UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN M. AUG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 74-1054
	)	
NATIONAL RAILROAD PASSENGER CORPORATION,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR AWARD OF REASONABLE ATTORNEYS' FEES AND LITIGATION COSTS

This memorandum is submitted in support of plaintiff's accompanying motion requesting the Court to award him reasonable attorneys' fees and other litigation costs reasonably incurred in this litigation under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. This Court granted summary judgment for the plaintiff on March 30, 1976, ordering defendant National Railroad Passenger Corporation (Amtrak) to disclose all statements of policy, explanations thereof, and votes thereon contained in the minutes of the meetings of its Board of Directors. Amtrak did not appeal. However, Amtrak's original disclosure pursuant to the Court's Order was woefully inadequate. Plaintiff therefore entered into an extended period of discussions and correspondence with Amtrak's attorneys, and with the Board itself, which lead to several further disclosures over the past year, and culminated on April 1, 1977, in the disclosure of an additional 182 pages of minutes with deletions. With this disclosure, Amtrak has come into "substantial"

compliance with this Court's Order, and plaintiff hereby voluntarily withdraws his request for the remainder of the policy statements contained in the minutes. Having substantially prevailed, plaintiff qualifies for an award of reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E). Plaintiff has sought to settle the issue of attorneys' fees out of court, but defendants have taken the position that no fee award is allowable.

STATUTE INVOLVED

The FOIA, 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.

HISTORY OF THE LITIGATION

On July 15, 1974, plaintiff Stephen Aug, a well-known reporter for the Washington Star who regularly covers Amtrak, commenced this lawsuit seeking access to Amtrak's policy statements and Director's votes contained in the minutes of its Board of Director's meetings. Complaint ¶ 10. Over the previous fifteen months he had corresponded with Amtrak officials in an unsuccessful attempt to secure access. Id. at ¶¶ 6 and 8. Each time, Amtrak had responded that the minutes were exempt in their entirety from the FOIA's compulsory disclosure provisions. Id. at ¶¶ 7 & 9. The only exemption cited by Amtrak was the fifth, 5 U.S.C. § 552(b)(5), which protects certain pre-decisional deliberations. Id. at ¶ 7.[1/] When

1/ This correspondence concerning plaintiff's requests for and defendant's denials of access was submitted as plaintiff's exhibits 1 through 6, accompanying plaintiff's motion for summary judgment filed on October 1, 1975.

plaintiff's efforts at informal discovery failed,[2] plaintiff submitted a set of interrogatories seeking a more detailed description of the nature of the material claimed to be exempt. Amtrak answered in part and objected in part. For the first time it alleged the applicability of five exemptions in addition to exemption 5: exemption 2 (personnel practices); exemption 3 (another statute); exemption 4 (confidential commercial information); exemption 6 (personal privacy); and exemption 7 (law enforcement records).[3]

By oral order on February 3, 1975, the Court granted in part and denied in part plaintiff's motion to compel further answers, and ordered the disputed documents, and an index thereto, submitted to the Court for in camera inspection.

Amtrak submitted these materials and filed a motion supported by a 39-page memorandum and extensive exhibits. It claimed that it was not fully subject to the FOIA, and that, in any event, six exemptions applied in a blanket fashion to exempt its minutes entirely. Plaintiff then requested: (1) access to the index previously submitted to the Court; (2) the detailed itemization and justification required by Vaughn v. Rosen I, 484 F.2d 820 (D.C. Cir. 1973); and (3) permission for counsel to participate in in camera inspection

2/ See Letter of September 20, 1974, from George R. Clark to Larry P. Ellsworth, previously submitted as defendant's Exhibit 3, attached to Defendant's Memorandum Of Points And Authorities In Opposition To Motion To Compel Answers To Interrogatories (January 9, 1975).

3/ 5 U.S.C. § 552(b)(2), (3), (4), (6) & (7). Answer of Defendant National Railroad Passenger Corporation to Interrogatories Of Plaintiff ## 7-10 (Nov. 4, 1974).

subject to appropriate protective orders. Subsequently, plaintiff submitted two further sets of interrogatories on limited areas of dispute, and Amtrak objected to both. Plaintiff then moved to compel. By Order of July 18, 1975, the Court granted plaintiff access to the index previously submitted by Amtrak, as well as a secret brief submitted by Amtrak with the index which further described the minutes and sought to justify withholding; found that these disclosures satisfied the Vaughn requirement; held that counsel's participation in in camera inspection was unnecessary; and granted plaintiff's motion to compel answers to the second set of interrogatories, while denying his motion to compel answers to the third set.[4/]

Plaintiff was thus able to file his motion for summary judgment on October 1, 1975. He supported the motion with affidvaits from himself and Ross Capon, the Assistant Director of the National Association of Railroad Passengers; twelve exhibits, including portions of four sets of minutes to which he had gained access from sources other than Amtrak; and a fifty-six page memorandum of law, half of which was necessitated by Amtrak's belated allegation that five additional exemptions applied. Amtrak filed a thirty-three page reply memorandum and further briefing followed.

