

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

DEC 22 1976

ELDRIDGE CLEAVER
KATHLEEN CLEAVER

:

JAMES F. DAVEY, CLERK

:

Plaintiffs

:

Civil Action No. 76-795

CLARENCE M. KELLEY, et al

:

Defendants

MEMORANDUM ORDER

This matter is presently before the Court on plaintiffs' request for expedited consideration on remand, and defendants' motion to supplement this Court's May 27, 1976 opinion filed herein. The relevant background facts are set forth in the aforementioned opinion, Cleaver v. Kelley, 415 F.Supp. 174, and incorporated herein by reference.

Briefly stated, plaintiffs filed a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, et seq., February 27, 1976 with defendants herein, seeking all files relating to the activities of Kathleen and Eldridge Cleaver, and further requesting expedited treatment of the matter because of Mr. Cleaver's upcoming criminal trial. The defendants refused to process the request, not only on an expedited basis, but also under the time limits of the Act, citing their "chronological policy". This Court denied plaintiffs' preliminary injunction, finding that exceptional circumstances existed with the FOIA request backlog, thereby justifying the delay in processing, and plaintiffs appealed. The chronological approach was further affirmed by the United States Court of Appeals in Open America, et al v. The Watergate Special Prosecution Force, et al, No. 76-0129 (D.C.Cir., decided July 7, 1976).

This matter is presently on remand to determine whether "some exceptional need or urgency justifies putting appellants' request

ahead of all other requests received prior thereto". Cleaver v. Kelley, No. 76-1831 (D.C.Cir., decided November 23, 1976), Slip Op. at 2 (citing Open America, supra, Slip Op. at 19), petition for rehearing denied December 7, 1976. The parties have agreed to rest on the existing record.

Mr. Cleaver is now scheduled for trial in California State Court on January 24, 1977 on a six-count indictment charging attempted murder and assault with a deadly weapon. Because Mr. Cleaver faces criminal prosecution, which in the end could mean his loss of freedom or life, he is confronted with an exceptional and urgent need to obtain any and all information that could prove exculpatory.

It has come to public attention, furthermore, that the Federal Bureau of Investigation (FBI) engaged in covert activities designed to injure plaintiffs and the Black Panther Party. Senate Select Committee on Intelligence Activities, 94th Cong., 2d Sess., No. 94-755, Final Report on Intelligence Activities and the Rights of Americans. (1976). These activities, which included the encouragement of local police to institute raids and harass members of target groups, occurred during the time surrounding the allegations in the indictment in which Mr. Cleaver is charged. The defendants, therefore, may well have information which would aid Mr. Cleaver's defense and which might not be available in state files.

In view of these findings, the Court concludes that an exceptional and urgent need does exist which justifies putting this request ahead of other requests. ^{1/} The public interest lies in assuring a complete and thorough adjudication of criminal matters.

Such an interest outweighs that of those seeking material in the pursuit of less fundamental rights.

^{1/} It is noted that testimony taken before this Court indicated that the FBI is facing an approximate eight-month delay in processing initial requests. Plaintiffs' initial request is now ten months old and thus theoretically should be close to the processing

In accordance with the foregoing, it is by the Court
this 22nd day of December 1976,

ORDERED that plaintiffs' motion for a preliminary injunction should be and the same hereby is granted; and it is further

ORDERED that defendants, their agents, servants, employees and attorneys are restrained from refusing to process plaintiffs' request which, as narrowed and defined by their May 21, 1976 letter addressed to Quinlan Shea, Jr., Chief, Freedom of Information and Privacy Unit, Department of Justice, includes all information concerning "covert law enforcement and counterintelligence activities by the Federal Bureau of Investigation, acting alone or in collaboration with California local and state police authorities, directed against Eldridge and Kathleen Cleaver and the California branches of the Black Panther Party of which they were a part, for the time period August 1967 through April 1968"; and it is further

ORDERED that the defendants shall file by January 12, 1977 an index, which includes the FBI document's serial number, specifying the documents or portions of documents for which exemptions are claimed, and a detailed justification for withholding each document or portion thereof; and it is further

ORDERED that all documents for which exemptions are not sought shall be produced for plaintiffs by January 12, 1977.



JUNE L. GREEN
U.S. District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1831

September Term, 1976
Civil 76-0795

Eldridge Cleaver and Kathleen Cleaver,
Appellants
v.

United States Court of Appeals
for the District of Columbia Circuit

Clarence M. Kelley, individually
and as Director, United States
Department of Justice, Federal
Bureau of Investigation, et al.

FILED NOV 25 1976

GEORGE A. FISHER
CLERK

Before: McGowan and MacKinnon, Circuit Judges

O R D E R

On consideration of appellants' motion for expedited consideration of appeal, it is

ORDERED by the Court that the judgment of the District Court appealed from herein is vacated and the case remanded for further consideration as set forth in the attached memorandum.

