

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERNARD FENSTERWALD, JR.,
Plaintiff,

v.

UNITED STATES CENTRAL INTELLIGENCE
AGENCY,
Defendant.

] Civil Action No.
] 75-897
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FILED ✓
DEC 22 1977

JAMES F. DAVEY, Clerk

ORDER

Consistent with the Memorandum issued of even date herewith, it is by the Court this 22nd day of December, 1977,

ORDERED that defendant's motion to dismiss the action on the grounds of mootness be, and the same hereby is, denied; and it is

FURTHER ORDERED that defendant's motion for summary judgment be, and the same hereby is, held in abeyance pending the in camera review required by this Order; and it is

FURTHER ORDERED that plaintiff's motion for in camera inspection be, and the same hereby is, granted, as follows:

(A) Defendant shall, within thirty (30) days from the date hereof, deliver to the Court in a sealed unit a true copy of each of the items listed in Schedules A and B of plaintiff's motion to compel in camera inspection, with the exception of those documents that, as of the date of delivery, have already been disclosed to plaintiff in their entirety;*

* See, e.g. document identified as 957-927 AC on plaintiff's Schedule B which, according to defendant's Index, was released in its entirety.

(M)

(B) Defendant shall, with respect to each item delivered, identify those documents or particular portions thereof that, as of the date of delivery, remain classified;

(C) Defendant shall, with respect to each item delivered, place brackets around those portions that the agency deleted from the documents when it previously released them to plaintiff in part;

(D) Defendant shall attach to each item delivered a copy of the justification for withholding that document filed in its Document Disposition Index; PROVIDED That, in the event no justification has yet been filed for particular items because defendant has deferred to another agency for that purpose, defendant shall obtain that agency's justification and affix it to the appropriate withheld item. In that event, defendant shall file and serve upon plaintiff a copy of any justifications so obtained;

(E) Defendant shall immediately notify plaintiff when delivery of items for in camera inspection has taken place and plaintiff shall have twenty (20) days within which to file a statement of his views with respect to the justification offered for withholding each of the items delivered. Plaintiff shall state his views with respect to each separate justification on individual sheets of paper so that each statement may be attached to the pertinent justification.


UNITED STATES DISTRICT JUDGE

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MEMORANDUM

This Freedom of Information Act (FOIA), 5
U.S.C.A. § 552 (1977) suit^{1/} aptly illustrates the
problems of proof and procedure confronting trial courts
in determining whether claims of exemption are factually
supported. The difficulty arises chiefly because, un-
like in traditional litigation, the outcome of FOIA
litigation turns on narrowly drawn factual determinations
that are not the product of adversarial give and take.

^{1/} At issue in this litigation is the exempt status
of several hundred separately identified documents re-
lating to the assassination of John Fitzgerald Kennedy.
Suit was originally brought to obtain computer print-
outs that plaintiff requested as a prefatory step to
obtaining the materials identified on the printouts.
The agency later produced these printouts and, because
it was aware of plaintiff's broader interests in the
subject of the assassination, defendant included plain-
tiff among others who had earlier requested access to
assassination-related materials. Treating plaintiff's
request in this manner has led the agency to identify
a discreet number of items that went beyond the scope
of plaintiff's original request. To this extent, the
agency has correspondingly enlarged the scope of this
lawsuit. Viewed in this way, plaintiff's suit was not
mooted by the agency's production of the sought after
computer printouts. By the same token the present
scope of this lawsuit need not be further enlarged
by plaintiff's unilateral request beyond the currently
identified materials.

(N)

In traditional litigation, adversaries are equally in a position to get at the basic facts that are necessary for resolving contested issues. But this balanced situation simply does not exist in the FOIA context. FOIA litigation, in sharp contrast to other cases, poses a situation of severe adversarial imbalance. As the Court of Appeals stated in Vaughn v. Rosen, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973), "only one side to the controversy (the side opposing disclosure) is in a position to make statements categorizing information." Id. at 343, 484 F.2d at 823-24. And as the Court further noted, "This factual characterization may or may not be accurate. It is clear, however, that [plaintiff] cannot state that, as a matter of his knowledge, this characterization is untrue." Id.

The difficulties stemming from the adversarial imbalance inherent in FOIA suits are heightened when the policies of the Freedom of Information Act are taken into account. Running through the FOIA is the broad and insistent objective of rooting out governmental secretiveness by mandating prompt disclosure of requested information unless the particular items being sought are shown to come within the terms of restrictively drawn exceptions. Yet despite this emphasis on disclosure, the nature of FOIA litigation paradoxically makes adverse parties dependent on the withholding authority for the very information they need to dispute the asserted claims of exemption.

