HAROLD WEISBERG,

Plaintiff,

v.

GENERAL SERVICE ADMINISTRATION,

Defendant.

Civil Action No. 75-1448

OPPOSITION TO PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEYS FEES AND OTHER LITIGATION COSTS

This memorandum is submitted in opposition to plaintiff's motion for attorneys fees and costs. Plaintiff is not entitled to attorneys fees because he has not "substantially prevailed" within the meaning of 5 U.S.C. §552(a)(4)(E), or to costs because he is not "the prevailing party" within the meaning of Rule 54(d), Federal Rules of Civil Procedure. After winning on summary judgment below and while an appeal was pending, the defendant voluntarily released two of the three documents withheld due to events entirely independent of this litigation. Plaintiff's efforts were not a cause of the release. Moreover, the third document was properly withheld--a judgment of this Court which was affirmed on appeal.

Assuming arguendo, that plaintiff is eligible for attorneys fees because he has "substantially prevailed," this Court should not exercise its discretion to award attorneys fees in any amount. If the Court does award fees, however, the amount requested is not reasonable. Substantial delays resulting in the accumulation of attorneys hours were not only countenanced by, but caused by, the plaintiff. In addition, plaintiff unjustifiably seeks attorneys fees relating to hours spent in unsuccessfully attempting to secure the release of the third document which this Court and the Circuit Court found to be properly withheld.

A

Finally, plaintiff would have the Court double the amount he requests as a bonus. To do so would be to give weight a seond time the same factors which plaintiff argues should be considered in establishing his hourly rate. A 100% bonus would result in a windfall for plaintiff. - not personally

I. Background

On September 4, 1975, plaintiff brought this FOIA action to obtain the release of three Warren Commission transcripts of executive sessions: eleven pages of the transcript for January 21, 1964, and the entire transcripts for May 19, 1964 and June 23, 1964.

At the request of the Central Intelligence Agency ("CIA"), the Archives withheld the January 21 and June 23 transcripts under Exemptions 1, 3 and 5 to the Freedom of Information Act, 5 U.S.C. §552(b)(1), (b)(3) and (b)(5). Those transcripts (Public domain) contain information about Soviet defectors which the CIA had provided to the Warren Commission. On its own initiative, the Archives withheld the May 19 transcript under Exemptions 5 and 6 to the Freedom of Information Act, 5 U.S.C. §552(b)(5) and (6). That transcript involves the possible discharge of Warren Commission employees as a result of allegations about their personal lives. See, Defendant's Motion for Summary Judgment, filed March 26, 1976.

They also claimed b/ falsity

On the basis of affidavits filed by the CIA, this Court ruled that the January 21 and June 23 transcripts were privileged from disclosure under Exemption 3. On the basis of an in camera inspection, this Court ruled that the May 19 transcript was privileged from disclosure under Exemption 5. Order, filed March 10, 1977.

Plaintiff appealed this Court's decision. Weisberg v. GSA, App. Docket No. 77-1831. All of the briefs were filed as of February 22, 1978. However, on that date the plaintiff also attempted to file a fifty page addendum with his reply brief con-

sisting entirely of extra-record material which allegedly proved his contentions regarding the transcripts of January 21 and June 23. The government opposed plaintiff's motion to file the reply brief and moved to strike because the only 1 extra-record material, only 1 a magazine article, was improperly before the Circuit Court; because it was a classic example of triple, perhaps quadruple hearsay, which could not have been properly brought before this Court on a Rule 60(b) motion to ask consideration of newly discovered evidence; and because it was irrelevant. See, Appellee's Motion to Strike, filed March 2, 1978, and Appellee's Response, filed March 17, 1978.

On March 31, 1978, the Circuit Court ordered that plaintiff move this Court for a new trial. Plaintiff moved for a new trial on April 18, 1978. Plaintiff's challenge to the government's previously filed affidavit of Charles I. Briggs, Chief, Information and Services Staff, Directorate of Operations, CIA, was based on information in a magazine article, a book and a newspaper clipping--all attached to an affidavit of plaintiff. Not only was the information unsworn and rife with hearsay problems, but it was irrelevant to the proceeding. See, Defendant's Opposition to Plaintiff's Motion for a New Trial, filed April 24, 1978. Plaintiff also filed a motion to hold Mr. Briggs and government counsel in contempt, and sought to depose Mr. Briggs. Government counsel opposed the motion and moved to quash the deposition subpoena. On May 12, 1978, this Court rejected all of plaintiff's motions and quashed the subpoena. This Court once again found that the January 21 and June 23 transcripts were properly withheld under 5 U.S.C. §552(b)(3).

Plaintiff once again appealed. Weisberg v. GSA, App. Docket No. 78-1731. In the Circuit Court, Nos. 77-1831 and 78-1731 were consolidated. On September 11, 1978, plaintiff filed his opening brief in the Circuit Court challenging this Court's refusal to grant a new trial.

At this point, events occurred which were independent of and unrelated to this action. Those events resulted in the release of the January 21 and June 23 transcripts to plaintiff. On September 15, 1978, the House Committee on Assassinations summarized a report dealing with the Soviet defector Yuri Nosenko. See, Affidavit of Robert E. Owen, Exhibit 1, attached. Because this report was based upon classified information which the CIA had provided to the Committee under a pledge of confidentiality, it was submitted to the agency for prior clearance before public release. The Director of Central Intelligence reviewed the report within two days of receipt and agreed to declassify the draft. The Director also made Mr. John Hart, an expert in Soviet intelligence and counter-intelligence, available to testify before the Committee. A partial transcript of the hearings at which the report was summarized and at which Mr. Hart testified is attached to the Owen Affidavit.

As a result of the Director's decision concerning the scope of the disclosures to be made at the September 15 hearing, and on its own initiative, the CIA conducted a classification review on September 22, 1978 of the January 21 and June 23 transcripts. On October 11, 1978, the CIA informed the Department of Justice that, in view of the testimony given at the hearing, the agency no longer deemed it appropriate to withhold the transcripts. Owen Affidavit, Exhibit D.

On October 12, 1978, the General Services Administration informed the Department of Justice that it had withheld the transcripts of January 21 and June 23 solely at the request of the CIA and that it had no independent reason to contest disclosure. The GSA did, however, inform the Department that it would continue to withhold the May 19 transcript. Exhibit 2, attached. On October 16, 1978, plaintiff was given copies of the January 21 and June 23 transcripts. The government requested dismissal of that portion of the consolidated appeal relating to the transcripts which were released.

On January 12, 1979, the Circuit Court dismissed as moot that portion of the appeal in No. 77-1831 relating to the January 21 and June 23 transcripts, and the entire appeal in No. 78-1731.

On March 15, 1979, the Circuit Court concluded that the May 19, 1964 transcript was properly withheld. Nevertheless, the Circuit Court granted plaintiff costs in that Court and denied the government its costs on April 12, 1979. The government immediately moved for reconsideration. The Circuit Court has taken no action to date on the government's April 24, 1979 motion for reconsideration of the award of costs.

II. Argument

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

> The Court may assess against the United States reasonable attorneys fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed (emphasis supplied).

Clearly, the threshold question is whether a plaintiff requesting fees has "substantially prevailed." Cox v. Department of Justice, App. Docket No. 78-2267 (D.C. Cir. June 11, 1979)(slip op. attached as Exhibit 3). The next inquiry, assuming the plaintiff has substantially prevailed, is whether the Court should exercise its discretion to make an award of attorneys fees. The statute is clear that the Court "may" award fees--it is not required, however, to make such an award. The Court of Appeals for this Circuit has specified factors which the District Court should consider in determining whether to exercise its discretion to award fees. Nationwide Bldg. Maintenance Inc. v. Sampson ("Nationwide"), 599 F.2d 704 (D.C. Cir. 1977).

Only if the District Court determines that plaintiff has "substantially prevailed" and that an award should be made does the question of amount of fees become relevant. The statute only provides

for "reasonable attorneys fees." Plaintiff's request for fees must therefore be assessed in light of the factors enumerated by the Court of Appeals for this Circuit in National Treasury Employees Union v. Nixon, 521 F.2d 317, 322 (D.C. Cir. 1975) and in Evans v. Sheraton Park Hotel, 503 F.2d 1977 (D.C. Cir. 1974).

A. Plaintiff Has Not Substantially Prevailed and is not Eligible for Attorneys Fees. 5 U.S.C. §552(a)(4)(E).

1. The Defendant Properly Withheld the May 19, 1964 Transcript.

This Court's holding, following an in camera review of the May 19 transcript, that the defendant properly withheld the document under Exemption 5, 5 U.S.C. §552(a)(5), was affirmed on appeal by the Circuit Court on March 15, 1979. Unquestionably, plaintiff did not prevail and is not eligible for an award of either attorneys fees for services rendered or costs incurred as to this issue. Ward v. Postal Rate Comm'n, C.A. No. 77-0145 (D.D.C. June 27, 1979)(Gessel, J.)(attached as Exhibit 4); 5 U.S.C. §552(a)(4)(E); Rule 54(d), Federal Rules of Civil Procedure.

2. The Defendant Released the January 21, 1964 and June 23, 1964 Transcripts as the Result of a Declassification of the Information Contained in Them Which Was Totally Independent of Plaintiff's Efforts in this Litigation.

Defendant agrees with plaintiff that the standard for determining whether plaintiff "substantially prevailed" is set forth in Vermont Low Income Advocacy Council, Inc. v. Usery ("Vermont Low Income"), 546 F.2d 509, 513 (2d Cir. 1976). To obtain an award of attorneys fees in a FOIA action, plaintiff at a minimum must show (1) that the prosecution of the action could reasonably have been regarded as necessary and (2) that the action had substantial causative effect on the delivery of the information. Id. That standard has been adopted in this Circuit. Cox v. Nixon, supra, slip op. at 7; Cunes v. Rumsfeld, 553 F.2d 1360, 1366 (D.C. Cir. 1977); Nationwide,

supra at 714. The parties disagree as to the application of the standard. Clearly, the application of the two pronged test in this case leads to the inevitable conclusion that plaintiff did not "substantially prevail."

