

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK A. ALLEN,)
)
 Plaintiff)
)
 v.) Civil Action No. 81-1206
)
 FBI,)
)
 Defendant)

OFFICIAL TRANSCRIPT
OF HEARING

DATE: December 8, 1981
December 22, 1981

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1 - 13

GLORIA H. HORNING

Official Reporter
6814 U. S. Court House
Washington, D. C. 20001

Prepared for:
PLAINTIFF

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK A. ALLEN,)
Plaintiff)
v.) Civil Action No. 81-1206
FBI,)
Defendant)

Washington, D. C.
Tuesday, Decdmbler 8, 1981

The above-entitled case came on for a status call
before THE HONORABLE JUNE L. GREEN, United States District
Judge, at 10:15 a.m.

APPEARANCES:

JAMES H. LESAR, ESQ.
For the Plaintiff

STEPHEN HART, ESQ. and
JAMES FIDLER, ESQ.
For the Defendant

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DEPUTY CLERK: Civil Action 81-1206, Mark A.

Allen v. FBI. Mr. Lesar for the plaintiff, Mr. Hart for the defendant.

THE COURT: All right. Where are we now?

MR. LESAR: James H. Lesar for the plaintiff, Mark Allen.

Your Honor, after due and perhaps overdue deliberation, the Government has answered the interrogatories or at least responded to the interrogatories that were still outstanding. And I have had a chance to skim them quickly. They were handed to me just before the status call.

THE COURT: If we didn't have a status call, we'd never have anything moving, I often think.

MR. LESAR: There would be some doubt about it.

The Government has, I think, caved in on parts of its previous opposition to releasing some of the records. Their answer to interrogatory No. 5 indicates that four of the six categories of records that we listed in that interrogatory they now concede are agency records subject to FOIA.

And as a result, I think that the next step is to set a schedule for the delivery of the documents to get the processing started. It's now been half a year since this suit was filed and almost a year since plaintiff made the request.

1 MR. HART: Good morning, Your Honor. Stephen E.
2 Hart representing the FBI and the Department of Justice.

3 As Mr. Lesar said, we have now supplied further
4 answers to the interrogatories and, in fact, have changed
5 what was an initial tentative position on some of the documents.

6 However, I don't think at this time, Your Honor,
7 we would be prepared to be able to go into the documents for
8 several reasons. I believe there are still two or three
9 threshold issues existing, one of which would be a fee waiver
10 issue in this particular case, because no discussion --

11 THE COURT: I am under the impression that this
12 was all determined way back. I know it was with the Rosen-
13 berg papers, the Meeropol case; it was with Martin Luther
14 King, and I believe in all the other cases which other judges
15 have had it has been so determined in the JFK ones.

16 So I think that is something you don't have to spend
17 your time on.

18 MR. HART: Well, Your Honor, one of the reasons
19 is if those documents are already in the public domain, there's
20 no reason for them to, once again, waive a fee for them and
21 be brought out a second, third or fourth time.

22 THE COURT: I don't believe you would have possibly
23 given them to somebody else and decide until this moment they
24 are not releasable. Isn't that right?

25 MR. HART: May I confer with counsel for the FBI,

1 Your Honor?

2 MR. LESAR: Your Honor, if I could -- The Court
3 and perhaps counsel -- The previous counsel was not the ini-
4 tial counsel in this case. Mr. Metcalf and I had discussions
5 and we had informed him a long time back that we are not after
6 documents that have already been released.

7 We will concede that those are not within the request.

8 MR. HART: Your Honor, as I understand it, and I
9 cannot vouch completely, this is the way it is. As you have
10 seen, I just had the discussion. This request is for documents
11 released to the House Committee on Assassinations' investi-
12 gation.

13 Some of those documents have been released for other
14 requests made in a different way. Some of those documents
15 would be available in the reading room at the FBI. But what
16 we have here is a request phrased in a different way. Matching
17 up which has been released and which has not been released
18 is a very difficult process.

19 But, yes, some of these documents are in the public
20 domain. And we believe also, in addition to that issue, whe-
21 ther it should be decided by the Court or not, we also have
22 one or two issues that we would like to brief. For instance,
23 the way the request was made.

24 If, in fact, we were to win on that issue, the docu-
25 ments would not have to be processed. So we think there are

1 two or three things we would like to have examined before
2 the processing starts. Just in case we win on them, it would
3 save the processing of some 400,000 pages of documents.

