UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROGER B. FEINMAN, Plaintiff, -v- THE UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 79 C 1537 (ERN)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND LEAVE TO AMEND COMPLAINT

By: Roger B. Feinman
Plaintiff Pro Se

Return Date: December 1, 1980

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ROGER B. FEINMAN,

Plaintiff,

-v-

UNITED STATES DEPARTMENT OF JUSTICE,

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"As an agency of the Federal Government, the Justice Department has not shown itself to be a model in its administration of the Freedom of Information Act."

--"Agency Implementation of the 1974 Amendments to the Freedom of Information Act." Report on Oversight hearings by the staff of the subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary of the United States Senate. United States Government Printing Office, Washington:1980 at page 139.

This lawsuit seeks under the Freedom of Information Act, 5 U.S.C. §552, as amended, to recover records of defendant relating to the assassination of President John F. Kennedy , which were requested by plaintiff on May 25, 1976. Jurisdiction is based upon the Act. The action was commenced by the filing of a complaint on June 14, 1979, and service of the summons and complaint was performed by the U.S. Marshall shortly thereafter. The former Attorney General of the United States, Griffin Bell, was named and served as a defendant in the action, but shortly after his resignation from that office it was stipulated by the parties that the action as against

Mr. Bell should be dismissed, and his original co-defendant, the United States Department of Justice, remains as sole defendant. Defendant has moved for summary judgment dismissing the within complaint. Plaintiff, by his answer and cross-motion, seeks summary judgment in his favor.

STATEMENT OF FACTS

On May 25, 1976 plaintiff Roger B. Feinman sent a Freedom of Information Act request letter addressed to Mr. Quinlan J. Shea, Jr., Chief of the Freedom of Information and Privacy Unit within the Office of the Deputy Attorney General at the United States Department of Justice. Mr. Shea was the official responsible for processing initial requests for records of the Department of Justice, and for appeals from denials of requests in which the Office of the Deputy Attorney General had not participated, all on behalf of the Deputy Attorney General.

Defendant failed to reply to plaintiff's request within the time limit prescribed by the Freedom of Information Act; neither did it request any extension of time.

Plaintiff voluntarily sent a letter of appeal for the requested records on June 19, 1976 to the Honorable Edward Levi, then Attorney General of the United States. Levi did not reply to this appeal.

By letter of August 12, 1976 defendant advised plaintiff that processing of his FOIA request had begun. Such processing was prematurely terminated without notification or final response to plaintiff. The defendant closed its file on plaintiff's request sometime in April 1978.

On June 10, 1978 plaintiff wrote to defendant asking to be

informed of the status of his request, but that inquiry was ignored and placed in defendant's closed file.

On June 14, 1979 plaintiff commenced the instant action. On July 21, 1979 plaintiff received a letter from Mr. Shea dated July 18, 1979. In that letter, Mr. Shea alleged that a series of bureaucratic mishaps had prevented defendant from responding to plaintiffs Freedom of Information request, apologized for those mishaps while disclaiming any knowledge of them, and informed plaintiff that his staff had searched current records of the Office of the Attorney General and an index to the files of former Attorney General Ramsey Clark for the period May-June, 1967, but had been unable to locate records responsive to plaintiff's request. After further correspondence between plaintiff and Mr. Shea, plaintiff's request was referred to several of defendant's Divisions.

In August 1979 the Criminal Division of the Department of Justice on its own initative produced for plaintiff an inventory of documents in its files relating to the assassination of President Kennedy and invited plaintiff to request documents from the inventory list. Plaintiff did so, but defendant has failed to respond further or release all but one of the documents requested by plaintiff.

The major issue in this litigation is plaintiff's contention that defendant's search for records has been inadequate, incomplete, and not reasonably calculated to either identify, locate or retrieve the records requested.

DISCUSSION

> In order to prevail on an FOIA motion for summary judgment, 'the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.' National Cable Television Association, Inc. v. FCC, 479 F.2d 183,186(1973). In determining whether an agency has met this burden of proof, the trial judge may rely on affidavits....The agency's affidavits, naturally, must be 'relatively detailed' and non-conclusory, Vaughn v. Rosen, 484 F.2d 820,826(1973), cert. denied, 415 U.S. 977, 94 S.CT. 1564, 39 L.Ed.2d 873(1974), and must be submitted in good faith . But if these requirements are met, the district judge has discretion to forgo discovery and award summary judgment on the basis of affidavits.

