UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERNARD FENSTERWALD, JR.,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Civil Action Number 76-432

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STAY FURTHER PROCEEDINGS PENDING COMPLETION OF ADMINISTRATIVE REVIEW

Preliminary Statement

On March 16, 1976, plaintiff filed this action under the Freedom of Information Act (FOIA or the Act), 5 U.S.C. §552 et seq., as amended by Pub. L. No. 93-502, 88 Stat. 1561 (1974), to enjoin defendant from wrongfully withholding from plaintiff certain records pertaining to Lee Harvey Oswald and to compel defendant to produce such records.

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. On September 17, 1975, plaintiff wrote a letter to the Deputy Attorney General advising that, since no reply had been received to his August 21 letter, he was appealing the "denial" of the records sought. (Howard Affidavit, p. 2).

By letter to plaintiff dated December 19, 1975, FBI Director Clarence M. Kelley advised plaintiff that since his request would necessitate a review of voluminous documents, there would be a delay in furnishing the information to plaintiff. Plaintiff was

also 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 the FOIA matters. He was further assured that his request would be handled as promptly as possible. (Howard Affidavit, p.2).

By letter to plaintiff dated November 17, 1975, Richard M. Rogers, Deputy Chief of the Department of Justice Freedom of Information and Privacy Unit, 1/ acknowledged receipt of plaintiff's appeal and emphasized that although the FOIA authorizes plaintiff to treat the failure of the FBI to grant a request as a denial thereof, the Appeals Unit simply lacked the resources to conduct the comprehensive reviews that are necessary to make the initial determinations on requests for FBI records. He further informed plaintiff that the processing of plaintiff's request would be monitored by that office. In addition, the Unit would process the appeal if the FBI's final response was unsatisfactory to plaintiff. Finally, this letter advised plaintiff of his right to institute an action in the appropriate federal court. (Howard Affidavit, Exhibit D). Subsequently, the complaint in this action was filed by plaintiff.

Based on the date plaintiff's request was received, as well as the number of requests awaiting processing ahead of plaintiff's request and the present rate of processing, the FBI estimates

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1/ This unit constitutes the administrative appellate review arm of the Department of Justice, serving the Deputy Attorney General who has been designated the appeals official for FOIA requests submitted to components of the Department. (28 C.F.R. 0-18; Exhibit A to Affidavit of Quinlin J. Shea).

that within sixty days it will either have fully responded to plaintiff's request, or will have a realistic estimate as to the length of time necessary to respond. (Howard Affidavit, p. 11).[2/]

The Freedom of Information and Privacy Unit, Office of the Deputy Attorney General, Department of Justice, will be able to begin review of plaintiff's appeal immediately after the FBI has completed its initial determination, although the length of time necessary to process the appeal cannot be anticipated at the present time. (Shea Affidavit, p. 8-9).

Although the Government is making every reasonable effort to process plaintiff's request, exceptional circumstances preclude the FBI and the Justice Department from acting upon and completing review of plaintiff's request. Accordingly, defendant moves the Court to stay further judicial proceedings until the FBI and the Freedom of Information and Privacy Unit have completed their review. Because of the time period required to complete this processing, defendant would apprise the Court of progress in this matter at the conclusion of sixty days.

2/ Several caveats qualify this estimate; specifically, the present rate of processing could be disrupted by further court-imposed deadlines requiring accelerated completion of the processing of one request. Thus, the court-ordered processing in Meeropol v. Levi, et al. (D.D.C. Civil Action No. 75-1121), involving the voluminous Rosenberg files, required the FBI to assign approximately one-half of all its FOIA personnel to processing that request for a period of nearly three months. Attendant delays occurred in the processing of all other requests during that period. In Weinstein v. Levi (D.D.C. Civil Action No. 2278-72), a similar situation arose. At the present time, a substantial portion of FOIA personnel at the FBI are engaged in the processing of the voluminous data involved in Fellner v. U.S. Department of Justice (W.D. Wis. Civil Action No. 75-C-430), also by order of the court. (Howard Affidavit, p. 6).

ARGUMENT

I. The Freedom Of Information Act Provides For Time Extensions In Exceptional Circumstances.

It is well recognized that Congress intended to speed the administrative process under the Freedom of Information Act by passage of the 1974 amendments. However, it is equally clear from reading the statute that Congress intended for time extensions to be available in certain limited, unusual situations.[3/] The Act provides in subsection (a)(6)(C) that "If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records." It is this statutory provision upon which defendant presently relies.

