

FILED

FEB 04 2003

SECRET

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE LARDNER, JR.)
5604 32rd Street, NW)
Washington, DC 20015)

Plaintiff,)

v.)

UNITED STATES DEPARTMENT OF JUSTICE,)
10th & Constitution Avenue, NW)
Washington, DC 20530)

Defendant.)

CASE NUMBER 1:03CV00180

JUDGE: John D. Bates

DECK TYPE: FOIA/Privacy Act

DATE STAMP: 02/04/2003

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff brings this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to challenge the Department of Justice's decision to withhold information submitted to the Department and former Presidents in connection with applications for pardon or clemency. Plaintiff, in the course of researching a book on the presidential use of the pardon power, has requested access to files on pardon and clemency requests that were submitted prior to January 20, 1989 and are still being held by the Office of the Pardon Attorney within the Department of Justice. Records created prior to January 20, 1989, that contain confidential communications requesting or submitting advice between the President and his advisers, and communications between Presidential advisers, have been released under the Presidential Records Act, 44 U.S.C. § 2204, and in other contexts. However, the Department has withheld thousands of pages of the pardon and clemency records on the basis that recommendations, deliberations, and the names of individuals in these records should not be disclosed, despite the age of the records.

1

JURISDICTION

2. This Court has jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 as this case arises under the FOIA.

PARTIES

3. Plaintiff George Lardner is a reporter for the Washington Post and an author. Mr. Lardner has a contract with Public Affairs Press to author a book on the history and use of the Presidential pardon power.

4. Defendant United States Department of Justice is an agency of the United States. The Office of the Pardon Attorney ("OPA") is a component of the Department of Justice, and it has possession and control over the records that Plaintiff seeks.

BACKGROUND

5. OPA receives and reviews petitions for all forms of executive clemency, except for petitions relating to military offenses.

6. The OPA initiates investigations of clemency requests, and prepares a report and recommendation of the Attorney General (or his designee) to the President on clemency requests.

7. The report and recommendation is known as a Letter of Advice. It is drafted for the signature of the Deputy Attorney General and is submitted for his review.

8. If the Deputy Attorney General concurs with the OPA's assessment, the Deputy Attorney General signs the recommendation and returns the Letter of Advice to the OPA. If the Deputy Attorney General disagrees with the disposition proposed by the OPA, the Deputy may direct the Pardon Attorney to modify the Department's recommendation.

9. After the Letter of Advice is signed by the Deputy Attorney General, it is transmitted to the Counsel to the President for the President's action on the request.

10. The OPA maintains records on applications for clemency. The records maintained by the OPA include correspondence relating to the applications, reports and recommendations submitted to the OPA, and the Letters of Advice to the President and accompanying papers.

11. Some Letters of Advice concerning petitions for pardon or commutation from 1960 and later years have been transferred to the custody of the Archivist and the National Archives and Records Administration as records of permanent historical value. Other Letters of Advice from this period remain in the custody of the OPA.

Request for Letters of Advice, 1960-1989

12. By letter dated April 19, 2002, Plaintiff requested, pursuant to FOIA, "[a]ll letters of advice and attachments thereto, including but not limited to recommendations for approval and for denial, in the office of the U.S. Pardon Attorney, concerning petitions for pardon or commutation from 1960 through January 20, 1989." The Department identified this request as DOJ No. 2002-32.

13. Plaintiff and the OPA subsequently agreed to exclude from the scope of the April 19, 2002 request any recommendations that may be contained in the individual clemency case files that the OPA stores in its off-site records facility.

14. By letter dated May 7, 2002, the OPA announced that it had identified 10,2000 recommendations that are responsive to the April 19, 2002, request. The letter also announced that OPA had determined that it would withhold the records in their entirety because "it is the legal position of Justice Department" that these documents are exempt from disclosure under 5 U.S.C. § 552(b)(5) and because it is the position of the Department that most, if not all, information contained in these documents is exempt from disclosure pursuant to FOIA's exemptions for personal privacy, 5 U.S.C. § 552(b)(6) and (b)(7).

