IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

MICHAEL LEE FELLNER,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

OPINION AND ORDER

75-C-430

Plaintiff has renewed an earlier motion for an order requiring defendants to waive the costs of processing and duplicating documents, the furnishing of which to plaintiff by defendant has been ordered by this court on December 17, 1975. Defendant opposes this motion. Defendant has moved to be relieved from furnishing any further documents as required by the December 17, 1975 order until plaintiff pays to defendant the unpaid balance of the search and copy fees generated to date, and defendant has moved for an order requiring plaintiff to remit any appropriate future copy fees within 10 days of his receipt of further documents.

This opinion and order are directed to these competing motions.

For the purpose of deciding these motions, I find as fact those matters set forth below under the heading "Facts."

FACTS

Plaintiff is a journalist who intends to publish and disseminate the information which he has obtained and may yet obtain from the defendant pursuant to his request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. His purpose in doing so is "to enlighten the public as to possible abuses of power by agencies of the federal government." The records requested are those compiled by the Federal Bureau of Investigation (FBI): regarding the political activities, political involvements, political affiliations, and other activities of certain individuals who reside in the Madison, Wisconsin, area, or have resided there, or who may have engaged in activity there; regarding certain organizations which may have engaged in activity in the Madison area; regarding political activity that may have occurred in certain buildings in the Madison area; and regarding certain events that may have occurred in the Madison area.

There has been considerable national news coverage and national public interest in the existence and extent of possible political surveillance by the FBI in various parts of the country. There has been considerable news coverage and public interest in the Madison area in possible FBI political surveillance both locally and nationally, in this plaintiff's request for information from the defendant, and in this present law suit by this plaintiff to compel disclosure of the information requested.

In his attorney's initial March 25, 1975, letter of request for the information under the FOIA, plaintiff requested waiver of fees pursuant to § 552(a)(4)(A), stating only that the purpose of his request for the information was "to evaluate potential local violation of civil liberties by federal investigatory agencies." The waiver of fees was denied by defendant.

On about December 18, 1975, plaintiff submitted a renewed request to the defendant for waiver of the fees, this time providing the defendant with affidavits and a brief containing the matters which I have found as fact in the three preceding paragraphs of this opinion. On December 26, 1975, defendant denied the renewed request for waiver of fees, with the following explanation by the Deputy Attorney General:

> The Department of Justice receives numerous requests for information -- accompanied by requests for waivers of fees -- from media personnel and others who assert that their work will benefit the general public. If every such request were to be granted simply because the information sought is of interest to some small portion of the American public and/or could be used by, for example, media personnel "in the Madison community," the resultant expenditure of public funds would be great. Although I personally waived a large search fee in the Meeropol [Rosenberg] case, that case involved sustained, national public interest and possibly unique historical significance. There is absolutely no parallel between Mr. Fellner's request involving an "important local news story" and the Rosenberg case, because your client's request simply does not involve any significant benefit to the general public. Accordingly, I have concluded, as did Director Kelley, that the interests of the general public appear

> more likely to be served by the preservation of public funds. I am enclosing a copy of my statement at the time of the Meeropol search fee waiver which will, I trust, put the present situation into proper perspective.1/

The statement referred to by the Deputy Attorney General concerning the Meeropol search fee waiver on December 1, 1975 was to the effect that the search fees in that case amounted to $20,458; that the magnitude of the sum demonstrated that the defendant must review all such fee waiver requests with great care; that the defendant "cannot grant waivers unless an overriding public interest is convincingly established;" that the Rosenberg case (the subject of the Meeropol waiver request) was "close to being unique in terms of both current public interest and historical significance;" that requiring payment of the search fees could delay or even prevent the release of some or all of the records concerning which no compelling reason for withholding exists; that such delay or prevention of release would frustrate defendant's decision to release as much information as possible concerning the Rosenberg case; and that the waiver of the search fees was in the

1/ The words "in the Madison community" and "an important local news story" appear within quotation marks in the Deputy Attorney General's letter refusing the waiver, without explanation of the source of the quotes. The phrase "in the Madison community" appears in several of the affidavits submitted by the plaintiff in support of his waiver request in this context: "...the ultimate release to the public of documents...will be of general public benefit in informing the public as to the existence or nonexistence of the controversial activities by a federal government agency in the Madison community." If this is the source of the Deputy Attorney General's quotation, the significance of the words is not as it appears in his statement. I have been unable to locate the source of the quoted phrase "an important local news story." I appreciate, however, that the record in this court may not include everything submitted to the defendant by the plaintiff in support of the request for a waiver. In any event, while news of plaintiff's FOIA request to the defendant and news of the present lawsuit are probably fairly characterized as "a local story," it is much less clear whether news of the content of the documents disclosed and to be disclosed would be a local story only.

public interest in that particular case because the release of the records would "benefit the general public far more than it will any individual requester." (The waiver in Meeropol reached only the search, not the copying, fees.)

The unpaid balance of the search and copy fees generated to date is $422. The fees yet to be generated will be copy fees at the rate of 10 cents per page released. It has been estimated by defendant that there were 15,600 pages to be reviewed for release or non-release. If the court's order of December 17, 1975 has been complied with, about 3,600 pages remain to be reviewed. If the 3,600 pages were to be released in their entirety, the additional copy fee would be $360.

