

31 July 1974 *HR 12004*

MEMORANDUM FOR: Mr. Warner

SUBJECT : Director's Testimony Before Moorhead

The following tidbits came out at the ICRC meeting today which are of interest in connection with Mr. Colby's testimony tomorrow:

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a. Both Mr. Colby and AEC (Charley Marshall) are scheduled for 10:00 a.m. I mentioned this to [redacted] who is attempting to take it up with the Moorhead Staff.

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b. When Defense testified, the staff told them a former CIA employee is also scheduled to testify tomorrow. [redacted] is checking this one also.

c. When Defense testified, Bella Abzug chaired the meeting for at least a major portion of the time. She was particularly interested in the release of restricted data from foreign governments.

d. When Defense testified, they received from the Moorhead Committee a request to be furnished the quarterly reports which Senator Muskie's Subcommittee has also requested of all departments. It is assumed by ICRC that Moorhead will request these reports of other departments also. ICRC also took the position that they should be furnished to both subcommittees.

[redacted]

Associate General Counsel

STATINTL

cc: OLC

CENTRAL INTELLIGENCE AGENCY

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Type of Information Requested	Request	Date of Agency Response	Nature of Response
9 requests: Of the 9 requests, 6 were refused, 1 was directed to The Department of State, 1 to The National Security Council, and 1 to Justice. Of the 6 CIA refusals, 5 involved documents prior to 1950.	6/5/72	6/12/72	CIA acknowledgment.
1) Minutes of the "303" committee --the White House inter-agency body supervising CIA (and named for the NSC orders creating them, e.g. NSM 303)		6/26/72	<u>Request denied</u> ; not CIA documents.
2) Intelligence reports on Chinese troop movements just before Korean war (11/1/50)		6/26/72	Request lacks "sufficient particularity".
		8/23/72	<u>Request denied</u> , after more details provided by NYT.
3) Memoranda or reports providing basic justification for U.S.-Laos involvement (1961-62).		6/26/72	Request lacks "Sufficient particularity".
		8/23/72	<u>Request denied</u> , although further details were given
4) Early 1960 assessments by CIA, State, and NSC re Khrushchev's speech about "Wars of National Liberation" and its bearing on U.S. foreign policy.		6/26/72	unable to locate. (see State chart for final disposition).
5) State/CIA papers re Tito's decision to close Yugoslavia's frontier with Greece and termination of Greek civil war.		6/26/72	Request lacks "sufficient particularity."
		8/23/72	<u>Request denied</u> , though additional material supplied by NYT.
6) Reports on U.S. involvement in Trujillo's assassination (5/30/59)		6/26/72	Unable to locate.

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CIA (cont'd)

<u>Type of Information Request</u>	<u>Date of Request</u>	<u>Date of Agency Response</u>	<u>Nature of Response</u>
	7/31/72		NYT supplies more details on items 2, 3, and 5 above.
		8/4/72	CIA says "We're working on it."
	8/7/72		NYT adds 3 additional requests:
7) Reports on U.S. relations with French underground during World War II.		9/27/72	<u>Request denied.</u>
8) Reports on U.S. relations with Italian underground during World War II.		9/27/72	<u>Request denied.</u>
9) Reports to CIA on East Berlin uprising and riots (1953).		9/27/72	<u>Request denied.</u>
		8/9/72	CIA acknowledgement of 8/7/72 NYT letter.
		8/8/72	DOD says in another letter to try CIA for JC papers re Bay of Pigs.
	8/9/72		NYT asks CIA for "basic collection of documents" on Bay of Pigs.
		8/10/72	CIA says "We're working on it."
	8/10/72		NYT replies to DOD that government's aim seems to be evasion.

<u>Type of Information Requested</u>	<u>Date of Request</u>	<u>Agency Response</u>	<u>Nature of Response</u>
	8/23/72		3 requests in 7/31/72 NYT letter--items 2, 3, and 5--after review, <u>are denied</u> . CIA suggests appeal.
	8/28/72		NYT requests reasons for denial, in order to appeal.
	9/6/72		NYT requests <u>just</u> JCS papers; no longer <u>all</u> Bay of Pigs documents.
	9/7/72		NYT writes NSC official advising of last-gasp effort re JCS papers, Abel-Powers, and RB-47.
	9/25/72		Bay of Pigs request, says CIA, doesn't conform with "sufficient particularity" requirement; are intelligence documents, overlap with non-classified material; and segregation of two "not feasible"; after consultation with DOD, NSC papers can't be released.
	9/27/72		<u>Request denied for 3 additional requests</u> in NYT letter of 8/7/72; appeal suggested.

