Mr. Alan Fitzgibbon
P.O.Box 34071
Bethesda, Md. 20817

9/1/84

Dear Alan,

Jim Lesar has sent me copies of your 8/24 to him and your 8/22 to Page Miller.

I agree entirely with what you say about the importance of and interest in the CIA's foreign operations in graf 2 of your letter to Jim, but I suggest that there is still considerable interest in its domestic operations, particularly dirty ones, and that exposure of these might have more impact on the Congress.

On the second page of your other letter, 2d full graf, you wonder about why security markings were deleted. Two purposes are served, if not more. One is that if a classified document is disclosed it must first be declassified, and that required deleting security markings. Another purpose serves the requesters' interests. They cannot be charged with improper possession of a classified record if the classification is ended.

I'm not familiar with the CIA's Sims brief ( page 3, 2d full graf), but it seems to me that if you know that someone was an informant, it is not confidential and has been disclosed and therefore is not within any exemption. If they haven't, I'd guess that they invoke another provision, protection of information provided by that source only.

Best wishes,

Harold Weisberg

August 24, 1984
P. O. Box 34071
Bethesda, Maryland 20817

Mr. James H. Lesar
Suite 900
1000 Wilson Boulevard
Arlington, Virginia 22209

Dear Jim:

Great job!

1. The most serious problem I have with the entire memo is its over-emphasis on the Family Jewels aspect of the bill, which I imagine comes from the ACLU, and on assassinations. The FOIA is supposed to allow the public to examine all aspects of an agency's operations and, though Reagan issued an executive order unleashing the CIA domestically, the agency is still supposed to operate mostly abroad. Historians, political scientists, journalists, and others ought to be interested in its routine foreign operations, as in Angola, Cuba, or Indonesia--and your memo should reflect that interest.

2. Capitulation by whom? I would favor going farther in analyzing the ACLU's various positions on the bill and showing clearly that it does not give them by any means all that they said they wanted. Perhaps some of Glaser's statements in The Nation can be cited.

3. "Public interest" should mean "public benefit," but I've noticed that bureaucrats often manipulate the former to mean a topic in which the public has demonstrable interest at the moment. That excludes most things that would benefit public knowledge if the public knew about them. And, of course, the bureaucrats often take it upon themselves to define what interests the public currently.

4. This section could be strengthened by mentioning the CIA's standard obstructionist tactics: often it will do nothing more than acknowledge receipt of a request unless the requester writes several letters; then it puts him off with vague promises as in Hoch's case or demands hugely unreasonable fees and quibbles endlessly about waivers; then it asks for releases from U.S. citizens and resident aliens with their birthdates and Social Security numbers; then it processes at about a half-word a minute; then it submits Vaughns that are meaningless boilerplate, forcing any conscientious judge into in camera review; then it asks for extension after extension, etc., etc.

Have you given thought to the form in which the memo should be typed to accompany the ad hoc committee letter to House members? Perhaps a cover page with the title at the top followed by your name as author and then an alphabetic, uncentered, and perhaps two-column list of the people who associate themselves with the memo? What phrase are you going to use with those who associate themselves? For busy readers, should there be subheads to structure the text quickly?

Cheers!

Alan

Alan L. Fitzgibbon

August 22, 1984
P. O. Box 34071
Bethesda, Maryland 20817

Dr. Page Miller
National Coordinating Committee for
the Promotion of History (NCC)
American Historical Association
400 A Street, S.E.
Washington, D.C. 20003

Dear Page:

Further to our telephone conversation, I asked Jim Lesar, a lawyer-friend in Rosslyn who has represented many FOIA plaintiffs in the local district and appellate courts and who has just finished an analysis of HR 5164's implications, to send you a copy of his study and he has done so. I enclose a copy of the House government operations committee's July 31 markup, which is the basis of his analysis and which I assume will be the House version voted on on September 10.

If you have any comments on Jim's analysis, will you get them back to him as quickly and by the quickest means possible? He should prepare the final version by next midweek so that it can be distributed in time for the following week's maneuvers.

You asked about my case and the extent to which I would not have received what I have had HR 5164 been law.

Let me note at the outset that many requesters do not pursue the CIA vigorously because they lack the time or are daunted by the agency's formidable stonewalling; many plaintiffs' lawyers do not have the FOIA experience they need or cannot give cases adequate time because of their contingency basis; and all but a handful of judges intensely dislike the FOIA and are loathe to undertake de novo, in camera review, as the law allows.

