UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROGER B. FEINMAN,

Plaintiff,

-v-

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

Civil Action No.

79 C 1537 (ERN)

AFFIDAVIT OF ROGER B. FEINMAN IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF HIS CROSS-MOTION FOR SUMMARY JUDGMENT, LEAVE TO AMEND COMPLAINT, ETC.

STATE OF NEW YORK )
) ss.:
COUNTY OF QUEENS )

ROGER B. FEINMAN, being duly sworn, hereby deposes and says:

(1) I am the plaintiff in the above-entitled cause, which seeks under the Freedom of Information Act ("FOIA"), 5 U.S.C.§552, to enjoin defendant UNITED STATES DEPARTMENT OF JUSTICE ("DOJ") from withholding certain records relating to the assassination of President John F. Kennedy. I appear on my own behalf and on behalf of the public's interest in receiving information, both about the assassination and about the response of our society's major institutions to this tragedy.

(2) I make this affidavit in opposition to defendant's motion for summary judgment and in support of my cross-motion for summary judgment with leave to amend the complaint herein. This affidavit is based upon personal knowledge, except where I have clearly indicated reliance either upon sources and/or facts of which this Honorable Court may properly take judicial notice or upon facts which I believe I can qualify as admissible.

(3) This affidavit is accompanied by a Rule 9(g) statement, a memorandum of law, and a separate document appendix.

INTRODUCTION AND BACKGROUND

(3) During a total of nine out of the past seventeen years I have closely studied the circumstances relating to President Kennedy's death and the controversy pertaining thereto. During

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the past five years, I have frequently directed FOIA requests on this subject at numerous federal agencies with varying success, but always with the full cooperation and frankness of the officials involved, except for defendant here. The original request which led to this skirmish is the only one which I have felt compelled to sue upon in order to vindicate my rights under FOIA. It concerned defendant's cooperation with a CBS-TV production of June 1967 which argued strongly in favor of the Warren Commission's findings on the assassination at a point in time when the Commission's investigation was under severe attack from other communications media (most notably the book and magazine publishing industry) and members of the Congress, and when public opinion polls indicated that a majority of those Americans polled did not accept the Commission's practical conclusions. More specifically, my original request to defendant was concerned with discovering information about how former Attorney General Ramsey Clark and his colleagues acted to facilitate a CBS interview with one of the pathologists who had been involved in the autopsy of President Kennedy's remains.

(5) First, I shall relate the circumstances which caused me to file my original FOIA request. Then I shall deal with Mr. Shea, and show why defendant's response to this lawsuit is inadequate and incomplete. Finally, I shall explain why I believe defendant is withholding records from me, and what its probable motives are for doing so.

(6) On June 25,26,27 and 28 of 1967, the Columbia Broadcasting System, Inc. (now CBS Inc.) presented a four-part series of broadcasts which examined the central findings of the Warren Report and the challenges raised by the Report's critics.

(7) Since the medical evidence associated with the assassination was a key area of controversy in the contemporary critical literature, one of the outstanding features of the CBS program was an exclusive filmed interview with the senior member of a three-man team of military pathologists who had conducted the autopsy of President Kennedy's remains on the night of his murder. He was Navy Captain James J. Humes. (The other pathologists had been Navy Cmdr. Thornton J. Boswell and Army Lt.Col. Pierre Finck.) During this interview, Doctor Humes was afforded the opportunity by CBS to defend the conclusions of his official autopsy protocol. In substance, he represented that he had examined photographs and x-rays taken at autopsy, and that they supported his original conclusions.(Exhibit A, Appendix p. 1 consists of a transcript of Humes' interview as published by CBS)

(8) To the best of my knowledge and belief, this is the only formal recorded broadcast news interview of Doctor Humes on this subject . His only other appearance in public was on September 7, 1978, when he was called to testify before a congressional committee investigating the assassination. (Hearings before the Select Committee on Assassinations of the U.S. House of Representatives, 95th Cong. 2d Sess., Vol. I, p.323, U.S. Government Printing Office, Washington: 1978) (Humes did testify to the Warren Commission in 1964, but that testimony was taken behind closed doors and a transcript of unknown accuracy later published.)

(9) If Doctor Humes has been scarce in public, it may perhaps be due to circumstances beyond his control: On September 17, 1979 I received from the Department of the Navy's Bureau of Medicine and Surgery a copy of a document which it supplied to the House Committee indicating that participants in the Kennedy autopsy had been under verbal and written orders of silence. (Exhibit B, Appendix p. 5 ). The House Select Committee has reported that these orders were rescinded by the Department of the Navy for its investigation. Appendix to Hearings before the Select

Committee on Assassinations, id., Vol.VII, p.6 paragraphs 27 and 29. I cite this information not merely for its historical interest, but to illustrate for the Court the degree of formality which was involved in obtaining military clearance for participants in the autopsy to cooperate with a committee of the U.S. Congress.