The legislative history of the FOIA is instructive on this grant of authority to the Court. The court-supervised extension of time is to be allowed when the agency is clearly making a diligent, good-faith effort to complete its review of requested records but can not practically meet the time deadline set; the extension is not allowed when the agency did not commit all appropriate and available personnel to the review and deliberation

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3/ The framework of time limits for government operations in response to the FOIA requests is set out in 5 U.S.C. 552(a)(6) which states the limits for both initial administrative determinations (see (a)(6)(A)(i)), and their appeals (see (a)(6)(A)(ii)), and also provides for two kinds of time extensions. Under subsection (a)(6)(B) administrative extensions not to exceed ten working days are authorized in three types of "unusual circumstances." These are delineated as: (B)(i), the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (B)(ii), the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or (B)(iii), the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

process.[4/]

Subsection (a)(6)(C) represents an accommodation between a requestor's interest in avoiding interminable administrative delays in processing his FOIA request and the Government's interest in completing its administrative processes without unnecessary judicial interference. Thus, the time limits set forth in 5 U.S.C. §552(a)(6)(A) mark "the exhuastion of administrative remedies, allowing the filing of lawsuits after a specified period of time," even if the administrative process has not run its course. S. Rep. No. 93-854, 93rd Cong., 2nd Sess., p. 26. However, under subsection (a)(6)(C) the agency may obtain extensions of time to complete its administrative process when its delay in responding to the requestor's FOIA request is warranted.

Subsection (a)(6) is in accord with the well-established principle, recognized in FOIA cases, that a federal court should normally decline to consider a case until the full administrative process has been completed. Tuchinsky v. Selective Service System, 418 F.2d 155 (7th Cir. 1969); Jaffess v. Secretary, 393 F.Supp. 626 (S.D. N.Y. 1975); Aviation Consumer Action Project v. CAB, 370 F.Supp. 945 (D.D.C. 1972), aff'd, 480 F.2d 1195 (D.C. Cir. 1972); Center for National Policy Review on Race and Urban Issues v. Richardson, (C.A. D.C. No. 75-1431, February 25, 1976).

4/ Remarks of Senator Edward Kennedy, S. Rept. 93-854, May 16, 1974, Senate Report on S. 2543, p. 26. Since the Conference Report acknowledges the adoption of this language from the Senate bill, S. 2543, the Senate Report accurately reflects the Congressional intent. Freedom of Information Act Amendments, Conference Report - H. Rept. 93-1380 (S. Rept. 93-1200 identical), September 25, 1974.

Participation by the agency's final decision-making authority thus serves to forestall that "premature interruption of the administrative process" which might otherwise deprive an agency of an opportunity to "apply its expertise" to the questions before it and result in the inefficient use of judicial resources due to needless judicial review." McKart v. United States, 395 U.S. 185, 193-95 (1969).

Furthermore, this provision is not intended to impose an unreasonable burden on the Government. As noted in the Congressional debates on this provision: "Its effect would be to demand of executive officials that they process information requests quickly, not to disrupt their activities to fulfill the requests." Cong. Rec. H10862 (Nov. 20, 1974; remarks of Representative Horton.)

Plaintiff seeks agency records pursuant to the FOIA. Prior to the time his request was acted upon, plaintiff sought to exercise his right of administrative appeal. This appeal has not yet been finally acted upon. Despite the diligent efforts of the FBI and the Department, it has been impossible to complete the review of plaintiff's request and appeal due to a large backlog of pending requests. Because the FBI and the Unit desire to give careful attention to plaintiff's request and appeal and because it would be unfair to other individuals who have pending requests to give plaintiff preferential treatment, the Court should stay these proceedings pursuant to 5 U.S.C. §552(a)(6)(C) until plaintiff's request and appeal have been concluded. 5/

5/ The fact that a requestor can afford the services of an attorney or is an attorney himself should not result in that requestor receiving better treatment than those requestors who cannot afford legal representation or who don't file suits on their own. Under the FOIA all requestors should stand on an equal footing and receive equal treatment.

In carrying out the scheme of the Act, appellate administrative review should only be made after the FBI has completed a substantial review of the material falling within the scope of the FOIA request.

