UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

G. ROBERT BLAKEY,	:	
Plaintiff,	:	
v.	:	Civil Action No. 81-2174
DEPARTMENT OF JUSTICE, ET AL.,	:	
Defendants	:	

PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, Mr. G. Robert Blakey, and moves the Court for an order granting summary judgment in his favor with respect to: (1) a waiver of search fees and copying costs for records sought in this action; and (2) the February 13, 1981 Bayse Memorandum.

This motion is made pursuant to Rule 56 of the Federal Rules of Civil Procedure. A Memorandum of Points and Authorities and a proposed Order are attached hereto.

In support of his motion plaintiff files the original of the February 15, 1982, affidavit of Professor G. Robert Blakey and a copy of Professor Blakey's March 17, 1982, affidavit. (The original of the latter affidavit is being filed with plaintiff's Opposition to the FBI's Motion for Summary Judgment.)

Respectfully submitted,

James H. Lesar

JAMES H. LESAR
Fensterwald & Associates
1000 Wilson Blvd., Suite 900
Arlington, Virginia 22209
Phone: 276-9297

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiff's Cross Motion for Summary Judgment was this 24th day of March, 1982, mailed to Nathan Dodell, Assistant U.S. Attorney, U.S. Courthouse, 3rd & Constitution Avenue, N.W., Washington, D.C. 20001

James H. Lesar

JAMES H. LESAR

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

G. ROBERT BLAKEY,	)	
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Plaintiff,	)	
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v.	)	Civil Action No. 81-2174
	)	
DEPARTMENT OF JUSTICE, ET AL.,	)	
	)	
Defendants.	)	
	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES

This case arises from the Freedom of Information Act, 5 U.S.C. § 552. Plaintiff is G. Robert Blakey, who formerly served as Chief Counsel and Staff Director for the House Select Committee on Assassinations. He brought this action to obtain copies of Department of Justice records which he deems relevant to his further study of the assassination of President John F. Kennedy and its investigation, a study which he now carries forward as Professor of Law at Notre Dame University.

The FBI has moved for summary judgment as to all issues. Plaintiff has opposed the Bureau's motion; however, because two of the issues in this litigation seem susceptible of resolution in his favor as a matter of law, he concurrently files this cross motion for summary judgment on these two issues.

ARGUMENT

I. PLAINTIFF IS ENTITLED TO THE BAYSE MEMORANDUM AS A MATTER OF LAW

The FBI has withheld in its entirety a six-page internal

memorandum from an FBI Special Agent assigned to the Technical Services Division to a Mr. Bayse. This memorandum ("the Bayse Memorandum") is dated February 13, 1981, and according to the FBI it "sets forth the details of the appearance on January 31, 1981, of FBI personnel before the Committee on Ballistic Acoustics in the National Research Council of the National Academy of Sciences, concerning the Dallas, Texas, Police Department tape recording made at the time of the assassination of President John F. Kennedy." Affidavit of FBI Special Agent John N. Phillips, ¶ 5(A).

The FBI seeks to withhold the Bayse Memorandum in its entirety on the basis of Exemption 5. This exemption protects from mandatory disclosure matters that are: "inter-agency or intra agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption was intended to incorporate the government's common law privilege from discovery in litigation. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); S. Rep. No. 1219, 88th Cong., 2d Sess. 6-7, 13-14 (1964). The Supreme Court has noted, however, that "it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery . . ." Federal Open Market Comm. v. Merrill, 443 U.S. 340, 354-355.

Of the four privileges which the Supreme Court has held to be incorporated into Exemption 5, the only one which the FBI could seem to have in mind is the "executive" privilege which protects advice, recommendations, and opinions which are part of the deliberative, consultative, decision making processes of government. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-154 (1975); EPA v. Mink, 410 U.S. 73, 85-91 (1973). The ultimate purpose of this privilege is to prevent injury to the quality of

agency decisions. NLRB v. Sears, Roebuck & Co., supra, 421 U.S. at 151.

The Phillips affidavit makes it clear that Exemption 5 is invoked to try and protect against premature revelation of "the method of inquiry and preliminary conclusions of the [C]ommittee" [on Ballistic Acoustics of the National Academy of Sciences]. But the National Academy of Sciences is a nongovernmental body; hence, Exemption 5 cannot be invoked to protect its deliberations.

Moreover, the courts have drawn a distinction between "purely factual, investigative matters," which are not exempt, and deliberative materials, which are. EPA v. Mink, supra, at 89. As Professor Blakey points out, the Bayse Memorandum reports on the January 31, 1981, meeting at which the FBI gave the results of its technical work, not policy recommendations. See March 17, 1982 Blakey Affidavit (Exhibit 1). Exemption 5 does not extend to the scientific results of investigations. Verrazzano Trading Corp. v. United States, 349 F. Supp. 1401 (Customs 1972).

Accordingly, summary judgment should be awarded in favor of plaintiff as to the Bayse Memorandum, and the FBI should be ordered to release it forthwith.

II. PLAINTIFF IS ENTITLED TO A WAIVER OF SEARCH FEES AND COPYING COSTS

A. Background.

By letter dated June 11, 1979, plaintiff requested a copy of the FBI's files on Lee Harvey Oswald and Jack Ruby. He also requested that the Bureau waive any fees involved, noting that while he was not indigent, he had no independent funds with which to obtain these materials. (Exhibit 2)

In support of his application for a fee waiver, plaintiff represented to the FBI as follows:

> I expect that as a result of the recommendations of the [House] Select Committee [on Assassinations], there will be a public discussion on what, if any, action the Bureau should take. While I read substantial portions of the files as chief counsel to the Committee (I no longer have access to the committee files, which are now in the Archives) I never completed a personal review of the entire file, and, in any event, they should now be reexamined by one knowledgeable with the Committee's entire investigation, so that concrete recommendations can be made to the Bureau and the Department about what, if anything, should be done to finish the investigation. The results of my examination will, of course, be made available to the Bureau, the Department, and the House Judiciary Committee. I believe that my review and recommendations would serve the general public.
>
> In addition, I expect that I will teach a course at the Law School in the future on the legal and other aspects of the Kennedy case. I would expect that as I finish my use of the files that I would turn them over to the Library for its use, where the general public would have access to them. Out of class room use of the files, I would also expect that one or more publications would result that would contribute to public understanding.

Plaintiff also asked the FBI to contact him if there was any more information he could supply that would assist in securing a fee waiver.

By letter dated June 21, 1979 (Exhibit 3), the FBI notified plaintiff that the materials he was requesting were available for review at the FBI Reading Room from 9:00 a.m. to 4:00 p.m. on 48 hours advance notice. This letter also advised plaintiff that his fee waiver request was being considered, and that he would be advised of the results of this determination at a later date.

On August 14, 1979, plaintiff wrote the FBI that since he lived in Ithaca, New York, public access to these files in Washington, D.C. did not meet his purpose. (Exhibit 4)

By letter dated September 12, 1979 (Exhibit 5), the FBI informed plaintiff that it was denying his request. As grounds for its determination, the Bureau asserted that:

> In balancing the potential public benefit in this instance against the concomitant expenditure of public funds, we have determined that under reasonable standards the interests of the general public appear more likely to be served by the preservation of public funds.

IF FBI WR, they have mine - the public's

Plaintiff was also advised that he would be provided 15,845 pages of records on Jack Ruby and 36,122 pages on Lee Harvey Oswald if he would remit checks or money orders in the amounts of $1,584.50 and $3,612.20 respectively.

On September 17, 1979, plaintiff appealed the FBI's denial of his fee waiver. (Exhibit 6) By letter dated October 14, 1981, Mr. Richard L. Huff, Acting Director, Office of Privacy and Information Appeals, affirmed the denial. Relying on (1) speculation that a library near plaintiff might have a microfilm of these records, and (2) the fact that "[t]hese materials have been reviewed and processed by the Bureau and are available for inspection and copying in the Bureau's public reading room," Acting Director Huff grounded his decision on the accessibility of the materials sought by plaintiff and his opinion that a fee waiver for the cost of duplicating a copy for plaintiff was unwarranted. (Exhibit 7)

B. The Law.

Under 5 U.S.C. § 552(a)(4)(B), this Court has jurisdiction to review a violation of any portion of the Freedom of

Information Act. American Mail Line, Ltd. v. Gulick, 133 U.S.App. D.C. 382, 411 F.2d 696 (1969). This review includes alleged violations of the fee waiver provisions of § 552(a)(4)(A). Alan L. Fitzgibbon v. Central Intelligence Agency, et al., Civil Action No. 76-700, United States District Court for the District of Columbia (Memorandum and Order of Aubrey Robinson, Jr., filed October 29, 1976), citing Diapulse Corporation of America v. Food and Drug Administration of the Department of Health, Education and Welfare, 500 F.2d 75 (2d Cir. 1974). (A copy of the Fitzgibbon decision is appended hereto as Attachment 1) This court also has jurisdiction to review the fee waiver issue under 5 U.S.C. § 702, which provides judicial review for persons adversely affected by agency action. Fellner v. Department of Justice, No. 75-C-430, United States District Court for the Western District of Wisconsin (Opinion and Order by Judge Doyle filed April 28, 1976, at p. 6), citing Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 156 (1970); Barlow v. Collins, 397 U.S. 159, 166 (1970). (A copy of the Fellner decision is appended hereto as Attachment 2)

The Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A), provides:

> Documents shall be furnished without charge or at a reduced 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.

