

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE MARY FERRELL FOUNDATION, INC.; JOSIAH THOMPSON; and GARY AGUILAR,)	
)	Case Number: 3:22-cv-06176-RS
)	
Plaintiffs,)	JOINT CASE MANAGEMENT
)	STATEMENT
vs.)	
)	Date: September 5, 2024
)	Time: 10:00 a.m.
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,)	Judge: Richard Seeborg
)	
Defendant.)	
)	
)	
)	

The parties to the above-entitled action jointly submit this Joint Case Management Statement pursuant to the *Standing Order for All Judges of the Northern District of California* and Civil Local Rule 16-9.

1. Jurisdiction & Service

Plaintiffs allege that this Court has subject matter jurisdiction under 28 U.S.C. § 1331 (actions arising under the laws of the United States) and the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.* No issue has been raised as to personal jurisdiction or venue. Plaintiffs have served the National Archives and Records Administration (NARA), the remaining Defendant not dismissed from this action.

2. Facts

Plaintiffs' Statement

Plaintiff's chronology of the facts:

- 1 • 1963 - JFK is assassinated.
- 2 • 1964-1978 - Various investigations are conducted, including but not limited to Warren
3 Commission, Church Committee, House Select Committee on Assassinations.
- 4 • 1978-1991 - Many of the documents from these investigations are classified. FOIA is
5 incapable of obtaining many of these records, including the operational records.
- 6 • 1991-1998 - In the wake of Oliver Stone's movie on JFK, the JFK Records Act is
7 unanimously passed by Congress and signed by President Bush in October 1992. The
8 Assassinations Records Review Board (ARRB) is set up in 1994 and collects several
9 million records from a wide variety of federal, state and local agencies as well as private
10 individuals. Before the ARRB dissolves in 1998, an MOU is created between the ARRB
11 and the CIA. NARA is also part of this MOU. The CIA agrees to continue to provide
12 new assassination records to NARA as such documents are brought to the agency's
13 attention. Tens of thousands of unreleased documents are in NARA's custody.
- 14 • 1998-2017 - Before and after the ARRB's dissolution, NARA was the custodian of (most
15 if not all) of the JFK Collection. The executive agencies have an ongoing duty to provide
16 new assassination records that are brought to their attention to NARA to add to the JFK
17 Collection. Only a few thousand records were publicly released by NARA between
18 1998 and 2017.
- 19 • 2017-2024 - Tens of thousands of records were released by NARA during these years,
20 while several thousand records were postponed from being released in full due to
21 executive orders issued by Presidents Trump and Biden.

22 Plaintiff's statement of the principal factual issues in dispute:

- 23 • Central directory contains no identification aids for some agencies such as SS, NSA,
24 NSC, US Army IRR (TAC, 20:1-11, aka Paragraph 57a); central directory missing other
25 identification aids for FBI, JFK Library, and DIA (TAC, 20:13-20, aka Paragraph 57b);
26 5000 redactions in central directory (TAC, 20:22-24, aka Paragraph 57c);
27 reclassifications in central directory is barred by JFK Act Section 5(a)(3). (TAC 20:26-
28 21:2, aka Paragraph 57d)
- Plaintiffs' research shows that a portion of 337 documents said by NARA to be open in
full appear not to be open in full (TAC 21:21-22:4).
- Furthermore, 27 documents have never been posted online and their release status is
unclear – does NARA actually have possession of these documents? If not, these
documents should be included as part of the removed/destroyed documents category.
(TAC 21:12-19, aka Paragraph 58a)
- Plaintiffs also believe that at least nine documents show that many document redactions
were not justified under section 6 of the JFK Records Act - as new releases show that the
old redactions were unjustified, the court should take *ex parte* review of these documents
to see if Section 6 was applied correctly during the 1998-2017 period.
- Many documents have been removed/destroyed by various agencies.

