

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERNARD FENSTERWALD, JR.

Plaintiff

v.

Civil Action No.
76-0432

DEPARTMENT OF JUSTICE

Defendant

AFFIDAVIT

I, John E. Howard, being duly sworn, depose as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned in a supervisory capacity to the Freedom of Information - Privacy Acts (FOIPA) Section of the Records Management Division at FBI Headquarters (FBIHQ), Washington, D. C.

(2) Due to the nature of my official duties, I am familiar with the procedures the FBI follows in processing requests for records in FBI files received pursuant to Title 5, United States Code, Section 552, more commonly known as the Freedom of Information Act (FOIA), and I am personally familiar with these procedures as they apply to our response to plaintiff's FOIA request. The information furnished herein is based on my personal knowledge, obtained in my official capacity.

(3) For the information of the Court and for purposes of clarification, there is listed below all correspondence between plaintiff and defendant in possession of the FBI concerning plaintiff's FOIA request, with each item briefly described:

(a) By letter to the Deputy Attorney General dated August 21, 1975, plaintiff requested, under the FOIA, several categories of records, consisting primarily of

photographic material regarding Lee Harvey Oswald. Attached to plaintiff's request were copies of letters he had received from a third party, pleadings plaintiff had filed in an FOIA-related civil action four years ago, and pages from a book on the CIA written by Philip Agee. Copies of plaintiff's August 21st letter, with attachments, are attached hereto as Exhibits A1 through A6 and incorporated herein by reference.

(b) By letter to the Deputy Attorney General dated September 17, 1975, plaintiff advised that, since no reply had been received to his August 21st letter, he was appealing the "denial" of the records sought. A copy of this letter is attached hereto as Exhibit B and incorporated herein by reference.

(c) By letter to plaintiff dated September 19, 1975, Clarence M. Kelley, Director of the FBI, acknowledged receipt of plaintiff's request, and advised that since it would necessitate a review of voluminous documents, there would be a delay in furnishing the information to plaintiff. Plaintiff was further advised that the FBI was in receipt of an unanticipated number of FOIA requests and was experiencing a considerable backlog, despite having increased the number of personnel assigned to FOIA matters. He was assured that his request would be handled as promptly as possible. A copy of this letter is attached hereto as Exhibit C and incorporated herein by reference.

(d) By letter to plaintiff dated November 17, 1975, Richard M. Rogers, Deputy Chief of the Department of Justice Freedom of Information and Privacy Unit, acknowledged receipt of plaintiff's appeal, and advised plaintiff that,

"Although the Act authorizes you to treat the failure of the Bureau to grant your request as constituting a denial thereof, . . . (o)ur function is limited to the

review of those records to which access is in fact denied. . . . This Office will, however, monitor the processing of your request by the Federal Bureau of Investigation. In addition, if the final response to you by the Bureau is other than a substantial grant of your request, we will then process your letter as an appeal on the merits.

You may, if you choose, treat this letter as a denial of your appeal and bring an action in an appropriate Federal court. In making a decision in this regard, we hope that you will give sympathetic consideration to the fact that the F.B.I. has thousands of requests pending at this time and is making every possible, reasonable effort to process them."

A copy of this letter is attached hereto as Exhibit D and incorporated herein by reference.

(4) In further explanation of the FBI's response to plaintiff's FOIA request, the Court's attention is respectfully directed to the following facts detailing the impact the FOIA, and in particular the 1974 amendments thereto, have had on the FBI.

(5) In 1973, we received an average of approximately one FOIA request per day, which amount we were able to process without undue burden. In 1974, we averaged over 37 requests per month. The amendments went into effect in February of 1975, the Privacy Act went into effect in September of 1975, and in that year we received 13,875 requests pursuant to these two acts, an increase of more than three thousand percent over the previous year. During August of 1975 alone, the month in which plaintiff submitted his request, we received 2,095 requests.

