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	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO WAIVER OF COPYING CHARGES

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STATEMENT OF THE CASE

This case arises under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff is Mark A. Allen ("Allen"), a lawyer who has engaged in extensive research into the circumstances surrounding the assassination of President John F. Kennedy for the past decade. In 1975 he worked with a group of University of Virginia students who lobbied Congress for a committee to investigate the President's assassination. After Congress created the House Select Committee on Assassinations ("HSCA" or "the Committee"), Allen was in touch with the members of its staff. At their request, he prepared several memoranda for them on various aspects of the Kennedy assassination; and, in August 1977, he presented a 90-minute briefing to several staff members on Lee Harvey Oswald's activities in Mexico City. November 21, 1983 Declaration of Mark A. Allen

("Allen Declaration"), ¶¶3-6.

Allen is Director of Access, an organization which was formed for the purpose of securing release of the records of the House Select Committee on Assassinations. Access is a nationwide organization which includes authors, historians, lawyers and journalists among its members. Allen Declaration, ¶¶7-8.

Allen has led the fight to compel federal agencies to divulge their records pertinent to the Committee's investigation. In addition to the instant suit against the Department of Defense ("DOD") and the Central Intelligence Agency ("CIA"), he also has sued the Federal Bureau of Investigation ("FBI") for its records pertaining to the Committee's inquiry. Allen Declaration, ¶8.

The materials which Allen receives in response to his Freedom of Information Act requests are useful in furthering his own research into the Kennedy assassination. He also makes these records available to others interested in the subject. In the past he has shared such records with authors, researchers and reporters, including George Lardner, Jr. of the Washington Post; Norman Kempster of the Los Angeles Times; Harold Weisberg, author and leading critic of the official investigations into the Kennedy assassination; and Anthony Summers, author of Conspiracy, a recent book on the Kennedy assassination and the work of the HSCA. The information which he provided these persons was used in their writings. As a result of a fee waiver granted him in Allen v. Federal Bureau of Investigation, Civil Action No. 81-1206, Allen

is now receiving FBI materials related to the HSCA probe, and these records are being furnished by Allen to others interested in the subject. For example, copies of these records have been furnished to Henry Hurt, Roving Editor at Reader's Digest, for use in connection with his forthcoming book on the Kennedy assassination. Copies of a considerable volume of these records also have been furnished to Harold Weisberg for his continuing study of the assassination and the performance of agencies and branches of the United States Government in investigating it. Two volumes were furnished to author Anthony Summers because they are pertinent to a book he is currently researching. Allen Declaration, ¶¶8-9.

Allen's initial request to the CIA, made December 15, 1980, sought copies of "all correspondence or records of any communications between your agency and the U.S. House Select Committee on Assassinations relating to the Select Committee's investigation into the assassination of President John F. Kennedy." Allen Declaration, Exhibit. 1. In that letter Allen also requested a waiver of search and copying fees, stating that because the records relate to the assassination of an American president, "they are of important historical value and therefore would significantly benefit the public." Id.

By letter dated December 29, 1980, the CIA denied this request on the ground that the documents requested were congressional materials not subject to the FOIA. Allen Declaration, Exhibit 2. On January 5, 1981, Allen appealed this determination, and on January 12, 1981, the CIA acknowledged his appeal. Allen

Declaration, Exhbits 3-4.

Allen submitted a second, related request on April 6, 1981, which asked for all records relating to the HSCA investigation into the Kennedy assassination not covered by his December 15, 1980 request. He again requested a fee waiver. Allen Declaration, Exhibit 5. The CIA acknowledged his letter by letter dated April 14, 1981. Allen Declaration, Exhibit 6. On June 28, 1983, having received no determination of his April 6th request, Allen elected to treat the CIA's failure to act as a denial and appeal. Allen Declaration, Exhibit 7.

On July 27, 1981, the CIA wrote Allen concerning its appeal backlog and informed him that his appeal would be acted on in turn. It also denied his request for a fee waiver. It asserted that its fee waiver denial was based on the following:

> (1) the fact that release of any of this information would not be of significant benefit or usefulness to the public in light of the vast quantity of information already in the public domain concerning the assassination of President John F. Kennedy; (2) the fact that the House of Representatives has indicated to this Agency its judgment that such material not be publicly released without its prior written concurrence; and (3) the fact that the House Select Committee on Assassinations has, with the publication of its voluminous report and findings, made a determination as to what information concerning the assassination of President John F. Kennedy was significanct enough to warrant the expenditure of public funds to release in printed form. Any material not published in the House Select Committee's public study was determined by Congress to have insufficient usefulness or benefit to the public to warrant the expenditure of any further public funds to make it available to the public.

The CIA's letter concluded by stating: "In light of the foregoing,

we have determined that it would not be in the public interest nor serve any interest of the government to grant your request for a fee waiver." Allen Declaration, Exhibit 8.

