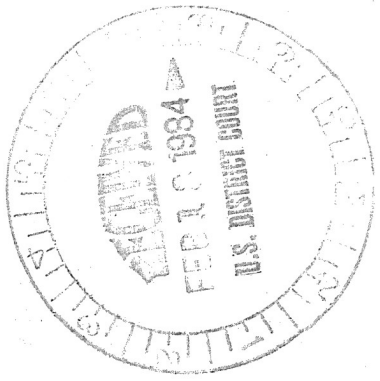
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA



MARK A. ALLEN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 81-2543
	:	
DEPARTMENT OF DEFENSE, ET AL.,	:	
	:	
Defendants	:	

PLAINTIFF's OPPOSITION TO DEFENDANT CENTRAL INTELLIGENCE AGENCY'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO FEE WAIVER DENIAL AND REPLY TO CIA'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO WAIVER OF COPYING COSTS

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TABLE OF CASES AND AUTHORITIES

*Cases chiefly relied upon marked by asterisk

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STATEMENT OF THE CASE

The facts pertinent to the CIA's cross motion for summary judgment on the fee waiver issue were set forth in the Statement of the Case section found at pages 1-7 of the Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment As To Waiver of Copying Costs previously filed with the Court. To avoid needless repetition, that section is incorporated herein by reference, as are the Declaration of Mark A. Allen ("Allen Declaration") and the attachments which were submitted with plaintiff's motion.

ARGUMENT

I. THE CIA IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE FEE WAIVER ISSUE AS A MATTER OF LAW

In moving for summary judgment on the fee waiver issue, the CIA argues that it properly determined, in light of the information available to it, that the release of the documents sought by plaintiff Mark A. Allen ("Allen") would not primarily benefit the general public. Memorandum of Points and Authorities in Support of Defendant Central Intelligence Agency's Motion for Partial Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment As to Waiver of Copying Costs (hereafter "Defendant's Memorandum") at 12. The CIA advances two reasons why its decision to deny the fee waiver was correct. Each of these contentions is addressed in detail below.

A. Ability and Intent to Disseminate

The CIA asserts that Allen provided it "with no information concerning his fee waiver request, other than his bare assertion of his conducting 'scholarly research concerning the work of the [HSCA],' which would allow the CIA to conclude that he would disseminate the information to the public." Specifically, the CIA claims that:

> Mr. Allen gave no details whatsoever concerning his intent to disseminate or his ability to disseminate any released material to the public. Therefore, the CIA had no reason to believe that any requested material would even be disseminated to the public in general or to any group in particular.

Defendant's Memorandum at 13.

It must be noted, however, that the administrative record is devoid of any evidence that the CIA considered this factor in reaching its fee waiver determination. In initially denying Allen's request for a waiver, the CIA gave three reasons. Two involved its supposition that the volume of information on the Kennedy assassination already in the public domain means that no significant benefit will inure to the public from any further releases. The third was the irrelevant alleged "fact" that "the House of Representatives has indicated to this Agency its judgment that such material need not be publicly released without its prior written concurrence." Allen Declaration, Exhibit 8. Not only did the CIA's initial denial fail to cite ability and intent to disseminate as factors bearing on its decision to deny a fee waiver, but it did so even though Allen had specifically invited the CIA to contact him if it needed any additional information of the fee waiver issue. See Allen Declaration, Exhibit 5.

In appealing the CIA's initial fee waiver denial, Allen addressed each of the reasons given by the CIA for denying his request. Inasmuch as the CIA had not mentioned ability and intent to disseminate information as grounds for the denial, he did not provide direct information bearing on these matters. He did so indirectly, however, by submitting with his appeal a copy of a major story in the May 26, 1981 issue of the Washington Post which identified him as a Kennedy assassination researcher and quoted him. See Allen Declaration, Exhibit 9.

In denying Allen's fee waiver appeal, the CIA repeated the same three reasons it had advanced initially. It gave no indication that ability and intent to disseminated were factors which had affected its negative decision in any degree whatsoever. See Allen Declaration, Exhibit 11.

