

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J. GARY SHAW and MARK ALLEN,)
)
 Plaintiffs,)
)
 v.) Civil Action Nos. 82-1602,
) 82-2108, 82-2109, 82-2110,
 FEDERAL BUREAU OF INVESTI-) 82-2128, 82-2130, 82-2156,
 GATION,) 82-2379, 82-2522, 82-2523,
) 82-2679 and 82-2680
 Defendant.)
) *dismissed (w/out prej)*

DEFENDANT'S STATEMENT PURSUANT
TO ORDER FILED DECEMBER 17, 1982

I. Introduction--and Plan for Completing the
Processing of Documents

Immediately after the status hearing on December 7, 1982, counsel for plaintiffs met briefly with counsel for defendant and employees of the Federal Bureau of Investigation (FBI) to discuss the Court's directions given at the hearing. As a result of that discussion, a subsequent FBI letter (Attachment 1), and a subsequent meeting on December 21, 1982, counsel for plaintiffs has dropped the request relating to Fair Play for Cuba. In addition, at the December 21, 1982 meeting, the parties made further undertakings to facilitate the processing of plaintiffs' requests. ^{1/}

1/ For example, plaintiffs' counsel agreed: to drop two additional requests; that, where the only information the FBI has on a request is in the Warren Commission report, the FBI need only state that fact as to the request; and that four requests dealing with the OAS could be consolidated into one request for processing. In one respect, it did not seem possible to reduce the task of processing. This is discussed under "Additional Matters," in Part IV below. In another respect, as a result of the discussion at the December 21, 1982, the task will be increased to some extent, which is also discussed in Part IV.

Furthermore, immediately after the December 7, 1982 status hearing, the FBI added an additional person to the task of processing plaintiffs' requests.

As a result of these developments, the FBI anticipates that all the requests will be processed within ninety days, subject to the relatively minor caveats which are discussed in Part IV below. ^{2/}

We include tables (Attachment 2) with this Statement, which provide, for each request, the following items of information required by the first full paragraph at page 3 of the Court's Order filed December 17, 1982

- the civil action to which each request relates;
- the estimated number of pages that need to be reviewed; ^{3/}
- the steps the FBI has taken to comply with the request;
- what the FBI is prepared to do in the future;

^{2/} The Order makes reference to a ninety day period from the date of its issuance. Because full staff will not be working during the holiday season, we respectfully ask the Court to construe the ninety day period liberally, i.e., ending March 31, 1983.

^{3/} In the case of Kennedy assassination materials that have previously been processed, the numbers of pages are those that are contained in reports which include some pages dealing with the subject of the request. Pursuant to agreement at the meeting of December 21, 1982, where the report is thirty pages or less, the entire report will be furnished. Where the report is in excess of thirty pages, the FBI will furnish the title page, the index page, and the pages dealing with the subject of the request.

Because the processing is not expected to take more than ninety days, item (7) in the Court's Order does not require response. ^{4/}

II. Use of Manpower

There are two aspects of the review of the documents: the review of classified documents, and the general FOIA review. The classification review must be undertaken by persons with expertise in the area of intelligence. It is necessary to exercise extreme caution with respect to release of information that may be classified, because information may appear to be innocuous, yet its release may be damaging to national security if combined with other available information by persons sophisticated in intelligence matters. Gardels v. CIA, D.C. Cir. No. 81-1567, September 29, 1982, slip opinion at 9. ^{5/} In addition, where a

^{4/} Item (2) specifies "stating what exemption or exemptions are being invoked." In advance of the processing of documents that is to take place pursuant to this Statement, it would be premature to list the exemptions being invoked. Item (6) provides for the Statement "to indicate with exactitude a reasonable time within which such processing will be completed." The completion date for the entire task has been set at ninety days. It would be very difficult to break down the period of time for each individual request and to forecast the exact sequence in which the requests will be processed, and the length of time required for each of the many requests.

^{5/} Information released under FOIA is available to any requester, so that information disclosed pursuant to a FOIA request is disclosed to the world. .

related body of material is being reviewed, it is hazardous to proper review, as well as unproductive, to divide the task among several classifiers. This is so because it is necessary to have a grasp of the relevant body of material in order to make judgments as to parts of that body of material.

Admittedly, the FOIA review as to matters that do not involve classification is not quite as sensitive as the review for classification. Nevertheless, important concerns are protected by the other FOIA exemptions; e.g., the protection of privacy against unwarranted invasion, and protection of confidential sources and information received from such sources. The FOIA review must also be done carefully and by FBI employees of sufficient training, experience and skill to protect legitimate concerns recognized by the exemptions. The FBI has assigned two such employees to the review of the documents to apply FOIA exemptions. In allocating personnel, the FBI has been mindful of other obligations in FOIA litigation and of other FOIA requesters who are also entitled to consideration of their requests. ^{6/} In addition, it is a fact that the application of FOIA exemptions is not an exact science; matters of judgment are involved, and the issues are sufficiently complex that even courts do not always agree with one another, as is shown, for example, by the need for Supreme Court resolution of questions regarding the scope of

^{6/} Attachment 3 to this Statement is the FOIPA Section Work Analysis, Fourth Quarter, Fiscal Year 1982, Dated October 8, 1982.

exemptions 3, 6 and exemption 7(c). If the number of reviewers of related requests is multiplied, it increases the possibility of differing judgments as to similar materials. It is respectfully submitted that such potential for variation would unnecessarily increase the complexity of litigating these consolidated cases, once the processing of documents has been completed. This is an additional reason why the FBI considers it appropriate to allocate two skilled analysts to the task involved in these consolidated cases, especially since the processing will be completed in ninety days.

III. Actions That Have Been Taken On Plaintiffs' Requests

Item (3) of the Court's Order provides that the FBI shall outline the steps it has taken to comply with each request, and this information is included in tabular form in Attachment 2. In view of the number of requests, it may be helpful to state more comprehensively how the FBI has sought to organize and deal with the requests in order to handle them in an orderly, rational and responsible way.

Plaintiffs' requests were received over the period March 12 to June 2, 1982. In addition to interim responses to plaintiffs' request letters, the FBI, by letter dated June 23, 1982, organized plaintiffs' requests to FBI headquarters into five categories. ^{7/} Attachment 4.

4/ Requests to the field offices were handled on a case-by-case basis.

Category A--Requests pertaining to ascertainable events, items, organizations or known deceased individuals for which a search of the indices to FBI central records system is being conducted.

Category B--Requests pertaining to persons or events for which a search reveals that that the FBI does not have a record.

Category C--Requests pertaining to organizations which are inadequately identified for the purpose of searching the indices to the central records system.

Category D--Requests pertaining to persons presumed to be alive.

Category E--Requests pertaining to individuals whom plaintiffs asserted to be deceased, but for whom no supporting evidence of death was furnished.

The FBI explained its approach to each of these categories in its June 23, 1982 letter.

By letter dated June 29, 1982, plaintiffs, while disagreeing with various aspects of the June 23, 1982 letter, acknowledged that it was "very thorough." Attachment 5 (but without its attachments).

By letter dated September 9, 1982, the FBI advised plaintiffs of changes in status and/or final disposition of some of plaintiffs' requests. Attachment 6.

By letter dated October 15, 1982, the Office of Information and Privacy of the Department of Justice advised plaintiffs' attorney of its decision regarding plaintiffs' administrative appeals. Attachment 7. ^{8/}

^{8/} By letter dated October 20, 1982, plaintiffs' counsel commented on the Justice Department letter. Attachment 8.

Since that date, the FBI has communicated further with plaintiffs' counsel with regard to plaintiffs' requests, by letters dated December 9, 1982 (Attachment 9), December 15, 1982 (Attachment 1), and December 21, 1982 (Attachment 10). ^{9/}

IV Additional Matters

At the December 21 meeting referred to above, the parties discussed, inter alia, the processing of the OAS-requests. There are between 190-200 pages. These include approximately 160 pages in the main file; the remainder (contained in sixteen documents) constitute "see" references. The "see" references are scattered through voluminous (16 sections of file, comprising approximately

^{9/} The text states steps that were taken administratively in response to plaintiffs' requests, and the attached tables further reflect those steps in regard to each request. In addition, it has been necessary for the FBI to supply to the United States Attorneys' Office litigation reports and affidavits in order to enable the Assistant United States Attorney to respond, as required under the Federal Rules of Civil Procedure, in the litigation. Although it is true that there is a good deal of information that is common to the various responsive pleadings and memoranda, it is also true that answers to the twelve complaints contained specific factual responses to the 117 counts included in those complaints. This entailed keeping the United States Attorney's Office apprised of the status, at time of filing the answers, of the sixty-two requests to headquarters and the fifty requests to field offices. Similarly, the affidavits prepared to support the FBI's response to plaintiffs' motions to compel production and for preparation of a Vaughn index included reports on the status of requests in the particular cases in which the affidavits were filed. Also it has been necessary for the FBI to respond to needs in other FOIA litigation brought by plaintiffs' counsel's law firm dealing with the assassination of President John F. Kennedy.

3200 pages) files. The main file appears to present no significant problem insofar as either the burden on the FBI is concerned or our ninety day undertaking to the Court. However, the "see" references present the following difficulty, as discussed at the meeting. In order for a classification review to be made of the sixteen "see" references, classifiers must review all of the extensive files in which they are contained, and not merely the sixteen documents. This is so because classification decisions cannot be made properly absent an understanding of the context of the material reviewed. Obviously, it would simplify the FBI's task and expedite the process if the "see" references could be eliminated. The parties were unable to do so at the December 21, 1982 meeting.

Also, at the December 21, 1982 meeting, plaintiffs' counsel indicated that he would present proof of death as to some four individuals who are the subject of plaintiffs' requests. ^{10/}

10/ This is significant because, under the FBI policy as modified by the Justice Department (see Attachment 7), the FBI will search the indices to Kennedy files and process retrieved documents as to any individual, even without authorization by the individual or proof of death. If individuals are listed in the so called "Meagher" index, the FBI will conduct a general search of its indices, again without such authorization. However, because of privacy consideration, the FBI does not confirm or deny the existence of records outside the Kennedy files absent authorization or proof of death. This was expressly upheld in Blakey v. Department of Justice, et al., D.D.C. No. 81-2174, decided October 18, 1982 (Attachment 11) (case also brought by plaintiffs' counsel's law firm), citing Baez v. United States Department of Justice, 647 F.2d 1328, 1338-39 (D.C. Cir. 1980) and Fund for Constitutional Government v. National Archives, 658 F.2d 865, 856, 863 (D.C. Cir. 1981).

The FBI had requested such proof of death some time ago, because of its effect on the search and processing of documents. Now that the FBI will be receiving such proof, it will affect to some extent the scope of the task as envisioned prior to the December 21, 1982. It is doubtful that this development will affect the anticipated ninety day period, but we alert the Court to it.

V. Conclusion

We have endeavored to respond fully to the Court's Order filed December 17, 1982.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Statement and its attachments was mailed to plaintiffs' counsel, Bernard Fensterwald, Jr., Esq., 1000 Wilson Boulevard, Suite 900, Arlington, Virginia, 22209, this 23rd day of December, 1982.



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