

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BARBARA FEINMAN
The Pearl Project
Center for Public Integrity
910 17th Street, N.W.
Suite 700
Washington, D.C. 20006

and

GARRETT M. GRAFF
1828 L Street, N.W.
Suite 200
Washington, D.C. 20036

Plaintiffs

v.

Civil Action No. 09-_____

FEDERAL BUREAU OF
INVESTIGATION
Washington, D.C. 20535

and

EXECUTIVE OFFICE FOR
UNITED STATES ATTORNEYS
Washington, D.C. 20530

and

DEPARTMENT OF JUSTICE
Washington, D.C. 20530

Defendants.

* * * * *

COMPLAINT

This is an action brought by journalists Barbara Feinman and Garrett Graff, and where appropriate on behalf of all other similarly situated individuals, under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, et seq., as amended, Federal Declaratory

Judgment Act, 28 U.S.C. § 2201 and the Administrative Procedures Act (“APA”), 5 U.S.C. § 701 et seq., for the disclosure of agency records pertaining to certain foreign terrorists and to challenge continuing agency practice to categorically refuse to process requests for records concerning foreign nationals without proof of death or submission of a privacy waiver, as well as the failure to inform requesters of their right to administratively appeal such a constructive denial.

JURISDICTION

1. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the defendant pursuant to 5 U.S.C. §§ 552(a)(4)(B), 702 and 28 U.S.C. § 1331.

VENUE

2. Venue is appropriate under 5 U.S.C. §§ 552(a)(4)(B), 703 and 28 U.S.C. § 1391.

PARTIES

3. Plaintiff Barbara Feinman (“Feinman”) is the Journalism Director for the English Department at Georgetown University and co-director of The Pearl Project. She is a representative of the news media as that term is defined by the FOIA statute. Feinman has had previous FOIA requests, including concerning foreign terrorists such as Khalid Sheikh Mohammed, who admitted to beheading American reporter Daniel Pearl, and Richard Reid, the “shoe bomber”, returned without having been processed for failing to provide a privacy waiver.

4. Plaintiff Garrett M. Graff (“Graff”) currently serves as the Editor for *The Washingtonian Magazine*. He is a representative of the news media as that term is defined by the FOIA statute.

5. Similarly situated individuals include anyone who, within six years of the filing of this Complaint, submitted a FOIA request to the defendants Federal Bureau of Investigation or Executive Office for United States Attorneys seeking records, or appealing to the Department of Justice's Office of Information and Privacy a denial concerning records, pertaining to a foreign national and whose request was not processed due to the absence of a submission of proof of death or a privacy waiver and/or were not provided with notice of the opportunity to appeal the response.

6. Defendant Federal Bureau of Investigation ("FBI") is an agency within the meaning of 5 U.S.C. §§ 552 (e) and 701(b)(1). The FBI is in possession and/or control of the records requested by Feinman and Graff, and all similarly situated individuals, which are the subject of this action. The FBI maintains an unlawful policy requiring the submission of privacy waivers or proof of death before agreeing to process requests seeking records pertaining to foreign nationals.

7. Defendant Executive Office for United States Attorneys ("EOUSA") is an agency within the meaning of 5 U.S.C. §§ 552 (e) and 701(b)(1). The EOUSA is in possession and/or control of the records requested by Graff, and all similarly situated individuals, which are the subject of this action. The EOUSA maintains an unlawful policy requiring the submission of privacy waivers or proof of death before agreeing to process requests seeking records pertaining to foreign nationals.

8. Defendant Department of Justice ("DOJ") is an agency within the meaning of 5 U.S.C. §§ 552 (e) and 701(b)(1). It controls the components National Security Division ("NSD"), Criminal Division ("Crim") and the Office of Information and Privacy ("OIP",

all of which are in possession and/or control of the records requested by Graff which are the subject of this action.

CLASS ACTION ALLEGATIONS

9. This action is brought by Feinman and Graff on their own behalf and on behalf of the class of all others similarly situated under the provisions of Fed. R. Civ. P. 23(a) and (b).

10. The class so represented by Feinman and Graff in this action, and of which they are members, consists of anyone who, within six years of the filing of this Complaint, submitted a FOIA request to the FBI or EOUSA seeking records pertaining to a foreign national and whose request was not processed due to the absence of a submission of proof of death or a privacy waiver and/or were not provided with notice of the opportunity to appeal the response.