In short, there is no support in the record for the CIA's claim that it considered these factors against Allen. The CIA simply relies on the post hoc argument of counsel on this point. This is, however, an inadmissible basis for sustaining agency action: "[W]e cannot 'accept appellate counsel's post hoc rationalization for agency action'; for an agency's order must be upheld , if at all, on the same basis articulated in the order by the agency istelf.'" Federal Power Comm'n v. Texaco, 417 U.S. 380, 3 97 (1974)(quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168-169 (1962)).

Fellner v. Department of Justice, No. 75-C-430 (W.D. Wis. April 28, 1976), involved a Department of Justice fee waiver denial that claimed to have considered the relevant criteria but that "[did] not make clear which of these varying standards [had] actually been applied . . . ." Id., slip op. at 8. (A copy of this opinion is appended to plaintiff's motion for partial summary judgment as Attachment 2.) Because of this defect, the district court considered the fee waiver denial inadequate. In the instant case, this flaw is even more glaring, since there is nothing at all in the administrative record to suggest that the CIA con-

sidered the dissemination criteria it now advances as grounds for properly having rejected Allen's fee waiver request.

If the CIA actually did rely on these criteria, it did so without informing Allen, thereby failing to comply with the procedural requirements of Section 552(a)(6)(A) of the Freedom of Information Act, which specifically requires agencies denying FOIA requests to explain their reasons.[1/] Moreover, it also thereby violated the rudiments of fair informal administrative procedure. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975)(in some circumstances due process does not require trial procedure but forbids resolving a question of adjudicative fact against a party without first allowing him to respond informally to a summary of adverse evidence), and the discussion of the "Goss Principle" in Davis, Administrative Law Treatise (1982 Supplement), Chapter 13: Fair Informal Procedure. If the CIA did in fact base its fee waiver decision at least in part on the dissemination criteria, it was required to advise Allen of this so he could informally respond to it in his appeal of the initial fee waiver denial.

Contrary to the CIA's belated claim that it "had no reason to believe any requested material would even be disseminated to the public in general or to any group in particular," Defendant's Memo-

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1/ This provision applies to fee waiver requests, as well as to requests for records. See Bonine, Public-Interest Fee Waivers Under the Freedom of Information Act, 1981 Duke Law Journal 213, 235-236 (1981).

randum at 13, Allen's interest in disseminating information on the assassination of President Kennedy to the public was well-known to the Agency, as is evidenced by the fact that he earlier had sued it for disclosure of a key CIA document concerning the activities of Lee Harvey Oswald in Mexico City prior to the assassination. During the course of that lawsuit, Allen v. Central Intelligence Agency, Civil Action No. 78-1743, Allen's expert knowledge on this subject[2/] and his dissemination of information obtained from the CIA to other Warren Commission critics became known to the Agency.[3/] Thus, the CIA's argument concerning Allen's ability and intent to disseminate is untenable factually as well as legally.

B. Volume of Information Already Public

The CIA's second reason why its decision to deny the fee waiver is correct is its claim that it considered "the vast amount of information already available to the public on the subject of the assassination of President Kennedy and the fact that the HSCA had, 'with the publication of its voluminous report and findings,

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2/ In Allen v. Central Intelligence Agency, 636 F.2d 1287, 1289 (D.C.Cir. 1980), the Court of Appeals stated: "Mark Allen has for a number of years engaged in extensive research concerning the murder of President Kennedy." The Court cited a statement to this effect in Allen's appeal brief which was never challenged by the CIA.

3/ For example, affidavits on file in that lawsuit show that he made CIA Document 509-803 available to Warren Commission critics Harold Weisberg and Paul Hoch. This representation is made on the basis of the undersigned counsel's personal knowledge of the file in Civil Action No. 78-1743.

FOIA requests. The court held, however, that "[a]ny such perceived obligation is irrelevant to the purposes of § 552(a)(4)(A)." Civil Action No. 76-700, slip op. at 2 (D.D.C. Jan. 10, 1977)(appended as Attachment 1A to plaintiff's motion for partial summary judgment). (For a discussion of cost in fee waiver determinations, see Bonine, Public-Interest Fee Waivers Under the Freedom of Information Act, 1981 Duke Law Journal 213, 250-255.)