(6) We have recognized and taken substantial action in terms of allocation of manpower and other measures to meet the tremendous administrative burdens imposed upon us as a

result of the numerous requests for information from our files received under the FOIA and Privacy Act. A special Unit, solely designated to handle FOIA requests, became operational in October of 1973, at which time it consisted of 8 employees, including 3 law-trained Special Agents. This complement was doubled during 1974 to keep pace with the increased volume of requests. During 1975, further periodic increases in the personnel complement assigned solely to the processing of FOIA and/or Privacy Act requests were made, by reassigning personnel from other substantive duties, resulting in serious backlogs in some areas of operation. By the end of 1975, 161 employees at FBIHQ were engaged solely in the processing of such requests, including 23 law-trained Special Agents. This did not include numerous employees from other Divisions at FBIHQ who are required to devote a substantial portion of their time, to the detriment of their other duties, to assist in this effort. Through additional increases this year, we now have approximately 175 employees, including 25 law-trained Special Agents, assigned full-time at FBIHQ to the processing of requests received pursuant to the FOIA and Privacy Acts. The expense incurred by the FBI in terms of both money and manpower has been enormous, and I believe our overall investigative responsibilities imposed by statute may suffer as a result.

(7) Despite what we feel to be more than diligent efforts to comply with all requests, including plaintiff's, on an equitable basis, there have been unavoidable delays arising from the sheer volume of requests received and as a result of court orders requiring reassignment of substantial numbers of our personnel to process certain cases on a deadline basis. Selected examples of these orders are listed below.

(a) In Meeropol, et al. v. Levi, et al. (United States District Court for the District of Columbia. Civil Action No. 75-1121), the court issued an order on August 27, 1975,

which required us to review, index and inventory, by October 21, 1975, some 363 volumes (each of which averages 150-200 pages) of files, and by the same date locate, review, index and inventory over 9,000 references, all of which represented material in our possession considered relevant to the Rosenberg espionage case. Additionally, all of the above material not exempt pursuant to the FOIA had to be made available to plaintiffs in that case by November 17, 1975, accompanied by a detailed justification for those portions of the above-described material which were withheld pursuant to the FOIA. This single court order forced us to assign approximately one half of all our FOIPA personnel to the processing of the subject matter of one FOIA request, while the remainder of the complement attempted to process the thousands upon thousands of other FOIA requests which continued unabated.

(b) In Weinstein v. Levi, et al. (United States District Court for the District of Columbia, Civil Action No. 2278-72), the court issued an order on October 20, 1975, which required us to furnish plaintiff an itemized inventory, by December 1, 1975, of all documents he had requested under the FOIA (essentially, all pertinent material in our possession concerning the Rosenberg case, supra, plus an additional 152 volumes of files pertaining to the Alger Hiss perjury case) not previously furnished him, setting forth detailed refusal justification with respect to any documents which we withheld pursuant to the FOIA. Additionally, the order required us to make available to plaintiff, by December 15, 1975, all of the above-described material which was not exempt from release pursuant to the FOIA. An additional 32 volumes of files had to be reviewed in order to locate information plaintiff had requested. Although the court issued an order on November 25, 1975, extending the above-described deadlines until January 31, 1976, as well as limiting the inventory requirement to only that material not being furnished plaintiff, this order still

required us to assign a substantial portion of our FOIPA personnel to the processing of the subject matter of one request.

(c) In Fellner v. U. S. Department of Justice

(United States District Court for the Western District of Wisconsin, Civil Action No. 75-C-430), the court issued an order on December 17, 1975, requiring us to review an additional 4,000 pages per month of the voluminous material subject to plaintiff's request. Because of this order we are once again required to devote a substantial portion of our FOIPA personnel on a continuing basis to the processing of one request, to the detriment of all others, including plaintiff's.

(8) The FBI is and has been making every reasonable, and sometimes extraordinary, effort to comply with the unexpected demands of the amended FOIA. In consideration of the present and continuing increase in the workload of the FBI in fulfillment of its Congressionally-mandated investigative duties concerning violations of statutes of the United States, and taking into account present budgetary and personnel limitations, it has been and continues to be an overwhelming burden for the FBI to respond to FOIA requests with any greater speed. Of the 13,875 requests received in 1975, we were able to respond fully to 7,699, and as of the end of that year, were processing an additional 1,004. This left a backlog of 5,172 requests which still required processing, preferably on the basis of date received to ensure fairness to all requesters. Meanwhile, in the first three months of this year, we have received 3,487 additional requests, and they continue to come in at a rate in excess of 50 per workday.

