September 6, 1980

Dear Jim:

Re: Civil Action 75-1996, Fees and the Pertinence of the Appeals Court Copeland III Decision No. 77-1351

I have read the majority opinion and MacKinnon's concurring while walking up and down in the lane and I have marked passages to which I want to draw your attentinn, not because I don't think you will note them but in part to give you a more rapid means of retrieving them for future use and in part to suggest meanings and uses that may not in all cases have occurred to you.

Based on this I think you should do three things as soon as possible. One, put in a separate bill for your time on copyright. As you will go through what I will call to your attention, you will find several references to the fact that payment should not be delayed.

Two, put in an immediate motion for payment of my consultancy fee, and I think you should ask also for interest and an allowance for inflation. Again you will find, and I hope I will call specially to your attention, several pertinent quotations. In addition, the fact that I am now about to undergo surgery and for sometime will be reduced in what I can do gives me a greater need for this. The majority says specifically that payment ought not be delayed

Three, I think you should do this in the context of this decision and as a notification to the Attorney General and the Court and Department counsel of the fact that it is they who are running up the costs. I think that at some point above Civil Division an effort must be made to call this to the attention of higher authority in the Department and perhaps the best means is for you to write in addition a letter which you hand-deliver to the office of the Attorney General and state in the letter that you are hand-delivering it because prior

experience indicates that those in higher authority rarely know what is going on. and you are making that effort to fully inform the Attorney General.

The majority opinion seems to be more than reasonable. It seems also to have even greater applicability in FOIA cases.

In FOIA cases, in addition, the entire general public is the beneficiary of the litigation.

On page 13, "A reasonable fee can only be fixed by the exercise of judgment, using the mechanical computations simply as a starting point to reach a higher or lower figure. The Court must perform this function." I cite this in part because of its pertinence to quotations that will follow and in this I mean in the sense of reaching a higher figure, not a lower one, and opposing the reaching of a lower one.

Page 13, "...but no charge has been made for what was undoubtedly a substantial amount of time spent by paralegals who play such a useful role in large documentary cases."

I think this is a close enough parallel to my role in this litigation in which I did spend more than a substantial amount of time, an extraordinary amount of time because of the need to produce all the extensive documentation. I think this provides a bsis for making a separate claim for a reasonable extimate of the time I had to spend in this case.

Here again, especially with the passing of time, more than five years, and the uses made by others in the public interest of the material I forced into the public domain I think provides a special basis for it. This information includes the House committee, newspapers and other writers.

Page 15, there is quotation by number of the standards in the Johnson case. I call to your attention "(4) the preclusion of other employment;" I think this is particularly true in your case and is something you should emphasize.

At the same point, "(7) time limitations imposed by the client or the circumstances;" Here time limitations are imposed by the government and the

circumstances it contrived. I think there will be later pertinent quotations but remember that Green described that what they did as Pobstructionist" in more than one case. The Beckwith affidavit is one that I recall readily. She repeatedly told them they would get no place by filing obstructionist and delaying motions. She accused them of stonewalling, she said their affidavits were worthless (you can find quotations in the summary I gave you of the transcripts).

At the top of 16, there is another factor to be weighed in determinging the fee: "(10) the undesirability of the case;" I think you might want to make a strong argument here that the government has made all FOIA cases undesirable by the vigor with which it resists them, even when resistance has no legitimate basis, and by the experiences you have had where, without exception, they string all of them out unreasonably and unnecessarily and are able to do this only because they are the government.

Page 24, first line, "In any event, payment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime, which use, particularly in an inflationary era, is valuable."

This applies to both you and me and is one of the portions of the decision I suggest above that you have in mind in asking for immediate payment for me now together with adjustments for interest and inflation.

I see nothing to be lost by including these factors and much to be gained whether or not we prevail on that basis.

Page 25, bottom: "Until now the calculations have entirely ignored the results of the litigation. ... should be considered now, under the rubric of 'quality of representation.'

"Where exceptional results are obtained - taking into account the hourly rate commanded and number of hours expended - an increase in fee is justifiable..."

The results of this litigation are incalculable in national importance. Not only did it result in the making available of information the government had

refused to make available for a decade, and remember my requests go back to 1969 and the judge held they apply in this litigation, it also resulted in identification of new and very important records the mere existence of which had been withheld by the government. Particularly I have in mind such things as:

1. Ticklers. The FBI and the Department consistently denied that they have ticklers. The Government has denied that the FBI has records outside of its central files. Here we have established that they do make and keep ticklers, that these ticklers contain what will not be found in a search of the main file in central files, that they contain significant notqtions that are not found in the records in central files. In addition, the ticklers have great anthological value that is increased by the magnitude of the case and the records in the case.

2. Abstracts. Nobody, neither the FBI agents involved in the case nor Department counsel, even knew of the existence of abstracts until we established it on deposition. The abstracts are of unquestionable historical value, not only in this case but as a result of this litigation it is now known that the FBI has abstracts on every major headquarters file.

3. Inventories of field office records indicating the nature and extent of the incredible FBI operations against Dr. King. After a number of Congressional investigations did not bring this to light, like the Church or Senate intelligence committee and the House assassinations committee neither one of which learned of or used these inventories, we forced their production which required three years and in this, although they are clearly incomplete, only partly established in court but to a greater extent than was pertinent in court, these are of more than 400 pages. It is of great public interest to know the amount of time, money and effort that should have been devoted to the detection and prevention of crime that was wasted in this personal vendetta against a great American.

It can be alleged that one of the results of this litigation was to make

the work of the Congress easier.