Goland v. Central Intelligence Agency, 607 F.2d 339, 352 (D.C. Cir., 1978). In a case where an agency claims inability to locate requested records, it must demonstrate their unavailability sufficiently to entitle it to summary judgment. Founding Church of Scientology of Washington, D.C.,Inc. v. National Security Agency , 610 F.2d 824, 833 (D.C.Cir., 1979). To support such a claim, the agency must substantiate its search as of a caliber sufficient to assure the retrieval of all existing data. Weisberg v. United States Department of Justice, 48 Pike & Fischer Ad.Law 2d 571,580 (D.C.Cir. 1980) , reversing 438 F.Supp. 492(D.C.,D.C.,1977) The adequacy of the agency's search is a matter dependant upon the circumstances of the case. Founding Church of Scientology of Washington, D.C., Inc. v. National Security Agency, supra., at 834.

Here, defendant does not show its good faith when, amidst effusive apologies, its deponent recounts an inherently implausible series of procedural defaults, including the unilaterally aborted and mysterious first search for records in 1976. Nor does it show such good faith when its deponent represents that his office and responsibilities are the same as they were in 1976.

Furthermore, defendant does not show its good faith in its mischievous,retroactive application of present Department regulations governing information disclosure, to the effect that a request originally directed at discovering all responsive Department of Justice records is magically transformed into a request of more limited scope, Compare, 28 CFR§§0.15(b)(5), 16.1, 16.3, 16.4(a)(1976) with, 28 CFR§§ 0.28,0.29(1979), and see S.E.C. v. Chenery Corp, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995(1947); or in its denial to plaintiff of procedural due process by allowing the same official and staff to act as the judge of their own case, see 28 C.F.R.§§16.5(d), 16.7(b)(1976), 28 C.F.R.§§ 0.19(a),16.7(b)(1979), and see, United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039(1974); Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012(1959); Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403(1957; United States ex.rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681(1954)(An agency is bound by its own regulations.).

Moreover, defendant cannot sustain its heavy burden of proof when it shows that it seized upon a segregable portion of plaintiff's Freedom of Information request and confined its search to current records of the Office of the Attorney General and file titles of Attorney General Clark's tenure in office, especially when its deponent admits that, when Attorneys General leave office their agency records are routed back to the component of the Department of Justice concerned with such records. And, while defendant's deponent himself raises the possibility in his letter of July 18,1979 that records responsive to plaintiff's request exist elsewhere within the Department of Justice, defendant offers no evidence relating to the searches within its Divisions.

It is respectfully submitted that defendant's response to this lawsuit is inadequate, and that it cannot demonstrate on the basis of its submitted papers that the scope of its search for records was sufficient, complete, and reasonably calculated to identify, locate or retrieve the records requested. To grant to defendant summary judgment dismissing the within complaint would be to allow it to circumvent the Freedom of Information Act on a pitifully weak showing.

Although defendant's knowledge is superior in this regard, plaintiff has set forth in his affidavit and exhibits circumstantial evidence of the existence of files which may contain records responsive to his original FOIA request. It is likely that defendant's tactics of delay and confusion are to protect records associated with a heretofore secret Department of Justice task force which reviewed the Kennedy assassination evidence in 1967.

This Court can direct defendant to disclose whether or not the documents requested by him exist and, if they do, to furnish copies to plaintiff. Cf. Weberman v. National Security Agency, 490 F.Supp.9 (S.D.N.Y., 1980); Hayden v. U.S. Department of Justice, 413 F.Supp.1285 (D.C.D.C., 1976). In addition, this Court can order defendant to comply with 28 C.F.R.§16.6(c), which has consistently provided that if a requested record is known to have been destroyed or otherwise disposed of, the requester shall be so notified.

Finally, by identifying other records associated with the Kennedy assassination to plaintiff, defendant enlarged the scope of his original request and of this suit, but the case will not be mooted by production of the CRM Inventory records unless they contain records responsive to plaintiff's original request.

Fensterwald v. U.S. Central Intelligence Agency, 443 F.Supp.667,668 (D.C.D.C.,1977). Plaintiff respectfully requests leave to amend his complaint accordingly in the interests of justice and in view of his showing that the CRM Inventory records may lead to the discovery of information he originally sought.

CONCLUSION

For all the forgoing reasons, defendant's motion for summary judgment dismissing the within complaint should be denied, and plaintiff's cross-motion for summary judgment with leave to amend the complaint should be granted in all respects.

Respectfully submitted,

Roger B. Feinman, J.D.
Plaintiff Pro Se
142-10 Hoover Avenue
Apartment 404
Jamaica, New York 11435
(212) 526-2362