(9) The sheer enormity of our administrative burden can be seen when it is realized what is involved in processing each of the thousands upon thousands of requests we have received:

(a) Upon receipt of each request, assuming the subject matter is reasonably identifiable, such as a named

individual or individuals, or a named organization or organizations, we initiate a search of our Central Indices, the result of which will indicate whether we have any files dealing with the subject matter of the request. In the case wherein we locate no record of an investigation concerning the subject matter of the inquiry, the requester is so advised at this time. If our indices search indicates that we do have files which might fall within the purview of the request, we so advise the requester, and then place it in chronological order until we are able to initiate the actual processing.

(b) The mechanical task of processing an FOIA request involves first reproducing an entire section of the file, in order to review and mark for deletions or exemptions, if any, where appropriate. From this working copy, additional copies are made - one for the requester and one for our own administrative control. Review consists of a line-by-line reading, with constant attention to matters which involve, among other considerations, the privacy and confidentiality of third parties, classified data, and other information which is exempt from release pursuant to the FOIA. Classified material must be further reviewed by Special Agent personnel with expertise in the substantive area to which the particular document pertains, who must determine if the document meets the current classification criteria and which portion of the document is actually the part subject to classification. Thereafter, a determination will be made as to the release of any non-classified portion of the document.

(c) This entire reviewing process is carried out under the supervision of law-trained Special Agents, and assuming we have located and processed material which falls within the subject matter of the FOIA request, this material is subject to several succeeding higher levels of examination

and is finally furnished to the requester over Director Kelley's signature. These examinations are made for the purpose of assuring that no material to which the requester is entitled is erroneously withheld, and conversely, no material which should be withheld pursuant to the FOIA is inadvertently released.

(d) The above-described procedure is followed without exception in every FOIA request we receive. (Obviously, however, this is not necessary in those cases wherein we have no information concerning the subject matter of the request.)

(10) Based on our experience to date in these matters, we feel due diligence requires that the only fair way of ensuring that each request receives the legitimate attention it deserves is to process these requests in chronological order based on the date of their receipt, and this is the policy we are presently following. We have been required to make exceptions to this policy pursuant to the above-described court orders. In the not-too-distant future, such orders may become a vicious circle of self-defeating proportions, with the ultimate victims being those requesters who lack the resources necessary to institute legal action. It is not inconceivable that we will soon reach the stage where all personnel are engaged solely in the processing of requests pursuant to court-imposed deadlines, to the detriment of the rights of all other requesters. This could well cause those requesters who are able to file suit, but who thus far have displayed an understanding of our burdens and have waited patiently for their requests to be processed, to institute legal action, which in turn could cause more court orders requiring immediate processing. In view of the substantial allocations of personnel and finances we have already committed to FOIA and Privacy Act processing, given our present budgetary and personnel limitations and, most importantly, other statutory responsibilities, additional court-imposed deadlines could place the FBI in the position of

expending so much manpower in attempting to comply with a court order in one case, that we would be held in contempt of a similar court order in a different case. Meanwhile, as stated above, those requesters who have not sued would still be waiting.

(11) We have attempted to make a preliminary estimate as to the amount of time required in order to fully respond to plaintiff's FOIA request, and we have taken into consideration the date plaintiff's request was received, as well as the number of requests we had on hand awaiting processing prior to receipt of plaintiff's request. Caution must be exercised in interpreting this information, because there are variables involved over which we have no control: Our present rate of processing may be further disrupted by receipt of additional court-imposed deadlines requiring accelerated completion of the processing of one request, which would require reassignment of more personnel to that request, thus delaying our responses to all others. Another problem is that we cannot tell exactly how long it will take to respond fully to those requests received prior to plaintiff's, because we do not know if each of these requests will result in fairly rapid processing (because we do not possess an enormous amount of information responsive to that particular request), or a massive processing effort (because we have thousands of pages of material responsive to that particular request). Thus, it is not possible to predict exactly when we will be able to initiate the processing of a request, and for the same reason it is not possible to predict exactly when the processing will be completed.