The Department of Justice regulation implementing this provision authorizes a waiver of fees where "the official of the Department making the initial or appeal decision determines that such charges, or a portion thereof, are not in the public interest because furnishing the information primarily benefits the general public." 28 C.F.R. § 16.9(a)(1980).

The appropriate standard for review of agency action under the Administrative Procedure Act is found at 5 U.S.C. § 706(A), which provides for reversal where agency action is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." In reviewing agency action pursuant to § 706(2)(A) the court must decide whether the agency acted within the scope of its statutory authority, whether the agency complied with applicable procedural requirements, whether the decision was based a consideration of relevant factors, and whether there has been a clear error of judgment. Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 402, 415-416.

It is clear that plaintiff meets the substantive standard for a waiver of fees under 5 U.S.C. § 552(a)(4). In one of the few cases which have construed the requirements of this provision, Judge Aubrey Robinson ruled as follows:

> 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 Defendant's fee waiver is that the agency feels an obligation to the public to collect fees for processing Freedom of Information 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.

Memorandum and Order filed January 10, 1977, in Fitzgibbon, supra. (A copy of this decision is appended hereto as Attachment 3)

Obviously, if information concerning the abduction and murder of Jesus Galindez by agents of the Trujillo regime can be considered as primarily benefitting the general public, it follows a fortiori that information pertaining to the assassination of President Kennedy also meets this standard. Indeed, the public interest in Kennedy assassination has been overwhelmingly demonstrated by several official investigations by both the Executive Branch (the Warren Commission, the Rockefeller Commission and Congress (The House Select Committee on Assassinations, the Senate Select Committee on Intelligence Activities), as well as by massive news coverage and innumerable books and magazine articles over the past 18 years. The Court of Appeals for the District of Columbia Circuit has expressly noted the public interest in this subject in two published decisions: Allen v. Central Intelligence Agency, 205 U.S.App.D.C. 159, 172, 636 F.2d 1287, 1300 (1980) (Kennedy assassination is an event in which the public has demonstrated an almost unending interest), and Weisberg v. Dept. of Justice, 177 U.S.App.D.C. 161, 543 F.2d 308 (1976) (plaintiff's inquiry into existence of FBI Laboratory records pertaining to Kennedy assassination is "of interest to the nation").

Insofar as plaintiff is aware, only two cases have litigated the question of whether or not an FOIA requester was entitled to a waiver of fees for copies of materials pertaining

to the assassination of President John F. Kennedy. In Weisberg v. Bell, et al., Civil Action No. 77-2155, Judge Gesell ruled that the refusal of the Department of Justice to waive fees for 40,000 pages of FBI Headquarters records on the Kennedy assassination was arbitrary and capricious. (See Exhibit 8) The waiver of fees in that case was for records that were available for review in the Reading Room at FBI Headquarters, and which were also being disseminated to several other paying requesters and to the Library of Congress. More recently, District Judge June L. Green found that where the primary benefit from disclosure of the records sought would be to the public rather than to the requester, the "unsupported judgment otherwise" of the Federal Bureau of Investigation and the Department of Justice "was a clear error, and constitutes arbitrary and capricious decisionmaking." See Memorandum Opinion in Mark A. Allen v. Federal Bureau of Investigation, et al., Civil Action No. 81-1206, at p. 5 (filed March 19, 1982). Exhibit 9)

Thus, in both known cases in which a court has been called upon to review the denial of a fee waiver for Kennedy assassination records, the court has in each instance found the refusal of the FBI and the Department of Justice to grant such a waiver to be arbitrary and capricious.

In affirming the fee waiver denial, OIPA's Acting Director based his decision on two factors which have no applicability to the circumstances of this case. First, he speculated that a library near Professor Blakey might have microfilm copies of the records. Professor Blakey has checked on this and informs the Court that the University of Notre Dame does not have copies of the records he seeks.

Secondly, he relied upon the fact that the materials sought are available at the Reading Room at FBI Headquarters in

Washington, D.C. But as Professor Blakey pointed out in his correspondence with the Bureau, he now lives at Notre Dame, Indiana, and has no independent source of funds with which to pay for the materials nor to travel to Washington, D.C. to review them at the FBI Reading Room. Thus, the "accessibility of the materials" upon which Acting Director Huff based his determination is unreal insofar as this requester is concerned. The materials sought are not in fact accessible to plaintiff. The fee waiver denial was thus based on (1) speculation which in point of fact is incorrect, and (2) a fact which had no application whatever to plaintiff's circumstances. As a result, Director Huff made a clear error in judgment, and the denial of the fee waiver was arbitrary and capricious on this basis alone.

The FBI's answers to plaintiff's interrogatories provide further evidence that the denial of plaintiff's fee waiver was arbitrary and capricious. The answers to Interrogatories No. 7 and No. 8 establish that there have been 159 persons or organizations who requested copies of Kennedy assassination records, that the only one to receive a fee waiver was Harold Weisberg, and he got that only because a court ordered it. From this it is apparent that the FBI routinely denies such requests without considering their individual merits, a practice which per se amounts to an abuse of discretion. This is further fortified by the answer to Interrogatory No. 11, which states in pertinent part: "No documentation exists as to the factors which were considered by FBI in denying plaintiff's request for a fee waiver."

The fee waiver determination, both initially and on appeal, fails to make any reference to the special credentials which Professor Blakey has which make him uniquely qualified to benefit the public through his study of these materials. These

credentials include both his experience as a government official and his stewardship as Chief Counsel and Acting Director of the House Select Committee on Assassinations. The latter position in particular has given him the background to be able to benefit the public with unique insights into these materials.

His present position as Professor of Law at Notre Dame University is also a relevant factor, since it places him in a position to both direct and receive assistance from others at the university who are interested in carrying out scholarly research into the assassination and related topics, such as the integrity of public institutions. In fact, Professor Blakey intends to use these materials for just such purposes. See February 15, 1982 Blakey Affidavit, ¶¶ 7-10, 11-12.

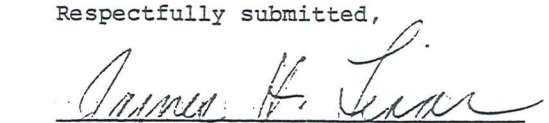
By not taking Professor Blakey's special qualifications into account, the Department of Justice ignored its own Interim Fee Waiver Guidelines, and thus again acted arbitrarily and capriciously. See Interim Guidelines, II(B)(1) and (2). (Exhibit 10)

Finally, plaintiff wishes to point out that the answers to interrogatories seem to establish that the FBI already has on hand one or more extant copies of the materials requested by plaintiff. Thus, answer to Interrogatory No. 5 states that the FBI made ten sets of the Kennedy assassination records it released to the public on December 7, 1977, and January 8, 1978, but the answer to Interrogatory No. 6 accounts for the dissemination of only eight sets of these records to requesters. If the FBI already has on hand one or more extra sets of the records which plaintiff seeks, then the FBI will not incur any additional copying costs if it simply provides one of these sets to him. Indeed, it will save itself storage costs.

CONCLUSION

For the reasons set forth above, summary judgment should be awarded in favor of plaintiff on the two issues briefed in this memorandum.

Respectfully submitted,



JAMES H. LESAR
Fensterwald & Associates
1000 Wilson Blvd., Suite 900
Arlington, Virginia 22209
703-276-9297

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

G. Robert Blakey
Notre Dame Law School
Notre Dame, IN 46556

Plaintiff

v.

Civil No.
81-2174

Department of Justice
Washington, D.C. 20530

and

Federal Bureau of Investigations
Washington, D.C. 20535

Defendants

Affidavit of Plaintiff

I, G. Robert Blakey, being duly sworn, depose and say as follows:

(1) I am a professor of law at the Notre Dame Law School, Notre Dame, Indiana 46556, where I teach courses related to the field of criminal law, criminal procedure, evidence, and matters generally relating to sophisticated investigations and prosecutions.

(2) From 1960 to 1964, I was a special attorney in the organized crime section of U.S. Department of Justice; from 1964 to 1969, I was a professor of law at the Notre Dame Law School; from 1969 to 1973, I was chief counsel of the Subcommittee on Criminal Laws and Procedures of the U.S. Senate Judiciary Committee; from 1973 to 1980, I was a professor of law at the Cornell Law School, Ithaca, New York 14850; and from 1977 to 1979, I was on leave from Cornell to serve as chief counsel and staff director to U.S. House Select Committee on Assassinations.

(3) I am a co-author of Racket Bureaus: Investigation and Prosecution of Organized Crime (National Institute of Law Enforcement and Criminal Justice 1978), an empirical study of

the management of joint attorney-police officer units engaged in the investigation and prosecution of sophisticated forms of criminal activity.

