

425-180

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

FEDERAL BUREAU OF  
INVESTIGATION,

Defendant.

Civil Action Nos.  
78-322 and 78-420  
(Consolidated)

DEFENDANT'S APPLICATION FOR EXPENSES  
INCURRED IN OBTAINING THE ORDER  
COMPELLING PLAINTIFF TO ANSWER ITS  
DISCOVERY REQUESTS

In December 1982, the defendant propounded to plaintiff a set of interrogatories and a request for production of documents. Although plaintiff requested a two-week extension to respond to those discovery requests, he chose instead to file a motion for protective order. Defendant opposed that motion, and the Court subsequently denied it and directed plaintiff to answer defendant's discovery within 20 days. Eighteen days later, plaintiff requested another two-week extension of time to complete the formulation of his answers. Upon expiration of that two-week period, however, plaintiff's counsel filed blanket objections that merely parroted the same arguments he had advanced in support of the earlier motion for a protective order -- arguments which the Court had rejected when it denied the protective order motion.

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The defendant then filed a motion to compel which incorporated by reference the substance of its earlier opposition to plaintiff's motion for a protective order. The defendant also moved the Court to assess expenses against plaintiff and his counsel under Rule 37(a)(4) of the Federal Rules of Civil Procedure. During the hearing on defendant's motion to compel and to assess expenses, the Court inquired of defense counsel whether he had submitted an expense itemization with respect to the prosecution of the motion. Counsel responded that he had not, but requested leave to file an affidavit within 10 days should the Court grant the defendant's motion.

On February 13, 1983, the Court entered an Order which, inter alia, granted defendant's motion to compel. The Court also directed the defendant to submit an affidavit within 10 days "detailing the expenses, including attorney fees, which were incurred in obtaining the Order compelling plaintiff to answer the [discovery requests]."

Pursuant to that directive, the defendant is hereby filing the affidavit of Henry I. LaHaie, a trial attorney with the Justice Department's Civil Division, who has been primarily responsible for representing the defendant in this litigation, including the prosecution of the defendant's motion to compel. In that affidavit, Mr. LaHaie states that he spent a total of 12.5 hours in prosecuting the motion to compel. Mr. LaHaie has not included the time he spent researching and drafting defendant's opposition to plaintiff's motion for a protective order, even though defendant's motion to compel expressly incorporated

the arguments in that earlier opposition. Nor does defendant seek fees for the time spent by the FBI's counsel who reviewed all the pleadings prior to filing or for the time spent by the FBI's FOIA analysts who conferred with Mr. LaHaie about the underlying motion.

The amount of compensation which defendant asks for Mr. LaHaie's time is \$53 per hour. Although the "prevailing rate" in this area is much higher for an attorney with Mr. LaHaie's experience,<sup>\*/</sup> defendant seeks the \$53 amount because the Office of Management and Budget has preliminarily calculated that that is what it costs the government for legal representation by its attorneys, and it is that amount that OMB anticipates incorporating into legislative proposals for a cap on the fees that the government will pay to private counsel.<sup>\*\*/</sup>

The only other costs the defendant seeks are the expenses for duplicating its motion to compel and the memoranda and exhibit in support of the motion. At 10¢ per page, that amounts to \$22.00 (i.e., 4 copies -- 2 copies to the Court, one to opposing counsel and one for the defendant -- of 55 pages each).

Thus, the total amount of expenses that defendant seeks for prosecution of the motion to compel is \$684.50. This is an

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<sup>\*/</sup> For example, in a recent submission in another case, plaintiff's counsel indicated that he "currently charges \$85 per hour for non-FOIA work in which he is not an expert and has no prior experience." See Plaintiff's Motion for Attorney Fees and Litigation Costs at p. 22, filed on August 23, 1982 in Weisberg v. U.S. Department of Justice, C.A. No. 75-1996 (D.D.C.).

<sup>\*\*/</sup> The \$53 sum takes into account the salaries of the lead attorney and his supervisors as well as overhead costs and support personnel.

entirely reasonable sum, especially given what other attorneys -- including plaintiff's counsel -- would charge in a similar situation and given plaintiff's obstreperousness with respect to defendant's discovery requests. Moreover, the awarding of those expenses will effectuate the purpose of Rule 37(a)(4) of the Federal Rules of Civil Procedure. See Addington v. Mid-American Lines, 77 F.R.D. 750 (E.D. Mo. 1978); Advisory Committee's Notes, 48 F.R.D. 487, 539-40 (1970); Wright & Miller, Federal Practice Procedure: Civil § 2288 at 787-89 (197 ); 4A Moore's Federal Practice, ¶ 37.02 [10-1] at 37-49 (1975).

Respectfully submitted,

J. PAUL McGRATH  
Assistant Attorney General

STANLEY S. HARRIS  
United States Attorney

  
BARBARA L. GORDON

  
HENRY I. LAHAIE

Attorneys, Department of Justice  
Civil Division, Room 3338  
10th & Pennsylvania Avenue, N.W.  
Washington, D.C. 20530  
Telephone (202) 633-4345

Attorneys for the defendant

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DECLARATION OF HENRY I. LaHAIE

I, Henry I. LaHaie, make the following declaration:

1. I have been a trial attorney in the Civil Division of the United States Department of Justice since September 29, 1979. Prior to coming to the Justice Department, I was in private practice with the law firm of Lavey & Harmon for almost a year, and before that, I was a law clerk to the late Terry L. Shell, United States District Judge for the Eastern and Western Districts of Arkansas. I commenced that clerkship upon graduating with honors from the University of Arkansas at Little Rock School of Law in May, 1977.