Where the quotations refers to "exceptional results," the foregoing are among the exceptional results. But bear in mind also that we have established that the FBI's pretense in this and in other cases, that all its records of any significance are at FBI Headquarters, is factually incorrect. We found highly significant records that did not reach headquarters and are in the field offices and can be provided from the field offices. Although the government claimed at the outset that it was entitled to summary judgment and it had fewer than a hundred pages of pertinent records, it now brags of having provided in excess of 50,000 pages. The providing of 50,000 pages of records of great public and historical interest and making them part of the public domain I believe are "exceptional results."

Pertinent to this is a line from the first paragraph on page 26, referring to "an upward adjustment for quality is appropriate" where "the attorney performed exceptionally well, or obtained an exceptional result for the client." As partly noted above, the results are exceptional and do justify an upward adjustment.

On pge 28 is a quotation from the prior decision in Parker v. Califano. I quote from that quotation which, although it refers to federal employee complainants as "not merely private attorneys general; they are the only attorneys general under the enforcement scheme" of the act under which the litigation was brought. This is even more true of those of us who are not ~~private~~ government employees and who bring Freedom of Information cases in which all of the country is the beneficiary. In this case we surely are the only private attorneys general and the only attorneys general.

Later in the same quotation the court refers to the fact that "unlike private sector employees, federal employees must first bring their employment discrimination grievances, not to an independent state or local administrative body or to EEOC, but to the very agency about whose practices they are complaining."

This is no less true of an FOI litigant who first be[illegible] as we did by making the request of the Department of justice whose practices we inquire into under FOIA, but that also is the agency that defends FOI cases so our handicap is even greater than that of government employees. It certainly is no less.

Having to do with the fee and the size of the fee, on page 38, end of first full paragraph, "We do not think that Title VII intended that defendants should have an indentive to litigate imprudently simply because of the fortuity of the identity of plaintiff's counsel."

The first part of this quotation is particularly pertinent in FOIA cases where Congress stated pretty explicitly that it did not want imprudent litigation. It also is pertinent in FOI cases because, particularly in light of a quote that will follow, there is no pecuniary award and it thus becomes much more difficult for an FOI requester to obtain counsel. This means also that FOIA counsel runs a much greater risk.

On the amount of time required of the plaintiff, on page 47, from a quotation from the District Court, "The litigation went forward in a relatively civilized manner but it was hard fought. The Government offered firm, persistent resistance throughout the litigation and concessions developed only as it became apparent there was little prospect of Government success. Indeed, the Government moved to dismiss at the outset, and it opposed discovery..."

All of this is pertinent in our case and more of the same nature having to do with the character of the opppsition, described by the Court as obstructionist, stonewalling and, in the case of affidavits, worthless. As noted above, the Court also indicated that some of the motions the government said it would offer were pointless if not frivolous. In short, the government did everything within its power to prolong and thus make this case much more costly.

A further pertinent quotation is from the second paragraph on page 49, the end: "The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." I believe this

also is pertinent to some of the efforts we made in which we did not prevail. It was the tenacity of the government's opposition that required this of us and, as it became clear and as the court itself made clear, the only reason the government prevailed on some of these things was because the court had grown weary after five years.

Page 52, footnote 61, two quotations: "Another factor to be considered under the genral rubric of 'contingency' adjustments is that delay in the receipt of fees may warrant an increase in them." I refer to this above and I also note that it applies to both of us. The second quote, "...the fee in this case will not be obtained until years after the legal services were rendered." The footnote then says, "these are circumstances in which an adjustment might have been appropriate," although the District Court did not make an adjustment and none had been requested.

There is reference to the other than monetary benefits on page 53, second full paragraph, that is also pertinent in FOIA cases: "the court found that the nonmonetary relief achieved in this case ... was important, and 'will be felt for many years to come.'" Early in this case the Court found the records to be important. In fact, not until after this case was filed, after six years of ignoring my initial requests and most of a year of stonewalling my refiled requests, only after the case was in litigation did the Attorney General make an historical case determination.

Page 54, footnote 66, in referring to the value of litigation, "acted as a catalyst which prompted the (employer) to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII." I beliege this applies equally to us and to you as counsel. We acted as a catalyst in prompting the government to make the historical case determination and we compelled the production of records that were not even produced to the Congress.

On page 55, another of the values of this litigation is illustrated by

the quotation in that case in the end of footnote 66. It refers to "a situation which heretofore has been unperceived," the language quoted from the government at the District Court level. The footnote continues, saying, "The record in this case clearly (again quoting from the same source) 'demonstrates that the (government) changed its policies with great reluctance and only under the pressure of the lawsuit ... The (settlement(was the product of the litigation and plaintiff is entitled to use it to justify an award (of fees).'"

I think that all of this is quite pertinent in this case. We did compel the government to change its policies ranging from t he withholding of all of the records to practices in processing records and to produce records the existence of which it had already denied.

On page 56 is the quotation I referred to earlier about FOIA counsel. Line 3: "It is relatively easy to obtain competent counsel when the litigation is likely to produce a substantial monetary award. It is more difficult to attract counsel where the relief sought is primarily nonmonetary. For this reason, fee awards in cases that produce substantial nonmonetary benefits must not be reduced simply because the litigation produced little cash."

Of course, another reason for not reducing and for increasing fees in the context of this quotation is the value of the nonmonetary FOI litigation in serving the purposes of the Congress and making information available to the people, especially where the information otherwise would not be made available.

In the MacKinnon paragraph I call your attention to his reference to the keeping of records and the value of the approach "where all lawyers do not keep detailed records of overhead costs and other relevant expenditures."