15. By letter dated June 6, 2002, Plaintiff appealed the OPA's decision to withhold all records responsive to the April 19, 2002 request in their entirety. The Department identified this appeal as Appeal No. 02-2445. The Department received this appeal letter no later than June 12, 2002.

16. Plaintiff has exhausted his administrative remedies with respect to his FOIA request for Letters of Advice in the possession of the OPA.

Requests for Files on Twenty-Five Historical Pardon Files

17. By letter dated March 7, 2001, Plaintiff requested, pursuant to FOIA, all materials – petitions, letters of support, memoranda, letters, telephone records, and legal briefs – concerning the granting of executive clemency to Jimmy Hoffa by President Nixon on December 22, 1971. The Department identified this request as FOIA request No. 2001-79.

18. By letter dated April 20, 2001, the Department responded to this request by announcing that it had determined that 800 pages of records would be released with partial redactions based on 5 U.S.C. § 552(b)(6) and (7)(C), and that it was withholding “several hundred pages” of responsive documents in their entirety on the basis that these records are exempt from disclosure under 5 U.S.C. § 552(b)(5). The April 20, 2001 letter also stated that “[w]e are currently considering whether, and to what extent, a discretionary disclosure of these deliberative materials would be appropriate in this case.”

19. By letter dated April 25, 2001, the Department reported that, “[a]fter consulting with the White House counsel's office, we have determined that a discretionary release of such deliberative documents would not be appropriate in this case. No further documents will be released.”

20. By letter dated May 9, 2002, the OPA announced that it had decided to release an additional 40 pages of records from the Hoffa pardon file. The OPA also announced that it had referred 17 pages to the Office of Legal Counsel and 7 pages to the United States Parole Commission.

21. By letter dated June 13, 2002, the Office of Legal Counsel released the documents referred to that Office in response to Plaintiff's FOIA request with one redaction. The agency did not specify its basis for withholding the redacted information.

22. By letter dated October 15, 2002, the United States Parole Commission announced that it had determined that documents referred to that Office in response to Plaintiff's FOIA request should be released in full.

23. By letter dated May 25, 2001, Plaintiff appealed the OPA's decision to withhold records and portions of records responsive to his FOIA request. The Department identified this appeal as Appeal No. 01-2514.

24. By letter dated June 12, 2002, the Department responded to Plaintiff's appeal by announcing that it had decided to affirm the OPA's decision to withhold records and portions of records pursuant to 5 U.S.C. § 552(b)(5) and (6).

25. By letter dated April 19, 2002, Plaintiff requested the pardon files of twenty-four additional named individuals. More specifically, Plaintiff requested, pursuant to FOIA, "[a]ll petitions for pardon or commutation and Reports of the U.S. Pardon Attorney, including letters of advice furnished to the President, correspondence with the White House, and presidential responses" for individuals identified in the letter. The Department identified this request as FOIA Request No. 2002-33.

26. By letter dated April 19, 2002, Plaintiff also requested, pursuant to FOIA, "[a]ll records in the U.S. Pardon Attorney's files on the twenty-five individuals listed below, including reports to the Pardon Attorney and other documents reflecting any exchanges with the prosecutors, judges, wardens, deputy U.S. Attorney General's office and other officials contacted about the case, background checks and pre-sentence investigations — but excluding the petitions for pardon or computation, which are subject to a separate request."

27. The twenty-five individuals listed in the April 19, 2002 letters are: James R. Hoffa, David Beck, Lester Binion, William Bioff, Joseph Civello, James Curley, Iva D'Aquino (a.k.a., Tokyo Rose), John Ehrlichman, John Factor (a.k.a., Jake the Barber), Marcus Garvey, Harry Golden, Herman Greenspun, Armand Hammer, Tomoya Kawakita, Otto Kerner, Carlos Marcello, John Mitchell, Richard Nixon, David L. Parr, William Presser, Julius and Ethel Rosenberg, Frank Sturgis, Seymour Weiss and Harrison Williams.

28. With the exception of David Parr, the individuals identified in the April 19, 2002, requests are deceased.

29. Each of the individuals identified in the April 19, 2002, requests either received a pardon or commutation from a former President or submitted an unsuccessful petition for pardon or commutation to a former President prior to January 20, 1989.

