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Robert N. Ford, Esquire
Chief, Civil Division
Office of the United States Attorney
United States Courthouse
Washington, D.C. 20001

Re: Attorneys' fee award in Vaughn v. Rosen,
Civ. No. 1753-72 (D.D.C.)

Dear Mr. Ford:

This letter is to request that the Government stipulate to an award of reasonable attorneys' fees to plaintiff pursuant to 5 U.S.C. § 552(a)(4)(E) in the above entitled Freedom of Information Act (FOIA) case. We are writing to you as Chief of the Civil Division because Mr. Derek I. Meier, who previously handled the case for your office, has left your employ.

The two appellate opinions and the second district court decision in this case are unquestionably among the most important FOIA cases yet decided. Indeed, the first appellate decision (484 F.2d 820) is undoubtedly the most important decision thus far concerning the procedures to be followed in FOIA litigation. In it, the court of appeals held that in order to meet its burden of proof the Government generally must submit a detailed index, itemization and justification covering each document withheld. The decision has been widely followed.

On remand from our procedural victory, the District Court ordered disclosure of virtually all of the information contained in the Civil Service Commission personnel evaluation management reports we sought, allowing withholding of only "action items" and the names of individual employees (383 F.Supp. 1049). The District Court broke new ground in applying exemption 5, classifying expert opinions as disclosable along with factual information,

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and contrasting such disclosable expert opinions with exempt policy recommendations.

The Court of Appeals affirmed the District Court's opinion and, based on the analysis presented in our briefs, made the first detailed judicial analysis of exemption 2 (523 F.2d 1139). This decision has since been cited with approval and followed by the Supreme Court in Department of the Air Force v. Rose, 425 U.S. 352 (1976).

Obviously, there has never been any question that the plaintiff "substantially prevailed" under Section 552(a)(4)(E). However, a portion of the fees in this case predated the effective date of the amendment adding this attorneys' fee provision to the FOIA, and since the parties disagreed as to the retroactive effect of that fee provision, the parties agreed to a continuance of the costs and fees issue pending the outcome in the Court of Appeals for the District of Columbia Circuit of Cuneo v. Rumsfeld, No. 75-2219, which concerned that issue. On March 24, 1977, the Court of Appeals held that the attorneys' fee provision is retroactive, and the Government's petition for rehearing was recently denied. We thus urge you to agree to pay plaintiff's reasonable attorneys' fees, as outlined below, and taxable costs.

This litigation began over five years ago, and as previously noted has twice required lengthy opinions from the Court of Appeals. Plaintiff fully prevailed on both of these appeals, and he successfully opposed the Government's petition for a writ of certiorari from the first decision. Mr. Ronald Plesser originally had principal responsibility for the case, and Mr. Alan Morrison has continuously had supervisory responsibility. I have reviewed and edited many of the papers since the time of the first appellate decision. Mr. Mark Lynch took over principal responsibility for the case at the time of the second appeal in the spring of 1975, which resulted in the affirmance on the merits. To the best of my knowledge, we have more FOIA litigation experience than any other four attorneys in private practice in the country.

Mr. Plesser, who is presently the General Counsel of the Federal Privacy Protection Study Commission, was the first private attorney in the country to work full time on Freedom of Information Act matters. He joined the Freedom of Information Clearinghouse in April 1972 and left in October 1974. He has

in the past been active in the activities of the District of Columbia Bar (Unified), and is a past member of the Steering Committee for Division I (Administrative Law).

Mr. Morrison is and has been for the past five years the Director of the Public Citizen Litigation Group, and he has wide experience in FOIA matters. He was formerly the Assistant Chief of the Civil Division of the United States Attorney's Office for the Southern District of New York, and prior to that he was associated with the law firm of Cleary, Gottlieb, Steen and Hamilton in New York City. He is presently a member of the Board of Governors of the District of Columbia Bar. Similarly, I am presently the Chairperson of the Administrative Law Division of the District of Columbia Bar, and I have previously served as Chairperson and Vice-Chairperson of the Division's Committee on Access to Government Information. I have personally worked on over 30 FOIA cases, and I have lectured across the country on freedom of information matters.

Mr. Lynch, while with Congress Watch, was the principal lobbyist on behalf of the 1974 amendments to the FOIA. He later joined the Freedom of Information Clearinghouse where he litigated a wide variety of FOIA cases, and he is a frequent lecturer on the FOIA at seminars and conferences, including those sponsored by the Civil Service Commission for new Government employees. Mr. Lynch is presently the Chief Counsel of the American Civil Liberties Union's Project on National Security and Civil Liberties.