In Vermont Low Income, the Second Circuit affirmed the District Court's denial of attorneys fees because the release of documents was not the result of plaintiff's efforts--the result "was not one whit different than if VLIAC [plaintiff] had withheld legal action." Id. at 514-15. In Vermont Low Income, plaintiff, a representative of low-income, unemployed and underemployed persons, sought certain evaluations of apple growers' efforts to recruit domestic labor. While plaintiff's administrative appeal was pending, the agency notified plaintiff that the file had not been located by the Department of Labor in Washington. Nevertheless, plaintiff filed suit on November 12, 1975 against the Department of Labor. On or about December 16, 1975, the plaintiff's attorney was notified by telephone that the Solicitor would grant the administrative appeal then pending. On December 17, 1975, the plaintiff moved for summary judgment. Before the motion was set for hearing, the defendant supplied the records with deletions under 5 U.S.C. §552(b)(6). The District Court concluded that the suit was not the cause of the delivery of the information. The Second Circuit upheld the District Court's judgment, noting that judgment is not an absolute prerequisite to an award of fees. Id. at 513.

Defendant agrees with plaintiff herein that judgment in favor of plaintiff is not the sole factor to be considered in determining whether plaintiff "substantially prevailed." Under certain circumstances, if the government acts to moot a case by supplying the requested documents after inception of litigation, an award of fees may be appropriate. See, e.g., Goldstein v. Levi, 415 F. Supp. 303 (D.D.C. 1976)(Parker, J). In Goldstein, this Court found that plaintiff had unsuccessfully tried for three years to obtain information from the FBI which was withheld on the basis of Exemption 7. It

was significant, the Court noted, that the documents were released within a few weeks of the filing of the Court action. Id. at 305. The Court found a causal relation between plaintiff's efforts in litigation and the release of the documents in question. See also, Cuneo v. Rumsfeld, supra, at 1365.

More recently, however, the Circuit Court has stated that release of requested information after the FOIA court action has been filed does not necessarily mean that plaintiff has "substantially prevailed." Cox v. Nixon, supra, at 7. The plaintiff must show something more than post hoc, ergo propter hoc. Id. He must comply with the Vermont Low Income standards. "Whether a party has made such a showing is a factual determination within the province of the District Court to resolve." Id. The Cox v. Nixon holding was recently applied by this Court. Baez v. CIA, C.A. No. 76-1920 (D.D.C. July 31, 1979)(Sirica, J.)(attached as Exhibit 5). Plaintiff herein has not made the necessary showing. He has done nothing more than demonstrate that the January 21 and June 23, 1964 transcripts were released while an appeal of a judgment favorable to the defendant was pending.

In this case, plaintiff cannot demonstrate that prosecution of this action was necessary or that this action had substantial causative effect on the release of the January 21 or June 23 transcripts. On March 21, 1977 this Court held that the January 21 and June 23 transcripts were properly withheld under Exemption 3. This Court reconsidered its decision twice and came to the same conclusion. See, Orders, dated June 7, 1977 and May 16, 1978.

As set forth in the Affidavit of Robert E. Owen, Information Review Officer, Directorate of Operations, CIA, certain information was declassified at the request of the Select Committee on Assassinations of the House of Representatives in September, 1978. Some of that same information was contained in the transcripts of

January 21 and June 23. After the information requested by the Committee was declassified, an immediate review of the transcripts was undertaken to determine whether the transcripts plaintiff wanted were still exempt from disclosure under Exemptions 1 and 3. The CIA acted on its own initiative in making the review. The result was that the CIA determined further withholding of those two transcripts was not warranted. The transcripts were released within a month of the declassification of the information for the Committee.

This case is analogous to Vermont Low Income. There excusable delay in processing the administrative appeal resulted in disclosing the requested information after a district court action was filed. See also, Nixon v. Cox, supra; Baez v. CIA, supra. Here, a Congressional Committee requested the CIA to declassify information the result of which was to cause the release of the transcripts in question. In both cases, the efforts of the plaintiffs did not contribute to or cause the disclosure of documents.

The facts in this case are much stronger than those in Vermont Low Income. Normally, classified information is automatically and and gradually declassified. After certain intervals of time a lower classification is assigned to a particular document. Implicit in this process is that over a period of time the reasons for retaining a classification erode. If a persistant requestor of classified information keeps a court action alive long enough, the information may ultimately be released in the normal course of events without regard to the requestor's efforts. This is what happened in this case. The plaintiff herein caused substantial delays in litigating this case which kept the case alive and precluded the Circuit Court from rendering a decision before September, 1973.

For example, after this Court rendered its judgment and the case went up on appeal, both parties had submitted briefs by February 22, 1973. At that time, plaintiff attempted to include in his reply

brief material which was outside the record. The government promptly moved to strike. The Circuit Court agreed that such material had to be considered in the first instance in the trial court and directed plaintiff to make his motion in this Court. When plaintiff moved for a new trial based on newly discovered evidence, his newly discovered evidence was a magazine article, a book, and a newspaper clipping. This Court denied the motion for a new trial and plaintiff again appealed. The whole episode took from February until August, 1978. This is just one example of delay caused by plaintiff which kept the case alive until September, 1978. Such dilatory efforts should not be rewarded by payment of attorneys fees. Plaintiff's efforts were not a cause of the release of the transcripts in October, 1978.

B. This Court Should Not Exercise Its Discretion to Award Attorneys Fees.

Nationwide requires, at a minimum, the analysis of four factors in determining whether attorneys fees should be awarded: (1) the benefit to the public from the release of the information; (2) the commercial benefit to plaintiff; (3) the nature of his interest in the information sought; and (4) whether the government's withholding of documents had a reasonable basis in law.

Assuming without conceding that plaintiff "substantially prevailed," an analysis of the factors in Nationwide must be undertaken. In connection with the first criterion, plaintiff contends that he acted as a private attorney general and made available to the public the information in the January 21 and June 23 transcripts as soon as it was released to him. Plaintiff ignores the fact that the information released was already within the public domain when he received the documents. The information had been released in large measure in testimony to the Congressional Committee a few weeks before.

Under the second criterion, plaintiff claims entitlement to fees because he did not seek the information for commercial profit, but to benefit the public by providing information which was

newsworthy. He alleges he has received no commerical benefit. Under the third criterion, plaintiff claims entitlement to fees because his interest in the transcripts was "scholarly." "His approach has been serious, scholarly and public-interest oriented" which sets him apart "from a legion of sensationalists and self-seekers who have endlessly exploited this great tragedy." Memorandum in Support of Plaintiff's Motion for Attorneys Fees, at 8.

If this Court is predisposed to award fees, the defendant would request that limited discovery be permitted to determine the use which plaintiff has put the released information and the extent to which he has benefited financially from it. It is unclear from the record whether plaintiff's interest is merely scholarly or whether he is a part of the "legion." Plaintiff has in the past published books based on information obtained through FOIA. Affidavit of Lesar, at 10-11, ¶27. If plaintiff has derived commercial benefit from the information obtained, it is relevant to inquire into the nature and extent of that benefit in connection with this Court's determination of attorneys fees.

The last criterion is whether the government had a reasonable basis in law for withholding the requested information. To satisfy the "reasonable basis in law" requirement a court need not find that the information withheld was in fact exempt. Cuneo v. Rumsfeld, 553 F.2d 1360, 1365 (D.C. Cir. 1977). Where, as here, this Court found the January 21 and June 23 transcripts exempt under Exemption 3 on three separate occasions, there was clearly a "reasonable basis in law" for withholding the documents until September, 1978 wnen the information was declassified for use by the Congressional Committee. Significantly, the agency on its own initiative immediately reconsidered its withholding of the two documents once the information was declassified for the Committee. Within a month, the documents were in plaintiff's hands.

Considering the above analysis of the Nationwide factors and the current state of the record, this Court should not exercise its discretion to award attorneys fees.

C. Plaintiff's Request for Attorneys Fees is Unreasonable.

Plaintiff requests $85 an hour for approximately 340 attorney-hours spent on this case since 1975. This amounts to $28,580. Plaintiff, however, requests a 100% bonus. Plaintiff's actual request therefore is for $170 per hour.

The burden of proof to establish a claim for fees is on the applicant. Merola v. Atlantic Richfield Co., 493 F.2d 292, 295 (3rd Cir. 1974). In assessing an amount for "reasonable" attorneys fees, this Circuit has required application of a four factor test. National Treasury Employees Union v. Nixon ("NTEU"), 521 F.2d 317 (D.C. Cir. 1975) citing Lindy Bros. Builders Inc. v. American Radiator and Standard Sanitary Corp. ("Lindy I"), 487 F.2d 161 (3d Cir. 1973). The market value of the attorney's services must be established by determining the number of hours spent, the reasonable rate per hour, and then mulitplying the two factors together. The resulting figure may then be adjusted upward or downward to reflect two other factors--the contingent nature of the services performed and the quality of those services. Id; accord, Gruin v. International House of Pancakes, 513 F.2d 114, 128 (8th Cir.) cert, denied 423 U.S. 864 (1975); City of Detroit v. Grinnell Corp., 495 F.2d 448, 473 (2d Cir. 1974).

Prior to NTEU, this Circuit had listed other criteria to be considered in analyzing reasonable attorneys fees: time and labor required; novelty and difficulty of the questions; skill required to perform the services; preclusion of other employment; customary fee; time limitations imposed by the client or circumstances; amount involved and results obtained; experience, reputation and ability

of attorney; undesirability of case; nature and professional relationship with the client; awards in similar cases. Evans v. Sheraton Park Hotel, 503 F.2d 177, 188-89 (D.C. Cir. 1974). These criteria must be considered in assessing the contingent nature of services performed and the quality of those services.

1. Plaintiff's Attorney has not Substantiated his Claim to $85 per hour.

Attorney for plaintiff has not submitted any evidence as to his reasonable hourly rate in 1975, 1976, 1977, 1978 or 1979. Clearly, his billing rate at the time services were rendered is an essential element in calculating his hourly rate. Attorney Lesar merely states that $85 an hour is appropriate because of "his experience in handling FOIA matters" and because of the "prevailing rates for attorney services in the Washington, D.C. area." Memorandum in Support of Plaintiff's Motion for Attorneys Fees, at 12. This is an admission that the rate suggested is based on current rates in Washington--not on his rates and without regard to his rates when the services were offered.

