

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BERNARD FENSTERWALD, JR.,            )  
  )  
    Plaintiff,                            )  
  )  
    v.                                    )  
  )  
WILLIAM FRENCH SMITH,                )  
    et al.,                            )  
  )  
    Defendants.                            )  
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Civil Action No. 83-2116

OPPOSITION TO PLAINTIFF'S MOTION TO REOPEN  
CASE AND ESTABLISH TIME TABLE FOR  
ADMINISTRATIVE DECISION

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Preliminary Statement

Plaintiff brought this action pursuant to the Administrative Procedure Act, 5 U.S.C. §§701-706, as amended, and 28 C.F.R. §50.8 (1982), based upon his application for special access as a historian to certain United States Department of Justice records. By Order dated October 31, 1983, this Court dismissed the action without prejudice to its being reopened if defendants failed to act on plaintiff's application within a reasonable time. On April 3, 1984, plaintiff filed a Motion To Reopen Case And Establish Time Table For Administrative Decision. In support of his motion, plaintiff alleged that defendants appear "to be nowhere near a decision as to the availability of either classified or unclassified material." Plaintiff's Memorandum Of Points And Authorities, filed April 3, 1984. Inasmuch as defendants have made a final administrative decision, defendants

respectfully request that the Court deny plaintiff's motion as moot.

Factual and Procedural Background

By letter dated March 29, 1983, plaintiff requested access as a "serious researcher" of the "several major assassinations of the 1960's" to defendants' files pursuant to Executive Order 12356 and 28 C.F.R. §50.8 (1982) (copy attached hereto as Attachment A). On July 22, 1983, plaintiff filed the Complaint in this action and on September 22, 1983, defendants filed their Answer.

By letter dated October 14, 1983, D. Jerry Rubino, Director, Security Staff, Justice Management Division, United States Department of Justice, asked for clarification as to the records to which plaintiff sought special access and explained the cause of defendants' delay in responding to his request (copy attached hereto as Attachment B). By letter dated October 28, 1983, plaintiff confirmed that the sought records pertained to the assassinations of John F. Kennedy, Robert F. Kennedy and Dr. Martin Luther King, Jr., that the relevant components of the Department of Justice included the Criminal Division, the Federal Bureau of Investigation ("FBI"), the Drug Enforcement Administration ("DEA") and the Immigration and Naturalization Service ("INS"), and that classified information would be involved (copy attached hereto as Attachment C).

At a status call held October 28, 1983, defendants' counsel advised the Court that defendants had been considering plaintiff's application and that a final decision would be reached within a reasonable time. By Order dated October 31, 1983, the Court dismissed the action without prejudice to its being reopened within six months if a decision was not made.

By letter dated December 23, 1983, plaintiff sought to remind defendants of his pending application (copy attached hereto as Attachment D). By letter dated January 16, 1984, Mr. Rubino requested that plaintiff provide certain information relevant to his request for classified information, including the specific purposes for which he sought access, the particular uses he intended to make of the information and the precise reasons why his access would be consistent with the interest of national security (copy attached hereto as Attachment E). Plaintiff responded by letter dated January 27, 1984, stating that he sought access to further his own investigation of the assassinations and to enrich the public's knowledge of the events. According to plaintiff, access would be consistent with the interest of national security because it "will reassure many of the integrity of our system of government" (copy attached hereto as Attachment F).

By letter dated February 17, 1984, defendants' counsel suggested to plaintiff that, with regard to his request under 28 C.F.R. §50.8 (1982) for special access to certain investigatory

records, a meeting be arranged between plaintiff, defendants' counsel and representatives of the pertinent Department of Justice components to allow plaintiff to specify the particular records at issue (copy attached hereto as Attachment G). On March 7, 1984, such a meeting was held, at which time plaintiff advised defendants that at this time he sought access only to certain records pertaining to the John F. Kennedy assassination maintained by the FBI, DEA and INS.

On April 3, 1984, plaintiff filed his motion to reopen this lawsuit. On April 16, 1984, defendants moved for a seven-day enlargement of time to file their response to plaintiff's motion. Defendants' motion was granted on April 18, 1984. On April 23, 1984, the parties filed a stipulation that defendants shall have an additional fourteen-day enlargement of time to file their response. This stipulation was approved by the Court on April 24, 1984.