4 THE COURT: First of all, what is your point on
5 the fact that you think you might not have to do it?

6 MR. HART: That's correct, Your Honor.

7 THE COURT: First of all, you said most of them
8 had been released. How can that be?

9 MR. HART: I said some of them. I thought some
10 of them had been released, Your Honor.

11 THE COURT: Mr. Lesar has indicated he is not seek-
12 ing what has been released. You don't know what has been
13 released?

14 MR. HART: If they have been released in a different
15 way, we may not know. They would have to go through 400,000
16 documents. You can't go in and look at 400,000 pages in an
17 afternoon and decide that. It's a very, very difficult pro-
18 cess.

19 The fact he can say, "We don't want the ones that
20 have been released," we would still have to process every
21 one of them to see what has or has not been released. It's
22 the same situation.

23 THE COURT: I can't quite fathom where you thought
24 the Government wasn't going to have to do it, that you might
25 not have to respond to the Freedom of Information Act case.

1 That one has be baffled; since just no way you can get out
2 of that one. Nor can the Court, I might add.

3 MR. HART: Your Honor, if they were Congressional
4 records --

5 THE COURT: We have already been over that now.

6 MR. HART: I realize that. And it's been decided.
7 I am saying there are reasons it could happen. If, in fact,
8 his request doesn't reasonably describe the records, once
9 again we would be in a situation we would not be able to process
10 until we have a reasonable description.

11 Those are the reasons you don't have to start pro-
12 cessing records.

13 THE COURT: You know, I have maybe a different view
14 on these things and that is born of too many years of delay
15 on Freedom of Information Act cases. And, because of my ex-
16 perience, it gives me, as I say, a rather short fuse in that
17 regard.

18 I have the Martin Luther King papers, I have the
19 Rosenberg papers, and for something over a year on the Rosen-
20 berg case we met every month, for about a year and a half,
21 and every single time the Government would tell me all of
22 the work they were doing on it and all of these things and
23 every time counsel for the Rosenberg sons would indicate that
24 he was having problems.

25 And, finally, in sheer and utter desperation, I

1 said, "How many pages have you received?" And he said, "Zero."

2 Now, I couldn't believe that, but it happened to
3 be the fact. For one year and a half I was wasting my time,
4 everybody was wasting their time, and something like 17 affi-
5 davits were filed by FBI agents telling me this, that and
6 something else as to what they were doing, and not one docu-
7 ment had been released.

8 Well, as I say, I have the background of this in
9 my mind and when somebody says, "Maybe they won't do any of
10 it," forget it. You will do it. Somebody will do it and
11 they will get on it right away. That's just how it is.

12 They have all been worked on and we are almost
13 finished, since 1975, we hope, maybe. And that's coming on
14 a little later today. But I just want to say there have been
15 loads of papers and millions of them, I am sure, done on the
16 Kennedy assassination.

17 We just have some more and they are just going to
18 have to gird up their loins and get to it. I am not going
19 to sit here for five more years. I probably won't be here
20 in five more years, but, anyway, I am not going to have this
21 case for five more months, I hope. So let's get to it.

22 MR. HART: Yes, Your Honor.

23 THE COURT: I will see you all before Christmas
24 to find out what's going on. How about December 22nd? At
25 10 o'clock.

MR. HART: That's fine with me, Your Honor.

THE COURT: All right. At that time we hope we will have some understanding as to where you are going.

(Whereupon, at 10:25 a.m., the hearing in the above-entitled case was concluded.)

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REPORTER'S CERTIFICATE

This record is certified by the undersigned to be the official transcript of the above-entitled hearing.



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK A. ALLEN,)
Plaintiff)
v.) Civil Action No. 81-1206
FBI,)
Defendant)

Washington, D. C.
Tuesday, December 22, 1981

The above-entitled case came on for a status call
before THE HONORABLE JUNE L. GREEN, United States District
Judge, at 10:05 a.m.

APPEARANCES:

JAMES H. LESAR, ESQ.
For the Plaintiff

STEPHEN HART, ESQ. and
JAMES FIDLER, ESQ.
For the Defendant

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DEPUTY CLERK: Civil Action 81-1206, Mark A.

Allen v. FBI. Mr. Lesar for the plaintiff, Mr. Hart for the defendant.

