UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff,	)	
v.	)	Civil Action No. 75-1996
U. S. DEPARTMENT OF JUSTICE, Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFF'S MOTION FOR COMPLIANCE
AND SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT
OF DEFENDANT'S MOTION TO STAY

Preliminary Statement

On August 10, 1976, the defendant, by and through its counsel, filed a motion pursuant to 5 U.S.C. §552(a)(6)(C) to stay the above entitled action insofar as it related to plaintiff's December 23, 1975 Freedom of Information Act request to obtain access to documents relating to the assassination of Dr. Martin Luther King, Jr. Plaintiff has not filed an opposition to this motion. However, on September 16th and 17th, 1976 pursuant to direction of this court, there were held hearings on the above entitled motion. Two witnesses from the Federal Bureau of Investigation testified and on September 17, 1976, defendant submitted to the court the FBI proposal submitted to Congress with respect to the administration of Freedom of Information Act requests by the FBI and the plan or plans to effectively eliminate the backlog (Defendant's Exhibit 1 entitled "FBI Proposal Prepared For The Civil And Constitutional Rights Subcommittee Of The House Committee On The Judiciary To Effectively Administer Freedom Of Information And Privacy Acts Requests".)

The Court did not rule on defendant's motion to stay at the close of the proceedings on September 17, 1976. Rather, the Court required of plaintiff to submit to the Court correspondence relating to the

response to that which should be filed as soon as the FBI locates the information.

On October 8, 1976, the Court held a further status call on this case, and at that time defendant's counsel represented to the Court that the FBI has begun prosessing plaintiff's December 23, 1975 Freedom of Information Act request. We further advised the Court that one analyst was assigned to conduct this research on the Martin Luther King assassination file. We further advised the Court that there were 88 sections on the Martin Luther King assassination file and each section comprises approximately 200 pages. The analyst further estimated, through counsel, that approximately two sections a week can be processed, and it would take approximately 44 weeks to process this entire assassination file.

Upon being advised as to the estimate of time, the Court indicated that the 44 weeks is unsatisfactory and the Court was prepared to sign an order to that effect. In explanation of the proposed order, the Court stated the following:

MR. DUGAN: Then I don't know the bottom line of the order from the Court, and I think before other counsel here proposes it, based on some of the things I have seen filed in this case, I would like to know what the Court's view of what the bottom line is. Ordered what? That is --

THE COURT: Ordered that one person to handle thismatter, with the estimated time length of 44 weeks, is unsatisfactory.

MR. DUGAN: And, therefore, by --

THE COURT: And that, therefore, whatever it requires in the way of manpower or expedition of this case must be presented by the FBI.

MR. DUGAN: In other words, you would be setting in this order a period of time within which the FBI would submit something to this Court for further review to see whether that is in compliance with this Court's basic declaration that this is inadequate, what we have demon-

In addition, the Court suggested to plaintiff's counsel that a proposed order also include an order to the FBI that the plaintiff receive copies of any items relating to the Martin Luther King assassination which had been released to other persons (TR 30). Plaintiff's counsel indicated he would be filing on October 8, 1976 a list of persons that had received information on the assassination of Martin Luther King in order to demonstrate that plaintiff has been singled out in not having his Freedom of Information cases promptly disposed of. On October 8, 1976, plaintiff's counsel submitted an order not consistent with the Court's directions but, rather filed a motion "To Compel Forthwith and Total Compliance and For The Recovery Of Costs". Attached to that motion was the plaintiff's affidavit consisting of 103 paragraphs together with a list of 16 exhibits none of which demonstrated that other persons had requested and received information from the FBI relating to the assassination of Martin Luther King.

Plaintiff's Motion to Compel raises new issues which will be addressed below but we respectfully submit for the reasons stated herein that this motion should be denied.

Argument

Rather than submitting a proposed Order consistent with this Court's suggestion of October 8, 1976, plaintiff's counsel has filed a proposed Order submitted with a Motion To Compel Compliance seeking the following:

1. That the FBI devote all the manpower required to assure complete and full compliance by not later than December 15, 1976;

2. To deliver all records called for on a weekly basis;

3. To search each and every office of any and all of defendant's components whereever located;

4. To list every record withheld;

7. To restore to plaintiff all charges already assessed by defendant and paid by plaintiff.

Defendant respectfully submits plaintiff's motion for compliance should be denied and defendant's motion for stay granted.

