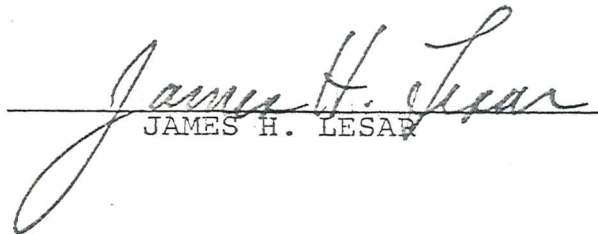


CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of June, 1979, mailed a copy of the foregoing motion for partial summary judgment on the issue of whether plaintiff has "substantially prevailed" in this litigation to Ms. Betsy Ginsberg, Attorney, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.



JAMES H. LESAR

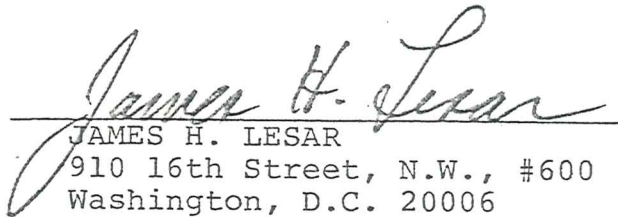
of this lawsuit, not a single component of the Department of Justice provided plaintiff with any records pertaining to the assassination of Dr. King.

6. Subsequent to the filing of this lawsuit, plaintiff has received, without charge, in excess of 50,000 pages of Department of Justice records pertaining to the assassination of Dr. Martin Luther King, Jr.

7. At the February 11, 1976 status call in this case, counsel for defendant told the Court that he planned to file a motion within two weeks which would convince the Court and plaintiff that this case was moot.

8. Of the more than 50,000 pages of records which have thus far been released during the pendency of this case, all but 71 were supplied to plaintiff after the February 11, 1976 status call at which defendant contended the case was moot.

Respectfully submitted,


JAMES H. LESAR
910 16th Street, N.W., #600
Washington, D.C. 20006
Phone: 223-5587

Attorney for Plaintiff

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

Introduction

Defendant has filed an Opposition to Plaintiff's Motion for an Order Requiring Defendant to Pay Consultancy Fee which argues that the consultancy fee is contingent upon a finding that plaintiff has "substantially prevailed" in this litigation and thus qualifies for an award of "reasonable attorney fees and other litigation costs reasonably incurred" as provided for by the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E). This is a falsification of the consultancy agreement, which never contemplated that plaintiff had to "substantially prevail" in this litigation in order to get paid for the work he was more or less dragooned into undertaking against his own personal wishes. Having previously attempted to renege on its original commitment to pay Weisberg at the rate of \$75.00 per hour for the consultancy work, the Department now seeks to renege on the agreement altogether.

The consultancy was never contingent upon a finding that plaintiff had "substantially prevailed" in this litigation. Nevertheless, there is some merit to litigating this precise issue now.

It is apparent that there is a need for some incentive in this case which will induce the defendant to stop its obstructionist tactics and get on with the task of locating records responsive to plaintiff's requests. Inasmuch as the FBI has already provided the House Select Committee on Assassinations with many such records not provided plaintiff, finding them for plaintiff should require very little time or effort.

While a finding that plaintiff has "substantially prevailed" does not automatically lead to an award of attorney fees and costs under the Act, it is a necessary first step. Taking this first step is appropriate at this time because it will put defendant on notice that a continuation of its present tactics runs the risk of substantially increasing the amount of attorney fees and costs which ultimately may be recovered by plaintiff.

Plaintiff stresses, however, that it is not necessary for this Court to find that plaintiff has "substantially prevailed" in order for it to rule that plaintiff must be paid his consultancy fee. Defendant offered to pay plaintiff \$75.00 per hour for work it repeatedly insisted that he undertake. Plaintiff accepted the offer. The Court placed its imprimatur on this arrangement. Plaintiff did the work which he was required to do. Simple decency requires that he be paid for it. Immediately and in full.

Argument

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

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

Before a complainant can qualify for an award of attorney fees and costs he must, therefore, be found to have "substantially pre-

ailed." This requires a showing that: (1) the litigation was reasonably necessary in order to obtain the documents, and (2) that the initiation of the suit had a substantial causative effect on the release of the documents. Vermont Low Income Advocacy Council v. Usery, 546 F. 2d 509 (2d Cir. 1976); Ford v. Selective Service System, 439 F. Supp. 1262 (M.D.Pa. 1977).

