

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J. GARY SHAW,)
)
 Plaintiff,)
)
 v.)
)
 FEDERAL BUREAU OF) Civil Action No. 82-0755
 INVESTIGATION,)
)
 Defendant.)
)
 _____)

MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Preliminary Statement

This is an action pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552, and the Administrative Procedure Act, 5 U.S.C. §701-706, in which plaintiff seeks access to certain photographs pertaining to the John F. Kennedy assassination which plaintiff believes are maintained by the Federal Bureau of Investigation (FBI). Plaintiff, by failing to comply with the statutory and administrative requirement of reasonably describing the records sought, has failed to make a proper administrative request under the FOIA giving rise to this Court's jurisdiction. Defendant, therefore, has found it necessary to move to dismiss plaintiff's Complaint. For the reasons set forth below, and based upon the Declaration of FBI Special Agent John N. Phillips ("Phillips Declaration"), filed herewith, defendant respectfully requests that its motion to dismiss this action be granted.

Factual Background

By letter dated May 13, 1980, to the FBI, plaintiff sought access to six photographs (and the identities of the individuals photographed) which were referred to in a Central Intelligence Agency (CIA) document attached to plaintiff's request letter.¹ Phillips Declaration, para. (3)(A) and exh. A. The FBI, by letter dated May 23, 1980, acknowledged receipt of plaintiff's request and advised him that additional information might be requested in future correspondence. Phillips Declaration, para. (3)(B) and exh. B.

¹ The CIA document attached to plaintiff's request letter states: "FBI is bringing to Dallas two copies of six photographs of six persons one of which could be Oswald. These are people who were seen in Mexico City." Phillips Declaration, exh. A at p.2.

By letter dated June 18, 1980, the FBI advised plaintiff that based on the information provided, a search of its indices could not be made. Phillips Declaration, para. (3)(C) and exh. C. The FBI, in this communication, requested that plaintiff provide additional information concerning the photographs he requested. Phillips Declaration, exh. C.

By letter dated June 25, 1980, plaintiff advised the FBI that he was unable to provide additional information and asked the FBI to query the CIA regarding his request. Phillips Declaration, para. (3)(D) and exh. D. In response, the FBI, by letter dated July 9, 1980, advised plaintiff that it could not determine if the photographs requested were contained in FBI files and advised him to contact the CIA because it appeared that the photographs sought originated with the CIA. Phillips Declaration, para. (3)(E) and exh. E.

By letter dated July 15, 1980, plaintiff appealed the FBI's action to the Department of Justice. Phillips Declaration, para. (3)(F) and exh. F. The Department of Justice acknowledged receipt of plaintiff's appeal by letter dated August 5, 1980. Phillips Declaration, para. (3)(G) and exh. G. By letter dated August 18, 1980, the Department of Justice advised plaintiff that it was affirming the action of the FBI and recommended that plaintiff contact the CIA regarding his request. Phillips Declaration, para. (3)(H) and exh. H. Plaintiff subsequently brought this lawsuit on March 16, 1982.

Argument

The Freedom of Information Act affords access to agency records which can be identified and are not exempt from mandatory release. 5 U.S.C. §552. In order for an agency to locate records that are the subject of a FOIA request, a request for information must reasonably describe the records sought:

Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. §552(a)(3) (emphasis added).

In this regard, the applicable Department of Justice regulation elucidates the practical application of the statutory requirement:

Request should reasonably describe the records sought. A request for access to records should sufficiently identify the records requested to enable Department personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester. If the request relates to a matter in pending litigation, the court and its location should be identified.

28 C.F.R. §16.3(b) (1981) (emphasis added).

Clearly, the element of reasonableness in both the statute and regulation operates to ensure that access is afforded to all non-exempt records that can be identified through a reasonable amount of effort by agency personnel. Indeed, the relevant legislative history demonstrates that Congress intended agency compliance be accomplished by reasonable means:

A 'description' of a requested document would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.

H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 6 (1974), reprinted in 1971 U.S. Code Cong. & Ad. News 6271 (emphasis added).

Mindful of these statutory and regulatory provisions, courts have consistently held that federal agencies are required to produce only those records which can be identified with a reasonable degree of effort:

It is well established that an agency is not 'required to reorganize [its] files in response to [a plaintiff's] request in the form in which it was made,' and that if an agency has not previously segregated the requested class of records production may be required only 'where the agency [can] identify that material with reasonable effort.'