Defendant's Statement

1 “The factual history of this suit has been extensively reviewed previously.” *Mary Ferrell*
2 *Found., Inc. v. Nat'l Archives & Recs. Admin.*, No. 22-CV-06176-RS, 2024 WL 202975, at *1
3 (N.D. Cal. Jan. 18, 2024); *see also* Dkt. No. 68. As a result of the Court’s latest motion-to-
4 dismiss ruling on January 18, 2024, Dkt. No. 107, three claims remain, each of which is asserted
5 under the Administrative Procedure Act: (i) a claim seeking to compel NARA to release the so-
6 called “legislative records,” (Third Am. Compl. ¶ 164(b)); (ii) a claim seeking to compel NARA
7 to “properly maintain” the central directory of identification aids (*id.* ¶ 164(a)); and (iii) a claim
8 that NARA has violated the Federal Records Act, 44 U.S.C. § 2905, by not requesting that the
9 Attorney General initiate an action to recover assassination records that have allegedly been
10 destroyed (Third Am. Compl. ¶¶ 167–76). Defendant believes that there are no material factual
11 issues in dispute and that each of these claims can be resolved by a motion for summary
12 judgment.

13 Plaintiffs have also filed four motions for preliminary injunctions, each of which the
14 Court has denied. Plaintiffs have filed a notice of appeal of the Court’s order denying their
15 second, third, and fourth motions for a preliminary injunction. Dkt. No. 109. That appeal is
16 fully briefed and pending before the Ninth Circuit as Case No. 24-1606. Since Plaintiffs’ appeal
17 raises issues that, depending on how they are decided, could affect the scope of this litigation,
18 Defendant believes that it would be appropriate to wait for the Ninth Circuit to issue its decision
19 before proceeding with further litigation in the district court over Plaintiffs’ remaining claims.
20 If, however, the Court believes that the parties should proceed with the remaining claims during
21 the pendency of the appeal, Defendant is prepared to move for summary judgment on the
22 remaining claims.

23 **3. Legal Issues**

24 **Plaintiffs’ Statement**

25 The JFK Records Act mandates that the JFK Collection **shall** include a central directory
26 comprised of identification aids created for each record transmitted to Defendant NARA through
27 the Archivist. JFK Records Act, § 4(a)(2)(B), APA.
28

1 The JFK Records Act mandates that the JFK Collection **shall** be made available to the
2 public. § 4(d)(1), APA.

3 NARA must be enjoined from issuing any certification to Congress that all Assassination
4 Records have been obtained until Defendant NARA ensures that all obligations under the JFK
5 Act are met to ensure that all assassination records have been obtained by the agencies. Any
6 certification made without such a search and review would be arbitrary and capricious, void and
7 ultra vires. § 12(b), APA.

8 Plaintiffs are entitled to relief in the form of a declaratory order that Defendant NARA is
9 in violation of its statutory responsibilities, and the issuance of an injunctive order compelling
10 Defendant NARA to request that certain agencies search for certain removed or destroyed
11 documents, and/or the Attorney General initiate action, or seek other legal redress, to recover
12 these Assassination Records from the agencies that removed or destroyed these
13 documents. Federal Records Act. 44 USC § 2905(a), 44 USC § 3106.

14 A number of document redactions were not justified under section 6 of the JFK Records
15 Act - as new releases show that the old redactions were unjustified, the court should take *ex*
16 *parte* review of these documents to see if Section 6 was applied correctly during the 1998-2017
17 period, which would have inevitably impacted the subsequent 5(g)(2)(D) presidential findings.

18 Plaintiffs are entitled to conduct discovery pursuant to the FRA, and to specific
19 exceptions to the APA, and are unrelated to the appeal filed with the Ninth Circuit.

20 See the analysis in 6a-b below regarding the duty of the CIA to search for and provide
21 possible new assassination documents pursuant to the 1998 MOU.