By letter dated August 13, 1981, Allen appealed the denial of his request for a fee waiver. He took issue with the reasons advanced by the CIA for denying the waiver. Conceding that a great deal is known about the Kennedy assassination, he pointed out that "it is equally true that a great deal is not known." In this connection he noted that although the Select Committee concluded that there was probably a conspiracy to murder President Kennedy, it was unable to determine who the conspirators were. He challenged the CIA's second reason--the allegation that the House had indicated its judgment that such material should not be released without its prior written concurrence--as irrelevant to the fee waiver determination. With respect to the third ground relied upon by the CIA--its allegation that any material not published by the Committee was determined by Congress to have insufficient usefulness or benefit to the public to warrant the expenditure of any further public funds to make to available to the public--Allen argued it was both unfactual and illogical. Illogical because based on the erroneous inference that because Congress did not publish the material sought by Allen, such material was not worth publishing. Unfactual because it ignored the CIA's own internal memoranda on the Committee's inquiry, an important segment of the material covered by Allen's requests which would not have been relied upon by the Committee, much less contained in its published volumes. Unfactual also be-

cause the Committee's former chief counsel and staff director, G. Robert Blakey, had publicly stated that the Committee had intended to publish more materials but simply ran out of time and money to do so. Allen Declaration, Exhibit 9.

On August 30, 1981, the CIA acknowledged Allen's fee waiver appeal. Allen Declaration, Exhibit 10. On September 21, 1981, Mr. John E. Bacon, the CIA's Information and Privacy Coordinator, wrote Allen that his appeal of the fee waiver denial had been submitted to the Executive Secretary of the CIA Information Review Committee for consideration, and that the Executive Secretary had denied it.

In setting forth the reasons why the Executive Secretary had denied the fee waiver request, Mr. Bacon basically reiterated those recited in the original request, stating:

> The information you seek from the Agency files does not possess significant potential for benefiting the general public in light of the amount and character of information on the Kennedy assassination already in the public domain. The fact that the House of Representatives has indicated that the requested material not be publicly released without its prior written concurrence strongly indicates a Congressional judgment that there is no significant public interest in the public release of these materials at this time. Such a Congressional judgment, although not binding on this Agency, is entitled to consideration and due deference.
>
> We do not agree with your comments concerning the reasons for the House Select Committee's determination to publish certain materials. It seems clear that by failing to authorize supplemental appropriations to publish the remainder of the House Select Committee's records on the assassination of John F. Kennedy, Congress indicated the public benefit accruing from the publication of such records was not sufficient to warrant further expenditures of public funds. Given such a

> Congressional decision not to commit further public funds to making such materials available to the public, this Agency has determined that it would not be in the public interest nor serve any interest of the government to grant your request for a fee waiver.

Allen Declaration, Exhibit 11.

On October 20, 1981, Allen filed this lawsuit. The CIA subsequently moved for summary judgment on the ground that the documents sought were "congressional" and were also exempt from disclosure under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). The CIA further contended that the records were not improperly withheld within the meaning of the FOIA because Congress requested that the agency secure, and limit access to, the documents. However, this Court, in its Judgment and Order of March 4, 1983, denied the CIA's motion for summary judgment except insofar as "congressionally generated documents" were concerned.

Thus, Allen is entitled to obtain, subject to such legitimater claims of withholding under the FOIA's nine exemptions as the CIA may assert, a large volume of materials responsive to his request. However, Allen is unable to pay the copying charges for these materials. Allen Declaration, ¶11. Absent a fee waiver these records will not be made available to the public, even though they are "indispensible to a current and timely discussion of the Kennedy assassination." Allen Declaration, ¶10.

For the reasons set forth below, Allen contends that he is entitled to a waiver of fees for these materials.

ARGUMENT

I. UNDER 5 U.S.C. § 552(a)(4)(A), PLAINTIFF IS ENTITLED TO BE FURNISHED ALL DOCUMENTS COVERED BY HIS REQUESTS WITHOUT CHARGE

A. This Court Has Jurisdiction to Review a Fee Waiver Determination

Absent a clear expression of congressional intent otherwise, administrative agency actions are subject to judicial review. Dunlop v. Bachowski, 421 U.S. 560, 567 (1974); Barlow v. Collins, 397 U.S. 159, 166 (1970); Abbot Laboratories v. Garder, 387 U.S. 136, 141 (1967). 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 the Act. Eudey v. Central Intelligence Agency, 475 F. Supp. 1175 (D.D.C. 1979), citing the same court's prior decision in Fitzgibbon v. CIA, Civil Action No. 76-700 (D.D.C. October 29, 1976)(order denying motion to dismiss)(unpublished), citing in turn Diapulse Corp. of America v. FDA, 500 F.2d 75 (2d Cir. 1974) and American Mail Line, Ltd. v. Gulick, supra. (A copy of the Fitzgibbon decision is submitted 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)(unpublished), 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)

B. Congress Intended For Scholars Engaged in Serious Research About Significant Events in American History --As Is the Case Here--To Be Furnished Documents Without Charge

As the Court of Appeals for the First Circuit has recently recognized, quoting the Supreme Court's decision in GTE Sylvania, Inc. v. Consumer's Union of U.S., Inc., 445 U.S. 375, 385 (1980):

> The Freedom of Information Act was intended "to establish a general philosphy of full agency disclosure," . . . and to close the "loopholes which allow agencies to deny legitimate information to the public. . . ."