(4) I am a co-author of The Plot to Kill the President (Times Books 1981), a study of the assassination of President John F. Kennedy and the official investigations into the President's death.

(5) On June 11, 1979, I made a formal Freedom of Information Act request of the Federal Bureau of Investigation for a copy of all F.B.I. records relating to Lee Harvey Oswald and Jack Ruby. Related requests were also subsequently made.

(6) I requested a waiver of all fees, as, while I am not indigent, I have no independent source of funds with which to pay for the materials nor to travel to Washington where I could obtain access to them in the Public Reading Room.

(7) If I am given these materials I expect to review them in connection with a seminar on the Kennedy investigation to be taught here at the Notre Dame Law School. The materials themselves will be placed in the library where any member of the university community or the public will share equal access to them.

(8) I expect that one or more articles dealing with various aspects of the investigation of the President's death will be written either by myself or students, or others who will have access to the materials.

(9) I expect to make no commercial use of them myself.

(10) While aspects of them were made public and published in connection with the work of the House Select Committee on Assassinations, substantial portions of the files, most of which I had and exercised personal access to, have not been published or publicly analyzed.

(11) I understand that the files have already been prepared for release independent of this request, so that only factors of postage would represent costs not already incurred.

(12) I believe that public understanding of the processes following in the investigation assassination of President Kennedy

is not only historical interest, but contemporary concern, as it relates to public confidence in the integrity of the government, when announcements are made about actual and attempted assassinations of public officials as well as public figures, which, tragically, are running at about the rate of one a year. Similarly, too, it is crucial that the government learn from its mistakes in the past and reform its procedure in order that past mistakes not be repeated. Outside and knowledgeable review of government procedures can substantially contribute to public understanding and administrative reform, contributing to public safety and in integrity and efficiency in government and enhancing informed civic activity and the quality of our national life.

(13) Having had access to these materials and personally reviewed substantial portions of them as chief counsel to the House Select Committee on Assassinations, I can attest that they are pertinent to my request, are of such a quality that they can serve as an adequate basis for the purpose that I intend to put them, and that there will be substantial value in the work that I propose to do over and above that which has previously been done by public bodies, other scholars, or myself.

(14) Based on my knowledge of all aspects of my requests and how they have been handled, I also believe that the denial of my requests as well as the related fee waiver has not only been not an exercise of discretion consistent with applicable law and administrative standards but also indefensible, arbitrary and capricious, if not related to those aspects of my work on the congressional committee that were critical of the government in these areas.

G. Robert Blakey
Professor of Law
Notre Dame Law School
Notre Dame, IN 46556

Subscribed and sworn to before me this 15th day of February, 1982.

Notary Public

My Commission expires October 19, 1984.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

G. ROBERT BLAKEY, Plaintiff,	)	
v.	)	Civil Action No. 81-2174
DEPARTMENT OF JUSTICE, ET AL., Defendants.	)	

O R D E R

Upon consideration of plaintiff's cross motion for summary judgment, the opposition of defendant Federal Bureau of Investigation thereto, and the entire record herein, for the reasons expressed in the accompanying memorandum opinion, it is by the Court this ____ day of _____, 1982,

ORDERED, that plaintiff's motion be, and the same hereby is granted; and it is further

ORDERED, that defendants shall waive all search fees and copying costs for records made available to plaintiff as a result of this action; and it is further

ORDERED, that defendant Federal Bureau of Investigation shall release a copy of the so-called Bayse Memorandum to plaintiff within ____ days of the date of this Order.

_____
UNITED STATES DISTRICT JUDGE

Exhibit 1 C.A. No. 81-2174

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

G. Robert Blakey,

Plaintiff

v. Civil Action 81-2174

Department of Justice
and
Federal Bureau of Investigation

Affidavit of G. Robert Blakey

I, G. Robert Blakey, being duly sworn, depose and say as follows:

(1) I am a professor of law at the Notre Dame Law School, Notre Dame, Indiana, 46556, where I teach courses related to the fields of criminal law and criminal procedure.

(2) From 1960 to 1964, I was a special attorney in the Organized Crime and Racketeering Section of the Criminal Division of the United States Department of Justice; from 1966 to 1967, I was a special consultant on organized crime to the President's Commission on Law Enforcement and Administration of Justice; from 1969 to 1973, I was Chief Counsel of the Sub-committee on Criminal Laws and Procedures, of the United States Senate Judiciary Committee; and, from 1977 to 1979, I was the Chief Counsel and Staff Director of the Select Committee on Assassinations of the United States House of Representatives.

(3) Based on the experience I noted in paragraphs (1) and (2), I have become familiar with the administrative and other practices of the United States Department of Justice (hereinafter: Department) and the Federal Bureau of Investigation (hereinafter: Bureau).

(4) I have also reviewed the affidavits of Special Agents John N. Phillips and James C. Felix of February 18, 1982.

I. Status of Rogelio Cisneros

(5) The Department and the Bureau have already determined that the investigation of the death of President John F. Kennedy

is a matter of public interest by releasing under The Freedom of Information Act the files that they consider relevant to the President's death, including a substantial body of material on Rogelio Cisneros and groups that he was apparently associated with .

(6) This judgment is well-taken, both generally and in particular to Mr. Cisneros. A bibliography compiled in 1978 by the Library of Congress for the Select Committee on Assassinations of published work on the death of the President contains over 1000 entries. Since that time, at least three major books on the assassination have been published, one of which was on the New York Times best seller list for a number of weeks. The role, too, of the so-called Odio incident, as noted below, in the investigation of the President's death remains unsettled in the minds of even those who do not subscribe to a conspiracy theory of the assassination. Wesley Liebeler, the Warren Commission counsel in immediate charge of the investigation of the incident, testified to the Select Committee on Assassinations:

> MR. CORNWELL: The Sylvio Odio incident was never resolved to your satisfaction, was it?
>
> MR. LEIBLER: No, not really. (XI JFK Appendix at 223 (1979))

In fact, Mr. Cisneros was identified by the Rev. Walter J. McChann (Warren Commission Exhibit No. 2943) as one of the three individuals including the President's assassin, Lee Harvey Oswald, (Warren Commission Ex. No. 3146), who may have visited Mrs. Sylvio Odio in Dallas, Texas, in the summer of 1963. Cisneros, on the other hand, denied to the Secret Service that he knew Oswald or that he was there at the time of the Oswald visit, although he acknowledged being in Dallas that summer and knowing Odio (Warren Commission Ex. No. 2896). Mrs. Odio, a member of an anti-Castro Cuban group known as the Cuban Revolutionary Junta (JURE), told the Warren Commission that one of the three individuals who visited her quoted the individual she identified as Lee Harvey Oswald as saying, following the visit to her apartment, that Cubans "don't have any guts. . . because President Kennedy should have been assassinated after the Bay of

Pigs, and some Cubans should have done that, because he was the one that was holding the freedom of Cuba. . . ." (Warren Commission Report at 322 (1964)).

(7) The House Select Committee on Assassinations concluded in January 1979, that "President John F. Kennedy was probably assassinated as a result of a conspiracy" (Select Committee's Report at 95 (1979)) and that "the available evidence does not preclude the possibility that individual members [of anti-Castro Cuban groups] may have been involved." (Id. at 129).

(8) Cisneros' background in anti-Castro Cuban groups, as well as his associations with other individuals and various groups, who may have had a role in the death of the President, can hardly be termed "not a matter of public interest." His identity as a possible associate of Lee Harvey Oswald in the context of highly incriminating evidence - an explicit death threat a month before the assassination itself - makes it of substantial public interest, as the Department and the Bureau have already acknowledged by previously releasing documents about him. Any additional invasion of privacy of Mr. Cisneros, beyond that already connected with the release of information in the past, cannot be termed "unwarranted" under 5 U.S.C. §552 (7)(c) or 5 U.S.C. §552 b (c)(7)(C). The only outstanding issue is shall the Department and the Bureau control the test of relevancy (not privacy) when these agencies have steadfastly maintained a single assassin theory in the face of substantial evidence to the contrary. The Freedom of Information Act and the Privacy Act suggest that the records should be open, so that the truth can be determined, not by interested agencies of government, but by the people.

II. Complete and Thorough Record of Search in the Acoustics Area

(9) By letter dated October 29, 1980, I requested copies of various documents relating to the Department's and the Bureau's study of the acoustics work of the Select Committee on Assassinations, including "all supporting documents, data and calculations by the Bureau. (Exhibit S, in this litigation).

(10) On May 21, 1981, I was falsely advised by James K. Hall of the Bureau that it had "no background material pertaining

to our review." (Exhibit X, in this litigation).

(11) When it came time to make this representation, subject to the jurisdiction of this court, and under penalties of contempt and perjury, I was forwarded on February 1, 1982, two such documents.

(12) Based on my experience with Department and Bureau procedures, it is my considered opinion that there is a substantial possibility that these documents still do not represent full compliance with my original request.

