

*Done*

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ISABEL LETELIER, individually and )  
on behalf of her deceased husband, )  
Orlando Letelier, )  
 )  
Plaintiff, )  
v. )  
 )  
UNITED STATES DEPARTMENT OF )  
JUSTICE, et al., )  
 )  
Defendants. )

Civil Action No. 79-1984

**FILED**  
**OCT 2 - 1980**

JAMES E. DAVEY, Clerk

MEMORANDUM & ORDER

This matter comes before the court on plaintiff's motion for interim attorneys' fees. Under the Freedom of Information Act (FOIA), a court may award attorneys' fees to a complainant who has "substantially prevailed" in a FOIA suit. 5 U.S.C. §552 (a) (4) (E). The question raised by plaintiff's motion is whether a complainant may "substantially prevail" before a suit is concluded, either by court order, or agreement of the parties.

The plaintiff, Isabel Letelier, began requesting documents in the possession of the government on July 13, 1977. She requested documents concerning herself, and her deceased husband, Orlando Letelier. Having had all her requests denied, either expressly or constructively (by failure of the agencies to act), she filed suit on July 30, 1979, against specified agencies of the government. Subsequent to the filing of this complaint, the defendant-agencies began releasing information to plaintiff, and as of the date of this Order, have released large numbers of documents. However, large numbers of documents are still being withheld in their entirety, under claims of FOIA exemptions. As to the withheld material, the parties are still in disagreement concerning the applicability of the exemptions, and the court has yet to resolve these disputes. Therefore, plaintiff has correctly styled her motion one for interim attorneys' fees.

Before the court can determine whether it should, guided by the factors discussed in Cunéo v. Rumsfeld, 553 F.2d 1360, 1365-68 (D.C. Cir. 1977), exercise its discretion to award attorneys' fees, the court must decide if it is appropriate to consider the question of attorneys' fees at this point in the litigation.

Plaintiff correctly asserts that a court order compelling disclosure of requested documents is not a prerequisite to an award of fees. See Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704, 708-10 (D.C. Cir. 1977). However, that statement of the law, as accurate as it is, is inapposite. As the facts in Nationwide, and the cases it discusses, reveal, all that is meant by not requiring a court order before finding that a party has "substantially prevailed," is that the government cannot defeat Congress' purpose of encouraging individuals to enforce the FOIA, by conceding a case before final judgment. The distinction which must be drawn, and which plaintiff has not drawn, is between a suit which is fully resolved, either by settlement or judgment, and a suit which has been partly resolved, but as to which some documents remain in dispute. In the former class of cases, a court may award attorneys' fees. Nationwide, supra at 710. No court has yet held that such fees may be awarded in the latter class of cases. This instant case is in the latter class of cases.

While plaintiff has cited no cases supporting an award of interim attorneys' fees under the FOIA, defendant has cited one unreported opinion, Abramson v. FBI, Civil Action No. 77-2206 (D.D.C. Nov. 30, 1979), in which the court denied plaintiff's motion for interim attorneys' fees, because such motion was premature, even though plaintiff in that case had succeeded in getting the defendants to release many documents, after filing suit.

The policy behind the holding in Nationwide, supra, does not support plaintiff's position. Withholding resolution of the issue of attorneys' fees until the conclusion of litigation, either by agreement of the parties, or court order, will not raise the same roadblocks to private enforcement of the FOIA that would be raised if the government could avoid all fee liability by conceding before a court order is issued.

Furthermore, the court notes that a rule allowing interim attorneys' fees would likely result in duplication of effort, as fees might be requested at successive stages in this case, each time the agency releases some, but less than all, the requested documents. Indeed, such a rule might therefore make agencies less willing to engage in partial settlements or partial releases of requested documents. Also, the resolution of such piecemeal motions would be highly speculative, because the proper evaluation and weighing of the relevant criteria could not be complete until the suit is complete. See Nationwide, supra at 712 (Four factors for award of attorneys' fees are 1. public benefit; 2. commercial benefit to the complainant; 3. nature of complainants interest in the records sought; and 4. reasonableness of the governments asserted legal basis for withholding documents.)

In light of the absence of any clear direction from Congress, the lack of case support for an award of interim fees, and the practical difficulties which a rule allowing such fees would engender, the court feels constrained not "to fashion drastic new rules with respect to the allowance of attorneys' fees." Alaska Pipeline Service Co. v. Wilderness Society, 421 U.S. 265, 269 (1975).

An appropriate Order accompanies this Memorandum.

  
UNITED STATES DISTRICT JUDGE

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ORDER

Upon consideration of the plaintiff Isabel Letelier's motion for interim attorneys' fees, and opposition thereto, it is, by the court, this 2nd day of October, 1980,

ORDERED that the plaintiff's motion is hereby denied, without prejudice to her filing a motion for attorneys' fees at the termination of this litigation.

  
UNITED STATES DISTRICT JUDGE