UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION
FOR WAIVER OF ALL SEARCH FEES AND COPYING COSTS

Defendant, by its attorney, the United States Attorney for the District of Columbia, respectfully opposes plaintiff's motion for waiver of all search fees and copying costs for records made available as a result of this action.

In support of this motion, defendant submits herewith a memorandum of points and authorities and a proposed Order.

Respectfully submitted,

EARL J. SILBERT
United States Attorney

ROBERT N. FORD
Assistant United States Attorney

Michael J. Ryan
MICHAEL J. RYAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a copy of the foregoing Defendant's Opposition, Memorandum in Support Thereof, Attachments, and proposed Order upon plaintiff's counsel by mailing a copy thereof to James H. Lesar, Esquire, 910 16th Street, N.W., Suite 600, Washington, D.C. 20006, on this 11th day of January, 1977.

Michael J. Ryan

MICHAEL J. RYAN
Assistant United States Attorney
U.S. District Courthouse
Room 3421
Washington, D.C. 20001
426-7375

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR WAIVER OF ALL SEARCH FEES AND COPYING COSTS

Preliminary Statement

Plaintiff brought this action under the FOIA seeking disclosure of all FBI documents pertaining to the assassination of Dr. Martin Luther King. By the instant motion, plaintiff now seeks an order waiving all search fees and copying costs for records made available as a result of this action. For reasons set forth infra, defendant submits that plaintiff's motion is without merit and should be denied.

On November 4, 1976, plaintiff's attorney wrote to then Deputy Attorney General Harold R. Tyler, Jr., and requested that search and copying charges be waived on the grounds that furnishing the information could be considered as "primarily benefiting the general public." 5 U.S.C. §552(a)(4)(A). (Plt's. Mot., Exh. 1). On May 26, 1977, Mr. Quinlan J. Shea, Jr., Director, Office of Privacy and Information Appeals, Department of Justice, indicated to plaintiff's attorney that his fee waiver request would be finally determined along with plaintiff's pending appeal for access to the records themselves. (Pltf's. Mot., Exh. 2). On July 12, 1977, Mr. Shea informed plaintiff's attorney that the standard copying fee of ten cents ($.10) per page had been partially waived for plaintiff on this material, and that he would be charged only six cents ($.06) per page. Mr. Shea also stated that the FBI's investigation of Dr. King's assassination is a matter of great public

interest and historical importance, and accordingly, Director Kelley had very early decided to place all releasable materials in the public reading room, making them available for public inspection at no cost. Plaintiff had chosen, however, to request personal copies of all these materials, and consequently had incurred copying fees. (Pltf's. Mot., Exh. 3). Significantly, no search fees are involved in this action, inasmuch as defendant initially determined not to charge search fees due to the historical nature of the case. Thus, plaintiff is complaining only about copying fees which have already been partially waived by the Department of Justice, pursuant to the FOIA. Counsel for defendant has been informed that processing of the King assassination materials has been completed, and the total of 44,702 pages has been released to plaintiff on schedule at a cost of $2,708.10 (the copying fee averages slightly higher than 6 cents per page, due to the reproduction of certain photographs and more costly items).

Argument

I. The Standard Of Judicial Review Is Whether The Agency's Action Was "Arbitrary, Capricious, Or An Abuse Of Discretion."

The relevant subsection of the Freedom of Information Act provides:

> Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fees is in the public interest because furnishing the information can be considered as primarily benefiting the general public. [5 U.S.C. §552(a)(4)(A).] [Emphasis added].

Thus, the language of the FOIA leaves the question of waiving search fees to the discretion of the agency. This conclusion is fully supported by the legislative history of the 1974 Amendments. The Conference Report on the 1974 Amendments states:

> In addition, the conference substitute retains the agency's discretionary public-interest waiver authority but eliminates the specific categories of situations where fees should not be charged. By eliminating the list of specific categories, the conferees do not intend that agencies should actually charge fees in both categories. Rather, they felt such matters are properly the subject for individual agency determination in regulations implementing the [FOIA]. [S. Rept. 93-1200, 93rd Cong., 2d Sess. (1974)(Conference Report) at 8]. [Emphasis added].

