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1 - D. J. Dalbey (Hotis)
1 - C. W. Bates
1 - E. S. Miller

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BY COURIER

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1 - W. A. Branigan
1 - J. P. Thomas

Date: June 16, 1972
To: Director
Central Intelligence Agency
From: L. Patrick Gray, III, Acting Director
Subject: BERNARD FENSTERWALD, JR. v. DEPARTMENT
OF JUSTICE, USDC D.C., CIV. NO. 861-72

A civil action was instituted against the Department of Justice in United States District Court, District of Columbia, by complaint of Bernard Fensterwald, Jr., dated May 2, 1972. Fensterwald, under the Freedom of Information Act, seeks access to and the right to copy three photographs described in an FBI memorandum dated February 24, 1964, which was submitted to the President's Commission on the Assassination of President Kennedy, generally known as the Warren Commission. The memorandum became Warren Commission Document Number 566. A copy of that memorandum is enclosed. The photographs in question are described on pages 3 and 4 of that memorandum in the paragraphs commencing with "On February 20, 1964..." and concluding with "...occurrence described above."

It may be noted that a copy of the memorandum, classified "Confidential," was previously furnished to your Agency on March 4, 1964. The memorandum was declassified by the Department of Justice on January 14, 1971.

Our Legal Attache, Mexico City, Mexico, advised in February, 1964, that the three photographs shown to Pedro Gutierrez Valencia on February 20, 1964, were among photographs furnished to a representative of his office by your Mexico City station on February 19, 1964, and at that time they were reportedly classified "Secret." On June 5, 1972, our Legal Attache, Mexico City, reported that the three pertinent photographs were not in his possession, were never made a part of his file, were not forwarded to FBI Headquarters

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and were apparently returned to your Mexico City station in February, 1964, following Gutierrez' failure to identify the individual pictured therein. The Legal Attache also reported that your field representative had informed him that all pertinent material in this matter had been forwarded to CIA Headquarters.

In order that this Bureau may respond to requirements of the Civil Division of the Department of Justice in this matter, it is requested that your Agency furnish the following information:

1. Are the photographs shown to Gutierrez in the possession of your Agency?
2. Would your Agency object to the release to Fensterwald of those photographs in the form in which they were shown to Gutierrez, that is, with backgrounds cropped out?
3. Were the photographs prepared and furnished by your Mexico City station to our Legal Attache for display to Gutierrez copies made from those photographs which were made available to the Legal Attache by your Mexico City station on November 22 or 23, 1963? It is noted that we are in possession of uncropped copies of the latter. A cropped version of one of those photographs (Odom Exhibit number 1) was displayed to Marguerite Oswald on November 23, 1963, and subsequently became the subject of a November 7, 1964, affidavit of Richard Helms, then Deputy Director for Plans. That affidavit is set out on pages 469 and 470 of Volume XI of the published "Hearings Before the President's Commission on the Assassination of President Kennedy."
4. Would your Agency object to the release to Fensterwald of copies of the uncropped photographs obtained from your Mexico City station on November 22 or 23, 1963?
5. What is the security classification of the aforementioned photographs made available by your Agency on November 22 or 23, 1963, and February 19, 1964?
6. If your Agency would oppose release of any of the photographs mentioned above, can you suggest reasons why, in your opinion, they should not be released? Such reasons should

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relate as directly as possible to the Freedom of Information Act, as, for example, that the photographs are exempted from disclosure by statute, or come within one or more of the exemptions specified in the Act. Any exemption should be specifically identified and discussed. If appropriate, a statement of facts demonstrating the manner in which production of the photographs requested would prejudice the operations of your Agency should be included.

Preliminary discussions on this matter have been held with the Civil Division of the Department of Justice. At this time it is the tentative opinion of the Civil Division that if your Agency objects to the release of the photographs to Fensterwald, an affidavit of a representative of this Bureau must be prepared stating in effect that the photographs are classified material under Executive Order 12801, as amended, and are part of an investigatory file compiled for law enforcement purposes. No mention of the Central Intelligence Agency in the affidavit is contemplated at this time.

The Civil Division has requested that this matter be handled most expeditiously inasmuch as the Freedom of Information Act provides that actions under it "shall take precedence on the docket over all other causes...and expedited in every way." In addition, a motion for Summary Judgment was filed by Fensterwald on June 8, 1972. Mr. Jeffrey Axelrad, Civil Division, Department of Justice, has stated that he is available for consultation with representatives of your Agency should you desire to contact him prior to responding to this communication.

Enclosure

1 - Acting Assistant Attorney General
Civil Division

NOTE:

See memorandum W. A. Branigan to E. S. Miller, dated 6/15/72, captioned as above, prepared by JPT:pld.