On March 30, 1976, the Court granted plaintiff's motion for summary judgment in its entirety and denied defendant's

4/ During this time Amtrak also submitted a set of interrogatories to plaintiff Aug to which he responded on June 30, 1975.

motion in its entirety. In its accompanying opinion, the Court held that Amtrak was fully subject to the FOIA (Slip Op. at 5), ruled that Amtrak's policy statements were not protected by exemption 5 (Slip Op. at 5-6), and rejected seriatum each of the other five exemptions Amtrak claimed. (Slip Op. at 7-8).

PLAINTIFF'S EFFORTS TO SECURE COMPLAINCE WITH THE COURT'S ORDER

The Court's Order of March 30th required compliance within twenty days. While considering whether to appeal, Amtrak's counsel inquired of plaintiff's counsel whether plaintiff intended to seek attorneys' fees, and was orally informed that fees would be sought. Thereafter, Amtrak announced that it would not appeal, but stated that it needed more time to assemble the minutes. The parties, therefore, stipulated, with the Court's approval, to extend this time for disclosure until May 3, 1976. On May 4th, plaintiff received the first, highly censored disclosures from Amtrak.[5/] These disclosures were, to say the least, "extremely skimpy" (Pl. Exh. 13B; see Pl. Exh. 13A). Plaintiff's protests (id.) led to a meeting with defendant's counsel (see Pl. Exh. 17 & 19), and eventually to several additional disclosures (Pl. Exh. 21 & 23).

In the meantime, after receiving authorization from defendant's counsel, plaintiff's counsel had written directly

5/ The cover letter, dated May 3, 1976, is submitted herewith as plaintiff's Exhibit 13. The other correspondence between the parties is also submitted herewith as plaintiff's Exhibits 13A through 40, and will henceforth be cited by their Exhibit numbers. Plaintiffs Exhibits 1 through 12 were previously submitted along with plaintiff's motion for summary judgment on October 1, 1975.

to Amtrak's Board of Directors in an effort to resolve this dispute. Additionally, the communique pointed out that at least for those minutes which were several years old, disclosure could not possibly harm Amtrak, and so disclosure was in order whether or not Amtrak agreed that it was required (Pl. Exh. 20; see Pl. Exh. 22). The Board took the matter up at its June, 1976 meeting, but reached no conclusion (Pl. Exh. 24). At the July meeting, it decided to have Mr. Donald P. Jacobs, Chairman of the Board, consider the matter further (Pl. Exh. 25), but despite plaintiff's repeated requests (e.g., Pl. Exh. 26), it was mid-November before Amtrak reported that Mr. Jacobs' review would not result in further disclosures (Pl. Exh. 27).

Conversations between counsel were thus resumed in late November and early December (Pl. Exh. 28). Amtrak then promised to supply summaries of each of the items on which the Board had voted, while continuing to withhold the items themselves, so that plaintiff could make an informed decision as to whether to press further for them (Pl. Exh. 29-31). When these summaries still had not been supplied by mid-February, plaintiff announced that he would be forced to seek court assistance unless Amtrak promptly presented the oft-promised summaries (Pl. Exh. 32). Amtrak then promised to present the summaries before the end of February (Pl. Exh. 33), and a letter listing the categories of minutes concerning Directors' votes was produced on February 25, 1977 (Pl. Exh. 34).

The next week, plaintiff offered to withdraw his request if Amtrak would supply him with the portions of the

minutes concerning capital appropriations and pay reasonable attorneys' fees and costs (Pl. Exh. 35). This was rejected out of hand by Amtrak (Pl. Exh. 36). Plaintiff's counsel then orally suggested an agreement as to the reasonableness of the hours and rates regarding attorneys' fees, allowing Amtrak to raise other alleged defenses to any payment. This was later put in writing (Pl. Exh. 37). However, Amtrak rejected even this suggestion, stating that "it cannot pay any fees" (Pl. Exh. 38).

Plaintiff on March 24th agreed to leave the fee question to the Court, and offered to stipulate to withdrawal of the remainder of his request if Amtrak would stipulate to surrender the capital expenditure information (Pl. Exhs. 39A and 39B). On March 31, 1977, counsel for plaintiff orally informed Amtrak's counsel that there was a significant amount of legal work done on this case prior to passage of the attorneys' fee provision at the FOIA, which had not been included in the amount that counsel had previously agreed to accept in settlement, but that plaintiff would accept the previously specified amount if Amtrak would promptly agree to pay. However, plaintiff's counsel also stated that if Amtrak rejected this offer, plaintiff would seek payment for this time as well, especially in view of the District of Columbia Circuit's recent decision that the FOIA attorneys' fee provision is fully retroactive. Cuneo v. Rumsfeld, No. 75-2219 (March 24, 1977). Amtrak, however, did not accept the fee settlement. As to the other issues, it responded on April 1, 1977, by refusing to sign the stipulation, while nonetheless

releasing 182 pages of Board minutes containing capital expenditure decisions and a policy statement on financing (Pl. Exh. 40).