Crooker v. U.S. Department of Justice, 632 F.2d 916, 920 (1st Cir. 1980). The thrust of the law is to get information out to the public, especially information which concerns matters of significant public interest. Dept. of the Air Force v. Rose, 425 U.S. 352 (1976).

The public policy underlying the Freedom of Information Act "was principally . . . in opening administrative processes to the scrutiny of the press and the general public. . . . [And] to enable the public to have sufficient information in order to be able . . . to make intelligent, informed choices with respect

to the nature, scope, and procedure of federal government activities." Renegotiation Board v. Bannercraft Co., 415 U.S. 1, 17 (1974); GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375 (1980).

Thus, the FOIA is a legislative implementation of the profound values of the First Amendment; and, in particular, its extension to the internal processes of government itself. See, inter alia, The New York Times v. Sullivan, 376 U.S. 254, 270 (1974)(First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.")

Unfortunately, the purpose for which the FOIA was enacted was initially thwarted because the original Act contained no fee waiver provision. The cost of obtaining documents proved to be a significant barrier to the full use of the law by journalists, scholars, non-profit public interest organizations, and other non-commercial users who are best able to fulfill this central purpose of the Act. As a 1972 Congressional report on practices under the original FOIA found, excessive fee charges had become "an effective bureaucratic tool in denying information to such requesters. House Committee on Government Operations, Administration of the Freedom of Information Act, H.Rep. No. 92-1419, 92d Cong., 2d Sess. 8-10 (1972), quoted in Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary, "Agency Implementation of the 1974 Amendments to the Freedom of Information Act: Report on Oversight Hearings," 95th Cong., 2d Sess. 13 (Comm. Print 1980).

(Hereafter cited as "1980 Oversight Hearings Report") As a result, corporations and private law firms were making far more use of the FOIA than were public-interest groups.[1/]

In an attempt to overcome this problem, Congress amended the law. The fee waiver provision in 5 U.S.C. § 552(a)(4)(A) was included in the 1974 amendments to the FOIA because of congressional concern over the "real possibility that search and copying fees may be used by an agency to effectively deny public access to public records." S.Rep. No. 93-854, 93d Cong., 2d Sess. 11 (1974); Department of Air Force v. Rose, 425 U.S. 352, 361 (1976). The objective of the 1974 amendments was to strengthen the disclosure purposes of FOIA. Jordan v. United States, 591 F.2d 752 (D.C. Cir. 1978).

The Amended FOIA's fee waiver provision states:

> 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.

5 U.S.C. § 552(a)(4)(A).

1/ See 1980 Oversight Hearings Report 47-49; John E. Bonine, "Public Interest Fee Waivers Under the Freedom of Information Act," 1981 Duke L.J. 213, 214-215 (hereafter cited as Bonine, Public Interest Fee Waivers"). As Professor Bonine noted, at p. 214 n. 3, one government survey of practices under the original Act indicated that there were "three times as many requests from corporations and private law firms as from the news media, public-interest groups, and researchers." The use of the FOIA for business purposes has continued to rise. Id. at 216.

As the district court recognized in Eudey v. Central Intelligency Agency, 478 F. Supp. 1175, 1177 (D.D.C. 1979)--a case where, as here, documents were sought under FOIA for scholarly research purposes and plaintiff moved for summary judgment on her right to a fee waiver under § 552(a)(4)(A):

> Congress intended that the public interest standard [in § 552(a)(4)(A)] be liberally construed, see S.Rep. No. 93-854, 93d Cong., 2d Sess. 12 (1974) and that fees not be used as an obstacle to disclosure of the requested information. See Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. (1974) [reprinted in] [1974] U.S.Code Cong. & Admin.News at 6287.

Further guidance in discerning the congressional intent behind the fee waiver provision can be found in three post-amendment documents: (1) the 1980 Senate subcommittee report on the 1977 oversight hearings on the 1974 amendments to the FOIA (the "1980 Oversight Hearings Report"); (2) a report on public-interest fee waiver policy prepared for the Administrative Conference of the United States by John E. Bonine, an associate professor of law at the University of Oregon (Bonine, "Public Interest Fee Waivers:");[2/] and (3) a 1981 memorandum from Attorney General Benjamin R. Civiletti devoted to fee-waiver policy.

All three of these documents unequivocally point to the same conclusion: that Congress intended that where serious research on

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2/ This work, cited earlier (p. 11, n. 1) to the Duke Law Journal, is described in that journal as "based on a report prepared for the Administrative Conference of the United States (emphasis added). In a February 1, 1983 telephone conversation with an attorney who is associated with the undersigned counsel in another FOIA case, Ms. Sue Boley, the Information Officer for the Administrative Conference indicated that the Duke Law Journal article and the actual report submitted to the Conference are the same in all material respects.

a significant event in American history by scholars is involved, fee waivers should be granted.