Goland v. Central Intelligence Agency, 607 F.2d 339, 353 (D.C. Cir. 1978), vacated in part on other grounds on reh'g., 607 F.2d 367 (D.C. Cir. 1979), cert. denied, 445 U.S. 927 (1980) (quoting Irons v. Schuyler, 465 F.2d 608, 615 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972)). See also Founding Church of Scientology v. National

Security Agency, 610 F.2d 824, 837 (D.C. Cir. 1979); McGehee v. Central Intelligence Agency, 533 F. Supp. 861, 865 (D.D.C. 1982) ("The adequacy of an agency's search for FOIA documents is measured by a standard of reasonableness.").

Thus, the common denominator in the case law applying 5 U.S.C. §552(a)(3) is that a request is defective if it does not allow the agency to locate the requested records through reasonable means. See, e.g., Marks v. United States Dept. of Justice, 578 F.2d 261, 263 (9th Cir. 1978); Mason v. Callaway, 554 F.2d 129, 131 (4th Cir.), cert. denied, 434 U.S. 877 (1977); Irons v. Schuyler, supra, 465 F.2d at 612; Fonda v. Central Intelligence Agency, 434 F. Supp. 498, 501 (D.D.C. 1977). Indeed, with language strikingly prescient of the instant case, one court not long ago found a FOIA request defective under 5 U.S.C. §552(a)(3) because it

would require either an agency FOIA staff with clairvoyant capabilities (as to the needs of the individual requester) or an FOIA staff willing to undertake a virtual advocacy position on behalf of the requester, spending countless numbers of personnel hours seeking needles in bureaucratic haystacks.

Devine v. Marsh, Civil Action No. 81-0343-A, slip op. at 2-3 (E.D. Va. Aug. 27, 1981) (Attachment A).

In the instant case, plaintiff has sought access from the FBI of six photographs concerning the JFK assassination which were referred to in a CIA document. Phillips Declaration, exh. A. The FBI advised plaintiff that it could not conduct a meaningful search of its indices based on the information provided. Phillips Declaration, exhs. C & E. Nevertheless, as is attested to in the Phillips Declaration, the FBI has made every reasonable attempt to locate the records that plaintiff sought:

A search of the FBI's Central Indices could not be conducted based upon the limited information provided by plaintiff. However, an employee who is familiar with the files of the JFK assassination looked at known CIA photographs in the FBIHQ, Dallas Field Office and New Orleans Field Office files pertaining to the assassination, in an attempt to locate the photographs requested by plaintiff. The FBI was unable to determine if these photographs were the ones being requested by the plaintiff. The FBI also attempted to locate photographs in specific places suggested by counsel for plaintiff. The photographs which were located and reviewed are the same ones that were previously provided to the plaintiff by the CIA in Shaw v. Central Intelligence Agency, No. 82-0757 (D.D.C. filed March 16, 1982).

Phillips Declaration, para. (5).

The only alternative presently available to the FBI is to conduct a page-by-page hand search of the FBI Headquarters, Dallas Field Office and New Orleans Field Office JFK assassination files. Phillips Declaration, para. (6). A search of this magnitude would require an estimated 720 hours of labor, with search fees totalling approximately \$5,758.00. Phillips Declaration, para. (6). Upon completion of such an arduous task, it is most probable that even if any responsive photographs were located, they would have to be referred to the CIA prior to a release determination since the photographs requested appear to have originated with the CIA. Phillips Declaration, paras. (3)(E), (3)(H), (6).

It is clear that a hand search of the approximately 200,000 pages contained in the JFK assassination files would entail more than either the FOIA or common sense require. See Goland v. Central Intelligence Agency, *supra*, 607 F.2d at 353 (page-by-page search of 84,000 cubic feet of documents held unreasonably burdensome); McGehee v. Central Intelligence Agency, *supra*, 533 F. Supp. at 865. Indeed, to conduct a search of approximately 200,000 pages seeking "needles in bureaucratic haystacks" surely would be unreasonably burdensome. Devine v. Marsh, *supra*, slip op. at 3. The FBI, in good faith, has exhausted every reasonable means to locate the photographs sought by plaintiff and that is all that is required under the FOIA.

Conclusion

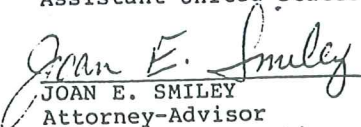
For the foregoing reasons, defendant respectfully suggests that its motion to dismiss this action should be granted.

Respectfully submitted,

STANLEY S. HARRIS
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

Dated: August 19, 1982


JOAN E. SMILEY
Attorney-Advisor
Office of Information and Privacy
United States Department of Justice
550 11th Street, N.W. - 9th Floor
Washington, D.C. 20530
(202) 724-7341