(10) My curiosity about the Humes-CBS interview was first aroused when I read a book that CBS had published in association with the Macmillan Company publishers as a "spinoff" to its 1967 Warren Report program. In an appendix to that book, Mr. Leslie Midgley, the Executive Producer of the program for CBS News, made the following statement with respect to how the interview came about :" Commander James J. Humes, Chief Autopsy Surgeon, always had refused to talk publicly about the case, but he agreed after clearance had been obtained from Attorney General Ramsey Clark." (Exhibit C, Appendix p. 8 )

(11) In 1976, while researching and interviewing for a book about the Kennedy assassination, I received information from a source who was employed by CBS in 1967 and who had personal knowledge of the preparation of the CBS broadcasts. In relevant part, I was informed that, early in 1967, but prior to May of that year, CBS News had requested access to the autopsy x-rays and photos which were then (as now) in the U.S. Government's possession, and had also attempted to persuade Doctor Humes to grant an interview, but that these efforts had met with failure.

(12) Also in 1976, I obtained a document which I believe to be a true copy of a CBS internal memorandum summarizing a meeting between then-Attorney General Clark and CBS representatives. The memo was authored by Mr. Leslie Midgley, the CBS executive who was responsible for the broadcasts. Furthermore, I believe that the representations in this memo are accurate and truthful because Midgley---a highly experienced and respected journalist--- was addressing his immediate superior in the CBS organization about a matter of mutual concern in terms of responsibility to their corporate employer and the public, and he would have no motive

to falsify. The document is reproduced as Exhibit D, Appendix p. 10 .

THE REQUEST, APPEAL AND FOLLOW-UP

(13) On May 25, 1976 I wrote and sent my letter of request to the DOJ. A true copy of that letter is reproduced as Exhibit E, Appendix p. 11 .

(14) Defendant DOJ failed to reply to me within the time limits prescribed by FOIA.

(15) Although it was my belief then, as now, that I had exhausted my administrative remedies, I voluntarily wrote and sent a letter of appeal for the requested records on June 19, 1976 to Edward Levi, then Attorney General of the United States. A true copy of that letter is reproduced as Exhibit F, Appendix p. 13. In addition to pro forma language of appeal, I included a request for reference to whether at any time anyone had destroyed, discarded or otherwise disposed of records such as those which I sought. Mr. Levi did not reply to my appeal.

(16) In mid-August 1976, I received a letter dated August 12, 1976 from one Richard Rogers of the Freedom of Information and Privacy Unit, Department of Justice. That letter is reproduced as Exhibit G, Appendix p. 15 , and the Court is respectfully referred to the letter for any interpretation thereof.

(17) Up until the time I filed the within complaint I did not receive any further correspondence or results from my FOIA appeal from either the DOJ or any of its officers or employees.

(18) Since the last correspondence I had received on this matter came from the Freedom of Information and Privacy Unit, I wrote and sent a letter to Mr. Quinlan J. Shea, Jr., the Chief of that Unit, on June 10, 1978, asking to be informed of the status of my request. A copy of this letter is reproduced as Exhibit H, Appendix p. 16 .

(19) Up until the time I filed the within complaint, I did not receive any reply to my letter of June 10, 1978 from any source connected with the DOJ.

(20) On or about June 14, 1979 I filed the complaint in the instant action, and on July 20, 1979 I received the defendant's answering papers.

MR. SHEA'S "MEA CULPA"

(21) On July 21, 1979 I received a letter dated July 18, 1979, from Mr. Quinlan J. Shea Jr., Director of the Office of Privacy and Information Appeals within the Office of the Associate Attorney General. Before referring the Court to Mr. Shea's letter, I must first offer some crucial factual groundwork.

(22) It is fundamental that Mr. Shea's contrite appearance is an attempt by defendant DOJ at distraction. He is behaving like a computer which, since 1976, has had its old memory banks removed and new programs substituted: Since 1976, Mr. Shea has undergone a bureaucratic metamorphosis in that his responsibilities within DOJ have changed. Preferring to ignore past errors, defendant DOJ now pretends that my request is a recent arrival subject to defendant's new procedural rules governing information disclosure. The administrative procedural result is that (a) with respect to my original request and appeal there has resided in Mr. Shea and his staff the unorthodox and improper combination of initial and appellate determinative functions, he being the official who effectively denied my initial request within the meaning of DOJ regulations and who also acted upon or supervised the processing of the appeal; and (b) his newly defined functions at DOJ have been applied retroactively to my case, including the interpretation of my request and the scope of his staff's search. The practical substantive consequences have been delay, obfuscation, and the lack

of a responsible, accountable, authoritative and final response to my request and appeal, as well as the concealment of records which I believe defendant has in its possession, custody or control.

(23) Under DOJ regulations which were in effect at the time I filed my original FOIA request, the Office of the Deputy Attorney General was responsible for coordinating the DOJ's response to requests for production or disclosure of information under FOIA. 28 CFR §0.15(b)(5) (1976). All requests for records of the DOJ were to be directed to the Office of the Deputy Attorney General. 28 CFR §16.3(1976). Appeals from initial denials---including denial in the form of delay, see 28 CFR §16.5(d)(1976)---were to be made to the Attorney General. 28 CFR §16.7(1976). "Unless the Attorney General otherwise directs, the Deputy Attorney General shall act on behalf of the Attorney General on all appeals under this section, except that (1)in the case of an initial denial by the Deputy Attorney General, the Attorney General or his designee shall act on the appeal, and (2) an initial denial by the Attorney General shall constitute the final action of the Department on the request." 28 CFR §16.7(b)(1976). For the purpose of contingency (1), the Attorney General's designee appears to have been the Office of Legal Counsel. 28 CFR §0.18(1976).