Furnishing copies of the pages and portions of pages to be released is the course of action which defendant prefers, as contrasted with permitting plaintiff to inspect the original records themselves. However, defendant has not been requested to permit inspection of the originals by the plaintiff (as compared with furnishing copies), and thus has not been called upon either to grant or deny such a request.

OPINION

The FOIA (§552(a)(4)(A)) provides that in order to carry out its provisions, each agency shall specify a

schedule of fees "limited to reasonable standard charges for document search and duplication and [providing] for recovery of only the direct costs of such search and duplication." Thus, Congress has imposed upon users of the service a portion of that expense attributable to their use, but strictly limited to direct costs of search and duplication. This reflects both a desire that taxpayers generally not be saddled with the entire costs of services benefitting only or primarily specific persons, and a desire that access to public information not be impeded by excessive expense to those seeking access. The latter purpose is accentuated by the further sentence of the subsection, which contains the language presently at issue: "Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public."

Defendant's decision not to waive or reduce the fee in the present case is subject to judicial review. 5 U.S.C. § 702; Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 156 (1970); Barlow v. Collins, 397 U.S. 159, 166 (1970). See Paramount Farms, Inc. v. Morton, 527 F.2d 1301, 1303 (7th Cir. 1975). However, a large measure of discretion clearly has been vested in the defendant, and it appears that its

exercise of this discretion may be overturned only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...." 5 U.S.C. § 706.

Were it not for some of the specific language employed by the Deputy Attorney General in denying a waiver to the plaintiff, I would be strongly disposed to refrain from any interference with the exercise of defendant's discretion in this case. More to the point, if the administrative decision to waive or not to waive the fees properly depends upon comparing a case like the Rosenberg case with the present case in terms of the scope and intensity of public interest in the release of information, there would be no basis for disturbing it.

However, in his letter to the present plaintiff and in his statement in connection with the waiver of fees in the Meeropol request (apparently intended by him to be incorporated by reference in his denial of this plaintiff's request), the Deputy Attorney General appears to have adopted one or more of the following standards in passing upon requests for waivers: whether the information sought is of interest to a large or small portion of the American public; whether the information sought relates to a subject of sustained, national public interest and possibly unique historical significance; whether a particular release of records will benefit the general public far more than it will any individual requester; and whether "an overriding

public interest is convincingly established." The Deputy Attorney General's statements do not make clear which of these varying standards has actually been applied in the present case, but the standard expressed most emphatically in his Meeropol statement is this: "...the Department... cannot grant waivers unless an overriding public interest is convincingly established."

This latter standard clearly does not conform to the statutory language: whether "...furnishing the information can be considered as primarily benefitting the general public." I think it appropriate that the Deputy Attorney General be provided the opportunity to review his decision in this case and, if he elects to do so, to make more explicit the standard by which the defendant proposes to exercise its discretion with respect to waivers or reductions of fees.

I am persuaded in this direction, too, by Department of the Air Force v. Rose (United States Supreme Court, No. 74-489, April 21, 1976), 44 Law Week 4503. Rose dealt with the exemptions from disclosure under FOIA, rather than with waiver or reduction of fees. However, those requesting the documents in Rose were editors or former editors of a publication (New York University Law Review) and their purpose was to explore certain systems and procedures within an executive department (disciplinary systems and procedures at the military service academies). The Court remarked

upon "the public's stake in the operation of the [Honor and Ethics] Codes [administered and enforced at the Air Force Academy] as they affect the training of future Air Force officers and their military careers...." and described these matters as "subject to such a genuine and significant public interest." 44 Law Week, at 4508. The present case also involves an intention to publish the information to be provided, and the public interest in the existence or non-existence of political surveillance by the FBI, and in the nature and scope of such surveillance if it exists, seems as genuine and significant as the public interest in the honor and ethics codes in the military service academies. I do not conclude, of course, that any information which is non-exempt must be furnished without requiring payment of search and copying fees. I consider Rose significant here only as it may bear on the meaning of the statutory language "primarily benefitting the general public."

With respect to plaintiff's motion for an order requiring defendant to waive the search and copying fees, I will refrain from entering a decision until June 1, 1976, or later, in order to provide the defendant the opportunity to reconsider the matter and, if it elects to do so, to clarify and amplify the basis upon which waiver is refused.

With respect to defendant's motion for relief from the December 17, 1975 order, it appears that although on

June 20, 1975, defendant initially denied plaintiff's request for a waiver of fees, it has not insisted until very recently upon prepayment. Also, it has made no showing whether the copying fees yet to be generated will be substantial. It does not appear that interruption of the disclosure schedule pending a resolution of the waiver of fees question is appropriate.

ORDER

It is ordered that defendant's motion filed April 19, 1976 for relief from the order of this court entered December 17, 1975 is DENIED.

It is further ordered that a ruling is reserved on plaintiff's motion filed April 21, 1976 for an order requiring defendant to waive fees for search and copying.

Entered this 28th day of April, 1976.

BY THE COURT:

James E. Doyle

JAMES E. DOYLE
District Judge