The Attorney General's memorandum on the 1974 Amendments to the FOIA states that, "there is no doubt that waiver or reduction of fees is discretionary." Id. at 16. Moreover, Judge Robinson in Fitzgibbon v. CIA, C.A. No. 76-700 (D.D.C.), noted that:

> The statute [5 U.S.C. §552(a)(4)(A)] requires the agency to make a determination concerning fee waivers or fee reductions based upon its interpretation of where the public interest lies, and that interpretation is grounded upon the agency's judgment in regard to whether furnishing the information can be considered as primarily benefiting the general public. This is a discretionary decision and any review of that decision must be conducted on a case-by-case basis, and must be confined to the Administrative Record upon which the decision was based. [Memorandum and Order of October 29, 1976 (copy attached), at 4]. [Emphasis added].

Thus, plaintiff cannot reasonably dispute that the decision to waive or reduce copying fees is vested in the discretion of the agency. Once it has been determined that the matter being reviewed is a discretionary decision of the agency, the standard of review (assuming arguendo that the matter is not remitted to agency discretion by law and, hence, not subject to redetermination in any event) follows from well-settled principles. Judicial review of administrative decisions not involving rule making, adjudicatory proceedings, or enforcement proceedings is limited to the standard set forth in 5 U.S.C. §706(2)(A); i.e., whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accord with law. E.g., Camp v. Pitts, 411 U.S. 138 (1972); Overton Park v. Volpe, 401 U.S. 402 (1971). This is the standard of review which has been applied to fee waivers under the FOIA. Fitzgibbon v. CIA, C.A. No. 76-700 (D.D.C. January 10, 1977); Burke v. Department of Justice, C.A. No. 73-336-C3 (D. Kan. September 13, 1976); Fackelman v. Levi, C.A. No. C75-2175A (N.D. Ga. August 30, 1976)(copies attached); Reinoehl v. Hershey, 426 F.2d at 816 (9th Cir. 1970).

Defendant respectfully submits that this is the standard of judicial review which should be applied in the instant case as well.

II. Review Of Defendant's Decision To Partially Waive Copying Fees Is Limited To The Administrative Record.

With his "Motion for Waiver of all Search Fees and Copying Costs," plaintiff has submitted affidavits which were not before the agency at the time of its decision on plaintiff's fee waiver request. In Fitzgibbon v. CIA, supra, Judge Robinson ruled that:

> This [waiver of fees] is a discretionary decision and any review of that decision must be conducted on a case-by-case basis and must be confined to the administrative record upon which the decision was based. [Memorandum and Order (copy attached) at 4] [Emphasis added].

Accordingly, in conducting judicial review of the agency's decision to reduce the copying fees for plaintiff in this case, the Court should review the record as it existed on July 12, 1977, the date of that decision.

III. The Decision Of The Department Of Justice To Partially Waive Copying Fees Was Not "Arbitrary" Or "Capricious."

The primary support for a waiver of copying fees contained in the administrative record is the letter from plaintiff's counsel dated November 4, 1976. The basic factual allegations in that letter supporting the requested waiver are that: (1) plaintiff is writing his second book on the assassination of Dr. King which will deal with questions plaintiff raises regarding the assassination; (2) plaintiff's counsel knows of "no way in which the general public can gain access to these Department of Justice records or any discussion of them except through Mr. Weisberg's book"; and (3) plaintiff intends to leave his files on the assassinations of Dr. King and President Kennedy to a scholarly institution as an historical archive.

In its July 12, 1977 decision to reduce copying charges for plaintiff by forty percent (40%), defendant noted its recognition of the public interest and historical importance attaching to materials concerning Dr. King's assassination. Contrary to the impression conveyed by plaintiff's initial request for a waiver in November 1976, and in the instant motion, that this information on the assassination of Dr. King is provided to the press and public through plaintiff, Mr. Shea's letter of July 1977 makes it clear

that this information has been available for inspection and reading by all at no cost in a public reading room, since the initial processing of the materials. For his own reasons, however, plaintiff chose to request personal copies of all these materials and thereby incurred copying charges. Assessing the public interest in the matter, the large volume of material, and plaintiff's extensive study and long-standing interest in the assassination of Dr. King, defendant determines to reduce the copying charge for plaintiff from ten cents ($.10) to six cents ($.06) per page. 5 U.S.C. §552(a)(4)(A). Clearly, the agency considered the relevant criteria under the FOIA, acted well within its discretion, and its decision cannot be deemed "arbitrary" or "capricious".

In Fitzgibbon v. CIA, supra, Judge Robinson ruled that "[a]n agency's decision not to waive fees is arbitrary and capricious when there is nothing in the agency's refusal of fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefitting the general public." (Memorandum and Order of January 10, 1977)(copy attached). In the July 12, 1977 decision complained of in plaintiff's motion, defendant clearly did consider the benefit to the general public in furnishing the information. On that basis, and based on plaintiff's study and interest in the assassination of Dr. King and defendant's earlier determination to make the materials available to the general public at no cost in a public reading room, defendant exercised its discretion to grant a partial fee waiver and reduced reproduction fees for plaintiff in this case.

Conclusion

Accordingly, since defendant considered relevant criteria in determining plaintiff's request for a fee waiver, and since that determination is not arbitrary and capricious, defendant respectfully requests the Court to deny plaintiff's motion for waiver of all search fees and copying costs.

Respectfully submitted,

EARL J. SILBERT
United States Attorney

ROBERT N. FORD
Assistant United States Attorney

Michael J Ryan

MICHAEL J. RYAN
Assistant United States Attorney

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 waiver of all search fees and copying costs, defendant's opposition thereto, and the entire record herein, it is by the Court this _____ day of _____, 1978,

ORDERED that plaintiff's motion for waiver of all search fees and copying costs be, and the same hereby is, denied.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALAN L. FITZGIBBON,

Plaintiff

v.

CIVIL ACTION 76-700

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff's and Defendants' Cross-Motions for Summary Judgment. At issue is the decision by Defendant agency denying a waiver of the search fees involved in processing Plaintiff's Freedom of Information Act request, in which Plaintiff seeks the Central Intelligence Agency records relating to the abduction in 1956 and murder of Jesus de Galindez by agents of the Trujillo regime.

Although 5 U.S.C. §552(a)(4)(A) gives the agency broad discretion in regard to fee waivers, the agency's determination cannot be arbitrary and capricious. An agency's decision not to waive fees is arbitrary and capricious when there is nothing in the agency's refusal of fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefitting the general public.

Based upon the record developed in this case and upon the language employed by the agency in refusing a waiver of search fees, it is the opinion of this Court that the Defendant may have applied an inappropriate standard in reaching its decision to deny fee waiver, and that at the very least the Defendants' decision is arbitrary and capricious. The implication evident from Defendants' letter rejecting fee waiver is that the agency feels an obligation to the public to collect fees for processing Freedom of Information Act requests.' Any such perceived obligation is irrelevant to the purposes of §552(a)(4)(A).

There has been no showing by the agency here that the Galindez affair was not newsworthy and of public interest at the time it first arose and there has been no showing by the agency that the Galindez affair does not continue to be of interest to the general public, in an historical sense at least. It is the judgment of this Court that furnishing information contained in CIA files regarding the abduction and murder of Jesus de Galindez can be considered as primarily benefitting the general public.

Accordingly, it is this 10th day of January, 1977,

ORDERED, that Defendants' Cross-Motions for Summary Judgment be and it is hereby DENIED; and it is

FURTHER ORDERED, that Plaintiffs' Motion for Summary Judgment be and it is hereby GRANTED and that Defendants shall waive all fees involved in processing Plaintiff's request under the Freedom of Information Act for all records in Defendants' possession relating to the Galindez case.

AUBREY E. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALAN L. FITZGIBBON, :

Plaintiff :

v. : CIVIL ACTION 76-700

CENTRAL INTELLIGENCE AGENCY, et al., :

Defendants :

MEMORANDUM AND ORDER

Plaintiff in the above-entitled action brings suit challenging the refusal of the Central Intelligence Agency to waive the fees involved in searching for certain records which the plaintiff has requested pursuant to the Freedom of Information Act. On December 13, 1974, plaintiff, a journalist and historian, asked the Central Intelligence Agency to supply him with its records relating to the abduction and murder of Jesus de Galindez by agents of the Trujillo regime. Plaintiff received no reply for nearly a year and on December 4, 1975, Plaintiff appealed the Agency's failure to respond. On December 16, 1975, the defendants answered that plaintiff would have to agree to pay an estimates fee of $448.00 before the processing of plaintiff's claim could begin. Plaintiff appealed the requirement of search fee payment and on February 27, 1976, the defendants denied this appeal. On April 22, 1976, plaintiff initiated this lawsuit, alleging

that the acts of the defendants in refusing to waive the imposition of search fees violated 5 U.S.C. §552(a)(4)(A).