(13) A Bureau memorandum of November 19, 1980, makes reference to a letter of November 8, 1979, of Mr. Robert L. Keuch, a copy of which , according to my records, I have not yet received. A Bureau memorandum of January 14, 1981, makes reference to a letter of January 7, 1981, of Jeffrey I. Fogel, a copy of which, according to my records, I have not yet received. A Department memorandum of January 26, 1981, requested action of the Bureau. I have, according to my records, not received any documents relating to the Bureau's comments on or response to the Department request.

(14) In short, there should be a number of Department and Bureau documents relating to Department requests for Bureau action as well as Bureau comments and responses to Department requests. Bureau offices that should be involved would include the Technical Services Division, the Criminal Investigative Division, the Legal Counsel Division, the Office of Public Information as well as the offices of various assistant directors and the director.

(15) Neither the Department nor the Bureau has made on the record of this litigation a good faith effort to comply with my original request in either a timely or complete fashion. Nothing less that the identification of all individuals involved in any fashion in the Department's and the Bureau's response to the request of the Select Committee on Assassinations for a review of its acoustical work as well as sworn statements from each that the documents produced or identified so far constitute all known documents can dispel, on this record, the powerful inference that

more documents, not identified or produced, still exist.

(16) What is at stake here is the performance of the Department and the Bureau in compliance with a request of a Congressional Committee, a matter uniquely one which the Freedom of Information Act was intended to make a question for public review.

III. Withholding of La Cosa Nostra/ Criminal Commission Reports

(17) On November 29, 1979, I requested two specific FBI reports on organized crime: "The Criminal Commission" June 29, 1962, and "La Cosa Nostra" July 19, 1965. (Exhibit H, this litigation)

(18) I read the Report of June 29, 1962, while I was a special attorney in the Organized Crime and Racketeering Section of the Department; I also recall having access to the Report of July 19, 1965, while I was a special consultant to the President's Commission on Law Enforcement and Administration and Justice.

(19) It is my considered opinion that the excised Report produced in response to the request for the "Criminal Commission" dated June 29, 1962, is not the proper Report. This report is a field report barely 11 pages long. The Report I requested - and remember - was a national summary - the first given to the Department of Justice, over 100 pages long, and similar to the second report produced. It should be out of New York City or Philadelphia. It was prepared - I remember, but am not sure - by Special Agent Joseph Verica (sp.).

(20) Special Agent James C. Felix suggests (Aff. ¶(5)), using boiler-plate language, that it was proper to withhold virtually all of the Report of July 19, 1965, because of information obtained from (1) confidential sources, (2) unwarranted invasion of personal privacy, (3) names of individual investigative interest, (4) information about third parties, (5) identities by state and local law enforcement agencies, and (6) names of FBI agents and support personnel.

(21) This blanket excision is unwarranted. I have no objection to a limited excision based on (1), (3), (4), (5), and (6) above, but (1) and (2) - asserted in a blanket fashion -

violate the Freedom of Information Act, as I understand it.

(22) It is not true that all, or even most, of the information in the two reports I requested comes from confidential sources. In fact, most of it came from electronic surveillance. I know from a variety of sources that electronic devices were used, inter alia, in the Boston area, in Buffalo, in Chicago, in Kansas City, in Las Vegas, in the Los Angeles area, in Miami, in Milwaukee, in the Newark area, in Philadelphia, in the San Diego area, and in Tampa. Such devices are not "confidential sources."

(23) The nature of the surveillance employed can be seen, for example, from the opinion of the Second Circuit Court of Appeals in United States v. Magaddine, 496 F.2d 455 (2d Cir. 1974). The Court observed:

> The undisputed evidence adduced at the suppression hearing established that beginning in April, 1961, the FBI placed bugs at several locations in the Buffalo area, including the Magaddine Memorial Chapel in Niagara Falls, the Capitol Coffee Shop also located in Niagara Falls, and the Camelia Linen Supply Company in Buffalo. According to the government, the purpose of this electronic surveillance was to gather intelligence on a feud between the Magaddine and Bonanno families over control of certain illegal activities in Canada and the Western United States. The surveillance, which the government conceded to be illegal, continued until sometime in 1965. (496 F.2d at 457)

(24) Many of the principal subjects of the surveillance - Magaddine, for example, - are dead. As such, it is difficult to see how it can be said that they have any privacy interests under 5 U.S.C. §552 (7)(c) or 5 U.S.C. §552 b (c) 7 (C).

(25) The rest of the principals have been identifed, often by the Department or the Bureau in criminal proceeding, congressional hearings, and the media as what they are: major figures in organized crime. It borders on the silly to suggest - in a blanket fashion - that their personal privacy outweighs the public interest in who they are, as shown in Reports 17 years old.

(26) For an identification of the principals by the Department and the Bureau in Congressional proceedings, in which I was the chief counsel, see Measures Relating to Organized Crime, Hearings before the Subcommittee on Criminal Laws and Procedures

of the Committee on the Judiciary of the United States Senate, 90th Cong. 1st Sess. at 124-139 (1969).

(27) To use a football analogy, this request, as in the case of the others, is being "stiff-armed" by the Department and the Bureau. However proper that may be with a private individual - it is not, under the law of the land, which applies to the government as it does to its citizens - it ought to be intolerable in a Court of the United States.

IV Withholding of Acoustics Memorandum

(28) On February 3, 1981, I requested, in follow up of my letter of January 5, 1981, (Exhibit O, this litigation), copies of all memoranda written in connection with. . . [the] appearance [of the FBI] both before and after [a National Science Foundation Panel on January 31, 1981]." (Exhibit W, this litigation)

(29) It is not clear that this request was answered until this litigation was brought. By letter dated May 21, 1981, (Exhibit Y, this litigation), I was told by the Bureau that there was, "in further response to your letter dated January 5, 1981," no "background material," (Exhibit X, this litigation).

(30) The affidavit of Special Agent John N. Phillips of February 18, 1982, paragraph (5) (A) indicates, for the first time, that there is, however, in existence, as I supposed, a memorandum setting "forth the details of the appearance on January 31, 1981, of FBI personnel before the Committee on Ballistic Acoustics in the National Research Council of the National Academy of Sciences. . . ."

(31) Nevertheless, this memorandum being withheld because the work of the NSF Committee is confidential.

(32) By the Bureau's own admission, the memorandum, however, deals with the appearance of the Bureau before the Committee, a fact that is not confidential. It concerns the Bureau's performance in reviewing the work of the Select Committee on Assassinations, about which the Department and the Bureau have already released a public report.

(33) According to the memorandum of January 26, 1981, the Bureau was to give to the Committee the results of its technical

work, not policy recommendations. Robert L. Keuch, moreover, observed:

> I believe that it would be extremely inappropriate for any component of the Department to request or encourage the exclusion of other invited experts from any portion of [the January 31, 1981] meeting. I base my opinion upon my understanding that much of the FBI presentation will be critical of the research effort of the other experts present. A Department endorsed exclusion of those experts could generate public doubt regarding the ability of the FBI to support its widely-publicized acoustics report. (emphasis added)

(34) This effort to create a non-existing exception to the Freedom of Information Act for this memorandum is wholly unjustified, based on the information the Department and the Bureau have already released.

(35) Accordingly, the motion of the Department and the Bureau for summary judgment on the grounds that there is no genuine issue of material fact and that as a matter of law judgment for the defendants should be granted ought to be denied.

G. Robert Blakey
Professor of Law
Notre Dame Law School
Notre Dame, IN 46556

Subscribed and sworn to before me on this 17th day of March, 1982.

Rosemary K. Rutter
Notary Public

My commission expires Nov. 25, 1983.

Exhibit 2 Civil Action No. 81-2174

Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853

June 11, 1979

S.A. David G. Flanders
FOIA/DA Section
FBI Headquarters
Washington, D.C.

Re: Freedom of Information Request
Oswald and Ruby Files

Dear Mr. Flanders:

Pursuant to the Freedom of Information Act 5 U.S.C. 552, I hereby request a copy of the files of the Federal Bureau of Investigation on Lee Harvey Oswald and Jack Ruby. I also request that the Bureau waive any fees involved.

I recognize, of course, that these materials run into several hundred files. Nevertheless, the basic files have been already prepared for delivery in connection with other public requests and the work of the Select Committee on Assassinations. Only the cost of copying and transportation would be involved. While I am not indigent, I have no independent funds that could be used for copying or transporting the files. I also believe that my use of the files would primarily benefit the general public.

I expect that as a result of the recommendations of the Select Committee, there will be a public discussion on what, if any, action the Bureau should take. While I read substantial portions of the files as chief counsel to the Committee (I no longer have access to the committee files, which are now in the Archives) I never completed a personal review of the entire file, and, in any event, they should now be reexamined by one knowledgeable with the Committee's entire investigation, so that concrete recommendations can be made to the Bureau and the Department about what, if anything, should be done to finish the investigation. The results of my examination will, of course, be made available to the Bureau, the Department, and the House Judiciary Committee. I believe that my review and recommendations would serve the general public.