We submit based on the decision by the Court of Appeals in Open America v. The Watergate Special Prosecution Force, et al., D.C. Cir. No. 76-1371, decided July 7, 1976 that "exceptional circumstances" exist and that the FBI has been exercising "due diligence" in the processing of FOIA requests. We submit, pursuant to Open America, that this Court should retain jurisdiction over this December 23, 1975 request and allow the agency additional time to complete its review. While we recognize this Court is prepared to enter an Order declaring that one analyst is inadequate in view of the large amount of documents that must be reviewed, we respectfully submit that this does not undercut the decision by the Court of Appeals in Open America. Therefore the FBI should be granted a reasonable period of time within which to complete this FOIA request.

This Court is aware of the demands on the FBI under the FOIA. The proposal submitted to Congress by the FBI to meet the backlog is now in the process of being implemented. As indicated in the testimony before this Court, this proposal will have an effect on the processing of the instant case as well as others. Since the FBI is now processing plaintiff's December 23, 1975 request and there is every likelihood that additional resources will be committed to FBI FOIA Unit in the near future, we submit that the Court should take this into consideration in any order entered in granting a stay. We believe that this Court should grant the FBI a six-month stay of proceeding relating to the December 23, 1975 FOIA request. Hopefully the additional resources that are currently being sought will have an effect on expediting the review of plaintiff's December 23, 1975 FOIA requests. At the end of six months, if the FBI has not fully processed

Plaintiff's motion for compliance seeks far more than this Court was prepared to do on October 8, 1976, and raises entirely new issues that will have a substantial effect on the processing of other Freedom of Information Act requests pending in the FBI. We will briefly comment on three of the matters that plaintiff seek to have made part of this Court's Order. First, plaintiff suggests that the FBI ought to devote "all the manpower required to assure complete and full compliance by not later than December 15, 1976." We submit there is no basis for such a order and it would be entirely inconsistent with the Court of Appeals' decision in Open America, wherein the Court declined to order a reallocation of resources to expedite the processing of the requests in Open America. The Court recognized that any order giving preferential expediated treatment would have the effect of taking personnel away from other request which the FBI is now engaged in processing. Open America v. Special Watergate Prosecution Force, supra, p. 17, slip. op. While the FBI is attempting to add additional resources to meet the backlog we submit any order that will require compliance by the date suggested would have a diastrous effect on processing of other FOIA requests that are presently being processed.

The second point we wish to address in this proposed order in support of the motion for compliance is this order would require a search of each and every office of any and all of defendant's components wherever located. We submit that this order contemplated by the Court should not include such a directive unless and until search of the files of the FBI's main office proves to be inadequate. We believe as the Court found in the case of Meeropol v. Levy, C.A. 75-1121, opinion filed January 20, 1976, that any such search of the field offices would be counterproductive.

The third issue which we wish to address relates to the cost for the search that has been previously conducted as well as any future cost. Plaintiff seeks at this point to have the Court order

that the defendant restore to the plaintiff all charges previously paid and further that this Court declare that this search yet to be completed be conducted without cost. This is entirely improper and should not be addressed by the Court in this order. We submit that the Department of Justice regulations relating to the cost are reasonable and consistent with the statute, 28 C.F.R. §16.9(c)(e) (1975). In support of our position on this, we rely on the decision of Judge Gasch in the case of National Consumers Congress, et al., v. Agency for International Development, C.A. 75-1209, Memorandum Opinion and Order filed September 15, 1976, copies attached.

In conclusion, defendant respectfully submits that plaintiff's motion for compliance should be denied and that this Court should enter an order consistent with the dictates of Open America and grant the FBI a reasonable period of time within which to complete the processing of plaintiff's December 23, 1975 FOIA request.

EARL J. SILBERT
United States Attorney

ROBERT N. FORD
Assistant United States Attorney

JOHN R. DUGAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Memorandum Of Points And Authorities In Opposition To Plaintiff's Motion For Compliance And Supplemental Points And Authorities In Support Of Defendant's Motion To Stay with attached Memorandum Opinion and Order, have been mailed to the following on this 27th day of October, 1976:

James Hiram Lesar, Esq.
1231 Fourth Street, S.W.
Washington, D.C. 20024
Attorney for Plaintiff

Harold Weisberg
Route 8
Frederick, Maryland 21701
Plaintiff

JOHN R. DUGAN
Assistant United States Attorney
Room 3419 U.S. Courthouse
Washington, D.C. 20001
426-7261

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL CONSUMERS CONGRESS, ET AL., Plaintiffs, v. AGENCY FOR INTERNATIONAL DEVELOPMENT, Defendant.	)	Civil Action No. 75-1209

ORDER

Upon consideration of the defendant's motion for summary judgment, the plaintiffs' motion for partial summary judgment, the memoranda in support of and in opposition thereto, and the entire record herein, and having heard the parties in oral argument of these motions, it is by the Court this 10th day of September, 1976, for the reasons set forth in the attached Memorandum,

ORDERED that plaintiffs' motion for partial summary judgment be and it hereby is denied; and it is further

ORDERED that defendant's motion for summary judgment be and it hereby is granted.

Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL CONSUMERS CONGRESS, ET AL., Plaintiffs,	)	Civil Action
v.	)	No. 75-1209
AGENCY FOR INTERNATIONAL DEVELOPMENT, Defendant.	)	

MEMORANDUM

This matter came on for hearing on defendant's motion to dismiss or for summary judgment, and plaintiffs' motion for partial summary judgment. By order filed May 17, 1976, the Court denied the motion to dismiss and temporarily withheld a ruling on the motions for summary judgment pending further discovery, pursuant to the terms of a stipulation that was filed by the parties on January 14, 1976. For the reasons discussed below, the Court has determined to grant defendant's motion for summary judgment and deny plaintiffs' motion.

INTRODUCTION

This suit grew out of a sweeping request under the Freedom of Information Act (FOIA) that plaintiffs filed with the defendant Agency for International Development (AID). The plaintiffs, two non-profit consumer organizations and Mrs. Ellen Haas, a consumer advocate, seek access to five broad categories of records dating from 1964 to the present

of corruption, inefficiency and ineffectiveness in the administration of the aforementioned AID programs.

Unlike the typical FOIA case, this suit is not before the Court for review of the agency's refusal to disclose requested documents. Defendant makes no claim that plaintiffs' FOIA request is unreasonably vague or not properly formulated. Instead, the agency has expressed its willingness to conduct the document search requested by plaintiffs if the plaintiffs will pay in advance one-fourth of the extimated costs of the search and will commit themselves to pay whatever search charges the Agency ultimately incurs. Defendant's preliminary estimate of such charges amounts to $10,764.00.

Plaintiffs challenge in this case AID's requirement that plaintiffs pay one-fourth ($2,691.00) of the estimated search fee before the agency will begin to search for the requested documents, and AID's refusal to waive the fee requirement at this time. The merits of these issues turn on the interpretation to be accorded the following portion of the 1974 amendments to the FOIA:

> In order to carry out the provisions of this section, each agency shall promulgate regulations, . . . specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that

Plaintiffs have repeatedly requested that the search fees be waived or reduced, claiming that disclosure of the requested documents can be considered as primarily benefitting the general public within the meaning of § 552(a)(4)(A), supra. The agency has refused to waive the fees prior to the document search, but has indicated that it might change its mind once it sees the documents that are disclosed by the search. Plaintiffs claim that they cannot pay the $2,961.00 down payment on the search fees and that if the fees are not waived or reduced, they will have to abandon the request.

SUMMARY OF UNDISPUTED MATERIAL FACTS

On February 19, 1975, plaintiff Ellen Haas filed the FOIA request that gave rise to this action. On February 26, 1975, defendant denied the request for the reason that it was not properly formulated and did not reasonably describe the requested records. Plaintiffs' attorney and AID staff attorneys subsequently met in an effort to reformulate the narrow plaintiffs' request. On March 5, the plaintiffs submitted the modified request which is still before the agency pending the outcome of this suit.[1/] The March 5 request named five categories of documents, including all written communications or written memoranda of oral communications between AID personnel and numerous entities and individuals, including Otto Passman, with reference to certain enumerated subjects. The March 5 letter also requested that AID provide estimates of the search and copying fees for each of the five categories of documents, and permit the plaintiffs to inspect the documents without charge. Plaintiffs

as the justification for their fee waiver request that "this information is sought (as the Act provides) primarily for the benefit of the general public and not for any personal benefit of Ms. Haas."

