UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RICHARD M. NIXON, :
Plaintiff :
v. : CIVIL ACTION NO. 74-1518
ARTHUR F. SAMPSON, et al., :
Defendants:
and :
THE REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, et al., :
Plaintiffs:
v. : CIVIL ACTION NO. 74-1533
ARTHUR F. SAMPSON, et al., :
Defendants:
and :
LILLIAN HELLMAN, et al., :
Plaintiffs:
v. : CIVIL ACTION NO. 74-1551
ARTHUR F. SAMPSON, et al., :
Defendants:

MEMORANDUM OPINION

Plaintiffs have moved for an award of attorney fees and costs pursuant to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. §552(a)(4)(E), and Defendants have opposed this motion. The background of this litigation is complex.

On August 9, 1974, Richard M. Nixon resigned as President. On September 6, 1974, Attorney General William B. Saxbe issued an opinion that the Nixon Presidential materials and tape recorded conversations were the property of the former President.

The Attorney General also stated that the Government, as custodian, had the responsibility of responding to subpoenas or court orders relating to the tapes and other materials. Pursuant to that opinion, on September 7, 1974, the Administrator of General Services signed an agreement on behalf of the Government with former President Nixon (the so-called Nixon-Sampson Agreement). The Agreement provided that Mr. Nixon would retain title to his Presidential materials but transfer them to the Government for deposit. The most controversial provision in the Agreement called for the imminent destruction of the tape recordings.[1/]

On September 10, 1974, Plaintiff Jack Anderson made a request under the Freedom of Information Act (FOIA) for all the records of the Nixon Administration possessed by the White House and the Executive Office of the President. This request was denied. On October 2, 1974, Plaintiffs Lillian Hellman, et al., filed a FOIA request for access to all tape recordings of conversations in the White House and Executive Office Buildings. This request was also denied. After exhaustion of remedies, the above Plaintiffs filed a FOIA action. See Nixon v. Sampson, 389 F.Supp. 107, 117 (D.D.C. 1975).

On October 17, 1974, Mr. Nixon brought a suit seeking a temporary restraining order and a preliminary injunction to enforce compliance with the Nixon-Sampson Agreement. Nixon v. Sampson, Civil Action 74-1518 (D.D.C. filed October 17, 1974). On October 21, 1974, Jack Anderson moved to intervene

---

1/ Under the Agreement, former President Nixon retained all legal and equitable title to the materials. He agreed to deposit the materials at the GSA for three (3) years, during which time no one could gain access without his approval. Nixon reserved the right to withdraw the materials he desired after (3) years. Tape recordings of White House and Executive Office Building conversations were to remain on deposit at GSA until September 1, 1979, and access was to be limited to persons approved by Nixon. After September 1, 1979, the GSA agreed to destroy tape recordings upon Nixon's request. All tape recordings were to be destroyed when Nixon died, or on September 1, 1984, whichever event occurred first.

seeking temporary and preliminary injunctive relief to prevent implementation of the Agreement. Also on October 21, the Reporters Committee for Freedom of the Press, et al., filed suit seeking to restrain the Agreement and to obtain access to the materials pursuant to the FOIA. The Reporters Committee for Freedom of the Press, et al. v. Sampson, Civil Action No. 74-1533 (D.D.C. filed October 21, 1974). On October 21, Judge Richey consolidated these cases and issued a Temporary Restraining Order prohibiting the implementation of the Agreement. The Order also set forth the access procedures to the materials until a full hearing on the motions for preliminary injunction could be held. On October 24, 1974, Lillian Hellman brought suit for injunctive and declaratory relief, requesting access to specific tape recordings. Hellman, et al. v. Sampson, Civil Action 74-1551 (D.D.C. filed October 24, 1974). On October 25, former President Nixon moved to amend the temporary restraining order, seeking immediate transfer of all materials and tape recordings to his personal possession. After a hearing on October 30, the Court granted Hellman's motion to consolidate with the other actions and Reporters Committee's motion to extend the temporary restraining order.

On December 19, 1974, Congress passed and President Ford signed the Presidential Recordings and Materials Preservation Act, Pub.L.No. 93-526, 44 U.S.C. §2107. Section 101 of the Materials Act retained government control over the materials in question, Section 104(d) left FOIA access to them undisturbed, and Section 104(a) provided for supplemental public access to certain of the materials pursuant to regulations to be written by the GSA.

