

September 18, 1979

Mark Allen
2689-1 Barracks Rd.
Charlottesville, Va. 22901

Dear Mark:

Enclosed is the affidavit which I promised you. You may or may not want to use it.

In your opposition to the government's remand, I think you should emphasize the fact that this issue was fully briefed and argued in the district court and that the government is explicit that it still does not concede that it was wrong in contending that the vacated Fensterwald order ~~was~~ disclosure of the document you seek. In fact, the government, at the same time it asks for a remand, continues to argue that the district court decided the matter correctly.

Also, if your appeal brief did not note that in an FOIA case the Fensterwald order would not be binding precedent even if it had not been vacated, then you should make this argument if and when you get a chance to file a Reply Brief. That this is so is particularly obvious in the context of a document for which a national security exemption is claimed, ~~because~~ the promulgation of a new Executive Order since the decision in the Fensterwald case means that the law has changed, thus rendering orders issued on the basis of a decision under the old Executive Order null. In addition, in an FOIA case the passage of time alone affects the legal status of many documents. For example, in ~~my~~ case for OPR records on Dr. King, one of the principal figures, Stanley D. Levinson has just died, thus extinguishing the privacy claims which the government had made under 7(C).

Best of luck,

Jim