A complainant may, however, be held to have "substantially prevailed" and to have qualified for an award of attorney fees and costs without having obtained an actual judgment in his favor as to some or all of the materials sought. Vermont Low Income Advocacy Council, supra. Thus, the fact that the government, after commencement of the litigation, acts to moot it by supplying the requested documents, does not preclude an award of attorney fees and costs. Kaye v. Burns, 411 F. Supp. 897 (D.C.N.Y. 1976). The cases arising in the District of Columbia Circuit support this view. Cuneo v. Rumsfeld, 553 F. 2d 1360 (D.C.Cir. 1977); Goldstein v. Levi, 415 F. Supp. 303 (D.D.C. 1976).

Plaintiff first requested some of the records obtained in this litigation more than 10 years ago. Yet no response was made to the requests he submitted to FBI Director J. Edgar Hoover in March, 1969.

On April 15, 1975 plaintiff made a new request for records on the assassination of Dr. King. As of November 28, 1975, the date he filed this lawsuit, plaintiff had not obtained a single page of Department of Justice records on Dr. King's assassination as the result of his April 15 request.

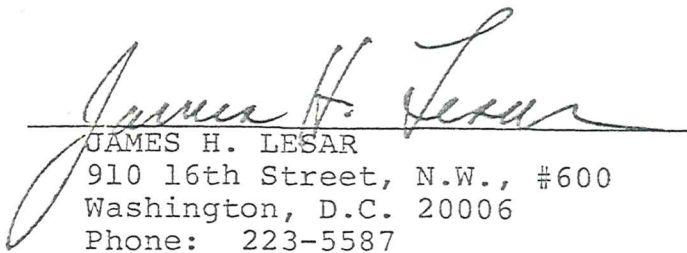
In the nearly four years since this lawsuit was filed, plaintiff has obtained approximately 50,000 pages of records pertaining to Dr. King's assassination. Ultimately, long after this suit was instituted, plaintiff received a waiver of all search fees and copying charges for such records.

The fact that the FBI refused even to respond to plaintiff's 1969 requests and the fact that the Department of Justice failed to provide any records responsive to his April 15, 1975 request until after he filed suit on November 28, 1979, some seven and a half months later, make it quite clear that this litigation was "reasonably necessary" in order to obtain the documents he had requested.

Plaintiff has already obtained more than 50,000 pages of Department of Justice records on the assassination of Dr. Martin Luther King, Jr. These records were obtained after plaintiff filed suit on November 28, 1975. Indeed, all but 71 of these more than 50,000 pages of records were released to plaintiff after the February 11, 1976 status call at which counsel for defendant told the Court that within two weeks he would be filing a motion which would convince plaintiff and the Court that the case was moot. In view of this, it is also clear that the initiation of this lawsuit had a substantial causative effect on the release of these documents.

It being apparent, therefore, that plaintiff has "substantially prevailed" within the meaning of section (a)(4)(E) of the Freedom of Information Act, this Court should award summary judgment in favor of plaintiff on this issue.

Respectfully submitted,



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Washington, D.C. 20006
Phone: 223-5587

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

.....		:
		:
HAROLD WEISBERG,		:
	Plaintiff,	:
		:
v.		:
		:
		:
U.S. DEPARTMENT OF JUSTICE,		:
	Defendant	:
.....		:

Civil Action No. 75-1996

O R D E R

Upon consideration of plaintiff's motion for partial summary judgment on the issue of whether plaintiff has substantially prevailed in this litigation within the meaning of the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), the opposition thereto, and the entire record herein, the Court finds that:

1. It was reasonably necessary for plaintiff to bring this Freedom of Information Act lawsuit in order to obtain the records he had requested;
2. The initiation of this lawsuit had a substantial causative effect on the release of documents sought by plaintiff; and
3. plaintiff has "substantially prevailed" in this litigation within the meaning of the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E).

Accordingly, it is by the Court this _____ day of _____, 1979, hereby

ORDERED, that plaintiff's motion for partial summary judgment on the issue of whether he has substantially prevailed in this litigation be, and the same hereby is, GRANTED.