2. Plaintiff's Attorney has Inflated the Number of Hours by Including Those for Services Rendered in Connection with the Challenge to the Withholding of the May 19, 1964 Transcript.

This Court's holding, after an in camera review, that the May 19, 1964 transcript was properly withheld from disclosure under Exemption 5, 5 U.S.C. §552(b)(5), was affirmed on appeal by the Circuit Court for the District of Columbia Circuit on March 15, 1979. There is no question that plaintiff prevailed on this issue. Nevertheless, plaintiff does not distinguish between attorney hours devoted to challenging the withholding of this document in the District Court and on appeal, and his challenge to the withholding of the other two documents. Moreover, plaintiff has the temerity to request payment of fees for hours spent pursuing the issue relating to the May 19 transcript on appeal after all other issues on appeal were moot. This Court has held in a case brought

under FOIA and the Privacy Act that attorneys fees should not be awarded for hours spent on an issue on which the plaintiff did not prevail. Ward v. Postal Rate Comm'n, C.A. No. 77-0145 (D.D.C. June 27, 1979) (Gesell, J.)(Attached as Exhibit 4).

The Court should not award any fees for attorney hours spent on the appeal from October 16, 1978, the date on which the other issues became moot. This means that hours recorded by Attorney Lesar in Exhibit 2 to his Affidavit for the following dates should be disregarded: 10/20/78 (1 hour); 10/21/78 (1 hour); 10/24/78 (1 1/2 hours); 10/25/78 (11 1/2 hours); 10/26/78 (8 hours); 2/12/79 (3 hours); 2/12/79 (4 hours); 2/13/79 (2 hours); 2/15/79 (2 hours); 2/16/79 (2 1/2 hours); 2/17/79 (2 hours); 2/29/79 (1 1/2 hours); 3/2/79 (4 hours); 3/3/79 (1 3/4 hours); 3/4/79 (4 1/2 hours); 3/5/79 (3 1/6 hours)--for a total of 55 5/12 hours.

Additionally, attorney hours spent on the Exemption 5 issue raised by the May 19, 1964 transcript prior to the dismissal of the other issues in the case must be deducted from the 340 hours for which Attorney Lesar seeks compensation. The Court should cut the number of attorney hours in half: This case involved only two legal issues whether the May 19, 1964 transcript was properly withheld pursuant to Exemption 5 or 6 and whether the January 21 and June 23, 1964 transcripts were properly withheld under Exemption 3 or 1. Accordingly, plaintiff's request for fees for approximately 340 hours should be reduced by 55 1/2 hours--to 284 1/2--and then cut in half--to 142 1/4 hours.

3. Plaintiff has Erroneously Calculated his Risk of Non-Compensation.

The analysis of plaintiff's attorney suggests that his only source for fees would be the government if plaintiff "substantially prevailed." Implicit in his analysis is that there was no fee agreement between

plaintiff and him. Should this Court decide to award fees, it is essential for plaintiff's attorney to establish that fees awarded are not being paid twice--once by the government and once by plaintiff.

Plaintiff suggests that this action presented novel issues and speculates that he laid the groundwork for a possibly precedent-setting decision. Rather than risk another adverse precedent, plaintiff suggests that the defendant released the January 21 and June 23 transcripts. Plaintiff's evidence of the possible precedent-setting potential of this action was the Circuit Court's unusal interest in the case: when plaintiff attached newly discovered material to attack the government's affidavits and the government moved to strike, the Circuit Court ordered plaintiff to file a motion for a new trial in this Court. The defendant has already dealt with the lack of merit of these contentions elsewhere in this brief. No further comment is required.

4. Quality of Counsel's Work.

This Court has had this case since it was filed. The Court has had full opportunity to assess the quality of Attorney Lesar's work over an extended period. Moreover, the record on file speaks for itself. Fees may be assessed upward--or downward--based on the judgment of this Court.

III. Conclusion

For the foregoing reasons, the defendant respectfully requests this Court to deny plaintiff's motion for attorneys fees and costs because plaintiff has not substantially prevailed. If, however, the Court is disposed to award fees and costs, the defendant requests

consideration of whether the rate and hours claimed by plaintiff are warranted. The defendant suggests a bonus factor of 100% is patently unreasonable: it would be tantamount to assessing a fee of $170 per hour.

Respectfully submitted,

Carl S. Rauh

CARL S. RAUH
United States Attorney

Royce C. Lamberth

ROYCE C. LAMBERTH
Assistant United States Attorney

Patricia J. Kenney

PATRICIA J. KENNEY
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Defendant's Opposition to Plaintiff's Motion for an Award of Attorneys Fees and Other Litigation Costs with accompanying attachments and proposed Order has been made upon plaintiff by mailing a copy thereof to plaintiff's counsel, James H. Lesar, Esquire, 910 16th Street, NW., #600, Washington, D. C. 20006, on this 10th day of August, 1979.

Patricia J. Kenney

PATRICIA J. KENNEY
Assistant United States Attorney
U.S. District Courthouse
3rd & Constitution Avenue, NW.
Room 3212
Washington, D. C. 20001
(202) 633-5064

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff, v. GENERAL SERVICE ADMINISTRATION, Defendant.	)	Civil Action No. 75-1448

O R D E R

UPON CONSIDERATION of Defendant's Opposition to Plaintiff's Motion for an Award of Attorneys Fees and Other Litigation Costs and the entire record herein, it is by the Court this ____ day of August, 1979

ORDERED that plaintiff's motion be, and hereby is, denied.

UNITED STATES DISTRICT JUDGE

EXHBIT #1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff, v. GENERAL SERVICES ADMINISTRATION, Defendant.	)	Civil Action No. 75-1448 AFFIDAVIT

Robert E. Owen, being first duly sworn, deposes and says:

1. I am the Information Review Officer for the Directorate of Operations of the Central Intelligence Agency (CIA). I replaced Mr. Charles A. Briggs in this position in September 1977. My responsibilities include the review of Directorate of Operations documents which are the object of Freedom of Information Act (FOIA) requests to and litigation against the CIA to insure that determinations made regarding the disposition of such documents are proper. I am authorized in accordance with Sections 1-201 and 1-204 of Executive Order 12065 to make original classification determinations up through TOP SECRET. The statements made herein are based upon my knowledge, upon information made available to me in my official capacity, upon advice and counsel from the CIA Office of General Counsel and upon conclusions reached in accordance therewith.

2. In September 1978, I became aware of the fact that a variety of classified CIA information was being made available to the Select Committee on Assassinations of the U.S. House of Representatives. The Soviet defector, Yuriy Nosenko, was of particular interest to the Committee. Nosenko was formerly an Intelligence Officer in the Soviet KGB who was aware of some facts concerning Lee Harvey Oswald's experiences as an American defector to the Soviet Union. As a result of the Committee's

interest in information provided by Nosenko and information concerning Nosenko's credibility, the Committee requested that CIA declassify information in these areas for the purpose of placing the facts on the public record. The Director of Central Intelligence determined that certain responsive information would be declassified because the congressionally-assured benefit to the general public outweighed the damage which could reasonably be expected to national security interests as a result of such disclosures. The CIA information is summarized in the testimony of Professor G. Robert Blakey, Chief Counsel and Director of the House Committee Staff, in the first ten pages of the transcript of testimony taken before the Committee in open session on 15 September 1978 (CIA Exhibit A). Professor Blakey describes the circumstances surrounding CIA's declassification of the required information in his concluding remarks immediately following the close of his summation, on page ten of the transcript (CIA Exhibit A). The testimony which followed that of Professor Blakey was that of Mr. John L. Hart, an official CIA spokesman who provided the detailed factual information from which Mr. Blakey prepared his aforementioned summary. The complete transcript ran a total of 72 pages. Professor Blakey on 26 October 1978 confirmed the circumstances surrounding the Committee's request for declassification of information concerning Yuriy Nosenko (CIA Exhibit B).

3. On 22 September 1978, I was asked by the Office of General Counsel of CIA to review the above-styled litigation to determine whether the transcripts remained exempt from release under Freedom of Information Act exemptions (b)(1) and (b)(3). After comparing the details of the declassified CIA information, which appeared in the aforementioned testimony before the House Committee on 15 September 1978, with the information withheld from release in the Warren Commission testimony, I determined that the continued assertion of the

does not say was was tenable

Freedom of Information Act exemptions was no longer tenable. I so advised the CIA Office of General Counsel (CIA Exhibit C). On 11 October 1978 the General Counsel of CIA advised the Justice Department and the Archivist of the United States that as a consequence of the declassified CIA information regarding Yuriy Nosenko being placed on the public record before the House Committee, the two aforementioned Warren Commission transcripts would no longer warrant being withheld from Freedom of Information Act requesters (CIA Exhibit D). I am advised that the Federal Court then considering the plaintiff's previously-filed appeal in the matter of the Warren Commission transcripts was advised and the documents were released to the plaintiff.

What? not this

He does not allege that the two transcripts ever qualified for withholding.

4. My determination that the two aforementioned Warren Commission transcripts would no longer be withheld from Freedom of Information Act requesters was the direct result of the decision of the Director of Central Intelligence to declassify CIA information requested by the House Committee on Assassinations and my decision with regard to the two aforementioned Warren Commission transcripts was solely attributable to that declassification determination. The status of the above-styled litigation played no role in my determination regarding the releasability of the two aforementioned Warren Commission transcripts.

Robt E. Owen
Robert E. Owen

COMMONWEALTH OF VIRGINIA)
) ss.
COUNTY OF FAIRFAX)

Subscribed and sworn to before me this 26th day of July 1979.

Debbra M. Weyant
Notary Public

My commission expires: 17 April 1982

FOR PUBLIC AFFAIRS STAFF

PROGRAM House Assassinations Hearings STATION WETA-FM Radio NPR Network

DATE September 15, 1978 9:00 AM CITY Washington, D.C.