(24) Mr. Shea, then Chief of the Freedom of Information and Privacy Unit within the Office of the Deputy Attorney General, was the official responsible for processing initial FOIA requests, and FOIA appeals from denials of initial requests in which the Deputy Attorney General (and hence, Mr. Shea) had not participated. 28 CFR §0.18(1976). (Apparently, when handling an initial request Mr. Shea's Unit held itself out as the "Freedom of Information and Privacy Unit", see Exhibit G, Appendix p. 15, and when handling an appeal called itself the "Freedom of Information

and Privacy Appeals Unit.)

(25) It is my position in this lawsuit that once Mr. Shea and his staff effectively denied my request by failing to respond within the statutory response period--28 CFR§ 16.5(c,d) (1976)---and once my appeal was filed, the matter passed out of his hands; it was contrary to DOJ regulations for defendant, by Attorney General Levi, to remand the appeal back to the same office and staff which had ignored the initial request, and I further believe that it was arbitrary, capricious and an abuse of discretion for him to do so. The result of such action was to allow the same office and staff to mishandle my request in both its initial and appellate stages.

(26) As of December 8, 1976, Mr. Shea's office was formally redesignated the Office of Privacy and Information Appeals, but was still established in the Office of the Deputy Attorney General. Federal Register Vol. 41, No.244--Friday, December 17, 1976, p. 55179.

(27) As of March 10, 1977 defendant invented the Office of the Associate Attorney General. Federal Register Vol.42, No.54--Monday, March 21, 1977, pp.15314-15315. But the Deputy Attorney General still remained responsible for DOJ's response to FOIA requests. Annual Report of the Attorney General of the United States 1977, U.S. Department of Justice; 28 CFR §16.3(1977).

(28) As of September 27, 1978, Mr. Shea's Office of Privacy and Information Appeals was moved into the new Office of the Associate Attorney General, and the Office of the A.A.G. assumed primary responsibility for DOJ's implementation of the Freedom of Information Act. Federal Register, Vol.43, No.194--Thursday, October 5, 1978, p.45992; The Annual Report of the Attorney General of the United States 1978, U.S. Department of Justice.

(29) By 1979 defendant's information disclosure procedures were substantially different from those in effect in 1976. A new office called the Office of Information Law and Policy was established in the Office of the Associate Attorney General, headed by its own Director and subject to the general supervision and direction of the Associate Attorney General. It became the responsibility of the Director of the Office of Information Law and Policy to coordinate DOJ's responses to FOIA requests. 28 CFR §§ 0.28,0.29(1979). Mr. Shea's Office of Privacy and Information Appeals became responsible for processing initial requests only for records of the Offices of the Attorney General, Deputy Attorney General and Associate Attorney General. It was also responsible for processing administrative appeals from initial denials, except that in the case of appeals from initial decisions in which the Associate Attorney General (hence, Mr. Shea and his staff) participated, appeals were to be processed by the Office of Legal Counsel. Annual Report of the Attorney General of the United States 1979, U.S. Department of Justice; 28 CFR §§0.19(a), 16.7(b)(1979).

(30) It is with great relief that I have been able to determine that, despite his change in title and responsibilities, the filing system utilized by Mr. Shea and his colleagues has remained substantially the same since 1976. In further aid of the Court's interpretation of Mr. Shea's statements, I have derived certain facts pertaining to that filing system from the following sources: Office of Federal Register, Privacy Act Issuances, 1979 Compilation, pp.1862,1869 (vol.3); id.,1978 Compilation, p.69(Vol.3); Federal Register, Vol.43, No.189--Thursday,September 28, 1978, p.44678; Federal Register, Vol.42, No.190--Friday,September 30, 1977, p.53354; Federal Register, Vol.42,No.43--Friday, March 4, 1977, p.12784; Office of Federal Register, Privacy Act Issuances, 1976 Compilation,vol.4 pp231-232; Federal Register, Vol.41, No.255--Friday, November 19, 1976, p.51089; and Federal Register,Vol.41,No.181--Thursday, September 16,

1976 pp. 39971-39972.

(32) The filing system utilized by Mr. Shea and his colleagues encompasses all individuals who submit certain initial requests and all administrative appeals under the Freedom of Information or Privacy Acts.

(33) Copies of administrative requests, appeals, and other related correspondence filed under the Freedom of Information and Privacy Acts are filed sequentially by date of receipt based upon a numerical identification assigned to each appeal.

(33) Also included are index cards which list the name of the appellant and the numerical identifier assigned.

(34) These records are maintained for the purpose of processing administrative requests and appeals under the Freedom of Information and Privacy Acts and to comply with the reporting requirements of those Acts.

(35) These records are stored in file folders in cabinets. These folders are filed by the number assigned to each. These records are stored in cabinets in a lockable room. These folders are kept indefinitely.