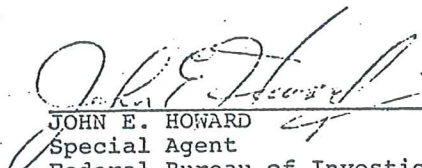
(12) Because of the exceptional burdens caused by the problems set out in this affidavit (particularly the Meeropol and Weinstein cases, which, although we responded fully to the courts' initial orders, continue to occupy a substantial portion of our personnel) we have just recently been able to assign for processing those requests received in the latter

part of August of 1975, many of which require a review of voluminous amounts of material in order to respond to them. Preliminary steps were undertaken in March, 1976, to process plaintiff's FOIA request and to locate all records pertinent to that request.

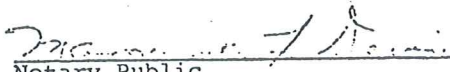
(13) Plaintiff's request is one of sixteen such requests for documents relating in general to the FBI's investigation of the assassination of President John F. Kennedy, two of which were received prior to plaintiff's. In addition, and pursuant to Public Law 89-312 and subsequent directives of the Department of Justice, the FOIPA Section of the FBI has been involved in processing documents which the President's Commission on the Assassination of President Kennedy transferred to the National Archives upon completion of its hearings. Three employees of the FOIPA Section have been involved full-time in this review for the last five months, and when it is completed, the response to all succeeding FOIA requests within this general category should be facilitated.

(14) Plaintiff's FOIA request is directed primarily toward photographic materials which, unlike written documents, cannot be readily indexed and are therefore much more difficult and time consuming to retrieve from our files. In this sense, the subject matter of plaintiff's request is not as readily identifiable as it would be if he were requesting only written documents. If our preliminary steps are successful in locating the photographs plaintiff described in his original request, we then anticipate being able to locate the written material he has requested concerning these photographs within 60 days, at which time we will then have responded fully to his request. However, if because of the problems described above in retrieving photographic materials, we are required to review, on a page-by-page basis, the entire Kennedy assassination file in order to respond to plaintiff's request, the time necessary to do this would obviously be considerably longer than 60 days.

(15) For the reasons stated above, therefore, I anticipate that within 60 days we will either have fully responded to plaintiff's request, or will have a realistic estimate as to the length of time necessary to respond. Despite the exceptional circumstances under which we are operating, we are continuing to do our utmost to give equal and fair treatment to all requesters, including plaintiff. With specific reference to the matter under litigation, we will make every reasonable and good faith effort to meet our self-imposed deadline. Conversely, if we are in the meantime able to accelerate our rate of processing despite our increasing burdens, we will of course furnish plaintiff the material he has requested sooner than we now anticipate. In any event, plaintiff's request is being handled as equitably and expeditiously as possible, and all material which can be released to him will be made available at the earliest possible date.


JOHN E. HOWARD
Special Agent
Federal Bureau of Investigation
Washington, D. C.

Subscribed and Sworn to before me this 16th day
of April, 1976.


Notary Public

My Commission expires 12/14/78.

Bernard Fensterwald, Jr.
910 - 16th Street, N.W.
Washington, D.C.
223-1667

August 21, 1975

Deputy Attorney General
Department of Justice
Washington, D.C. 20530

Dear Sir:

On May 2, 1972, I filed suit against the Department of Justice in the District Court for the District of Columbia (Civil No. 861-72) under the Freedom of Information Act (5 U.S.C. 552) for production of two photographs taken in Mexico City circa October 1, 1963, of a man mistaken for Lee Harvey Oswald. On July 5, 1972, when the matter came to trial in Judge Gesell's Court, the Department provided cropped versions of the pictures rather than contest the matter further.

More recently, Mr. David Belin, erstwhile Staff Counsel to the Warren Commission and Staff Director of the Rockefeller Commission, has revealed in correspondence that pictures of the "unidentified man" were taken on October 1, 14, and 15, 1963; and it should be noted that in a sworn affidavit to the Warren Commission, Richard Helms indicated that at least one other photograph of the same "unidentified man" was taken on October 4, 1963. Thus, there appear to be four dates on which photographs were taken.