SUBJECT Testimony by Mr. John Hart

REP. LOUIS STOKES: The Chair recognizes Professor Blakey (?).

PROFESSOR BLAKEY: Thank you, Mr. Chairman.

Within hours of the arrest of Lee Harvey Oswald for the assassination of President Kennedy, officials in the United States began to speculate about the significance of Oswald's defection to the Soviet Union in 1959 and his activities in that country until returning to the United States in June of 1962. Specifically, the troubling question was asked, whether Oswald had been enlisted by the Soviet secret police, the dreaded KGB.

U.S.-Soviet relations had been turbulent during the Kennedy presidency. There had been major confrontations over Berlin, where the wall had come to symbolize the barrier between two superpowers, and over Cuba, where the emplacement of Soviet missiles had nearly triggered World War II.

A nuclear test ban treaty in August of 1963 had seemed to signal detente. But in November, tension was building again, as the Communists harassed American troop movements to and from West Berlin.

Cuba, too, was as much an issue as ever. In Miami, on November 18, Kennedy vowed the U.S. would not countenance the establishment of another Cuba in the Western Hemisphere.

The Warren Commission, of course, considered the possibility of Soviet complicity in the assassination, but concluded that there was no evidence of it. In its report, the Commission noted that the same conclusion had been reached by Secretary of

State Dean Rusk and Secretary of Defense Robert McNamara, among others. Rusk testified before the commission on June 10th, 1964, quote, "I have seen no evidence that would indicate to me that the Soviet Union considered that it had any interest in the removal of President Kennedy. I can't see how it could be to the interest of the Soviet Union to make any such effort."

Then, in February 1964, a Russian, saying that he was a KGB agent, sought asylum in the United States, and he seemed to answer the question categorically by denying Oswald had been connected with the KGB. According to Yuri Nosenko, a self-proclaimed former KGB officer, he had been assigned in 1959 and 1963 to the KGB's American Tourist Section. This assignment, he said, had afforded him an opportunity to review Oswald's KGB file in those years.

Nevertheless, Nosenko's assertion did not end the mystery. In fact, it only tended to complicate it, because some officials of the Central Intelligence Agency doubted Nosenko was a bona fide defector. Some went so far as to suggest his defection was a KGB disinformation mission, an effort to mislead the American Government.

Beginning in April 1964, hostile interrogations of Nosenko were approved an initiated. He was cut off from the world and confined to a single room. Every movement he made was monitored. The hostile interrogations continued for over three years. Eventually, Nosenko was released from confinement, and a senior official in the agency was assigned to interview him anew. This time, the interviews were conducted in a more friendly atmosphere. Ultimately, the official wrote a report detailing his conclusions. At the termination of this yearlong process, it was decided that Nosenko was indeed a bona fide defector. He was given a substantial sum of money and hired as a CIA consultant, a position he holds to this day.

In its investigation of the Kennedy assassination, the Warren Commission was aware of the Nosenko issue, but it was able to make little of it, and opted not to refer to it in its reports.

News accounts of the Nosenko matter have not been particularly informative, owing to the limited nature of the generally classified information that they were reporting. A book by Edward J. Epstein, "Legend: The Secret World of Lee Harvey Oswald," published in early 1978, did raise some question about Nosenko's information on Oswald, though Epstein did not have complete access to all of the FBI and CIA files on Nosenko. Apparently, he depended on secondhand accounts.

Mr. Chariman, the evidence to be received today is directed toward the public resolution of a twofold issue with

regard to Nosenko. First, are his statements about Oswald credible? If so, the issue of Soviet involvement in the assassination is, of course, moot. But if not, the converse does not necessarily follow. Nosenko can be a bona fide defector and still not be a valid source of information about Lee Harvey Oswald. Deciding not to believe what Nosenko told about Oswald does not, therefore, necessarily lead, absent other information, to any conclusion about Nosenko's general bona fides or Soviet involvement in the assassination. Nosenko is only one possible source of evidence on this point. If he turns out to be good, he may be decisive. If he turns out to be bad, it may simply mean that there is no good source of information on this point available to the American Government, and nothing definite can be said about this question by the American Government.

Consequently, because the mandate of the Select Committee, as the committee has indicated to the staff, was limited to determining the facts and circumstances surrounding the President's death, no examination of the general question of the bona fides of Mr. Nosenko has been made. That question properly lies within the jurisdiction of other bodies.

Second, what was the quality of U.S. Government agencies in the Nosenko affair? The agencies whose performance is at issue are the CIA, the FBI, and, of course, the Warren Commission itself.

Mr. Chairman, Nosenko has been given a new identity by the CIA; and the agency, as well as the FBI, believes that to compromise it could put him in great personal danger. Consequently, he cannot testify before the committee in this public session, either in person, by film, or by tape recording, although each of these alternative methods was explored with him and with those in charge of his security. He did, of course, testify in person before two closed sessions of this committee on May 19 and May 20th. I addition, he was deposed, and extensive files were read, both at the CIA and the FBI. Interviews and depositions of other principals were conducted by the committee or the staff. While virtually all of the material reviewed, either by the committee or by the staff is classified, it is possible to tell the essential aspects of the Nosenko story without compromising national interest. And the CIA, as well as the FBI, has cooperated with the committee by facilitating the declassification of the basic outlines of the story.

A staff report on the committee's investigation has been prepared by the staff. Before summarizing the staff report, which will be made public, Mr. Chairman, I would like again to emphasize for those who follow the committee's work that the question of Nosenko's bona fides lies outside of the jurisdiction of the committee. Its mandate is limited. It is to weigh Nosenko's credibility as it bears on the career of Lee Harvey Oswald and to evaluate the performance of federal agencies in the matter. Other ques-

tions are for other bodies.

Finally, I note that the staff report does not contain any conclusions on either of these issues. Conclusions remain in the province of the committee to formulate and decide in December.

Mr. Chairman, I would ask at this time that the staff report on Mr. Nosenko be entered in the record as JFK Exhibit Number F-425.

I'd like, Mr. Chairman, with your permission, at this time to summarize the highlights of that report.

Not relevant but public domain

Nosenko has testified to the committee that he was born Yuri Ivanovich Nosenko in the town of Nikolayev in the Ukraine on October 30th, 1927. On leave in Moscow in 1953, he joined the NVD, later KGB. In 1955 Nosenko was transferred to the Seventh Department of the Second Chief Directorate, a department newly formed in the KGB to monitor tourists in the Soviet Union. In July 1962, he was promoted to Deputy Chief of the Seventh Department, second chief director.

Not relevant

Nosenko first came to the attention of U.S. intelligence agencies in June 1962. He identified himself to the CIA and offered to sell information for 900 Swiss francs. He explained he needed the money to replace KGB funds he had spent on a drinking spree. He has since said he did not really need the money, but felt an offer simply to give away the information would be rejected, as it had been with similar offers by other Soviet agents.

Not in transcripts

On January the 23rd, 1964, Nosenko was heard from again. The CIA was surprised by his sudden decision to defect, but Nosenko was adamant. On February the 4th, Nosenko revealed he had received a telegram ordering him to return to Moscow directly from Geneva. Nosenko later admitted, however, that the recall telegram was a fake. He had made up the story to get the CIA to agree to his defection without further delay.

Not in tr.

By April 1964, Nosenko had been in the U.S. for nearly two months. Already, top officials of the Soviet Russia and counterintelligence sections of the CIA had nagging doubts as to whether he was a bona fide defector. Information Nosenko had given about Oswald, for one thing, aroused suspicions. The chief of the Soviet Russia section had difficulty accepting the statements about Oswald, characterizing them as seemingly, quote, almost to have been tacked on to or have been added, as though it didn't seem to be part of the real body of the other things he had to say, many of which were true, close quote.

Statements by Nosenko at the time of his contact with the CIA in 1964 revealing he had information about Lee Harvey

Oswald led to his being questioned by the FBI upon arrival in the United States. Nosenko told the FBI about his knowledge of Oswald and the fact that the KGB had no contact with him. The conclusion of the March report by the FBI reads as follows:

"On March 4, 1964, Nosenko stated that he did not want any publicity in connection with this information, but stated that he would be willing to testify to this information before the presidential commission, provided such testimony is given in secret and absolutely no publicity is given, either to his appearance before the commission or to the information itself,"

The report noted that on March 6th Nosenko inquired if the information he furnished on March 4 regarding Oswald had been given to the appropriate authorities. He was advised that this had been done.

On April 4, 1964, CIA officials decided to place Nosenko in isolation and to commence hostile interrogations.

First he was subjected to a polygraph, one designed to insure a proper atmosphere for the hostile interrogations. The CIA polygrapher was instructed to inform Nosenko that he had lied, regardless of the actual outcome of the test. In his report, the polygrapher wrote his true conclusion, which was that Nosenko had indeed lied. The official position now stated by the CIA is that the test was invalid or inconclusive.

The condition of Nosenko's isolation has been described by the Rockefeller Commission as, quote, Spartan, unquote.

Both Nosenko and the CIA were asked by the committee to describe them. Nosenko says the room to which he was confined had a, quote, metal bed attached to the floor, close quote, and, quote, the only furniture in the room was a single bed and a light bulb, close quote. The CIA states, quote, Nosenko received a regular diet of three meals a day. Periodically during his time, his diet was modified to the extent that his portions of food were modest and restricted, close quote.

Nosenko states he, quote, was not given a toothbrush and toothpaste, and food given to me was very poor. I did not have enough to eat, and was hungry all the time, close quote.

The CIA: Quote, Nosenko did not have access to TV, radio, or newspapers. He was provided with a limited number of books to read from, April 1964 to November 1965, and from May 1964 to October 1967. His reading privileges were suspended from November 1965 to May 1967, close quote.

Nosenko: Quote, I had no contact with anybody to talk. I could not read. I could not smoke, close quote.

The CIA states that Nosenko was, quote, under constant surveillance, constant visual observation from April 1964 to October 1967, close quote, the period of his isolation.

