

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BERNARD FENSTERWALD, JR.

Plaintiff,

v.

Civil Action No. 76-0432

UNITED STATES DEPARTMENT OF  
JUSTICE,

Defendant.

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AFFIDAVIT OF  
QUINLAN J. SHEA, JR.

I, Quinlan J. Shea, Jr., being duly sworn, do hereby  
depose and state as follows:

1. I am Chief of the Freedom of Information and Privacy Unit, Office of the Deputy Attorney General, United States Department of Justice. The Unit is responsible for processing internal administrative appeals to the Deputy Attorney General under the Freedom of Information Act, including an appeal by Bernard Fensterwald, Jr., plaintiff herein dated October 14, 1975. The statements made herein are based upon personal knowledge obtained in the course of my official duties.

2. The Freedom of Information and Privacy Unit became operational within the Office of the Deputy Attorney General on March 19, 1975. The text of the order establishing the Unit is set forth at 28 C.F.R. §0.18 (1975). The Unit was then known as the Freedom of Information Appeals Unit. Its primary obligation was to assist the Deputy Attorney General in making recommendations to the Attorney General concerning the disposition of appeals from Freedom of Information Act requests filed with the various components of the

Department of Justice. By Order dated August 1, 1975, the Attorney General delegated to the Deputy Attorney General authority to decide appeals under the Act. A copy of this Order is attached as Attachment A. I then assumed the role of furnishing advice to the Deputy Attorney General that he had previously performed vis-a-vis the Attorney General.

3. At the time of the Unit's establishment, it was also intended that I would furnish advice to the Deputy Attorney General on initial requests for records actually maintained in the Offices of the Attorney General and the Deputy Attorney General. This continues to be one of my responsibilities. In addition, since the Privacy Act of 1974 became effective on September 27, 1975, this Unit has performed the same advisory functions under that Act at both the appellate and initial request stages that it performs under the Freedom of Information Act. Over time, I have also become, of necessity, the Deputy Attorney General's staff advisor on all matters pertaining to these general areas of the law. As of this date, appeals under the Freedom of Information Act constitute well over 90% of the matters pending in my Unit. The initial requests and other related staff matters each take about as much time to handle as does the average appeal.

4. Prior to the formation of this new Unit, administrative appeals under the Act were processed by the Office of Legal Counsel. During the twelve months preceding creation of the new Appeals Unit, the Office of Legal Counsel had received and processed approximately one hundred such appeals. Based on this experience, and recently enacted 1974 Amendments to the Freedom of Information Act, the carefully considered Departmental expectation

was that appeals would increase to the 300-400 range during the next twelve months. Therefore, at the time of the Unit's creation, it was anticipated that a staff of three or four attorneys and one or two secretaries would be sufficient to fully meet the responsibilities of the Department of Justice under the Act. However, these estimations proved to be a grievous miscalculation of developments which no one could have possibly foreseen. As shall appear from the following, see paragraph 6, even if these circumstances had been anticipated, other considerations than volume of workload would have hampered our filling the manpower needs of the Unit.

5. By the end of March, a little over three weeks after the Unit was established, and I took charge of the appeals administration, the Unit had already received 41 matters. During April, 75 more matters were received and, during May and June, another 160 and 147, respectively. This was a total of 423 matters in less than four months. During the same period, 85 files were closed. We received an additional 853 matters from July 1 to December 31, 1975, and have completed the processing of an additional 446 during the same period. Although the number of pending appeals has grown, the rate of their processing has grown even faster. In December, for the first time our closings exceeded our matters received.

6. During January, February and March, 1976, the Unit received 309 matters, almost all of which were appeals under the Freedom of Information Act. On March 31, 1976, there were an additional 83 appeals which had been received within the Department, but not yet processed administratively and forwarded to the Appeals Unit. <sup>1/</sup> As of December 31, 1975, there was a pending backlog of 745 appeals.

7. During January, final disposition of 90 matters was effected; in February, it was 107 matters; and in March the processing of an additional 115 was completed. Thus, the total number of matters closed by the Appeals Unit during the quarter was 312. In terms of appeals actually received, this gave a closing rate of 101%. If allowance is made for the other 83 appeals, the rate is approximately 80%.