Per Curiam

Eldridge Cleaver is scheduled to go to trial in California state court on January 24, 1977, on a six-count indictment charging attempted murder and assault with a deadly weapon. Cleaver and his wife, Kathleen, submitted a request to the Federal Bureau of Investigation (FBI) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for information and files pertaining to the "person or activities" of Eldridge Cleaver and Kathleen Cleaver." The FBI was informed that the information was needed in preparation for Eldridge Cleaver's criminal trial in California. After the FBI responded that requests were handled in chronological order and refused to expedite the processing of appellants' request, appellants filed suit in federal district court. During the proceedings in the court below, appellants offered to narrow their request to information relating to their activities in the State of California during the period from August 1967 through April 1968, but appellees rejected this offer.

On May 27, 1976, the district court entered judgment for appellees. It held that the FBI had "exercised due diligence under exceptional circumstances" in processing its backlog of FOIA requests and that therefore its failure to comply with the time limitations set out in the FOIA was excusable. The Court then added that

the result may well present a particular hardship for the plaintiffs; however, the Court can only interpret the law as written. Changes to the law by way of exceptions to the manner in which the Act is implemented*** can only come from Congress.

Less than two weeks later, this Court issued its decision in Open America, et al. v. The Watergate Special Prosecution Force, et al., No. 76-0129 (D.C. Cir. July 7, 1976), which held that under section 552(a)(6)(C), the FBI's backlog of FOIA requests constituted "exceptional circumstances" and that the agency's procedures for processing requests on a first-in, first-out basis constituted "due diligence." However, in our opinion we repeatedly emphasized:

We believe that Congress intended for a district court to require an agency to give priority to a request for information if some exceptional need or urgency attached to the request justified putting it ahead of all other requests received by the agency prior thereto.

Slip op. at 19; see id. at 20, 21.

Despite the clear implications of that decision, the District Court summarily denied appellants' motion for relief from final judgment in light of Open America. We think that the District Court erred in holding that it was powerless to order expedition of appellants' request. Accordingly, we vacate the judgment of the District Court in light of Open America and remand for a determination, as soon as possible, as to whether "some exceptional need or urgency" justifies putting appellants' request ahead of all other requests received prior thereto.

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FILED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAY 27 1976

JAMES F. DAVEY, Clerk

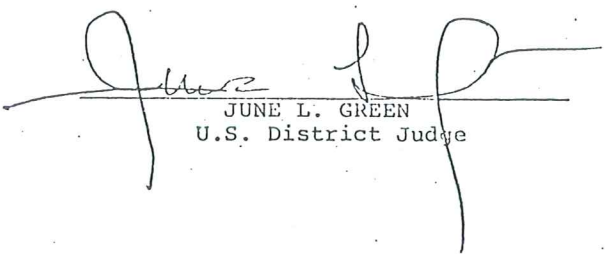
ELDRIDGE AND KATHLEEN CLEAVER :
Plaintiffs :
v. : Civil Action No. 795-76
CLARENCE M. KELLEY, et al :
Defendants :

JUDGMENT

Upon consideration of plaintiffs' motion for preliminary injunction with accompanying memoranda of points and authorities, and opposition filed thereto by defendants, which the Court ruled on May 20, 1976 would be consolidated into hearing of a trial on the merits pursuant to Rule 65 of the Federal Rules of Civil Procedure, and upon consideration of oral argument by counsel on May 20, 1976, and upon further inquiry and hearing by the Court on May 26, 1976, it is by the Court this 27th day of May 1976, in accordance with the accompanying Opinion,

ORDERED that plaintiffs' motion for preliminary injunction be and it is hereby denied; and it is further

ORDERED that final judgment be and it is hereby entered in favor of defendants on all counts of plaintiffs' complaint.


JUNE L. GREEN
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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FILED

MAY 27 1976

ELDRIDGE AND KATHLEEN CLEAVER :
Plaintiffs :

JAMES F. DAVEY, Clerk

v. : Civil Action No. 795-76

CLARENCE M. KELLEY, et al :
Defendants :

OPINION

This action is brought pursuant to the Freedom of Information Act, as amended, 5 U.S.C. 552, et seq., and 28 U.S.C. 1361. Plaintiffs are seeking to compel the United States Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI), or their directors, to disclose the contents of certain files in defendants' possession relating to the plaintiffs prior to Mr. Cleaver's trial on June 14, 1976, in California on state criminal charges.

Pending before the Court are plaintiffs' motion for preliminary injunction and defendants' opposition thereto, and motion to dismiss and to stay further proceedings. The trial on the merits was consolidated with a hearing on the motions on May 20, 1976, and with further hearings on May 26, 1976. Rule 65(a)(2) F.R. Civ. P.

On February 27, 1976, plaintiffs' attorney sent a letter to the Deputy Attorney General, DOJ, requesting "any and all records, materials, files, memoranda and papers which refer, directly or indirectly in any manner, to the person or activities of Eldridge Cleaver. . .and Kathleen Cleaver." Expedited treatment of the material was requested since the

information was thought to be pertinent to Mr. Cleaver's imminent trial in the state court in California. The letter was referred to the FBI and Criminal Division, DOJ, for separate determinations and responses.