There are numerous other defects with this alleged ground for denying Allen's fee waiver request. There is nothing in the administrative record to indicate how the CIA arrived at its opinion that the HSCA had determined through publication of its report and findings "what information concerning the assassination . . . was significant enough to warrant the expenditure of public funds. . . ." Although the CIA attacks the affidavit of Professor Blakey contradicting this claim, it has adduced no Rule 56(e) evidence in support its speculation on this matter.[4/] Even if the HSCA had made such a determination, it would irrelevant because, among other reasons, the focus of this lawsuit includes information bearing not only upon the assassination itself and upon the performance of government agencies in investigating it, but also upon the performance of the HSCA and the agencies asked to cooperate with it.

4/ The evidentiary objections which defedant has lodged in opposition to plaintiff's motion for partial summary judgment (see Part I(A) of Defendant's Memorandum), apply equally, if not more so, to defendant's cross motion. The CIA has failed to submit any Rule 56(e) materials in support of its motion; even an elementary affidavit identifying the administrative record and attesting to the genuineness of the reasons allegedly advanced in making the fee waiver determination is absent.

As Allen pointed out in his appeal letter, the HSCA's alleged determination, had such in fact been made, would not have covered the CIA's own internal memorandum on the HSCA's investigation, and this is an important segment of the records being sought by him. See Allen Declaration, Exhibit 9.

Additionally, the CIA's records show that the HSCA never examined much of the material which is within the scope of this litigation. For example, a CIA memorandum which the CIA produced during this litigation describes a visit which HSCA's Chief Counsel and Staff Director made to CIA Headquarters on April 27, 1979 to examine Agency held material requested by the HSCA and to designate that portion of it to be sequestered. With regard to Category 1a, the CIA memo states:

> Files reviewed by HSCA staff members fill nine four-drawer safes. The files include the Lee Harvey OSWALD 201, which fills two four-drawer safes. OSWALD's 201 file was not completely reviewed by HSCA staff members.

(Emphasis added) With respect to Category 1b, the CIA memo states:

> Classified material, from Agency holdings, requested by the HSCA, which staff members had not reviewed (for one reason or another). [Comment: Files not reviewed by HSCA staff members fill almost four four-drawer safes.

(Emphasis added) (A copy of the CIA's memorandum is attached hereto as Exhibit 1.)

Thus, according to the CIA's own records, the HSCA failed to review almost 16 file drawers of records requested by it plus portions of Oswald's 201 file. Obviously, the alleged HSCA publication decision cannot have include materials not reviewed by it. Equally obvious, records requested by the HSCA but not reviewed by it could prove to be of major significance in evaluating its performance.

This disclosure of the existence of a vast amount of materials said to have been requested by the HSCA but not reviewed by it is markedly at variance with the CIA's reliance on suppositions that everything of significant value to the public already has been released or published by the HSCA. It clearly raises a question as to the adequacy of the CIA's factfinding procedure. Therefore, if this Court is unable to grant plaintiff's motion for partial summary judgment on the administrative record as it now stands, it should conduct a de novo review of the CIA's fee waiver denial. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)(de novo review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate).

C. CIA Failed to Make Public Benefit Determination

In Eudey, supra, Judge Aubrey Robinson held that in deciding a fee waiver, "the issue to be considered by the agency is whether furnishing the information will primarily benefit the public at large or whether any benefit will inure primarily to the specific

individual requesting the documents." 478 F. Supp. at 1177. The CIA failed to make this determination. Not only does this defect defeat the CIA's motion for partial summary judgment, it renders its decision arbitrary and capricious and thus requires judgment in Allen's favor on the fee waiver issue.