On December 20, 1974, Mr. Nixon filed suit to enjoin the operation of the Materials Act and requested a three-judge panel to hear his challenge. Nixon v. Administrator, supra 408 F.Supp. 321 (D.D.C. 1976), aff'd, 433 U.S. 425 (1977).

While the former President's motion was pending, Judge Richey issued an opinion in the consolidated cases. Nixon v. Sampson, supra, at 107. However, the Court of Appeals stayed the entry of the order implementing the opinion pending the ruling of the three-judge court. Nixon v. Richey, 513 F.2d 427 (D.C. Cir. 1975), on reconsideration, 513 F.2d 430 (D.C. Cir. 1975). The Reporters Committee intervened as defendants in Nixon v. Administrator, supra, on the grounds that the relief sought by Mr. Nixon threatened Plaintiff's FOIA claims. The three-judge District Court and the Supreme Court rejected Mr. Nixon's constitutional challenge to the Materials Act. Nixon v. Administrator, supra, 408 F.Supp. 321 (D.D.C. 1976), aff'd, 433 U.S. 425 (1977).

During the pendency of Nixon v. Administrator, supra, Miss Rose Mary Woods, Mr. Nixon's former personal secretary, intervened in the instant action and sought the removal of certain of the Nixon Presidential materials to her personal possession. The Reporters Committee prevailed on that issue in the Court of Appeals, and the disputed materials claimed by Miss Woods remained in the possession of the Government. Nixon v. Sampson, 580 F.2d 514 (D.C. Cir. 1978).

After the Supreme Court's decision, the Government moved to dismiss the consolidated cases as moot in light of Nixon v. Administrator, supra. This Court granted the motion holding that the access sections of the Materials Act mooted both FOIA petitions for the Nixon materials, and the ownership issue. Nixon v. Sampson, 437 F.Supp. 654, 656 (D.D.C. 1977).

Plaintiffs appealed, and the Court of Appeals reversed, holding that FOIA access to the materials was fully preserved by the Materials Act, and that the question of whether the United States or Mr. Nixon owned the Presidential materials remained justiciable. Reporters Committee For Freedom of the Press v. Sampson, 591 F.2d 944, 948-49 (D.C. Cir. 1978).

On remand to this Court, on July 27, 1979, the Government again sought to dismiss these actions. Defendants contended that there was no longer any case or controversy because, inter alia, Plaintiffs had accomplished their litigative goals. Plaintiffs agreed to dismiss only after the parties submitted GSA access regulation §105-63.407 to Congress, providing for administrative resolution of FOIA claims. On September 13, 1979, the Court dismissed the consolidated cases as moot. Shortly thereafter, Plaintiffs applied for an award of reasonable attorney fees and costs.

The Freedom of Information Act, 5 U.S.C. §552(a)(4)(E) states that:

> 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.

The purpose of the 1974 FOIA amendments, including the section on attorney fees, is ". . . to facilitate freer and more expeditious public access to Government information, to encourage more faithful compliance with the terms and objectives of FOIA, and to strengthen the citizen's remedy against agencies and officials who violate the Act." S. Rep. No. 93-854, 93d Cong., 2d Sess. 1 (1974). Four criteria must be examined to determine whether the award of attorney fees is proper, to wit: (1) whether the cases are genuine FOIA cases; (2) whether Plaintiffs have substantially prevailed; (3) whether the Court should use its discretion to award fees; and (4) what amount of fees and costs are reasonable under the circumstances.

The consolidated cases are true FOIA cases by virtue of the doctrine of the law of the case. Generally:

> When . . . a federal court enunicates a rule of law to be applied in the case at bar it not only establishes a precedent for subsequent cases under the doctrine of stare decisis, but, as a general proposition, it establishes the law which other courts owing obedience to it must, and which it itself will, normally apply to the same issues in subsequent proceedings in the case.

1B Moore's Federal Practice §0.404[1] at 402-403 (2d ed. 1974). Res judicata prevents reconsideration of the same cause of action after a final, valid judgment on the merits. In contrast, the doctrine of the law of the case bars reconsideration of rules of law articulated by trial and appellate courts before final judgment. The doctrine is not inexorable or absolute; it is based on the policy of judicial economy. Schupak v. Califano, 454 F.Supp. 105, 114 (E.D.N.Y. 1978).