In addition, I expect that I will teach a course at the Law School in the future on the legal and other apsects of the Kennedy case. I would expect that as I finish my use of the files that I would turn them over to the Library for its use, where the general public would have access to them. Out of class room use of the files, I would also expect that one or more publications would result that would contribute to public understanding.

If there is any more information that I can supply that would assist in securing a waiver of fees, please contact me.

Thank you.

Sincerely,

G. Robert Blakey
Professor of Law

Exhibit 3 Civil Action No. 81-2174

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

June 21, 1979

G. Robert Blakey, Esq.
Professor of Law
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853

Dear Mr. Blakey:

This is to acknowledge receipt of your letter dated June 11, 1979, in regard to your Freedom of Information-Privacy Acts request.

Please be advised that the material you are seeking concerning the John F. Kennedy assassination has already been processed and this material is available to be reviewed at no cost during the working hours of 9 a.m. to 4 p.m., in Room 1060, J. Edgar Hoover F.B.I. Building, 10th and Pennsylvania Avenue, Washington, D. C. 20535. We require 48 hours advance notice from individuals who desire to make an appointment to review materials. To make such an appointment, you may contact us at telephone number (202) 324-3762.

Your request for a waiver of fees is being considered and you will be notified at a later date concerning the results of this determination.

Sincerely yours,

David G. Flanders /bkl

David G. Flanders, Chief
Freedom of Information-Privacy
Acts Branch
Records Management Division

Exhibit 4 Civil Action No. 81-2174

Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853

August 14, 1979

Mr. David G. Flanders
Chief
F.O.I.A. Branch
United States Department of
Justice, F.B.I.
Washington, D.C. 20535

Dear Mr. Flanders:

This is in furtherance of my letter of June 11, 1979, which you answered on June 21, 1979.

In my letter of June 11, I requested a copy of the files of the Bureau on Lee Harvey Oswald and Jack Ruby. I also requested a waiver of fees.

Your letter of June 21, 1979, informed me of the availability of these files for public access in Washington, D.C. Obviously, since I live in Ithaca, New York, this access, while appreciated, does not meet my purpose.

I remain interested in receiving a copy of the files. Your letter of June 11, 1979, indicated that my request for a waiver was being considered. Could you inform me of the status of the request, as it is now almost two months from the date of my original request?

Thank you.

Sincerely yours,

G. Robert Blakey
Professor of Law

GRB:peb

Exhibit 5 Civil Action No. 81-2174

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

September 12, 1979

G. Robert Blakey, Esq.
Professor of Law
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853

Dear Mr. Blakey:

This is to acknowledge receipt of your letter dated August 14, 1979, in connection with your Freedom of Information-Privacy Acts request.

Reference is made to my letter dated June 21, 1979. The records which you are seeking have been processed, and documents available for release consist of the following pages:

Jack Ruby	15,845
Lee Harvey Oswald	36,122

Pusuant to Title 28, Code of Federal Regulations, Sections 16.9 and 16.46, there is a fee of ten cents per page for duplication. Upon receipt of your check or money order, payable to the Federal Bureau of Investigation in the amount of $1,584.50 for documents pertaining to Jack Ruby and $3,612.20 for documents pertaining to Lee Harvey Oswald, these documents will be forwarded to you.

Your request for a waiver of fees has been considered in accordance with the provisions of Title 5, United States Code, Section 552 (a)(4)(A) which permits an agency to waive or reduce fees in the public interest when furnishing information is considered as primarily benefiting the general public. In balancing the potential public benefit in this instance against the concomitant expenditure of public funds, we have determined that under reasonable standards the interests of the general public appear more likely to be served by the preservation of public funds. Therefore, your request for a waiver of fees is denied.

If you disagree with the decision regarding a fee waiver, you may appeal to the Associate Attorney General.

G. Robert Blakey, Esq.

Appeals should be directed in writing to the Associate Attorney General (Attention: Office of Privacy and Information Appeals) Washington, D. C. 20530, within thirty days from receipt of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request so that it may be easily identified.

Sincerely yours,

David G. Flanders/ERR

David G. Flanders, Chief
Freedom of Infromation-Privacy
Acts Branch
Records Management Division

Exhibit 6 Civil Action No. 81-2174

Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853

(21)

September 17, 1979

Associate Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Attention: Office of Privacy and Information Appeals

Dear Sir:

Attached are copies of my correspondance with the F.B.I. in reference to a waiver of fees request in connection with a request for a copy of the Oswald and Ruby files.

Accordingly, I appeal the denial of fees waiver, in whole or in part, on the basis of the materials already presented.

Sincerely,

G. Robert Blakey

GRB/ss
Enclosures.

Exhibit 7

Civil Action No. 81-2174

U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

14 OCT 1981

Bernard Fensterwald, Esquire
Fensterwald & Associates
1000 Wilson Boulevard
Suite 900
Arlington, Virginia 22209

Re: Appeal No. 9-2014
RLH:LFE

Dear Mr. Fensterwald:

Robert Blakey appealed from the action of the Federal Bureau of Investigation on his request for a fee waiver for materials pertaining to Lee Harvey Oswald and Jack Ruby.

After careful consideration of his appeal, I have decided to affirm the initial action in this case. As the Bureau informed Mr. Blakey, the materials he seeks consist of over 50,000 pages. These materials have been reviewed and processed by the Bureau and are available for inspection and copying in the Bureau's public reading room. In addition, I have been advised by the Bureau that microfilm copies of these materials have been produced by the Microfilm Corporation of America. It is possible that a library near him has a copy of this microfilm. Accordingly, because of the accessibility of the materials your client seeks to review, a fee waiver for the cost to duplicate his own copy of these records is, in my opinion, unwarranted. This has been the policy of the Department of Justice since the records were initially processed. You may be interested to know that four news organizations and one university have purchased all of the Kennedy materials. Furthermore, two individual requesters have reviewed the materials in the reading room and paid duplication costs for a substantial portion of them.

I regret our response to this appeal took so long. The Department has been reviewing and evaluating how to apply its fee waiver policy and we are now trying to make a concerted effort to respond to all the fee waiver appeals we have received.

C.A. 81-2174

ATTACHMENT A

Although I am aware that you have filed suit concerning this matter, I am required by statute and Department regulation to advise you of your client's right to judicial review of my action on this appeal. Such review is available to Mr. Blakey in the United States District Court for the judicial district in which he resides or has his principal place of business, or in the District of Columbia, which is also where the records he seeks are located.

Sincerely,

Jonathan C. Rose
Assistant Attorney General

By: 
Richard L. Huff, Acting Director
Office of Privacy and Information Appeals

Exhibit 8 Civil Action No. 81-2174

IN THE 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 plaintiff's motion for preliminary injunction and defendants' motion to dismiss and supplemental motion to dismiss or for partial summary judgment, the memoranda of points and authorities filed by the respective parties in support thereof and in opposition thereto, of the entire record herein, and of the argument of counsel in open Court on this day, and for the reasons set forth by the Court in its oral decision this day, it is by the Court this 16th day of January, 1978,

ORDERED that plaintiff's motion for preliminary injunction be, and it hereby is denied;

And it appearing that defendants' refusal to waive fees is arbitrary and capricious, it is

FURTHER ORDERED that defendants shall make a copy of the materials scheduled for release on January 18, 1978, available to plaintiff, without charge, with all reasonable dispatch; and it is

FURTHER ORDERED that this decision is limited to the circumstances herein presented and should not be construed as establishing precedent for cases involving other circumstances.

Gerhard A. Gesell

UNITED STATES DISTRICT JUDGE

Exhibit 9 Civil Action No. 81-2174

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK A. ALLEN)
Plaintiff)
v.) Civil Action No. 81-1206
FEDERAL BUREAU OF INVESTIGATION, et al.)
Defendants)

FILED
MAR 19 1982
CLERK, U.S. DISTRIC COURT
DIST: CT OF COLL MBIA

MEMORANDUM OPINION

This action arises under the Freedom of Information Act, 5 U.S.C. § 552 (the Act). Plaintiff has moved for waiver of all search fees and copying costs. The non-congressional defendants contend that plaintiff has failed to exhaust his administrative remedies, and that the administrative denial of his fee waiver request was not arbitrary and capricious. For the reasons expressed below, the Court grants plaintiff's motion.

I.

On December 12, 1980, Mark Allen wrote to the Federal Bureau of Investigation (FBI), requesting "all correspondence or any records of any communications between the U. S. House Select Committee on Assassinations and the Federal Bureau of Investigation relating to the Select Committee's investigation into the assassination of President John F. Kennedy." Mr. Allen requested these records "as part of a program of scholarly research into the work of the Assassinations Committee," and sought a waiver of search and copying fees. By letter dated January 30, 1981, Mr. Allen was informed that the FBI was in the process of determining whether Congress maintained control over the requested documents. The fee waiver determination was held in abeyance pending that determination.