To correct this inherent inconsistency and to restore some measure of adversarial proceeding to

FOIA cases, the courts have adopted the practice of requiring the withholding agency to furnish particularized justifications to support asserted claims of exemption. Vaughn, supra, at 346-47, 484 F.2d at 826-27.^{2/} This approach is designed to make sure that adversary parties will obtain at least a sketch of the factual information necessary for contesting claimed exemptions. But this procedure is not altogether satisfactory. Requiring the withholding authority to come forward with adequately detailed and particularized justifications runs the risk of requiring the agency to disclose the very information that is claimed to be protected. This danger is particularly grave in instances where the requested material is withheld on the basis of the national security exemption.^{3/} The FOIA does not afford astute litigants a license to use the indexing and justification procedure in order to discern the contents of potentially exempt materials.

One way to overcome this difficulty is to employ the procedure of in camera examination. The FOIA expressly provides for in camera inspection of withheld items to assess whether claims of exemption are accurate.^{4/} Yet in camera review, like the indexing

^{2/} See also EPA v. Mink, 410 U.S. 73, 93, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973)

^{3/} 5 U.S.C. § 552(b)(1). Similar concerns arise where the claim of exemption is based on 5 U.S.C. § 552(b)(3) in the tandem with 50 U.S.C. §§ 403(d)(3) & (g).

^{4/} 5 U.S.C. § 552(a)(4)(B).

and justification method of proceeding, is not without inherent defects. One shortcoming implicit in the procedure lies in the fact that in camera inspection is generally conducted^{5/} "without [the] benefit of criticism and illumination by a party with the actual interest in forcing disclosure." Vaughn, supra, at 345, 484 F.2d at 825. A more glaring problem results from the fact that in camera examination entails an awesome "investment of judicial energy" where numerous documents are subject to dispute. Id. This problem is compounded where the particular items being withheld are claimed to be protected by a variety of different statutory exemptions.

The difficulties associated with in camera review were recently recognized in Weissman v. CIA, No. 76-1566 (D.C.Cir., January 6, 1977, as amended April 4, 1977). In that case, the Court of Appeals for this jurisdiction upheld a decision denying plaintiff's request for in camera proceedings. Plaintiff had requested the trial court "to check the truthfulness of Agency claims under each exemption, and to conduct a line-by-line analysis of documents withheld under each exemption to cull out any non-exempt material." Id., Slip Op. at 9. But the Court of Appeals held that intensive review of that kind is to be the exception rather than the rule in national security cases. As the Court stressed: "neither the legislative history [of the FOIA], nor

^{5/} But see Rural Housing Alliance v. United States Department of Agriculture, 502 F.2d 1179 (1974) (Bazelon, C.J., concurring).

[relevant] court decisions, have indicated that it [is] appropriate for the District Courts to undertake line-by-line analysis of agency records in each [national security] case." Id., Slip Op. at 11-12. Only where "the record is vague" or where the agency's claims are "sweeping" or "suggestive of bad faith" is in camera inspection required "to look for segregable non-exempt matter." Id., Slip Op. at 12.

The meaning of Weissman is plain. Weissman counsels strongly against conducting in camera examination for the purpose of winnowing out potentially non-exempt tidbits from the documents of which they are part. But by the same token, Weissman does not rule out the procedure for reviewing a small yet representative sample of withheld material in order to determine whether the agency's sketchy justifications are substantially overstated. The benefits of this limited and narrowly directed kind of examination are obvious and compelling. Foremost is the fact that this kind of limited review permits the court to test the validity of the agency's general theories of exemption by means of a sampling technique without requiring the agency to furnish highly detailed justifications at the risk of exposing potentially protected national security information. Furthermore, once the review is completed, the Court will then be in a position to extrapolate its conclusions from the representative sample to the larger group of withheld materials.