II. THIS COURT SHOULD NOT REMAND THE FEE WAIVER ISSUE TO THE CIA

The CIA suggests that if this Court denies its motion, "the proper course would be to remand the fee waiver issue to the CIA . . . ." Allen contends that such a remand is both unwise and unnecessary. The reasons against fee waiver remands have been well stated by Prof. Bonine:

> When courts allow after-the-fact explanations --whether they be post hoc rationalizations of counsel, post hoc affidavits of decision makers (often prepared by counsel), or post hoc statements after a remand to the agency--they encourage poor administration in the agency at the time of its initial and appellate decisions. The cost of further administrative and judicial proceedings is likely to be many times greater than the cost of simply waiving the fees. Moreover, remand frustrates the need of many requestors to obtain documents quickly. A judicial policy of automatic waiver whenever an agency's decision contains inadequate reasons would ultimately improve the quality of all fee-waiver decisions, whether litigated or not. In essence, such a policy would put the burden of the agency to provide adequate reasons for its decision and would allow the agency to carry its burden only at the time it acts.

Bonine, Public Interest Fee Waivers Under the Freedom of Information Act, 1981 Duke Law Journal 213, 237-238.

Plaintiff has patiently waited more than three years to begin receiving the documents he has requested. Because of the volume of documents covered by the scope of his request, it will undoubtedly be several more years before compliance with his request is achieved. Allen and the American public on whose behalf he acts should not be required to wait any longer for the release of these important records to commence. In light of the gross defects in the CIA's treatment of his fee waiver request, it would be most salutory for this Court to decide the now, without allowing the CIA to reconsider a decision that was obviously wrongly made to begin with.

CONCLUSION

For the reasons set forth above, this Court should deny the CIA's motion for partial summary judgment on the fee waiver issue and grant plaintiff's motion instead. Alternatively, it should hold an evidentiary hearing at which the fee waiver issue would be considered de novo.

Respectfully submitted,

James H. Lesar

JAMES H. LESAR
1000 Wilson Blvd., Suite 900
Arlington, Va. 22209
Phone: 276-0404

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of February, 1984, mailed a copy of the foregoing Plaintiff's Opposition to Defendant Central Intelligence Agency's Motion for Partial Summary Judgment As To Fee Waiver Denial and Reply to CIA's Opposition to Plaintiff's Motion for Summary Judgment As To Waiver of Copying Costs to Mr. Stephen E. Hart, Civil Division, Room 3744, U.S. Department of Justice, Washington, D.C. 20530, and Steve Ross, General Counsel to the Clerk, U.S. House of Representatives, Washington, D.C. 20515.

James H. Lesar

JAMES H. LESAR

Exhibit 1 Civil Action No. 81-2543

MEMORANDUM FOR THE RECORD

SUBJECT: G. Robert Blakey's Visit to CIA Headquarters on 27 April 1979

Participants:

1. On 27 April 1979, Mr. G. Robert Blakey, Chief Counsel and Staff Director of the House Select Committee on Assassinations (HSCA), visited CIA Headquarters. The purpose of his visit was two-fold: (a) to examine Agency held material requested by the HSCA in conjunction with its investigation into the assassination of President John F. Kennedy; and (b) to designate that portion of Agency held material to be sequestered.

2. Mr. Blakey examined only that material held He apparently did not go elsewhere within the Agency, to examine their holdings. He stayed for about an hour; however, he spent only twenty or thirty minutes discussing and examining the contents of some fifteen safes of Agency material held in . A recapitulation of his remarks follows.

3. Categories of material to be sequestered: Mr. Blakey described the Agency-HSCA record as comprising three general categories of material.

Category 1a: Classified material, from Agency holdings, requested by the HSCA, which HSCA staff members reviewed in Agency Headquarters. [Comment: Files reviewed by HSCA staff members fill nine four-drawer safes. The files include the Lee Harvey OSWALD 201, which fills two four-drawer safes. OSWALD's 201 file was not completely reviewed by HSCA staff members.]

Category 1b: Classified material, from Agency holdings, requested by the HSCA, which staff members had not reviewed (for one reason or another). [Comment: Files not reviewed by HSCA staff members fill almost four four-drawer safes. An inventory in the form of an index card file of files not reviewed as well as of files reviewed by the HSCA is available.]

Category 2: Material generated by the HSCA from Agency classified holdings made available to the HSCA in response to the latter's request. NB: Mr. Blakey stated that he considered this material to be the property of the HSCA and, therefore, not releasable to the public or other unauthorized personnel under the provisions of the Freedom of Information Act. [Comment: This material fills almost two four-drawer safes. An inventory has been completed of the material turned over to the Agency by the HSCA.]

Category 3: Classified correspondence exchanged between this Agency and the HSCA. [Comment: Classified correspondence includes all classified letters exchanged with the HSCA, errata sheets (pointing out inaccurate quotations, document citations, etc., in HSCA draft reports — classified and unclassified), copies of letters, supporting documents (or copies of documents passed to the HSCA for use in executive sessions or obtaining depositions from Agency employees, either retired or presently employed, and logs held in OLC Registry, as well as in other Agency components, Mr. Blakey was quite concerned that copies of errata sheets (prepared primarily by DO) should not become part of the public record.]

4. Categories of material to be destroyed: Of that material turned over by the HSCA to the CIA, Mr. Blakey stated that the following types of material could be destroyed: Typewriter ribbons, stenographic notes, and cassettes (recordings of interviews, depositions, etc.). He asked that miscellaneous drafts and notes (Unclassified) based upon Agency material should be held with other Category 2 material.

5. Memorandum of Agreement: Mr. Blakey suggested that the Agency prepare a memorandum (or letter) of agreement which would set forth, in general terms, the Agency's proposal as to the handling of the material to be sequestered. His signature on the memorandum (or letter) would denote his agreement.

6. Mr. Blakey was told that in order to carry out HSCA's desire that the three categories of material be held in sealed and sequestered storage, the Agency proposed to make a photographic record of each official Agency document made available to the HSCA in response to the latter's specific request. [Comment: It would not be necessary to photograph copies of specific documents which had already been copied by Xerox or

other means before being made available to the HSCA for its review. Copies already made could be included in the Agency-HSCA record, thus saving the Agency some time and money.]

7. Upon completion of the task of photographing Agency held documents, the film of Categories 1a and 1b (excluding those documents already copied by Xerox or other means), HSCA generated materials (Category 2), and Agency-HSCA correspondence (Category 3) including all material (or copies thereof) held in will be prepared for sequestered storage. Such material will be sealed and either turned over to the Archivist of the United States or held in Agency Archives. In either case, access to this material will be allowed only after fifty years, according to Mr. BLakey, or to Members of Congress acting in an official capacity.

8. A draft memorandum setting forth in general terms the categories mentioned above and the Agency's tentative proposal has been forwarded to the Office of General Counsel. Inasmuch as other Agency components are involved, the OGC will consult with those components at a later date.

9. Added Note: Mr. Blakey informed the undersigned that he was passing the HSCA reports to the GPO in three days which would mean 30 April and indicated further that the galley proofs would possibly not be available for at least three weeks, possibly more. Since he will, according to his own statements, read the proofs before they are sent to the Agency, we can possibly expect the galley proofs sometime in early June.

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Dear Mr. Blakey:

The purpose of this letter is to set forth, in general terms, the Agency's proposal as to the disposition of three categories of material related to the investigation by the House Select Committee on Assassinations (HSCA) into the death of President John F. Kennedy. Your signature on this letter will indicate your agreement with the Agency's proposal.

The three categories of material to be addressed are as follows:

a. Category 1a: Classified material from Agency holdings, requested by the HSCA, which HSCA staff members reviewed.

Category 1b: Classified material from Agency holdings, requested by the HSCA, but which HSCA staff members did not review.

b. Category 2: Material generated by the HSCA from Agency classified holdings made available to the HSCA in response to the latter's request. (NOTE: This HSCA material is considered by the HSCA as its property and therefore not releasable to the public under the Freedom of Information Act. An inventory of this material received from HSCA has been completed.

c. Category 3: Classified correspondence exchanged between this Agency and the HSCA.

