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November 11, 1983

Mr. Launie M. Ziebell
Associate General Counsel
Office of General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Re: Allen v. Dept. of Defense, et al., Civil Action No. 81-2543

Dear Mr. Ziebell:

In your letter to me of August 30, 1983, you requested that Mr. Allen consider stipulating certain categories of records out of his request. We have given careful consideration to your suggestions. Our response to each of the categories listed by you is as follows:

A. All record material originated with other U.S. government agencies

There are several concerns which we have with excluding this category of records from Mr. Allen's request. Although you comment that such records should be merely duplicates of records being dealt with by other agencies which have received other Freedom of Information Act ("FOIA") requests by Mr. Allen, we do not know if this is in fact true. We have several reasons for believing that it may not be true.

First, the records which the House Select Committee on Assassinations ("HSCA" or "the Committee") requested of other agencies may not be the same as the records of those agencies which were within the scope of the Committee's requests to the CIA. Second, records of the other agencies may have been lost, misplaced or destroyed by them, yet the CIA may still maintain copies of the same records.

Third, even records which appear to be duplicates may in fact be different. Close examination may reveal a crucial difference in the content on just one or two sentences which changes the meaning of the document entirely. For example, Attachments 1 and 2 to this letter are the same page of two different copies of the identical consolidated report sent to the Warren Commission by the FBI's Dallas Field Office. Each copy indicates that it was

dictated the same day by the same FBI Special Agent for the purpose of setting forth the results of the same laboratory test performed on the same evidentiary specimen. The text of both copies is identical in all respects except that Attachment 1 states that some brown paper tested by the FBI Laboratory was "found to have the same observable characteristics as the brown paper bag shaped like a gun case which was found near the scene of the shooting on the sixth floor of the Texas School Book Depository," whereas Attachment 2 alters this sentence to state that the specimen "was found not to be identical with the paper gun case found at the scene of the shooting."

Even where two copies of a document have the same text, one copy may contain notes not found on the other. Copies with notations added are important to proper scholarly study.

Mr. Allen's concern over the possibility that the CIA may still possess copies of records of other agencies that are no longer in the files of those agencies is real. In some instances agencies which made their records available to the HSCA now claim that it did not return them or that such records were lost or destroyed.

Mr. Allen does wish to limit the burdens on the agency if it is possible to do so while also addressing the concerns expressed above. There would appear to be at least two means by which this may be accomplished. First, the CIA could simply list the FBI records by serial number, if any; or, if this is not available, the CIA could provide the date, subject, number of pages and author/addressee of each document. This would eliminate the vastly more time-consuming task of processing these records under FOIA. To the extent that such records did not contain notes, the CIA would not be required to process them unless Mr. Allen designated certain ones on the list on the basis that they have not in fact been provided by another agency.

An alternative approach would be to grant Mr. Allen access to these records so he could review them himself. This would enable him to determine himself which ones already have been released to him by other agencies or otherwise been made public. FBI documents probably comprise the majority of records which fall within Category A. Under the authority of 28 C.F.R. § 50.8, the Department of Justice may allow persons engaged in historical research to have access to Department records over 15 years old. In addition, Section 4.3 of Executive Order 12356 authorizes agencies to grant historical researchers access to classified records. Although Mr. Allen has not yet applied for access to Kennedy assassination records under these provisions, he is willing to do so.

B. All CIA-originated material found in the files of other U.S. government agencies and referred to CIA for direct response to the request

You comment that material in this category should be duplicated by the material in the CIA's collection. This may well be, although it cannot be taken as a certainty. Even so, such materials are required for proper scholarly study of the investigation of President Kennedy's assassination. The withholding of such materials makes it impossible for scholars accurately to assess the degree of cooperation which the CIA extended to other agencies in the investigation of the President's murder. Therefore, Mr. Allen cannot agree to eliminate this category of materials. He notes, in addition, that this category is probably not very large in any event, and that the CIA has a history of not acting upon such referrals even after the passage of several years except in the context of a lawsuit.

C. All responsive material originated by the House Select Committee on Assassinations

As you note, the District Court already has ruled that material originated by the HSCA is not subject to disclosure under the FOIA. However, Mr. Allen does not wish to exclude this category from his request for two reasons. First, when final judgment is rendered in this case, he may chose to appeal this ruling. Second, it is also possible that he may ask the District Court to reconsider its ruling on this point in light of the holding of the United States Court of Appeals on the agency records issue in the case of Maryann Paisley v. Central Intelligence Agency, et al., D.C. Cir. No. 82-1799 (decided July 22, 1983). However, because the Senate Select Committee on Intelligence Activities has moved to intervene in Paisley and has asked the Court of Appeals to rehear it, a motion to reconsider, should Mr. Allen decide to file one, is premature at this time.