11. The exact number of members of the class, as hereinabove identified and described, is not known but it is reasonable to believe the class is so numerous that joinder of individual members is impractical.

12. The relief sought is common to the entire class, and there are common questions of law and fact that relate to and affect the rights of each member of the class. These common questions include and involve whether the defendants' policy to refuse to process FOIA requests for records without submission of proof of death or a privacy waiver is unlawful, as well as their failure to provide requestors with notification of their appeal rights. Certain defenses raised by the defendants would apply equally to all members of the class.

13. The claims of Feinman against the FBI and Graff against the FBI/EOUSA are typical of the claims of the class in that the claims of all members of the class depend on a showing of the acts and omissions of defendants as giving rise to rights to the relief sought herein. There is no conflict as between Feinman and Graff and other members of the class with respect to this action, or with respect to the claims for relief contained herein.

14. Feinman and Graff are representative parties for the class, and are able to and will fairly and adequately protect the interests of the class. The attorneys for Feinman and Graff are experienced and capable in litigating the claims at issue and have successfully represented claimants in other FOIA matters of this nature. Attorney Mark S. Zaid of Mark S. Zaid, P.C., who has been litigating FOIA cases for nearly 20 years and has taught the D.C. Bar CLE course on FOIA annually since 2003, will actively conduct and be primarily responsible for the conduct of the action on behalf of the plaintiff class.

15. This action is properly maintained as a class action in that the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of others not party to the adjudications, or would substantially impair or impede their ability to protect their interests.

16. This action is properly maintained as a class action inasmuch as the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

COUNT ONE
(FOIA – FEINMAN – FBI)

17. By facsimile dated April 13, 2009, Catherine Beirne (“Beirne”) submitted a FOIA request to the FBI requesting copies of records, including all cross-references, which pertain to Taliban commander and suspected Al Qaeda terrorist Qari Ismail, who has been credited with downing a U.S. Special Forces Chinook helicopter in June 2006 that killed 16 U.S. soldiers. Beirne indicated that the FBI could restrict the time frame for the request to records created since January 1, 2000 and up to the date of acceptance of the request.

18. By letter dated April 17, 2009, the FBI assigned the request No. 1129261-000 and returned it to Beirne on the basis that the FBI required the submission of proof of death or a signed privacy waiver from Qari Ismail before it would begin processing the request for records. The letter contended that, absent proof of death or a signed privacy waiver, any responsive records, should they exist, were categorically exempt as unwarranted invasions of privacy by way of FOIA Exemption Six and (7)(C). The letter included a Privacy Waiver and Certification of Identify form. The letter failed to accord Beirne any rights to an administrative appeal of the FBI’s refusal to process the FOIA request.

19. By facsimile dated August 27, 2009, Feinman submitted two letters to the FBI. The first letter, signed by Beirne, informed the FBI that Beirne was lawfully assigning her rights and interests in the FOIA request to Feinman. The second letter, signed by Feinman, informed the FBI that Feinman was accepting the lawful assignment of rights and interests in the FOIA request.

20. Feinman has constructively exhausted any or all necessary administrative remedies.

21. Feinman has a legal right under the FOIA to obtain the information she seeks, and there is no legal basis for the denial by the FBI of said right

COUNT TWO
(FOIA – GRAFF –EOUSA)

22. By letter dated January 23, 2009, Graff submitted a request to the EOUSA for certain files pertaining to the investigation, capture and prosecution of former Panamanian General Manuel Noriega (“General Noriega”).

23. By letter dated January 30, 2009, EOUSA assigned the Request No. 09-237 and returned it to Graff on the basis that records pertaining to a third party generally cannot be released absent express authorization and consent of the third party, proof of death or a clear demonstration that the public interest in disclosure outweighs the personal privacy interest and that significant public benefit would result from the disclosure of the requested records. According to the letter, absent any of those the release of records concerning a third party would result in an unwarranted invasion of personal privacy and would be in violation of the Privacy Act. The letter also explained that the records would generally be exempt from disclosure pursuant to sections (b)(6) and (b)(7)(C) of FOIA. The EOUSA did indicate that Graff could appeal the decision.