8. Freedom of Information is a Congressionally mandated, but unfunded, Departmental activity. An important consequence of this fact is that each decision to assign personnel either to my Unit or to Freedom of Information/Privacy activities in any other component of the Department necessarily involves the diversion of those same individuals from other missions within the Department. During the first weeks of my tenure, I began the process of attempting to identify and recruit several additional attorneys of

<sup>1/</sup> This exceptionally high number of unforwarded appeals is due to a vacancy within the Unit responsible, inter alia, for locating all previous correspondence with an appellant and forwarding it, together with the appeal, to the Appeals Unit. That Unit also receives and routes initial requests for Departmental records, a mission which necessarily takes priority over the handling of appeals.



sufficiently high caliber to be assigned to the staff of the Deputy Attorney General. Efforts to solicit volunteers of this caliber from within the Department were unsuccessful, but quite time-consuming.<sup>2/</sup> In April, the inaccuracy of the Department's estimate of activity in this area was clear and I was authorized to hire several additional permanent personnel. It was simultaneously decided to "levy" certain of the Departmental components for "90-day detail" attorneys. The first such joined my staff on April 7, the first attorney other than myself working in the Unit. Several other "details" arrived during the next few weeks. However, almost immediately, as appeals flooded in during May, the true magnitude of the miscalculation became apparent. The Department then authorized a total permanent complement of eleven attorneys for the Unit. On May 5, a second permanent secretary began working here and on May 12, Mr. Rogers became the first permanent attorney to join my staff. On that same day, another "detail" arrived. On May 27, a third secretary was added and on June 2, the first of two "summer hire" law students was added, one of whom has continued to work part-time. A fourth secretary arrived on July 17 and two permanent staff attorneys on July 21. On August 18, two additional attorneys joined the staff, followed by one each on September 2, September 29, November 3 and November 19. A

<sup>2/</sup> I expended considerable time in attempting to recruit from within the Department because outside hires require full F.B.I. background investigations. This results in a delay of between 2 and 3 months between the "hiring" of an attorney and his actual commencement of work. This was in fact the reason why attorneys finally hired between April and July did not actually begin to work in the Unit until July through November.

trained para-legal joined my permanent staff on December 8. I have just been authorized to recruit and hire four more professional personnel. On December 31, 1975, the Unit's actual strength was ten permanent staff attorneys (including myself and Mr. Rogers), two "detail" attorneys, one part-time law student, one trained para-legal and four secretaries.

9. The experience with the Freedom of Information Act that the various attorneys -- details and permanent -- brought to the Unit ranged from none, in every case but one, to some, in the other case. Most of the permanent staff came from outside the Department. This is a complex legal area; the records of the Department of Justice are, in many instances, very sensitive. None of the new attorneys were immediately productive. Training occupied a greater and continually increasing part of my own time. This, coupled with the time spent in reviewing and editing their work product as they did begin to become of value, reduced substantially the number of matters I was able to handle myself. Most of the "detail" attorneys left to return to their regular positions not too long after they became productive members of my staff.

10. A recent complicating factor in our efforts to process our pending matters was a court order in a case involving the records in the Rosenberg case that imposed very short time limits for the necessary initial review by the F.B.I. and other Departmental components of their records. Deputy Attorney General Tyler had made a public commitment to the maximum possible disclosure of these records. This required me and members of my staff to engage in an actual

review of a substantial portion of the unclassified materials which were intended by the components to be withheld in whole or in part and resulted in a large expenditure of man-hours during October and November. Similar orders have been entered by other courts and have had the effect of escalating the ill effects of this factor. Another substantial complicating factor was the quite logical assignment to my Unit of the same responsibilities vis-a-vis the Privacy Act of 1974 that we perform in the Freedom of Information Act area.

11. As must be obvious from the foregoing, it has been impossible to meet the time limits imposed by the Freedom of Information Act for the processing of administrative appeals. <sup>3/</sup> Although I do attempt to keep the very "big" cases from impeding a reasonable flow of "little" cases, I have adopted a general practice of assigning appeals for processing by staff attorneys in their approximate order of receipt. I consider this both fundamentally fair and wholly consistent with the intent of Congress in this area. Appellants are notified by letter of this practice and of their relative standing in terms of previously-received, unassigned cases. Save in those relatively rare instances where an appellant can demonstrate a real and substantial need for preferential handling, I adhere to this practice as an almost absolute rule.

<sup>3/</sup> The same problem, on a much greater scale, exists at the initial request level. The Freedom of Information and Privacy Section of the F.B.I. has some 173 persons assigned to it, including over 25 Special Agents. Its burden is also enormous.



12. The processing of each of our matters is in no sense a "mechanical" operation. Each appeal, for example, receives the particularized treatment it requires. This depends, in large measure, on the nature and quantity of the materials to which access has been denied. Almost invariably, all of the records in question or a representative sampling are reviewed de novo by a member of my staff. The advice memorandum to the Deputy Attorney General is then written to encompass the legal and factual issues of the specific case, in light of his overall guidance to me that, although he considers an exemption to be a legitimate basis to deny access to any record, I am nonetheless to examine all withheld materials to see if any of them might be appropriate for release as a matter of the Deputy's discretion. A reversal or a substantial modification of the initial response to the request for Justice Department records results from this procedure in over 50% of the cases appealed to the Deputy Attorney General.