The 1980 Senate Subcommittee report referred to above was based primarily on the record of four days of FOIA oversight hearings conducted in the fall of 1977 by the Judiciary Committee's Administrative Practice and Procedure Subcommittee supplemented by case law, casework, literature, and GAO and Library of Congress studies on FOIA administration. The goal of these hearings, as Chairman Abourezk put it, was "to ensure congressional intent [regarding FOIA] is being carried out." 1980 Oversight Hearings Report at 1. But despite passage of § 552(a)(4)(A), the subcommittee staff found that "excessive fee charges . . . and refusal to waive fees in the public interest remain . . . 'toll gate[s]' on the public access road to information" and that "the potential for abuse of agency discretion over FOIA fees remains high." Id. at 78.[3/]

Perhaps most significant for purposes of the present motion, the subcommittee report noted that "[c]asework also has revealed particular fee problems concerning scholars and news media representatives," id. at 78, n. 45. The report concluded that "[m]ost agencies have also been too restrictive with regard to granting fee waivers for indigent, news media, scholars. . . ."

3/ The 1980 Oversight Report bluntly concluded that "the agencies, relying on the general language of the statute . . ., have applied a wide variety of criteria, many clearly improper or questionable" in making fee waiver decisions. Id. at 83. Improper denial of fee waiver requests is evidently a mechanism which undermines the implementation of the FOIA's objectives.

Id. at 90. It was specifically recommended that uniform guidelines to deal with these fee waiver problems be developed by the Department of Justice, and that:

> The guidelines should recommend that each agency authorize as part of its FOIA regulations fee waivers for the indigent, the news media, researchers, scholars, and non-profit public interest groups. The guidelines should note that the presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public.

Id. at 96. (Emphasis added)

Professor Bonine's report for the Administrative Conference, like the oversight hearings, had the goal of comparing agencies' implementation of the fee-waiver provision with the congressional intent behind that amendment. Bonine, "Public Interest Fee Waivers," at 217. Bonine's very careful and detailed analysis of the legislative history of the fee-waiver provision demonstrates that the Senate[4/] relied primarily on five sources in shaping that provision: (1) prior law on charges for government services, (2) a 1971 study of the FOIA prepared for the Administrative Conference, (3) a 1972 House report on the implementation of the FOIA, (4) existing agency regulations on fee waivers, and (5) the "public benefit concept as applied to attorneys' fees. Id. at 239. Professor

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4/ The fee-waiver provision originated in the Senate bill; no such provision was in the original House bill.

Bonine's analysis of these sources[5/] reveals that all of them support the conclusions that "nonprofit activities and educational or scholarly work were among the types of requests the Senate had in mind when it drafted the public-benefit test." Id. at 243. Indeed, Professor Bonine concludes that:

> The purpose and legislative history of the Freedom of Information Act point to two groups of requesters whose fees should generally be waived. The first group consists of journalists, scholars and authors. These persons confer a public benefit by disseminating information to others, thereby multiplying the benefit obtained from a single release of documents.

Id. at 260.

Moreover, the Attorney General, who as head of the Department of Justice is charged with overall responsibility to ensure proper implementation of the FOIA by the agencies, himself agreed with these views of the Congressional intent regarding fee waivers. In a January 5, 1981 Memorandum to all department and agency heads, the then-Attorney General stated that he has "concluded that the Federal Government often fails to grant fee waivers under the Freedom of Information Act when requesters have demonstrated that sufficient public interest exists to support such waivers," and reminds the agency heads that "Congress clearly intended that this discretion [to grant fee waivers] be exercised generously. . . ." The Attorney General went on to state:

> Examples of requesters who should ordinarily receive consideration for partial fee waivers,

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5/ To avoid unnecesary repetition, the details of Professor Bonine's analysis are not set forth here. Plaintiff urges the Court to consult his article directly if further evidence in support of his conclusions is desired.

> at minimum, would be representatives of the news media or public interest organizations, and historical researchers. Such waivers should extend to both search and copying fees, and in appropriate cases, complete rather than partial waivers should be granted. 6/

Allen is both a representative of a public interest organization, Access, and a historical researcher, and thus obviously qualifies for fee waiver consideration under these guidelines.

The courts, too, have recognized that documents must be furnished free of charge whenever the public benefit criterion is met, and that agency refusal to grant fee waivers in such cases is an abuse of discretion. 7/ See Allen v. FBI, 551 F. Supp. 694 (D.D.C. 1982); Diamond v. FBI, 548 F. Supp. 1158 (S.D.N.Y. 1982); Wooden v. Office of Juvenile Justice Assistance, Research & Statistics, 2 GDS ¶81,122, Civil Action No. 80-2866 (D.D.C. March 20, 1981); Eudey v. CIA, supra; Fellner v. U.S. Dept. of Justice, No. 75-C-430 (W.D.Wis. April 28, 1976)(Attachment 2 hereto); Fitzgibbon v. CIA, Civil Action No. 76-700 (D.D.C. January 10, 1977)(Attachment 1 hereto).