II. Defendants Have Shown That Exceptional Circumstances Exist And That They Are Exercising Due Diligence In Responding To Plaintiff's Request

A. Exceptional circumstances exist which prevent a more rapid consideration of plaintiff's request under the FOIA.

Defendant's failure to meet the time limits in this case has not derived from a lack of diligence or spirit to comply with the FOIA. The time limits have not been met solely because they could not be met, despite the best efforts of defendant.

The FBI has taken substantial action since the magnitude of the FOIA requests problem became evident. The volume of FOIA requests jumped from approximately one per day in 1973, which could be processed without undue burden, to a total of 13,875 requests received under the FOIA and Privacy Act in 1975. This represented an increase of more than three thousand percent over 1974, when an average of 37 requests per month were received.[6/] A special unit, solely designated to handle FOIA requests, became operational in October, 1973. Initially, this office consisted of eight employees, including three law-trained Special Agents. Periodic increases in personnel were made throughout 1974 and 1975 by reassigning personnel from other substantial duties, resulting in serious backlogs in some areas of operation. At the present time this office has grown to nearly 190 employees assigned fulltime at the FBI Headquarters to processing requests received pursuant to the FOIA and Privacy Act. The expense incurred has been enormous both in terms of money and manpower. Furthermore, in the

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6/ During the single month of August, 1975, the FBI received 2,095 requests.

professional opinion of dedicated, experienced career agents, there is concern that the FBI's overall investigative responsibilities may be suffering as a result of this deployment of manpower. (See Howard Affidavit, p. 4).

The FBI's cost for the implementation of the FOIA was $160,000 in Fiscal Year 1974. In Fiscal Year 1975 it jumped to $462,000. The projected cost for FY '76 is $2,675,000, and in FY '77 the FBI estimates its costs will be this figure plus an additional $752,000 for the Privacy Act. These figures are in stark contrast to Congress' cost estimates. The Committee on Government Operations of the House of Representatives concluded that since the 1974 legislation (amendments),"merely revises information procedures" and "does not create costly new administrative functions," existing staff of the Federal agencies should be able to carry out this responsibility without necessity for significant amounts of additional funds. The Committee estimated, therefore, that minimal increased expenditures required by the amendments should not exceed $50,000 in fiscal year 1974 and $100,000 for each of the succeeding five years.[7/]

By making every effort to comply with the unexpected demands of the FOIA, the FBI has been able to respond to 6,999 requests out of the 13,875 requests received in 1975. At the end of the year, an additional 1,004 were being processed, leaving a backlog of 5,172 requests. Meanwhile, in the first ten weeks of 1976, 2,740 new requests were received; they continue to pour in at a rate in excess of 50 per workday.

7/ See House Report 93-876, March 5, 1974, to accompany H. R. 12471.

A comparable explosion took place in the number of appeals from Freedom of Information request denials. When the Freedom of Information and Privacy Unit within the Office of the Deputy Attorney General was created, the increase in appeals as a result of the 1974 amendments was expected to be 300 or 400 over the ensuing twelve months. In less than four months, over 423 matters had been received. In the next six months an additional 853 matters were received. Thus, in less than a year, the Unit had received more than 1000 matters for consideration by its staff. In contrast, the Office of Legal Counsel, which had previously handled FOIA appeals, decided only 100 appeals in the twelve months prior to the Unit's creation. The Unit had received more than that number in the first two months of its existence. (Shea Affidavit, paras. 4 and 5).

It soon became apparent that the Department's original plans for a staff of three or four attorneys and minimal clerical help was grossly inadequate to cope with the flood of appeals. The time required to hire and adequately train a competent staff to deal with complex legal matters made it inevitable that the rush of appeals would rapidly outstrip the Department's capacity to deal with them. This task was impeded by difficulties in locating qualified candidates. The Unit did not reach its current strength of ten permanent attorneys until relatively recently. Because most of the attorneys who were recruited lacked experience, none of them became immediately productive. Most of the "detail" attorneys left to return to their regular positions not too long after they became productive members of the staff. As a result, at a time when the Unit had docketed almost 500 appeals in less than three months, the work was being handled by several inexperienced short-term attorneys and Mr. Shea, whose productivity

diminished by supervisory and administrative responsibilities.[8/]

Although the Department has "committed all appropriate and available personnel to the review and deliberation process," it has been unable to forestall a substantial backlog of pending cases. The tremendous upsurge in the volume of FOIA appeals could not have been anticipated by the Department, and apparently was not considered by the Congress. Despite the substantial commitment of resources to overcome the unexpected workload, unavoidable delays in developing an expert appellate staff have made it impossible to respond to pending appeals within the time limits established by the FOIA.