ARGUMENT

I. THE FOIA AUTHORIZES THIS COURT TO AWARD PLAINTIFF REASONABLE ATTORNEYS' FEES AND OTHER LITIGATION COSTS INCURRED IN THIS ACTION.

The 1974 amendments to the FOIA, Pub. L. No. 93-502, specifically authorize the award of attorneys' fees and other litigation costs when the plaintiff substantially prevails:

> 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 U.S.C. § 552(a)(4)(E). According to the Senate report on the amendments, "[t]hese fees and costs would be payable from the budget of the agency involved as party to the litigation." S. Rep. No. 93-854, 93d Cong., 2d Sess. 17 (1974) (hereinafter "Senate Report"). The 1974 amendments to the FOIA also expanded the definition of agency to include any "Government controlled corporation" (5 U.S.C. § 552(e)), and subsequent to this Court's decision, the D.C. Circuit Court has found that "[t]he legislative history of the 1974 Amendments to FOIA reveals that Congress intended to strengthen the Act and expand its coverage to include quasi-governmental entities like . . . Amtrak . . . ." Rocap v. Indiek, 539 F.2d 174, 177 (D.C. Cir. 1976). See Senate Report at 33; H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 8-9 (1974) (hereinafter "House Report"). In any event, this Court has held that "[t]he Rail Passenger Service Act expressly makes Amtrak subject to the provisions of the FOIA, 45 U.S.C.

§ 546(g) . . ." (Slip. Op. at 5). Thus, there is no doubt that in the FOIA Congress has provided a specific statutory exception to the general rule against award of attorneys' fees against quasi-government agencies like Amtrak.

II. THIS COURT SHOULD EXERCISE THE DISCRETION CONFERRED UPON IT BY 5 U.S.C. § 552(a)(4)(E).

The impetus for the attorneys' fee provision was a study by the House Government Operations Committee of the effectiveness of the FOIA during its first seven years. After an exhaustive set of hearings extending over several years and consuming nine printed volumes, the Committee concluded, inter alia, that "the investment of many thousands of dollars in attorney fees and court costs . . . makes litigation under the act less than feasible in many situations." H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 8 (1972). The most complete description of the purpose of the attorneys fee provision is contained in the Senate Report, which states in part that (pp. 17-19):

> Such a provision was seen by many witnesses as crucial to effectuating the original congressional intent that judicial review be available to reverse agency refusals to adhere strictly to the Act's mandates. Too often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law. "If the government had to pay legal fees each time it lost a case," observed one witness, "it would be much more careful to oppose only those areas that it had a strong chance of winning." (Hearings, vol. I at 211.)
>
> The obstacle presented by litigation costs can be acute even when the press is involved. As stated by the National Newspaper Association:
>
> > An overriding factor in the failure of our segment of the Press to use the existing Act is the expense connected with litigating FOIA matters in the courts once an agency has decided against making information available. This is probably the most undermining aspect of existing law and

> severely limits the use of the FOI Act by all media, but especially smaller sized newspapers. The financial expense involved, coupled with the inherent delay in obtaining the information means that very few community newspapers are ever going to be able to make use of the Act unless changes are initiated by the Committee. (Hearings, vol. II at 34.)

The necessity to bear attorneys' fees and court costs can thus present barriers to the effective implementation of national policies expressed by the Congress in legislation.

* * *

> The bill allows for judicial discretion to determine the reasonableness of the fees requested. Generally, if a complainant has been successful in proving that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating an important public policy. In such cases it would seem tantamount to a penalty to require the wronged citizen to pay his attorneys' fee to make the government comply with the law.

The attorneys' fees provision in the Senate bill to amend the FOIA contained four criteria to guide a court in making its decision whether to award attorneys' fees: (1) the benefit to the public, if any, deriving from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) whether the agency's withholding had a reasonable basis in law. Senate Report at 19. These specific criteria, however, were deleted from the final version of the bill. The Report of the House-Senate conferees explained:

> By eliminating these criteria, the conferees do not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria. Instead, the conferees believe that because the existing body of law on the award of attorney fees recognizes such factors, a statement of the criteria may be too delimiting and is unnecessary.

H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. 10 (1974)(hereinafter "Conference Report"). While it is apparent that Congress intended the courts to exercise their discretion more liberally than the

Senate criteria, it is also readily apparent that, even under those more restrictive criteria, plaintiff is entitled to an award in this case.