On March 6, 1975, Mr. William Ide, Acting Director, Office of Public Affairs of AID, responded to plaintiffs' request by requiring plaintiffs to agree to pay all search fees that would be incurred, and to make an advance payment of 25% of the estimated search fees before the agency would begin the search. Mr. Ide enclosed rough estimates of the number of hours that would be required to search "accessible files, retired files, and overseas sources" for each of the five categories of documents requested. The estimated total search time amount to 1,196 hours. Mr. Ide's letter noted that the $9.00 per hour search fee was prescribed by the agency's regulations, 22 C.F.R. § 212.35(a) (1975), and that § 212.35(c) of the regulations also authorized the Secretary to require an advance deposit of search fees. The same regulation also provides that "A request will not be deemed to have been received until the requester has agreed to pay the anticipated fees and has made an advance deposit if one is required." Finally, Mr. Ide denied the request for waiver of search fees by stating, "I regret that I cannot consider the production of these numerous documents on many different subjects as primarily benefitting the general public pursuant to 5 U.S.C. §552(a)(4)(A)."

In letters dated March 20, April 7, and June 13, 1975, plaintiffs appealed to AID to

requirements. Plaintiffs argued in their first letter that their request satisfied the statutory "public interest" criterion for waiver of fees because (1) the requester, Mrs. Haas, could not afford to pay the fees, and (2) she did not intend to make any

> "private, profit-making use of the requested documents, but desires access to the requested documents solely to further public education concerning your agency's rice export and population programs, to promote study by consumer groups of these programs, and to study Congressman Passman's impact on AID's programs, particularly those dealing with food exports."

The agency, through Clinton F. Wheeler, Director, Office of Public Affairs, responded to the March 20 appeal letter by stating that "we fail to find any evidence in the Act or its legislative history to indicate that a disinclination to use requested information for profit-making purposes should be a ground for waiver of fees." Mr. Wheeler also wrote that plaintiff's description of her purpose in seeking the documents failed to "identify the size of the public to benefitted, the significance of the benefit, and the likelihood that tangible public good would be realized by the release of this information without charge." Mr. Wheeler also explained that he was presently unable to determine that the fees should be waived "because the documents you have requested cover so many subjects, because I am not aware of the contents of these documents, and because the public interest which would be benefitted by their release has not been described with particularity," and

benefit the general public." He also stated that he would be willing to consider waiver or reduction of fees "after the required documents have been retrieved if a convincing showing can be made from the nature of the documents themselves that the general public interest would be benefitted by making them available on a reduced or no-fee basis."

By letter dated April 7, plaintiffs attempted to "describe with particularity" the public good that would flow from disclosure of the requested documents. Plaintiff Haas described herself as a prominent consumer advocate, and a past and present officer of two consumer organizations. She stated that she would provide the disclosed information to her two organizations, which claim 1700 members, and would then distribute the information to the consuming public through the news media. Plaintiff placed primary emphasis on the possibility of discovering and exposing corruption in the rice export program as a cause of skyrocketing rice prices.

Mr. Wheeler responded to the April 7 letter by reiterating the points he had made in this previous letter to plaintiffs. Plaintiffs retorted with their third letter, largely repetitive of their previous letter, but accompanied by a memorandum describing the legislative history in support of fee waivers. Mr. Wheeler responded with his third letter, restating his opinion that it would not primarily benefit the general public to waive the search fees before retrieval of the documents, but that he would reconsider waiving the fees once he had an opportunity to review the

THE ISSUES FOR DECISION

The defendant agency bases its motion for summary judgment on the claim that it reasonably exercised its discretion in refusing to waive the fees and requiring a prepayment of one-fourth the estimated amount of the search fees. Plaintiffs argue in opposition to defendant's motion that the discovery conducted to date demonstrates a lack of a rational basis for the agency's decisions. Plaintiffs have also moved for a partial summary judgment in their favor which would declare: (a) that § 552(a)(4)(A) of the FOIA, supra, requires AID to set forth in its regulations specific criteria for determining whether to waive fees; (b) that AID's regulations do not fulfill this requirement, and that AID's denial of plaintiffs' request for a fee waiver or reduction in the absence of adequate regulations violates the FOIA; (c) that defendant's demand for a down payment and a promise to pay the balance of all search fees prior to a determination of (i) whether release of the requested information can be considered as primarily benefitting the public, and (ii) whether any of the materials will be withheld as exempt from disclosure, is unlawful. In connection with argument (c), plaintiffs contend in their Memorandum that the agency may not lawfully condition its determination whether to waive fees on an examination of the requested documents themselves, and that the agency may not include in the charges imposed on plaintiffs any charges for the agency's services in examining the requested documents to determine whether the requester is entitled to

MERITS OF THE MOTIONS

I. Plaintiffs Motion for Partial Summary Judgment.

A. Whether AID has failed to adopt adequate regulations with respect to fee waiver determinations.

Plaintiffs contend that the AID regulation on the subject of fee waivers does not comply with the Congressional intent underlying the fee waiver provision of the statute and is so vague as to permit standardless decision-making violative of due process. Plaintiffs seek a declaration that AID has failed to issue adequate regulations and that its refusal to waive plaintiffs' FOIA fees is therefore unlawful.