Nosenko states, quote, I was watched day and night through TV camera. I was desperate, wanting to read. And once when I was given toothpaste, I found in the toothpaste box a piece of paper with a description of the compound on this toothpaste. I was trying to read it under my blanket, but guards noticed it, and again it was taken from me, close quote.

Both Nosenko and the CIA agree that conditions improved markedly beginning in the fall of 1967, the end of the period of isolation.

Nosenko was questioned about Lee Harvey Oswald on five occasions in 1964. Nosenko said that as soon as President Kennedy's asssassin was identified as a man who had lived in the Soviet Union, the KGB ordered that Oswald's file be flown to Moscow and reviewed to determine whether there had been any contact between him and Soviet intelligence. Nosenko said, further, he was assigned to review Oswald's file.

Based on that review, as well as his earlier contacts with the case, he was able to report positively that Oswald had neither been recruited nor contacted by the KGB.

At the time of his second polygraph examination, in October 1966, Nosenko was again asked about Oswald. The CIA examiner, the same one who administered the first test, concluded, again, that Nosenko was lying, although the official agency position now is that the test was, quote, invalid or inconclusive because the conditions and the circumstances under which it was administered are considered to have precluded an accurate appraisal of the results, close quote.

The Soviet Russia section of the CIA wrote a 900-page report based on its interrogations of Nosenko, though it was trimmed to 447 pages by the time it was submitted in February 1968. It came to the following conclusions:

Nosenko did not serve in the Naval Reserve, as he had claimed. He did not join the KGB at the time nor in the manner he described. He did not serve in the American Embassy section of the KGB at the time he claimed. He was not a senior case officer or deputy chief of the Seventh Department, as he stated he had been. He was neither deputy chief of the American Embassy section nor a supervisor in that section. He was not chief of the American/British Commonwealth section. He was not a deputy chief of the Seventh Department in 1962, as he had claimed.

High officials of the CIA, including Richard Helms, were

aware of the Nosenko dilemma by the time the Soviet Russia section report had been drafted. In May of 1967, a career officer in the Office of Security was assigned to write a critique of the handling of Nosenko. The security officer gradually came to the conclusion that Nosenko was supplying valid intelligence and that he was who he claimed to be, leading to the eventual conclusion that Nosenko was bona fide. The investigation ended in the summer of 1968.

On August 8th, 1968, Nosenko was given a third polygraph test. Two of the questions related to information he had supplied about Oswald. This time, Nosenko passed.

The CIA, when asked by the committee to comment on the third polygraph, now states, quote, This test is considered to be a valid test, close quote.

This committee obtained an independent analysis of the three polygraph tests given Nosenko from Richard Arthur, president of the Scientific Lie Detection, Incorporated and a member of the American Polygraph Association. In his report, Mr. Arthur expresses the judgment that the second test, the one in which the examiner determined Nosenko was lying, was the most valid and reliable of the three examinations administered to Nosenko.

As for the two questions about Oswald in the third test, Mr. Arthur characterized the first as, quote, atrocious, unquote, and the second as, quote, very poor, close quote, for use in assessing the validity of Nosenko's responses.

In a report issued in October 1968, the security officer disputed each and every conclusion of the report of the Soviet Russia section written only eight months earlier.

The security officer's report, like the Soviet Russia section report, paid little attention to the Oswald aspect of the Nosenko case. Neither attempted to analyze the statements made about Oswald. Out of a combined total of 730 pages of the report, only 15 deal with the alleged assassin of President Kennedy. The security officer did reach a conclusion, however, that Nosenko was not dispatched by the Soviet Government to give false information to the U.S. officials about Oswald.

The Warren Commission received FBI and CIA reports on Nosenko and his statements about Oswald, but chose, in its final report, not to refer to them. And while Nosenko expressed a willingness to testify before the Commission, as I previously noted, he was not called as a witness.

The CIA has informed the House Select Committee of Nosenko's status subsequent to the 1968 report as follows: Quote, Following the acceptance of Nosenko's bona fides in late 1968, an arrangement was worked out whereby Nosenko was employed as an

independent contractor for the CIA effective March 1st, 1969. His first contract called for him to be compensated at the rate of 16,500 a year. As of 1978, he is receiving $35,325 a year. In addition to the regular yearly compensation, in 1972 Nosenko was paid for the years 1964 through 1969 in the amount of $25,000 a year, less income tax. The total amount paid was $87,052. He also received, in varying increments, in March 1964 through July 1973, amounts totaling $50,000 to aid in his resettlement in the private economy.

To this day, Nosenko is a consultant to the CIA and the FBI on Soviet intelligence, and he lectures regularly on counter-intelligence.

In 1978 the Select Committee began its investigation of the Nosenko case. It was granted permission by the FBI and the CIA to read all documents, to interview principals in the case, and to question Nosenko himself about his knowledge of Oswald. Nosenko spoke to the House committee on five occasions. During two of these sessions, staff members took notes. In the third, Nosenko gave a sworn deposition. And on July 19 and 20, 1978, Nosenko testified before the committee in executive session. There was no substantive variation in Nosenko's recounting of the facts. There have been, however, significant inconsistencies over the years in Nosenko's story. Let me here note one, although others appear in the full summary:

Nosenko has always insisted that the KGB never had any contact with Oswald. He stated in both 1964 and 1968 that the KGB determined that Oswald was of no interest to them and did not even bother to interview him.

Question: And exactly why did no KGB officer ever speak to Oswald before they made the decision about whether to let him defect? Answer: We didn't consider him an interesting target.

When asked if he knew of any other defector who was turned away because he was uninteresting, Nosenko answered: No. Nosenko said the KGB not only did not question Oswald when he asked to defect, it also did not interview him later when it was decided he would be permitted to remain in Russia. At no time, Nosenko told the committee, did the KGB talk to Oswald.

Question: Now, when it was determined that Oswald was going to be allowed to stay in the Soviet Union and live in Minsk, did any KGB officers speak to him at that time? Answer: No. As far as my knowledge, nobody was speaking with him.

Question: Why didn't the KGB speak to him, then? Answer: KGB once said, "We don't have interest." The same was reported to the government [technical difficulties] that

the KGB doesn't have interest. The KGB didn't want to be involved.

According to Nosenko, the KGB would have been very interested in the fact that Oswald worked at the air base in Japan from which the super-secret U-2 spy planes took off and landed.

Question: And in 1959, would the Soviet Union have been interested in someone who served as a radar operator on an air base where U-2s took off and landed? Answer: Yes, sir. It would be very interested.

But Nosenko maintains that the KGB never spoke with Oswald, so it didn't know that he had any connection with the U-2 flights.

The head of the CIA Soviet Russia section from 1963 to 1968 was asked by the committee if he knew of comparable situations in which someone was not questioned, was just left alone, as Nosenko says Oswald was. He replied that he did not know of any former Soviet intelligence officers or other knowledgeable sources to whom he had spoken who felt that this would have been possible.

Quote, If someone did, close quote, he said, quote, I never heard of it, close quote.

In short, Nosenko's Oswald story is as follows: The KGB, although very interested in the U-2, never learned anything about it from Oswald because it didn't know he had any knowledge of the aircraft. Why? Because Oswald was never questioned by the KGB, because the decision was made that Oswald was of no interest to Soviet intelligence.

After questioning Nosenko on a number of other statements and their possible contradictions with prior statements which he made to the FBI and the CIA in 1964, and receiving similar response to the one I've just outlined, the committee, in its May hearing, returned to earlier topics.

Nosenko on numerous occasions had complained that the transcripts he was being shown were inaccurate, that he had been drugged by the CIA during interrogation, and that he was not fairly quetioned, etcetera, etcetera, etcetera.

Therefore, the committee decided to play for Mr. Nosenko the actual tapes of the interrogation in which Nosenko made these statements, and to allow him to comment on them. At the time, a tape recorder was brought out and the following was stated by the questioner: "I would like to ask that this tape, which is marked 3 July '64, Reel Number 66, be marked for identification." A recess was requested to put the tape in the

machine. At the conclusion of the recess, Nosenko returned to the room and then refused to answer any questions dealing with interviews done by the CIA prior to 1967. He stated that all statements prior to that time by the CIA were the result of hostile interrogations, and that he was questioned illegally, in violation of his constitutional rights.

The committee considered how to respond to Mr. Nosenko's objection. And after deliberation, it decided that all questions dealing with prior statements to the FBI and the CIA would be suspended by the committee.

Mr. Chairman, that concludes my summary of the report.

It's appropriate to note that a draft of the staff report, a summary of which was just read, was submitted to the CIA for declassification. Within two days, the CIA declassified the entire draft, requiring that only a few minor changes and the deletion of the names of agency personnel and sources. The committee provided both the FBI and the CIA with copies of the report and asked the agencies if they wished to respond to the report at the public hearing to be held today. The FBI informed the committee that no response would be submitted. The CIA has made available to the committee John Lemon (?) Hart as its official representative to state the agency's position on the committee's Nosenko report.

Mr. Hart is a career agent with the CIA, having served approximately 24 years. He has held the position of chief of station in Korea, Thailand, Morocco, Vietnam, as well as several senior posts at CIA Headquarters in Virginia. Mr. Hart has considerable experience with Soviet intelligence and counterintelligence activities while serving in various capacities in the United States and abroad. He has written two extensive studies on Soviet defectors; one of which, dated 1976, dealt with the handling of Yuri Nosenko by the CIA.

Mr. Chairman, it would be appropriate at this time to call Mr. Hart.

* * *

KENNETH KLEIN (?): Mr. Chairman, at this time, I believe, Mr. Hart would like to make a statement to the committee.

REP. STOKES: You're recognized, sir.

JOHN HART: Thank you, Mr. Chairman, gentlemen.

Before I begin my statement, I would like to make a prefatory remark on a technical aspect of what was said about me by the chief counsel, Mr. Blakey. I was not and never have been

what is called a career agent with the CIA. I bring that up only because that term happens to have a technical meaning in the agency. I was what you would call an employee or an officer of the agency. And I would like to have that made part of the record.

REP. STOKES: The record may so show.