Six weeks after this initial response, the FBI wrote Mr. Allen again. In this letter, dated March 13, 1981, the FBI referred to two letters from Congress requesting non-disclosure of the Assassinations Committee's records. Neither of the letters was provided to Mr. Allen. Although the FBI did not explicitly adopt the Congressional position, the letter informed Mr. Allen he could appeal "any denial contained herein" to the Associate Attorney General. Mr. Allen appealed the FBI's determination by letter dated March 19, 1981.

On April 6, 1981, plaintiff wrote to the FBI again and asked for all records relating to the Assassinations Committee's investigation of President Kennedy's murder not covered by his previous request. Plaintiff requested specifically material generated by the Assassinations Committee which "does not qualify as a congressional record. . ." He further asked for a waiver of all copying and search fees or, in the alternative, that the requested records be available in the FBI's public reading room for inspection and copying. The FBI reiterated its refusal to release material "generated in response to requests from" the Assassinations Committee. This denial was dated April 13, 1981. Four days later, Mr. Allen appealed the FBI's determination to the Associate Attorney General. Plaintiff was informed that decision on both appeals would be delayed because of a substantial backlog of pending appeals and a shortage of attorneys. The record does not reflect any action by the Associate Attorney General on either of plaintiff's appeals.

Plaintiff filed this action on May 22, 1981. On December 8, 1981, defendants stated that Congress did not maintain control over all of the requested records. Rather, defendants represented that four categories of documents are agency records: (A) FBI records sent to the Assassinations

Committee; (B) FBI records made available to the Assassinations Committee at FBI offices; (C) Internal FBI memoranda pertaining to the Assassinations Committee; and (D) FBI communications with other agencies pertaining to the Assassinations Committee. At hearings before the Court on December 8, 1981 and December 22, 1981, defendants stated that the question of fee waiver remained unresolved. Not until December 31, 1981, the day plaintiff filed and hand-served the instant motion, did the FBI send a letter to plaintiff denying his fee waiver request.

II.

The doctrine of exhaustion of administrative remedies need not be applied rigidly in every case. The doctrine provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." McKart v. United States, 395 U. S. 185, 193 (1969), citing Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 50-51 (1938). It is subject to numerous exceptions. Application of the doctrine requires an understanding of its purposes and of the particular administrative scheme involved. Ibid.

Defendants argue that plaintiff has failed to exhaust his administrative remedies by not appealing the FBI's December 31, 1981 denial of fee waiver. The denial informed plaintiff of his right to appeal within thirty days to the Assistant Attorney General.

This is not a case where the applicable statute requires an administrative appeal from the initial denial of a fee waiver. Cf. Myers v. Bethlehem Shipbuilding Corp., supra. Rather, the Act states that a requester has exhausted his remedies when the agency fails to respond to an initial request within ten days or an appeal within twenty days. 5 U.S.C. § 552(a)(6)(A), (C). Since defendants have not

complied with the statutory time limits for either of plaintiff's requests, plaintiff has exhausted his administrative remedies. Marschner v. Department of State, 470 F.Supp. 196 (D. Conn. 1979); Information Acquisition v. Department of Justice, 444 F.Supp. 458 (D.D.C. 1978). Plaintiff asked for fee waivers in both of his requests. Once the record requests were denied, plaintiff could assume reasonably that the fee waiver requests were also denied. Plaintiff's administrative appeals thus included his request for a fee waiver.

Defendants contend that there was no need to respond to the fee waiver request until they determined that some of the records belonged to the FBI, not Congress. This determination was made December 8, 1981, twelve months after plaintiff's initial request. Three weeks more passed before plaintiff's fee waiver request was denied. With due consideration to the number of records involved in this action and the complexity of the legal issues, defendants' actions do not represent the prompt response required by the Act. See U.S.C. § 552(a)(3) (". . .each agency, upon any request for records which (A) reasonably describe such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person"). To require plaintiff to appeal the December 31 denial of fee waiver would cause further unjustified delay.

III.

Alternatively, defendants contend that their denial of a fee waiver should be upheld because it was not arbitrary and capricious.

Section 552(a)(4)(A) of the Act states that "Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the infor-

mation can be considered as primarily benefitting the public." This Court has reviewed agency refusal to waive fees under the arbitrary and capricious standard, Eudey v. Central Intelligence Agency, 478 F.Supp. 1175 (D.D.C. 1979); Bussey v. Bresson, No. 81-0536, 2 Govt. Discl. ¶81,228 (D.D.C. June 6, 1981), and has ordered a fee waiver where the agency refusal was found arbitrary and capricious. Eudley v. Central Inteligence Agency, supra.

Defendants' letter denying a fee waiver recited seven factors as having been considered: the nature of information requested; the purpose for which the information is sought; the size of the public to be benefitted; the likelihood that tangible public good will be realized as a result of this release; whether disclosure is timely with regard to a matter of current public interest; its relevance to important legal, social or political issues; and whether the material is personal in nature or will serve only the private interests of the requester. Defendant recites these factors, but does not apply them to plaintiff's case.

With regard to the factors the Court notes that the Congressional investigation of President Kennedy's assassination is clearly a matter of public interest. The Kennedy assassination is one of the most talked about events in the history of our nation, and a subject in which the public has demonstrated almost unending interest. See Allen v. Central Intelligence Agency, 636 F.2d 1287, 1300 (D. C. Cir. 1980). The primary benefit from disclosure of Assassination Committee records, if warranted under the Act, would be to the public. Defendants' unsupported judgment otherwise therefore was a clear error, and constitutes arbitrary and capricious decisionmaking.

Defendants assert two more justifications for the denial in their response to plaintiff's motion: (1) insufficient information was presented to the FBI to show that release to plaintiff would benefit the public; and (2) the requested records have either been published by the Assassinations Committee, made available in the FBI reading room as a result of other requests, or are irrelevant to President Kennedy's assassination. The Court finds they also lack merit.

Mr. Allen informed the FBI in his first letter that he was requesting the records "as part of a program of scholarly research into the work of the Assassinations Committee." He continued: "the performance and cooperation of the (FBI) in this probe and previous investigations into the murder of President Kennedy has been a subject of considerable discussion throughout the years. For this reason I believe the public would be significantly benefited by the release of the requested records, which would clarify the (FBI's) role in what may be the final official inquiry into the JFK assassination." Plaintiff presented sufficient information for the FBI to conclude that release to him would benefit the public at large rather than just the plaintiff himself. Cf. Rizzo v. Tyler, 438 F.Supp. 895 (S.D. N.Y. 1977) (release to inmate of files regarding himself would benefit only inmate, not the public).

Plaintiff has indicated that he does not seek documents available in the FBI reading room. Plaintiff has submitted an affidavit from Professor G. Robert Blakey, a former chief counsel and staff director of the Assassinations Committee. Professor Blakey stated that the Committee did not publish everything it wanted to publish or everything which was relevant to President Kennedy's assassination. The Court accords substantial weight to Professor Blakey's affidavit because it is based on personal knowledge.

For the reasons stated above, the Court grants plaintiff's motion, and orders defendants to waive all search fees and copying costs for records made available to plaintiff as a result of this action. An appropriate order accompanies this opinion.

JUNE L. GREEN
U. S. DISTRICT JUDGE

March 19, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK A. ALLEN)
Plaintiff)
v.) Civil Action No. 81-1206
FEDERAL BUREAU OF INVESTIGATION, et al.)
Defendants)

FILED
MAR 19 1982
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

O R D E R

Upon consideration of plaintiff's motion for waiver of all search fees and copying costs, defendants' opposition, plaintiff's replies, the entire record in this action, and after oral argument on February 4, 1982, for the reasons expressed in the accompanying memorandum opinion, it is by the Court this 19th day of March 1982,

ORDERED that plaintiff's motion for waiver of all search fees and copying costs is granted; and it is further

ORDERED that defendants shall waive all search fees and copying costs for records made available to plaintiff as a result of this action.

JUNE L. GREEN
U. S. DISTRICT JUDGE

Exhibit 10 Civil Action No. 81-2174

United States Department of Justice
OFFICE OF INFORMATION LAW AND POLICY
WASHINGTON, D.C. 20530

31,261

28pp
$2.75

December 18, 1980

MEMORANDUM

O: All Federal Departments and Agencies
Attention: Principal Legal and Administrative Contacts on Freedom of Information Act (FOIA) Matters

ROM: Robert L. Saloschin, Director
Office of Information Law and Policy

UBJECT: Interim fee waiver policy for administering the provision for waiver or reduction of search and duplication fees in subsection (a)(4)(A) of the Freedom of Information Act (FOIA), 5 U.S.C. 552.

(Note: The following memorandum is an interpretation of law and a statement of interim policy within the meaning of 5 U.S.C. §552(a)(2)(B) which was adopted on the above date and which is being placed in the Department of Justice reading room.)

This memorandum provides additional and comprehensive guidance to agencies for their administration of the fee waiver provisions of FOIA. It was prepared in response to continuing indications from agencies and others of a need for additional guidance on this subject, and it has been reviewed by the Department's Freedom of Information Committee, by persons in various agencies, and by the Associate Attorney General. Comments are invited from members of the public, now or at any time, on whether there is a need for different or still further guidance on this subject. It is contemplated that this interim policy may be reissued, with or without modifications, after review of such comments and of experience under this interim guidance.