Before reaching the question whether the challenged regulation is adequate under the statute, the Court must first decide whether the FOIA requires the agency to adopt regulations relevant to fee waiver determinations instead of, or in addition to, stating the reasons underlying the waiver determinations on a case-by-case basis. The relevant provision of the FOIA, § 552(a)(4)(A), supra, does not expressly require the promulgation of regulations with respect to fee waiver determinations. The reference in that section to the promulgation of regulations simply states "each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency."

Although the quoted provision makes no mention of fee waivers as a subject of the regulations, the scope of that provision must be determined in the context of its

legislative history. The most useful source of relevant legislative history is the Conference Report, H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. (1974). That Report accompanied H.R. 12471, which was enacted as the 1974 amendments to the FOIA. The Conference Report, id. at 7, notes that the Senate had amended H.R. 12471, by specifying certain instances in which the agencies would ordinarily be required to waive fees. The Senate Report that accompanied the Senate bill described the fee waiver provision of the Senate amendment as follows:

> ". . . [The Senate bill] allows documents to be furnished without charge or at a reduced charge where the public interest is best served thereby. This public interest standard should be liberally construed by the agencies, it is borrowed from regulations in effect at the Departments of Transportation and Justice. In addition to establishing the general rules, the amendment specifies that fees shall ordinarily not be charged whenever the person requesting the records is indigent, when the aggregate fee would amount to less than $3, when the records requested are not found, or when the records located are not withheld. S. Rep. No. 93-854, 93d Cong., 2d Sess. at 12 (1974).

Although the Conference Committee eliminated the specification of waiver categories from the final version of the bill, the Conference Report explains this action by stating that "Such matters are properly the subject of individual agency determination in regulations implementing the Freedom of Information law." H.R. Rep. No. 93-1380, supra, at 7 (emphasis added). Thus, although the fee waiver provision of FOIA does not expressly require the agencies to promulgate regulations governing fee waivers, the legisla-

regulations be promulgated. Applying this legislative history to the portion of 5 U.S.C. § 552(a)(4)(A) that requires the agencies to promulgate regulations, the Court believes that § 552(a)(4)(A) imposes on each agency a duty to promulgate regulations setting forth the basic standards to be considered by the agency in making fee waiver determinations.

Since in the instant case the defendant agency has promulgated a regulation on the subject of fee waiver determinations, the issue for decision is whether that regulation, as amplified by the agency's statements of reasons in this case, satisfies the statutory directive. The regulation, which amounts to little more than a paraphrase of the statutory "public interest" standard set forth supra, reads as follows:

> The Director, Office of Public Affairs, or an officer designated by the Director may waive all or part of any fee provided for in these sections when the Director or the designated officer deems it to be in either the Agency's interest or in the general public's interest. 22 C.F.R. § 212.35(h) (1975).

Despite the brevity of AID's fee waiver regulation, it seems to the Court adequate as applied to plaintiffs herein. This conclusion flows from the well-known principle of administrative law which holds that the choice between proceeding by general rule or by individual case-by-case decisions "lies primarily in the informed discretion of the administrative agency." Securities Exchange Commission v. Chenery Corp., 332 U.S. 194, 203 (1947); see also Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 596 (D.C. Cir. 1971). The principle applies even if Congress required the promulgation of regulations relevant

to fee waivers, for such a directive would not, without more, preclude the agency from exercising its informed discretion as to the degree of detail to include in early formulations of the required regulation. As the Supreme Court noted in Chenery, "Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development. . . ." Id. at 202.

