

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1556

September Term, 1976

Gary A. Weissman,

Plaintiff-Appellant

Civil Action No. 75-1583

v.

Central Intelligence Agency, et al.,

Defendants-Appellees

BEFORE: McGowan and Tamm, Circuit Judges; Gesell*, U.S. District
Judge for the District of Columbia

O R D E R

Upon consideration of the petitions for rehearing filed by the appellant and by the appellees, and of the brief filed by Senator Edward S. Muskie, as amicus curiae on behalf of appellant's petition for rehearing, and the Court having this date filed and entered an order amending the Opinion for the Court dated January 6, 1977, it is

ORDERED by the Court that both petitions are denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 292(a).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1566

September Term, 1976

Gary A. Weissman,
Plaintiff-Appellant

Civil Action No. 75-1583

v.
Central Intelligence Agency, et al.,
Defendants-Appellees

FILED APR 4 1977

BEFORE: McGowan and Tamm, Circuit Judges; Gesell*, U.S. District
Judge for the District of Columbia

O R D E R

It is ORDERED by the Court, sua sponte, that the Opinion for the Court heretofore filed in this case on January 6, 1977 be, and it hereby is, amended by striking in its entirety the paragraph beginning on Page 10 which extends onto Page 11, including Footnote 10 to which it refers, and substituting in lieu thereof a new paragraph, including a new footnote, which shall be and read as follows:

Additional considerations apply to in camera proceedings under exemption (b) (1) where classification of documents is involved. Few judges have the skill or experience to weigh the repercussions of disclosure of intelligence information. Congress was well aware of this problem when it amended the FOIA to permit in camera inspection in exemption (b) (1) cases.^{10/} If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated. In deciding whether to conduct an in camera inspection it need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.

^{10/} Claims under (b) (1), like other claims of exemption, are subject to de novo review in the District Court. See 5 U.S.C. § 552(a) (4) (B). However, the legislative history of the 1974 amendments makes clear that, in evaluating (b) (1) claims under this standard, "substantial weight" is to be accorded to detailed agency affidavits setting forth the basis for exemption:

[T]he conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that the federal

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1566

Page 2

September Term, 19 76

courts, in making de novo determinations in section 552(b) (1) cases under the Freedom of Information Act, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record. S. Rep. 93-1200, 93d Cong., 2d Sess. 12 (1974).

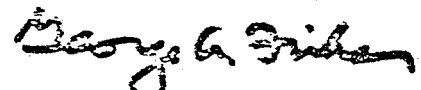
See also Senator Muskie's remarks during the floor debate preceding the Senate's vote to override President Ford's veto of the amendments. 120 Cong. Rec. 36870 (1974) ("The judge would be required to give substantial weight to the classifying agency's opinion in determining the propriety of the classification.")

It is FURTHER ORDERED by the Court, sua sponte, that the word "and" in the eighth line on Page 12 of the Opinion for the Court is stricken and the word "or" is inserted in lieu thereof, so that as amended, the sentence of which that line is a part, shall be and read as follows:

It is only where the record is vague or the agency claims too sweeping or suggestive of bad faith that a District Court should conduct an in camera examination to look for segregable non-exempt matter.

Per Curiam

For the Court:



GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 292(a).