

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD MARTIN,)	
)	
)	Civil Action No. 96-2866 (PLF)
Plaintiff,)	
)	
v.)	FREEDOM OF INFORMATION ACT
)	
U.S. DEPARTMENT OF JUSTICE, et. al.)	
and FEDERAL DEPOSIT INSURANCE)	
CORPORATION,)	
Defendants.)	

SECOND AMENDED COMPLAINT/
SUPPLEMENTAL COMPLAINT

1. This suit under the Freedom of Information Act (FOIA), 5 U.S.C. §552 *et seq.*, seeks public access to specifically-identified agency records showing “government wrongdoing”¹ in the form of wrongfully-withheld *Brady* material² as found by a federal Court in Texas. The agency records requested are sought under the FOIA to further the public interest in understanding the operations and activities of the defendant government agencies, and to study the wrongful withholding of *Brady* material by the government, its causes and cures. Other specific public interest purposes of this FOIA suit are spelled out in paragraph 11 and in the AMENDED COMPLAINT [#88] (December 29, 1998), which is incorporated by reference.

¹ See, e.g., *National Archives and Records Administration v. Favish*, ___ U.S. ___ (March 30, 2004) (“where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester ... must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred”); *Spirko v. U.S. Postal Service*, 147 F.3d 992 (D.C.Cir. 1998) (Court of Appeals examines record in FOIA case *de novo* to confirm that it contains no “*Brady* material”).

² “*Brady* material” refers to exculpatory and impeachment materials, and earlier statements of government trial witnesses, that a prosecutor is obligated to disclose to a defendant in a criminal case. See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985); *Banks v. Dretke*, ___ U.S. ___, 72 USLW 4193 (February 24, 2004) (impeachment materials come within *Brady*); *United States v. Smith*, 77 F.3d 511 (D.C.Cir.), reh. denied, 85 F.3d 646 (D.C.Cir. 1996) (same).

2. The objective of this Second Amended Complaint/ Supplemental Complaint is to set forth facts and events-- occurring after the Court of Appeals' JUDGMENT (April 23, 2002) remanding this case for further proceedings-- that show that Plaintiff has now exhausted all FOIA administrative remedies for seeking what the Court of Appeals called "Brady material pertaining to Generelli." This pleading clarifies what records are FOIA-requested. It also adds the Federal Deposit Insurance Corporation (FDIC) as a party defendant, in light of FDIC's status as an "originating agency," FDIC's belated admission (after remand) that in fact it holds some of the FOIA-requested records, and the government's actions in treating FDIC as if it were already a party defendant, in filing "Defendants Supplemental Motion to Dismiss and/or in the Alternative for Summary Judgment Following Remand on Behalf of the Executive Office of the United States Attorneys and the Federal Deposit Insurance Corporation" (November 22, 2002) (denied without prejudice to renew by ORDER [#157] (June 25, 2003)).

PARTIES

2. Plaintiff is the person who requested the agency records at issue. Though once a federal prisoner, Plaintiff is no longer incarcerated. Trials, appeals, and collateral review of Plaintiff's criminal conviction have been exhausted. There are no ongoing law enforcement proceedings related to any of the FOIA-requested records.

3. Defendant United States Department of Justice (DoJ) is an agency of the United States. Under the FOIA, Defendant DoJ has supervisory jurisdiction and control over the records of the Federal Bureau of Investigation (FBI) and the Executive Office of the United States Attorneys (EOUSA). See 28 C.F.R. §16.1 & Appendix I ("components of the Department of Justice"). Defendant DoJ has possession of and control over all the records that Plaintiff seeks.

4. Defendant Federal Deposit Insurance Corporation (FDIC) is a federal government agency. DoJ and FDIC have stated that some of the records in FBI files, which Plaintiff requested under the FOIA, were sent to the FDIC for FOIA processing as the "originating agency" of those records. After this case was remanded by the Court of Appeals, Defendant FDIC has stated that it has possession and control over some records that Plaintiff seeks. Defendants submitted filings and motions on behalf of FDIC in this case, after remand from the Court of Appeals JUDGMENT (April 23, 2002), even though FDIC was not yet formally a party to this suit.

THE SPECIFIC RECORDS SOUGHT

5. Plaintiff has made repeated, specific FOIA requests and administrative appeals to the United States Department of Justice seeking what the Court of Appeals called "Brady material pertaining to Generelli." These FOIA requests and appeals stated in pertinent part:

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking "Brady material pertaining to Generelli" in certain specifically-identified records held by the FBI. This specific description, "Brady material pertaining to Generelli," is the description used by the United States Court of Appeals to describe information showing that prosecution witness Generelli was suspected of wrongdoing in the bank fraud for which I was convicted. I am seeking this "Brady material pertaining to Generelli" from the following government records:

"all information about Generelli in the "shipped off" records that were referred by the FBI to the FDIC and the Executive Office for United States Attorneys (as the "originating agencies") in my pending FOIA case, Martin v. Department of Justice (United States Ct App., D.C.Cir. #00-5389, USDC, DDC, Civil Action #96-2866 (PLF));

"all information about Generelli in the FDIC's December 14, 1992 memorandum (cover page enclosed);

"all information about Generelli in the Broadway Bank's March 22, 1991 Report of Apparent Crime (FBI "Newark File" No. 29B-NK-69023-1 and -2);

"all information about Generelli in the documents identified by the government's Hodes Declaration in my pending FOIA case as:

Document #20 (FBI "Dallas File" 29B-DL-58080-141),
Document #47 (FBI "Newark File" 29-NK-69023-17)
Document #48 (FBI "Newark File" 29B-NK-69023-20),
Document #66 (FBI File 29A-48040-139)

The United States Department of Justice³ repeatedly denied these FOIA requests and appeals.