22 **Defendant's Statement**

23 As noted above, as a result of the Court's motion-to-dismiss rulings, there are currently
24 three legal claims pending before this Court. *See supra* Section 2. In response to Plaintiffs'
25 claim seeking release of the so-called "legislative records" Defendant intends to argue that it has
26 no non-discretionary duty to make such a release, and that the President's postponement decision
27 under the JFK Act applies to those legislative records. In response to Plaintiffs' claim seeking to
28

1 compel NARA to “properly maintain” the central directory, Defendant intends to argue that it
2 has not failed to meet any non-discretionary duty imposed by the JFK Act. In response to
3 Plaintiffs’ claim seeking to compel NARA to make a request to the Attorney General under the
4 Federal Records Act, Defendant intends to argue that it has no non-discretionary duty to make
5 such a request when the records at issue have been irrevocably destroyed.

6 **4. Motions**

7 Plaintiffs anticipate filing: (i) a Motion to Amend or Supplement the Complaint (see #5
8 below), (ii) a Motion for Discovery to Determine the Nature of the Contents and the Disclosure
9 Status of the Legislative Documents and the JFK Collection, (iii) a Motion to Determine the
10 Scope of Discovery Based on Previous Submissions to Defendant of Proposed Depositions,
11 Document Productions, RFAs and Interrogatories, (iv) a Motion to Release the Legislative
12 Branch Records, and (v) a Motion for Summary Judgment when Discovery is Resolved.
13 Plaintiffs’ discovery requests are unrelated to the issues presently on appeal, and a ruling is
14 requested on the scope and timing of discovery and expert designation before Defendant is
15 permitted to file a Motion for Summary Judgment.

16 Defendant is prepared to move for summary judgment on some or all of Plaintiffs’
17 claims. If the Court agrees with Defendant that a stay is warranted pending resolution of
18 Plaintiffs’ appeal to the Ninth Circuit, and the Court requests that a formal motion be filed,
19 Defendant is prepared to do so.

20 **5. Amendment of Pleadings**

21 **Plaintiffs’ Statement**

22 Plaintiffs seek to amend or supplement the pleadings, based on contentions made in the
23 Third Amended Complaint that were not raised in Defendant's Motion to Dismiss. Plaintiffs do
24 not seek to revisit issues this court has ruled on.

25 As the court stated in its January 2024 Order, pp. 6-7: "Since all factual allegations in the
26 TAC were incorporated in the second claim, however, the Court will consider these arguments,
27 which are discussed more extensively by Plaintiffs in their Opposition to Defendants’ Motion to
28 Dismiss."

1 This issue was not addressed in their motion to dismiss. Plaintiffs believed it was clearly
2 pleaded in the complaint. The court stated in its latest ruling that our causes of action should
3 have been more specific and not simply include large portions of text "by reference". (1/18/24
4 Order, footnote 3 at 6:25).

5 Thus, Plaintiffs request leave to amend or supplement their complaint to make it
6 sufficiently definite within the cause of action itself to address the court's stated concern. These
7 amendments are unrelated to the discovery being sought, which should not be delayed.

8 These amendments or supplementations would include these contentions:

9 Plaintiffs' APA claim, based on unreasonable delay in all cases and final action where
10 appropriate and the right of citizens to directly request new searches from the CIA pursuant to
11 the JFK Records Act and the 1998 MOU.

12 Plaintiffs' FRA claim is based on removed/destroyed documents.

13 **a. The need for searches by citizens for JFK assassination records from the CIA**
14 **must be conducted on JFK Records Act standards pursuant to the MOU of 9/30/98,**
15 **not FOIA standards.** (See the TAC, paragraphs 119, 162d-h, 163).

16 The MOU "provide(s) that the CIA will transmit to the JFK Collection at NARA a
17 number of specifically identified documents, along with "[a]ny other non-duplicate
18 assassination-related records created or discovered by the CIA after September 30, 1998."
19 Memorandum of Understanding Regarding Continuing Obligations of the CIA Under the JFK
20 Act, at 3 (Sept. 30, 1998). *Morley v. CIA* (D.C. Cir. 2007) 508 F. 3d 1108, 1115.

21 "(Plaintiff is) on somewhat stronger ground in saying that the CIA should have realized
22 that his FOIA request – even though it expressly referenced the Kennedy assassination – asked
23 the CIA for some categories of CIA documents that may not have been transferred to the
24 Archives. We agree with (Plaintiff) that the CIA's initial response to him was not entirely
25 sufficient, as was revealed when the CIA ultimately produced some responsive documents that
26 had not been transferred to the Archives." *Morley v. CIA* (D.C. Cir. 2018) 894 F. 3d 389, 395.