HART: Mr. Chairman, it has never been my custom to speak from a prepared text. I've tried and I never succeed. Therefore, what I have before me are a series of notes which were finished about eight o'clock last night, based on guidance which I got at that time from Admiral Stansfield Turner, Director of Central Intelligence. It is my purpose to tell you as much as possible about the background of the Nosenko case, with the idea not of addressing what have been called his bona fides, but what has been described as his credibility.

Now, I must say that I have difficulty in distinguishing between credibility and bona fides, but, in any case, the testimony and the evidence which has been presented regarding Nosenko simply cannot be evaluated properly unless I give you the background which I am about to present.

REP. DODD: Mr. Chairman, I would like to make a request at this point, if I could. As I understood it last week, the agreement and understanding was that we would prepare a report of our investigation, submit it to the agency, to which the agency would then respond in a like report. We were notified earlier this week that a detailed outline of the agency's response would be forthcoming.

And am I to assume that this detailed outline consists of this single page and the summary of Mr. Hart's presentation, listing four subtitles. And that, as far as I can determine, is the full extent to which we have any response at this juncture of Mr. Hart's testimony.

What I would like to request at this point is if this committee could take a five- or ten-minute recess and we could have the benefit of examining your notes from which you're about to give your testimony, so that we could prepare ourselves for proper questioning of you, Mr. Hart.

Mr. Chairman, I'd make that request.

REP. STOKES: Does the witness care to respond?

HART: Mr. Chariman, I will do anything which will be of help to the committee. I want to state that I am not personally certain what was promised the committee. I was brought back on duty to be the spokesman for the agency. I've spent my

How what follows
+ Blakey's later comments

(202) 225-4624

Select Committee on Assassinations
U.S. House of Representatives
3359 HOUSE OFFICE BUILDING, ANNEX 2
WASHINGTON, D.C. 20515

October 26, 1978

OLC #78-1583/2

Mr. Lyle Miller
Deputy Legislative Counsel
Office of Legislative Counsel
Central Intelligence Agency
Washington, D. C. 20505

Dear Mr. Miller:

This letter is to confirm that this Committee requested that the Central Intelligence Agency provide it with full disclosure of all information and materials relating to the following:

1. The credibility of all statements made by Yuri Nosenko concerning Lee Harvey Oswald

2. The treatment of Yuri Nosenko by the Central Intelligence Agency during the years he was in its custody and control.

The information received as a result of these requests was put into a Committee Report. That report was thereafter submitted by the Committee to the CIA with the request that it be declassified for presentation at the Committee's public hearing on September 15, 1978. This request was complied with by the CIA, and the presentation was made on that date. In addition, the information elicited from the above materials was used by the Committee during public hearings on September 15 and 22, 1978 in questioning Mr. John Hart, who represented the CIA, and Mr. Richard Helms, onetime director of the CIA. Mr. Hart was provided by the CIA for testimony in response to a request for an Agency spokesman to testify on those issues, and Mr. Helms appeared, and the subject matters of his testimony were declassified by the Agency, at the request of the Committee.

Sincerely,

G. Robert Blakey
Chief Counsel and Director

GRB:cr

CIA EXHIBIT B

DD/078:6036

26 September 1978

MEMORANDUM FOR: Launie M. Ziebell
Assistant General Counsel

FROM: Robert E. Owen
DO Information Review Officer

SUBJECT: Warren Commission Transcripts Regarding Yuriy Nosenko in FOIA Litigation

REFERENCE: Your Memorandum dated 22 September 1978; Same Subject (OGC 78-6295)

1. The Warren Commission transcripts which accompany your memorandum of 22 September (OGC 78-6296) may be released to FOIA requesters, including the litigant in the civil action cited in your memorandum. Based on advice received from the Counterintelligence Staff, I have determined that they can be declassified by the National Archives.

2. Recently, testimony by an Agency witness before the House Assassinations Committee included the substance of the information treated in the two transcripts which had previously been denied to FOIA requesters under exemptions (b)(1) and (b)(3) of the Act. While some damage may still ensue as a consequence of the revelation of other details in the transcripts that relate to foreign relations, the continued assertion of FOIA exemptions by this Directorate seems no longer tenable. As noted in the Charles A. Briggs affidavit of 30 December 1976, "a classification judgment is not valid indefinitely. The circumstances which justify classification may change ..." Although the need to protect sources is a constant, whether or not information is technically classified, this particular instance of executive disclosure eliminates the possibility of providing continued protection under FOIA to specific source details in the transcripts.

CIA EXHIBIT C

3. I am prepared to work with you on an explanatory affidavit for the court's consideration in CA #77-1831.

Robert E. Owen

Robert E. Owen

cc: DDA/IPS

Washington, D.C. 20505

OGC 78-6738
11 October 1978

Honorable Barbara A. Babcock
Assistant Attorney General
Civil Division
Department of Justice
Tenth & Constitution Ave., NW
Washington, D.C. 20530

Dear Ms. Babcock:

Re: Weisberg v. GSA/National Archives and Records Services, U.S.D.C. (CA #77-1831, formerly CA #75-1448)

In the referent litigation, two executive session transcripts of the Warren Commission involving CIA equities are at issue. They are the transcript for 21 January 1964, pages 63 through 73, and for 23 June 1964, pages 7640 through 7651. The transcripts are among those requested by Mr. Harold Weisberg under provisions of the Freedom of Information Act (FOIA). The two transcripts have been withheld from release pursuant to FOIA exemptions (b)(1) and (b)(3). The basic reason in withholding these documents from release under the FOIA had been to protect intelligence sources and methods against unauthorized disclosure and because the documents were classified confidential.

In connection with the investigations of the House Committee on Assassinations, the Director of Central Intelligence determined that previously classified information regarding Yuriy I. Nosenko, a Soviet defector, would be declassified and put on the public record as part of the testimony before the committee. The testimony has been given and consequently the Central Intelligence Agency will no longer assert previously claimed FOIA exemptions for the two Warren Commission transcripts identified above.

CIA EXHIBIT D

Your assistance is requested in advising the court of these circumstances. Arrangements will be made to provide declassified versions of the two transcripts to the plaintiff in the above-captioned litigation.

Sincerely,

Anthony A. Lapham
General Counsel

cc: Honorable James B. Rhodes
Archivist of the United States
National Archives and Records Service
General Services Administration
Washington, D.C. 20408

OGC:LMZ:slg

Distribution:
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1 - OGC Chrono

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

OCT 13 1978

National Archives and Records Service
Washington, DC 20408

EXHIBIT #2
C.A. No. 75-1448

Honorable Barbara Allen Babcock
Assistant Attorney General
Civil Division
Department of Justice
Washington, DC 20530

Dear Ms. Babcock:

Subject: Weisberg v. General Services Administration, USDC DC, Civil Action No. 77-1831 (formerly 75-1448)

We are in receipt of a copy of a letter of October 11, 1978, from Anthony A. Lapham, General Counsel of the Central Intelligence Agency, to you. In the letter, Mr. Lapham advises that the CIA no longer (1) requests the continued security classification, or (2) the application of any other Freedom of Information exemption to prevent the disclosure by the National Archives and Records Service (NARS) of a portion of a Warren Commission executive session transcript dated January 21, 1964, and the entirety of another transcript dated June 23, 1964.

Because NARS has based its prior decisions to withhold these materials entirely on the recommendations of the CIA, I have directed the immediate declassification of the subject documents in accordance with the Lapham letter. I also have directed the archivist in charge of these documents to transmit copies of them as quickly as possible to plaintiff in the above-captioned litigation, and to have them available as requested by other researchers and members of the public.

NARS continues to withhold the other transcript at issue in this litigation, dated May 19, 1964, which is not security classified, pursuant to the fifth and sixth exemptions under the Freedom of Information Act (5 U.S.C. § 552(b)(5) and (6), respectively).

Sincerely,

James E. O'Neill

JAMES E. O'NEILL
Acting Archivist of the United States

cc:
Anthony A. Lapham
General Counsel, CIA

Keep Freedom in Your Future With U.S. Savings Bonds

EXHIBIT #3
C.A. No. 75-1443

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2267

EDDIE DAVID COX, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

On Motion for Appointment of Counsel

(D.C. Civil Action No. 77-2220)

Filed June 11, 1979

Before WRIGHT, *Chief Judge*, MACKINNON and ROBB, *Circuit Judges*.

Opinion Per Curiam.

PER CURIAM: Eddie David Cox filed an action *pro se* against the United States Department of Justice and the United States Marshals Service ("Marshals") to obtain information he had requested under the Freedom of In-

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

formation Act, 5 U.S.C. § 552 (1976). After Cox filed suit, the Marshals voluntarily released most but not all of the requested information. Cox amended his complaint (1) to obtain disclosure of the remaining material, and (2) to seek an award of attorney's fees for having caused disclosure of the material the Marshals had released. The district court granted the Marshals' motion for summary judgment. The matter comes before us on Cox' motion for appointment of counsel to pursue the two claims on appeal. We deny the motion insofar as Cox seeks appointment of counsel to pursue the first claim, and we concomitantly dismiss the appeal on that claim *sua sponte*. We grant the motion insofar as Cox seeks appointment of counsel to pursue the attorney's fees claim, and we concomitantly, *sua sponte*, vacate that portion of the district court's judgment relating to that claim and remand the case to the district court for further proceedings on that claim not inconsistent with this opinion.

Cox is an inmate at the federal penitentiary in Marion, Illinois. By letter dated November 8, 1976, Cox asked the Marshals for a copy of the Manual for United States Marshals ("Manual"), citing the Freedom of Information Act. Six months later, having received no response from the Marshals, Cox wrote to the Attorney General to report the Marshals' inaction and to appeal what Cox construed as a tacit denial of his claim. In a letter dated May 26, 1977, the Justice Department replied that, owing to its limited resources, it could not pass on Cox' request until the Marshals had. While acknowledging that the Freedom of Information Act entitled Cox to regard the Marshals' silence and its own response as a refusal to release the information, the Justice Department asked Cox to postpone filing suit until the Marshals actually reviewed his demand for the Manual. In December 1977, not having heard from the Marshals, Cox sued.