If I have succeeded where few others have, it has been because the reasons for failure I just mentioned have been reversed: I had a considerable knowledge of the Galindez case before bringing suit, knew in general what CIA documents should exist and what they should contain, and had the orneriness to pursue the CIA; I have had exceptionally able pro bono representation by Steve Doyle at Wilmer, Cutler & Pickering, a firm with great resources; and we were exceptionally lucky in drawing Judge Harold Greene, one of the very few conscientious and unintimidated members of the local district court.

I present all these thoughts not to toot my own horn or Steve's or Greene's, but to demonstrate that when the right combination of circumstances occurs the

CIA can be made to obey the law. This, of course, runs contrary to the ACLU's tacit assumption that the CIA's "operational" files are unreviewable.

The 966 documents the CIA has so far processed for me fall into two categories, 895 which Judge Greene has adjudicated on various occasions, chiefly in his decision of last November, and 71 that it processed in response to my supplemental request.

The 895 documents comprise 646 that the CIA originated and 249 FBI documents containing CIA information. Two hundred thirty-six (26.4 percent) of the 895 documents were totally withheld and 64 (7.2 percent) that were released were in the public domain or had only security markings deleted (why such deletions were made I don't know since the CIA supplied me all document classifications in separate letters). This produced 595 releases of partially declassified material (the figure is actually somewhat higher since some documents counted as one were really two or three separate documents) and 831 documents on which Judge Greene needed to rule.

The extent of censoring in the 595 documents released varied considerably. Some had little left but their page numbers; others were largely intact. In general, however, the deletions were quite heavy. But it should be emphasized that that did not render the documents entirely useless since I could use them to establish patterns and dates of communication and, by collating what information they did contain with other information, extract either firm data or useful hypotheses from them.

The CIA could assert up to half a dozen exemptions for each document--and then often many times--once it was required to Vaughn them. Because of the boiler-plate nature of its Vaughns and for other reasons, it would be almost impossible to determine the exact number of exemptions the agency asserted in all the documents. In his principal decision of November 10, 1983, Judge Greene made 692 rulings on the claimed exemptions, 280 (40.5 percent) of which were in my favor. In certain exemption areas such as privacy his rulings were unclear and still confuse both the CIA and me.

Last November's decision caused the CIA conniptions. It immediately submitted a motion for reconsideration, accompanied by a ten-page affidavit by Director William Casey claiming perfervidly and quite repetitiously that U.S. national security would face "exceptionally grave danger" if quarter-century-old Confidential documents about the Trujillo regime were disclosed. The tone of the Casey affidavit can only be described as near-hysterical.

Judge Greene agreed to reconsider, whereupon the CIA brought a case officer out of retirement (Greene later seemed to doubt that the CIA had done so because he referred to the retiree as "alleged") to prepare a Top Secret affidavit presenting "new" facts and arguments. Significantly, the agency had said in its motion for reconsideration that the reason it had not presented these "facts" and

"arguments" on several earlier possible occasions was that it had no idea that the judge would rule against it. Other judges didn't do such monstrous and unpatriotic things, it commented.

The upshot of the reconsideration was that Judge Greene reversed 64 of his November rulings in my behalf and maintained himself in my favor 45 times. Copies of both his November 1983 and July 1984 decisions are enclosed.

Since he gave the CIA a second shot, Steve Doyle and I are about to ask Judge Greene for ours too under a different procedural rule than that the CIA used. Among other things, I show in an affidavit soon to be submitted to the court that two of the CIA's sources, one an extremely prominent Trujillo regime figure who was one of the CIA's most frequent informants, have recently died and so no longer merit protection. If the judge agrees with this position, he will logically have to order the agency to disclose hundreds of additional source mentions and the information the two sources provided. Needless to say, the CIA argues in its Sims brief before the Supreme Court that all sources, including the dead and the New York Times, should be protected forever.

My present case will go to the local appeals court about the same time Steve makes his motion in the lower court, and he is predicting that if the Supreme Court decides Sims narrowly enough, our own case will end there too. As you know, the language in S 1324 that would quash all pending litigation against the CIA was removed from HR 5164, which would kill only complaints filed after last February 7.

The other category of documents the CIA has processed consists of 71 new items found in response to my supplemental request. Fourteen (19.7 percent) of the 71 were totally withheld and three (4.2 percent) were in the public domain, so that in this go-round the CIA released 54 partially declassified documents. These documents, plus 240-odd others which I have identified but which have not been processed, still have to be Vaughned and litigated.

Two things are noteworthy about the total of 966 documents. First, 86 percent of them are now more than a quarter-century old. And second, fewer than 5 percent of them would have been released had HR 5164 been law.

I am sure I have forgotten a few interesting things, so please feel free to ask about whatever occurs to you. I will be in touch very shortly after you return from Pittsburgh.

Sincerely yours,

Alan L. Fitzgibbon

enclosures