27 "...the MOU provides its own enforcement mechanism for procuring relevant documents
28 from the CIA; Morley can no more sidestep these procedures than he could those of the JFK

1 Act, see *id.* at 1545. Notably, the MOU neither mentions the FOIA nor addresses the release of
2 relevant documents to FOIA requesters; it merely provides that the appropriate records shall be
3 released to NARA. If Morley has identified new assassination-related records, then NARA can
4 seek their release pursuant to the MOU. To the extent that Congress sought to remedy the
5 executive branch's overzealous shielding of assassination-related records under the FOIA, the
6 JFK Act and the MOU supply the process by which to obtain these documents." *Morley v.*
7 *CIA* (D.C. Cir. 2007) 508 F. 3d 1108, 1115.

8 **b. The Joannides documents need to be released.** (TAC, paragraph 61a). These
9 documents are the subject of an MDR that has not been addressed for more than four years. My
10 understanding is that Mr. Jefferson Morley - who filed the MDR - has heard nothing about the
11 processing of the MDR since the filing date. This constitutes unreasonable delay under the
12 APA, among other issues.

13 Counsel's understanding is that if the agency has reviewed the information within the past
14 2 years, or the information is the subject of pending litigation, the agency shall inform the
15 requester of this fact and of the requester's appeal rights.

16 These documents were placed in a *Vaughn* index and provided to NARA to be placed in
17 the JFK Collection, even though these documents are plainly assassination records. The CIA has
18 an ongoing duty pursuant to the MOU to provide known assassination records to the JFK
19 Collection, and the treatment of the Joannides documents violates the APA and the JFK Records
20 Act.
21

22 The Plaintiffs seek to amend or supplement the pleadings regarding the Joannides
23 documents, which were removed into the CIA's *Vaughn* index rather than submitted to NARA
24 (cited in the Third Amended Complaint, "TAC", 24:13-25:13, paragraph 61a)

25 **c. The need to unseal the Marcello documents.** (TAC, 25:14-26:14, paragraph 61b)
26 The DOJ indicated early in this case that might be possible. The Marcello audio recordings have
27 not being unsealed and have not being provided to NARA to be placed within the JFK
28 Collection, in violation of the APA and the JFK Records Act.

1 d. **The need for the agencies to search for removed or destroyed Church Committee**
2 **records and other files as listed in ARRB Final Report.** (TAC 27:1-6, paragraph 61d). The
3 failure of the agencies to find these documents violates the FRA, the APA and the JFK Records
4 Act. Plaintiffs seek an order establishing a procedure for NARA to report removed or destroyed
5 attachments to the agencies and/or the Attorney General if necessary, so that such attachments
6 can be restored to the document and provided to the JFK Collection.

7 e. **The need to search for removed or destroyed attachments to assassination**
8 **records.** The agencies have often removed attachments from a document and providing only
9 the document. (TAC 27:7-12, paragraph 61e). Many of these attachments can be found
10 elsewhere in the JFK Collection; many cannot. Plaintiffs seek an order establishing a procedure
11 for NARA to report removed or destroyed attachments to the agencies and/or the Attorney
12 General if necessary, so that such attachments can be restored to the document and provided to
13 the JFK Collection.

14 **Defendant's Statement**

15 Defendant does not believe amendment is warranted and is prepared to proceed with
16 summary judgment. If Plaintiffs' requested amendment is permitted, Defendant will respond to
17 the amended pleading as permitted by the Federal Rules. If Plaintiffs' requested amendment
18 proceeds, Defendant does not believe discovery is appropriate until the pleadings are settled.

19 **6. Evidence Preservation**

20 The parties have reviewed the Guidelines Relating to the Discovery of Electronically
21 Stored Information and confirm that they have met and conferred pursuant to Fed. R. Civ. P.
22 26(f) regarding reasonable and proportionate steps taken to preserve evidence relevant to the
23 issues reasonably evident in this action.