There are two matters before the Court at this stage of the litigation. The defendants have filed a Motion to Dismiss and the plaintiff has filed a Motion to Compel Answers to Certain Interrogatories asking about agency search fee practices. For the reasons discussed below, this Court has reached the conclusion that both motions must be denied.

I. MOTION TO DISMISS

In their Motion to Dismiss, the defendants argue that this Court lacks jurisdiction to entertain the plaintiff's action. Defendants' argument is based upon claims that the plaintiff has failed to exhaust his administrative remedies, and that the agency refusal to waive fees is not reviewable under the Freedom of Information Act or the Administrative Procedure Act.

The Court rejects these contentions. The doctrine of exhaustion of administrative remedies requires resort to established procedural devices with the purpose of avoiding premature interruption of the administrative process and of facilitating administrative review. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Sterling Drug Inc. v. Federal Trade Commission, 450 F.2d 698 (D.C. Cir. 1971). The plaintiff here has followed the procedural scheme set out in §552(a)(6) of the Freedom of Information Act. He requested that the agency waive its requirement of search fee payment, was denied that request, and appealed

that denial. That is all that the law requires of him in this situation.

In regard to the defendants' claim that actions concerning fee waiver are nonreviewable, this Court is satisfied that it has subject matter jurisdiction to hear plaintiff's suit. 5 U.S.C. §552(a)(4)(B) provides the district courts with jurisdiction to order the production of any agency records improperly withheld from a complainant. §552(a)(4)(B) review is available for a violation of any portion of the Freedom of Information Act, American Mail Line v. Gulick, 441 F.2d 696 (D.C. Cir. 1969), and this review includes alleged violations of the search fee provisions of §552(a)(4)(A), Diapulse Corporation of America v. Food and Drug Administration of the Department of Health, Education and Welfare, 500 F.2d 75 (2d Cir. 1974).*/

In their Motion to Dismiss, the defendants make a final argument that the plaintiff has failed to state a claim upon which relief can be granted because the defendants' actions here are neither arbitrary or capricious. The question whether the agency has abused its discretion and acted arbitrarily and capriciously in refusing to waive the search fee requirement involves factual issues which cannot be resolved adversely to the plaintiff on a motion to dismiss. Cruz v. Beto, 405 U.S. 319, 322 (1972). At this stage of the proceedings, this Court cannot say that the plaintiff could not prove a set of facts in support of

*/ Jurisdiction might also be based upon 5 U.S.C. §702, which provides judicial review for those persons adversely affected by agency action. See Fellner v. Department of Justice, No. 75-C-430, Slip Op. (W.D. Wisc. April 28, 1976).

his claim which would entitle him to the relief he desires. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Thus, the Motion to Dismiss must be denied.

II. MOTION TO COMPEL DISCOVERY

Plaintiff, in his Motion to Compel Discovery, seeks discousure from the defendants of all letters written to the agency subsequent to February 19, 1975, requesting waiver of the fees involved in processing Freedom of Information Act searches. Plaintiff also seeks disclosure of all agency letters granting or denying such requests. It is the opinion of this Court that the discovery of this information is irrelevant to the issues before the Court in this lawsuit.

The language of 5 U.S.C. §552(a)(4)(A) controls the boundaries of relevancy here. The statute requires the agency to make a determination concerning fee waivers or fee reductions based upon its interpretation of where the public interest lies, and that interpretation is grounded upon the agency's judgment in regard to whether furnishing the information can be considered as primarily benefitting the general public. This is a discretionary decision and any review of that decision must be conducted on a case-by-case basis, and must be confined to the Administrative Record upon which the decision was base. What the agency did in past cases does not matter under §552(a)(4)(A). Thus the Motion to Compel Discovery must also be denied.

Accordingly, it is by the Court this 27th day of October, 1976,

ORDERED, that Defendants' Motion to Dismiss be and it is hereby DENIED; and it is

FURTHER ORDERED, that Plaintiff's Motion to Compel Discovery be and it is hereby DENIED.