By letter dated March 19, 1976 to plaintiffs' attorney, the Director of the FBI acknowledged receipt of the request and advised plaintiffs that due to the heavy volume of Freedom of Information and Privacy Act (FOIPA) requests, and in an attempt to deal with each one equitably, the Agency was processing the requests in chronological order based on the date received, and that all documents which would be released would be available under this condition at the earliest possible date. Further correspondence from plaintiffs was sent requesting expedited treatment, which request was again denied based on the chronological processing policy. On May 7, 1976, the instant action was filed with a motion for a temporary restraining order, which was denied. Following the aforementioned proceeding, and before a hearing on the merits, counsel for plaintiffs and counsel and agents for the defendants met in an attempt to narrow the request, define the volume of material sought and possibly retrieve the files which were most pertinent.

Plaintiffs assert that, in effect, their request has been denied since it was not processed within the specific time provisions of the Act, 5 U.S.C. 552(a)(6)(A), and thus the defendants should be compelled to furnish information on an expedited basis. Defendants have responded that they have not denied the request but are only following the so-called "chronological processing policy" which, under the exceptional

circumstances presented by the heavy volume of FOIA requests, conforms the agency's conduct to the law.

The crux of this action is whether the Agency has complied with the Act in its failure to process plaintiffs' request under the time deadlines set forth at 5 U.S.C. 552 (a) (6) (A).

Although the Act specifies stringent time deadlines within which requests are to be processed, it also allows for alternative procedures under exceptional circumstances. Under 5 U.S.C. 552(a)(6)(C), the Act provides:

"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."

In 1973, the FBI, with an FOIA staff of eight people, received approximately one request a day and processed them without undue delay. The requests, however, have increased enormously. In 1975, an average of 53 requests a workday were received. During the first two months of 1976 alone, 2288 requests were received. To meet the growing burdens, the FBI increased the number of personnel processing the FOIPA requests to 161. This number rivals the number of agents assigned to the headquarter's general investigatory section. Despite these efforts, the backlog is estimated to be about 6532 requests. (This means an approximate eight-month delay in processing the initial request.)

Furthermore, it should be noted that plaintiffs' request covers extensive information. At least 29 main file

volumes exist on Eldridge Cleaver, and both plaintiffs appear in several other files. Each volume contains approximately 200 pages.

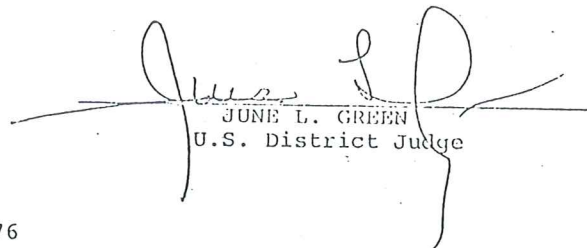
In view of the history of the FOIPA and the Agency's experience with requests under the Act as cited above, it would appear that the backlog with which the Agency is now faced was not predictable or expected; indeed, it is exceptional. Under the circumstances, the Agency has shown to the satisfaction of the Court that it has exercised due diligence under exceptional circumstances as concerns the initial processing of requests, and has responded in an equitable manner through the implementation of the chronological policy.

The Court, therefore, holds that the FBI is in compliance with the Act under 5 U.S.C. 552(a)(6)(C). The Court notes in passing that the result may well present a particular hardship for the plaintiffs; however, the Court can only interpret the law as written. Changes to the law by way of exceptions to the manner in which the Act is implemented which would amend the policy herein, or additional funds to provide sufficient manpower to implement the Act can only come from Congress.^{1/}

Since plaintiffs have structured their complaint as an action to compel an agency response prior to Mr. Cleaver's trial commencing June 14, 1976, and the testimony has indicated that the instant request will not be processed by that time under the chronological policy which the Court has upheld,

^{1/} During the May 26, 1976 hearing, James J. McDermott, Assistant Director, Administrative Services, FBI, indicated that a bill, H.R. 12975, has been introduced into the House Subcommittee on Government Information and Individual Rights which would amend the FOIA and permit an agency thirty days (cont.)

the Court will not exercise its discretion to retain jurisdiction under 5 U.S.C. (a) (6) (C), and judgment will be entered for defendants.


JUNE L. GREEN
U.S. District Judge

Dated: May 27, 1976

1/ (cont.) additional processing time for each 200 pages of documents. Thus, in a case such as the instant action, the bill would give the Agency 2-1/2 years to complete just the initial review. The spirit and language of the 1974 amendments to the FOIA gives life to the concept of the public's right to know and enunciates a national policy requiring prompt and complete disclosure of information. It would appear to this Court that the solution is in added manpower and training so that agencies may conform their conduct to the requirements of 552(a) (6) (A) and upon initial review of the documents withhold only those items specifically exempted from disclosure under a narrow reading of the Act as opposed to provisions giving extensive time delays.