24 **7. Disclosures**

25 The parties have agreed to dispense with initial disclosures. However, Plaintiffs did so
26 with the understanding that initial disclosures would be provided 14 days after the CMC., in
27
28

1 harmony with FRCP 26(a)(1). This case involves disclosures mandated by the Federal Records
2 Act, the JFK Records Act, and applicable exceptions to the APA, addressed in #8, below.

3 Defendant, consistent with its position on discovery generally, does not believe initial
4 disclosures are necessary in this APA case.

5 **8. Discovery**

6 **Plaintiffs' Statement**

7 Plaintiffs seek to commence with certain discovery under the Federal Records Act,
8 unrelated to the issues on appeal in the Ninth Circuit and any amendment sought to the
9 pleadings. The Federal Records Act is an appropriate avenue for limited discovery on records
10 retention. *Raher v. Fed. Bureau of Prisons*, No. 09-cv-526, 2012 U.S. Dist. LEXIS 95294; 2012
11 WL 2721613, at *2-3 (D. Or. July 9, 2012). As just one example, a failure to preserve
12 responsive records after a request has been made can constitute an improper withholding under
13 FOIA – the JFK Records Act is analogous here. See *Kissinger v. Reporters Comm. for Freedom*
14 *of the Press*, 445 U.S. 136, 155, [*189] 100 S. Ct. 960, 63 L. Ed. 2d 267 (1980); *Judicial*
15 *Watch, Inc. v. U.S. Dep't of Commerce*, 34 F.Supp.2d 28, 42-44 (D.D.C. 1998).

16 Plaintiffs also seek to determine if records within the JFK Collection have been removed
17 or are “open in full” which is relevant to the “finding aids”, “legislative records”, and
18 “removed/destroyed documents” sections of the complaint.

19 Furthermore, the *San Luis* case cited below by Defendant cites four exceptions for the
20 inclusion of extra-record evidence in APA cases– see 776 F.3d 971, at footnote 7. See the
21 use of such evidence in *Department of Commerce v. New York*, 588 US 752, 781-782 (2019).

22 Plaintiffs seek to file a motion on the proper scope of discovery regarding these issues.

23 **Defendant's Statement**

24 Defendant believes that discovery, including expert discovery, is neither appropriate nor
25 necessary in this case. That is particularly so at this juncture while Plaintiffs' appeal is still
26 pending in the Ninth Circuit and the pleadings are not yet settled given Plaintiffs' intention to
27 amend. If the Court is not amenable to staying proceedings pending resolution of Plaintiffs'
28 appeal, and is inclined to permit discovery, Defendant believes that the most efficient course is

1 for it to file a motion for protective order from all discovery. Defendant believes that discovery
2 would be inappropriate because all of Plaintiffs’ remaining claims are purely legal claims
3 brought under the Administrative Procedure Act. *See San Luis & Delta-Mendota Water Auth. v.*
4 *Locke*, 776 F.3d 971, 992 (9th Cir. 2014) (“In general, a court reviewing agency action under the
5 APA must limit its review to the administrative record.”). These claims can be resolved through
6 a motion for summary judgment.

7 **9. Class Actions**

8 This case is not a class action.

9 **10. Related Cases**

10 Plaintiffs state that the following are related cases: The mandatory declassification
11 review for the “Joannides documents” that remain unreleased, now more than four years old with
12 no resolution; the “Marcello documents” that have not been fully unsealed as part of a grand jury
13 proceeding many years ago.

14 Defendant is not aware of any related cases.

15 **11. Relief**

16 Plaintiff seeks orders mandating that finding aids be created pursuant to the JFK Records
17 Act; the release of the legislative records; and to search for and obtain documents pursuant to the
18 following methods: injunctive relief, declaratory relief, mandamus. No monetary damages
19 sought in this action.

20 Defendant seeks judgment in its favor and dismissal with prejudice of all remaining
21 claims.

22 **12. Settlement and ADR**

23 **Plaintiffs’ Statement**

24 If discovery is granted, ADR should be delayed until the scope of discovery is
25 determined. If discovery is denied, Plaintiffs will seek permission to seek interlocutory appellate
26 review.

