

"persons employed by a university, college, or library." Why are such persons, whether janitors or professors,

so many years old when the sheer willfulness of the whole enterprise will collapse the house inward upon itself.  HW

#### THE FBI SHREDS ITS FILES

## CATCH IN THE INFORMATION ACT

### JOHN ROSENBERG

Amid the seemingly endless disclosures brought about under the Freedom of Information Act and the Privacy Act there is a little-noticed development that threatens to make a mockery of that well-intentioned legislation. With the cooperation, if not complicity, of the National Archives, the Federal Bureau of Investigation and other government agencies have embarked upon a "government-wide record destruction program" that has in all likelihood already destroyed most of the inactive investigative files located in FBI field offices—and unless something is done soon, numerous files in FBI Headquarters will meet the same fate.

One alarm has been sounded. Writing in this journal last October, Athan Theoharis cited the March 26, 1976 agreement between the National Archives and the Justice Department that authorized the destruction of "closed files of the Federal Bureau of Investigation containing investigative reports, inter- and intro-office communications, [and] related evidence. . . ." Fearing that the meager staff of ten in the Records Disposition Division of the National Archives responsible for the FBI was insufficient to monitor the destruction of FBI files, Theoharis warned that "existing law and regulations do not appear adequate to guarantee retention of public papers, thus assuring that the Freedom of Information Act will give access to the full record of federal agency practices." (See "Double-Entry Intelligence Files," by Athan Theoharis, *The Nation*, October 22, 1977.)

My recent experience suggests that this warning was

*John Rosenberg is writing a biography of Clifford Durr on a grant from the Rabinowitz Foundation.*

well advised. For the past year I have been working on a biography of Clifford Durr. Beginning in the early 1940s, Durr became a prominent critic of J. Edgar Hoover, loyalty investigations and the entire apparatus of the domestic cold war. An Alabama lawyer and brother-in-law of Hugo Black, he went to Washington with the first wave of New Dealers in 1933, serving in the Reconstruction Finance Corporation, then as General Counsel and Director of the Defense Plant Corporation, and finally as Federal Communications Commissioner from 1941 to 1948, when he was the leading figure in creating and expanding the role of public radio and television. In 1948 he refused reappointment to the FCC because of his opposition to Truman's loyalty program and spent the next two years practicing law in Washington, serving as president of the National Lawyers Guild and spending most of his time representing people who had lost their jobs because of the loyalty program. Unable to make a living at that, and after a year in Denver as counsel to the National Farmers Union, he returned to Alabama in 1951 and soon became one of the few white Southern lawyers to identify himself with the civil rights movement. (It was Durr, incidentally, who secured Rosa Parks's release from the Montgomery jail after she was arrested for refusing to move to the back of the bus.)

Last February Durr's widow and I began to request "all the material in FBI files" concerning the two of them, and 646 heavily censored pages were finally turned over to me on October 17, 1977 (66 additional pages were released following my appeal). Only then did I learn that the FBI treated my application—and pre-

sumably all similar ones—as a request limited to information in the FBI Headquarters files in Washington and that it was necessary to write separate letters to each field office that might have relevant material. I was also told at this time that the field offices were rapidly destroying their old files.

I wrote to the Mobile, Ala. field office on October 19, 1977. My letter was promptly acknowledged on October 26 by the SAC (Special Agent in Charge), who informed me that his staff was "currently in the process of searching our files so as to ascertain what information is pertinent to your request. Upon completion of this project, any information deemed to be within the scope of your request will be furnished to you."

On November 8 he wrote again, sending 6 pages of material. He added that his search had turned up indications of two extensive files on the Durrs, but they "no longer exist as they were previously destroyed in conformity with a Government-wide record destruction program."

Intrigued, I immediately wrote back asking when those files had been destroyed and how the 6 pages had managed to avoid a similar fate. On November 23 the SAC sent a reply that was as disturbing in its substance as in its syntax:

During late October, 1977, at a time contemporaneous to our Mobile Office receipt of your Freedom of Information Act (FOIA) request, a directive was issued from our FBI Headquarters at Washington which made the field office file destruction program immediately mandatory. Attendant to the directive were specific instructions as to the assignment of available manpower and for a vigorous pursuit of the file destruction program consistent with the guidelines previously established.

In compliance with this directive and as a result of circumstances which are factually and completely unrelated to your FOIA request, the two files I referred to in my previous correspondence to you were destroyed. Our records here at Mobile reflect that these two files, along with a multitude of other similar investigative-type materials, were destroyed on November 3, 1977. Again, let me emphasize there is absolutely no relation to the destruction of the two files and your FOIA request.