First, merely by initiating this lawsuit and forcing Amtrak to comply with the requirements of the FOIA, plaintiff has acted as a private attorney general vindicating the strong Congressional commitment to a national policy of full disclosure. See Senate Report at 19. As a result of these disclosures, the public has learned of various suspect practices of Amtrak Directors involving possible conflicts of interest. See Aug, Amtrak Bosses on First-Class Trip Despite Deficits, Wash. Star, May 7, 1976, § A, p. 3, submitted as Pl. Exh. 13C. Thus, plaintiff meets the first criterion under which, the Senate Report stated, "a court would ordinarily award fees . . . where a newsman was seeking information to be used in a publication . . . ." (Senate Report at 19).

Nor does the second criterion, which counsels against awards of fees to those reaping commercial benefits from disclosure, apply to journalists seeking information for the public. Again, the Senate Report specifically states that, "[f]or the purposes of applying this criterion, news interests should not be considered commercial interests." Id. at 19.

Similarly, the Senate Report explicitly states that "[u]nder the third criterion a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented . . . ." Id. at 19 (emphasis added).

The fourth criterion to be considered is whether the agency's withholding had a colorable basis in law, or whether

it was intended to cover up embarrassing information such as conflicts of interest. Id. at 19. Of course, even if an agency meets the reasonable basis requirement, fees may still be awarded, for "[i]t is but one aspect of the decision left to the discretion of the trial court." Cuneo v. Rumsfeld, supra, slip. op. at 11. Indeed, the Senate Report states that "newsmen would ordinarily recover fees even where the government's defense had a reasonable basis in law . . . ." Senate Report at 19-20. In any event, as explained below (pp. 23-25, infra), several of Amtrak's alleged defenses bordered on the frivolous, and Congress stated that fee awards are especially appropriate where "officials have been recalcitrant in their opposition to a valid claim or have been otherwise engaged in obdurate behavior." Senate Report at 19.

Moreover, under "the existing body of law" which Congress has directed the courts to apply to awards of attorneys' fees under the FOIA (Conference Report at 10), plaintiff is entitled to a strong presumption in favor of an award. Congress has clearly indicated that it regarded the FOIA fee provision to be analogous to the fee provisions of such civil rights legislation as Title II of the Civil Rights Act of 1964 and the Emergency School Aid Act of 1972--which like 5 U.S.C. § 552(a)(4)(E) are discretionary. Senate Report at 18. Under these provisions, the Supreme Court has held that fee awards "ordinarily" should be made to successful plaintiffs "unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968)(construing 42 U.S.C. § 2000a-3(b)); Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427, 428

(1973)(construing 20 U.S.C. § 1617); Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 261-262 (1975). The same presumption should be applied in FOIA cases. Indeed, the public policies underlying the fee provisions in both civil rights legislation and the FOIA are strikingly similar. The civil rights statutes provide a mechanism whereby private parties can vindicate rights guaranteed by the Fourteenth Amendment. Similarly, the FOIA provides a mechanism whereby private parties can pursue their rights guaranteed by the First Amendment.[6/]

In brief, it is apparent from the legislative history that Congress provided for attorneys' fees under the FOIA with at least three purposes in mind: (1) to enable citizens acting as private attorneys general to vindicate a national policy of disclosure of agency-held information; (2) to enable individuals to fully exercise their rights under the FOIA; and (3) to chastise and deter noncompliance with the FOIA on the part of government agencies. Moreover, Congress plainly intended that journalists would be among the primary users and beneficiaries of this provision. All of these purposes will be served by a fee award in this case, and the Court thus should exercise its

---

6/ As the Senate Report on the FOIA amendments of 1974 states:

> Open government has been recognized as the best insurance that government is being conducted in the public interest, and the First Amendment reflects the commitment of the Founding Fathers that the public's right to information is basic to maintenance of a popular form of government. Since the First Amendment protects not only the right of citizens to speak and publish, but also to receive information, freedom of information legislation can be seen as an affirmative congressional effort to give meaningful content to constitutional freedom of expression.
>
> Senate Report at 1-2 (emphasis added).

discretion to make an award of reasonable attorneys' fees and other litigation costs.

III. THE SUM OF $26,536 IS A REASONABLE AWARD FOR ATTORNEYS' FEES AND OTHER LITIGATION COSTS IN THIS ACTION.

Plaintiff submits that an award of $26,536 is reasonable in this case. It is also consistent with fee awards found to be reasonable in other FOIA cases in this District Court.[7/] This sum was arrived at through the following computations and for the reasons set forth below and in the accompanying affidavits of each attorney:

Mr. Ellsworth	298.5 hours x $65/hour x 1.2	$23,283
Mr. Morrison	30.0 hours x $90/hour x 1.2	3,240
Taxable Costs	Filing & Marshal's Fees	13
		$26,536

The Court of Appeals for this Circuit has recently reaffirmed this method of determining the reasonable value of attorneys' services for purposes of an award:

> The inquiry begins with a determination of the time devoted to the litigation. This figure in turn is multiplied by an hourly rate for each attorney's work component, a rate which presumably would take into account the attorney's legal reputation and experience. The resulting figure represents an important starting point because it 'provides the only objective basis for valuing an attorney's services.'