27 **Defendant’s Statement**

1 Given the nature of Plaintiffs' claims, Defendant does not believe that a global settlement
2 is likely or that an ADR process would be productive at this time. The parties have, however,
3 attempted to resolve one of Plaintiffs' remaining claims and will continue to do so in order to
4 narrow the disputes for judicial resolution.

5 **13. Other References**

6 The parties do not believe that this case is suitable for reference to arbitration, a special
7 master, or the Judicial Panel on Multidistrict Litigation.

8 **14. Narrowing of Issues**

9 **Plaintiffs' Statement**

10 **Finding aids:** If NARA agrees to provide the Plaintiffs with a copy of the digitized records,
11 subject to various guarantees, Plaintiffs would be willing to drop the complaints about the
12 finding aids. MFF can indeed repair the central directory itself if need be, and could provide
13 NARA with a copy.

14 **Legislative records:** What documents are contained in the "legislative records". What is the
15 defense theory stating why none of these documents should be provided?

16 **Databases and search tools for documents sought by Plaintiffs:** Which documents will be
17 sought? What databases and what other search tools will be used to locate these
18 documents? Which agencies will engage in this search? What tools are available to reconstruct
19 these documents?

20 **Defendant's Statement**

21 Defendant is considering Plaintiffs' above proposal on the finding aids, and if possible will
22 attempt to resolve it in order to narrow the disputes for judicial resolution.

23 **15. Scheduling**

24 **Plaintiffs' Statement**

25 Plaintiffs would object to Defendant filing a motion for summary judgment while
26 Plaintiffs' motion to determine the scope of discovery is pending and before the parties have
27 designated their experts.
28

1 Discovery cut-off date is difficult because we don't know how long a search will be
2 needed for the Defendant to determine whether the removed/destroyed records will be located or
3 not. Plaintiffs would suggest that a status conference be scheduled to determine Defendant's
4 success in locating removed/destroyed records.

5 Expert designation would occur after the discovery cut-off date.

6 Hearing of dispositive motions would be after the expert discovery is concluded.

7 **Defendant's Statement**

8 Defendant believes that it would be appropriate for the Ninth Circuit to resolve Plaintiff's
9 appeal before proceeding with further litigation in the district court. Alternatively, Defendant is
10 prepared to move for summary judgment on at least two of Plaintiffs' remaining claims by
11 October 7, 2024.

12 **16. Trial**

13 The parties do not believe that a trial will be necessary or appropriate in this case as the
14 remaining claims can be resolved through summary judgment motion practice.

15 **17. Disclosure of Non-party Interested Entities or Persons**

16 Plaintiffs have filed the certification of interested entities or persons required by Civil
17 Local Rule 3-15. Defendant is exempt from the requirement to file a certification because they
18 are governmental parties.

19 **18. Professional Conduct**

20 All attorneys of record for the parties have reviewed the Guidelines for Professional
21 Conduct for the Northern District of California.

22 **19. Other matters that may facilitate disposition of this matter**

23 **Plaintiff's Statement**

24 a. Obtaining a best possible estimate when the NARA digitization plan will be
25 completed. It was initially supposed to be a two year process, beginning in early 2022 with two
26 definite phases, and two tentative phases to be completed by August, 2023. At this point,
27 Plaintiffs don't know if it has even begun yet.

1 b. Obtaining a best possible estimate when NARA will respond to our estimates about
2 the contents of the Collection. During December 2022, NARA issued its statement about the
3 state of the contents of the Collection. Plaintiffs provided our analysis to DOJ in August 2023 -
4 disagreeing with some aspects of NARA's statements, and providing our evidence. Plaintiffs
5 have not heard back yet from DOJ.

6 **Defendant's Statement**

7 Defendant believes that this matter can be resolved through setting a schedule for the
8 briefing of a motion for summary judgment once the Ninth Circuit resolves Plaintiffs' appeal.

9
10 Dated: August 29, 2024

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