The files, in short, were not only destroyed nine months after my initial request to the FBI for "all the material in [its] files," but two weeks after the receipt of my request in the Mobile office. Even if one accepts the assurance that the destruction was unrelated to my request, the SAC's letter is alarming, since it reveals a mandatory destruction program of all old files, with apparently no—and obviously inadequate—supervision or review. The existence of this program was confirmed when I complained to the office of the Deputy Attorney General, Quinlan J. Shea Jr., Director of the Office of Privacy and Information Appeals, replied to me on December 9 that "the occurrence you described is extremely unfortunate. The destruction was the result of the concurrent existence of two distinct administrative programs—FOIPA [Freedom of Information Privacy Appeals] and destruction—with, it would appear, insufficient coordination between those actually administering them.

I am personally satisfied," he added, "that only administrative error was involved, as opposed to any wrongful intent to deny you access to the requested records."

One should be thankful, I suppose, that the intent was not wrongful, but this general program of destruction is seriously disturbing, quite aside from any implication of evil motives or administrative incompetence. According to Ronald Ostrow of the *Los Angeles Times*, who is investigating the record destruction program, the bureau's response to this concern is that all "substantive" material would have been forwarded to FBI Headquarters anyway, but that argument is not persuasive. An investigative agency's criteria for what is substantive simply are not the same as a scholar's. For example, the 6 pages that escaped destruction in Mobile (the SAC explained that they were "administrative-type files" and not "investigative-type files," and hence not included in the destruction program), were significant and they were not included in the material I received from Headquarters, even though they involved communications between Headquarters and Mobile over whether to release information to a Red-hunting Alabama Attorney General in 1961. (Hoover chose not to.) In addition, the Washington D.C. field office (WFO) subsequently released 91 pages, and virtually none of them were duplicated in the Headquarters material. (Earlier the Washington field office had estimated that it had between 250 and 500 pages that could be released, and it is likely that they withheld everything they had forwarded to Headquarters, as I requested. Of course, there is no way of knowing whether any of these 91 pages is duplicated in material FBI Headquarters refused to release to me, and there is plenty of that. One is reminded here—and elsewhere—of an observation Henry Adams made in *The Education*: "Material furnished by a government seldom satisfies critics or historians, for it lies always under suspicion.")

Although the FBI presumably does not regard anything in these 91 pages as substantial, much of it is in fact important, revealing and useful. To pick one instance, in 1964 the Durrs traveled to Washington for a testimonial affair in honor of their good friend Aubrey Williams, who as head of the National Youth Administration in the New Deal had, among other things, given Lyndon Johnson his first political job. The affair and Clifford Durr's speech were reported in *The Washington Post*; FBI Headquarters notified Mobile, which in turn requested the Washington field office to send "any information furnished to WFO by informants pertaining to the activities of DURR and Mrs. VIRGINIA DURR while they were in Washington." The Washington field office duly sent a copy of the *Post* article but had to report that "No information was received from informants in this office relative to the visit of the DURRS to Washington."

Now there is nothing "substantive" here, and there is no mention of this episode in the papers I have from FBI Headquarters, and yet there are those who would regard it as a matter of some significance that in 1964 the bureau took note of one old New Dealer honoring another; that the Mobile field office was concerned

enough about the Durrs to want their movements monitored; that sympathetic association with Aubrey Williams was cause for official concern (and the reverse was no doubt true; Williams's file must note that CLIFFORD and VIRGINIA DURR attended his testimonial); and that WFO had a network of informants to report on such matters.

As matters stand, however, the question of whether all the important information in the field offices had been forwarded to FBI Headquarters before destruction may be academic, for the "Government-wide record destruction program" is about to spread to the Headquarters files themselves. Officials in the FOIPA branch at the FBI claim, Ostrow reports, that no "historically significant" material will be destroyed, but so far they have said neither who will attempt to formulate the crucial criteria nor who will apply them. It is not even clear whether they mean that only the record of famous cases or individuals will be preserved, or that they intend to read each file, saving parts and destroying parts—a seemingly impossible task. In either case, the criteria should be established and approved before destruction begins.

Using the Durr files as an example, and assuming for the moment that they would not have been totally destroyed as historically insignificant, one may wonder how an intrepid team of FBI document evaluators would regard such evidence as the following that is included in them:

¶ Indications that Durr was hounded because of his criticism of the bureau. In December of 1947, after a particularly bitter public dispute with J. Edgar Hoover over loyalty reports on applicants for radio licenses that the FBI sent on its own initiative to the FCC, one of Hoover's assistants wrote another: "It would be my recommendation that we not, at this time, open a loyalty investigation on Clifford Durr. I believe that we should wait until a loyalty form is received on him. To open an investigation at this time prior to the receipt of the loyalty form could easily be construed by him and publicized as persecution in view of his attack on the Bureau. . . . I think it would be better to wait until the loyalty form is received, at which time the Bureau has the definite responsibility of making the investigation." When his loyalty form did arrive, the FBI didn't quite know what to make of it. A 1949 "Background Report" notes: "On December 12, 1947, Durr's loyalty form was filled out in what appears to be a sarcastic or at least facetious manner, e.g., Aliases, 'Pat,' 'Pinky,' 'Daddy,' 'Grandpa'; Organizations: Sigma Alpha Epsilon; Group Health Associates, Inc., Exalted Order of Giraffes." (The latter, by the way, was a group of friends who happened to be tall.)

