

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

Civil Action No. 77-2155

GRIFFIN BELL, ET AL.,

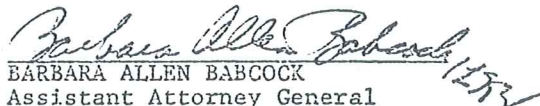
Defendants.

DEFENDANTS' SUPPLEMENTAL MOTION TO DISMISS OR
IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT

Defendants, pursuant to Rules 12(b)(1) and 56 of the Federal Rules of Civil Procedure, hereby move this Court to dismiss one additional putative claim in the above-captioned action or, alternatively, to grant partial summary judgment for defendants with respect to such claim.

In support of this motion, the Court is respectfully referred to defendants' Memorandum Of Points And Authorities In Support Of Motion To Dismiss, Exhibits A and B attached thereto, and the brief memorandum of points and authorities filed herewith.


Respectfully submitted,


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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

Civil Action No. 77-2155

GRIFFIN BELL, ET AL.,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' SUPPLEMENTAL MOTION TO
DISMISS OR IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT

Preliminary Statement

Plaintiff seeks through this lawsuit certain relief pertaining to materials which are to be released to the public by the FBI on Wednesday, January 18, 1978. On January 12, defendants moved to dismiss this action and also opposed plaintiff's motion for a preliminary injunction by a separate memorandum. One day later, on January 13, plaintiff filed and served upon defendants a "Notice Of Amendments To Complaint"^{1/} which, inter alia, makes reference to the initial and final determinations which have now been rendered upon plaintiff's request for waiver of all fees in connection with the materials to be released.^{2/}

Defendants' Motion To Dismiss addressed itself to those aspects of plaintiff's Complaint which were ripe for the Court's consideration as of the time at which the Complaint was filed. Accordingly, defendants moved to dismiss plaintiff's claim for a determination of his fee waiver request

1/ It appears that contrary to the express provisions of Rule 15(a), plaintiff has not sought leave of the Court (nor has he obtained defendants' written permission) in his endeavor to amend his Complaint. In the interests of conducting this litigation on an expedited basis and for the Court's convenience, however, defendants will herein treat plaintiff's Complaint as amended.

2/ See Notice Of Amendments To Complaint at ¶¶25-26; see also Exhibits A and B to defendants' Motion To Dismiss. Plaintiff has been awarded a partial fee waiver in the amount of forty percent.

on the grounds of mootness pursuant to Rule 12(b)(1), and moved to dismiss plaintiff's remaining "withholding of documents" claim pursuant to Rule 12(b)(6). Inasmuch as these are the only two claims raised in plaintiff's motion for a preliminary injunction,^{3/} they were similarly addressed in defendants' opposition thereto.

It does appear, however, that plaintiff attempted in his Complaint to state an additional claim for relief in connection with his fee waiver request, one which in effect requested judicial review of a discretionary determination not yet then rendered. Paragraph 4 of plaintiff's prayer for relief reads as follows:

4. That the Court declare that plaintiff is entitled to a waiver of search fees and copying costs as requested by his November 19, 1977 letter to the Deputy Attorney General, and that any denial of said request is arbitrary and capricious;

It would appear that this claim for relief, although in no sense ripe as of the time this action commenced, may now arguably be part of this case in light of the recent administrative determinations of plaintiff's fee waiver request and, more to the point, plaintiff's attempt to amend his Complaint.^{4/}

Accordingly, for the convenience of the Court and so that the record may be complete as regards all potential aspects of this case (even those which are not involved in plaintiff's motion for a preliminary injunction),^{5/} defendants herein address plaintiff's putative claim for judicial review of defendants' decision to award plaintiff a partial fee waiver in the amount of forty percent. Defendants respectfully suggest that such claim should be dismissed for lack of subject

^{3/} See plaintiff's Motion For Preliminary Injunction and accompanying proposed order.

^{4/} See note 1 supra. It should be noted that plaintiff has not sought by amendment to add any additional prayer for relief in this action.

^{5/} See note 3 supra and accompanying text.

matter jurisdiction or, alternatively, should be decided in defendants' favor on partial summary judgment.

