



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

JAN 08 1991

James H. Lesar, Esq.
Room 509
918 F Street, N. W.
Washington, D. C. 20004

Request No. 338159

Dear Mr. Lesar:

This is in further response to your Freedom of Information Act (FOIA) request on behalf of The Assassination Archives and Research Center concerning Malcolm X.

Records which you requested on Malcolm X from our New York Office have been partially processed under the provisions of the FOIA, and documents already processed for release consist of 3,752 pages. In addition, 3,603 pages of material in FBI Headquarters files have also been previously processed and released. Pursuant to Title 28, Code of Federal Regulations, Section 16.10, there is a fee of ten cents per page for duplication. No fees are assessed for the first 100 pages. Upon receipt of your check or money order payable to the Federal Bureau of Investigation in the amount of \$725.50, the documents will be copied and forwarded to you. Please place your request number on your check or money order.

We have considered your fee waiver request in light of the statutory mandate that fees in connection with FOIA requests shall be either waived, or reduced, if the documents released will be both (a) likely to significantly contribute to public understanding of Government operations and activities, and (b) not primarily in the requesters commercial interests. See Title 5, United States Code, Section 552 (a) (4) (iii). A fee waiver or reduction in connection with your request has been determined to be inappropriate, given your intended use of the materials you requested.

However, you may at no charge, review the releasable records in our Freedom of Information-Privacy Acts (FOIPA) Reading Room at FBI Headquarters by making an appointment in advance by calling (202) 324-3386.

The cited FOIA provision was enacted into law as an amendment to the Anti-Drug Abuse Act of 1986. See Pub. L. 99-570, 100 Stat. 3207, Section 1803. A cosponsor of the amendment, Senator Orrin Hatch, explained the intention of the new fee waiver language, in pertinent part, as follows:

(O)rganizations seeking to establish private repositories of public records shall not qualify for a waiver. These groups purport to act as an intermediary between the Government and requesters in seeking records that requesters could seek directly from the Government. This type of private library of public documents, whether operated for profit

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or not, should not qualify for a waiver....

See 132 Congressional Record S14040 (Sept. 27, 1986) (emphasis added).

Senator Hatch's comment has been accepted as part of "the only authoritative indication () of congressional intent" respecting the FOIA's current fee waiver requirements. See National Security Archive v. U. S. Department of Defense 880 F. 2d 1381, 1385 (D. C. Cir. 1989), quoting North Haven Board of Education v. Bell, 456 U. S. 512, 527, (1982). The decision to deny your fee waiver request has been made following that guidance, as well as fee waiver guidelines issued by the Department of Justice, a copy of which is attached.

If you disagree with the decision regarding your fee waiver, or from any other denial contained herein, you may appeal in writing to the Assistant Attorney General, Office of Legal Policy (Attention: Office of Information and Privacy), United States Department of Justice, Washington, D. C. 20530, within thirty days from receipt of this letter. The envelope and letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIA number assigned to your request so that it may be easily identified.

Documents remaining to be processed from our New York Field Office consist of approximately 10,000 pages.

If all pages are determined to be releasable, duplication costs of \$1,000 could result, representing a charge of ten cents per page. It is emphasized that this is only an estimate; and that the actual charges, after completion of processing of these records, will most likely be less. No duplication fees will be charged for pages that are withheld in their entirety pursuant to any FOIPA exemptions.

Department of Justice regulations (Title 28, Code of Federal Regulations, Sections 16.10 and 16.47) require notification to a requester when anticipated charges exceed \$25. This letter constitutes such notification.

Please indicate in writing your willingness to pay the estimated fees so that further action can be taken on you request. Department of Justice regulations further provide that, where the anticipated fee exceeds \$250, an advance payment of an amount up to the estimated fee may be required. A 25% deposit of \$250 is

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hereby requested. Your check or money order should be made payable to the Federal Bureau of Investigation. Include the FOIA request number with your payment.

Sincerely yours,

J. Kevin O'Brien; mem
J. Kevin O'Brien, Chief
Freedom of Information-
Privacy Acts Section
Information Management Division

Enclosure

Harold 11/25/91
Request includes
records both on
Analcobin + and
on his apparition.
Jim

Department of Justice
Fee Waiver Regulations

28 CFR § 16.10 (7-1-88 Edition)

(d) *Waiver or reduction of fees.* (1) Records responsive to a request under 5 U.S.C. 552 shall be furnished without charge or at a charge reduced below that established under paragraph (b) of this section where a component determines, based upon information provided by a requester in support of a fee waiver request or otherwise made known to the component, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Requests for a waiver or reduction of fees shall be considered on a case-by-case basis.

(2) In order to determine whether the first fee waiver requirement is met—i.e., that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government—components shall consider the following four factors in sequence:

(i) *The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government."* The subject matter of the requested records, in the context of the request, must specifically concern identifiable operations or activities of the federal government—with a connection that is direct and clear, not remote or attenuated. Furthermore, the records must be sought for their informative value with respect to those government operations or activities; a request for access to records for their intrinsic informational content alone will not satisfy this threshold consideration.

(ii) *The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities.* The disclosable portions of the requested records must be meaningfully informative on specific government operations or activities in order to hold potential for contributing to increased public understanding of those operations and activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be likely to contribute to such understanding, as nothing new would be added to the public record.

(iii) *The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding."* The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. A requester's identity and qualifications—e.g., expertise in the subject area and ability and intention to effectively convey information to the general public—should be considered. It reasonably may be presumed that a representative of the news media (as defined in paragraph (j)(8) of this section) who has access to the means of public dissemination readily will be able to satisfy this consideration. Requests from libraries or other record repositories (or requesters who intend merely to disseminate information to such institutions) shall be analyzed, like those of other requesters, to identify a particular person who represents that he actually will use the requested information in scholarly or other analytic work and then disseminate it to the general public.

(iv) *The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.* The public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent. Components shall not make separate value judgments as to whether information, even though it in fact would contribute significantly to public understanding of the operations or activities of the government, is "important" enough to be made public.

(3) In order to determine whether the second fee waiver requirement is met—i.e., that disclosure of the requested information is not primarily in the commercial interest of the requester—components shall consider the following two factors in sequence:

(i) *The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.* Components shall consider all commercial interests of the requester (with reference to the definition of "commercial use" in paragraph (j)(5) of this section), or any person on whose behalf the requester may be acting, but shall consider only those interests which would be furthered by the requested disclosure. In assessing the magnitude of identified commercial interests, consideration shall be given to the role that such FOIA-disclosed information plays with respect to those commercial interests, as well as to the extent to which FOIA disclosures serve those interests overall. Requesters shall be given a reasonable opportunity in the administrative process to provide information bearing upon this consideration.

(ii) *The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."* A fee waiver or reduction is warranted only where, once the "public interest" standard set out in paragraph (d)(2) of this section is satisfied, that public interest can fairly be regarded as greater in magnitude than that of the requester's commercial interest in disclosure. Components shall ordinarily presume that, where a news media requester has satisfied the "public interest" standard, that will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who compile and market government information for direct economic return shall not be presumed to primarily serve the "public interest."

(4) Where only a portion of the requested records satisfies both of the requirements for a waiver or reduction of fees under this paragraph, a waiver or reduction shall be granted only as to that portion.

(5) Requests for the waiver or reduction of fees shall address each of the factors listed in paragraph (d) (2) and (3) of this section, as they apply to each record request.