The annual cost of administering FOIA is substantial; only a small fraction of the cost is recovered through fees; and the cost of processing particular requests is not invariably or even usually proportionate to the public benefits which flow from those particular requests.1/

Accordingly, to the extent the statutory basis for a waiver or reduction is not found, decisions on whether to reduce or waive a fee should take into account the question of financial loss to the government, especially if the fee involved is sizable. Where it appears that the statutory benefit standard has been satisfied to some degree, but that the magnitude of the benefits to the public is quite limited or the likelihood they will actually occur is quite uncertain, the policy of minimizing financial loss to the government may be reconciled with the previously discussed general policy of enhancing such benefits, for example, by reducing instead of waiving completely the fees involved.

B. Policy factors that are applicable in estimating whether and to what extent the general public will benefit from furnishing the information

1. Preliminary Analysis -- dissemination of information or of benefits -- effective dissemination of beneficial information to "general public."

The process of estimating whether and to what extent the general public may benefit from furnishing the requester with the information in the requested records may be analytically divided into two principal inquiries, namely, (i) whether such information contains a significant potential for benefitting the general public, and (ii) whether releasing such information to the requester is likely to result in such potential benefits actually being received by the general public.

Note that the information containing such potential public benefits need not itself be conveyed to the public, so long as the benefits in it are. For example, specialized scientific information which can significantly advance medical research on serious illnesses need not be disseminated to the general

1/ See generally, on the costs and benefits of administering FOIA, articles entitled "Estimating FOIA Costs" and "Costs and Benefits -- FOIA," respectively, in Vol. 1, No. 2 and Vol. 1, No. 3 of FOIA UPDATE, a quarterly newsletter published by this Office (Winter 1980 and Spring 1980 issues).

public if it will be disseminated to researchers so as to assi in the development of better treatments for such illnesses. Comparable benefits may be involved if specialized historical information enables historical researchers to provide better foundations of understanding for the development of future public policies.

However, in cases where potentially beneficial information can be readily understood and utilized by members of the genera public who are not specialists, satisfaction of the statutory standard may largely turn upon the prospects that release of th information to the requester will result in its effective dissemination to the general public. In this context, the term "general public" does not necessarily mean the entire public, but it does mean a substantial part of the public, such as public library patrons, newspaper readers, broadcast audiences, or other population groups of a national, regional, or local nature, including homemakers, students, parents, commuters, investors, retirees, factory workers, etc., which are not demarcated in exclusive terms, such as the stockholders of a particular company.

The effectiveness of dissemination to such a general public may depend on many aspects of communications, such as speed, cost, form, accuracy, accessibility, storability, retrievability, and the percentage of the audience that is reached, but the ultimate test of effective dissemination of information to nonspecialists is the likelihood that significant numbers of persons will have the information when it may benefit them or benefit other members of the general public.

Benefits to members of the public other than the recipients of the information may be important for nonspecialized as well as for technical or complex information. For example, effective dissemination to commuters of information on car operation or maintenance which will help them to conserve motor fuel would not only benefit them but also would benefit a larger general public through its effects on the nation's energy supply and inflation problems.

2. Identity of the requester. While the identity of a FOIA requester is usually not a proper factor for agencies to consider in granting or denying requests for access to records, 2/

2/ For a recent discussion of the circumstances in which the identi and purposes of a requester may properly be taken into account in deciding whether to grant access, see the May 29, 1980 letter from this Office to the FTC, which is available to all agencies and the public, at 3-7 (as regards discretionary releases of exempt materia and at 7 (as regards determination of whether requested records are legally withholdable from the requester).

the requester's identity and attributes, such as his or her experience, purposes, plans, and capabilities, may sometimes be proper or even important factors to consider in acting on a request for a fee waiver.

These attributes of the requester may be pertinent to fee waivers in at least three respects: first, a requester's expertise on the subject of the requested records may sometimes help an agency estimate whether the records contain information of potential benefit to the general public. Such requesters may include, e.g., scholars, scientists, historians, former agency officials, or others with extensive background on the subject of the requested records.

Second, where the potential benefits of the information in the records seems clear but specialized knowledge will be required if the benefits are to be extracted and conveyed to the public, the requester's attributes may sometimes help the agency estimate whether such benefits will actually be realized by the public. Here, the agency should consider both the requester's expertise and whether he/she is likely to extract the potential benefits from the specialized information and convey them to the public, for example, by research and publication.

Third, where the potential public benefits do not require specialized subject matter expertise to appraise or effectively convey, requesters may vary in their ability to see that the information will be effectively disseminated. Agencies should remember that journalists and popular writers are more likely than a random requester to improve the prospects that beneficial information will actually be conveyed to the general public.

The foregoing does not mean that the attributes of a particular requester are themselves dispositive on a fee waiver, but only that such facts may and sometimes should be considered. The agency is not under an obligation to solicit or collect facts about the requester, nor need it ordinarily give much weight to bare, unsupported general assertions by a requester that he/she is a scholar or expert in a particular field, or that he/she is a journalist or writer who will disseminate the information to the public.

There are two cautions concerning agency consideration of a requester's identity in acting on fee waivers. First, agencies should hesitate to ascribe a definite or uniform quantum of weight or importance to the characterization of a requester (assuming the agency accepts it) as a "journalist," or "scholar," or "historian," or "scientist," or "writer," or the like. Second, agencies should not employ rigid tests

for deciding whether a particular requester should be deemed within such a characterization, although an agency may properly use such characterizations for convenience. Both of these cautions rest on a common reason: the weight to be accorded to a requester's attributes should be based upon the underlying facts, to the extent known to the agency, which may be the basis for such characterizations. These underlying facts might include, e.g., the requester's affiliations with such institutions as a university, government agency, or professional or civic organization; the length and nature of his/her education and experience in pertinent areas; publications, distinctions or reputation among peers or others; and whether currently or recently active in pertinent areas full-time or part-time, vocationally or avocationally.

The point is that not all requesters who may be described as "journalist" or "historian" or the like are the same. Within each characterization, requesters may vary in their likelihood of contributing to the benefits of which the statute speaks. For example, if a requester seeks a waiver for a request for records on international economic policy during the past decade as a "journalist" or "historian," it would be pertinent to consider facts showing he/she is a "journalist" in that he/she is a sportswriter as opposed to a full-time reporter and analyst of foreign monetary and industrial trends for recognized business publications, or that he/she is a "historian" of the Civil War or for a local historical society, as opposed to a professor of economic history and a consultant to various organizations on modern international economic developments. These examples can serve as reference points for facts of intermediate significance. At the same time, agencies should guard against attaching undue importance to prominence or fame as such, as these are only indications of professional activity and competence.

3. The types of information which are, or may be, contained in the records sought.

This is generally a key factor in considering fee waiver requests, because under the statutory standard the benefits to the public are those which can be realized from the information in the records sought. The following discussion is intended to provide help in determining the types of information which are likely to contain potential benefits for the general public. The benefits in question are chiefly those already referred to under heading II, A, 1, above, as those which reflect the general policy objectives of the Act, -- objectives there characterized as the enhancement of informed civic activity and of the quality of national life, especially as regards such areas of concern as

ATTACHMENT 1

Civil Action No. 81-2174

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

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

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, 411 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 Druz 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 discousure 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 base. 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

Attachment 2

Civil Action No. 81-2174

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

MICHAEL LEE FELLNER,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

OPINION AND ORDER

75-C-430

Plaintiff has renewed an earlier motion for an order requiring defendants to waive the costs of processing and duplicating documents, the furnishing of which to plaintiff by defendant has been ordered by this court on December 17, 1975. Defendant opposes this motion. Defendant has moved to be relieved from furnishing any further documents as required by the December 17, 1975 order until plaintiff pays to defendant the unpaid balance of the search and copy fees generated to date, and defendant has moved for an order requiring plaintiff to remit any appropriate future copy fees within 10 days of his receipt of further documents.

This opinion and order are directed to these competing motions.

For the purpose of deciding these motions, I find as fact those matters set forth below under the heading "Facts."

FACTS

Plaintiff is a journalist who intends to publish and disseminate the information which he has obtained and may yet obtain from the defendant pursuant to his request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. His purpose in doing so is "to enlighten the public as to possible abuses of power by agencies of the federal government." The records requested are those compiled by the Federal Bureau of Investigation (FBI): regarding the political activities, political involvements, political affiliations, and other activities of certain individuals who reside in the Madison, Wisconsin, area, or have resided there, or who may have engaged in activity there; regarding certain organizations which may have engaged in activity in the Madison area; regarding political activity that may have occurred in certain buildings in the Madison area; and regarding certain events that may have occurred in the Madison area.

There has been considerable national news coverage and national public interest in the existence and extent of possible political surveillance by the FBI in various parts of the country. There has been considerable news coverage and public interest in the Madison area in possible FBI political surveillance both locally and nationally, in this plaintiff's request for information from the defendant, and in this present law suit by this plaintiff to compel disclosure of the information requested.