Mr. Morrison's present hourly rate for cases is \$90, Mr. Ellsworth's is \$65, Mr. Lynch's is \$50, and Mr. Plesser's rate would be comparable to Mr. Ellsworth's if he were presently in private practice. These rates are in line with those charged by other attorneys of similar experience and reputation in Washington Law firms having primarily a Federal practice. However, we recognize that the rates have increased significantly over the period of this action, both because of a general increase in rates and, more importantly, because of the increasing experience and expertise which we have gained in the area. Therefore, for all but the most recent actions, the proposed hourly rates, set forth below, are charged at much lower levels.

Since February, 1975, when the FOIA attorneys' fee provision took effect, I have kept daily records of the time I have expended

on this case, and we have each reconstituted time records for periods for which daily time sheets were not maintained. These figures do not include time expended on this fee application. Our experience teaches that our reconstituted hours generally fall far below the actual hours expended on a case. Nonetheless, for purposes of settlement, we have adopted this very conservative method for figuring our time on the case whenever we do not have contemporaneous time sheets.

There have been several distinct stages of this litigation, and for convenience we have broken the work down into them:

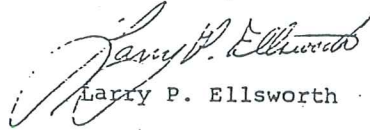
<u>District Court I:</u>	<u>Attorney</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
(August, 1972- January, 1973)	Ronald Plesser	.60	\$45	\$ 2,700.00
	Alan Morrison	9-1/2	\$70	\$ 665.00
<u>Court of Appeals I:</u>				
(January, 1973- November, 1973)	Ronald Plesser	97	\$50	\$ 4,850.00
	Alan Morrison	19-1/2	\$75	\$ 1,462.50
<u>Supreme Court:</u>				
(February, 1974)	Ronald Plesser	20	\$50	\$ 1,000.00
	Alan Morrison	8	\$75	600.00
	Larry Ellsworth	6	\$40	240.00
<u>District Court II:</u>				
(April, 1974- October, 1975)	Ronald Plesser	155	\$60	\$ 9,300.00
	Alan Morrison	15-1/2	\$85	\$ 1,317.50
	Larry Ellsworth	11	\$60	660.00
<u>Court of Appeals II:</u>				
(March-December, 1975)	Mark Lynch	134	\$50	\$ 6,700.00
	Alan Morrison	25	\$85	\$ 2,125.00
	Larry Ellsworth	34-3/4	\$60	\$ 2,085.00
				\$33,705.00

These figures do not include the time which we have already expended on the attorneys' fee issue, including this letter, and the time spent assisting counsel in Cuneo v. Rumsfeld in their

appeal of the retroactivity issue. Nor do they include the time which Mr. Plesser donated on a pro bono basis while he was in private practice, after leaving the Clearinghouse and prior to joining the Privacy Commission. Additionally, we have not charged for the time Mr. Lynch spent reviewing the extensive record at the time of the second appeal. Furthermore, we believe that we are entitled to a multiplier of at least 50% in view of the risk of non-compensation, the long delay in payment, the high quality of the work performed, the public benefit resulting from this suit, and other relevant factors. See Lindy Bros. Builders, Inc. v. American Radiator and Stand. Sanitary Corp., 540 F.2d 102 (3d Cir. 1976); National Treasury Employees Union v. Nixon, 521 F.2d 317 (D.C. Cir. 1975); Lindy Bros. Builders, Inc. v. American Radiator and Stand. Sanitary Corp., 487 F.2d 161 (3d Cir. 1973); American Fed. of Govt. Employees v. Rosen, 418 F. Supp. 205 (N.D. Ill. 1976). However, in the interest of securing a prompt settlement, we are willing to forego our entitlement to this incentive bonus. Of course, if it becomes necessary to seek an award from the Court, we will probably seek payment for these items, as well as for the additional time we will expend on such an application.

The fee award we seek -- \$33,705 -- is fair and reasonable for this case. Thus, we hope that you will promptly agree to bring this litigation to an end by stipulating to pay such an award, plus taxable costs. If you have any questions, please call me.

Yours truly,


Larry P. Ellsworth