Aubrey E. Robinson, Jr.
United States District Judge

DATE: October 29, 1976

9-13-76
DN

FILED

SEP 13 1976

ARTHUR G. JOHNSON, CLK.
By /s/ PATRICIA A. ROBBINS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

ROBERT T. BURKE,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

CIVIL ACTION

No. 75-336-C3

MEMORANDUM AND ORDER

The instant Freedom of Information Act litigation is now before the Court for determination of the defendants' motion to dismiss for lack of subject matter jurisdiction. The defendants argue that the only relief available to the plaintiff under 5 U.S.C. §552(a)(4)(B) is an order directing the production of the records sought; that the defendants have agreed to furnish said records to the plaintiff upon his payment of the costs of reproduction; and that because no further controversy exists between the parties, the Court is ousted of subject matter jurisdiction and is obligated to dismiss the pending action. The plaintiff, on the other hand, claims that the action is not moot and that subject matter jurisdiction is not divested, because the Court has authority to award him the reasonable costs of the instant litigation including attorney's fees and the cost of reproducing the documents sought.

It does appear that the principal controversy here, *i.e.*, whether the defendants must produce the photographic material sought by the plaintiff, has been mooted by the defendants' decision to comply with the plaintiff's request. The Court finds that the defendants' voluntary compliance does not deprive the Court of jurisdiction over the subject matter

of this action or bar further proceedings herein, yet it appears that the sole issue remaining for determination is whether the plaintiff should be entitled to recover the reasonable costs, if any, incurred in the prosecution of this action.

The plaintiff's contention that the Court has jurisdiction to award him the cost of reproducing the materials sought or to order the defendants to "defray" such costs is legally erroneous. Under 5 U.S.C. §552(a)(4)(A), the defendant agencies are entitled to recover the "direct costs" of document search and duplication through the imposition of "reasonable standard charges" upon the person requesting such information. An agency may, in its discretion, waive or reduce that charge if it determines that "furnishing the information can be considered as primarily benefiting the general public." The Freedom of Information Act does not, however, empower a federal court to control the exercise of administrative discretion by directing an agency to waive or reduce the fees authorized by statute in a particular case; nor does it make any allowance for awarding the cost of reproduction to a prevailing plaintiff in an action brought under 5 U.S.C. §552.

Section 552(a)(4)(E) does provide that where a complainant has "substantially prevailed" in a Freedom of Information Act lawsuit, the Court may assess against the United States "reasonable attorney fees and other litigation costs reasonably incurred" by the plaintiff. The plaintiff here was clearly authorized to institute this action by the express language of 5 U.S.C. §552(a)(6)(C), in spite of the fact that the defendants had not completed administrative review of his request for prosecution and inspection of records. The Court finds that the plaintiff has "substantially prevailed" in this action; that he is entitled to an opportunity to persuade the Court that he should be allowed reimbursement for any actual, reasonable costs of litigation under §552(a)(4)(E); and that dismissal of the action at this time would therefore be premature.

IT IS THEREFORE ORDERED that the defendants' motion to dismiss is hereby overruled; that the plaintiff be allowed

15 days from receipt of a copy of this Memorandum and Order in which to submit an itemized accounting of the expenses, if any, with reference to which he claims a right of reimbursement under 5 U.S.C. §552(a)(4)(A); that the file in this case be returned to the undersigned judge at the end of said fifteen-day period for such further action as may be appropriate; and that the Clerk transmit copies of this Memorandum and Order to the plaintiff and to the Office of the United States Attorney for the District of Kansas.

Dated this 10 day of September, 1976, at Kansas City, Kansas.

/S/ EARL E. O'CONNOR

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN T. FACKELMAN,

Plaintiff

vs.

EDWARD H. LEVI, Attorney General, NORMAN CARLSEN, Director, B.P. MASON HOLLEY, Regional Director, B.P., MARVIN HOGAN, Warden, Atlanta Penitentiary

CIVIL ACTION

NO. C75-2157A

ORDER

In its previous order entered in the above-entitled case, the court dismissed this action filed by a federal prisoner, currently incarcerated at Lewisburg Penitentiary, against certain federal officials pursuant to the Freedom of Information Act, (FOIA), 5 U.S.C. § 552 as amended by P.L. 93-502. The action sought to compel the production of certain documents for inspection and copying, and to challenge the deduction of a certain amount from petitioner's commissary account, which amount was charged for the production of certain documents previously supplied to him. Plaintiff now moves to have this judgment set aside, Rule 60(6), Fed.R.Civ.P. In support of this motion, plaintiff states that this court's ruling was made without the benefit of plaintiff's brief and thus without consideration of recent case law which, argues plaintiff, should affect the outcome of the case.[1/]

After reviewing plaintiff's brief, and defendant's brief filed thereto, this court finds no reason to set aside its order of January 27, 1976.

