the foregoing Petition for Rehearing and Suggestion of Rehearing En Banc to Ms. Patricia J. Kinney, AUSA, United States Courthouse, Washington, D.C. 20001.

JAMES H. LESAR

trict Court. National Railroad Passenger Corp. v Delaware (1977, DC Del) 441 F Supp 302.

33. —Removal

Even if United States, by reason of its position as mortgagee under Railroad Revitalization and Regulatory Reform Act (45 USCS §§ 801 et seq.) is defendant, in condemnation proceeding brought by state of Delaware against rail corporation, under category of "unknown owner" as required by Delaware law, Amtrak is without authority to file removal petition, as only United States may remove case to Federal District Court. National Railroad Passenger Corp. v Delaware (1977, DC Del) 441 F Supp 302.

33.5. Applicability of 28 USCS § 2410(b)

28 USCS § 2410(b), which prescribes manner in which process should be served in actions which affect property on which United States claims lien, does not apply in case where bank names United States postal service as garnishee in suit against judgment debtor. Bank of Virginia v Tompkins (1977, DC Va) 434 F Supp 787.

34. Pleading

Complaint alleging that United States claims some interest in premises does not set out nature of interest or lien with particularity and does not meet requirement of 28 USCS § 2410(b). City Bank of Anchorage v Eagleston (1953, DC Alaska) 110 F Supp 429.

§ 2411. Interest

RESEARCH GUIDE

Forms:

10 Federal Procedural Forms L Ed, Government Contracts, § 34:165.

15 Federal Procedural Forms L Ed, Tort Claims Against United States §§ 63:2, 63:3, 63:42.

§ 2412. Costs

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

1981 Prospective amendment. Act Oct. 21, 1980, P. L. 96-481, Title II, § 204(a), 94 Stat. 2327 (effective 10/1/81, as provided by § 208 of such Act, which appears as 5 USCS § 504 note), amends this catchline and section to read:

"§ 2412. Costs and fees

"(a) 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 and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

"(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

"(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

"(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

"(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

"(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other

expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

"(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

"(2) For the purposes of this subsection—

"(A) 'fees and other expenses' includes the reasonable expenses of expert witness, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

"(B) 'party' means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and

"(C) 'United States' includes any agency and any official of the United States acting in his or her official capacity.

"(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

"(4)(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

"(B) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded pursuant to this subsection in such fiscal years.

"(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.".

1984 Prospective repeal. Act Oct. 21, 1980, P. L. 96-481, Title II, § 204(c), 94 Stat. 2329, provided: "Effective October 1, 1984, subsection (d) of section 2412, as added by subsection (a) of this section [see the 1981 Prospective amendment note to this section], is repealed, except that the provisions of that subsection shall continue to apply through final disposition of any action commenced before the date of repeal.".

Effect on other laws. Act Oct. 21, 1980, P. L. 96-481, Title II, § 206, 94 Stat. 2330 (effective 10/1/81, as provided by § 208 of such Act), provides: "Nothing in section 2412(d) of title 28, United States Code, as added by section 204(a) of this title [see the 1981 Prospective amendment note to this section], alters, modifies, repeals, invalidates, or supersedes any other provision of Federal law which authorizes an award of such fees and other expenses to any party other than the United States that prevails in any civil action brought by or against the United States.".

Application of 1980 amendments. For provisions as to the application of the 1980 amendments of this section, see Act Oct. 21, 1980, P. L. 96-481, Title II, § 208, 94 Stat. 2330, which appears as 5 USCS § 504 note.