<u>Type of Information Requested</u>	<u>Date of NYT Request</u>	<u>Date of Agency Response</u>	<u>Nature of Response</u>
	3/8/73		<u>Appeal of denial of Bay of Pigs</u> , especially JCS part.
	3/8/73		separate letter asking for declassification of CIA material on Abel-Powers swap (see also Justice request of 9/6/72).
		3/14/73	CIA acknowledgment of Abel-Powers 3/8 letter; says if no answer forthcoming in 60 days, appeal.

<u>Type of Information Requested</u>	<u>Date of NYT Request</u>	<u>Date of Agency Response</u>	<u>Nature of Response</u>
	6/21/72		Max Frankel, NYT's Washington correspondent and bureau chief, protests.
1) Gaither Report on the so-called "missile gap" (11/57)	9/7/72		NYT last-gasp effort to get RB-47, Bay of Pigs collection, Abel-Powers documents.
		10/13/72	<u>NSC refuses to declassify Gaither Report.</u>
	10/23/72		<u>NYT appeals NSC refusal to interagency committee.</u>
		11/6/72	Committee acknowledges NYT appeal.
2) Technological Capabilities Panel (TCP) report chaired by James R. Killian in 1954 or 1955 and implementative of the Gaither Report.	3/2/73		NYT asks for Killian TCP report. Still pending.

1 request: After a delay of more than 7 months, the one New York Times request was granted.

<u>Type of Information Requested</u>	<u>Date of NYT Request</u>	<u>Date of Agency Response</u>	<u>Nature of Response</u>
1) All documents, including diplomatic correspondence and cables, leading up to U.S. government efforts to obtain the release from jail of Rudolph Abel, the convicted Soviet spy, in exchange for Gary F. Powers (2/10/62) .	9/6/72	10/6/72	Acknowledgment, & under review.
	3/8/72		NYT requests Abel-Powers from CIA, which it says it now learns is source of documents.
		3/14/72	CIA acknowledges 3/8/72 letter. Says if no answer in 60 days, well, then, appeal.
		3/30/73	<u>Justice releases the papers.</u>

HARDING F. BANCROFT
Executive Vice President, The New York Times

before the

SENATE SUBCOMMITTEES ON
INTERGOVERNMENTAL RELATIONS,
SEPARATION OF POWERS,
ADMINISTRATIVE PRACTICES AND PROCEDURE

Wednesday, April 11, 1973

INTRODUCTION

I am glad to appear today in response to your request for a report on the experience of The New York Times under the Freedom of Information Act, particularly our experience since the issuance in March 1972 of Executive Order 11652. In the light of that experience, I am delighted to give our comments on S. 1142, introduced by Senator Muskie, proposing amendments to the Freedom of Information Act.

When the Freedom of Information Act was signed on July 4, 1966, President Johnson stated that it sprang "from one of our most essential principles: A Democracy works best when the people have all the information that the security of the nation permits". "No one" he said "should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."

That gives us a batting average so far of 5 for 49, or .102 -- not good enough even for the minor leagues. And, this meager 10 per cent success record has come only after persistent efforts by The Times, efforts which are beyond the means of many smaller news organizations, let alone individual scholars and members of the public. We have come to conclude, as a result, that the President's emphatic order is not enough, and that in declassification as in the American League, what is now necessary is a Designated Pinch Hitter, a compelling legislative response.

THE TIMES EXPERIENCE UNDER E.O. 11652

Executive Order 11652 called for the automatic declassification of most documents within no more than 10 years. Some materials could be specifically exempted, but even these were subjected to mandatory review if requested by a member of the public.

The Times sought to respond to this opportunity in a serious fashion. On Monday, June 5, four days after the executive order took effect, we initiated our first of a series of declassification requests which amounted in all to 51. These were directed to five agencies, on topics ranging from United States relations with the French Resistance in World War II, to the Bay of Pigs.

It is necessary to recount only a few of the responses to indicate why we have come to feel almost total frustration now that we have gone from the President's commendable language to the bureaucracy's dissembling or dilatory actions.

The precise nature of our experience has varied from agency to agency, but with the same general result. After numerous exchanges of calls and letters, usually over months, the buck is passed to another agency; or reasonable conditions in the executive order are used to block declassification without explanation; or expensive charges are proposed; or requests are denied, with an appeal suggested, though the reasons for denial — and hence for the appeal — are refused.

One notable instance began on June 5 when we asked the Department of Defense for the comments of the Joint Chiefs of Staff on the Bay of Pigs operation. In a report dated July 24, the Department responded: "The JCS papers can be identified and placed under review." So far, so good. But then on August 8, we were told, "It turns out that the papers in question are in fact comments on documents prepared by another agency and, therefore, your request cannot be handled as a review separate from the basic collection of documents which, as you know, is under the control of the Central Intelligence Agency." (Emphasis supplied).