(36) The Court is respectfully referred to a copy of Mr. Shea's letter to me dated July 18,1979, which is reproduced as Exhibit I, Appendix p. 17

(37) To begin with, there are at least two (and most likely even more) additional instances of defendant "overlooking" my request and appeal to which Mr. Shea does not give any honorable mention, let alone an attempt at explanation. Under the Freedom of Information Act at 5 U.S.C.§552(d), the defendant is required to submit annual reports to the U.S. Congress concerning its implementation of the FOIA. Among other data, such reports are required to include the number of determinations made by defendant not to comply with requests for records together with the reasons for each such determination, and the number of appeals from initial denials together with the results and reasons for the action upon each appeal that results in a denial of information.

(38) Even granting Mr. Shea's assertion in the first paragraph of page 2 of his letter that the file on my case was closed in April 1978 (and he does not explain why my file was reviewed at that time), I believe that a substantial burden falls upon him to explain how he and his DOJ colleagues managed to overlook my case when compiling their data for the annual reports covering the calendar years 1976 and 1977.

(39) If the closing of my file in April 1978 is considered an action upon my appeal, Mr. Shea ought to be able to explain---without resort to sheer conjecture---what the reasons for that action were, and why this information would not be reflected in defendant's annual report to Congress covering the calendar year 1978.

(40) (Mr. Shea does not explain what prompted him and his staff to believe that they would have any better luck in 1978 in freeing the captive records from the Federal Records Center, where they were apparently being held hostage in 1976.)

(41) An additional instance of neglect of my request and appeal letters may have occurred when Mr. Shea prepared to testify at hearings before the Senate oversight subcommittee on his administrative backlog problems in 1977---if, indeed, he did prepare, and his testimony indicates that he was aware of how many appeals he had pending. Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 95th Cong.,1st Sess., on Oversight of the Freedom of Information Act, U.S. Government Printing Office, Washington: 1978 (CIS Microfiche 1978 S521-31) at page 134( "Abourezk Hearings").

(42) At page 757 of the Abourezk Hearings, the Subcommittee prints in facsimile a copy of a memorandum written by Mr. Shea, and I also include it here as Exhibit J in my Appendix at p. 20 .

This is an undated memo which Mr. Shea wrote in 1977 to his superior, Mr. Peter F. Flaherty, the Deputy Attorney General. It indicates the kind of detailed quarterly statistical accounting in which Mr. Shea was engaged during that period, a period of time when---if I read his July 18th letter to me correctly---my file was still active.

(43) I grant that Mr. Shea came forward with his letter of July 18, 1976, in advance of any discovery by me, in an obvious effort to get out in front of serious administrative irregularities. I also note that Mr. Shea expressly disclaims any knowledge of this matter until after I filed suit (please see his letter, page 1, paragraph 2). And I emphasize my contention that DOJ has not adhered to its procedures for the handling of appeals. Nevertheless, setting aside the administrative irregularities, when an official such as Mr. Shea, who is responsible for supervising the orderly and sequential processing of FOIA appeals, and for annually accounting to the Congress of the United States for that process, is at a complete loss to explain how a request letter, an appeal letter, and a follow-up inquiry all went by the wayside until acknowledgment of them was coerced by the filing of this lawsuit, or why processing of that request was begun in 1976 but prematurely terminated, then I believe that common sense dictates a presumption that the request and appeal were treated out of the normal routine course of business for the purpose of avoiding compliance therewith. (Please note at page 2 of Mr. Shea's letter: "I can assure you that this does not reflect the procedure customarily followed in this office, etc.")

(44) I now wish to turn to the last full paragraph of Mr. Shea's letter, in which he describes his staff's search.

(45) Without explaining why, Mr. Shea reports that the search was limited to the Office of the Attorney General. He states that

the files of the Office of the Attorney General were searched, without specifying the time frame of the files searched or the types of files or file groupings. The phrasing of his statement does not make clear whether the files searched were current files then present in the Office of the Attorney General or retired files ordered up from the Federal Records Center. (Neither does he make this plain in his affidavit of July 18, 1976 at page 2, paragraph 3.)

(46) Mr. Shea also states that indices for records generated by the Attorney General's office during the relevant period were checked. He does not state what reason he had to expect that these indices would reveal the existence, location or disposition of such records, or whether all Attorney General files which might contain records responsive to my request are indexed within those indices and, if not, whether non-indexed files were also searched.

(47) On July 19, 1979, two days before I received Mr. Shea's letter in the mail, I received a telephone call from Linda Robinson, a paralegal assistant in Mr. Shea's office. This telephone conversation centered upon a separate request that I had made for records from Attorney General Levi's time. (That request was subsequently satisfied by DOJ only after I provided it with the precise identification numbers of the documents I sought!) Without digressing into the nature of that request, for present purposes I shall adopt Mr. Shea's own characterization of it as dealing with "the same subject." Ms. Robinson told me that, in response to that other request, she had searched files for both the Attorney General and the Deputy Attorney General which specifically mentioned the JFK assassination. I cannot comprehend, therefore, why Mr. Shea and his staff elected to search only the Attorney General files in the present case. Ms. Robinson also stated that Attorney General records are indexed according to file titles, not according to individual records or documents within the files. Mr. Shea's statements to the opposite effect are therefore unfortunately misleading. (Contrary to Mr. Shea's unsworn assertions, Robinson declined to discuss with me the subject matter of this lawsuit.)