30. With the consent of Plaintiff, the Department excluded from the scope of the April 19, 2002 requests, voluminous Japanese language documents from the Kawakita file, trial transcripts of the Rosenbergs' trial, and documents related to a FOIA lawsuit by the Rosenberg children.

31. By letter dated June 18, 2002, the Department announced that, in response to the April 19, 2002 requests, the Department had decided to release 3,454 pages of documents with partial redactions pursuant to 5 U.S.C. § 552(b)(5), (6) and (7)(C). The release of these records

represented a first installment of documents in response to Plaintiff's request for records on these individuals.

32. In the letter dated June 18, 2002, the Department also announced that it had decided to withhold in their entirety 525 records from the files concerning Joseph Civello, David Beck and Tomoya Kawakita. The OPA maintains that these documents are properly withheld pursuant to 5 U.S.C. § 552(b)(5).

33. In the letter dated June 18, 2002, the Department also announced that it had referred 77 pages to the FBI for a determination whether the records should be released under the FOIA.

34. By letter dated August 20, 2002, the Department announced that, in response to Plaintiff's FOIA request, the Department had decided to release 7,000 pages of records with partial redactions pursuant to 5 U.S.C. § 552(b)(5), (6) and (7)(c). The Department also announced that it had decided to withhold 1,539 records in their entirety pursuant to 5 U.S.C. § 552(b)(5).

35. The August 20, 2002 letter also announced that the OPA had decided to withhold 57 pages from the file concerning David Parr, including the clemency application and correspondence between OPA and Parr and his attorney. These records were withheld in their entirety on the grounds that they were exempt from disclosure under 5 U.S.C. § 552(b)(5), (6) and (7)(C). The OPA released five documents from the file concerning David Parr, with partial redactions pursuant to 5 U.S.C. § 552(b)(5), (6) and (7)(C).

36. The August 20, 2002, letter also announced that the OPA had referred 1447 pages of responsive documents to the to FBI, 119 pages of responsive documents to the Bureau of Prisons, 38 pages of responsive documents to the Internal Revenue Service and 23 pages of responsive documents to the United States Parole Commission.

37. By letter dated October 29, 2002, the United States Parole Commission released the documents referred to that Office in response to Plaintiff's FOIA request in full.

38. By letter dated, September 12, 2002, Plaintiff appealed the OPA's decision to withhold records and portions of records responsive to his FOIA request for the files on twenty-five individuals who applied for clemency between 1960 and 1989. The Department designated that appeal IOP Number 02-3554.

39. By letter dated August 21, 2002, the FBI announced that it had determined to release, in part, records relating to the pardons of Iva D'Aquino and Armand Hammer.

40. Plaintiff has exhausted his administrative remedies with respect to his FOIA requests for the files on the pardon applications of the individuals identified in paragraph 27.

COUNT ONE — WRONGFUL WITHHOLDING OF RECORDS

41. Plaintiff has a statutory right to release of the Letters of Advice and other portions of the historical pardon files identified in his requests of March 7, 2001 and April 19, 2002, and there is no legal basis for the Department's failure to make those records available promptly.

CLAIM FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

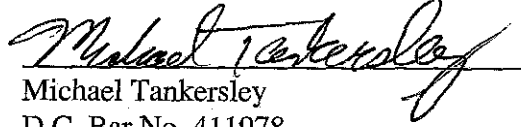
(A) Declare the Defendant's withholding of the requested records and portions thereof unlawful;

(B) Order Defendant to make the requested records available to Plaintiff without further delay;

(C) Award Plaintiff its costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(e); and

(D) Grant such other relief as this Court may deem just and proper.

Respectfully submitted,



Michael Tankersley

D.C. Bar No. 411978

Allison M. Zieve

D.C. Bar No. 424786

PUBLIC CITIZEN LITIGATION GROUP

1600 20th Street, N.W.

Washington, D.C. 20009

(202) 588-1000

Attorneys for Plaintiff

Dated: February 4, 2003