THE COURT: Well, what's happened so far?

MR. HART: Your Honor, my name is Stephen E. Hart. I represent the Federal Bureau of Investigation and the Department of Justice in this case.

If you will recall, on the 8th of December, you ordered that we start processing documents in this case. We have started processing documents. We are, at this point, going through everything we have to determine what we have. Of the 400,000 pages we thought we had, it appears it is more like 370,000 pages.

It is still an awful lot of pages. All of them are not in the same place, as we had previously thought, because some of them are being researched for other requests, some of which are before you, as a matter of fact. Some are very sensitive documents, so they are in another place where we have classified documents.

We are xeroxing documents. It appears it will be a very long process.

THE COURT: So how many have been released or have been made available?

MR. HART: None have been released or made available.

1 available, Your Honor.

2 THE COURT: Why is that?

3 MR. HART: None of them are --

4 THE COURT: You don't sit down and wait for 300,000
5 of them to be done. As they are ready, you release them,
6 and that has been the situation.

7 MR. HART: Well, Your Honor, we do not, at this
8 point, consider that we have had the fee waiver issue resolved.
9 So when we do have them ready, at that point, those particular
10 issues will probably be brought to the Court's attention.
11 So then the Court can resolve them to make the decision.

12 THE COURT: I am sorry. I didn't understand what
13 you just said.

14 MR. HART: As you ordered, Your Honor, we are pro-
15 cessing documents.

16 THE COURT: I didn't understand why they weren't
17 being released.

18 MR. HART: They are not at a point to be released
19 yet.

20 THE COURT: So many of them have already been pro-
21 cessed.

22 MR. HART: That's not the way documents get processed,
23 Your Honor. You don't pull out a piece of paper and process
24 that one piece of paper.

25 THE COURT: I'm awfully glad to know how they do

1 it. Because I haven't had a Freedom of Information Act case
2 before and I didn't know these things.

3 Mr. Hart, I would ask that you check with the FBI
4 and find out these things, because I don't think you are quite
5 up on how they do it.

6 MR. HART: Pardon me, Your Honor? I didn't understand
7 what you said.

8 THE COURT: I said apparently you are not too well
9 acquainted with how they do the Freedom of Information Act
10 cases and so I would suggest that you check with them and
11 find out how it's done.

12 MR. HART: Yes, Your Honor.

13 THE COURT: It isn't done that way. Nobody sits
14 down, after all of these years -- Now you said, I believe
15 in early December, that, indeed, these had all been done for
16 somebody else and there wasn't any necessity for doing them
17 for this plaintiff, as I understood.

18 MR. HART: No, Your Honor. I beg your pardon, Your
19 Honor, but that is not what I said. I said some of them had
20 been.

21 THE COURT: So, if that is the case, they shouldn't
22 need any further processing. Should they?

23 MR. HART: Well, those particular records, Your
24 Honor, Mr. Lesar said he doesn't want. There is no need to
25 determine which of those there are.

1 THE COURT: Do you really mean there are three
2 hundred-some documents nobody has had processed before?

3 MR. HART: I don't know whether that is a fact or
4 not, Your Honor.

5 THE COURT: Since 1963?

6 MR. HART: I do not know the answer to that ques-
7 tion, Your Honor.

8 THE COURT: Do you know the answer to that question?
9 If you'd come up to the lectern, please. Just state
10 your name for the record.

11 MR. FIDLER: James Fidler, Legal Counsel Division
12 of the FBI.

13 Your Honor, in this situation, as Mr. Hart indicated,
14 there are approximately about 370,000 pages that are involved.
15 O.K. Now, encompassed within the House Select Committee on
16 Assassination records are records of all different individu-
17 als, all different files, all different subject matters, some
18 of which have been addressed in other FOIA requests, some
19 of which have been the subject matter of other FOIA lawsuits;
20 some of which before Your Honor, as you have noted quite well.

21 The problem for the Bureau, at this point, is that
22 these records, many of which Mr. Lesar has stated he does
23 not want, those that have already been given to someone else,
24 they are among these 370,000 pages.

25 It's not as if they are all in one cabinet which
says, "These previously given out to someone else." Our

1 people have to go through all of these things to locate them,
2 to find them. That is one of the problems.

3 Processing. The documents, the deletions or any
4 exemptions that are taken are not made on the original copy
5 of the document. A xerox copy has to be made and it is from
6 that copy that FBI personnel function, when they process,
7 "process," meaning they review that copy to determine if any
8 exemptions are applicable or if the material is suitable for
9 release.

10 That is a physical processing and, as I said, there
11 are about 370,000 pages. Also, many of the documents that
12 are encompassed within these 370,000 pages -- I won't say
13 many, I will say some, or a good number are the subject matter
14 of other FOIA requests that are going on at this time.

15 So that there might be a file on a particular in-
16 dividual included in these House Select Committee records
17 that is currently out on the floor in the possession of someone
18 else who is reviewing that pursuant to the other FOIA request.

19 And some of these are sensitive files, some of these
20 are in the hands of our classification people. So these are
21 many of the situations that we are up against in processing.

22 THE COURT: Well, I guess I just wondered as they
23 get to page 1, 2, 3, 4, whatever, why they wouldn't have been
24 released. You know, that is what is customary. I think just
25 to release them as you get them done. And that keeps plaintiff

1 not happy, but it mollified him a little bit.

2 And, as I think I indicated last time, having sat
3 here for something over a year once, and had many, many meet-
4 ings every single month and found out not document one had
5 ever been released, I kind of take a dim view of that at this
6 late date, because it is kind of a lot of water over the dam
7 at this time.

8 Really, I think it meets the qualifications of the
9 historic document.

10 MR. FIDLER: Your Honor, there are several issues
11 which I will allow Mr. Hart to address, but the FBI has no
12 problems or reservations about making periodic releases. The
13 only problem is that we have to get the documents in a form
14 where they are releasable.

15 And there are also other issues as far as fee waiver
16 and things like that that would come up. But I think what
17 Mr. Hart is trying to state, and what the FBI is trying to
18 state is that simply these documents, as they exist right
19 now, are not in a form which can be released to the requestor.

20 THE COURT: Do you mean if you have 50 or more people
21 all asking for the same document, and they all have been gone
22 through and indicated what's to be deleted and what is not,
23 nobody saves that and they do it over again, all 50 times?

24 I can't think that that can be sensible. Is that
25 really what you are telling me?

1 MR. FIDLER: No, ma'am. Ma'am, what I am saying
2 is in the form that some of these may have been released, they
3 are not in that same form --

4 THE COURT: Somewhere along the line somebody must
5 have saved one of those hard-working copies. I would think
6 if they haven't, they'd better start it, because they are
7 wasting manpower hours like nobody's business.

8 Now I can't believe that you would go through a
9 document, just say one, and you sit down and you do all of
10 the things that you say make it so hard for anybody to get
11 a copy of anything, and not save what you have done.

12 They just take that to the person and somebody else
13 is going to pick it up next time and do it all over again,
14 50, 60 times? I don't think the FBI is stupid.

15 MR. FIDLER: No, Your Honor. That procedure that
16 you are speaking of now is done. O.K. And that is done.
17 The problem is that for us to know that. we have to go through --

18 THE COURT: You mean they are kept some place different
19 from the original files?

20 MR. FIDLER: Yes, ma'am. Yes, ma'am.

21 THE COURT: Isn't that stupid?

22 MR. FIDLER: Ma'am, those are copies.

23 THE COURT: Why wouldn't they file the original
24 and copy along with it and take one that has been processed,
25 xerox that and make the people happy? I can't think that

1 nobody ever thought of that one. Can you?

2 MR. FIDLER: It might be, Your Honor. I'm just
3 speculating now. That it might be they are afraid that the
4 file would be up off the floor, if they did that.

5 THE COURT: I understand there are rooms full, so
6 I guess they'd have to make another room.

7 I really can't think that either of you can be seri-
8 ous about your proposal, that nothing has been saved about
9 doing these things. Because, if so, it's the most outrageous
10 misspent Government funds I have heard of and I think there
11 is a lot of it that is misspent, but I hardly think it is
12 for that purpose.

13 MR. HART: Your Honor, I don't recall that I spoke
14 to that. I don't recall that I went on the record.

15 THE COURT: I believe you indicated that.

16 MR. HART: Each one has to be processed, Your Honor.

17 THE COURT: That is what I am saying. The only
18 processing that the Court would think that it needed to have
19 done is putting through a xerox machine.

20 MR. HART: It takes a long time to put 370,000 pages
21 through a xerox machine, Your Honor.

22 THE COURT: We will have Mr. Shea in. I hope he
23 hasn't gone away. How about this afternoon?

24 Can you find out whether he is available by this
25 afternoon? I'd like to talk with him. Just briefly. All

1 right?

2 I think everybody is wasting their time and I would
3 like him to put a stop to it so they don't have a miserable
4 Christmas. All right?

5 MR. HART: Yes, Your Honor.

6 THE COURT: Mr. Lesar?

7 MR. LESAR: Your Honor, I believe Mr. Shea may no
8 longer be with the FOIA Appeals Unit.

9 THE COURT: I can't blame him, poor soul. But he
10 certainly might be able to at least tell them how to run the
11 thing.

12 MR. LESAR: Enlighten us, yes. I think that, one,
13 there's no reason why periodic releases can't start and start
14 immediately. I think that a crucial question here is how
15 many analysts the FBI intends to place on this case. And
16 I would like to inquire whether or not they know the answer
17 to that at this point.

18 THE COURT: Probably none, if they don't know they
19 have already been done.

20 MR. HART: Your Honor, it appears at this time they
21 are working on some other than Mr. Lesar's requests, but we
22 can probably put five analysts on this job.

23 They can do, each, about a hundred pages a day,
24 once they start going through. So that's a hundred pages
25 per day, or about 500 pages a day, if things roll correctly.

1 MR. LESAR: Then, with respect to the fee waiver
2 issue, I guess the only way to resolve that is for me to make
3 a motion; if the Court will give me about two weeks, I will
4 put a motion before the Court, and we will get that one out
5 of the way.

6 THE COURT: I don't know what will take you two
7 weeks to do it, if you are in a hurry. Everybody is in a
8 hurry. I can't tell them to do all these things and the one
9 that wants it is going to take two weeks to put in a simple
10 motion.

11 MR. LESAR: I will do it as soon as I can.

12 THE COURT: How about by the 28th? I will be in
13 here on the 28th.

14 MR. LESAR: I may be able to do it.

15 THE COURT: I think they are entitled to respond
16 to it, though.

17 MR. LESAR: Also, I would -- just for the Court's
18 information, I am informed that the Congressional Liaison
19 Unit of the FBI did segregate the documents that were sent
20 to the House Select Committee, so that it would seem that
21 they are locatable and in one location, at least most of them
22 would be.

23 THE COURT: You mean should be.

24 MR. LESAR: Should be.

25 THE COURT: Well, as long as they have this law

1 on the books, we all are stuck with administering it and the
2 only way to do it is to get to it, because there isn't any
3 way that gets any better by prolonging it. Believe me, with
4 my ones that go back to 1975.

5 I don't want this one to go on the rest of my life.
6 on this bench. I want it started and finished, and I also
7 them to be released as they do a batch, and I want a batch
8 done, and I don't think that is unreasonable.

9 And I doubt sincerely that it's 300,000 that you
10 had in mind.

11 MR. LESAR: Your Honor, Mr. Allen's position is
12 that he wants all of the documents that have not been placed
13 in the FBI Reading Room.

14 Now there are at least a hundred thousand pages
15 of FBI Headquarters records on the Kennedy assassination in
16 the FBI Reading Room and there may be that many, or certainly
17 a very large number from the Dallas and New Orleans Field
18 Offices. Those would be included within this request.

19 So that the number of pages that will be released
20 here is substantially less than 370,000.

21 THE COURT: I do hope so. Let's see you all in
22 early January and we will let Mr. Shea stay away. But, really,
23 don't strain the Court's credibility. I mean, really. We
24 know that they wouldn't keep processing the same documents
25 over and over and over again.

1 If they would, then there'd be one big blowup and
2 I would be the one doing the blowing. So we will see you
3 all for a report on what has been released to the plaintiff
4 by the 13th of January at 10 o'clock. And I don't want it
5 to be nothing.

6 MR. LESAR: Thank you, Your Honor.

7 (Whereupon, at 10:25 a.m., the hearing in the above-
8 entitled case was concluded.)

9

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 REPORTER'S CERTIFICATE

11 This record is certified by the undersigned to be
12 the official transcript of the above-entitled hearing.

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OFFICIAL COURT REPORTER

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1) If FBI... out under... has been...

They have... to... work...

If all... in adequate... not -
... post date... in what... case?