(48) Mr. Shea next states that his staff was "unable to locate any records pertaining to proposed or actual meetings between the Office of the Attorney General and representatives of CBS concerning the assassination of President Kennedy during this period." I have two comments to make about this statement.

(49) First, I believe that Mr. Shea reflects an unreasonably narrow interpretation of my request which likewise indicates a too narrow scope of search. It also smacks of a "negative pregnant" construction. The Court is respectfully referred to the request letter for any interpretation thereof (Exhibit E, Appendix p. 11 ).

(50) Second, Mr. Shea does not state in his letter whether his staff was able to identify records which are known to be missing or destroyed or otherwise disposed of. I am entitled to receive such reference under DOJ regulations for information disclosure (28 CFR §16.6(c): "If a requested record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the requester shall be so notified.")

(51) Finally, it can hardly inspire confidence, let alone be taken as a final DOJ response, when Mr. Shea states that, even though his staff was unable to locate records, it is entirely possible that records exist elsewhere within the Department. Nor does he explain why, in view of his superior knowledge of DOJ routing methods, he did not immediately refer the request down to the Divisions.

(52) On July 22, 1979 I wrote and sent a letter of reply to Mr. Shea. A true copy of that letter is presented as Exhibit K, Appendix p. 21 .

(53) On August 7, 1979 I received a letter dated August 2 from Michael J. Egan, Associate Attorney General, by Mr. Shea.

Having regained his composure from the catharsis of his July 18th letter, Mr. Shea here makes bold the retroactive application of recently revised DOJ information disclosure regulations to my case and a treatment of my case as though it were at initial request stage, which I consider to be arbitrary, capricious and contrary to law. A copy of the letter is reproduced as Exhibit L, Appendix p. 23 , and the Court is respectfully referred to the letter for any further interpretation thereof.

(54) The contents of Mr. Shea's affidavits overlaps his letters, and therefore they do not require separate analysis except to state the obvious: they rest mostly upon conjecture and supposition rather than upon personal knowledge.

(55) To recapitulate this portion of my Affidavit, I believe that the exercise by Mr. Shea of both initial and appellate functions in the case of this request, his narrow interpretation of the request, his strict retroactive application of his presently assigned duties, his lack of detail and clarity in relating the search procedures undertaken, and all other procedural irregularities heretofore discussed, as well as Mr. Shea's admitted uncertainty as to the existence of records responsive to my request within DOJ, all prejudice defendant's claim to summary judgment in its favor.

(56) Defendant has not brought forward evidence relating to the searches made by its various components to whom Mr. Shea referred my request. This fact alone must serve to defeat its present motion.

THE CRIMINAL DIVISION'S OFFER TO AMEND

(57) In September 1979 I received a letter dated August 30, 1979 from E. Ross Buckley, Attorney in Charge of the Freedom of Information/Privacy Unit of the Criminal Division of the DOJ enclosing "a schedule of all documents of the Criminal Division indexed to various aspects of the assassination." Mr. Buckley asked me to review the schedule ("CRM Inventory") , designate the documents I wished to be released to me, and return it to him.

Mr. Buckley's letter and the CRM Inventory are reproduced as Exhibit M, beginning at Appendix p. 25 .

(58) I respectfully submit that by identifying these documents to me in association with my May 25, 1976 request, defendant DOJ correspondingly broadened the scope of this lawsuit.

(59) The CRM Inventory is a 124-page document which, by my count, contains 2,389 separate entries. It is undated and contains no indicia of authorship or administrative purpose. Many of the entries are cryptic in their descriptions of the records inventoried. One thing that this list does prove, however, is that virtually all of the major components of DOJ have had correspondence or handled matters dealing with the JFK assassination.

(60) By letter of September 27, 1979 I returned the list to Mr. Buckley, having designated the documents I wished to be reviewed. I also asked to receive, for certain specified files, reference to missing documents. Exhibit N, Appendix p. 152 . To date, I have received no further correspondence or determination from DOJ as to my original or amended FOIA request.

(61) On January 17, 1980 I attempted to speak with Mr. Buckley by telephone but was referred by his secretary to Mr. Keith Dyson, who identified himself to me as a paralegal specialist working for Mr. Buckley. Mr. Dyson said, among other things, that he had completed reviewing File No. 129-11. He told me that he was the only paralegal assigned to review the entire CRM Inventory. Mr. Dyson further stated to me that there may be other files on the Kennedy assassination not in the CRM Inventory.

(62) Mr. Buckley has apparently made the CRM Inventory available to other researchers working in the field of the Kennedy assassination. One of them, Mr. Jeffrey Goldberg, spoke to Mr. Dyson on March 28, 1980 and memorialized the conversation in a letter to a friend the next day. The letter is reproduced as Exhibit O , Appendix p. 154. It quotes Mr. Dyson as saying, inter alia, that a substantial portion of Inventory files had been sitting on Buckley's desk for several months without action.