B. In light of the circumstances, due diligence has been used in processing plaintiff's request and appeal.

It has been amply shown that both the Department of Justice and the Federal Bureau of Investigation have exerted great effort to create satisfactory means of coping with what can only be termed, the FOIA Crisis. Although efforts were made to prepare for the increased burdens of the 1974 amendments, these burdens were grossly underestimated. When the miscalculation became evident, repeated expansions of personnel were implemented. There has been a diligent, good faith effort to close the gap in backlog of the intial processing as well as the appellate review.

8/ Two additional factors contributed to the Unit's inability to keep pace with the rush of appeals. The first was caused by a court order issued in a case involving the records of the Rosenberg trial. The order imposed a very short time limit on the FBI and other components of the Department to review records in their possession. During this period, Mr. Shea and members of his staff reviewed a substantial portion of the unclassified materials which were intended by these components to be withheld. This "resulted in a very large expenditure of man-hours during October and November." The second factor was the assignment to the Unit of appellate responsibilities under the Privacy Act. (Shea Affidavit, para. 10).

Regarding plaintiff's request specifically, plaintiff has been kept advised of the status of his request and the problems preventing an immediate final response. There has been marked improvement in the apparatus for dealing with these problems from which the plaintiff will surely benefit. At the present time, plaintiff's request is receiving active attention by the FBI. Responding to plaintiff's pending motion at this time would require giving plaintiff preferential treatment over numerous other requestors and also would be extremely disruptive of the orderly administration of the Act. The affidavits of Mr. Shea and Mr. Howard both substantiate the significant additional delays to other requestors which the preferred treatment of the Meeropols caused. Further delays at the FBI were caused by the Weinstein and Fellner orders. When the FOIA gave standing to "any person" (5 U.S.C. §552(a)(3)), the position was thereby established that all requestors are to be treated equally; none is preferred over others. There is no such thing under this statute as a special party.

Furthermore, as was recently recognized by the Court of Appeals in this Circuit, every opportunity should be given to allow administrative expertise to play a role in this highly specialized area. Center for National Policy Review, supra. As the House Report made clear:

> . . . there may be exceptional circumstances where the requested information is stored in a remote location outside the country and cannot be retrieved by the agency for examination within the 10-day time period even with the most diligent effort. In such unusual cases, the committee expects that the requestor will accept the good faith assurances of the agency that the information requested will be retrieved and the request

> itself acted upon in the most expeditious manner possible.
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> It is thus the intent of this provision that the agency have a sufficient flexibility which will enable it to meet its requirement in an orderly and efficient manner. (House of Representatives Report, No. 93-876, page 6).

The facts set forth above show that subsections (a)(6)(C) was intended to apply.[9/]

CONCLUSION

For all of the above reasons, defendant's motion for a stay pending completion of review should be granted.

EARL J. SILBERT
United States Attorney

ROBERT N. FORD
Assistant United States Attorney

ROGER C. SPAEDER
Assistant United States Attorney

9/ See Capitol Hill News Service v. United States Department of Justice, D.D.C. Civil Action No. 75-2184, Order dated March 26, 1976 (J. Smith); Fonda v. Department of Justice, D.D.C. Civil Action No. 76-289, Order dated April 20, 1976 (J. Smith).

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BERNARD FENSTERWALD, JR.,

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v.

DEPARTMENT OF JUSTICE,

Defendant.

Civil Action Number 76-432

ORDER

This matter having come before the Court on defendant's motion to stay further judicial proceedings pending completion of administrative review, and the Court having concluded that defendant's request is appropriate under the circumstances, it is by the Court this _____ day of _____, 1976,

ORDERED that defendant's motion to stay further proceedings pending completion of review be, and the same hereby is, granted pursuant to 5 U.S.C. §552(a)(6)(C); and it is

FURTHER ORDERED that this action be, and the same hereby is, stayed, including an enlargement of time within which defendant may respond to plaintiff's motion for summary judgment, until further order of this Court pending the completion of the administrative review and appeal of plaintiff's Freedom of Information Act request.

UNITED STATES DISTRICT JUDGE