National Treasury Employees Union v. Nixon, 521 F.2d 317, 322 (D.C. Cir. 1975)(footnote omitted), citing Lindy Bros. Builders, Inc. v. American Radiator and Stand. Sanitary Corp., 487 F.2d

---

7/ See, e.g., Consumers Union, Inc. v. Board of Governors of the Federal Reserve System, 410 F. Supp. 63, 65 (D.D.C. 1976) (appealed on another ground)($19,549.19); Cuneo v. Schlesinger, Civ. No. 1826-67 (D.D.C., Sept. 15, 1975), remanded on other grounds, No. 75-2219 (D.C. Cir., Mar. 24, 1977)($19,000).

161, 167 (3d Cir. 1973)(hereinafter "Lindy Bros. I"). This base amount or "lodestar" should then be adjusted to take account of the risk involved, the quality of the work and other relevant factors. Lindy Bros. Builders, Inc. v. American Radiator and Stand. Sanitary Corp., 540 F.2d 102, 117-18 (3d Cir. 1976) (hereinafter "Lindy Bros. II"). As this Circuit's Court of Appeals explained in National Treasury Employees Union:

> In turn, this figure may be adjusted upward if there was a risk of non-compensation or partial compensation. In addition, the fees may be adjusted upward or downward on the basis of the quality of work performed as judged by the District Court.

521 F.2d at 322 (footnotes omitted). This rule is equally applicable in appropriate FOIA cases. See American Fed. of Govt. Employees v. Rosen, 418 F. Supp. 205, 209 (N.D. Ill. 1976). Of course, the Court must state the factors considered and give a brief statement of the reasons for increasing or decreasing any fee award. See Lindy Bros. II, supra, 540 F.2d at 117 & 118; Lindy Bros. I, supra, 487 F.2d at 169. Cf. Schwartz v. IRS, 511 F.2d 1303 (D.C. Cir. 1975).

Furthermore, the D.C. Circuit in National Treasury Employees Union held that courts should follow this formula in determining awards to salaried "public interest" lawyers as well as attorneys for hire:

> '[i]t may well be that counsel serve organizations like appellants for compensation below that obtainable in the market because they believe the organizations further [the] public interest.' If such was the case here the District Court should award such additional amounts as are necessary to bring the compensation up to reasonable value.

Id. at 322-23 (footnote omitted); accord, Wilderness Society v. Morton, 495 F.2d 1026, 1037 (D.C. Cir. 1974)(en banc), rev'd on other grounds sub nom. Alyeska Pipeline Service Co. v. Wilderness

Society, 421 U.S. 240 (1975). Indeed, the principal sponsor of the FOIA attorneys' fee provision in the Senate specifically approved this approach, stating that "courts should look to the prevailing rate on attorneys' fees, for example, rather than solely to whether the specific attorney involved is from Wall Street or a public interest law firm." 120 Cong. Rec. S 9317 (daily ed., May 30, 1974)(remarks of Senator Kennedy).

A. The Base Amount--Hours and Rate--Is Reasonable.

Under the criteria established by the D.C. Circuit, the base amount of the requested fee award is reasonable and proper. The number of hours expended, which are supported by affidavit proof, are quite low for a hard-fought case such as this which has been in litigation and negotiations for almost three years --since July 15, 1974. Similarly, the base rate per hour requested --$65 and $90, respectively--is on the conservative side for experienced attorneys of the reputation of plaintiff's counsel. By comparison, law firms in Washington, D.C. having primarily Federal practices generally bill from $40 to $85 an hour for the time of associates, and from $75 to $150 an hour for partners. Ellsworth Aff. ¶ 10; Morrison Aff. ¶ 7. These rates are generally increased if an attorney has special expertise in the area involved. Ellsworth Aff. ¶ 10. Since plaintiff's counsel apparently have more experience in FOIA matters than any other private counsel in the country, they certainly must qualify as having special expertise. Mr. Ellsworth has himself worked on over thirty FOIA cases, and is a frequent lecturer on the FOIA at seminars, conferences, classes and training programs conducted by government agencies, bar associations, law schools,

journalistic groups, and civic organizations. Ellsworth Aff. ¶¶ 6 & 8. He has written various articles on the FOIA, and has advised Federal, State and foreign governments concerning public access laws. Id. ¶¶ 8 & 9. Mr. Morrison, in turn, has not only supervised most of the cases handled by Mr. Ellsworth, but has also supervised most of the other FOIA cases brought by the Freedom of Information Clearinghouse and Public Citizen Litigation Group. Morrison Aff. ¶ 5. Moreover, Mr. Morrison's rate is on a par with those used in his court-awarded fee awards in other recent cases. Morrison Aff. ¶ 8.

