

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALAN L. FITZGIBBON, :
 :
 Plaintiff :
 :
 v. : CIVIL ACTION 76-700
 :
 CENTRAL INTELLIGENCE :
 AGENCY, et al., :
 Defendants :
 _____ :

FILED
OCT 29 1976

MEMORANDUM AND ORDER

JAMES F. DAVEY, CLERK

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 disclosure 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 based. 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