UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK A. ALLEN,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE, ET AL.,

Defendants

Civil Action No. 81-1206

REPLY TO DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR WAIVER OF ALL SEARCH FEES AND COPYING COSTS

Preliminary Statement

This action arises from plaintiff's requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for materials in the possession of the Federal Bureau of Investigation ("FBI") pertaining to the U.S. House of Representatives Select Committee on Assassination's ("HSCA") investigation into the assassination of President John F. Kennedy.[1/] At the status call held on December 8, 1981, counsel for defendants ("the Government") indicated that the question of a waiver of copying fees was one of "two or three threshhold issues" which barred immediate release of records responsvie to plaintiff's requests. Tr., p. 3. At the next status call, held on December 22, 1981, he stated:

> . . . we do not, at this point, consider that we have had the fee waiver issue resolved. So when we do have them ready, at that point,

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1/ Plaintiff was initially told that his requests involve some 750,000 pages of documents. The Government's more recent estimates range from 300,000 to 400,000 pages. In all likelihood this still inflates the actual number, as plaintiff has stipulated that he does not seek those records that are in the FBI Reading Room, thus eliminating perhaps as many as 200,000 pages. It is doubtful that this action involves "several hundred thousand pages" as the Government represents. Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Waiver of All Search Fees and Copying Costs ("Memorandum"), p. 1.

> those particular issues will probably be brought to the Court's attention. So then the Court can resolve them to make the decision.

Tr., p. 3.

In order to avoid further delay in resolving this issue, plaintiff's counsel stated at the December 22nd status call that plaintiff would move for a fee waiver as soon as possible. On December 31, 1981, plaintiff's fee waiver motion was served on counsel for the Government. On the evening of January 12, 1982, the Government hand-delivered its opposition to plaintiff's counsel's home. In the interim plaintiff received a letter from the FBI denying the fee waiver which he had requested at the time he made his December 12, 1980, and April 6, 1981, Freedom of Information Act requests.[2/]

As the Government's opposition challenges the motion for a fee waiver on both procedural and substantive grounds, these issues are separately addressed in the section which follows.

Argument

I. Plaintiff Has Exhausted His Administrative Remedies

The Government contends that that the fee waiver issue is not properly before the Court because plaintiff has not exhausted his administrative remedies. Indeed, the Government contends that because plaintiff has supplied information in support of his motion that was not contained in his original waiver request letter, the matter should first be remanded to the FBI so that it can reconsider its position. Both contentions are in error.

2/ Although the letter denying plaintiff's fee waiver request is stamp-dated December 31, 1981, it was not received by plaintiff until at least January 5, 1982, and perhaps later. The letter is addressed to plaintiff, not his counsel. No copy was received from the FBI by plaintiff's counsel, and apparently none was sent. On January 8, 1982, plaintiff hand-delivered a copy of the letter to his counsel.

The Freedom of Information Act (FOIA) sets strict time limits for compliance with requests. Absent certain "unusual circumstances" set forth in the statute which are not present here, an agency must determine within ten working days after receipt of a request

> whether to comply with the request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination . . . .

5 U.S.C. § 552(a)(6)(A)(i). Similarly, an agency must make a determination with respect to any appeal within twenty working days. 5 U.S.C. § 552(a)(6)(A)(ii). If the government fails to comply with these time limits, the requester "shall be deemed to have exhausted his administrative remedies with respect to such request." 5 U.S.C. § 552(a)(6)(C).

The Government failed to comply with these provisions. The FBI did not respond to plaintiff's December 12, 1980, request at all until January 30, 1981, well beyond the ten-day period, and even then did not make a determination on whether to comply. With respect to Allen's April 6, 1981, request, the FBI met the ten-day limit but plaintiff's appeal, received April 17, 1981, has yet to be acted upon.

The plain meaning of the statute is supported by the case law in this Circuit. In Information Acquisition v. Department of Justice, 444 F.Supp. 458 (1978), plaintiff's FOIA request was received by the agency on May 10, 1977. The Government did not respond until May 31, 1977. When suit was brought the Government contended that plaintiff had failed to exhaust his administrative remedies because he had not taken an administrative appeal from the adverse determination in the May 31 letter. However, the court (Sirica, J.) was "unable to discern how this contention can have any merit in light of 5 U.S.C. § 552(a)(6)(C)," and held that

"plaintiff must be deemed to have exhausted his administrative remedies." 444 F.Supp. at 461-462.

It should also be pointed out that the Department of Justice states in its interim fee waiver guidelines that:

> A refusal of, or failure to grant, a request to waive fees is ordinarily not a "denial of the request for records" within the meaning of subparagraph (a)(6)(A)(ii) of FOIA, and therefore, it ordinarily is not administratively appealable as of right unless agency regulations otherwise provide.

Memorandum of Robert L. Saloschin, Director, Office of Information Law and Policy, to All Federal Departments and Agencies (issued December 18, 1980), Part III(A). (A copy of the Department's Interim Fee Waiver Guidelines is appended hereto as Attachment 1)

With respect to the Government's contention that the fee waiver issue should be remanded to the FBI for reconsideration in light of the additional information submitted in support of his motion, plaintiff refers the Court to the oral ruling made by Judge Gesell in Weisberg v. Griffin Bell, et al., Civil Action No. 77-2155, that by its delays the Government forfeited any right to a remand. (See excerpts from Judge Gesell's oral ruling appended hereto as Attachment 2)

In addition, remand is unwarranted because plaintiff's original request for a fee waiver, although brief, provided sufficient information for the FBI to determine that a waiver was justified. In this regard, it must be noted that the Government misrepresents the substance of plaintiff's fee waiver request, saying, for example, that "[i]n his first request for these materials . . . plaintiff merely stated he was requesting them 'as part of a program of scholarly research into the work of the Assassinations Committee.'" Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Waiver of All Search Fees and Copying Costs ("Opposition"), p. 1. In fact, this mischaracterization,

which is repeated elsewhere in the Opposition, omits the two more important sentences which immediately follow the one quoted and which state:

> As you may be aware, the performance and cooperation of the Bureau in this probe and previous investigations into the murder of President Kennedy has been a subject on considerable discussion throughout the years. For this reason I believe the publid would be significantly benefitted by the release of the requested records, which would clarify the Bureau's role in what may be the final official inquiry into the JFK assassination.

December 12, 1980 FOIA request letter from Mark A. Allen to Thomas Bresson appended as Exhibit A to Affidavit of John N. Phillips filed in support of the Government's Opposition.

This was sufficient to require a favorable consideration of plaintiff's fee waiver request. Plaintiff did not "merely state" that he was embarking upon a program of scholarly research into the Kennedy assassination but gave reasons why release of the records would primarily benefit the general public. After numerous official investigations, innumerable books and massive media attention over a period of nearly twenty years, not to mention some celebrated court cases to which the FBI was a party, it is obvious that the relevant facts needed to reach a favorable fee waiver determination were readily available to the FBI without the necessity for plaintiff to submit affidavits substantiating and elaborating upon the obvious.

If the FBI felt that the information which Allen provided was insufficient, all it had to do was ask him to supply more. In his April 6, 1981 request Allen expressly asked the FBI to call him if it needed any additional information or clarification, and provided his phone number. Although the Government argues that it had no responsibility to solicit additional information from plaintiff, the Justice Department's interim fee waiver guidelines

state "it is desirable that agencies invite requesters seeking fee waivers to explain why information of the type the requester expects to find in the records might produce benefits for the general public." See Saloschin Memorandum on "Interim Fee Waiver Policy," Part II(B)(3)(c), reproduced at Attachment 1.