¶ Letters—two to members of Truman's Cabinet—that were stolen from Durr's desk. SAC, Denver, to the Director, November 4, 1950: "On November 3, 1950, —, whose identity should be protected, made available to the following two letters which he had obtained from Mr. Durr's desk and/or file."

¶ A copy of the inscription written by Corliss Lamont in one of his books that was in the Durrs' library—pro-

vided by an informer posing as a friend who also reported on dinner-table conversations, guests, etc.

¶ Abundant evidence that, once the Durrs were back in Montgomery, the FBI was primarily interested in their work on behalf of integration. In 1962 SAC, Mobile, wrote Hoover that "Mrs. Durr is not known to have any current CP organizational functions or activities whereas she is publicly known to be sympathetic to Negroes in all current race troubles and issues." In 1964 Hoover wrote Mobile that Mrs. Durr "has never been identified as a Communist Party member. She was extremely active in integration activities over the years. . . . In addition, subject is considered to be a non-conformist. . . ." In 1964, when Durr was invited to deliver a series of lectures at English universities, Hoover alerted the CIA and the State Department: "Clifford Durr is a well-known proponent of civil rights for all and has been outspoken in his opposition to Government loyalty investigations and investigating committees in the past. . . . Mrs. Durr . . . is extremely active on behalf of integration activities at present."

¶ Eventually, Mrs. Durr was no longer seen as a threat to the national security, although for an interesting reason. Hoover to SAC, Mobile, November 13, 1968: "In view of fact that subject is a housewife it would appear that she no longer qualifies for inclusion in Section A of the Reserve Index."

Should the FBI be allowed to decide whether material like this is historically significant? Indeed, could the FBI, even with the best of intentions (I found several people in the FOIPA branch and the field offices who were especially concerned and helpful), and with expert assistance from the National Archives or the American Historical Association, ever formulate acceptable criteria that would balance the interest in the preservation of valuable historical documents with the right to privacy that was reaffirmed and mandated by the Privacy Act of 1974?

There is an irony here, for the justification of, and reason for, the record destruction in the first place is the requirement in the Privacy Act—placed there at the insistence of civil libertarians—that each federal agency "maintain in its records only such information as is relevant and necessary to accomplish a purpose . . . required to be accomplished by statute or by executive order of the President." Further, no federal agency may maintain records "describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained unless pertinent to and within the scope of an authorized law enforcement activity."

The FBI, in short, is caught in the middle of a familiar struggle between historians, who champion the public's right to know, and Congress, which has shown a commendable—if late-blooming—concern for the right to privacy. As a historian, my view is that Congress was too hasty in requiring the wholesale destruction of documents, even documents the government had no business securing in the first place. I believe, further, that the rights of people whose privacy was invaded by the FBI

and other government agencies over the years can be protected by measures short of that wholesale destruction.

Surely the public does have a legitimate interest in learning how public agencies—especially sensitive ones like its national police force—have behaved in the past, and valuable history can be written from records that even conscientious investigators would not regard as significant. Thus, records that were created at public expense to serve public policy should be preserved. Moreover, if a belated concern for the right to privacy is the real reason for the destruction, shouldn't the FBI be required to secure the permission of the subjects of those files before destroying them? Certainly some investigatees would want to waive their newly appreciated right to privacy in the interest of preserving the historical record of a shameful period in our history. Or are their preferences to be ignored in the suddenly popular rush to protect their rights? And what of the dead—who speaks for their posthumous concern for privacy? Finally, destruction of the files will not right the wrongs that were done; it will only destroy the evidence of them.

In short, acceptable criteria for saving and destroying

some of each file would seem impossible to formulate, and destroying all but a few celebrity files would also be a calamity. Why not, instead, save the whole sordid lot of it (or what's left), store it in the National Archives, and limit access in the ways research libraries have always done, such as requiring advance permission of the subjects of the files, or closing them until a specified number of years after their deaths?

It is neither necessary nor wise for Congress to amend the Privacy Act—transferring the files to the National Archives would in itself prevent the originating agency from maintaining them—but the Government Information and Individual Rights Subcommittee of the House Committee on Government Operations should be urged to hold immediate hearings to rescind or revise the March 1976 agreement that authorizes and sets guidelines for the record destruction program.

It is a misguided conception of civil liberties that attempts to compensate for their abuse by obliterating the historical record of those abuses. Forgetting the past cannot right its wrongs, and may contribute to their recurrence. □