The task of defining the statutory public interest standard governing FOIA fee waiver determinations is a difficult one, and one that an agency might more appropriately deal with on a case-by-case basis rather than by general rule so long as the agency lacks adequate experience in applying the statutory standard. In this case plaintiffs filed their FOIA request with AID on February 19, 1975, which was the very day on which the AID regulation in question became effective. See 22 C.F.R. § 212 (1975); see generally Wheeler and Dadian depositions. Moreover, the 1974 amendments to the Freedom of Information Act became effective that same day. See Pub. L. No. 93-502 § 4, 88 Stat. 1564. On July 10, 1975, when the agency issued its final response to the plaintiffs' fee waiver request, the 1974 amendments and the AID regulation had been in effect for only four and a half months. In view of the novelty of the 1974 fee waiver amendment during the time when the agency was considering plaintiffs' request, it appears to the Court that the agency acted reasonably and within the bounds of the discretion remaining to it in choosing to

determinative criteria in more detail on a case-by-case basis. To insist that the agency should initially have included the details in its regulations "is to exalt form over necessity." Securities and Exchange Commission v. Chenery, 332 U.S. 194, 202 (1947). The validity of the agency's action in denying plaintiffs' fee waiver request thus turns on the validity of the reasons articulated in support of that agency action, as discussed infra in connection with the defendant's motion for summary judgment.

B. Whether the agency's requirement that plaintiffs make a down payment on estimated search fees prior to the search, and agree to pay all search fees incurred as per se unlawful.

Plaintiffs argue that AID should be prohibited as a matter of law from demanding as a prerequisite to conducting the document search, that plaintiffs make a down payment on estimated search fees and agree to pay all search fees actually incurred. A ruling to this effect would require this Court to invalidate the AID regulation, 22 C.F.R. § 212.35(c) (1975), that authorizes the requirement of down payments and statements of willingness to pay. The Court finds no support whatsoever for that result, either in the statute, the legislative history, or the regulations of other agencies. Administrative regulations must be sustained unless they lack a rational basis and are plainly inconsistent with the statute. See United States v. Ekberg, 291 F.2d 913, 921 (8th Cir. 1961); Review Committee, Venue VII, etc. v. Willey, 275 F.2d 264, 272 (8th Cir.), cert. denied, 363 U.S. 827 (1960). The Court believes that

consistent with the Statute. The regulations must therefore be held valid.

Several factors justify this holding. Invalidation of § 212.35(c) of the AID regulations would necessarily require the invalidation of many other agencies' regulations, for many agencies, whose regulations plaintiffs have cited to support their attack on AID's fee waiver regulation, require statements of willingness to pay or down payments on estimated search fees as pre-conditions to the agency's commencement of the search. See, e.g., 28 C.F.R. § 16.9(c), (e) (1975) (Department of Justice); 29 C.F.R. § 70.64(b) (1975) (Department of Labor); 32 C.F.R. § 292.6(b), (d), (1975) (Department of Defense); 32 C.F.R. § 1285 (App. A) (1975) (Defense Supply Agency). Many of these regulations specifically state also that fees are chargeable even if exemptions are claimed for the documents discovered, and some require payment of the entire search fee in advance of the search. AID's regulations are substantially identical to those of the cited agencies on the question of down payments and statements of willingness to pay. Compare 22 C.F.R. § 212.35(c) (1975) (AID) with 28 C.F.R. § 16.9(c), (e) (1975) (Department of Justice).

The Court also notes that the Department of Justice regulations, which plaintiffs and Senate Report 93-854, supra, cite with approval, not only provide for advance down payments on anticipated fees, 28 C.F.R. § 16.9(e), but the agency actually applies the down payment provision. The record in Meeropol v. Levi, Civil Action 75-1121, filed June 14, 1975 (D.D.C.), a case which plaintiffs cite to

support their position, reveals that the Department of Justice required prepayment of $540.00, "representing the required advance deposit of 25% of the estimated fee." See Exhibit D(2), attached to Meeropol Complaint. The plaintiffs in that case promptly tendered their check for that amount. See Exhibit E, attached to Meeropol Complaint. Thus, although the Justice Department eventually waived additional search fees in Meeropol, that waiver provides no support whatsoever for plaintiffs' contention that down payments and promises to pay may not be required in advance of the search.

Finally, the reasonableness of the regulations requiring down payments and promises to pay is supported by the lack of any indication in the 1974 amendments of any legislative intent to reverse the Attorney General's established position on the issue. The Attorney General's Memorandum on the Freedom of Information Act (1967) stated that "Extensive searches should not be undertaken until the applicant has paid (or has provided sufficient assurance that he will pay) whatever fee is determined to be appropriate." Id. at 26-27. Section 212.35(c) of the AID regulations, and the regulations of the other aforementioned agencies, merely implement the Attorney General's views on the subject.