Four months later, in April 1978, the Marshals notified Cox that it had decided to release a copy of the Manual,

with certain deletions, upon Cox' payment of the duplication costs. Unsatisfied, Cox pressed his claim for the remaining material and also added a request for an award of attorney's fees based on the Marshals' release of the noncontroversial portions of the Manual. In an affidavit accompanying his motion for summary judgment, Cox claimed entitlement to the deleted portions of the Manual dealing with the following subject matters: the caliber of the weapon and the length of the barrel on the weapon used by the Marshals; the type of ammunition they used, and the number of rounds they are issued; the type of handcuffs they used, and the key combinations matching the handcuffs; the place where the keys are secured; the radio transmission and receiving frequencies of operational units; arrangement of prisoners during transportation of same, including the use of restraining devices; the position of the weapons on security personnel while transporting prisoners; and the inspection of prisoners during transport for objects used to break open handcuffs. The district court granted the Marshalls' motion for summary judgment on the ground that the foregoing items related to housekeeping matters exempt from disclosure under subsection (b)(2) of the Freedom of Information Act.

Subsection (b)(2) exempts from the disclosure provisions of subsection (a) materials that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2) (1976). This exemption applies to matters of merely intra-agency significance in which the public could not reasonably be expected to have a legitimate interest. *Department of the Air Force v. Rose*, 425 U.S. 352, 269-70 (1976). The exemption covers those portions of law enforcement manuals that prescribe the methods and strategy to be followed by law enforcement agents in the performance of their duties. *See Ginsburg, Feldman & Bress v. Federal Energy Adminis-*

tration, Civ. No. 76-0027 (D.D.C. June 18, 1976), *aff'd per curiam by an equally divided court*, 591 F.2d 752 (D.C. Cir. 1978) (en banc), *cert. denied*, 47 U.S.L.W. 3680 (U.S. Apr. 16, 1979). It does not apply to "secret law" contained in the rules and practices by which an agency regulates its own staff. *Jordan v. United States Department of Justice*, 591 F.2d 753, 763 (D.C. Cir. 1978) (en banc). The exemption exhibits a congressional judgment that material lacking external impact is unlikely to engage legitimate public interest, the touchstone of the policies underlying the Freedom of Information Act.

The deleted portions of the Manual unquestionably fall within subsection (b)'s exemption for routine matters of merely internal interest.[1] The precise nature of the de-

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[1] In Jordan v. United States Dep't of Justice, *supra*, a majority of the judges on this court held that the only exemptions from disclosure under the Freedom of Information Act are located in subsection (b). Judges MacKinnon and Robb dissented from that construction, asserting that materials which need not be disclosed under subsection (a)(2) are equally exempt from disclosure under subsection (a)(3). We based our view on the legislative intent of subsection (a)(2) as expressed in the Senate Report on that provision:

> The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters *rather than to law enforcement matters* protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law, while permitting a public examination of the basis for administrative action.

S. Rep. No. 713, 89th Cong., 1st Sess. 2, 7 (1965) (emphasis added). Absent the compulsion of *Jordan*, we would adhere to our dissenting view that the deleted portions of the Manual in the instant case, being a law enforcement manual, need not be disclosed under subsection (a) without resort to an exemption enumerated in subsection (b). *Cf.* Cox v. Dept. of Justice, 576 F.2d 1302, 1306-09 (8th Cir. 1978) (DEA manual).

leted information is clear from the context from which it was deleted. As the above listing of subject matters indicates, the deleted portions of the Manual pertain solely to housekeeping concerns of interest only to agency personnel. The undisclosed material does not purport to regulate activities among members of the public. Nor does it set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public. Differently stated, the unreleased information is not "secret law," the primary target of subsection (a)'s broad disclosure provisions.[2] No members of the public are likely to behave or to think differently owing to a revelation about the length of the barrel on the gun used by the Marshals. It is apparent from the released portions of the Manual that Marshals carry loaded guns and that they use handcuffs. We can assume for our purposes that some members of the public have a legitimate interest in that information. It is quite a different matter, however, and in our judgment unreasonable, to expect that the public also has an interest in how many bullets are in a Marshals' gun or in whether the Marshals keep the keys to the handcuffs in their right hip pocket, a drawer, or elsewhere. Such information is of legitimate interest only to members of the Marshals' staff.

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[2] It is clear, for example, that the deleted portions of the Marshals' Manual coincide far more closely with the relevant portions of the FEA manual at issue in Ginsburg, Feldman & Bress v. Federal Energy Administration, *supra*, which an equally divided court held were exempt from disclosure, than with those portions of the U.S. Attorney's Manual that this court required to be disclosed in Jordan v. United States Dep't of Justice, *supra*. The relevant portions of the Marshals' Manual do not contain secret law, which was *Jordan's* primary focus. Moreover, it is noteworthy that the Marshals' Manual meets the test of "predominant internality" suggested in Judge Leventhal's concurring opinion in *Jordan*.

Accordingly, we have no difficulty holding that the deleted material is exempt under subsection (b)(2). Having carefully reviewed the entire record, we conclude that Cox' appeal seeking the deleted portions of the Manual is baseless. We therefore dismiss the appeal *sua sponte*. *Cf. Schreiber v. Immigration & Naturalization Service*, 520 F.2d 44, 52 (D.C. Cir. 1975) (per curiam); *United States v. Marshall*, 510 F.2d 792, 794 & n.8 (D.C. Cir. 1975) (per curiam).

Cox' claim for an award of attorney's fees may have more substance under the cases in this circuit. The Freedom of Information Act provides that a court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case . . . in which a complainant substantially prevailed." 5 U.S.C. § 552(a)(4)(E) (1976). Cox maintains that the Marshals only released the information after he filed suit, seventeen months after his initial request. He argues that because the Marshals released the bulk of the Manual under the eventual threat of a court order compelling its release, he "substantially prevailed" in his action and is thus entitled to attorney's fees. In entering judgment below, the district court did not refer to Cox' attorney's fees claim, though it later denied, without explanation, Cox' motion to amend the judgment to award such fees.

In authorizing courts to award attorney's fees in Freedom of Information Act cases, Congress sought to encourage private persons to assist in furthering the national policy that favors disclosure of government documents. Consistent with this intent, this court has held that it is unnecessary for a complainant who is an attorney acting *pro se* to have actually incurred attorney's fees in order to be eligible for an award of same. *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1364-65 (D.C. Cir. 1977). In *Holly v. Acree*, 72 F.R.D. 115, 116 (D.D.C. 1976), *aff'd by order sub nom. Holly v. Chasen*, 569 F.2d 160

(D.C. Cir. 1977), the district court employed similar reasoning in a situation in which a layman was acting *pro se*. Consequently, under these cases, the fact that Cox is not an attorney does not disqualify him from receiving an award of attorney's fees. If Cox indeed "substantially prevailed" in his action, then the district court may in its discretion grant him an award of fees.

It is evident from the record that the Marshals released most of the requested information, and did so after Cox filed his suit. That fact alone, however, does not necessarily mean that Cox substantially prevailed in his action. It is true that a court order compelling disclosure of information is not a condition precedent to an award of fees, *Foster v. Boorstin*, 561 F.2d 340, 342 (D.C. Cir. 1977); *Nationwide Building Maintenance, Inc. v. Sampson*, 559 F.2d 704, 708-10 (D.C. Cir. 1977), but it is equally true that an allegedly prevailing complainant must assert something more than *post hoc, ergo propter hoc, Vermont Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509, 514 (2d Cir. 1976). Instead, the party seeking such fees in the absence of a court order must show that prosecution of the action could reasonably be regarded as necessary to obtain the information, *Vermont Low Income Advocacy Council, Inc. v. Usery*, *supra* at 513, and that a causal nexus exists between that action and the agency's surrender of the information, *Cuneo v. Rumsfeld*, *supra* at 1366. Whether a party has made such a showing in a particular case is a factual determination that is within the province of the district court to resolve. In making this determination, it is appropriate for the district court to consider, *inter alia*, whether the agency, upon actual and reasonable notice of the request, made a good faith effort to search out material and to pass on whether it should be disclosed. We have elsewhere had occasion to

note both the plethora of Freedom of Information Act cases pending before federal agencies at any given time, and the time-consuming nature of the search and decision process. *See Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 612 (D.C. Cir. 1976).[3] If rather than the threat of an adverse court order either a lack of actual notice of a request or an unavoidable delay accompanied by due diligence in the administrative processes was the actual reason for the agency's failure to respond to a request, then it cannot be said that the complainant substantially prevailed in his suit. The court must determine the cause of the delay.

As we noted above, if a party in fact substantially prevails in his action, then he is eligible for an award of attorney's fees. Eligibility, however, does not mean entitlement. Indeed, were it appropriate for us to consider the question here, we would have serious reserva-

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[3] In that case, we also held:

> [W]e interpret Section 552(a)(6)(C) [providing for exhaustion of administrative remedies upon lapse of the time limits for producing information under subsection (a)] to mean that "exceptional circumstances exist" when an agency, like the FBI here, *is deluged with a volume of requests for information vastly in excess of that anticipated by Congress*, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it "is exercising due diligence" in processing the requests. In such situation, in the language of subsection (6)(C), "the court may retain jurisdiction and allow the agency additional time to complete its review of the records." Under the circumstances defined above the time limits prescribed by Congress in subsection (6)(A) become not mandatory but directory.

Id. at 616 (emphasis added).

tions about the propriety of an award of fees on the facts of this case.[4] The issue, however, initially is one for the district court.

A decision on whether to award attorney's fees to an eligible party resides in the discretion of the district court, *see Cuneo v. Rumsfeld*, *supra* at 1365-68, though that decision is of course a valid object of appellate consideration under the abuse of discretion standard. In *Cuneo*, we identified a number of factors to be considered by the district court in exercising this discretion. These factors, which are not exhaustive of the possible considerations, include (1) the benefit to the public, if any, derived from the suit; (2) the nature of the complainant's interest in the released information; and (3) whether the agency's withholding of the records had a reasonable basis in law.