6. Plaintiff made repeated FOIA administrative requests and appeals to the FDIC—and the FDIC repeatedly denied such FOIA requests – seeking the December 14, 1992 FDIC memorandum. Only after remand and after Plaintiff complained to the FDIC's ombudsman did the FDIC acknowledge that it possesses this December 14, 1992 memorandum.

7. "Brady material pertaining to Generelli," requested by Plaintiff under the FOIA from DoJ and FDIC, and specifically identified in paragraphs 5 and 6 above, is properly at issue in this FOIA case on remand from the Court of Appeals.

8. Plaintiff has made repeated FOIA requests and appeals to the United States Department of Justice – which has repeatedly denied such FOIA requests and appeals – seeking segregable nonexempt records about prosecution witness Kevin Alme, whose status as an informant was officially confirmed by his own testimony in open court at Plaintiff's 1994 criminal trial. The segregable nonexempt records on Alme, which Plaintiff seeks under the FOIA, are contained within the following records, which were not identified by the government until after remand: (a) the Glomarized Alme records listed under Alme's own name, which the FBI has never identified or processed under the FOIA, (b) the undescribed, unidentified Alme records for which the FBI makes a conclusory claim of segregability under Exemption 7(C), and (c) the segregable non-exempt portions of the August 30, 1994- 74 pages "Review of

³ In FOIA cases, DoJ speaks for all its "component parts," including the FBI and the Executive Office of United States Attorneys (EOUSA). See 28 C.F.R. 16.4.

Timesharing Loan Department" (distributed on February 19, 1991) that is being withheld across-the-board by FDIC under a claim of FOIA 7(C).

JURISDICTION

8. This Court has jurisdiction over this action pursuant to 5 U.S.C. 552 (a)(4)(B).

FREEDOM OF INFORMATION ACT CAUSE OF ACTION

9. Plaintiff administratively requested the agency records listed in paragraphs 5,6, 7 and 8 and has exhausted his FOIA administrative remedies.

10. Plaintiff has a statutory right to the records that he seeks, and there is no legal basis for Defendants' refusal to disclose them to him.

11. This suit respectfully asserts that FOIA disclosure of the improperly withheld Brady material requested in this case will further important public interests in understanding the operations and activities of the defendant government agencies. These important public interests, which are served by FOIA disclosure of the requested records, include: (a) assisting an on-going public study by the National Association of Criminal Defense Lawyers (NACDL) investigating the wrongful withholding of Brady material, its causes and cures;⁴ (b) exposing government wrongdoing in wrongfully withholding Brady material in this particular case; (c) deterring Brady violations, and determining how well government public officials are performing their official duties under Brady; (d) probing the facts about a major bank failure at the Broadway Bank in New Jersey, and where the vast bulk of the stolen money went; (e) clarifying the law on the FOIA-disclosability of Brady material, an important issue for millions of imprisoned persons; (f) monitoring the conduct and actual performance of prosecutors and FDIC public officials; seeking improved government performance and reform; and bringing to public light (and remedying) the

⁴ Plaintiff will send the wrongfully withheld Brady material disclosed in this FOIA suit to the NACDL, for use in NACDL's on-going study of the wrongful withholding of Brady material, its causes and cures. One way or another, by news release, publication, web site posting, or otherwise, Plaintiff will publicize the results.

inadequacies in communication between FDIC and federal prosecutors in investigating and prosecuting bank fraud cases; and (e) finding out "what the government is up to."

WHEREFORE, Plaintiff prays that this Court issue an order and judgment:

- (a) Declaring that Defendants' refusal to disclose the records requested by Plaintiff is unlawful;
- (b) Ordering Defendants to make the requested records available to Plaintiff;
- (c) Awarding Plaintiff his costs and reasonable attorneys' fees in this action; and
- (d) Granting such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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Court-Appointed Counsel for
Plaintiff Harold Martin

April 14, 2004

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<i>Defendants.</i>)	

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April 2004, I served the foregoing "Second Amended Complaint/Supplemental Complaint" upon opposing counsel by causing copies to be Emailed to: Mark E. Nagle, Esquire, Sherri Evans Harris, Esquire, Assistant United States Attorneys, 555 Fourth Street, N.W., 10th Floor, Washington, D.C. 20530 (Tel: 202-541-7153; FAX: 202-514-8780; Email: sherri.evans.harris@usdoj.gov).

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April 14, 2004