I wish to make a formal request under the Freedom of Information Act for the following records in the possession of your Department.

- A. 1) A copy of every photograph taken of the "unidentified man" in Mexico, by himself or with others, regardless of date or place;
- 2) A record of the dates upon which each such photograph was thought to have been taken;
- 3) All leads, including but not limited to attempts to reach a positive identification;

~~Exhibit A~~

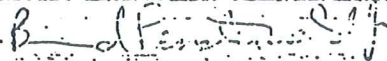
Deputy Attorney General
August 21 1975
Page Two

- B. 1) A copy of every photograph taken of Lee Harvey Oswald, by himself or with others, in Mexico City;
- 2) A record of the dates upon which each such photograph was thought to have been taken;
- 3) All agency records relating to the taking of photographs of Lee Harvey Oswald in Mexico City; or, if no such photographs were taken, all agency records relating to the absence of such photographs in view of Oswald's several alleged visits to both the Soviet and Cuban Embassies and/or Consulates in Mexico City;
- C. 1) A copy of every photograph taken of Lee Harvey Oswald, by himself or with others, in New Orleans in 1963, including but not limited to Jackson Square;
- 2) A record of the dates upon which each such photograph was thought to have been taken and the location within New Orleans if known; and
- 3) All agency records relating to such photographs.

To avoid any problem of identification, there is attached hereto Mr. Belin's correspondence, as well as certain of the pleadings in Civil No. 861-72. Additionally, there is also attached certain pages from Philip Agee's book Inside the Company, in which he publicly details the surveillance facilities at the Soviet and Cuban installations in Mexico City at the approximate time in question.

I shall pay all fees that are specified in the regulations for search and reproduction of the records requested.

Sincerely yours,



910 - 16th St., N.W.
Washington, D.C. 20006

BF:blf
Attachments

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERNARD FENSTERWALD, JR.

Plaintiff

v.

Civil No. 861-72

DEPARTMENT OF JUSTICE,

Defendant

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9(h) of this Court, plaintiff moves the Court for summary judgment in its favor on the ground that the material facts, as to which there is no genuine issue, show that plaintiff is entitled to judgment as a matter of law. The plaintiff made requests for the disclosure of certain identifiable records within the control of Defendant. Plaintiff's request was authorized by Public Laws 89-487 and 90-23, both codified in 5 U.S.C. 552, and Defendant has failed to disclose said records. The undisputed facts do not provide any basis for sustaining Defendant's failure to disclose, and defendant, who has the burden of proof, should be enjoined from refusing to disclose the documents in question.

Page 1

Exhibit A-2

Attached to this motion and in support thereof is a Statement of Material Facts, as to which movant contends there is no genuine issue, and a Memorandum of Points and Authorities

BERNARD FENSTERWALD, JR.
905 16th St., N.W.
Washington, D.C.
Tel: 347-3919
Pro Se

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing motion of plaintiff for Summary Judgment with attached Statement of Material Facts and Memorandum of Points and Authorities was mailed, postage prepaid, this ___ day of _____, 1972, to Mr. Harold Titus, U.S. Attorney, U.S. Court House, Washington D.C., and the Honorable Richard Kleindienst, Acting Attorney General of the United States, Department of Justice, Washington D.C.

BERNARD FENSTERWALD, JR.

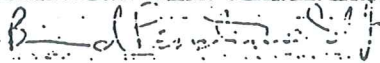
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Page Two

- B. 1) A copy of every photograph taken of Lee Harvey Oswald, by himself or with others, in Mexico City;
- 2) A record of the dates upon which each such photograph was thought to have been taken;
- 3) All agency records relating to the taking of photographs of Lee Harvey Oswald in Mexico City; or, if no such photographs were taken, all agency records relating to the absence of such photographs in view of Oswald's several alleged visits to both the Soviet and Cuban Embassies and/or Consulates in Mexico City;
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Washington, D.C. 20006

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Attachments