

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

MAR 17 1983

MARK A. ALLEN,

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants.

JAMES F. DAVEY, Clerk

Civil Action 78-1743

M E M O R A N D U M

Plaintiff, Mark Allen, moves for an award of attorneys fees pursuant to 5 U.S.C. § 552(a)(4)(E). He contends that he "substantially prevailed" in this Freedom of Information Act (FOIA) action and is entitled to at least \$12,000 in attorneys fees.

Plaintiff's original request was for disclosure of Document No. 509-803, which relates to the activities of Lee Harvey Oswald in Mexico City between September 28 and October 3, 1963. This Court dismissed the original complaint, finding that the document was properly withheld under Exemptions 1, 2, and 3 of FOIA. 5 U.S.C § 552(b)(1), (2) and (3). The action was appealed and on remand the CIA voluntarily released portions of the document. Defendant moved for summary judgment on its claim of exemption regarding the remainder of the document. The Court granted summary judgment in favor of the defendant.

Plaintiff again appealed. In its decision in Allen v. CIA, 636 F.2d 1287 (D.C. Cir. 1980), the Court of Appeals reversed the decision of this Court which upheld defendant's Exemption 2 claims.

It also ordered the CIA to restore classification markings to the document with appropriate markings to indicate that they no longer applied. This Court was directed to inspect, in camera, the withheld portions of the document. On remand, defendant was once again awarded summary judgment. On appeal, the Court of Appeals affirmed.

At this time, plaintiff has obtained two categories of material. The first is a portion of the document which the CIA voluntarily released, finding that it no longer posed a threat to national security due to passage of time and the cumulative effect of various other disclosures. The second category of released material included the filing and routing instructions for the document at issue. This last portion of Document No. 509-803 was released pursuant to the order of the Court of Appeals. Id.

FOIA provides that attorneys fees may be assessed if the complainant "substantially prevailed" in the action. 5 U.S.C. § 552(a)(4)(E). The fact that a portion of the requested material was released by defendant does not alone mean that plaintiff "substantially prevailed". Cox v. U. S. Department of Justice, 601 F.2d 1, 6 (D.C. Cir. 1979). The decision whether to award fees rests in the sound discretion of the Court. See Church of Scientology v. Harris, 653 F.2d 584, 590 (D.C. Cir. 1981).

In order to be awarded fees in connection with the material voluntarily released by defendant, plaintiff must show that the prosecution of the action was necessary to disclosure. See Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509, 513 (2d Cir. 1976). Defendant contends that this material was released

because it no longer endangered national security. Plaintiff has failed to show the necessary causal nexus between litigation and disclosure and, thus, that he "substantially prevailed" in regard to this portion of the document.

The filing and routing instructions are the only segment of the document released as a result of litigation. This information does not relate to the substance of the document. It merely discloses where the document was kept and who had access to it. Although there is a causal nexus between prosecution and disclosure with regard to this information, plaintiff's small victory on this relatively insignificant issue does not justify an award of attorneys fees. Plaintiff has failed to obtain the significant portions of his original FOIA request.

Eligibility for attorneys fees does not mean entitlement. See Cox v. U. S. Department of Justice, 601 F.2d at 6; Cuneo v. Rumsfeld, 553 F.2d 1366, 1365-68 (D.C. Cir. 1977). The Court in Cuneo identified certain factors to be considered in determining whether to award fees in a particular case. These factors include 1) the benefit to the public derived from the suit; 2) the nature of the complainant's interest in the released information; and 3) whether the agency's withholding of the records had a reasonable basis in law. Id. Upon consideration of these factors, the Court finds that plaintiff is not entitled to attorneys fees in connection with the release of any portion of Document No. 509-803.

An appropriate Order follows.


UNITED STATES DISTRICT JUDGE

Dated: March 16, 1983

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