The HSCA has indicated its desire that copies of these three categories of material be held in sealed and segregated storage to ensure the preservation of all relevant records pertaining to the phase of the investigation involving this Agency. In order to accommodate the HSCA, but also leave its own records accessible for routine purposes, the Agency proposes that a photographic copy be made of each official Agency document made available in response to a specific request by the HSCA (Category 1a and 1b).

Upon completion of the task of photographing the Category 1a and 1b documents, those copies (Category 1), the HSCA generated materials based upon Agency material (Category 2), and classified Agency-HSCA correspondence,

(Category 3), will be sealed and held in segregated storage, by the Agency, in accordance with schedules established by the Archivist of the United States.

Fred Hitz

G. Robert Blakey

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK A. ALLEN,	:	
	:	
Plaitiff,	:	
	:	
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	:	
DEPARTMENT OF DEFENSE, ET AL.,	:	
	:	
Defendants	:	

PLAINTIFF'S RULE 1-9(h) STATEMENT

Pursuant to Local Rule 1-9(h), plaintiff makes the following statement. In support of its motion for partial summary judgment the CIA makes certain contentions which Allen believes do not present genuine issues because of their irrelevance and/or lack of evidentiary basis. Should the Court believe otherwise, Allen disputes these contentions, which would thus render the CIA's motion inappropriate for summary judgment. These disputed contentions are:

1. Whether the CIA "had no reason to believe that any requested material would even be disseminated to the public in general or to any group in particular."

2. Whether the HSCA had, with the publication of its report and findings, made a determination as to what information concerning the assassination of President Kennedy was significant enough to warrant the expenditure of public funds to release in printed form.

Respectfully submitted,

JAMES H. LESAR
1000 Wilson Blvd., Suite 900
Arlington, Va. 22209
Phone: 276-0404

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of February, 1984, mailed a copy of the foregoing Plaintiff's Rule 1-9(h) Statement to Mr. Stephen E. Hart, Esq., Civil Division, Room 3744, U.S. Department of Justice, Washington, D.C. 20530, and Mr. Steve Ross, Esq., General Counsel to the Clerk, U.S. House of Representatives, Washington, D.C. 20515.

JAMES H. LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK A. ALLEN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 81-2543
	:	
DEPARTMENT OF DEFENSE, ET AL.,	:	
	:	
Defendants	:	

O R D E R

Upon consideration of defendant Central Intelligence Agency's motion for partial summary judgment as to fee waiver denial, plaintiff's opposition thereto, and the entire record herein, it is by this Court this _____ day of _____, 1984, hereby

ORDERFD, that the CIA's motion for partial summary judgment as to fee wiaver denial be, and hereby is, DENIED.

_____
UNITED STATES DISTRICT JUDGE

made a determination as to what information concerning the assassination of President Kennedy was significant enough to warrant the expenditure of public funds to release in printed form.'" Defendant's Memorandum at 12, citing Allen Declaration, Exhibit 8.

This ground is invalid because it improperly defers to an alleged congressional decision and thus fails to exercise the independent discretion required of the CIA by the statute. It is also invalid because it is "based on a factor that is not controlling under the terms of the statute." Eudey v. Central Intelligence Agency, 475 F. Supp. 1175 (D.D.C. 1979). Indeed, it incorporates two such impermissible factors. First, it suggests that because of the volume of information on the Kennedy assassination already in the public domain, few significant documents will be released. This, however, is akin to the argument advanced by the CIA in Eudey and forcefully rejected by the court:

> The statute does not permit a consideration of how many documents will ultimately be released. The court notes, moreover, that a single document may, in the present context, substantially enrich the public domain.

Id. at 1177. In fact, the Eudey court even suggested that knowledge of "the absence of documents . . . may itself benefit the public by shedding light on the subject of Plaintiff's research." Id.

Second, this ground also suggests that cost is a pertinent consideration and one which figured in the CIA's determination. The CIA advanced this rationale in Fitzgibbon v. CIA, stating that it felt an obligation to the public to collect fees for processing