The principle of the law of the case applies in all instances unless prior rulings were clearly erroneous or manifestly unjust. Jurisdiction and venue are binding on the parties, and must not be challenged at the end of litigation. See Marquis Who's Who v. North American Ad. Associates, 426 F.Supp. 139 (D.D.C. 1976).

The District Court in the instant case conferred jurisdiction and granted standing to Plaintiffs under FOIA on Plaintiffs' showing that the GSA had improperly withheld certain categories of the Nixon Presidential materials, which constituted agency records subject to disclosure.

The District Court also conferred jurisdiction and granted standing to Plaintiffs under the FOIA to seek injunctive relief restraining the Nixon-Sampson Agreement and declaratory relief regarding the validity of the Agreement and ownership of the Presidential materials. The Court concluded that:

> [I]t would do great violence to the letter and spirit of the FOIA to hold that the government, by merely asserting the third exemption, could preclude a determination of these issues and thus access which would otherwise be appropriate.

Nixon v. Sampson, supra, at 122 n.34, 123, 127; see also Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 19, 20 (1974).

Finally, the District Court ruled, and the United States Court of Appeals, District of Columbia Circuit affirmed, that the consolidated cases presented a justiciable controversy under the FOIA with regard to the ownership of the Presidential

materials and other related claims. Nixon v. Sampson, supra, at 123-131; Reporters Committee for Freedom of the Press v. Sampson, 591 F.2d 944 (D.C. Cir. 1978). The Appellate Court held that:

> With respect to access under the FOIA, the ownership issue is not moot, because neither the Materials Act nor Nixon v. Administrator, resolved the issue or changed its character.

Id., at 950, 951.

The above rulings are not erroneous or manifestly unjust. The consolidated cases represent genuine FOIA litigation since the District Court and the Court of Appeals reasonably acknowledged the jurisdiction, standing, and justiciability of these actions under the FOIA. 2/

A combination of factors must be weighed to determine whether a plaintiff has substantially prevailed in FOIA litigation. An order compelling disclosure of information is not a condition precedent to an award of fees. Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704, 708-710 (D.C. Cir. 1977); Cuneo v. Rumsfeld, 553 F.2d 1360, 1365 (D.C. Cir. 1977). In the absence of a court order, the party seeking fees typically must show that prosecution of the action could reasonably be regarded as necessary, and that the action had a substantial causal effect on the agency's eventual delivery of information. Cox v. United States Department of Justice, 601 F.2d 1 (D.C. Cir. 1979).

Plaintiffs efforts in the consolidated cases were necessary to insure ultimate disclosure under FOIA. Since the Nixon-Sampson Agreement implicitly authorized the former President to wrongfully remove agency records from Government custody, and since the agency had no obligation to reobtain those

---

2/ While the Reporters Committee requested injunctive relief prior to the filings of its FOIA request, and therefore arguably lacked standing to seek injunctive relief, Kissinger v. Reporters Committee for Freedom of the Press, 48 U.S.L.W. 4223, 4227 (March 3, 1980), this defect was cured when the Reporters Committee subsequently filed its FOIA request.

records, Kissinger v. Reporters Committee, supra, note 2 at 4227, the materials in question could have been forever lost to the public. Moreover, the Nixon-Sampson Agreement improperly withheld certain categories of the Presidential materials. These materials included documents and tapes produced and retained by the Executive Office of the President as well as those possessed by the White House, but created by other executive agencies. If Plaintiffs had not obtained injunctive relief against effectuation of the Nixon-Sampson Agreement, the former President could have transferred the materials and extinguished FOIA access before Congress passed the Presidential Materials Act. Plaintiffs helped to preserve Government custody over the entirety of the Presidential materials despite challenges by Mr. Nixon and his personal secretary, Miss Rose Mary Woods. Nixon v. Administrator, supra; Nixon v. Sampson, 580 F.2d 514 (D.C. Cir. 1978).

