

Senator Edward M. Kennedy
U.S. Senate
Washington, D.C.

3/8/84

Dear Senator,

During the debate on the 1974 amending of FOIA you saw to it that the legislative history reflects the fact that the reason for amending the investigatory files exemption was one of my earliest FOIA lawsuits. Right now the FBI and Department of Justice are seeking revenge and if they succeed, FOIA will be largely nullified. By this I mean that if the precedent they have already obtained from a district court judge who is their virtual rubber stamp is not overturned, the Act has been. Moreover, they have gone farthur and have created a threat against all lawyers who are willing to represent those who cannot pay them.

I have never written you before because I believe it was proper for your brother, as attorney general, to be completely detached from the investigation of the assassination of the President and that it would be better if all the family were. I asked Tom Susman to convey this belief to you. My belief has not changed and I am not now writing you about either the crime or its investigations but about the misuse of my FOIA requests and litigation by FBI/DJ to again in effect repeal the act through me and the presumed unpopularity of the subject matter and, I believe, widespread misuse of fabrications and other defamations of me. (One fabrication, a complete fabrication, was distributed widely, from records I obtained because those who processed them did believe them. It converted a religious gathering at a farm I then owned into an alleged celebration of the Russian revolution!) The subject-matter of my requests is immaterial now because of what the government has done to me and my counsel.

In C.A. 78-0322/0420 combined I requested the relevant records of the FBI's Dallas and New Orleans offices. The initial ~~searches~~ searches to comply still have not been made, Instead, without search, FBIHQ decided what files would be disclosed and nothing else has been disclosed except where I could persuade the appeals office to agree with me. Throughout this long-stonewalled litigation I addressed each and every government allegation, whether under oath (and almost without exception the FBI's attestations were by those who had no personal knowledge) or by counsel, and without refutation proved that they were in varying degrees untruthful. While I am not a lawyer I believe that within the meaning of the statute I established perjury, if not also its subornation. Without a hearing Judge John Lewis Smith refused to decide whether any of the government's challenged representations was untruthful. When without reasonable doubt I proved that the searches still had not been made the FBI and DJ cooked up the claim that under discovery they could prove that they had made the searches they had not even claimed to make and thus had complied in full.

Without a hearing and in complete disregard of all the case record Judge Smith ruled for them and I refused to comply. My unpaid lawyer, for whom all of this has been ruinous, leaned on me as much as he could to get me to make some gästure at compliance as the lessér evil but fearing that it would be very bad precedent I refused even that. Judge Smith ignored all the reasons for my refusal to which I swore without any effort at rebuttal except one and on that one, that discovery against the requester is not envisioned by the Act, ruled for the government and ordered me to comply. I refused. The DJ lawyer threatened to have me cited for contempt in an effort to intimidate my lawyer, to whom he made the threats, but I not only refused, I dared them to face that kind of trial and what I would adduce. I presume my lawyer conveyed my response. Instead they moved for dismissal as a sanction and the judge again rubber-stamped their motion. They then went farthur and sought recovery of costs, which he granted, and I again refused. After another verbal threat to my lawyer the DJ lawyer moved to amend the judgement to force my counsel to pay it and Judge Smith agreed so fast he did not wait for my time to respond to run.

opposing

The other reasons I gave for ~~refusing to comply~~ with this discovery trick include my advanced age and seriously impaired health, both well known to the FBI and DJ; excess burdensomeness, in which they sought not only reason to believe that withheld records exist but each and every fact in my possession and each and every document bearing on this, for the most part documents disclosed to me by the FBI itself; and the fact that I had already complied by providing about two file drawers of memo and documents to the appeals office, which had requested such help from me because of the historical importance of the subject matter. I did provide all that information entirely at my own expense, and for me, when my only regular income is Social Security (now \$345 a month!) that was a not inconsiderable cost.

The cost in time was enormous for one who wants to write and doesn't have all that time left for writing. But I have been in a public role since I began to use FOIA, have made what I obtain available to all others from the outset, often before I could use it myself, have already arranged for all my records to be a permanent, public university archive, without any quid pro quo, and I did what Quin Spear asked when he headed the appeals office. I guess I should say before he was forced out of it. To put this another way, I have conscientiously sought to meet the obligations imposed on me by obtaining this "public information" under FOIA and by making my knowledge of the subject matter available to "any person," the words of the Act. These range from college students, one of whom is at this moment working without supervision in these files, to the major media.

