UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH SCHOENMAN Plaintiff v. FEDERAL BUREAU OF INVESTIGATION, et al. Defendant	:	Civil Action No. 04-2202 (CKK)

REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO REQUIRE RELEASE OF ALL NONEXEMPT DOCUMENTS BY A DATE CERTAIN

Plaintiff Ralph Schoenman ("Schoenman") has filed a motion to require most of the named defendants to release all nonexempt materials responsive to his requests by July 14, 2005, a date four years after nearly all of the requests were submitted. Defendants employ hyperbolic language to characterize Schoenman's motion, describing it as an "extraordinary motion, a "novel motion," an "unprecedented motion," and a motion which seeks "highly unreasonable relief."[1] See Defs' Opp. at pp. 2, 4, and 6. At the same time, defendants represents that "the vast majority of the defendant agencies already have responded to plaintiff's requests," that at present only two agencies (the Department of State and the Defense Intelligence Agency) "are still processing responsive records that originated with their agency," and that Schoenman's motion is "unnecessary" and "could almost even become moot" because

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[1]There is nothing "extraordinary," "novel," or "unreasonable" about plaintiff's motion. Plaintiff's counsel has represented FOIA litigants in more than 125 civil actions filed over the past 35 years. He has made similar motions in a number of these cases.

"most, if not all, defendants plan to have filed their dispositive motions before even the deadline date proposed by plaintiff." Id., at 5-6.

Given these representations, the obvious question is why would defendants oppose his motion requiring compliance which they represent they will meet (except with respect to the agencies--the Air Force and the National Security Agency--which claim never to have received his requests)? Their own representations support the case for issuance of such an order because they not only are not saying that they cannot provide the records by July 24, 2005, they haven't made any factual showing under Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (1976) which requires them to do so to obtain a stay of proceedings.

They do cite Caifano v. Wampler, 588 F. Supp. 1392 (N.D.Ill., E.D.1984) for the proposition that "[f]aced with comparable circumstances, other courts have been understandably reluctant to set a deadline for an agency to respond to a FOIA request." Def's Opp. at 4. However, Caifano is from another circuit and it noted other cases in which courts had set deadlines for disclosure, citing as examples Hinton v. Federal Bureau of Investigation, 527 F. Supp. 223 (E.D.Pa.1981), and Hamlin v. Kelly, 433 F. Supp. 180 (N.D.Ill. 1977). Most important, Caifano was decided in 1984, long before the FOIA was amended in 1996 to make it much more difficult for an agency to support a claim for delay. Thus, an agency seeking delay under current FOIA must show that its delay in responding to a request does not "result[] from a predictable agency workload of

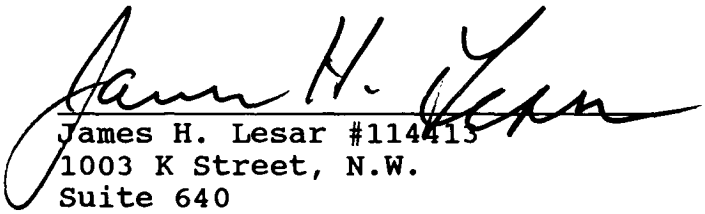
requests . . ., unless the agency demonstrates reasonable progress in reducing its backlog of requests." 5 U.S.C. § 552(a)(6)(C)(ii). Obviously, a four-year delay in responding to a FOIA request would require a very strong showing to justify the delay, and one that Schoenman suggests defendants have not made because they cannot.

Even with respect to the Defense Intelligence Agency ("DIA") and the State Department, the two agencies defendants say are still processing records, it makes no case for a delay beyond July 24, 2005. With respect to the State Department, it represents that it will be making "its own final release of nonexempt records well in advance of plaintiff's proposed deadline of July 24, 2005." Def's Opp. at 5, footnote omitted. With respect to the Defense Intelligence Agency, defendants state that it is currently processing "responsive records it recently found. . . ." An agency seeking a stay under Open America must show that it is exercising "due diligence" and has proceeded to process the request "in good faith." An agency which has only found the responsive documents nearly four years after the request was made can hardly be said to be acting diligently, and questions are also thereby raised about whether or not it has been acting "in good faith." Moreover, DIA claims only that it has located "a significant number of records," but gives no idea whether the number is 15 pages or 15,000 pages. Accordingly, it has provided no basis for excepting itself from an order that all nonexempt materials be released by July 24, 2005.

Finally, defendants assert that the National Archives and Records Administration received no request from Schoenman dated

March 31, 2003. Plaintiff will agree that NARA should not be subject to a court order setting a deadline for production of nonexempt materials with respect to that request. However, NARA should not be exempted from having to provide the materials sought by his March 4, 2002 request by July 24, 2005.

Respectfully submitted,



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James H. Lesar #114415
1003 K Street, N.W.
Suite 640
Washington, D.C. 20001
Phone: (202) 393-1921

Counsel for Plaintiff