Harold— This sets a couple of precedents, and if the Govt. doesn't appeal, I get about 1/4 of the $35,000 awarded.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT A. ARONSON,
Plaintiff,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.,
Defendants

CIVIL ACTION
NO. 86-333-S

DOCKETED

MEMORANDUM AND ORDER
ON PLAINTIFF'S PETITION
FOR AN AWARD OF ATTORNEYS' FEES

March 3, 1988

SKINNER, D.J.

Plaintiff Robert A. Aronson petitions this court for an award of attorneys' fees and costs reasonably incurred, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(E).[1] Plaintiff argues that he is eligible for attorneys' fees because he has substantially prevailed in his original action and that he is entitled to attorneys' fees because his action appreciably served the public interest.

Defendants Department of Housing and Urban Development ("HUD") and Donald C. Demitros, Director, Mortgage Insurance and Accounting, U. S. Department of Housing and Urban Development

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[1] 5 U.S.C. § 552(a)(4)(E) provides: "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."

(5)

oppose this petition on the ground that Aronson has not substantially prevailed and, even if he has substantially prevailed, that he is not entitled to attorneys' fees because the public interest served by this action is marginal while the private, commercial benefit to Aronson is great. For the reasons set forth in this opinion, plaintiff's petition is allowed in its entirety.

Background

On January 7, 1986, Aronson submitted a FOIA request to HUD seeking records of:

> vested, unpaid Home Mortgage Distributive Shares which are presently being held by the United States Department of Housing and Urban Development and/or The Treasury for distribution to persons who were the legal owners of real property in or within ninety (90) days of the date when mortgages insured by the federal Housing Administration pursuant to the National Housing Act, sections 203-207, terminated.

HUD received this request on January 8, 1986 but failed to respond to it within ten working days as required by the FOIA. Plaintiff commenced this action on January 28, 1986 to compel disclosure of the requested records. HUD replied to plaintiff's request on February 3, 1986, informing him that distributive share records for the period December 31, 1979 to December 31, 1983 would be released, and that records for the period prior to December 31, 1979 and for the years 1984 and 1985 would be

withheld under Exemption 6 of FOIA, 5 U.S.C. § 552(b)(6).[2] HUD explained that all claims for distributive shares vested prior to December 31, 1979 were time-barred, and that HUD must be allowed two years to locate the owners before 1984 and 1985 records could be released under FOIA.

Defendants filed an answer, and each party filed a motion for summary judgment. I issued a memorandum and order on October 3, 1986 on these cross-motions and found that the requested records were "similar files" within the scope of Exemption 6. However, I found that a clearly unwarranted invasion of personal privacy would result only as to those records for distributive shares vesting after December 31, 1983. I ordered defendants to disclose records of distributive shares vested prior to December 31, 1979.

On appeal, the First Circuit modified this judgment to allow disclosure of distributive share records pertaining to shares that had been vested for greater than one year, Aronson v. United States Department of Housing and Urban Development, 822 F.2d 182 (1st Cir. 1987). The Court of Appeals agreed that the requested records were "similar files" within the scope of Exemption 6, and that the public interest in disclosure of these records did not

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5 U.S.C. § 552(b)(6) provides: "This section does not apply to matters that are personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;..."

outweigh the potential invasions of privacy while HUD actively searched for the share owners, provided that the search was conducted in a reasonable time. The court noted that Aronson had not shown that HUD's procedures for locating eligible mortgagors within the first year after their shares had vested were unreasonable, ineffective or not in accord with accepted practice, and concluded that it was not unreasonable to allow HUD one year to search for eligible mortgagors. However, the court found HUD's activities during the second year of its search to be murky and ill-explained, leaving in doubt the nature and merit of HUD's search procedures in the second year.

Discussion

An award of attorney fees and costs under the FOIA is a matter for the discretion of the court. Education/Instruccion, Inc. v. United States Department of Housing and Urban Development, 649 F.2d 4, 7 (1st Cir. 1981). Plaintiff bears the dual burden of showing that he is "eligible" for such an award and, if so, that he is "entitled" to such an award. New England Apple Council, Inc. v. Donovan, 640 F. Supp. 16, 17 (D. Mass. 1985), citing Church of Scientology v. Harris, 653 F.2d 584, 587 (D.C. Cir. 1981); Fund for Constitutional Government v. National Archives, 656 F.2d 856, 870 (D.C. Cir. 1981). A plaintiff is eligible when he has "substantially prevailed," that is, where

plaintiff shows that the action was necessary to obtain the information and that the action had a causative effect on the disclosure of the requested information. Crooker v. United States Department of Justice, 632 F.2d 916, 922 (1st Cir. 1980); Accord Vermont Low Income Council, Inc. v. Usery, 546 F.2d 509, 513 (2d Cir. 1976); Cuneo v. Rumsfeld, 553 F.2d 1360, 1365 (D.C. Cir. 1977).