If Plaintiffs had not prevailed in defending against Miss Woods' and Mr. Nixon's claims, at least some of the materials would have been removed from Government custody. Moreover, Plaintiffs preserved the right to FOIA access to the materials in Reporters Committee v. Sampson, supra. In Reporters Committee the Court of Appeals affirmed that the FOIA provides a method of access to the Nixon materials, independent of the Presidential Materials Act. But for the success of the Reporters Committee in the Court of Appeals, no FOIA claims could be made for the tapes or documents. Plaintiffs have substantially prevailed in the instant litigation.[3/]

Congress granted courts broad discretion in determining whether to award fees in particular cases. Courts have identified four factors from legislative history as guides in determining whether to award fees: (1) the benefit to the public

---

3/ Plaintiffs also substantially prevailed because they made GSA aware of the laws it must observe. See Halpern v. Department of State, 565 F.2d 699, 706 n.11 (D.C. Cir. 1977).

deriving from the case, (2) the commercial benefit to plaintiff of obtaining the records, (3) the nature of the plaintiff's interest in the records, and (4) whether the Government's withholding of the records had a reasonable basis in law. Nationwide v. Sampson, supra, at 710-712; Fenster v. Brown, No. 78-2169 (D.C. Cir. Dec. 18, 1979).

Plaintiffs have met the first criterion of public benefit. According to Congressional intent:

> Under the first criterion a court would ordinarily award fees, for example, where a newsman was seeking information to be used in a publication or a public interest group was seeking information to further a project benefitting the general public, but it would not award fees if a business was using FOIA to obtain data relating to a competitor or as a substitute for discovery in private litigation with the government.

S. Rep. No. 93-854, supra, at 19. Plaintiffs benefitted the public by precluding the wrongful removal of the Presidential materials from Government custody. As was noted earlier, if the tapes and documents had been improperly removed, access under FOIA would have been permanently extinguished. See Kissinger v. Reporters Committee, supra, note 2 at 4227. The legislative history states:

> Under the second criterion a court would usually allow recovery of fees where the complainant was indigent or a nonprofit public interest group versus but would not if it was a large corporate interest (or a representative of such an interest). [sic] 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 information sought was scholarly or journalistic or public interest oriented.

S. Rep. No. 93-854, supra,at 19. Defendants concede that Plaintiffs had no particular commercial or other suspect interest in bringing the actions, and agree that Plaintiffs may be characterized as public interest oriented.

Plaintiffs have met the fourth criterion as well regarding the reasonableness of the withholding. According to

Congressional intent, "newsmen would ordinarily recover fees even where the Government's defense had a reasonable basis in law." Id., at 19, 20; Consumers Union v. Board of Governors, 410 F.Supp. 63, 64-65 (D.D.C. 1976). Plaintiffs are journalists, academicians, and public interest groups. Consequently, even if the Government's resistance had a reasonable basis in law, an award of fees would still remain appropriate.

For the reasons stated this Court grants Plaintiffs motions, pursuant to 5 U.S.C. §552(a)(4)(E), for an award of reasonable attorney fees and costs. An appropriate Order accompanies this Memorandum Opinion.

Aubrey E. Robinson, Jr.
United States District Judge

DATE: June 12, 1980

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RICHARD M. NIXON, Plaintiff	:	
v.	:	CIVIL ACTION NO. 74-1518
ARTHUR F. SAMPSON, et al., Defendants	:	
and	:	
THE REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, et al., Plaintiffs	:	
v.	:	CIVIL ACTION NO. 74-1533
ARTHUR F. SAMPSON, et al., Defendants	:	
and	:	
LILLIAN HELLMAN, et al., Plaintiffs	:	
v.	:	CIVIL ACTION NO. 74-1551
ARTHUR F. SAMPSON, et al., Defendants	:	

ORDER

In light of the Memorandum Opinion entered in the above-captioned case on this date, and the criteria elaborated upon in Evans v. Sheraton Park Hotel, 503 F.2d 177, 187 (D.C. Cir. 1974) and Jones v. U.S. Secret Service, 81 F.R.D. 700 (D.D.C. 1979), it is by the Court this 13th day of June, 1980,

ORDERED, that Plaintiff Anderson is entitled to $10,000 in attorney fees, Plaintiff Hellman is entitled to $7,000 in attorneys fees, and Plaintiff Reporters Committee is entitled to $60,000 in attorneys fees; and it is

FURTHER ORDERED, that Defendants shall pay Plaintiffs the above-stated attorneys fees on or before July 14, 1980.

Aubrey E. Robinson, Jr.
United States District Judge