24. By letter dated February 24, 2009, Graff submitted an administrative appeal to the DOJ OIP. In the appeal, Graff stated that given General Noriega’s current status as a prisoner of war in the custody of the United States it was not necessary to secure permission in order to secure release of responsive records. Graff explained that he

intended to use any records produced to contribute to public understanding of government operations and activities with regard to the case against General Noriega. Lastly, Graff noted that General Noriega is not a citizen of the United States and is not privy to personal privacy rights.

25. By letter dated March 6, 2009, DOJ OIP acknowledged receipt of the administrative appeal and assigned it Appeal No. 09-1154.

26. By letter dated September 8, 2009, DOJ OIP affirmed the decision by EOUSA to require consent, proof of death or demonstration that the public interest in disclosure outweighs the personal privacy interest and that significant public benefit would result from the disclosure of the requested records prior to conducting any search for responsive records. The letter indicated that Graff could file a lawsuit to challenge the denial.

27. Graff has exhausted any and all necessary administrative remedies.

28. Graff has a legal right under the FOIA to obtain the information he seeks and there is no legal basis for the denial by the EOUSA of said right.

COUNT THREE
(FOIA – GRAFF – DOJ NSD)

29. By letter dated January 23, 2009, Graff submitted a request to the DOJ National Security Division (“NSD”) for certain files pertaining to the investigation, capture and prosecution of General Noriega.

30. By letter dated February 5, 2009, DOJ NSD acknowledged receipt of Graff’s request and assigned it Request No. 09-065.

31. As twenty working days have elapsed without a substantive determination by the DOJ NSD concerning Graff's request, he has therefore constructively exhausted all required administrative remedies.

32. Graff has a legal right under the FOIA to obtain the information he seeks, and there is no legal basis for the denial by the DOJ NSD of said right.

COUNT FOUR
(FOIA – GRAFF – DOJ CRIM)

33. By letter dated January 23, 2009, Graff submitted a FOIA request to DOJ Crim for certain files pertaining to the investigation, capture and prosecution of General Noriega.

34. As twenty working days have elapsed without a substantive determination by the DOJ Crim concerning Graff's request, he has therefore constructively exhausted all required administrative remedies.

35. Graff has a legal right under the FOIA to obtain the information he seeks, and there is no legal basis for the denial by the DOJ Crim of said right.

COUNT FIVE
(FOIA – GRAFF – FBI)

36. By letter dated April 8, 2009, Graff submitted a FOIA request for certain files regarding the FBI's investigation into and role in the 1987 rendition of Royal Jordanian Flight 402 hijacker and Amal Organization militiaman Fawaz Younis ("Younis").

37. By letter dated April 10, 2009, the FBI assigned the Request No. 1128923 and returned it to Graff on the basis that the FBI required the submission of proof of death or a signed privacy waiver from Younis before it would begin processing the request for records. The letter contended that, absent proof of death or a signed privacy waiver, any responsive records, should they exist, were categorically exempt as unwarranted

invasions of privacy by way of FOIA Exemption Six and (7)(C). The letter included a Privacy Waiver and Certification of Identify form. The letter failed to accord Graff any rights to an administrative appeal of the FBI's refusal to process the FOIA request.

38. By letter dated April 17, 2009, Graff administratively appealed the FBI's determination that it could not begin processing his request for records pertaining to Younis absent proof of death or a signed privacy waiver. Graff argued that in light of the fact that Younis was not a United States citizen and had been sentenced to thirty years in prison in October 1989 for conspiracy, aircraft piracy and hostage-taking, it was not necessary to secure permission from Younis prior to beginning the processing of a search for FBI records pertaining to him.

39. As twenty working days have elapsed without a substantive determination by the FBI concerning Graff's appeal, he has therefore constructively exhausted all required administrative remedies.

40. Graff has a legal right under the FOIA to obtain the information he seeks, and there is no legal basis for the denial by the FBI of said right.

COUNT SIX
(ADMINISTRATIVE PROCEDURES ACT – FBI/ EOUSA/DOJ)

41. The FBI and EOUSA's FOIA regulations and the FOIA statute itself require that notification be sent to the FOIA requester of the right to an administrative appeal of an adverse determination. An "adverse determination" is defined as including a determination to withhold any requested record.