The D.C. Bar activities of both Messrs. Ellsworth and Morrison--Division Chairperson and Member of the Board of Governors, respectively--certainly evidence the high reputation they hold among members of the bar. Ellsworth Aff. ¶ 7; Morrison Aff. ¶ 6. Indeed, the Director of the Department of Justice's Freedom of Information and Privacy Unit has stated in a pleading in another case that Mr. Ellsworth "deservedly enjoy[s] the highest professional reputation."[8/] Thus, in light of the 1974 amendments to the FOIA and the rationale of National Treasury Employees Union, base rates of $65 and $90 per hour for the specified number of hours are fully justified.

B. The Requested 20 Percent Upward Adjustment Is Not Only Reasonable, But Modest, On The Facts Of This Case.

With these rates and hours as a "starting point," the court must next determine the amount of adjustments warranted by (1) the risk of non-compensation, (2) the quality of counsel's

---

8/ Memorandum in Opposition to Plaintiff's Motion to Permit Plaintiff's Counsel to Participate in In Camera Examination p. 2 n.2 (Nov. 24, 1975), submitted in Phillippi v. CIA, Civ. No. 75-1265 (D.D.C. 1975).

work, and (3), in the context of the FOIA, the obdurate behavior of the defendants, including the raising of several claims of exemption which bordered on the frivolous. See National Treasury Employees Union v. Nixon, supra, 521 F.2d at 322. It should, however, be noted at the outset that the 20 percent upward adjustment is quite modest when compared with adjustments made in other cases.9/

1. Regarding the first of these, the risks of non-compensation, there are three primary considerations: (a) the degree of plaintiff's burden at the time the suit was commenced, including the factual and legal complexity of the case and the novelty of the issues; (b) the delay in receipt of payment; and (c) the risks assumed, including:

> (a) the number of hours of labor risked without guarantee of remuneration; (b) the amount of out-of-pocket expenses advanced for processing motions, taking depositions, etc.; (c) the development of prior expertise in the particular type of litigation; recognizing that counsel sometimes develop, without compensation, special legal skills which may assist the court in efficient conduct of the litigation, or which may

---

9/ See, e.g., Lindy Bros. II, supra, 540 F.2d at 115-16 (100% incentive premium); National Association of Regional Medical Programs, Inc. v. Weinberger, 396 F. Supp. 842, 850-51 (D.D.C. 1975)(100% bonus), rev'd on other grounds, No. 75-1615 (D.C. Cir., Dec. 13, 1976), petition for cert. filed, 45 U.S.L.W. 3635 (March 11, 1977)(No. 76-1266); Pealo v. Farmers Home Administration, 412 F. Supp. 561, 567-68 (D.D.C. 1976)(50% increase); Blankenship v. Boyle, 337 F. Supp. 296, 302 (D.D.C. 1972)(33+% addition); National Council of Community Mental Health Centers, Inc. v. Weinberger, 387 F. Supp. 991, 997 (D.D.C. 1974)(30% upward adjustment), rev'd on other grounds, 546 F.2d 1003, 1009 (D.C. Cir. 1976)(appellate court found fee award to be "eminently reasonable," but impossible because of soverign immunity), petition for cert. filed sub nom. Wagshal v. Califano, 45 U.S.L.W. 3653 (March 18, 1977)(No. 76-1304); Parker v. Matthews, 411 F. Supp. 1059, 1068 (D.D.C. 1976)(25% incentive fee); Kiser v. Miller, 364 F. Supp. 1311, 1318 (D.D.C. 1973)(10% increment). See also Pete v. WMWA Welfare and Retirement Fund, 517 F.2d 1267, 1272 (D.C. Cir. 1974).

> aid the court in articulating legal precepts and implementing sound public policy.

Lindy Bros. II, supra, 540 F.2d at 117.

(a) It is generally recognized that the burden on a plaintiff in FOIA litigation is very high, for, as one experienced FOIA litigator has put it, "a plaintiff's lawyer is at a loss to argue with precision about the contents of a document he has been unable to see. Not knowing the facts--that is, what the documents say--puts him at a real disadvantage when he is trying to convince a judge that the information should be disclosed instead of kept secret under whatever exemption the government has chosen to assert." R. Plesser, Using the Freedom of Information Act, 1 Litigation Magazine 35 (1975). This Circuit's Court of Appeals has recognized this many times, stating for example that:

> In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. In many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought.

Vaughn v. Rosen I, 484 F.2d 820, 823 (1973), cert. denied, 415 U.S. 977 (1974). To overcome this disadvantage, plaintiff's counsel had to use ingenuity in developing their case through the use of trial discovery, finding outside sources of information concerning the nature of the documents, and the use of the Vaughn motion which they have perfected.