On April 18, 1984, defendants' counsel advised plaintiff, by telephone, that DEA and INS had agreed to grant him special access to the requested records if he agreed, in writing, to certain restrictions concerning the public dissemination of any information he obtained through this special access.<sup>1</sup> By letter

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<sup>1</sup> Defendants' counsel advised plaintiff that the names and identities of certain government employees and confidential  
(footnote cont'd)

dated April 24, 1984, plaintiff agreed not to disseminate the information without defendants' permission (copy attached hereto as Attachment H). By letter dated May 1, 1984, defendants' counsel formally advised plaintiff that the FBI, DEA, and INS had agreed to permit him special access, pursuant to 28 C.F.R. §50.8 (1982), to certain records pertaining to the assassination of John F. Kennedy once plaintiff agreed to and executed an enclosed form detailing the restrictions on public dissemination of any information obtained through this regulation. Plaintiff was also advised that the FBI would permit him access to certain classified information pertaining to the Kennedy assassination on the condition that a successful background investigation was completed and the Department Security Officer granted him a security clearance. Plaintiff was asked to complete the forms necessary to initiate a background investigation and to indicate his willingness to pay the estimated cost for this investigation (copy attached hereto as Attachment I).

Argument

Article III of the United States Constitution limits the judicial power of federal courts to "cases" and "controversies." U.S. Const., Art. III; see also Flast v. Cohen, 392 U.S. 83, 94

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(footnote cont'd)  
sources would not be released to him in the DEA and INS records. Plaintiff expressed no objection to this.

(1968). The controversy must be a "real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." Aetna Life Insurance v. Haworth, 300 U.S. 227, 241 (1936). An actual case or controversy must exist not only at the time a complaint is filed, but also at the time the matter is reviewed by a federal court. See, e.g., Davis v. Ichord, 442 F.2d 1207, 1212 (D.C. Cir. 1970). In the present case, there remains no case or controversy and, therefore, plaintiff's motion to reopen this lawsuit should be dismissed as moot.

Plaintiff brought this action pursuant to his application for special access as a historian to certain investigatory records pursuant to 28 C.F.R. §50.8 (1982)<sup>2</sup> and Section 4.3 of

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<sup>2</sup> This historical access regulation reflects defendants' interest in providing special access to Department of Justice investigatory records compiled for law enforcement purposes that are more than fifteen years old and are of historical interest and which might otherwise be exempt from disclosure under the Freedom of Information Act, 5 U.S.C. §552, as a matter of administrative discretion. The regulation reflects, at the same time, defendants' concern with protecting certain types of information from disclosure. See 28 C.F.R. §50.8(c) (1982). Defendants note that although this regulation was recently modified, the underlying policy remains the same. See 49 Fed. Reg. 12263-64 (1984) (to be codified at 28 C.F.R. §50.8). To the extent the new regulation changes the procedures for implementing this policy, it in no way affected defendants' consideration of plaintiff's pending application. See 49 Fed. Reg. 12252 (1984).

Executive Order 12356, 3 C.F.R. p. 166 (1982).<sup>3</sup> He apparently interpreted defendants' failure to yet reach a final agency decision as a denial of his application. See Complaint, para. 14. Accordingly, the relief plaintiff sought was the granting of his application.

Since the filing of the Complaint, however, defendants not only have acted on plaintiff's application, but have also decided to grant him special access to certain of their records once certain conditions are satisfied. See Attach. I. With regard to nonclassified investigatory records compiled for law enforcement purposes pertaining to the John F. Kennedy assassination, defendants have asked plaintiff to execute a non-disclosure agreement. Id. With regard to classified materials on the same subject matter, defendants have required that plaintiff satisfy a background investigation in order that the Department Security Officer can determine his trustworthiness as required by 28

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<sup>3</sup> Although plaintiff's Complaint did not cite Executive Order 12356, his earlier March 29, 1983, letter did. Accordingly, defendants' have interpreted plaintiff's lawsuit to include classified as well as nonclassified records. Section 4.3 of Executive Order 12356 provides, in part, that an agency may waive the limitation that access to classified information must be "essential to the accomplishment of lawful and authorized Government purposes" for historical researchers if certain conditions are satisfied. Executive Order 12356, §4.3, 3 C.F.R. p. 166 (1982). Defendants' implementing regulation, located at 28 C.F.R. §17.111 (1982), outlines the procedures for obtaining this special access.

C.F.R. §17.111(e) (1982), and to indicate his willingness to pay the cost of this investigation. Id.

Defendants, therefore, have made a final decision on plaintiff's application--a decision consistent with the relief sought by plaintiff in his Complaint. Thus, "[t]he case as framed in the original complaint ... is moot." Davis v. Ichord, 442 F.2d at 1211. And "[t]he mooted character of the case resting upon that complaint drains it of content of a case or controversy within the meaning of Article III of the Constitution." Id. at 1212. Accordingly, there remains no justiciable issue.

Conclusion

For the foregoing reasons, defendants respectfully suggest that plaintiff's Motion To Reopen Case And Establish Time Table For Administrative Decision should be denied as moot.

Respectfully submitted,

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JOSEPH E. DIGENOVA  
United States Attorney

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ROYCE C. LAMBERTH  
Assistant United States Attorney

Dated: May 7, 1984

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