42. No provision within the FBI, EOUSA or DOJ's regulations or policies, FOIA statute or Executive Order permits them to categorically refuse to process a FOIA request

for records concerning a foreign national without submission of proof of death or a signed privacy waiver.

43. A federal agency, to include the FBI, EOUSA and DOJ, must first process the request and, if responsive records are identified, then may seek to withhold records under the appropriate FOIA Exemptions. For all requests that potentially involve privacy interests the agency must first balance the public interest in releasing the requested records against the privacy interests of the individual in question.

44. Upon information and belief, on at least one occasion within the last two years, Melanie Pustay, Director, DOJ OIP, has stated publicly that FOIA does not permit a categorical requirement that privacy waivers be submitted for foreign nationals in order to process a request for records. Ms. Pustay further publicly stated that FOIA personnel should not pursue such a policy. OIP is responsible for encouraging agency compliance with FOIA and develops and provides guidance to agencies on questions relating to application of the FOIA. It also manages DOJ's responsibilities, which includes the FBI and EOUSA, related to the FOIA.

45. Notwithstanding its regulations and the FOIA statute, the FBI and EOUSA's FOIA Office, as well as the DOJ OIP, has nonetheless implemented an internal policy permitting FOIA personnel to refuse to process searches for records pertaining to foreign nationals absent proof of death or a signed privacy waiver.

46. Additionally, with respect to the FBI, FOIA requesters are not notified in these circumstances that such an adverse determination can be administratively appealed. This internal policy fails to comply with the FBI's FOIA regulations.

47. Alternatively, if the FBI, EOUSA or DOJ's FOIA regulations authorize these internal policies, then these regulations constitute an unreasonable interpretation of the statutory obligations imposed by the FOIA and fail to satisfy the Chevron analysis.

48. The FBI, EOUSA and DOJ's actions constitute conduct that amounts to "voluntary cessation" and/or which is "capable of repetition yet evading review" and therefore is not rendered moot by way of any subsequent agreement by the FBI, EOUSA or DOJ to process the requests without privacy waivers once litigation has commenced. The FBI, EOUSA and DOJ's policy is also sufficiently ripe for judicial review given that it raises purely legal questions and has reached its final and concrete form.

49. The FBI, EOUSA and DOJ, their officers and employees, committed and undertook actions that were arbitrary, capricious and/or an abuse of discretion, as well as in violation of internal regulations and/or FOIA, pertaining to the processing of the plaintiffs' FOIA requests and continues to do so.

50. The FBI, EOUSA and DOJ's actions unlawfully infringed upon, and will continue to unlawfully infringe upon, the plaintiffs' ability to obtain records and violate their rights and the FBI, EOUSA and DOJ's obligations under FOIA.

WHEREFORE, plaintiffs Barbara Feinman and Garrett Graff pray that this Court:

(1) Orders the defendants to disclose the requested records sought by Feinman and Graff in their entireties and make copies promptly available to them including, where requested, in electronic format;

(2) Declare as unlawful the implementation by the defendants of any policy that permits a refusal to process a request without informing the FOIA requester of the right to administratively appeal the denial;

(3) Declare as unlawful the implementation by the defendants of a policy that requires FOIA requestors seeking responsive records pertaining to a foreign national to first provide proof of death or a signed privacy waiver from the particular foreign national before processing of that request would commence;

(4) Order the defendants to discontinue implementation of any policy requiring FOIA requestors seeking responsive records pertaining to a foreign national to first provide proof of death or a signed privacy waiver from the particular foreign national before processing of that request would commence;

(5) Order the defendants to publicly announce, including on their respective agency FOIA websites, that they have discontinued implementation of any policy requiring FOIA requestors seeking responsive records pertaining to a foreign national to first provide proof of death or a signed privacy waiver from the particular foreign national before processing of that request would commence;

(6) Order the defendants to contact every FOIA requestor who is part of the class and offer the opportunity to reinstate their respective requests and then process accordingly;

(7) Award reasonable costs and attorney's fees as provided in 5 U.S.C. § 552 (a)(4)(E) and/or 28 U.S.C. § 2412 (d);

(8) expedite this action in every way pursuant to 28 U.S.C. § 1657 (a); and

(9) grant such other relief as the Court may deem just and proper.

Date: October 30, 2009

Respectfully submitted,

/s/

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