Although Mr. Allen cannot now agree to eliminate this category, he notes that the CIA is obviously under no obligation to process these records until their legal status is finally resolved.

D. All material dealt with in earlier FOIA litigations, specifically in Fensterwald v. CIA and Hoch v. CIA

Subject to one exception, Mr. Allen agrees to exclude the materials at issue in Hoch v. CIA, Civil Action No. 82-0754. The exception concerns the list of CIA documents set forth at Tab B to the affidavit of Louis J. Dube filed in the Hoch case. These Tab B records were at issue in the Fensterwald case but have not been subjected to declassification review since 1976. For that reason, Allen does not agree to exclude these records from his request.

For the same reason, Allen cannot agree, as a general proposition, to exclude the Fensterwald documents. He will, of course, agree to exclude those documents at issue in Fensterwald which have been released in their entirety. The remaining documents would appear not to have been subjected to declassification review since 1976. In Allen v. Central Intelligence Agency, Civil Action No. 78-1743, the CIA released, in 1980, half of a document (CIA Document No. 509-803) which had been withheld in its entirety in the Fensterwald case. In seeking to justify its decision to disclose half the document, the CIA has filed sworn declarations avowing that "changed circumstances" since 1976 accounted for the 1980 declassification and release of previously withheld material. This, plus the passage of another four years, makes it reasonable to believe that much of the material withheld in Fensterwald as a result of the 1976 review must now be releaseable.

E. Records concerning CIA employees, former and current

To the extent that such employees are dead, have already had their identities officially disclosed, or have been the subject of extensive publicity which revealed their link to the CIA, Allen cannot agree to exclude this category of records.

Mr. Allen and I remain willing to discuss with you again, either through correspondence or in person, the matters raised in your August 30 letter or any additional suggestions you may have for easing the CIA's burden of processing these records. If a mutually satisfactory stipulation can be worked out, we are certainly willing to assent to it and abide by it.

Sincerely yours,

James H. Lesar

James H. Lesar

cc: Stephen E. Hart, Esq.
Mark A. Allen, Esq.

Attachment 1

Date ...

Lt. [illegible] found the brown paper bag, stated he found the [illegible] scene of the shooting on the sixth floor of the School Book Depository Building. He stated the manager, Mr. [illegible] saw this bag at the time it was taken into police [illegible] by Lt. DAY. [illegible], according to DAY, had not seen this bag before. No one else viewed it. [illegible] stated the brown paper from the roll that was used in packing books by the Texas School Book Depository. This paper was examined by the FBI laboratory and found to have the same observable characteristics as the brown paper bag shaped like a gun case which was found near the scene of the shooting on the sixth floor of the Texas School Book Depository Building. The Dallas police have not exhibited this to anyone else. It was immediately locked up by DAY, kept in his possession until it was turned over to FBI Agent [illegible] for transmittal to the Laboratory. It was examined by the Laboratory, returned to the Dallas Police Department November 24, 1963, locked up in the Crime Laboratory. This bag was returned to Agent [illegible] on November 26, 1963, and taken back to the FBI Laboratory.

Lt. DAY stated no one has identified this bag to the Dallas Police Department.

FILED

JUL 2 1981

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

EXHIBIT # 17

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On 11/29/63 at Dallas, Texas File # DL 89-43

by Special Agent [illegible]/mm 11/30 Date dictated 11/29/63

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Attachment 2

Date 11/30/63

NOV 30 1963

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Lt. CARL DAY, Dallas Police Department, stated he found the brown paper bag shaped like a gun case near the scene of the shooting on the sixth floor of the Texas School Book Depository Building. He stated the manager, Mr. TRULY, saw this bag at the time it was taken into possession by Lt. DAY. TRULY, according to DAY, had not seen this bag before. No one else viewed it. TRULY furnished similar brown paper from the roll that was used in packing books by the Texas School Book Depository. This paper was examined by the FBI Laboratory and found not to be identical with the paper gun case found at the scene of the shooting. The Dallas police have not exhibited this to anyone else. It was immediately locked up by DAY, kept in his possession until it was turned over to FBI Agent DRAIN for transmittal to the Laboratory. It was examined by the Laboratory, returned to the Dallas Police Department November 24, 1963, locked up in the Crime Laboratory. This bag was returned to Agent DRAIN on November 26, 1963, and taken back to the FBI Laboratory.

Lt. DAY stated no one has identified this bag to the Dallas Police Department.

EXHIBIT # 18

Commission No. 1

on 11/29/63 at Dallas, Texas File # Dallas 89-43

by Special Agent VINCENT E. DRAIN Date dictated 11/29/63

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