Under these criteria, I conclude that plaintiff has substantially prevailed. Plaintiff pursued his request through established administrative channels, and defendants failed to respond to his request within the statutory period. Subsequent to plaintiff's filing of this action, defendants agreed to make a partial disclosure, but a substantial portion of plaintiff's request was withheld. It was only after this action and the appeal taken therefrom that defendants agreed to disclose those records of distributive shares vested prior to December 31, 1979 and those shares that had been vested greater than one year. On these facts, I infer a causal relationsip between plaintiff's action and defendants' eventual release of the requested records.

Defendants contend that plaintiff has not substantially prevailed because his "primary objective" - obtaining the most current unpaid distributive share records - was not achieved. This argument is flawed in two respects. First, the record is void of any evidence that even remotely suggests that Aronson's

primary objective was to obtain the most current unpaid distributive share records. Defendants' argument here is at best speculative. Second, defendants' argument conveniently overlooks the significant volume of records disclosed as a direct result of this action. The unambiguous meaning of the term "substantially prevailed" is not that plaintiff prevail in the entirety but only that plaintiff prevail in an adequate or considerable manner.[3] I conclude that plaintiff has substantially prevailed in this action within the meaning of the statute and is thus eligible to receive attorneys' fees.

The second inquiry is whether plaintiff is "entitled" to attorneys' fees. I am guided in the exercise of my discretion by four criteria enumerated by the Senate in its consideration of the 1974 amendments to the FOIA:

(1) The benefit to the public if any, deriving from the case;

(2) the commercial benefit to the complainant;

(3) the nature of the complainant's interest in the records sought; and

(4) whether the government's withholding of the records sought had a reasonable basis in law.

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[3] Webster's Third New International Dictionary (Unabridged 1979).

S. Rep. No. 93-854, 93d Cong., 2d Sess. 19 (1974).[4] These criteria are not "airtight, independently indispensable prerequisites." Crooker v. United States Parole Commission, 776 F.2d 366, 367 (1st Cir. 1985).

Defendants suggest that the benefit to the public of this action, if any, is marginal as the beneficial effect is to accelerate disclosure of vested distributive share owner records by a mere twelve months. Defendants' argument flies in the face of the evidence and is directly contradictory to the conclusion of the Court of Appeals:

> It cannot be gainsaid that there is a strong public interest in disclosure when that disclosure would lead to the distribution of refunds that would otherwise have little chance of reaching their rightful owners. HUD recognized this public interest in its pre-1984 policy of releasing information on all eligible mortgagors....The public interest is manifestly served by the disclosure and consequent disbursement of funds the government owes its citizens. The problem of nondisbursement in this context is dramatized by the alarming figure of $52 million the government had failed to distribute as of March 1980. The public interest in the release of information...[is also] consistent with FOIA's goal of the exposure of agency action to public inspection and oversight.

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4 This specific listing of factors was deleted from the final version of the amendment in order to avoid limiting the court to only those factors, see H.R. Rep. No. 1380, 93d Cong. 2d Sess. 10 (Conference Report) (1974), but numerous courts have adopted these criteria in their consideration of attorney fee awards in FOIA cases. See, e.g., Education/Instruccion, Inc., 649 F.2d at 7; Crooker, 632 F.2d at 922; VLIAC, 546 F.2d at 512.

Aronson, 822 F.2d at 185. I agree with the conclusion of the Court of Appeals that plaintiff's action has conferred a significant benefit upon the public.

The second and third factors are appropriately considered together. New England Apple Council, Inc., 640 F. Supp. at 17. Application of these factors was explored in the Senate Judiciary Committee Report to Senate Bill S. 2543:

> Under the second criterion a court would usually allow recovery of fees where the complainant was indigent or a nonprofit public interest group versus [sic] but would not if it was a large corporate interest (or a representative of such an interest). For the purposes of applying this criterion, news interests should not be considered commercial interests.
>
> Under the third criterion a court would generally award fees if the complainant's interest in the informtion sought was scholarly or journalistic or public-interest oriented, but would not do so if his interest was of a frivolous or purely commercial nature.

S. Rep. No. 93-854, supra. The import of these guidelines is that attorneys' fees are not to be awarded where the public does not derive benefit and where the primary objective of the action is to advance the private commercial interests of the complainant. Ettlinger v. F.B.I., 596 F. Supp. 867, 880 (D. Mass. 1984) (Where public derives some benefit from action and plaintiff was not motivated primarily by personal or commercial considerations, first three criteria are satisfied.).

Defendant has portrayed plaintiff's motivations as purely personal and commercial in nature. While the potential for personal commercial gain is present, this alone does not negate or outweigh the public interest served by plaintiff's action, as discussed supra. Further, the commercial interests served by Aronson's action are not exclusively personal to him. Plaintiff is but one of many persons who act as "tracers," that is, locating persons who are owed money and receiving a fixed percentage of the money owed in payment for this tracing service. Cases in which the complainant's personal, commercial interest were held to be contrary to the FOIA attorney's fees provisions are readily distinguishable. See, e.g., New England Apple Council, Inc., supra (Notwithstanding defendant's concession that plaintiff was not motivated by commercial gain, nature of plaintiff's interest was primarily personal rather than public since only plaintiff and its members benefited by ascertaining the impropriety of prior investigations and by putting the agency on guard about future investigations); Kendland Co., Inc. v. Department of Navy, 599 F. Supp. 936 (D. Me. 1984) (private self-interest of complainant sufficient to insure vindication of rights under the FOIA, thus making award of attorney's fees unnecessary, where information was sought solely for use in private litigation concerning plaintiff's business interests); Alliance for Responsible CFC Policy, Inc. v. Costle, 631 F. Supp.

1469 (D. D.C. 1986) (Plaintiff, a well-funded entity created solely for advancement of the private interests of its constitutent chlorofluorocarbon producers and users, was clearly motivated by private commercial benefit and had sufficient incentive to pursue FOIA claim without expectation of attorney's fee award.)

The remaining question is whether the government's withholding of the records sought had a reasonable basis in law. I conclude that it did not. The Senate Report suggests that:

> a court would not award fees where the government's withholding had a colorable basis in law but would ordinarily award them if the withholding appeared merely to avoid embarrassment or to frustrate the requester....

S. Rep. No. 93-854, supra. Defendants argue that they did not withhold the requested records to avoid embarrassment and that their withholding was based on the reasonable determination that disclosure of the personal and financial information contained in the requested records prior to HUD's completion of its 24-month search efforts constituted a clearly unwarranted invasion of personal privacy. Defendants argue that since the Court of Appeals held that reliance on Exemption 6 was reasonable as long as the search is conducted within a reasonable time, their entire response to plaintiff's request had a colorable basis in law.

Finally, defendants argue that the 24-month period had a colorable basis in law because it would allow HUD to pursue its expanded search procedures after the first year without interference from private tracers.

Defendants' arguments do not persuade me. In my opinion, it appears that defendants refused to disclose these records to avoid the embarrassment of public scrutiny that would result from disclosure of the amount of funds HUD failed to distribute. More importantly, though, it is disingenuous for defendants to argue that their withholding of records was colorable when the Court of Appeals held that, while Exemption 6 generally applies to these records, the exemption did not apply to the vast majority of plaintiff's request. The court specifically held that HUD's "expanded search procedures" after the first year were murky and lacking in both definition and merit, and that defendants were justified in withholding records only for the first year after the vesting of the shares. Defendants' position was also contrary to the policy established by its prior general counsel. Defendants' withholding of records was ill-conceived and served little purpose other than to frustrate the efforts of Aronson to expose the inefficiencies of HUD's Mortgage Insurance and Accounting office.

With respect to the appropriate amount of an attorneys' fees award, the award should be based on the quantity and fair market value of the legal services rendered, including those in connection with the motion itself. Consumers Union of United States, Inc. v. Board of Governors of the Federal Reserve System, 410 F. Supp. 63, 64 (D. D.C. 1976). Robert Aronson and Kennard Mandell prosecuted this action in the district court, and James Lesar handled the appeal and this petition. All three attorneys are experienced and seek compensation at the rate of $125.00 an hour for their services. This hourly rate is consistent with fees awarded in other FOIA cases in this circuit. See, e.g., Crooker v. United States Parole Commission, 776 F.2d 366, 369 (1st Cir. 1986). I conclude the amount of time spent and the hourly rate sought are reasonable in this instance.

Defendants argue that Aronson may not recover fees for his own time, since the First Circuit generally disallows pro se litigants from collecting fees, even where the litigant is an attorney. See Crooker, 632 F.2d at 922. I agree with plaintiff that Crooker is distinguishable, as Aronson is himself an attorney and as he was represented by other counsel. The rationale expressed in Crooker further distinguishes its application to these facts:

> little, if any, of FOIA's purpose [is] achieved by permitting a litigant to recover for a non-performed service or to be reimbursed for an expense not incurred. Rather, in actions where the complainant

> represents himself, sometimes as a hindrance instead of an aid to the judicial process, an award of attorney fees does nothing mroe than subsidize the litigant for his own time and personal effort.

Id., 632 F.2d at 920, citing White v. Arlen Realty & Dev. Corp., 614 F.2d 387 (4th Cir. 1980). Aronson is not seeking to recover fees for non-performed services or for unincurred expenses, and his role in this litigation has certainly not been a hindrance to the judicial process.

While this circuit has not yet squarely addressed this issue, other circuits have concluded that attorneys appearing in propia persona in a FOIA case may recover attorney fees. See, e.g., Cuneo, 553 F.2d at 1366; Cazalas v. United States Department of Justice, 709 F.2d 1051 (5th Cir. 1983); see also, Note, Awarding Fees to the Self-Represented Attorney Under the Freedom of Information Act, 53 George Washington L.R. 291,291 (1984-85). In the exercise of my discretion, I conclude that Aronson should not be denied attorney's fees for his own time spent prosecuting this action.

Conclusion

For the foregoing reasons, plaintiff's petition for an award of attorneys' fees is ALLOWED in the amount of $35,095.80.

United States District Judge