In Diamond v. FBI, for example, the court ordered the defendant agency to waive fees for a Columbia University professor of sociology and history who was seeking documents "relating to gov-

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6/ January 5, 1981 Memorandum to: HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES FROM: Benjamin R. Civiletti, Attorney General, reproduced in GDS, ¶300,793 (emphasis added).

7/ It must be remember that the statutory language regarding fee waivers is mandatory, not permissive: "Documents shall be furnished free of charge or at a reduced charge. . . ." 5 U.S.C. § 552(a)(4)(A)(emphasis added).

ernment surveillance of academicians, including himself, during the McCarthy era" (Diamond v. FBI, 532 F. Supp. 216, 219 (S.D.N.Y. 1981), noting that the requester's planned use of the information for scholarly lectures and articles would benefit the public. The court concluded, after reviewing the case law on fee waiver, that:

> Courts seem most willing to overrule agency fee determinations in cases in which authors sought information to further their research into topics of historical interest.

Other such cases include Eudey, Fellner, and Fitzgibbon. In Eudey, the plaintiff was a historian and research associate at the University of California at Berkeley who sought documents concerning relations between the United States and Italian and French trade unions during the post-World War II period. Although the CIA conceded that this research topic was of public interest, it denied plaintiff's request for a fee waiver on the ground that very little useful information would in fact be released as a result of the FOIA request. The court found this consideration impermissible under the Act, pointing out that the key question was not how many documents would be released, but rather who would primarily benefit from the release: the general public or the individual requester? Only if the agency could show that the benefit would flow primarily to the individual rather than to the public could a fee waiver denial be upheld as not arbitrary and capricious. 478 F. Supp. at 1177.

Similarly, in Fellner, the court ruled that an FBI denial of a fee waiver to a journalist who sought information concerning

FBI surveillance of political activity in Madison, Wisconsin on the ground that an "overriding public interest" had not been convincingly established[8/] was not in accord with the statutory requirement. And in Fitzgibbon, the court held that the agency had failed to show that the documents sought by a journalist and historian investigating the murder of Jesus de Galindez by agents of the Trujillo regime were not "of interest to the general public, in an historical sense at least." See Attachment 1A (Memorandum and and order of January 10, 1977) at 2.

Obviously, if information concerning the abduction and murder of Jesus Galindez by agents of the Trujillo regime can be considered as primarily benefiting 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 the Kennedy assassination has been overwhelmingly demonstrated by several official investigations by the Executive Branch (the Warren Commission, the Rockerfeller Commission) and Congress (House Select Committee on Assassinations, Senate Select Committee on Intelligence Activities), as well as by massive news coverage and innumerable books and magazine articles the past 20 years. Even now, 20 years after the assassination and after all the many official investigations, includ-

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8/ In that case the Attorney General's explanation of the fee waiver denial asserted that a fee waiver was inappropriate because the request concerned only "local" (i.e., Madison, Wisconsin) significance. He contrasted this with the Meeropol (Rosenberg atom spy) case, in which he "personally waived a large search fee because "that case involved sustained, national public interest and possibly unique historical significance." Fellner, supra, at 3. Like the Rosenberg case, the assassination of President Kennedy is a matter of sustained national public interest and particular historical significance.

ing what is said to have been the most expensive probe ever undertaken by Congress, approximately 30 percent of the public are said to favor yet another "large-scale" investigation, indeed, to consider it "necessary," and 80 percent persist in disbelieving the official Executive Branch account of the slaying.[9/]

The Court of Appeals for the District of Columbia 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 the Kennedy asssassination is "of interest to the nation"). In Allen v. F.B.I., 551 F. Supp. 694, 697 (D.D.C. 1982), in which the plaintiff in the instant case sought records of the Federal Bureau of Investigation pertaining to the House Select Committee on Assassinations, the district court noted that "the Congressional investigation of President Kennedy's assassination is clearly a matter of public interest." Moreover, it should be pointed out that in other lawsuits for records pertaining to the assassinations of President Kennedy and

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9/ These figures are from a Washington Post-ABC News nationwide telephone poll taken during the first week of November, 1983. The results of the poll were published in the November 20, 1983 issue of the Washington Post, p. F2. See Attachment 3.