Plaintiffs make two arguments which should be mentioned only to illustrate certain factual misconceptions contained therein. First, plaintiffs contend that AID's "requirement that plaintiffs underwrite the costs of its

here. However, nothing in the agency's correspondence with plaintiffs suggests that plaintiffs will be charged for anything other than search and copying fees. Apparently plaintiffs drew a contrary inference from Mr. Wheeler's statement, in his affidavit, that he "cannot make a determination to waive fees until the documents can be examined." (Emphasis added). Nothing in this statement implies that plaintiffs would be charged for the agency's services in examining the documents. The statute and legislative history clearly state that only the direct costs of search and copying may be charged. See Diapulse Corp. of America v. Food & Drug Administration of Dept. of H.E.W., 500 F.2d 75, 79 (2d Cir. 1974) (agency may not include in "search fee" charges for deleting exempt material). Because the issue is not raised by the facts before this Court, however, no ruling on the point is required in this case.

Plaintiffs also argue that AID acted contrary to the legislative intent in demanding a partial down payment of 1/4 of the estimated amount of the search fees prior to determining whether the payment of fees will be waived, and that the contents of the documents themselves are irrelevant to the waiver determination. Again, these objections are irrelevant to this case, for AID has in fact already decided, pursuant to plaintiffs' request, whether to waive the search fees. The agency has clearly stated that on the basis of the information available to it now, prior to conducting the document search itself, it appears to the agency that waiver would not primarily benefit the public interest. The agency

has stated that it will reconsider the issue on the basis of the contents of the documents, but it has not demanded partial payment prior to deciding the issue of entitlement to waiver, nor has it conditioned its initial waiver determination on the contents of the documents. The fact that defendant denied plaintiffs' waiver request does not mean that defendant refused to consider the question.

The procedure that the agency followed in acting upon plaintiffs' waiver request seems to this Court both necessary and proper. Because the agency requires a statement of willingness to pay, and a down payment of fees as a prerequisite to commencing any substantial search, it was incumbent upon the agency to consider plaintiffs' fee waiver request prior to conducting the search. In considering the fee waiver request at that time, defendant was required to consider no more than the information available to it at that time. The record in this case demonstrates that defendant understood this responsibility and discharged it by considering and rejecting plaintiffs' fee waiver request on the basis of the request alone. The Court rejects plaintiffs' argument that by offering to reconsider the fee waiver issue on the basis of the contents of the documents once they are retrieved the agency somehow invalidated its pre-search refusal to waive the fees, assuming that the pre-search refusal to waive was itself valid. Thus the only question remaining for decision is the validity of the agency's pre-search denial of the plaintiffs' fee waiver request.

II. Defendant's Motion for Summary Judgment Based on the Reasonableness of the Agency's Exercise of Discretion

In ruling on defendant's motion for summary judgment the appropriate standard of review is found in § 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1970). See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414-15 (1971). That section provides for reversal of agency action that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." In reviewing agency action pursuant to § 706(2)(A) the Court must decide whether the agency acted within the scope of its statutory authority, whether the agency complied with applicable procedural requirements, whether the decision was based on a consideration of relevant factors, and whether there has been a clear error of judgment. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 415-16. Of these four questions, the third and fourth are determinative in this case, for if the agency based its decision on relevant factors and made no clear error of judgment, then it necessarily acted within the scope of its statutory authority to grant or deny fee waivers and satisfied whatever procedural requirements may exist apart from those discussed supra in connection with plaintiffs' motion.

In resolving these issues in the instant case the Court has relied on the correspondence between plaintiffs and defendant in connection with the FOIA request, as summarized supra, the depositions of AID officials Parker,

record with the exception, however, of the unsigned, unconsented, and uncorroborated document entitled "Stipulation," which is attached to Exhibit A of plaintiffs' July 19, 1976, submission. The so-called Stipulation purports to summarize interviews of 14 AID employees that plaintiffs' counsel conducted in the presence of defendant's attorney. This "Stipulation" simply does not conform to the requirements of Rule 56(e) that affidavits "shall set forth such facts as would be admissible in evidence." The exclusion from consideration of the "Stipulation" substantially undermines, of course, the factual statement set forth at pages 3 to 7 of plaintiffs' July 19 submission.