In the Court's view, this procedure commends itself for application in this case. Where, as here,

LIST A (completely withheld)

<u>Doc.#</u>	<u>Pages</u>	<u>Date</u>	<u>Description</u>
24-534	1	12 Nov. 1963	Assignments day after assassination
25-536	1	20 Nov. 1963	?
33-537	2	23 Nov. 1963	Possible explanation of assassination
35-539	3	23 Nov. 1963	?
93-571	2	25 Nov. 1963	Info from BNDD
102-574	1/W	25 Nov. 1963	Communist diplomatic activity
118-584	3	26 Nov. 1963	Activity in Europe prior 11/22
120-585	2	26 Nov. 1963	Info from FBI
127-589	3	26 Nov. 1963	Communist reaction to assassination
133-594	82	None	?
168-612	2	27 Nov. 1963	FBI in Mexico City
169-612A	2	27 Nov. 1963	FBI in Mexico City
361-723	1	9 Dec. 1963	unidentified man in Mexico City
928-927	2	25 Nov. 1964	Oswald in Mexico City
940-927L	1	Fall 1963	Front & back of photo of unidentified man
1017-949	2	17 Dec. 1965	Info from State Dept-Referred to Dept.
1020-952	1	9 June 1966	Info from FBI
1032-957	1	23 Feb. 1967	Info from State Dept.
1053-947N	9	12 March 1964	"should be available in National Archives"
1054-9470	1	12 March 1964	"dealt with directly by National Archives"
1055-947P	5	24 June 1964	"being reviewed by National Archives"
1084-956	8	3 June 1967	?
1086-967	2/W	14 June 1967	Oswald in Mexico City- State Dept.
1186-999A	2	31 July 1975	Oswald 201 file
1194-985	?	24 Nov. 1963	From Navy Dept.

the agency has tendered only skeletal justifications to support broad claims of exemption and where, as in this case, the withholding authority runs the distinct risk of compromising protected national security secrets if required to particularize its justifications in greater detail, the prudent course is to make a limited in camera review of a sampling of the withheld items.^{6/} Proceeding in this way will allow the fact-finder to render an informed judgment regarding the agency's general claims of exemption.^{7/}

An order in accordance with the foregoing will be issued of even date herewith.


UNITED STATES DISTRICT JUDGE

December 22nd, 1977

^{6/} See Ash Grove Cement v. FTC, 167 U.S.App.D.C. 249, 511 F.2d 815 (1975). In the Court's view, the items listed in schedules A and B of plaintiff's motion for in camera inspection appear representative of the several categories of withheld materials.

^{7/} It is true that proceeding in this manner leaves counsel for plaintiff, who is the adversary party, more or less out of the picture. But nothing prevents counsel from conveying his views on the disclosure of each sample item based on the justifications that are presently part of the record.

LIST B (partially withheld)

<u>Doc.#</u>	<u>Pages</u>	<u>Date</u>	<u>Description</u>
32-14	1/W	22 Nov 1963	Unidentified in Mexico
308-114	3/WPh	5 Dec 1963	Traveler to Mexico & Cuba (Photo missing)
339-136	16	6 Dec 1963	Unidentified man in Mexico City
385-736	6	12 Dec 1963	Background on John Wilson-Negati
435-173(a)	2	12 Dec 1963	
538-801A	4	10 Feb 1964	Rankin letter with questions about CD 347
879-899	1	25 Sept 1964	Unidentified man in Mexico City
903-393A	10	13 Oct 1964	Cover page of CD 347--Draft of Warren Report
916-921	4	27 Oct 1964	CIA non-reporting of Oswald Cuban contacts
929-927A thru 939-927K	11	"Fall 1963"	Back of Photos showing date tak
948-927T	7	12 May 1967	Unidentified man in Mexico
957-927AC	5/W	None	Unidentified man in Mexico
971-927AQ	1	8 June 1972	Fensterwald's attempts to get photos
979-927AX	3	30 Dec 1964	Cuban gangsters arrive in Havana 11/22
1026-954C	7	16 June 1966	Analysis of Epstein book
1031-405	3	5 Dec. 1966	1960 defector file; info on Oswald
1036-961	1	13 Mar 1967	Possible visit of Dobkins to Mexican Embassy
1058-947S	2	3 Mar 1972	Summary of releases
1060-970	1	26 June 1967	Unidentified man in Mexico City
1080-962	1	9 May 1967	Time-Life inquiry on unidentifi man
1088-969	1	26 June 1967	Oct 15 photos of unidentified m
1134-993	1/W	25 Feb 1970	Bulky field personality file on Oswald
1180-996	1	4 Oct 1972	Oswald in Mexico
1182-998	2	19 Sept 1972	Fensterwald's attempts to get photos
1183-435	1	11 Oct 1972	Woman asked about 20 Mexican photos
1188-1000	4	18 Sept 1975	Original file check re Oswald & CIA