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March 31, 1978

Mr. Dan Metcalfe, Esq.
Information & Privacy Section
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Re: Weisberg v. Bell, et al.
Civil Action No. 71-2155

Dear Mr. Metcalfe:

In view of the Solicitor General's decision not to appeal Judge Gesell's order in the above case, I wish to again raise the issue of Mr. Weisberg's right to attorney fees and other litigation costs as a complainant under the Freedom of Information Act who has "substantially prevailed." I am presenting Mr. Weisberg's claim for attorney fees directly to you in the hope that this matter can be resolved without the need for further litigation.

Mr. Weisberg requests an award in the amount of $6,970.00 for the legal work done on this case. This figure is based on an hourly rate of $85.00 for a total of 82 hours. My activity log shows that I spent 74 hours working on this case. This does not include the time spent drafting this letter or at the conference I had with you, Paul Figley, and Lynne Zusman subsequent to Judge Gesell's decision. An attorney who performed research and gave me valuable advice during the few days immediately preceding the January 16, 1978 hearing spent an additional eight hours working on the case.

In order to assist you in evaluating this claim, I will set forth some relevant background information. If you wish additional information, please do not hesitate to ask me for it.

I graduated from the University of Wisconsin Law School in 1969. I am a member of the bars of the District of Columbia Court of Appeals and the Supreme Court of Wisconsin, as well as the bars of the United States Court of Appeals for the District of Columbia Circuit, the United States Court of Appeals for the Fifth Circuit, the United States Court of Appeals for the Sixth Circuit, and the Supreme Court of the United States. In 1977 I was invited to attend, and did attend, the Judicial Conference of the United States Court of Appeals for the District of Columbia Circuit at Hershey, Pennsylvania.

My hourly rate is based on my extensive experience in litigating cases brought under the Freedom of Information Act. This experience extends back more than seven years. I have represented clients in ten FOIA cases in the district court. With but one exception, I was the only attorney representing the plaintiff in these cases. I have handled five FOIA cases on appeal to the Court of Appeals or the Supreme Court.

Several of my FOIA cases have been difficult political cases which, at the time they were brought, involved novel or unique legal issues. One, Weisberg v. Department of Justice, 489 F. 2d 1195 (D.C. Cir. 1973), has been recognized as the major factor in the decision which Congress made to amend the investigatory files exemption. Hardly a week goes by without some story in the news media reporting on the contents of government records which would have been withheld from the public had not the Weisberg case forced Congress to amend the Act to conform the law to its original intent.

In another case, Weisberg v. General Services Administration, Civil Action No. 73-2052, I suceeeded in overcoming the sworn affidavits of National Archivist Dr. James B. Rhoads and former Solicitor General and Warren Commission General Counsel J. Lee Rankin. Although Rankin and Rhoads both swore that the January 27, 1964 Warren Commission executive session transcript was classified Top Secret pursuant to Executive Order 10501, Judge Gerhard Gesell found that this was not true and that the Government had failed to establish its entitlement to Exemption 1. This ruling came after the Supreme Court's decision in EPA v. Mink, 410 U.S. 73 (1973) imposed what was generally thought to be an insuperable barrier to access to purportedly classified government records but before Congress amended the Freedom of Information Act to override that decision. At least three law review articles have noted the significance of Judge Gesell's ruling in this case. The Madison, Wisconsin Capital Times ran a lengthy four-part series on this case, and the entire proceedings will soon be published verbatim in a volume issued by the University of Wisconsin--Stevens Point. The transcript obtained as a result of this lawsuit is of major importance in understanding the workings of the Warren Commission, as well as having broader political and societal implications. Mr. Weisberg reprinted the entire transcript in facsimile in a book he published in 1974 under the title: Whitewash IV: Top Secret JFK Assassination Transcript.

A third case, Weisberg v. Department of Justice, 543 F. 2d 308 (D.C. Cir. 1976), established a precedent by securing a ruling that an FOIA litigant seeking to establish the existence or nonexistence of government records may employ traditional discovery devices, including the taking of depositions of past and present government officials with first-hand knowledge of such matters.

This precedent is cited in standard works such as Litigation Under the Amended Freedom of Information Act, a handbook published by the Project on National Security and Civil Liberties of the ACLU Foundation. In this case the Court of Appeal's remarked that Mr. Weisberg's inquiries are in the national interest, a statement which has helped defuse the political opposition to his FOIA lawsuits. On remand, Weisberg established that the FBI had in fact conducted tests on items of evidence which it had previously sworn were not made. He also established that some vital records of this scientific testing are missing. Weisberg v. Department of Justice, 438 F. Supp. 492 (1977).

More recently, in Weisberg v. Department of Justice, Civil Action No. 75-1996, the district court ruled that the government could not protect allegedly copyrighted photographs from disclosure under Exemptions 3 or 4. To my knowledge, this is the first FOIA case to raise this novel issue.

While most of my legal experience has been under the Freedom of Information Act, I have also had important sucesses in other kinds of cases. I was primarily responsible for the legal work which caused the United States Court of Appeals for the Sixth Circuit to order a district court to conduct a "full-scale judicial inquiry" into James Earl Ray's allegations that his plea of guilty to the murder of Dr. Martin Luther King, Jr. had been coerced. Ray v. Rose, 491 F. 2d 295, cert. denied, 417 U.S. 936 (1974). In preparing for the two-week evidentiary hearing which resulted, I relied upon a little-used Supreme Court case to obtain court orders for the production of documents by fifteen persons and one corporations who were non-parties. Although the State of Tennessee vehemently protested the unprecedented and sweeping nature of this discovery, the Sixth Circuit upheld the orders and the Supreme Court denied certiorari. The documents obtained on discovery proved to be enormously important.