In the three letters from AID officials to plaintiffs regarding plaintiffs' fee waiver request, the agency specified two basic reasons for refusing to waive fees. These include (1) the magnitude of the estimated search time and the resultant magnitude of the anticipated search fees; and (2) the impossibility of predicting in advance of the search whether the documents ultimately produced in response to plaintiffs' request will contain information of sufficient interest to the general public to indicate that release of the information would confer a benefit on the general public. Both of these reasons seem to this Court perfectly relevant and adequate grounds for the agency's conclusions. The diversity of the types of information sought in plaintiffs' request, plus the breadth of the request and the number of the persons inquired about in the request compel the conclusion that the documents' content will wholly determine

whether their production confers a public benefit. At this point it appears that plaintiffs' FOIA request might simply result in the production of a hodge podge of miscellany of no interest to the public at large.

Plaintiffs herein do not deny the appropriateness or sufficiency of the considerations cited by the AID officials. Instead they argue that on the facts of this case the agency acted irrationally in concluding that the search time would be great, and by failing to recognize that the requested information would by its nature benefit the general public. In so arguing, however, plaintiffs reveal a critical assumption underlying their claim of public benefit, namely, that the information sought will reveal improprieties and inefficiency in certain AID programs. This assumption actually underscores the validity of the agency's non-waiver decision, for if the information sought should fail to reveal any wrongdoing or cause for scandal, then release of the information would not confer even the public benefit that plaintiffs themselves envision. On the other hand, if the documents when located by the agency reveal evidence of impropriety, then it may be that the agency will decide on the basis of that evidence to waive the fees. At least at that time the agency will be able to make a vastly more informed decision than is possible on the basis of the plaintiffs' FOIA request alone.

As for the plaintiffs' attack on the adequacy of the agency's efforts in formulating the estimate of search time and costs, it seems highly

view, that the estimated 1,197 hours might be required to complete a search responsive to plaintiffs' sweeping request. The record herein reveals no evidence to impeach the defendant's claim that it elicited good faith estimates of the necessary search time by responsible officials in the pertinent offices of AID. Accordingly, the Court agrees with defendant that the record reveals no genuine issue of material fact relevant to the reasonableness of the agency's exercise of discretion in denying the plaintiffs' pre-search request for waiver of search fees and in requiring a down payment of $2,691.00, which amounts to one-fourth of the estimated total search fee. Summary judgment will therefore enter for defendant.

Judge

Date: September 10th 1976

APPENDIX A

PLAINTIFFS' FOIA REQUEST

"The requested records now include all written correspondence or other written communications between, and written memoranda or other documents recording oral or telephone communications located with the foregoing written correspondence and communications between, and written memoranda or other documents recording oral or telephone communications located with the foregoing written correspondence and communications between AID and any of its officials and employees on the one hand, and on the other hand:

"1. Representative Otto Passman concerning any inquiry, interest shown, attempt to influence, use of influence and/or intervention of his in relation to any program or financing administered by AID and any AID authorization or appropriation pending in or enacted by the Congress, during the period January 1, 1964 to the present, and concerning in particular any requested written correspondence, communications, memoranda or documents located at AID's Congressional Relations Office, as well as any that exist at the offices of the AID Administrator, Deputy Administrator, and head of AID's population and humanitarian assistance program and the Food for Peace rice export program.

"2. Murdock Head, M.D.; Richard H. Ross; Airlie Foundation; Department of Medical and Public Affairs of the George Washington University; Family Health Foundation and Joseph Beasley, M.D. concerning AID's population and humanitarian

"3. Grover Connell; Connell Rice and Sugar Company; Continental Grain Company; Cargill, Inc.; Office of the Supply of the Republic of Korea; J.H. Park of the foregoing office; Senator John J. McClellan; General Bustanil Arifin of the Bureau of Logistics of Indonesia or any member of that Bureau; Gordon Dore; Supreme Rice Mill of Crowley, La., Kim Hak Yul (the late Deputy Prime Minister of South Korea); former Representative Edwin Edwards, Governor of Louisiana, concerning the Food for Peace rice export program with particular reference to the interests of Messrs. Passman, McClellan and Edwards in said program as it is administered by AID from its national office and from its missions in South Korea, Indonesia, South Vietnam and Cambodia, during the period January 1, 1969 to the present.

"4. The number of other persons or entities known to the head of the Food for Peace rice export program and/or other responsible AID official(s) to be engaged in the business of exporting rice from the United States to the four countries mentioned in the preceding paragraph pursuant to programs or financing administered by AID, during the period January 1, 1969 to the present. You agreed to formulate a rough estimate of the costs of searching for the records described in this paragraph.

"5. All requests for Food for Peace credits for the purchase of rice during 1971-1975 and all AID responses to such requests, any memoranda which include any scientific,