2. As a trial attorney with the Justice Department, I am responsible for representing various government agencies in a wide variety of civil litigation. I have been responsible for representing the Federal Bureau of Investigation in these consolidated FOIA cases since October, 1981. As the attorney assigned to these cases, I am the one who prepared and filed defendant's motion to compel, along with the memoranda and the exhibit in support of that motion.

3. A statement of the time I spent prosecuting defendant's motion to compel is attached hereto as Exhibit 1. The periods of time listed in that statement are based on a reconstruction of the time I spent preparing the motion and the two memoranda in support, and arguing the motion before the Court. Upon knowledge and belief, it is an accurate reflection of the time expended on the motion and the hearing. I therefore request attorney fees of \$53 per hour for the 12.5 hours I spent prosecuting the motion for an order compelling plaintiff to answer defendant's discovery requests.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated this 25<sup>th</sup> day of April, 1983.

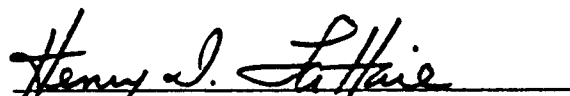
  
HENRY I. LAHAIE  
Trial Attorney  
Civil Division  
United States Department of  
Justice

EXHIBIT 1: Time Expended By Henry I. LaHaie  
On Defendant's Motion To Compel

<u>DATE</u>	<u>ACTIVITY</u>	<u>TIME SPENT</u>
3/11/83	Review of plaintiff's objections to defendant's interrogatories and request for production of documents, including the fourteen page affidavit of Harold Weisberg dated February 20, 1983, filed in support of those objections.	.5 hr.
3/14/83	Consultation with the FBI counsel and the FBI analyst	.25 hr.
3/14/83	Initial drafting of motion to compel and the memorandum in support	1.5 hr.
3/15/83	Consultation with Supervising Attorney Barbara L. Gordon about the substance of the motion and memorandum	.25 hr.
3/15/83	Final drafting of the motion and memorandum and filing them with the Court	.5 hr.
3/31/83	Review of plaintiff's opposition to defendant's motion to compel	.25 hr.
4/05/83	Initial drafting of defendant's reply to plaintiff's opposition	2 hrs.
4/05/83	Review of Court of Appeal's decision in <u>Weisberg v. U.S. Department of Justice</u> , No. 82-1072 (April 5, 1983)	1 hr.
4/06/83	Consultation with Supervising Attorney Barbara L. Gordon about the substance of the defendant's reply memorandum	.25 hr.

<u>DATE</u>	<u>ACTIVITY</u>	<u>TIME SPENT</u>
4/06/83	Final drafting of reply memorandum, including reference to the Court of Appeals' decision in <u>Weisberg, supra</u> , and attaching a copy of the opinion to defendant's reply memorandum	.5 hr.
4/07/83	Preparation for moot court and the next day's hearing	2 hrs.
4/07/83	Moot court in preparation of the next day's hearing	1.5 hrs.
4/08/83	Hearing on the Motion to Compel	2 hrs.
	TOTAL:	<u>12.5 hrs.</u>



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ORDER

On March 15, 1983, the defendant moved the Court, pursuant to Rule 37(a), F.R.Civ.P., for an Order compelling plaintiff to answer its discovery and assessing against him and his counsel the reasonable expenses, including attorney fees, incurred in obtaining that Order. Upon consideration of plaintiff's opposition thereto and after conducting a hearing thereon, the Court, on April 13, 1983, granted defendant's motion and ordered the plaintiff to answer defendant's discovery within 30 days. The Court also directed the defendant to submit an affidavit detailing the reasonable expenses, including attorney fees, it had incurred in prosecuting the motion to compel. The defendant complied with that directive and demonstrated that its counsel had expended 12.5 hours with respect to the motion. Defendant requested a rate of \$53 per hour for its counsel's work, for a total of \$662.50. It also requested \$22.00 for the cost of photocopying the motion and the memoranda and exhibit in support of the motion. As a result

of its consideration of that expense itemization by defendant, the Court finds that the applied for expenses, including attorney fees, are reasonable and fully documented. Accordingly, it is this \_\_\_\_\_ day of \_\_\_\_\_, 1983,

ORDERED that:

Defendant is awarded expenses under Rule 37(a)(4), F.R.Civ.P., in the amount of \$684.50; and that plaintiff shall pay said amount to the United States within sixty (60) days from the date of this Order.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify on this 25th day of April, 1983, I have served the foregoing Defendant's Application for Expenses Incurred in Obtaining the Order Compelling Plaintiff to Answer its Discovery Requests, by first class mail, postage pre-paid to:

James H. Lesar, Esq.  
Suite 900  
1000 Wilson Boulevard  
Arlington, Virginia 22209

  
HENRY I. LAHAIE