(63) On April 3, 1980 I succeeded in reaching Mr. Buckley directly. I informed Mr. Buckley during this conversation that I had filed a lawsuit pertaining to my original request. Mr. Buckley stated during this conversation that the Criminal Division's records were being reviewed, but that I could not expect to receive a response to my request until at least August 1980. (That response has not come.) I asked him to provide me immediately with a copy of the one document from the CRM Inventory that I could positively identify as being related to my original request. Mr. Buckley assured me that he would look for that document and send it to me, and then check out the rest of the material that I had listed in my letter and enclosure of September 27, 1979.

(64) Subsequently, I received from Mr. Buckley a copy of a document which purports to be a transcript of the interview between Dan Rather of CBS and Dr. Humes, Exhibit P, Appendix p 155. The document does not contain any indication as to how it found its way into DOJ files, but I believe that the presence of this document there implies the existence of such information either in the Criminal Division or elsewhere in the DOJ.

(65) I believe that defendant is deliberately holding back a substantive reply to my amended request during the pendency of this lawsuit and is furthermore attempting to deprive me of records from the CRM Inventory which may lead to the recovery of those records which I originally sought to acquire in May 1976. I would only note further that the time limits have lapsed on a response to my letter of September 27, 1979.

MOTIVE

(66) I believe that DOJ would have strong motives for concealing or destroying the type of records I have requested, if they exist or existed at one time, or for otherwise avoiding my FOIA request. In order to make these plain, a brief discussion of history is required.

(67) By the year 1966 a major public controversy had developed over the Kennedy assassination, and much of it centered upon the medical evidence in the case. At the risk of seeming audacious beyond belief, for present purposes the gist of the complicated controversy is easily summarized: critics of the Warren Commission's investigation and Report of 1964 complained that certain physical, documentary and eyewitness evidence pointed to more than one gunman firing shots from at least two directions at the President, and hence allegedly contradicted the findings of the autopsy pathologists upon which the Warren Commission relied heavily in concluding that there was no evidence of more than one gunman. Due to contradictions and internal inconsistencies in testimonial and other evidence, the critics complained, they were unable to derive a coherent explanation of the number and nature of the President's wounds. The "key evidence"--x-rays, photos and other materials taken at autopsy which had never been received by the Warren Commission into its evidentiary record--might clear up the doubts if made available, but such evidence was apparently missing and unaccounted for.

(68) For the sake of convenience, at certain points below I shall cite certain findings of fact of the U.S. House of Representatives Select Committee on Assassinations ("HSCA") in volume VII of the Appendix to its final Report which I know can be substantiated by reference to a multitude of other source material. Appendix to Hearings before the Select Committee on Assassinations, 95th Cong., 2d Sess., U.S. Government Printing Office: 1979. This is not meant to be either an endorsement of the Committee's interpretations, reasoning or conclusions from those facts, or a representation that I believe other facts reported by the Committee to be correct.

(69) On October 31, 1966 the photographs and x-rays taken at President Kennedy's autopsy became the property of the U.S. Government as a result of the delivery of a deed of gift dated October 29, 1966 (and the materials themselves) from the Kennedy

family to the National Archives (7 HSCA 3 par.16). On that date a delivery ceremony took place at the Archives. Among those present was Harold F. Reis, executive assistant to the Attorney General.(7 HSCA 26 par.121).

(70) Attorney General Clark initiated the action to acquire the materials transferred in the October 1966 deed of gift pursuant to Public Law 89-318, enacted on November 2, 1965. This law provided that the acquisition by the United States of certain items of evidence pertaining to the assassination of President Kennedy had to be completed within one year (7 HSCA 28 par.131). Relying on its staff's interview with Clark, HSCA states that, when Clark learned the time limit for obtaining the evidence was approaching, he contacted Robert Kennedy, "who was not sympathetic to the Government's need to acquire the autopsy material." Rather heated negotiations ensued between Clark and Burke Marshall, the Kennedy family representative, which resulted in the October 29, 1966 agreement constituting the deed of gift (7 HSCA 28 par.131 ).

(71) Certain physical specimens associated with the body of the late President were not included in this transaction (7 HSCA 3 par.16). The fact that these materials were missing from the collection of autopsy-related material which had purportedly been in the possession of Robert F. Kennedy was discovered by Reis and the other participants in the delivery ceremony on October 31, 1966 (7 HSCA 27 par.123). "Several of the physical materials--microscopic tissue slides, tissue sections of organs, bone fragments, and the brain--that the autopsy pathologists had acquired during the autopsy and retained for future examination are unaccounted for today."(7 HSCA 23 par.98.)

(72) "In November 1966, the autopsy pathologists reviewed the autopsy x-rays and photographs now in the custody of the National Archives. They did so at the request of the Department of Justice, which wanted to determine their consistency with the autopsy report." (7 HSCA 3 par.14.)

(73) On November 1, 1966 the DOJ publicly announced that the photos and x-rays had been turned over to the National Archives by the Kennedy family. As reported by the New York Times of November 2, 1966 (page 1, col.8), the DOJ outlined the restrictions that had been placed on access to the materials: they would be available to Federal law-enforcement agencies, but for the next five years access by scholars and other non-official investigators would be granted only with the Kennedy family's consent. Burke Marshall would serve as the family's representative in deciding who could see the material. According to the same Times article, the DOJ reported that two Navy doctors who took part in the autopsy had just seen the photos and x-rays for the first time and had said that the material corroborated their testimony to the Warren Commission and the Commission's conclusions about the wounds.