Moreover, while some of Amtrak's defenses were far-fetched, other issues in the litigation were quite novel. This was the

first case in which a Court held a "for profit" corporation to be subject to the FOIA. This was especially significant because, until this Court held against Amtrak, there was at least some room for doubt as to whether the FOIA was fully applicable to Amtrak under the terms of the Rail Passenger Service Act, 45 U.S.C. § 546(g). 10/ Likewise, until the D.C. Circuit settled the question after this Court's decision, there was some doubt as to whether the expanded definition of agency under the FOIA, 5 U.S.C. § 552(e), included Amtrak, or whether Amtrak was excluded along with the Corporation for Public Broadcasting. Rocap v. Indiek, supra, 539 F.2d at 178-79. 11/ Finally, the entire question of the availability of portions of minutes of a normal Federal agency, let alone a government-controlled corporation, was unresolved at the time that this case was commenced in 1974. It was not until the next year that the court of appeals held that portions of Federal Trade Commission minutes would be subject to disclosure. Ash Grove Cement Co. v. FTC, 511 F.2d 815, rehearing denied, 519 F.2d 934 (D.C. Cir. 1975). Even then, this Court still had to resolve whether § 552(a)(2)(B) required all policy statements to be disclosed, or only those "involving adjudicative or legislative functions" as Amtrak contended (Slip. op. 6). Of course, the novelty of the issues involved is to be determined as of the time that the suit was commenced.

(b) There has already been a three-year delay in receipt of any payment by plaintiff's counsel for the services rendered

---

10/ See Amtrak's Memorandum Of Points And Authorities In Support Of Defendant's Motion For Summary Judgment 2-11 (March 5, 1975).

11/ Defendant's Opposition To Plaintiff's Cross-Motion For Summary Judgment And Reply To Plaintiff's Opposition To Defendant's Motion For Summary Judgment 13 & 14 n.14 (Nov. 12, 1975).

in this case, and so the second factor in analyzing the contingent nature of plaintiff's success--delay in award--is present. Lindy Bros. II, supra, 540 F.2d at 117.

(c) Probably the most important of the factors affecting the risk of non-compensation is a consideration of the risks assumed. This is also the factor which most clearly requires increased compensation. The number of hours of labor risked over the past three years without compensation was total--the only attorneys' fees owed to plaintiff's counsel are those which might be awarded to counsel pursuant to 5 U.S.C. § 552(a)(4)(E) --so that if plaintiff had not prevailed, counsel would have received nothing. No matter how good plaintiff's counsel are, they cannot win every time, especially since they generally accept only those cases which they believe will help develop the law and result in disclosure of important information to the public. Ellsworth Aff. ¶ 4. Since a primary purpose of the FOIA attorneys' fee provision was to encourage counsel to agree to represent journalists and others who would not otherwise enforce their rights under the FOIA, the risk undertaken by plaintiff's counsel is a powerful force toward awarding a substantial upward adjustment in the attorneys' fee award. Additionally, it is clear from the nature of counsel's work, as evidenced by their affidavits (Ellsworth Aff. ¶¶ 4-9; Morrison Aff. ¶ 5) and the papers they have filed in this case, that prior to this litigation they had developed, without compensation, an expertise in FOIA matters which allowed them to aid the Court in articulating correct legal precepts and sound public policy. Again, this factor supports an upward adjustment in the fee award. Lindy Bros. II, supra, 540 F.2d at 117.

Thus, considering all of the factors concerning the "risk of non-compensation," a substantial upward adjustment in the requested fees is warranted. Indeed, the 20 percent increase, like the initial rates themselves, is quite modest considering the high risk at the outset of litigation that counsel would receive nothing.

2. The second consideration ennunciated by the Court of Appeals in National Treasury Employees Union was the quality of counsels' work. 521 F.2d at 322. The Third Circuit in Lindy Bros. I explained that the adjustment "for the quality of work is designed to take account of an unusual degree of skill, be it unusually poor or unusually good." 487 F.2d at 168. We would, as the Court might expect, suggest that counsel's resourcefulness has secured disclosure of Amtrak's policy statements to the public with a minimum amount of time invested, so that a failure to adjust upward the basic fee would give Amtrak a windfall. Lindy Bros. II, supra, 540 F.2d at 118. In this regard, we would point out by example that plaintiff's counsel fully and accurately articulated the scope and purpose of exemption two prior to the time that any appellate court had done so.[12/] Thus, it was only after plaintiff's memorandum of law had been filed that the D.C. Circuit adopted our construction of exemption two in Vaughn v. Rosen II, 523 F.2d 1136, 1140-43 (1975), and that the Supreme Court adopted it in Department of the Air Force v. Rose, 425 U.S. 352, 362-70 (1976). We have already referred to the fact that our memorandum of law correctly foresaw the

---

12/ See Plaintiff's Memorandum Of Points And Authorities In Opposition To Defendant's Motion For Summary Judgment And In Support of Plaintiff's Cross-Motion For Summary Judgment 36-43 (Oct. 1, 1975).