[1/] On November 4, 1975, respondents were given 30 days to show cause why petitioner's relief should not be granted. On December 11, 1975, respondents' response was filed, but was not received by petitioner until January 22, 1976. Petitioner's reply was filed on January 30, 1976, three days after this court had entered its order denying petitioner's claim on the merits and dismissing the action.

Plaintiff contends that he was charged improperly for the records which were in fact supplied pursuant to his request. Plaintiff cites 28 C.F.R. 16.9(a) which provides that in FOIA requests,

> [f]ees ... shall be charged ... unless the official of the [Justice] Department making the initial or appeal decision determines that such charges, or a portion thereof, are not in the public interest because furnishing the information primarily benefits the general public. (emphasis added.)

Obviously, the Justice Department did not find plaintiff's requests to be in the general public interest and therefore fees were imposed. Plaintiff does not attempt to assert that his case is in fact one in which the requests are in the public interest. In any event, this determination must be made by the agency through the exercise of its discretion 5 U.S.C. 552(a) 4(A). Accordingly, the court adheres to its original position that the fees charged the plaintiff for the production of certain documents were proper.

Plaintiff also claims that in upholding the government's decision that certain documents fell within specified exemptions under 5 U.S.C. § 552(b), and thus could be withheld from plaintiff, this court failed to follow the procedure set out in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973) cert. denied 415 U.S. 977 (1974), for making that determination. The court in Vaughn set out a procedure whereby an agency would be required to provide the requesting party and the court an indexing of allegedly exempt documents and a detailed justification for the application of each exemption to the specific documents in dispute. 484 F.2d at 827-28, Accord Pacific Architects & Engineers, Inc. v. Renegotiation Board, 505 F.2d 384 (D.C. Cir. 1974). Claiming that this procedure should be followed in the instant case, plaintiff has also moved the court to require such an indexing and detailed justification from the government. However, rather than laying down a per se rule to be followed in every FOIA case, the court in Vaughn "suggested a technique to assist the

court when needed." Exxon Co. v. F.T.C., 384 F. Supp. 755, 761 (D.D.C. 1974). In Vaughn and other cases cited by plaintiff which approve of the procedure set out in Vaughn, see, e.g., Cones v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973); Pacific Architects & Engineers, Inc. v. Renegotiation Board, supra, the courts were concerned with situations where agency response to a broad demand for information has "consisted of blanket claims of exemption, followed by the tender of a bulk of material for in camera inspection ... which imposes an unwarranted burden on the court." Seafarers International Union AFL-CIO v. Baldovin, 508 F.2d 125, 129 (5th Cir. 1975). It is within the court's discretion to require the agency to follow procedures, such as those outlined in Vaughn to alleviate this burden. Id.; Exxon Co. v. F.T.C. supra at 761.

In the instant case the court has already conducted an in camera inspection of forty-seven documents which are part of plaintiff's records but which have been withheld. Unlike the documents before the Vaughn court, which were hundreds of pages in length, the individual documents in the instant case are very brief. The court found that the government's list provided to plaintiff and which was submitted to the court, setting out the individual items requested and the sections of the FOIA which exempted their disclosure, was sufficient to facilitate this court's review of the documents. It should also be noted that the list in this particular case was also adequate to alleviate to a significant extent certain problems discussed in Vaughn concerning the difficulty FOIA plaintiff's have in pursuing their case when operating in an information vaccuum. Often plaintiffs are without a clue as to the contents of the requested information, or the specific section of a specified exemption under which the requested document falls. See Vaughn v. Rosen, supra at 824-826. In the instant case, the government provided explantations of each relevant exemption which were more

specific than the exemptions underlying it in the instant. In instances where more than one provision existed which prevented disclosure, all were given. The fact that entire documents were withheld was an indication that there were no portions of the documents which fell outside the coverage of the specified exemptions. Furthermore, the nature of the documents involved in this case require that further disclosure as to their contents not be given despite any disadvantage which plaintiff might encounter as a result therefrom. The documents are so brief that to describe them would contravene the interests that the exemptions were designed to protect.

This court has previously found after in camera inspection that the documents are within the exemptions as set out by the government, and now decides that the procedure followed by the government in withholding the documents and providing the plaintiff and court with the reasons therefore was adequate. Accordingly, plaintiff's motion to set aside the judgment and his motion to require a detailed justification, itemization, and indexing are hereby DENIED.

So ORDERED, this 27th day of July, 1976.

NEWELL EDENFIELD
United States District Judge