(74) On November 3, 1966, the New York Times reported at page 20,col.1, Burke Marshall as saying he would not grant any private person access to the photos and x-rays for five years, and he would bar the news media even longer.

(75) The next significant public reference to the autopsy materials occurred in January 1968, when the National Archives released the text of the government's agreement with the Kennedy family.(Exhibit Q , Appendix p. 163.)

(76) Finally, for these purposes, the next public reference to the materials came on January 17, 1969 in a proceeding entitled United States ex. rel. State of Louisiana v. James B. Rhoads, District of Columbia Court of General Sessions, Misc. 825-69A, January 1969(Judge Charles W. Halleck, Jr.). This was an attempt by Jim Garrison, then the District Attorney of Orleans Parish in New Orleans, to subpoena the autopsy x-rays and photos for use in a prosecution somehow related to the assassination. At that time, defendant DOJ disclosed information which had not hitherto been made public. This included the fact that the three original

autopsy pathologists had been called upon by DOJ to make a second examination of the autopsy materials in secret on January 20, 1967. As part of DOJ's effort to oppose Garrison in the 1969 court proceeding, it produced in the government's opposition papers a copy of a blank letterhead memorandum dated January 26,1967 from the autopsy surgeons, summarizing the findings of their re-examination of the autopsy photos and x-rays. Again, the existence of this report had not been previously disclosed. Exhibit R, Appendix p. 166.

(77) When I first became aware of this re-examination and new report by the original autopsy doctors, I was intrigued by the possibility that there was some assassination-related activity occurring at DOJ in early 1967 of which the public has never been informed. Efforts by DOJ to ascertain the authenticity and chain-of-possession of the autopsy materials( questions which were not matters of public dispute back in 1966-1967) were further suggested to me when, on August 27, 1979,the United States Secret Service released to me under the FOIA a statement which it had supplied to Mr. Barefoot Sanders, former Assistant Attorney General for the Civil Division of DOJ, on February 23,1967 relating to its agents' handling of the autopsy films. This is reproduced as Exhibit S, Appendix p. 169.

(78) On October 31, 1980, after the instant case had been set upon the motion calendar, I obtained a copy of a document which purports to be a copy of a DOJ memorandum dated April 30, 1975. (I did not receive this document from DOJ or any of its components.) This is a document of the very highmost significance. It reveals the existence, during Ramsey Clark's tenure as Attorney General, of an ad-hoc inter-divisional task force to review the evidence in the Kennedy assassination. The document is reproduced as Exhibit T, Appendix p. 174. The existence of this

task force has never been made publicly known by DOJ. The document states that the task force was headed by Carl Eardley, who was then the Acting Assistant Attorney General for the Civil Division. The Secret Service document previously discussed indicates that Eardley's predecessor, Barefoot Sanders, was also concerned with the assassination review. Sol Lindenbaum, also referred to in the DOJ memo, was the Executive Assistant to Attorney General Clark.

(79) Despite defendant's recalcitrance and obduracy, the pattern of events begins to emerge. Clark could have legally claimed the autopsy x-rays and photos outright, with or without the Kennedy family's acquiescence, yet he did not do so for reasons still unknown. What he did acquire from the aggrieved family was an agreement by them to take public responsibility for denying public access to the films. During the October 31, 1966 Archives delivery ceremony Mr. Reis, by comparing documents of prior transfer and receipt dating back to April 1965 with the autopsy materials there before him, ascertained the identity of physical specimens from the autopsy which were neither a subject of the Clark-Marshall negotiations nor included in the October 1966 transfer. (The public was not to learn that the specimens were gone until August 1972.) The very next day, DOJ had two of the original autopsy surgeons (the third was stationed at Tan Son Nhut in Vietnam at the time), their radiologist, and their medical photographer examine the x-rays and photos for the purpose of identifying them as complete and authentic. Further measures were undertaken thereafter by DOJ to establish a record of authenticity and chain-of-custody, including the extraordinary second inspection by the pathologists on January 20, 1967. (There is no evidence in the public record that DOJ attempted during this period--when Robert F. Kennedy was still living--to ascertain the fate of the missing specimens.)

(80) Meanwhile, U.S. Congressman Theodore Kupferman began (within two months of the Archives transfer) to build a record of correspondence documenting his unsuccessful efforts to gain

access to the forbidden autopsy films for himself and others. See Exhibit U, Appendix p.176. Kupferman's efforts to re-open the assassination investigation in Congress attracted media attention.

(81) Clark and the government were further placed on the defensive in mid-February 1967 when news broke of Jim Garrison's investigation of a possible New Orleans conspiracy to assassinate President Kennedy. Less than two weeks later, on March 1, 1967, the New York Times quoted Clark as expressing doubts that Garrison had found evidence of a conspiracy; the Warren Commission's findings, Clark said, were backed by "overwhelming evidence." Before another two weeks had passed, Clark was reported to have repeated his skepticism about the value of Garrison's probe.