In his attorney's initial March 25, 1975, letter of request for the information under the FOIA, plaintiff requested waiver of fees pursuant to § 552(a)(4)(A), stating only that the purpose of his request for the information was "to evaluate potential local violation of civil liberties by federal investigatory agencies." The waiver of fees was denied by defendant.

On about December 18, 1975, plaintiff submitted a renewed request to the defendant for waiver of the fees, this time providing the defendant with affidavits and a brief containing the matters which I have found as fact in the three preceding paragraphs of this opinion. On December 26, 1975, defendant denied the renewed request for waiver of fees, with the following explanation by the Deputy Attorney General:

> The Department of Justice receives numerous requests for information -- accompanied by requests for waivers of fees -- from media personnel and others who assert that their work will benefit the general public. If every such request were to be granted simply because the information sought is of interest to some small portion of the American public and/or could be used by, for example, media personnel "in the Madison community," the resultant expenditure of public funds would be great. Although I personally waived a large search fee in the Meeropol [Rosenberg] case, that case involved sustained, national public interest and possibly unique historical significance. There is absolutely no parallel between Mr. Fellner's request involving an "important local news story" and the Rosenberg case, because your client's request simply does not involve any significant benefit to the general public. Accordingly, I have concluded, as did Director Kelley, that the interests of the general public appear

> more likely to be served by the preservation of public funds. I am enclosing a copy of my statement at the time of the Meeropol search fee waiver which will, I trust, put the present situation into proper perspective.1/

The statement referred to by the Deputy Attorney General concerning the Meeropol search fee waiver on December 1, 1975 was to the effect that the search fees in that case amounted to $20,458; that the magnitude of the sum demonstrated that the defendant must review all such fee waiver requests with great care; that the defendant "cannot grant waivers unless an overriding public interest is convincingly established;" that the Rosenberg case (the subject of the Meeropol waiver request) was "close to being unique in terms of both current public interest and historical significance;" that requiring payment of the search fees could delay or even prevent the release of some or all of the records concerning which no compelling reason for withholding exists; that such delay or prevention of release would frustrate defendant's decision to release as much information as possible concerning the Rosenberg case; and that the waiver of the search fees was in the

1/ The words "in the Madison community" and "an important local news story" appear within quotation marks in the Deputy Attorney General's letter refusing the waiver, without explanation of the source of the quotes. The phrase "in the Madison community" appears in several of the affidavits submitted by the plaintiff in support of his waiver request in this context: "...the ultimate release to the public of documents...will be of general public benefit in informing the public as to the existence or nonexistence of the controversial activities by a federal government agency in the Madison community." If this is the source of the Deputy Attorney General's quotation, the significance of the words is not as it appears in his statement. I have been unable to locate the source of the quoted phrase "an important local news story." I appreciate, however, that the record in this court may not include everything submitted to the defendant by the plaintiff in support of the request for a waiver. In any event, while news of plaintiff's FOIA request to the defendant and news of the present lawsuit are probably fairly characterized as "a local story," it is much less clear whether news of the content of the documents disclosed and to be disclosed would be a local story only.

public interest in that particular case because the release of the records would "benefit the general public far more than it will any individual requester." (The waiver in Meeropol reached only the search, not the copying, fees.)

The unpaid balance of the search and copy fees generated to date is $422. The fees yet to be generated will be copy fees at the rate of 10 cents per page released. It has been estimated by defendant that there were 15,600 pages to be reviewed for release or non-release. If the court's order of December 17, 1975 has been complied with, about 3,600 pages remain to be reviewed. If the 3,600 pages were to be released in their entirety, the additional copy fee would be $360.

Furnishing copies of the pages and portions of pages to be released is the course of action which defendant prefers, as contrasted with permitting plaintiff to inspect the original records themselves. However, defendant has not been requested to permit inspection of the originals by the plaintiff (as compared with furnishing copies), and thus has not been called upon either to grant or deny such a request.

OPINION

The FOIA (§552(a)(4)(A)) provides that in order to carry out its provisions, each agency shall specify a

schedule of fees "limited to reasonable standard charges for document search and duplication and [providing] for recovery of only the direct costs of such search and duplication." Thus, Congress has imposed upon users of the service a portion of that expense attributable to their use, but strictly limited to direct costs of search and duplication. This reflects both a desire that taxpayers generally not be saddled with the entire costs of services benefitting only or primarily specific persons, and a desire that access to public information not be impeded by excessive expense to those seeking access. The latter purpose is accentuated by the further sentence of the subsection, which contains the language presently at issue: "Documents shall be furnished without charge or at a reduced 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 benefitting the general public."

Defendant's decision not to waive or reduce the fee in the present case is subject to judicial review. 5 U.S.C. § 702; Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 156 (1970); Barlow v. Collins, 397 U.S. 159, 166 (1970). See Paramount Farms, Inc. v. Morton, 527 F.2d 1301, 1303 (7th Cir. 1975). However, a large measure of discretion clearly has been vested in the defendant, and it appears that its

exercise of this discretion may be overturned only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...." 5 U.S.C. § 706.

Were it not for some of the specific language employed by the Deputy Attorney General in denying a waiver to the plaintiff, I would be strongly disposed to refrain from any interference with the exercise of defendant's discretion in this case. More to the point, if the administrative decision to waive or not to waive the fees properly depends upon comparing a case like the Rosenberg case with the present case in terms of the scope and intensity of public interest in the release of information, there would be no basis for disturbing it.

However, in his letter to the present plaintiff and in his statement in connection with the waiver of fees in the Meeropol request (apparently intended by him to be incorporated by reference in his denial of this plaintiff's request), the Deputy Attorney General appears to have adopted one or more of the following standards in passing upon requests for waivers: whether the information sought is of interest to a large or small portion of the American public; whether the information sought relates to a subject of sustained, national public interest and possibly unique historical significance; whether a particular release of records will benefit the general public far more than it will any individual requester; and whether "an overriding

public interest is convincingly established." The Deputy Attorney General's statements do not make clear which of these varying standards has actually been applied in the present case, but the standard expressed most emphatically in his Meeropol statement is this: "...the Department... cannot grant waivers unless an overriding public interest is convincingly established."

This latter standard clearly does not conform to the statutory language: whether "...furnishing the information can be considered as primarily benefitting the general public." I think it appropriate that the Deputy Attorney General be provided the opportunity to review his decision in this case and, if he elects to do so, to make more explicit the standard by which the defendant proposes to exercise its discretion with respect to waivers or reductions of fees.

I am persuaded in this direction, too, by Department of the Air Force v. Rose (United States Supreme Court, No. 74-489, April 21, 1976), 44 Law Week 4503. Rose dealt with the exemptions from disclosure under FOIA, rather than with waiver or reduction of fees. However, those requesting the documents in Rose were editors or former editors of a publication (New York University Law Review) and their purpose was to explore certain systems and procedures within an executive department (disciplinary systems and procedures at the military service academies). The Court remarked

upon "the public's stake in the operation of the [Honor and Ethics] Codes [administered and enforced at the Air Force Academy] as they affect the training of future Air Force officers and their military careers...." and described these matters as "subject to such a genuine and significant public interest." 44 Law Week, at 4508. The present case also involves an intention to publish the information to be provided, and the public interest in the existence or non-existence of political surveillance by the FBI, and in the nature and scope of such surveillance if it exists, seems as genuine and significant as the public interest in the honor and ethics codes in the military service academies. I do not conclude, of course, that any information which is non-exempt must be furnished without requiring payment of search and copying fees. I consider Rose significant here only as it may bear on the meaning of the statutory language "primarily benefitting the general public."

With respect to plaintiff's motion for an order requiring defendant to waive the search and copying fees, I will refrain from entering a decision until June 1, 1976, or later, in order to provide the defendant the opportunity to reconsider the matter and, if it elects to do so, to clarify and amplify the basis upon which waiver is refused.

With respect to defendant's motion for relief from the December 17, 1975 order, it appears that although on

June 20, 1975, defendant initially denied plaintiff's request for a waiver of fees, it has not insisted until very recently upon prepayment. Also, it has made no showing whether the copying fees yet to be generated will be substantial. It does not appear that interruption of the disclosure schedule pending a resolution of the waiver of fees question is appropriate.

ORDER

It is ordered that defendant's motion filed April 19, 1976 for relief from the order of this court entered December 17, 1975 is DENIED.

It is further ordered that a ruling is reserved on plaintiff's motion filed April 21, 1976 for an order requiring defendant to waive fees for search and copying.

Entered this 28th day of April, 1976.

BY THE COURT:

James E. Doyle

JAMES E. DOYLE
District Judge

(1) 1

FOR
Information & File

DEPARTMENT OF JUSTICE
Civil Division
1-19-77 , 19

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALAN L. FITZGIBBON,

Plaintiff

v.

CIVIL ACTION 76-700

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants

FILE

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 determination cannot be arbitrary and capricious. An agency 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 doe 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 E. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE