IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 77-1831
	)	78-1731
GENERAL SERVICES ADMINISTRATION,	)	
	)	
Defendant-Appellee.	)	
	)	

MOTION FOR RECONSIDERATION OF AWARD OF COSTS

By order dated April 12, 1979, this Court taxed $492.54 in costs against the United States. The Court did not explain its action. For the reasons stated below, the United States respectfully submits that the taxing of costs was inappropriate and requests this Court to reconsider its order.

1. The United States can only be sued on the terms expressed in a statutory waiver of sovereign immunity. See, e.g. United States v. Testan, 424 U.S. 392 (1976). Thus, Rule 39 F.R.A.P., explicitly recognizes that costs cannot be awarded against the United States in the absence of express statutory authorization:

> In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

2. The Freedom of Information Act does contain a limited waiver of sovereign immunity with regard to litigation costs

and attorneys' fees:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed. 5 U.S.C. §552(a)(4)(E).

However, the express terms of the statute limit the waiver to FOIA plaintiffs who have "substantially prevailed" on the merits of their lawsuits. In the instant case, the plaintiff lost the only legal issue which was presented for decision. Order dated March 15, 1979.

3. The government did release two of the disputed documents during the pendency of this appeal. While this Court has held that an actual ruling in favor of the plaintiff is not a prerequisite for an award under 5 U.S.C. §552(a)(4)(E), it has insisted upon proof that the suit "had a substantial causative effect on the delivery of the information." Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704, 714, 182 U.S. App. D.C. 3, 93 (1977), citing Vermont Low Income Advisory Council v. Usery, 546 F.2d 509, 513 (2nd Cir. 1975) (Friendly, J.) In the instant case, the United States has consistently maintained that it released the documents as a result of disclosures made in connection with a Congressional inquiry and not as a result of the plaintiff's lawsuit. The plaintiff has presented no evidence to the contrary. Thus, there is no foundation in the record for an award of costs based upon the release of the two documents. At most, there is a factual question as to whether

there was a causal relationship between the disclosures and the lawsuit, a question which can only be resolved against the United States upon a proper evidentiary showing in the District Court.

4. Even where a proper showing of causation has been made, an award of costs is not necessarily appropriate. Both the legislative history and the prior judicial construction of 5 U.S.C. §552(a)(4)(E) establish that an award of attorneys' fees or costs must be predicated upon a "multifarious analysis" of numerous equitable factors, such as the public benefit deriving from the suit, the commercial benefit to the plaintiff, the nature of the plaintiff's interest in the records sought, and the government's legal basis for withholding the documents in question. See, e.g. Joint Explanatory Statement of the Committee of Conference, H.R. Rep. 93-1380, 93d Cong., 2d Sess. (1974), reprinted in Freedom of Information Act and Amendments of 1974 (94th Cong., 1st Sess., March, 1975) at 226-27; Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704, 182 U.S. App. D.C. 83 (1977); Cuneo v. Rumsfeld, 553 F.2d 1360, 180 U.S. App. D.C. 184 (1977). This Court has often stressed the discretionary nature of these factors and has frequently stated that such discretion "is more properly exercised by the trial court which has had a continuing relationship with the parties throughout the suit." Nationwide, 559 F.2d at 706, 182 U.S. App. D.C. at 85 (1977). Accord Cuneo, 553 F.2d at 1368, 180 U.S. App. D.C. at 192 (1977).

5. The award of costs is not only inappropriate in light of this Court's prior constructions of 5 U.S.C. §552(a)(4)(E), it could seriously prejudice the United States in subsequent legal proceedings and spawn an otherwise unnecessary appeal. Because the same statutory provision authorizes both attorney's fees and costs, the plaintiff may very well request an award of attorney's fees in District Court and may very well cite this Court's ruling on costs as precedent. The United States would, of course, oppose any such request and would urge the District Court to conduct the sort of multi-faceted inquiry comtemplated in Nationwide and Cuneo without regard to the allowance of costs. Should the District Court decline to make the proper analysis and treat the unexplained decision on costs as controlling, this Court may very well be burdened with an additional appeal in order to clarify the situation.

For the foregoing reasons, the United States submits that the award of costs was inappropriate and should be reconsidered. Costs should only be taxed against the United States if the plaintiff can make a proper showing of entitlement in District Court.

Respectfully submitted,

LEONARD SCHAITMAN (202) 633-3321

LINDA M. COLE (202) 633-3525
Attorneys, Appellate Staff
Civil Division
Department of Justice
Washington, D. C. 20530

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 1979, I served the foregoing Motion For Reconsideration Of Award Of Costs upon counsel for the Plaintiff-Appellant by causing a copy to be mailed, postage prepaid, to:

James H. Lesar, Esquire
910 16th Street, N. W.
Suite 600
Washington, D. C. 20006

Linda M. Cole
LINDA M. COLE
Attorney