

Mr. Stephen Rosenfeld
Washington Post
1150 15 St., NW
Washington, D.C. 20005

3/21/84

Dear Mr. Rosenfeld,

Because I do not want to appear to be only critical of the Post I did not write you a week ago after reading the "Public Money for Lawyers' Fees" editorial. Now that from today's radio reports even the Burger court decides in opposition to the thrust of this editorial I do write to make you aware of the mischief that I do not believe the Post intended.

Without doubt all public moneys are not spent wisely. But can you (meaning all who had editorial input) think of many such wastes less significant than what little waste there is in all the proper programs for paying lawyers who handle class-action suits or litigation for those who cannot pay lawyers?

Did you balance this against the public good that has come from the litigation made possible by that 1976 and other such legislative enactments?

Did you begin to understand or even seek information relating to the relatively large amount of public money wasted by the government in both forcing and then stonewalling such litigation, particularly by the Reagan administration? This is where the greater cost to the government is, I believe from my own experience.

Not counting the costs to the courts, which also is tax money, I'd not be a bit surprised if the government didn't waste more than the atypical costs itemized in your editorial in just three of my FOIA lawsuits in which I prevailed and brought to light many thousands of previously-withheld records holding significant information. Each of these lawsuits was forced by the government and its violation of the law and each was enormously stonewalled by it.

FOIA requires disclosure of nonexempt public information and suit cannot be filed until administrative remedies are exhausted. This means that at the least to a very great extent all the costs of FOIA litigation are directly caused by the government's violation of the law.

With regard to lawyers' fees let me give you two examples. In 1969 I filed two FOIA requests for information related to the King assassination. They were entirely ignored, by direct order of the FBI's top echelon. In 1975 I renewed them and when I received no response filed suit. After about 50 calendar calls and hearings extending over a period of years I finally received (and the FBI's public reading room now holds) more than 60,000 pages. Not surprisingly the court held that I had "substantially prevailed," the language of the Act, and awarded some of my lawyer's costs and a minuscule fraction of my costs. The Department of Justice has taken this up on appeal and claims that I did not "substantially prevail," its entire argument based on untruthfulness. Under the 10-day law my 1969 requests are still before the courts - only because of the official determination to not comply with the law.

In 1977 I requested the JFK assassination investigation records of the Dallas and New Orleans field offices and when I received no response I filed suit in 1978. Under FOIA official compliance begins with searches. To this day no searches have been made to comply with my requests. Although FOIA does not provide for or even suggest it, the FBI's Department of Justice lawyers demanded discovery of me and told the rubber-stamping Judge John Lewis Smith that if I provided that discovery it would establish that the FBI had made the searches it still has not made! And that it also would establish FBI "good faith." (This is the same FBI that held that because it does not like me the law does not apply.)

For many reasons one of which is that I would not be party to a precedent that in effect nullifies the Act I refused. These same government lawyers then demanded and received a judgement against me for their litigating costs, which I also refused to pay pending appeal. ~~and~~ They then moved for an ~~obtained~~ dismissal as a sanction. When I still did not pay the judgement they had it amended to make my lawyer personally responsible for the judgement, not me, and even though he had counselled me to make some gesture at compliance with the Order as the lesser evil. Still without awaiting the appeals decision. And thus they created a threat against all lawyers willing to handle cases for those who cannot pay them.

Quite aside from the legal issues and principles involved the fact is that for other reasons I had already provided the information demanded on "discovery" and the FBI's lawyers admitted this in a pleading a year ago, before they cooked up this costly scheme for nullifying FOIA before a judge who has a record of being in their pocket.

Can you visualize the costs involved in this and the continuing litigation, the costs in time and money for all parties? And if the government gets away with this, they have turned FOIA entirely around and placed the burden of proof on the requester, despite the specific language of the Act, which places it exclusively on the government. If the government does not prevail, five years of its costs are wasted and it goes back to square 1. ~~And~~ its costs - and mine - begin all over again.

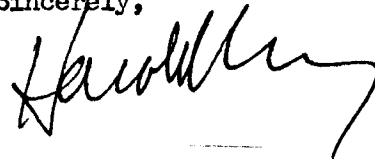
Who is responsible for the costs? ~~More~~ More than a year ago, because of seriously impaired health, I offered to dismiss this litigation, subject to the rights of others to request information not provided to me. The FBI and its lawyers refused this offer out of hand, without bothering to consult higher authority.

Some judges also are responsible for some of these costs, Judge Pratt for example. I enclose a copy of the first page of the Daily Washington Law Reporter of 12/9/83. Its reporting of the appeals court decision shows that ^{he} ~~persisted~~ in error even after remand in this "attorneys' fees" case. He sent one of my cases to the appeals court for the third time before it was satisfied that the required initial searches were made, and it then was satisfied only on the basis of official mendacity, which in my experience is commonplace in such litigation. And so costly!

How unbiased is he? When I proved that beyond question an FBI agent had perjured himself, Judge Pratt lectured my lawyer and me, telling us we could catch more flies with honey. In the end he accepted three contradictory attestations from a single agent on a single material point and found for the FBI, after the costs of two remands.

If constitutional rights were not violated, if the executive agencies did not violate the law, there would be no need for the litigation in which Congress decided that the plaintiffs' lawyers' costs were to be paid. The relatively small costs of a few atypical cases (and the National Association of Attorneys General is hardly an impartial authority) is insignificant compared with the costs created by the government. Based on my ^{own} experience I believe the Post would have been more in keeping with its fine past and better served a clear and present need if its editorial statement had been in accord with reality. Your editorial lends itself to and I fear will be used to perpetuate the wrongs Congress intended to right.

Sincerely,



Harold Weisberg
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