D.C. Circuit's determination in Rocap v. Indiek, supra, that Amtrak is a government-controlled corporation, and hence an agency under 5 U.S.C. § 552(e), and its decision in Ash Grove Cement Co., supra, that "secret law" contained in agency minutes must be disclosed. We will, however, leave the evaluation of counsel's work to the informed judgment of the Court, recognizing that:

> A judge is presumed knowledgeable as to the fees charged by attorneys in general and as to the quality of legal work presented to him by particular attorneys; these presumptions obviate the need for expert testimony such as might establish the value of services rendered by doctors or engineers.

National Treasury Employees Union v. Nixon, supra, 521 F.2d at 322 n.18, quoting Lindy Bros. I, supra, 487 F.2d at 169.

3. In considering the degree of upward adjustment of the fee award in this case, the Court may properly take into account the obdurateness of defendant and the degree to which it unnecessarily prolonged this litigation by interjecting late-blooming defenses which had no reasonable basis in law. The fact is that Amtrak opposed every effort of plaintiff to secure the discovery to which he is entitled under the FOIA, e.g., Weisberg v. Dept. of Justice, 543 F.2d 308 (D.C. Cir. 1976); Vaughn v. Rosen I, supra, thus forcing repeated motions to compel in order to seek even basic information such as to whom Amtrak had already made disclosures. Moreover, during the course of discovery, Amtrak raised five new exemptions which had never been raised at the administrative level. Indeed, much of the discovery was necessitated by Amtrak's hasty, shotgun approach of claiming nearly every exemption available.

Amtrak's claim that exemption 2 protected everything

"related to the internal management of Amtrak,"[13] was a quantum leap from the narrow words of the statute, and this Court easily rejected it as "an overly broad view of the exemption" (Slip op. at 7). This Court also recognized the exemption 3 claim to be "unfounded" and "[c]learly. . .not available to Amtrak . . . ." Id. Amtrak argued vigorously that commercial information about itself should be held exempt, but this Court properly did not even address this argument as the law has long been clear that only commercial information received from outside an agency is exempt. E.g., Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578, 582 n.18 (D.C. Cir. 1970). Equally without legal foundation was the argument that commercial information received from other railroads was "confidential" under exemption 4, since there had been no explicit pledge of confidentiality,[14] and officers of the very "competing" railroads to which Amtrak sought to prevent disclosure are members of Amtrak's Board of Directors. 45 U.S.C. §§ 543 & 544(a). See Slip op. at 8.[15] Amtrak's exemption 6 claims were also summarily rejected by the Court (Slip op. at 8), and its exemption 7 claim must be recognized as frivolous, since Amtrak has no civil or criminal law enforcement authority, and thus this Court held that Amtrak's "policy statements are neither 'investigatory records' nor 'compiled for law enforcement purposes'" (Slip op. at 8).

---

[13] Memorandum Of Points And Authorities in Support of Defendant's Motion For Summary Judgment 31 (March 5, 1975).

[14] See Defendant's Supplemental Answer to Interrogatories # 8(1), p. 8 (March 5, 1975).

[15] At the time that this litigation was commenced, these included present or former officers of the Burlington Northern, Inc., the Penn Central Transportation Co., and the Chicago, Milwaukee, St. Paul and Pacific Railroad Co. (Answer of Defendant National Railroad Passenger Corporation To Interrogatories Of Plaintiff #2, p. 4 (November 4, 1974).

The FOIA attorneys' fee provision was intended not just to make wronged requesters "whole," but also to encourage attorneys to take cases and to discourage agencies from wrongful withholding. See, e.g., Senate Report at 17-20. Moreover, since newsmen and public interest groups receive attorneys fees even where an agency's defenses are reasonable (Senate Report at 19-20), there is little disincentive to Amtrak and other agencies to avoid repeatedly raising non-meritorious defenses in an attempt to wear out requesters, unless courts demonstrate that there will be a greater rate of monetary awards to prevailing plaintiffs in these circumstances. This is the only effective manner to discourage large Government departments and companies like Amtrak, which make up their losses through millions of dollars in Government subsidies, from recalcitrantly opposing discovery, opposing settlements, and raising frivolous arguments in an effort to protect themselves from embarrassing disclosures by wearing down less well endowed citizens groups and journalists attempting to vindicate the public's right of access.

CONCLUSION

In view of the above, the hours expended, the hourly rate of pay requested, and the modest multiplier suggested are all reasonable. Each of these components of the requested fee award, and the total award itself, are consistent with awards found to be reasonable in other cases. Thus, this Court should order Amtrak to pay plaintiff's reasonable attorneys fees and other litigation costs reasonably

incurred in the amount of $26,536.

Dated: Washington, D.C.
April 11, 1977

Respectfully submitted,

Larry P. Ellsworth

Alan B. Morrison

Counsel for Plaintiff Aug

2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 785-3704