We responded to Defense (protesting "agile side-stepping and backpedaling") and, on August 9, made a new formal request to CIA for the documents. Having received no response, we wrote again on September 6, specifying particular interest in the JCS comments. On September 25, CIA replied that it could not meet our request, the reasons given were a bureaucratic tour de force.

For one thing, CIA wrote, "we do not hold a specific group of documents formally identified as 'the basic collection'." Second, while the agency acknowledged having a large volume of documents relating to the Bay of Pigs, "your request does not fulfill the requirement of sufficient particularity to fall within the Executive Order." We pointed out that "...identification of specific documents could be made only by employees of CIA, the National Security Council, or the Departments of Defense and State. Merely to cite a lack of particularity... is to seize a technicality to frustrate the Executive Order and ignore the accompanying statement by the President."

Further, even if we had been able to divine the identity of specific, highly classified documents more than 12 years old as a pre-condition of their being declassified, CIA erected yet another obstacle. In the same September 25 letter, CIA wrote that intertwined among the documents were "a large number of references to or reflections of intelligence sources and methods which could be jeopardized by release of these documents". Thus, CIA argued that the papers fell within an exemption in the executive order protecting intelligence sources and methods. To separate out still sensitive material, CIA wrote, "is simply not feasible".

In other words, Defense was prepared to review the material for declassification, but then backed off because it was in CIA's "basic collection". CIA said it had no "basic collection".

Nor, could it identify, among the files it did have, documents that Defense could identify. And even if it could identify the documents, CIA said it was sure — even without any review — that they could not be declassified.

Finally, at the end of the letter, CIA wrote that it had consulted with Defense as to the JCS comments on the Bay of Pigs. In this specific instance, neither insufficient particularity nor jeopardizing intelligence sources could credibly be cited as reasons for refusing. But, in the absence of valid reason for refusal, we were simply refused without a reason. The CIA letter merely said, "We jointly agree that the JCS documents cannot be released." Only since we appealed this multi-layered denial has CIA relented somewhat. In a letter received just last week, the agency backed off its claim that our request lacked particularity. Now, on direction of the appeals committee, the agency says it will, at least, conduct a complete review.

We had different frustrations with the Department of State, to which we sent requests for 31 documents. At length, under some prodding from the National Security Council staff, the Department attempted more seriously than others to be constructive and helpful. Three of our five successes involved the State Department.

But even before this meager achievement, we were subjected to a remarkable exercise. On June 27, we received a short,

blanket denial of the 31 requests previously made on the grounds of insufficient particularity. Then, the NSC staff urged State to make at least a gesture of good faith compliance -- if not with The Times requests, then at least with the President's order. State subsequently offered a new response. Yes, the Department wrote us, it could search for the information we requested, but The Times would have to foot the bill. Not the bill for the copying, which would make sense, but a bill estimated by the Department in the thousands of dollars -- for searching out the documents themselves, which makes no sense. Aside from the amounts involved which could be prohibitive for The Times, and totally out of the question for smaller organizations, scholars, or private citizens, there are other practical considerations. Even if we agreed in advance to pay open-ended fees for searching out the relevant documents, the Department could not promise that any of them would, in fact, be declassified and made available to us.

And even after the payment of these fees, and even if the documents were declassified, there was no way in the world for us to know if they were worth reporting. I can readily understand the exasperation that last June prompted Max Frankel, then our Washington Bureau chief, in a letter to the head of Declassification at the White House, to describe this all as "research roulette".

Ultimately, we paid \$124 in research assessments and \$70 in copying charges for the three sets of documents: finally declassified

official records from governmental agencies is knowing precisely what records the agency has. This was exemplified in the Bay of Pigs request. At least one of CIA's excuses in that case would be much less likely to be sustained under the new proposed language.

Secondly, the amendment expressly providing that, in a review by the Court, the Court has the power to examine the contents of any agency records in camera in order to determine if such records or any part thereof should be withheld under one of the statutory exemptions, is a particularly important one.

This amendment would meet and change the decision of the Supreme Court in the recent ruling in Environmental Protection Agency v. Mink, decided in January of this year. In that case, the Court in disallowing in camera judicial inspection of classified documents relating to possible environmental dangers of the Gannikin atomic test in the Aleutians construed most narrowly the exemptions contained in the Freedom of Information Act. Justice Stewart observed in his concurring opinion in that case that Congress:

"has ordained unquestioning deference to the Executive's use of the 'secret' stamp."

Indeed, Justice Stewart observed that Congress had:

"built into the Freedom of Information Act an exemption that provides no means to question an executive's decision