(82) As early as January 27,1967, DOJ had been on notice that CBS was planning its documentary. This is shown by a teletype from the FBI's field office in Dallas to Mr. Hoover, which was released by DOJ in 1978 under FOIA. Exhibit V, Appendix p.185. Referring again to Exhibit D, Appendix p.10, the CBS memo describing a meeting with Clark, one can discern a news organization eager in its solicitation and uncritical in its acceptance of government assistance in its documentary production. (How, for example, would Clark be able to bypass Marshall's authority in order to help them?) Clark, for his part, apparently misled CBS, knowing that he already had a report from the autopsy surgeons who had seen the x-rays and photos but not letting on about it.

(83) It is my belief that Clark and his colleagues seized upon the opportunity which had been presented to them, and used CBS in a public relations thrust to attempt to settle the dust, without compromising the task force's review of the autopsy materials' authenticity. Additional proof in the form of records responsive to my original request would probably be embarrassing to all concerned.

(84) Furthermore, if it should develop that Clark arranged a new and special examination of the autopsy films between May and June 1967 for the benefit of CBS, as well as the Humes-CBS interview, such records might reveal Clark's and defendant's interpretation of the Marshall agreement (or sideletters thereto or other parol evidence) such as would allow Clark to do so, despite the lack of explicit provision for same in the agreement. His reported statements to CBS indicate that Clark interpreted that agreement, which he negotiated, as vesting in himself a like degree of control over access as was vested in Burke Marshall.

(85) Finally, the records I seek may give clues and lead to the release of records of the DOJ task force which reviewed the assassination evidence. And that would represent a wealth of data and insight which DOJ possibly prefers private citizens who are interested in the assassination not to have.

CONCLUSION

(86) The major issue in this litigation is the adequacy of defendant's search for records in the light of my request and defendant's superior knowledge of its own files, filing systems and routing methods. Defendant's search has been inadequate. Moreover, by according my request and appeal treatment out of keeping with its own regulations and routine office methods, defendant has shown its unwillingness to comply with my request and the FOIA. Defendant has had 4½ years to do so, an ample amount of time; it does not deserve any further extensions. There is no material issue of fact in dispute, and I therefore respectfully submit that I am entitled to summary judgment as a matter of law.

WHEREFORE, I pray for summary judgment as follows :

1. Enjoining defendant from withholding records responsive to my Freedom of Information Act request of May 25, 1976 and reference to whether any such records have been destroyed or otherwise disposed of, and ordering defendant to release same to me immediately and without any further delay.

2. Granting me leave to amend my complaint to incorporate defendant's failure to release to me those of its Criminal Division Inventory records which I requested on September 27, 1979; enjoining defendant from withholding those records; and ordering defendant to release the same to me immediately and without further delay.

3. Ordering the Clerk of the Court to place this action on inactive status, and retaining jurisdiction in order to monitor defendant's compliance with the Court's orders.

4. Relieving me of the time limitation of Rule 59(e) of the Federal Rules of Civil Procedure, so that I may bring on a motion for an award of attorneys fees under § 552(a)(4)(F) of the Freedom of Information Act.

5. Granting me such other and further relief as to the Court may seem just, proper and equitable, together with the costs and disbursements I incurred in the within action.

Roger B. Feinman
ROGER B. FEINMAN

Sworn to before me this
17th day of November 1980

Martin Bitterman
Notary Public

MARTIN BITTERMAN
Notary Public, State of New York
No. 41-5322096
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1982

Civil Action No. 79 C 1537

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROGER B. FEINMAN,

Plaintiff,

-v-

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT WITH LEAVE TO AMEND THE COMPLAINT

Roger B. Feinman
Plaintiff Pro Se
142-10 Hoover Avenue
Apartment 404
Jamaica, New York 11435

# CBS MEMORANDUM

FROM: Leslie Midgley
TO: MR. SALANT cc: Messrs. Leonard, Manning & Miss McCloy
DATE: May 15, 1967

I had a very useful day in Washington Friday. Dan Rather, Joe DeFranco and I met with Ramsey Clark. I explained what we were doing. I told him that if we were completely shut off from the color pictures and X-rays all we could do was state that fact and indicate that if available they might tend to set to rest at least some of the rumors and suspicions.

He saw the point and obviously would rather, if possible, have someone to examine them and make a statement about their content than have us deplore their unavailability.

I said I would like to have a man we select do the examining, but if that were not possible would like at least to have a film interview or statement from one he would select. He thought this the most likely prospect and indicated that it might be one of the three autopsy doctors. He remarked that only Finck was a forensic pathologist, which indicates that he has pretty good information in this area. If he can get Finck back from Vietnam that would be great for us -- as a matter of fact anything in this direction would be a real coup.

Severeid was most enthusiastic when I described what we are doing. He thinks the project should be a great public service, is as important as anything we could do. Eric wrote a letter to the Chief Justice outlining our project and asking if he would appear. He said not to be too optimistic but there was a chance. That, of course, would be a coup of the first order.

Eric resisted the idea that he do an interpretive piece, but I think we really need him in the area of why the public does not accept the Report. I think we all should encourage him to develop a good analysis piece for the third episode.

L. M.