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13
14 **UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
16

17 THE MARY FERRELL FOUNDATION,
18 INC.; JOSIAH THOMPSON; and GARY
19 AGUILAR,

20 Plaintiffs,

21 v.

22 JOSEPH R. BIDEN, in his official capacity as
23 President of the United States; and the
24 NATIONAL ARCHIVES AND RECORDS
25 ADMINISTRATION,

26 Defendants.

No. 3:22-cv-06176-RS

DECLARATION OF WILLIAM M.
SIMPICH RE PLAINTIFFS’
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANTS’ MOTION TO DISMISS

Date: January 18, 2024

Time: 1:30pm

Dept: Hon. Richard Seeborg

27 I, William Simpich, declare:

28 1. The third amended complaint at paragraphs 129-149 lists a wide array of documents
that are missing, destroyed or have otherwise been removed from agency files and/or not
transmitted to NARA.

1 2. Of particular note is the January 1995 destruction of Secret Service presidential
2 protection survey reports for some of JFK's trips in the fall of 1963, after the passage of the JFK
3 Records Act in 1992. Other files destroyed included protective intelligence files on threats to
4 JFK in the Dallas area and on the infamous Fair Play for Cuba Committee (ARRB Final Report,
5 p. 149); CIA HTLINGUAL documents destroyed in 1990 (after the HSCA hearings) that would
6 have included references to the CIA's mail cover on Lee Harvey Oswald (ARRB Final Report, p.
7 83; and the admitted destruction of 1965-1970 Secret Service documents by James Mastrovito
8 (TAC, para. 134, 139). As to all other documents, I believe it is equally likely that they are
9 either "missing" or "destroyed" and that any recovery effort would use the same methods.
10

11
12 3. Furthermore, based on the number of methods available to locate destroyed or
13 missing documents, it is likely that many of them could be found. One simple method is to ask
14 other agencies who were copied on the correspondence if they still have a copy. A second
15 simple method is to ask the chief information officer who created the document if there is a
16 computerized version of the document. A third, less-simple method is to interview the "chief
17 information officer" for each agency and ask them about the different databases available.
18 The documents I have reviewed indicate that none of the databases listed below have been fully
19 searched, and certainly not since the ARRB was dissolved in 1998.
20

21
22 4. The CIA, for example, is famous for being proprietary about their information. In
23 regards to only the CIA, a more complete search would include:

24 a. The Executive Registry, which was in 1963 the central document file for the Office
25 of the Director and its Chief is responsible for the control and location of all papers throughout
26 the office. It is understood to be the destination and location of all documentation disseminated
27 within CIA for the attention of the Office of the Director as well as the office of the Deputy
28

1 Director of Plans (a high-ranking officer of operations). ER (Executive Registry) files are held
2 in storage at the Agency Archive Record Center in Alexandria, Virginia. Each file has a Job #
3 and commences with the two initials “ER”.

4
5 b. Operational files, defined as “certain files of the Directorate of Operations, the
6 Directorate for Science and Technology, and the Office of Personnel Security that contain
7 sensitive information about CIA methods.” *ACLU v. Dep’t of Def.*, 351 F. Supp. 265, 270
8 (S.D.N.Y. 2005)

9
10 c. Database systems and search strategies used by the National Clandestine Service
11 (“NCS”) which is “responsible for the clandestine collection of foreign intelligence from human
12 sources”, and the Directorate of Support (“DS”) which “houses the personnel and physical
13 security functions of the CIA and would be the most likely to contain records of individuals who
14 were applicants, contractors or employees of the CIA.” *Bothwell v. CIA*, 2014 LEXIS 144151,
15 *11 (N.D. Ca. 2014).

16
17 5. Also, the burden should be on the defendant, not the plaintiffs, at the pleading stage.
18 In *Citizens for Responsibility & Ethics in Wash. v. Exec. Office of the President*, 587 F.Supp.2d
19 48 (D.D.C. 2008), the court held that citizen watchdog groups had standing to sue when alleging
20 that the Executive Office of the President and Archivist of the United States failed to preserve
21 five million White House e-mails created between 2003-2005, because destruction of White
22 House e-mails was an injury-in-fact subject to redress under the Federal Records Act. The court
23 held “for the purposes of surviving this Motion to Dismiss, Plaintiff raises sufficient questions
24 regarding the (agency’s) failure to undertake actions for the recovery of records to support a
25 claim by a private litigant...the court will thus not foreclose at this early stage of the litigation
26 the possibility that such private action may be appropriate.”
27
28

1 6. Also, Defendant’s claim of lack of standing to challenge destroyed records is a new
2 claim, and, if necessary, Plaintiffs seek leave to amend the complaint to address this new and
3 unanticipated claim. Plaintiffs rely on the cases cited above, as well as the principle enunciated
4 in *Valencia-Lucena v. US Coast Guard, FOIA/PA Records*, 180 F.3d 321, 325 (DCA, 1999):
5 “Congress determined the ultimate policy of open government should take precedence...this
6 court has required agencies to make more than perfunctory searches and, indeed, to follow
7 through on obvious leads to discover requested documents.” At this point, Defendant NARA has
8 provided no evidence that it has ever looked for any of the documents at issue – a vitally
9 important factor. See *ACLU of Florida v. ICE*, *15.

12 I declare under penalty of perjury that the foregoing is true and correct to the best of my
13 personal knowledge. Executed on November 30, 2023, in Richmond, California.

14
15 _____/s/_____
16 William M. Simpich