In the present case my legal work resulted in a decision which appears to be unique and without precedent. My client obtained immediate delivery of 58,000 pages of records without charge. It appears safe to say that this decision will result in another 40,000 pages being made available to my client in the near future, again without charge. I know of no other attorney who has obtained these results for his client. Without this decision, my client would have been denied, because he could not afford them, the very records which are at the heart of his life's work for the past fourteen years.

The primary argument which I made to the court in this case was based on equitable considerations, a factor which attorneys frequently overlook in all cases. The court accepted this argument and based its ruling on equity. I know of no other case in which a

fee waiver determination has been overturned on the basis of equity. My extensive experience in handling Mr. Weisberg's many FOIA lawsuits made it possible for me to marshal facts in support of this argument in a way that I doubt any other attorney would have been able to do, particularly given the extreme time pressures involved. Quite frankly, I think most attorneys would not even have attempted the argument, much less succeeded at it.

I believe the foregoing facts, while not exhaustive by any means, establish my skill and expertise in the area of Freedom of Information Act lawsuits. In view of my considerable success in handling these cases, I think that payment at the rate of $85.00 an hour is not excessive or unreasonable. Law firms in Washington, D.C. having primarily federal practices are said generally to bill at $40 to $85 an hour for the time of associates and from $75 to $150 an hour for partners. Where an attorney has special expertise in the area involved, these rates are usually increased. In view of these figures, my rate would appear to be somewhat on the conservative side.

I understand that Alan Morrison has been paid at the rate of $90 per hour for FOIA work. Mr. Morrison, who has a very capable staff to assist him, has had several important successes in FOIA cases, notably the decision in the first Vaughn v. Rosen case, and one resounding failure, Open America v. Watergate Special Prosecution Force. Although I have had no staff to aid me, I believe our accomplishments in the area of Freedom of Information law have been roughly comparable. If anything, the development in the Freedom of Information law which has resulted from the cases which I have handled is both broader and more important than that which has resulted from the cases handled by Mr. Morrison. Moreover, there is no doubt in my mind but that the disclosures which have directly resulted from Mr. Weisberg's lawsuits are more important than those thus far produced by any other FOIA litigation.

In view of this, if any determination is made that the value of my services is worth less than the $85.00 an hour which I have requested, I would like to be apprised of any factors which, in your judgment, justify my being compensated at an hourly rate less than Mr. Morrison has received. This will enable me to make whatever response is appropriate.

In conclusion, I should like to point out that the case law governing an award of attorney fees authorizes an adjustment upward or downward from the base rate according to such factors as the risk of non-compensation or partial compensation, the quality of the counsel's work, the obdurate behavior of the defendant, the development of prior expertise in the particular type of litigation. See Lindy Bros. Builders, Inc. v. American Radiator and Stand. Sanitary Corp., 540 F. 2d 102 (3d Cir. 1976), National Treasury Employees Union v. Nixon, 521 F. 2d 317 (D.C. Cir. 1975),

and American Fed. of Govt. Employees v. Rosen, 418 F. Supp. 205 (N.D. Ill. 1976).

It is obvious that there was a very substantial risk of total or partial non-compensation in this case. In addition, there are other factors present, such as the tardy, arbitrary, and capricious behavior of the government and delayed compensation, which would justify an increase in the amount of attorney fees to be awarded. If I am forced to litigate the question of the amount of attorney fees owed for prosecuting this case, I will, of course, seek an adjustment upward in the amount of fees which I have requested. In addition, I would point out that since the time spent in litigating an award of attorney fees is itself compensable, this, together with any upward adjustment, could greatly increase the amount the government might have to pay out, perhaps even doubling it.

I hope, of course, that further litigation will not be required. I would appreciate it, however, if you could advise me of your reaction to this letter at your earliest possible convenience so I may determine whether or not we are going to be able to reach an agreement.

I am attaching a chronological account of the time I spent on this case together with a brief description of the corresponding activity.

Mr. Weisberg will also want compensation for some other litigation expenses "reasonably incurred." I will let you know shortly what they are and what they total. They are, of course, minor compared with the attorney fees.

Sincerely yours,

James H. Lesar

Weisberg v. Griffin Bell, et al., Civil Action No. 77-2155

11/19/77	1/2 hr.	fee waiver request to Attorney General
12/15/77	3 hrs.	research on preliminary injunction, TRO
12/16/77	3 hrs.	"
12/17/77	2 hrs.	work drafting complaint
12/18/77	4 1/2 hrs.	"
12/19/77	2 hrs.	drafting motion for preliminary injunction
1/11/78	5 hrs.	drafting of amended complaint, consultation with Weisberg, research on procedure
1/12/78	7 hrs.	amended complaint drafted, research on fee waivers, arbitrary and capricious standard, 1st amendment considerations
1/13/78	11 1/2 hrs.	research continued, drafting of Opposition to Motion to Dismiss begun. Consultations with Weisberg.
1/14/78	11 1/2	Drafting of Opposition, consultations with Weisberg
1/15/78	14 1/2	Drafting of Opposition, consultations with Weisberg
1/16/78	9 3/4	drafting of Opposition, consultation with Weisberg, morning hearing (1 hr.), afternoon hearing (45 minutes)
TOTAL:	74 hours	