II. The Information Plaintiff Seeks Can Be Considered As Primarily Benefitting the General Public

On December 31, 1981, the FBI denied plaintiff's fee waiver request. The denial consists of nothing more than a boilerplate list of factors which the FBI says it considered in reaching its determination that release of the information sought by Allen cannot be considered as primarily benefitting the general public. It merely states the FBI's conclusions; there is no analysis and no reasons or facts are advance in support of the decision.

Unwilling to confront the formidable--indeed, unavailing--task of arguing that the release of Kennedy assassination records cannot be considered as primarily benefitting the general public, the FBI declares instead that most of the files sought by plaintiff have nothing whatsoever to do with this event. This assertion is ventured on the basis of a whirlwind inventory of some 253,139 pages of records.[3/] The FBI's examination of these documents was admittedly cursory. Affidavit of John N. Phillips, ¶4. Just how cursory can only be seen by dividing the number of pages by the number of hours (160) allegedly spent on this project. This reveals that the FBI blitzed through its review at the rate of 1,582 pages per hour. Proceeding at a rate calculated to make

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3/ This figure excludes the approximately 100,000 pages of Kennedy assassination records which Agent Phillips asserts have been previously processed and are already in the public domain.

Evelyn Woods woozy, it is not surprising that the FBI arrived at the pre-intended result. Even assuming that the FBI examiners had the necessary subject knowledge to properly evaluate the relevance of these materials to the Kennedy assassination, none was actually required--or even had the time--to mull over their possible relevance.

The result of the FBI's cursory examination was predetermined by its presuppositions and the need to find some basis for rejecting plaintiff's application for a fee waiver. The overriding fact is the fact that the House Select Committee on Assassinations considered these records relevant to its probe of the Kennedy assassination and the FBI's investigation of it. And even if, as the FBI alleges, most of the records sought by plaintiff are not relevant to the Kennedy assassination, there is a considerable public benefit in establishing that fact, particularly in view of the fact that Congress expended some $5,000,000 dollars on its investigation.

The truth of the matter is that the FBI's opposition to plaintiff's fee waiver is not based upon any particular circumstances and facts but stems from a flat policy of denying such waivers for Kennedy assassination records. In this regard, special attention must be paid to the March 27, 1980, memorandum from Quinlan J. Shea, Jr., Director, Office of Information and Privacy Appeals, to Mr. Robert Saloschin, Director, Office of Information Law and Policy, which is appended to the Affidavit of FBI Agent John N. Phillips as Exhibit K.

Shea's memorandum, which is appended hereto as Attachment 3, indicts the FBI for its handling of the FOIA requests of Mr. Harold Weisberg for Kennedy assassination records. It states that the FBI's effort to get the Freedom of Information Act Committee to approve the FBI's desire to rescind Weisberg's fee waiver for these records "would contradict or be inconsistent with promises made to

Mr. Weisberg by the Bureau and Department representatives, and to representations made in court, and to testimony before the Abourezk Subcommittee." It further states Mr. Shea's personal belief that the FBI has not conducted searches for King and Kennedy assassination records, and that "there are numerous additional records that are factually, logically and historically relevant to the King and Kennedy cases which have not yet been located and processed--largely because the Bureau has 'declined' to search for them."

The refusal of the FBI to do what it is required by law to do, and its willingness to violate its promises to Weisberg, the courts and Congress strip its representations in this Court of any validity whatsoever. They make it clear that the FBI has a forbidden motive for routinely denying fee waiver requests for Kennedy assassination records: to prevent the American public from obtaining more information about the Bureau's role in the assassination investigations. The FBI's fear of further disclosures about its role in the Kennedy assassination investigations now takes the form of utilizing copying fees as an impediment to public disclosure.

The FBI should not be allowed to invoke copying charges as a bar to the disclosure of further information concerning its role in the Kennedy assassination investigations. Plaintiff's motion for a waiver of fees should be granted.

Respectfully submitted,

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