

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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BERNARD FENSTERWALD, Jr.,

Plaintiff

v.

DEPARTMENT OF JUSTICE,

Defendant  
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Civil Action No. 861-72

Washington, D. C.  
July 5, 1972

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MR. FENSTERWALD

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The above-entitled cause came on for Hearing on  
Plaintiff's Motion for Summary Judgment before the  
HONORABLE GERHARD A. GESELL, United States District Judge.

APPEARANCES:

BERNARD FENSTERWALD, Jr., Esq.,  
Pro Se

ROBERT M. WERDIG,  
Assistant United States Attorney,  
Counsel for Defendant

P R O C E E D I N G S

THE COURT: Good afternoon, gentlemen.

THE CLERK: Civil Action No. 861-72, Bernard Fensterwald Jr. v. Department of Justice. Mr. Bernard Fensterwald, Jr. for Plaintiff. Mr. Robert Werdig for the Government.

THE COURT: Mr. Werdig, what is the Government's position on this motion?

MR. WERDIG: The Government's position on the motion is that it should be denied as moot.

THE COURT: All right. Do you want to make some statement on the record about it?

MR. FENSTERWALD: Yes, I would, Your Honor.

It has been 110 days. We have had no answer from the Department of Justice. I would like this case, if possible, to be a case of record for two reasons: One is the question of exhaustion of administrative remedies. I have great difficulty getting the Department of Justice to answer these requests, whether they are granted or denied. Secondly, we would like to know whether we are getting these as a matter of grace from the Attorney General or matter of legal right. We think if we are entitled to them as a matter of legal right, we should get them; otherwise, we should not get them. Therefore, I think --

THE COURT: May I have the jacket.

MR. FENSTERWALD: I would like to proffer an order, if I might.

THE COURT: Did you make any motion after you filed your motion for summary judgment?

MR. FENSTERWALD: No, sir.

THE COURT: Well, I don't understand your comment about all the time. From my records, you filed a complaint and you filed a motion on the 7th of June. After that motion became at issue, when I found that there had been no opposition filed, as of June 22, I called your office to find you were out of the country and I set this matter down.

So I don't understand what you mean about the delay of 120 or 180 days. It looks to me as though I perhaps delayed two days over the minimum time possible to resolve your case.

MR. FENSTERWALD: I am sorry, sir, I was not referring to the Court's delay. It is a question of --

THE COURT: The Government never does anything unless the Plaintiff moves.

MR. FENSTERWALD: No, sir. Before the suit was filed in the first place, a request was made and not even acknowledgment was received after thirty days. Then a second request was made and no acknowledgment was received.

This has been a matter of considerable concern to the Administrative Conference and to lawyers generally. The Information Act is of no great value if it takes months and months even to get a reply from a Government agency as to whether you are entitled or even if they got your request. And

this has been at issue in a number of cases. But I don't think that it has ever been passed upon in Court. It is one of the items that I would like to bring to your attention.

The other is a question as to whether we are getting these as a matter of legal right or whether we are getting them as a matter of grace.

THE COURT: Well, if you are getting them, why does the Court have to concern itself with advisory matters?

If this were a typical information case, we would have a somewhat different situation perhaps. This is a somewhat unique case in the sense that most Freedom of Information Act matters don't relate to the files of the Federal Bureau of Investigation, but concern themselves with the day-to-day functioning of routine agencies of the Government.

MR. FENSTERWALD: Your Honor, I realize that there have not been many such cases. But it seems to me, and I think it seems to the Administrative Conference, who have made recommendations that ten days should be sufficient for any agency at least to acknowledge the receipt of a request.

Up until this afternoon we really have not gotten a response from the Department of Justice at all. Also, the Department has argued in other cases I have been involved in that the Attorney General has a certain amount of discretion whether he gives someone documents under this Act or not. I, personally, think that is very incorrect in that what he has to

decide is not a matter of discretion but as a matter of law whether the applicant is entitled.

In this case I don't know at this time -- maybe we should find out from the Assistant United States Attorney -- whether we are getting them as a matter of discretion or as a matter of right.

THE COURT: Well, are you handing over the photographs, Mr. Werdig?

MR. WERDIG: Yes, Your Honor, we do have the photographs and we are prepared to present them to counsel.

THE COURT: What is the explanation for the Bureau's attitude of not even acknowledging a letter?

MR. WERDIG: To that I merely say this, Your Honor:

THE COURT: Any time a citizen makes a request, even if the agency of the Government doesn't agree with it, it seems to me a reply might be in order. Don't you think so?

MR. WERDIG: I can only address myself to what I have factual knowledge of, Your Honor; and in this particular case I have not received any of the administrative record; to wit, I have not received, as we normally do in my office, what we refer to as a litigation report from the affected agency, which includes within it all documents which have been presented, and which in this case, had we decided to go to a point of litigation, would have included his, that is, Mr. Fensterwald's initial request, and any documents that were sent by the

Department to him.