13. The matter representing the appeal of Bernard Fensterwald, Jr., was assigned the sequential number 966 based on the time of its receipt by the Unit. His appeal has not been processed, primarily because the F.B.I. has not completed the initial processing of the request. In my judgment, the Department should be afforded the opportunity to act on this appeal. I have been advised that the request is being processed as part of a project file by the F.B.I., because of the numerous requests concerning the same documents, some of which may predate Mr. Fensterwald's. Given that fact, it is almost certain that the Appeals Unit would be prepared to begin review of the appeal and assign it to an attorney immediately once the F.B.I. has completed its initial determination, because



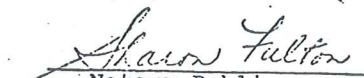
we have almost reached number 966 at this time. I cannot anticipate the length of time that will be necessary to process this appeal, because that will depend on the volume of information within plaintiff's request that is withheld by the F.B.I. and the complexity of legal issues involved. This is the type of case where, under the standing guidance of the Deputy Attorney General the Department recognizes the historical interest that exists and attempts to effect the maximum possible disclosure of records. The appeal in this matter will be processed under that standard.



QUINLAN J. SHEA, JR., Chief  
Freedom of Information &  
Privacy Unit  
Office of the Deputy Attorney  
General

District of Columbia: ss

SUBSCRIBED AND SWORN before  
me, Sharon Fulton, the undersigned  
Notary Public, this 23rd day  
of April, 1976, in the District  
of Columbia.



Notary Public

My commission expires October 31, 1980



Office of the Attorney General  
Washington, D. C. 20530

TITLE 28 - JUDICIAL ADMINISTRATION  
CHAPTER I -- DEPARTMENT OF JUSTICE

PART 0 -- ORGANIZATION OF THE DEPARTMENT OF JUSTICE

PART 16 -- PRODUCTION OR DISCLOSURE OF MATERIAL  
OR INFORMATION

Order No.

TRANSFER OF FUNCTION OF ACTING ON FREEDOM  
OF INFORMATION APPEALS TO THE DEPUTY  
ATTORNEY GENERAL

Under the Justice Department's regulations for administering the Freedom of Information Act, 5 U.S.C. 552, requests for access to Justice Department records, if denied by the head of a division, bureau, or similar component of the Department, may be the subject of an appeal by the requester to the Attorney General. The purpose of the present order is to enable the Deputy Attorney General

to act on the Attorney General's behalf upon the majority of such appeals, preserving to the Attorney General, however, the function of acting personally or assigning another official of the Department to act for him in designated cases, as well as in all cases where the initial determination to deny has been made by the Deputy Attorney General.

By virtue of the authority vested in me by 28 U.S.C. 509 and 510, and 5 U.S.C. 301 and 552, it is hereby ordered as follows:

1. 28 CFR Part 16, Subpart A, as amended, is hereby further amended as follows:

(a) §16.7, Appeals to the Attorney General from Initial Denials, is amended by redesignating subsections (b) through (f) as subsections (c) through (g), respectively, and by inserting a new subsection (b) to read as follows:

"(b) Action on Appeals by the Deputy Attorney General. Unless the Attorney General otherwise directs, the Deputy Attorney General shall act on behalf of the Attorney General on all appeals under this section, except that (1) in the case of an initial denial by the Deputy Attorney General, the Attorney General or his designee shall act on the appeal, and (2) an initial denial by the Attorney General shall constitute the final action of the Department on the request."

(b) The following conforming amendments are hereby made:

(1) § 16.7(c), as redesignated (Action within twenty working days), is amended by substituting in lieu of the words "The Attorney General will act upon the appeal" the words "The appeal will be acted upon".

(2) § 16.7(f), as redesignated (Form of action on appeal), is amended by striking the words "Attorney General's".

(3) § 16.7(g), as redesignated (Copies to Deputy Attorney General), is amended by substituting in lieu of the

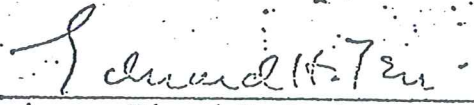


words "supplied to and maintained by" the words "maintained by and when necessary supplied to".

(4) § 16.8(b) (Maintenance of file open to public), is amended by striking the words "by the Attorney General".

2. Section 0.18 of 28 CFR Part 0, Subpart C, as amended, (Freedom of Information Appeals Unit) is hereby further amended by striking the words "the Attorney General".

Date: AUG 1 1978



Edward H. Levi  
Attorney General