

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

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BY: _____
DEPUTY CLERK

SHERRY ANN SULLIVAN,)
)
 Plaintiff)
)
 v.)
)
 UNITED STATES DEPARTMENT OF)
 JUSTICE, et al.,)
)
 Defendants)

Civil No. 87-0305 B

ORDER

The Government has presented affidavits from all the defendant agencies detailing the specific procedures they took in searching for documents that might refer to the plaintiff's father, Geoffrey Sullivan, and to Alexander Rorke.¹ The Government maintains that these affidavits show that each agency engaged in a reasonable search of its records to find documents referring to Sullivan and Rorke. If on their face the affidavits are relatively detailed and nonconclusory and if they reflect reasonable searches conducted in good faith, they should entitle the Government to summary judgment unless the plaintiff presents countervailing evidence. Miller v. United States, 779 F.2d 1378, 1383 (8th Cir. 1985).

¹ Mr. Sullivan and Mr. Rorke apparently disappeared on September 24, 1963, after leaving a Miami airport in a Beech Craft airplane bound for Tegucigalpa, Honduras. They reportedly landed at Cozumel, Mexico the same afternoon and departed but failed to reach their destination in the Honduras.

REASONABLENESS OF THE SEARCHES

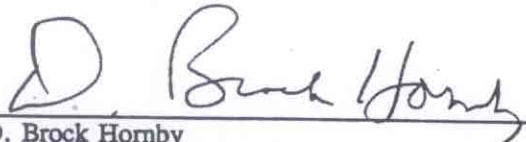
Considering the length of time this matter has been in litigation and the orders that have issued in the companion case, Maynard v. Central Intelligence Agency, I find the overall quality of the affidavits submitted here appalling. For INS the description of the search is marginal. There is no explanation as to how INS chose what units to search or how a search in the Miami Border Patrol office was carried out. So far as I can see Army has not provided a description of how its records are kept or the search procedures it has used. Customs does not state that its TECS data base is the only likely source of information. I cannot tell whether the FBI provided copies of "ticklers." (Ticklers are copies of documents and from time to time have written marginalia that may be helpful.) The Defense Intelligence Agency's affidavit does not even refer to a search but speaks only of documents that have been sent to it by the FBI. The CIA affidavits talks about appropriate searches "in keeping with the provision of the CIA Information Act of 1984," leaving me to guess whether or not documents are being withheld because of some provision in that statute.

EXEMPTIONS

I find the briefing by both parties on the issue of whether documents were properly withheld to be utterly confusing and unhelpful. The plaintiff's legal memorandum and other filings are turgid. On the Government's side there are (for example, in the case of the FBI) an abundance of codes and cross-references that are impossible to follow. There is no way I can evaluate whether the standard reasons for withholding documents that are cited in the affidavits are true here or apply to these documents. The notion of judicial review makes little sense

unless I am to see each of the documents and have a lawyer tell me as to each deletion or withholding the precise reason justifying the exemption. Any other procedure would seem to make a mockery of the process. Since this and Maynard v. Central Intelligence Agency are my first Freedom of Information Act cases, however, I will hear from the lawyers any better method of proceeding. The Clerk's Office will schedule an early conference of counsel to discuss how to proceed in this matter, whether by setting the case immediately for trial on the issue of the searches' reasonableness together with an in camera hearing on the claimed exemptions; or such other procedures as the lawyers may propose. I expect the parties' lawyers to come fully prepared to explain matters to me better than their briefs have accomplished to date.

Dated at Portland, Maine this 21st day of February, 1992.



D. Brock Hornby
United States District Judge


County Clerk

In this manner, the Court may conduct the judicial review in a neutral manner without having to examine each underlying document yet while maintaining the principles of neutral judicial review about which the Court expressed some concern in its Order.

C. No In Camera Review Is Required

In camera review is not appropriate here and ought to be used as a last resort only. Hayden, 608 F.2d at 1387. Nonetheless, should the Court find that such review is required, arrangements, with appropriate security, will be made through the agencies. Before moving to this stage, merely because plaintiff continues to posit broad-based dissatisfaction, the Court ought to consider some of the policy implications.

Counsel is advised by agency counsel that plaintiff has filed FOIA claims on behalf of several other persons. Because any person may file their own claim, it is suggested that obtaining venue in the District of Maine is one of the purposes of such activity. Moreover, the presence of Mr. Lazar, described by agencies as being devoted to FOIA litigation, filing affidavits, faxing documents and the like, yet not appearing before the Court, furthermore suggests to counsel that this is part of an attempt to locate venues more favorable than the District of Columbia which has traditionally borne the brunt of FOIA litigation. In camera review, in a case where the plaintiff has failed to provide record support for any of its contentions, has failed to accept or seriously consider⁷ any reasonable settlement despite having

⁷ Counsel notes that three of his four offers respecting settlement of the case were rejected by telephone messages left by opposing counsel's secretary. Only when defendants' counsel insisted on counsel-to-counsel discussions were negotiations resumed.