I. Plaintiff's Claim For Judicial Review Of Defendants' Fee Waiver Determination Should Be Dismissed For Lack Of Subject Matter Jurisdiction

The Freedom of Information Act ("FOIA"), 5 U.S.C. §552

(a)(4)(A) provides, in pertinent part, as follows:

Documents shall be furnished without 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 benefiting the general public. (emphasis added).

Thus, Congress has expressly authorized the waiver of FOIA fees where such a step would be "primarily" in the public interest, and it has committed such a determination to the discretion of the administrative agency involved. As is indicated by the legislative history on this subsection, this statutory waiver provision was amended in Conference Committee to delete the original enumeration of specific categories where fees could not be charged^{6/} and to, in the words of the conferees, "retain the agency's discretionary public-interest waiver authority."^{7/} Hence, it seems apparent that Congress relegated all determinations concerning whether or not FOIA fees should be waived (and, as well, concerning the exact amount of any waiver granted) to the sole discretion of the agency involved as a matter of the agency's particular expertise.

In view of this, and in view of the countless determinations made daily by federal agencies under this special administrative subsection of the Act, it would be inappropriate for the courts to undertake tedious judicial review of these special fee waiver determinations. It should be noted that where

6/ See House Report No. 93-1380, Conference Report To Accompany H.R. 12471, 93d Cong., 2d Sess., at 8.

7/ Id. But see Fitzgibbon v. Central Intelligence Agency, Civil Action No. 76-700 (D.D.C., October 29, 1976) (attached hereto as Appendix A); Fitzgibbon v. Central Intelligence Agency, Civil Action No. 76-700 (D.D.C., January 10, 1977) (attached hereto as Appendix B).

Congress determined that there should be judicial review of other, more substantive, agency determinations under the FOIA, it made affirmative provision for the appropriate jurisdiction of the federal courts. Thus, §552(a)(4)(B), for example, expressly provides for judicial review in those situations where a FOIA requester challenges the agency's substantive decision concerning the applicability of an exemption to the documents sought. Yet, it is the immediately preceding subsection of the Act, §552(a)(4)(A), which empowers an agency to at its discretion waive fees, and no such provision for judicial review of such determinations was therein enacted.

Defendants therefore respectfully suggest that judicial review of an agency decision not to waive all fees involved in a FOIA request is beyond the scope of the intended judicial role in FOIA actions and that such a review in the instant case would be inappropriate and unnecessary.

II. Alternatively, Plaintiff's Claim For Judicial Review Of Defendants' Fee Waiver Determination Should Be Decided In Defendants' Favor On Partial Summary Judgment

If, however, the Court determines that it has, and should exercise, review jurisdiction over this claim, defendants respectfully suggest that their decision to grant a 40% partial fee waiver should be readily upheld. Plaintiff has asked the Court to find that "any denial of [his fee waiver] request is arbitrary and capricious."^{8/} Yet defendants are confident that a review of the pertinent record^{9/} will reveal that defendants' determination of plaintiff's request was in no way arbitrary or capricious.

^{8/} Complaint at 10, ¶4.

^{9/} See Exhibit 7 to the Complaint (Plaintiff's November 19, 1977, request letter); Exhibit A to defendants' Motion To Dismiss (defendants' initial denial of plaintiff's request); Exhibit B to defendants' Motion To Dismiss (defendants' appellate determination to award a partial waiver in the amount of forty percent). Any review, of course, is limited to the "arbitrary and capricious" standard and "must be confined to the Administrative Record upon which the decision was based." Fitzgibbon v. Central Intelligence Agency, Civil Action No. 76-700 (D.D.C., October 29, 1976) (Appendix A, at 4).

Rather, it is abundantly clear on the face of the record that defendants gave careful consideration to a number of factors in acting upon plaintiff's request, including: (1) the substantial costs involved in the reproduction, review and assembly of a complete set of materials to be released; (2) the special public availability of these materials to those who do not pay the costs of obtaining a personal set; (3) the fact that other parties have similarly requested fee waivers in connection with these materials and have had their requests denied as a matter of considered general policy; (4) the fact that plaintiff admittedly seeks these materials for reasons which amount to, at most, an amalgam of his personal commercial interests with the general public interest; and (5) the fact that the considerations surrounding plaintiff's request here are roughly similar to those presented in another instance in which a 40% partial fee waiver was awarded to plaintiff. Moreover, it should be stressed that plaintiff's admitted commercial interest in the documents alone is sufficient to run afoul of the statutory instruction that a waiver be granted only when "primarily benefiting the general public."^{10/}

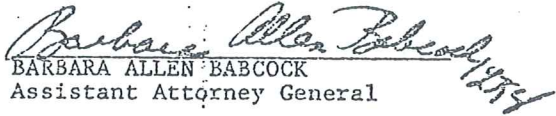
Therefore, defendants submit that the award of a 40% partial waiver to plaintiff under these circumstances was in no way arbitrary or capricious and that upon any review by this Court defendants' decision should be readily upheld.