On the record before us, we have no indication of the district court's views on these factors, nor, for that mat-

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[4] Although Cox' status as a prisoner is irrelevant to a determination whether the deleted portions of the Manual ought to be disclosed, *see* Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971), his status is germane to a decision on whether an award of attorney's fees is appropriate, *see* Cuneo v. Rumsfeld, *supra* at 1365-68. As we noted at the outset of this discussion, the policy underlying the statutory authorization for attorney's fees is to encourage private persons to advance the national interest in disclosure of government documents. But Congress did not mandate awards for every successful litigant; it left the matter to the discretion of the courts. A decision to grant or to deny fees in a particular case is an implicit decision, respectively, to encourage or to discourage that type of Freedom of Information Act claim. In approaching such a decision, a court must assess the relationship between the requested information and the status of the party requesting it. In view of the obvious and potentially ominous relationship between the Manual (and comparable documents) and Cox (and individuals similarly situated), we have doubts about whether encouraging inmates to bring this type of litigation is in the national interest.

ter, have we any on whether Cox indeed substantially prevailed in his action. There remain disputed issues of fact to be resolved and factual considerations to be weighed. It is sufficient for our purposes to hold that Cox' claim for attorney's fees cannot be said, under *Cuneo* and *Holly*, to lack a possible basis in law, and that further proceedings in the district court, rather than here, are appropriate.

On remand, the district court should first consider whether Cox' suit (as opposed to his initial request) *actually* provoked release of the Manual. In this connection, the district court should consider the Marshals' averment that it was unaware of Cox' request until the suit was filed. If the court finds that Cox' action was the true cause of the Marshals' decision to release the information, then it should assess whether in light of the *Cuneo* factors an award of attorney's fees is appropriate. In this connection, the court should take special notice of the facts, among others, (1) that the Manual contains information that is relevant to law enforcement operations rather than to matters of substance that normally affect the general public; (2) that the complainant is a federal prisoner with an apparent though unexplained interest in the way in which Marshals operate; and (3) that the Marshals' "decision" to withhold the Manual, if indeed it was a decision at all, antedated this court's decisions in *Jordan v. United States Department of Justice*, *supra*, and *Ginsburg, Feldman & Bress v. Federal Energy Administration*, *supra*. It may well be that the Marshals originally withheld the material it later released because of concern about its obligation to release or justification for releasing the information it deleted. Cox' request necessitated a detailed analysis of a Manual containing over 630 pages, most of which the Marshals eventually released. We are impressed by the small amount of material that was withheld.

In sum, the motion for appointment of counsel is granted in part and denied in part. Cox' appeal on the claim for the deleted portions of the Manual is dismissed *sua sponte*. That portion of the district court judgment relating to Cox' attorney's fees claim is vacated, and the case is remanded to the district court for additional proceedings on that claim not inconsistent with this opinion.

Judgment accordingly

Chief Judge WRIGHT concurs in the result.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

EXHIBIT #4
C.A. No. 75-1448

HAROLD N. WARD,

Plaintiff,

v.

THE POSTAL RATE COMMISSION, ET AL.,

Defendants.

Civil Action No. 77-0145

ORDER

After considering plaintiff's motion for award of attorney's fees and costs, and the defendants' opposition thereto, the Court finds that (1) the fee and costs sought must be reduced to eliminate administrative time and expenses before the agency, and to adjust for the fact that substantial effort by plaintiff related to an issue on which he did not prevail; accordingly Mr. Speiser's time is reduced by 25 hours and Mr. Heldman's by 15 hours; and it further appearing that (2) the rates of $75.00 and $50.00 per hour for these attorneys, respectively, are reasonable in the light of existing standards in the community and Mr. Speiser's professional ability and diligence, (3) this case involved no novel, protracted work or special problems such as are noted in Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974), but it was a routine case handed well but partially unsuccessful. Accordingly, it is hereby

ORDERED that Attorneys fees in the amount of $3,467.50 and expenses of $66.00 be awarded as fair and reasonable.

Edward A. Tamm
UNITED STATES DISTRICT JUDGE

June 29, 1979.

EXHIBIT # 5
C.A. No. 75-1448

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOAN C. BAEZ,

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants.

Civil Action No. 76-1920

FILED

JUL 31 1979

JAMES F. DAVEY, Clerk

MEMORANDUM

This FOIA action is before the Court on plaintiff's motion for reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E)(1976). See Order of May 25, 1979. That section 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 complainant has substantially prevailed." Although Congress invested the courts with broad discretion to determine whether attorney fees should be awarded in a particular case, see Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704 (D.C. Cir. 1977), the statute imposes a mandatory precondition to the award: the plaintiff must have "substantially prevailed." Cuneo v. Rumsfeld, 553 F.2d 1360, 1364 (D.C. Cir. 1977). The Court must therefore determine whether plaintiff has substantially prevailed within the meaning of the Act.

It is now clear that a plaintiff can substantially prevail without obtaining a court judgment or order to release withheld material. E.g., id. at 1364-65. Attorney fees may be awarded even if information is disclosed voluntarily by an agency, so long as plaintiff's prosecution of a court action is a causative factor in the disclosure. See Cox v. Dep't of Justice, No. 78-2297, slip op. at 7 (D.C. Cir. June 11, 1979); Vermont Low Income Advocacy Council, Inc. v.

Usery, 546 F.2d 509 (2d Cir. 1976) (Friendly, C.J.). An FOIA plaintiff must, however, do more than establish that the disclosure occurred subsequent to the filing of his lawsuit. Cox v. Dep't of Justice, supra, slip op. at 7. As the D.C. Circuit recently explained:

> Instead, the party seeking such fees in the absence of a court order must show that prosecution of the action could reasonably be regarded as necessary to obtain the information and that a causal nexus exists between that action and the agency's surrender of the information. . . . [I]t is appropriate for the district court to consider, inter alia, whether the agency, upon actual and reasonable notice of the request, made a good faith effort to search out material and to pass on whether it should be disclosed. . . . If rather than the threat of an adverse court order either a lack of actual notice of a request or an unavoidable delay accompanied by due diligence in the administrative processes was the actual reason for the agency's failure to respond to a request, then it cannot be said that the complainant substantially prevailed in his suit. The court must determine the cause of the delay.

Id. at 8 (citations omitted).

Plaintiff's initial FOIA request to the CIA was made in a letter dated April 27, 1976. When the agency did not respond, substantively, within the time limits mandated by the Act, plaintiff filed the instant action on October 18, 1976. Approximately one and one-half months later, on December 1, 1976, the agency informed plaintiff that it had located thirty-three responsive documents and, at the same time, released limited portions of fourteen of those documents. Some additional information was released in March 1979 following a remand of the record in this action by the circuit court.

Plaintiff makes no attempt to demonstrate a causal nexus between the institution of this action and the December release. Nor has counsel disputed defendants' allegations,

supported by affidavit, that the delay in responding to the initial request was a good faith delay occasioned by an administrative backlog of FOIA requests at the agency.[1/] And although the defendants would be hard pressed to argue that the litigation was not the causative factor in the March 1979 release, counsel has not contended that disclosure of this small quantity of additional information (including parts of three newly identified documents) itself would result in plaintiff's having substantially prevailed. Cf. Cox v. Dep't of Justice, supra, slip op. at 7 (possibility of fees eligibility raised by release of "most" of requested information).

Instead, much of plaintiff's original motion, as well as his reply to defendants' opposition, analyzes the discretionary factors which the Court must consider on a motion under section 552(a)(4)(E) and why those factors here favor an award of attorney fees. With respect to the non-discretionary requirement of substantial success, however, the thrust of plaintiff's argument is that an FOIA plaintiff may, in appropriate circumstances, be deemed to have prevailed even without gaining release "of specific pieces of paper in the Government's filing cabinets." Plaintiff's Reply Memorandum, at 2.

According to plaintiff's counsel, prosecution of this lawsuit has: (1) advanced the Act's objectives in a variety of other ways (primarily by having produced

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1/ The Cox case was decided subsequent to the filing of plaintiff's motion, but well before the filing of counsel's reply memorandum. Defendants, moreover, served and filed a copy of the court of appeals decision in Cox, together with a short statement of its relevance, on July 6, 1979.

clarification of the law);[2] and (2) caused the release of "information," as opposed to documents (primarily by having forced the CIA to file far more detailed and descriptive affidavits). In addition, counsel argues that his case is made even more compelling by the government's lack of good faith in its defense of this action, see id. at 4-8. Therefore, according to counsel, plaintiff has advanced the statutory objectives and prevailed in the broadest sense of the word.

But apart from references to the general purposes of the Act, plaintiff offers scant support for the proposition that any of this means he has "substantially prevailed" within the meaning of section 552(a)(4)(E). Counsel cites only one authority that arguably offers direct support for his theory: Halperin v. Dep't of State, 565 F.2d 699 (D.C. Cir. 1977). It is true that the court of appeals there recognized that a FOIA plaintiff could substantially prevail without receiving a single document from the government. See id. at 706 n.11. But the unique circumstances of Halperin were essentially that, for national security reasons, the court reluctantly declined to require release of documents which plaintiff was entitled to under the Act. See id. at 706-07. Halperin is not authority for the far broader definition of "prevail" advocated by plaintiff in this case.

2/ For example, while the instant action was pending on appeal, the circuit court requested plaintiff to appear as amicus in Ray v. Turner, 587 F.2d 1187 (1978), apparently due to the substantial similarity between that case and this one. In an order denying the motion of amicus for costs, the court noted: "[Amicus'] brief and argument made a substantial contribution to the resolution of this appeal. Unfortunately, however, under the law amicus' costs are not chargeable to the United States." No. 77-1401 (filed Oct. 31, 1978). This Court, too, can state that counsel has prosecuted this action with the greatest zeal and competence, and has displayed an encyclopedic knowledge of FOIA law.

If the Act allowed the courts to award attorney fees, at their discretion, when the ends of justice so required, this Court would do so in this case. The Act, however, requires that a FOIA plaintiff have "substantially prevailed." Because this plaintiff has not, the Court must deny her motion for attorney fees and costs.

IT IS SO ORDERED this 31st day of July 1979.

John J. Sirica

UNITED STATES DISTRICT JUDGE