Those who want copies get them and I mail them regularly to other scholars, particularly those who write and make information available that way.

When the government lawyer made insulting allegations that in effect accused me of faking ill health I provided the bills for three surgeries, two of which were emergency and potentially fatal in nature, and of my doctor bills for the period in question, this time last year when for half the year I suffered serious respiratory and other additional illnesses. The government and Judge Smith ~~is~~ ^{is} within my experience in this and other legislation ~~is~~ ^{is} his practise ~~to~~ ^{to} ignore all that is not favorable to the FBI and CIA. (I'll be 71 in exactly a month.)

ignore this.

I have forced the government to give me about a third of a million pages of previously withheld records. With my own work these take up about 60 file cabinets. The only place I have for them is in the basement. I read them as I received them, made duplicate copies for subject filing, and kept the originals exactly as I received them, the way they will be available to all in the future, as they are now. However, because of the serious circulatory problems I have, I must use stairs with great care and am unable to use them many times a day. So, as without contradiction I attested in this litigation, full compliance is a practical impossibility and an effort at it could require all that remains of my life.

Without my attestation the FBI and the Department, including the Civil Division and the U.S. attorney for D.C., have known this for more than eight years, so it is not by accident that they made their (unnecessary and inappropriate) discovery demands so excessive. They have known that I am required to keep my legs elevated when I sit since 1975 and was so enfeebled by arterial obstructions in 1977 that the FBI had to park my counsel's auto inside the Hoover building for me to confer with it, as asked by a judge in other litigation. They know that since then I have not been able to drive to Washington and since 1980 cannot even use Greyhound.

This is hardly a complete background. For example, in 1967 the FBI agreed, up to and including Hoover, that an agent would file a spurious civil action against me to "stop" me and my writing, but he chickened out. Later another agent put on paper that my writing and I had to be "stopped," the word both used. They have misused all my FOIA litigation to a similar end and in that have succeeded and they disclose nothing, usually ignoring my requests entirely, until I file suit.

Then they force me to litigate everything. In C.A. 75-1996, in which I compelled disclosure of well over 60,000 pages relating to the assassination of Dr. King, when the district court awarded counsel fees to me and found the FBI to have been obstructionist with me they have taken an appeal.

The more money they can waste in unnecessary litigation, litigation to which they leave no alternative, the more they can complain about the cost of FOIA to the Congress.

From my by now extensive experience I am certain that with this precedent all requesters and their counsel will have to worry about government demands for discovery, its cost and the time it will consume. At the very least this will discourage use of FOIA. To a large degree this can nullify the Act.

Now that despite the Rules counsel can be held liable for costs assessed against the plaintiff/requester, all counsel are threatened. As I understand the Rules, this can be done only when counsel advises the client not to comply. But my counsel not only did not do this, he did the very opposite. That discouraged neither the FBI/DJ nor the judge.

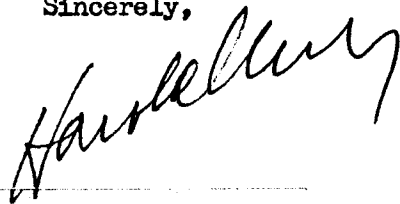
The threat here is not by any means limited to those who are without real means. It can be even greater with corporate requesters and their counsel. There is a recent case in Washington in which the bar agreed to what it objected to strongly because of the great personal harm that would be done innocent lawyers if it did not submit.

With my lawyer, the government has a real whipsaw. This year the District of Columbia appeals court decided that sanctions up to and including loss of license are appropriate against counsel if counsel fails to pursue the legal desires of the client. (Stanton case.) So, if my lawyer refused to pursue my desire to appeal what I regard as a very wrongful decision, he would be subject to punishment up to and including loss of license. He filed an appeal, certainly lawful, and in return there is a judgement against him for the sum the awarding of which is within my appeal. Plus interest, so the government could not lose by waiting, which it did not do.

Meanwhile, very soon I am going to need separate counsel and I do not know how I will arrange that. The briefs are due in about a month.

I am certain that in enacting and in amending FOIA the Congress had nothing at all like what I herein report in mind and that the government is well aware of this. On behalf of all the people who have benefited from FOIA and all those who yet may and for all the good that can come from the improvement in government that FOIA makes possible, I hope that once again the FBI and DJ have gone too far and that Congress will not accept it.

Sincerely,



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