Dr. Martin Luther King, Jr., fee waivers generally have been granted.[10/]

C. There Should Be No Deference to the Agency's Refusal to Grant the Fee Waiver

In judicial review of administrative agency determinations, considerable deference to agency fact-finding is ordinarily appropriate because of the "capability of administrative agencies to

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10/ See Weisberg v. Griffin Bell, et al., Civil Action No. 77-2155 (order of January 16, 1978 granting fee waiver for Kennedy assassination records); Weisberg v. Webster, et al. and Weisberg v. Federal Bureau of Investigation, et al., Civil Action Nos. 78-0322, 78-0420 (consolidated)(records of FBI's Dallas and New Orleans field offices on Kennedy assassination provided without charge as result of fee waiver determination by Office of Privacy and Information Appeals ("OPIA")); Allen v. FBI, 551 F. Supp. 694 (D.D.C. 1982)(fees ordered waived for FBI records relating to HSCA probe); Weisberg v. Department of Justice, Civil Action No. 75-1996 (complete fee waiver for King assassination records granted by OPIA after plaintiff filed motion for summary judgment challenging partial (40 percent) reduction initially awarded by appeals office; Lesar v. Department of Justice, Civil Action No. 77-0697 (fee waiver granted on administrative appeal after suit was filed for records pertaining to FBI's investigation of King assassination and FBI's surveillance of Dr. King.)

The instances in which courts have denied fee waivers for Kennedy assassination materials are easily distinguishable from the above cited cases and from this case. For example, Blakey v. Department of Justice, 549 F. Supp. 362 (D.D.C. 1982) involved a request for Kennedy assassination records which were already publicly available in the FBI Reading Room and to which the requester had access while he was Chief Counsel and Staff Director of the House Select Committee on Assassinations. Unlike the plaintiff in Blakey, plaintiff in this case does not seek copies of records which have already been made public, with one exception which is not really an exception. This "exception" concerns a small category of documents which were partially released to the public years ago but which have not been subjected to declassification review by the CIA since 1976. What Allen seeks in this category of records is, of couse, not what has already been released but materials previously withheld that now may qualify for disclosure.

draw specialized inferences based on their experience." Breyer and Steward, Administrative Law and Regulatory Policy (1979), 184; Public Citizen v. Foreman, 631 F.2d 969, 977 (D.C.Cir. 1980)(USDA approval of nitrites in curing bacon goes "beyond our competence, and we must defer to the administrative agencies with their technical expertise on these matters."; United States v. Rutherford, 442 U.S. 544, 553 (1979); Consolo v. FMC, 383 U.S. 607 (1966); NLRB v. Seven-Up Bottling Co., 344 U.S. 349 (1953); Board of Governors v. Agnew, 329 U.S. 441, 450 (1947)(concurrence by Rutledge, J. and Frankfurter, J.) But the comparative qualifications of the agency and court circumscribe this deference. Jaffe, Judicial Control of Administrative Action (1965), 579-585; Landis, The Administrative Process (1938), 152-155.

Thus where, as here, the agency making the decision has no expertise,[11/] a reviewing court ought to give that decision only the most minimal deference, if any. (It should be noted that there are no issues of witness credibility or the like. This Court has as many or more facts at its disposal in evaluating the requester's right to a fee waiver than did the CIA.) A fortiori, such is the case here where there is in effect an ex parte adjudicatory decision. See the dissent by Frankfurter, J. in FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 404 (1953); Davis, Administrative Law Treatise, § 30.08 (1976 Supplement).

11/ The CIA's expertise is in intelligence matters, not historiography.

D. The CIA's Fee Waiver Denial Is Unsupportable

Whether the standard of judicial review of the fee waiver is "arbitrary or capricious" or, as plaintiff avers, "de novo,"[12] makes little difference practically. On either standard (or an intermediary one such as the "substantial evidence" test) it is clear that the CIA's decision is plainly erroneous and unsupportable on any rational basis.[13] However, because this Court held in Eudey v. CIA, supra, that the proper standard for judicial review of a fee waiver denial is "arbitrary and capricious," Allen discusses the CIA's fee waiver denial in light of this standard.

The "arbitrary and capricious" 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 ac-

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12/ Rizzo v. Tyler, 438 F. Supp. 895 (S.D.N.Y. 1977)(FOIA fee waiver held subject to de novo review). And see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)(facts are subject to trial de novo by the reviewing court when the agency action is adjudicatory in nature and the agency fact-finding procedures are inadequate).

13/ Under any of these tests, Allen is entitled to the benefit of searching inquiry into every aspect of the administrative agency's decision-making process and each factor considered by the CIA in its decision to refuse to waive fees. American Textile Mfrs. v. Donovan, 452 U.S. 490 (1981); Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C.Cir. 1976); Portland Cement v. Ruckelshaus, 486 F.2d 375 (D.C.Cir. 1973); Assoc. Industries of New York State v. Dept. of Labor, 487 F.2d 342 (2d Cir. 1973, per J. Friendly).

cordance with law." In reviewing agency action under this standard 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 on 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. 402 at 415-416.

In Eudey, Judge Aubrey Robinson held that:

> The statute indicates that 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. The agency's decision will be rational, and therefore not arbitrary and capricious, if it is based upon some factor shedding light on that central issue. 14/

478 F. Supp. at 1177.

The CIA did not make the key determination called for: namely, whether "any benefit" form the release of the documents will inure primarily to the requester or to the general public.

14/ The most recent expression of the intent behind the fee waiver provision is found in the Senate report on S. 774, a bill to amend FOIA that is currently pending before Congress. That report confirms Judge Robinson's reading of the statute, stating:

> With respect to recoverable search and duplication fees, S. 774 retains the current language for waiver or reduction of fees where disclosure "can be considered as primarily benefiting the general public," and adds the clarifying phrase "and not the commercial or other private interests of the requester." This addition expresses what was previously implied, i.e., that benefit to the general public is to be distinguished from personal benefit to the request." S.Rep. No. 98-221 (98th Cong., 2d Sess. 10 (1983)(emphasis added).

For this reason alone, its decision was arbitrary and capricious.

The CIA's first reason for denying the waiver focuses upon the alleged "fact" that "release of any of the information sought by Allen would not be of significant benefit or usefulness to the public in light of the vast quantity of information already in the public domain concerning the assassination of President Kennedy." Allen Declaration, Exhibit 8. The CIA's reason is not, in fact, "fact," but judgment or opinion. To the extent that it constitutes a judgment that the primary benefit flowing from any disclosure will be to Allen rather than the public at large, it is "unsupported judgment" of the kind found to be a "clear error ... constitut[ing] arbitrary and capircious decision-making" in Allen v. F.B.I., supra, 551 F. Supp. at 697.

In addition, the opinion expressed in the CIA's first ground for denying the fee waiver is clearly erroneous for several reasons. First, it rests on the illogical assumption that because much information on the Kennedy assassination is already public, any additional information will not significantly benefit the public. The very history of the Kennedy assassination saga over the past twenty years demonstrates the falsity of this assumption. The Warren Commission accompanied its Report with 26 volumes of hearings and exhibits. Despite this mountain of evidence, additional information disclosed over the succeeding decade contributed very significantly to public knowledge concerning the assassination, with the result that both the Executive Branch (the Rockerfeller Commission) and the Congress (The Church Committee, the

Schweiker Subcommittee and the House Select Committee on Assassinations) conducted new investigations into the assassination or related matters.[15/]

Secondly, this first ground advanced by the CIA is too vague and undefined to support a fee waiver denial. There is no way this Court can determine from the record before it what criteria the CIA applied in arriving at its conclusion that release of these materials would not significantly benefit the public. For example, did the CIA narrowly consider only their value in shedding light on whether Lee Harvey Oswald alone committed the asssassination? Did it consider whether information in its files, if released, might enable knowledgeable citizens to combine such information with the product of their own investigations and thus perhaps contribute to completion of the task left unfinished by the HSCA, the identification of putative conspirators? Or did the CIA consider the broad value of these materials to scholars in illuminating such matters as the methodology, nature and thoroughness of the HSCA's investigation and the degree of cooperation

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15/ Presumably, much of the information responsive to Allen's requests is presently classified. Indeed, some of it is known to be classified, and in seeking to explain why the House Committee did not publish all of the materials that it had intended to, its former Chief Counsel and Staff Director, G. Robert Blakey, was quoted in the May 26, 1981 issue of the Washington Post as saying of the Committee's records, including those obtained from federal agencies, "[t]here was all kinds of classified materials in those [unpublished] documents." See Allen Declaration, Exhibit 9. The presence of classified materials among the documents sought by Allen is at odds with the CIA's statement that release of any of the information covered by his requests would not be of significant benefit or usefulness to the public. If the information in such classified materials is either already in the public domain or of little significance, why is it still classified?

extended to the Committee by the CIA? The record is silent on these questions.

Thirdly, the mere fact that information from these materials is to some extent already public does not negate the public benefit to be obatined from having access to the documents from which such information is derived. THE FOIA mandates the provision of records, not merely information. No scholar worth his salt would rely on information in secondary or tertiary sources where the primary sources are available.[16/]

16/ This Court may take judicial notice that many of the most significant scholarly works on recent American history published over the past several years would have been impossible of achievement without documents produced under FOIA. In particular, use of FOIA has made possible works involving the actions or policies of executive agencies carrying out sensitive and vital policy decisions.

These books clearly vindicate the Congressional purpose of the FOIA. (Its objective "was principally . . . in opening the administrative processes to the scrutiny of the press and the general public . . . to enable the public to have sufficient information in order to be able . . . to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities." Renegotiation Board v. Bannercraft Co., 415 U.S. 1, 17 (1974).

An example is Prof. David Garrow's The FBI and Martin Luther King, Jr.: From "Solo" to Memphis, a work which explores the reasons behind the FBI's campaign of harrassment against King. Although extensive and well-publicized inquiries into this subject were made by the Church Committee and the HSCA, Prof. Garrow found them deficient in a major way and undertook, with the aid of FBI documents obtained under FOIA, to conduct the scholarly study and book that would not have been possible without such documents.

Similarly, the work of the HSCA on the Kennedy assassination has been found deficient and severely criticized by historians. See, e.g., "Preface," The Assassination of John F. Kennedy: A Comprehensive Historical and Legal Bibliography, 1963-1979, at xxvi-xxxii. (Hereafter "Kennedy Assassination Bibliography.") (Reproduced at Attachment 6.) The authors stress the importance of obtaining "the full primary evidence," stating: "Future scholars will owe their first debt to the access to the evidence that federal judges and private litigants have forced." Id. at xxxiv.

In this regard, particular attention should be paid to the holding in Eudey that a decision to deny a fee waiver based on the agency's assessment that few documents would be released was arbitrary and capricious "because it was based on a factor that was not controlling under the terms of the statute." In making that ruling, Judge Aubrey Robinson stated:

> 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. In addition, knowledge of the quantity of responsive documents in agency files alone, or of the absence of such documents, may itself benefit the public by shedding light on the subject of Plaintiff's research.

Id. at 1177.

Apt illustration of the substance of these remarks in the context of the Kennedy assassination is found in an article on this subject by a history professor which the Washington Post published in its "Outlook" section on November 20, 1983. In the article, the author stated:

> From the CIA, the new president [Lyndon Johnson] probably learned not only about Oswald's Cuban connection, but also about the CIA's own plots against Fidel Castro's life. If it became known that Castro had retaliated through Oswald, it could mean war.

(A copy of this article is found at Attachment 4)

To the best knowledge of plaintiff and his attorney, there is no evidentiary basis for the speculation that the CIA informed President Lyndon Johnson about its plots against Castro immediately

after the assassination--or at any time--as this account would have it.[17/] The presence--or absence--of information in the materials sought by Allen confirming this speculation would enable scholars to write more accurately[18/] about the assassination, especially the complicated web of events which transpired in the aftermath of the President's murder.[19/]

Finally, the CIA's assertion that release of any of the material sought by Allen would not be "of significant benefit or usefulness to the public" (emphasis added) places the CIA in the position of determining what is important for the American people to know. This proposition is antithetical to the intent and purpose of the FOIA. As the Senate Judiciary Committee has recently stated in its report on a bill to amend the Act:

> The fee waiver language of S. 774 makes it clear that agency officials should look to see if the information is truly going to the public but should not ask whether it is something the public really wants and needs. The difference is crucial, for once government becomes the

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17/ It is known that later, in 1967, at a time when New Orleans District Attorney Jim Garrison's probe of an alleged conspiracy to assassinate the President was in full swing, the FBI--not the CIA--provided the White House with such information.

18/ This Court may take judicial knowledge that the Kennedy assassination controversy has been characterized by the publication of many works that are ill-informed, erroneous, speculative, irresponsible and exploitative. See "Preface," Kennedy Assassination Bibliography, at xix-xxxiv, for a critical analysis of the literature. (Attachment 6) Governmental secrecy, which still shrouds crucial facts and events, has not doubt contributed to this unsavory state of affairs.

19/ According to one author, William R. Corson, The Armies of Ignorance: The Rise of the American Intelligence Empire (New York: Dial, 1977), American forces entered a "red alert" phrase, the highest state of readiness for a preemptive nuclear strike. Cited in "Preface," Kennedy Assassination Bibliography, at xiii.

> deciders of what is, and is not, important to know, the freedom in Freedom of Information departs and individual prejudices come to dominate.

S.Rep. No. 98-221, 98th Cong., 1st Sess. 11 (1983).

The CIA gives as its second reason for denying Allen's fee waiver request "the fact that the House of Representatives has indicated to this Agency its judgment that such material not be publicly released without its prior written concurrence." Allen Declaration, Exhibit 8. This "fact" is irrelevant to the fee waiver determination, which must be based on whether the material sought will primarily benefit the public. Because it is thus "a factor that is not controlling under the terms of the statute," it renders the fee waiver determination arbitrary and capricious.

The CIA's third reason for denying a fee waiver is "the fact that [the HSCA] has, with the publication of its voluminous 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. Any material not published in the House Select Committee's public study was determined by Congress to have insufficient usefulness or benefit to the public to warrant the expenditure of any further public funds. . . ." Allen Declaration, Exhibit 8. This ground is invalid for two reasons. First, it improperly defers to an alleged congressional decision and thus fails to exercise its independent discretion as required by the statute. Secondly, this alleged "fact" is contradicted by the affidavit of the House Select Committee's former Chief Counsel and Staff Director, Prof. G. Robert Blakey,

which was filed with the court in Allen v. Federal Bureau of Investigation, Civil Action 81-1206. Professor Blakey states that the Committee did not publish everything it wanted to publish or everything which was relevant to the Kennedy assassination. See Attachment 5, Affidavit of G. Robert Blakey. Blakey's affidavit is based on personal knowledge, whereas the CIA's allegation is not. See Allen v. F.B.I., supra, 551 F. Supp. at 697 ("The Court accords substantial weight to Professor Blakey's affidavit because it is based on personal knowledge.")

CONCLUSION

For the reasons set forth above, the CIA's decision to deny a fee waiver to Allen for the materials covered by his requests was arbitrary and capricious. Accordingly, this Court should enter an order directing the CIA to waive all search fees and copying costs incurred in connection with the requests at issue in this lawsuit.

Respectfully submitted,

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