I have no knowledge of any of this correspondence. So I can't really answer the question that the Court has posed to me. I could pontificate about what the Government should do and what would be courteous and desirable, but as it relates to this particular lawsuit, I just don't have any information. I don't even know if in fact the Government did not respond to Mr. Fensterwald's request.

THE COURT: I don't know either except as I have before me statements by a member of the Bar of the Court to that effect.

MR. FENSTERWALD: Your Honor, might I add one other thing. If you would consider granting this motion and signing an order, I think it might be helpful in the future in getting more prompt action for applicants out of the Justice Department because this case would then have some precedential value. Although I do represent myself in this matter, it takes time and trouble, as Your Honor knows, and it takes the time of the Court. If they were going to give these documents in the first place, it seems to me a great deal of everyone's time and effort have been wasted.

MR. WERDIG: Of course, I would speak to that only in this degree: This Court only sees those few, I would assume, instances in which documents requested are not provided immediately to the person making the request. So we are seeing

sort of a jaundiced aspect of the Public Information Act.

THE COURT: I must say in my experience under the Act this is the first situation where it has come to my attention that there has been any failure to respond promptly and in detail to requests that are made under the Act. To be sure these responses on occasion have been responses that have been somewhat negative or partially negative or raised some legal questions to a portion of the documents, but it has been my experience, Mr. Fensterwald, in all of the cases -- I have had a number of them from the Renegotiation Board and from the Department of Commerce, and some of the different agencies -- a response has always been filed quite promptly.

When I saw your complaint, I recognized that the FBI is not a frequent recipient of requests under the Information Act. By and large they are protected by the exemption which is in the statute as it relates to their day-to-day activities, and this matter affecting the assassination of President Kennedy is somewhat unique.

MR. FENSTERWALD: Your Honor, there was another case in which I was involved in which the Department of Justice refused to turn over the documents on which James L. Ray was extradited to the United States. They refused these to an applicant. They also refused them to Ray; also refused them to Ray's lawyer at one point. This case went on for a year or so. If I am correct, I believe Your Honor had something to



do with it, although I am not absolutely sure on that point.

THE COURT: No, I don't believe so. I did have a pro se motion that you were involved in involving the Kennedy papers from a plaintiff I thought acted very irresponsibly. I don't recall anything about the Ray matter. There, again, that must have presented some really difficult questions, both under the foreign policy exemption and under the investigatory exemption.

How did it come out?

MR. FENSTERWALD: Judge Curran, I think, was the one that had the case. He finally gave summary judgment in that case in favor of the plaintiff, but it was only after about a year's delay. That was <sup>7/18-70</sup> 7/18/70, I am informed.

I also have here the report of the Administrative Conference of the United States. Although I can't put my finger on the exact place in the report, if I recall correctly, they suggest that ten days is a reasonable length of time in which an applicant should get some type of reply and in most cases be given the document or denied it. I don't know if the Act will be amended to that effect but at least that is the basic position of the Administrative Conference.

THE COURT: I think, given the particular facts of this case, the documents being handed to you, I will declare it moot and deny the motion and close the file.

MR. FENSTERWALD: Before you close it, may I see the

photographs, Your Honor?

THE COURT: Certainly.

MR. WERDIG: As far as the record is concerned, may I indicate as part of the complaint it is alleged that on February 20, 1964, Pedro Gutierrez Valencia advised as follows:

"He examined three photographs of an unidentified possible white male American suspect, which depicted this individual in the following poses:

"Attired in a white shirt and tan trousers, holding what appears to be a courier-type pouch under his left arm and examining a wallet-type folder which it appears may contain one or two documents resembling passports."

I now proffer to counsel such a photograph meeting that description.

Second:

"Attired in the same dress described above and holding the wallet-type folder in his left hand and inserting this folder into the courier-type pouch held in his right hand."

I now proffer to counsel a photograph matching that description.

Third:

"Attired in a dark shirt with white collar buttons and apparently walking along with the thumb

of his left hand hooked into the top of his left-hand trouser pocket."

I proffer to counsel a photograph matching that description. All three photographs, apparently, to my observation, are of the same person.

MR. FENSTERWALD: May I ask one question, and that is whether these photographs were cropped in this fashion when they were shown to Mr. Gutierrez?

The background, Your Honor, is simply taken out of the pictures. I was curious as to whether these were the same.

MR. WERDIG: I suggest to the Court that the Federal Bureau of Investigation indicates to me that these are the pictures in the same form that they were shown to Mr. Gutierrez.

THE COURT: Very well, you may submit an order, Mr. Werdig.

MR. FENSTERWALD: Thank you, Your Honor.

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CERTIFICATE OF COURT REPORTER

I, Ida Z. Watson, certify that I reported the proceedings in the above-entitled cause on July 5, 1972, and that the foregoing Pages 1 to 10, inclusive, constitute the official transcript.

Ida Z. Watson