^{10/} Compare §552(a)(4)(A) with Complaint ¶¶20, 21 and 24.

Conclusion

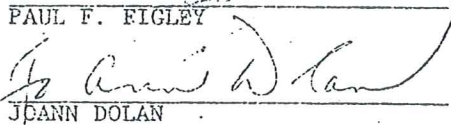
For the foregoing reasons, defendants respectfully suggest that plaintiff's putative claim for judicial review of defendants' fee waiver determination should be dismissed or, alternatively, should be decided in defendants' favor on partial summary judgment.

Respectfully submitted,


BARBARA ALLEN BABCOCK
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United States Attorney


LINNE K. ZISMAN

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

Civil Action No. 77-2155

GRIFFIN BELL, ET AL.,

Defendants.

ORDER

Upon consideration of Defendants' Supplemental Motion To Dismiss Or In The Alternative For Partial Summary Judgment, the papers filed with respect thereto, and the entire record herein, and it appearing to the Court that plaintiff's claim for judicial review of defendants' determination of his fee waiver request should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, it is by this Court this _____ day of January, 1978,

ORDERED that Defendants' Supplemental Motion To Dismiss Or In The Alternative For Partial Summary Judgment be, and it hereby is, granted in part; and it is further

ORDERED that plaintiff's claim for judicial review of defendants' determination of his fee waiver request be, and it hereby is, dismissed with prejudice.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

Civil Action No. 77-2155

GRIFFIN BELL, ET AL.,

Defendants.

ORDER

Upon consideration of Defendants' Supplemental Motion To Dismiss Or In The Alternative For Partial Summary Judgment, the papers filed with respect thereto, and the entire record herein, and it appearing to the Court upon the Court's review of the record that defendants' fee waiver determination was not arbitrary or capricious and that defendants are therefore entitled to partial summary judgment as a matter of law, it is by this Court this _____ day of January, 1978,

ORDERED that Defendants' Supplemental Motion To Dismiss Or In The Alternative For Partial Summary Judgment be, and it hereby is, granted in part; and it is further

ORDERED that partial summary judgment be, and it hereby is, entered in defendants' favor, as regards plaintiff's claim for judicial review of defendants' determination of his fee waiver request.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the foregoing Defendants' Supplemental Motion To Dismiss Or In The Alternative For Partial Summary Judgment and accompanying memorandum of points and authorities and proposed orders, upon plaintiff by hand-delivery to his counsel, James H. Lesar, Esquire, this 16th day of January, 1978.


DANIEL J. METCALFE

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OCT 29 1976
CIVIL
FILED

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALAN L. FITZGIBBON,
Plaintiff

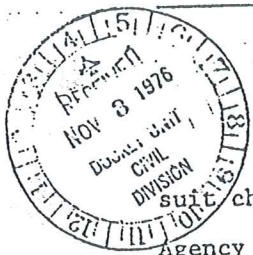
CIVIL ACTION 76-700

v.
CENTRAL INTELLIGENCE
AGENCY, et al.,
Defendants

FILED
OCT 29 1976

JAMES F. DAVEY, CLERK

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

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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-450, 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

FOR
Information & File

DEPARTMENT OF JUSTICE
CIVIL RIGHTS

1-19-77, 1/19/77
COATES

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

JAN 19 1977

JAMES E. DAVEY, CLERK

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.

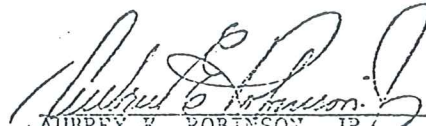
Based upon the record developed in this case and upon the language employed by the agency in refusing a waiver of search fees, it is the opinion of this Court that the Defendant may have applied an inappropriate standard in reaching its decision to deny fee waiver, and that at the very least the Defendants' 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 Z. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE