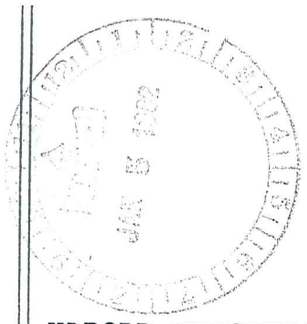

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDERS REGARDING THE "CONSULTANCY FEE" AND "SUBSTANTIALLY PREVAILED" ISSUES

On December 1, 1981, this Court issued an order disposing of numerous issues in this case. In one part of the order the Court required defendant to pay plaintiff a consultancy fee; in another part it ruled that plaintiff has "substantially prevailed" in this litigation within the meaning of 5 U.S.C. § 552(a)(4)(E). On December 11, 1981, defendant filed a motion for reconsideration of these parts of the Court's order.[1/]

With respect to the "substantially prevailed" issue, defendant complains that it has not briefed this issue on the merits. However, it makes no showing that the result would be one whit different were it allowed to do so. There is no even a suggestion that there is any factual or legal basis upon which the Court might properly arrive at a different conclusion.

The legal standard, as defendant notes, is set forth in Vermont Low Income Advocacy Council v. Usery, 546 F.2d 509, 512 (2d Cir. 1976), which held that in order to substantially prevail

---

1/ The certificate of service which accompanies defendant's motion for reconsideration asserts that a copy of the motion was mailed to plaintiff's counsel. That copy never reached plaintiff's counsel. A second copy, sent at the request of plaintiff's counsel, was received on December 28, 1981.

a Freedom of Information Act plaintiff "must show at a minimum that the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect on the delivery of the information." Applying this standard to the facts of this case, there does not appear to be any way in which defendant can in good faith argue that plaintiff has not "substantially prevailed."

It is not necessary to exhaustively comb the record to establish this. The principal facts upon which plaintiff bases his claim to have substantially prevailed are well known to the parties and the Court. They include the following:

1. Plaintiff's requests for information pertaining to the assassination of Dr. Martin Luther King, Jr. date to April, 1969.

2. Prior to the institution of this lawsuit, the FBI had a policy of not responding to plaintiff's requests.

3. Plaintiff received no documents responsive to his April 15 and December 23, 1975 requests until after he filed this lawsuit.

4. After releasing but a few documents, defendant informed the Court at the first status call in this case, held in February, 1976, that the case was moot. This claim was repeated on several subsequent occasions.

5. Some 60,000 pages of documents were released to plaintiff after defendant informed the Court the case was moot.

6. On not less than three occasions defendant has moved for summary judgment, or "partial summary judgment," claiming that it had complied with its obligations under the Freedom of Information Act. Notwithstanding this claim, each such motion has been followed by further voluminous disclosures of materials sought by plaintiff.

7. Defendant initially claimed that it had no crime scene photographs. When this claim was proven false, it then claimed that the crime scene photographs were exempt from disclosure. After losing that argument in this Court, it appealed to the Court of Appeals, where it also lost. On remand, the photographs were finally delivered to plaintiff.

8. Defendant initially failed to provide plaintiff with the Long tickler file. What remained of this file was provided only after plaintiff himself suggested its location to Mr. Quinlan J. Shea, Jr., the Director of the Department of Justice's Office of Information and Privacy Appeals.

9. Defendant initially resisted a search of field office files. In fact, plaintiff and his counsel were told that field office records would merely duplicate what was maintained at FBI Headquarters. When plaintiff persisted and forced the FBI to provide him with field office files, this representation was shown to have been false.

In light of these facts, the case for plaintiff's having "substantially prevailed" in this litigation is overwhelming. To entertain further briefing on this issue in the absence of any proffer by defendant of any viable line of attack, either factual or legal, would simply serve to needlessly drive up the costs of this case and waste everyone's time.

Defendant's challenge to the consultancy fee order is outrageous and reeks with bad faith. Having reneged on a commitment it made to pay plaintiff $75 per hour, defendant now tries to welch on the entire deal by raising issues about whether the Court has jurisdiction to order the payment and "whether a legally binding contract for a 'consultancy' was entered into by the parties." (Defendant's Memorandum of Points and Authorities, p. 2)

That the Department offered to employ plaintiff as a consultant and to pay him for his work cannot be denied. Nor can it be denied that plaintiff performed the work requested of him. Weeks after plaintiff submitted an interim bill for his services at the $75 an hour rate, the Department contrived a dispute over the hourly rate. But not until now did it ever seek to deny the existence of the contract. It is in any event estopped from doing so. Assistant Attorney General William Schaffer stood in open court and offered to pay plaintiff at the rate of $35 an hour, a rate which the Court found unacceptable.

Should the Court decide to grant defendant's motion for reconsideration as to the "consultancy fee" issue, plaintiff requests that rather than proceeding by affidavit as defendant suggests, the Court hold an evidentiary hearing. This will allow plaintiff to cross-examine the government officials on whose testimony defendant wishes to rely. This will be quicker than engaging in a battle of affidavits, produce a clearer and more complete record, and diminish the opportunity for mendacity.

Respectfully submitted,

James H. Lesar

JAMES H. LESAR
1000 Wilson Blvd., Suite 900
Arlington, Virginia 22209
Phone: 276-0404

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of January, 1982, mailed a copy of the foregoing Plaintiff's Opposition to Defendant's Motion for Reconsideration of Orders Regarding the "Consultancy Fee" and "Substantially Prevailed" Issues to Mr. William G. Cole, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.

James H. Lesar

JAMES H. LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

O R D E R

Upon consideration of defendant's motion for reconsideration of parts of the Courts order of December 1, 1981, plaintiff's opposition thereto, and the entire record herein, it is by the Court this _____ day of _____, 1982, hereby

ORDERED, that defendant's motion for reconsideration be, and the same hereby is, DENIED.

_____
UNITED STATES DISTRICT JUDGE