No. 82-1229

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG,

Appellant/Cross-Appellee,

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee/Cross-Appellant.

AND CONSOLIDATED Nos. 82-1274,
83-1722 and 83-1764

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLEE/CROSS-APPELLANT

RICHARD K. WILLARD
Acting Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

LEONARD SCHAITMAN
JOHN S. KOPPEL
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530

Telephone: (202) 633-5459

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INTRODUCTION

In our opening brief, we demonstrated that the district court erred in awarding plaintiff $93,926.25 in attorney's fees and $14,481.95 in litigation costs in this Freedom of Information Act case, for, inter alia, the following reasons: (1) plaintiff, who received only duplicative or nonresponsive material through the litigation (as opposed to the processing of his massive administrative request of December 23, 1975), did not "substantially prevail" in this case; (2) even if plaintiff "substantially prevailed," he does not satisfy the criteria for an award of fees under the FOIA, because this endless, unproductive litigation conferred no benefit upon the public and

the Department of Justice had a reasonable basis in law for all of its withholdings; and (3) assuming arguendo that plaintiff is entitled to an award of fees and costs, the district court's award is manifestly excessive. We take this opportunity to reply to certain assertions made by plaintiff in his answering brief.

ARGUMENT

THE DISTRICT COURT'S AWARD OF $93,926.25 IN ATTORNEY'S FEES AND $14,481.95 IN LITIGATION COSTS CANNOT STAND

A. Plaintiff Did Not "Substantially Prevail" In This Litigation.[1]

The Department showed in its opening brief (DOJ Br. at 39-49) that, contrary to the district court's analysis, plaintiff did not receive 50,000 pages of material as a result of this litigation. Rather, plaintiff received the vast bulk of this material as a result of the processing of his enormous

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[1] Plaintiff suggests (Pl. Cross-Appellee Br. at 32) that the district court's determination that plaintiff "substantially prevailed" in this action is reviewable on an abuse of discretion, or "clearly erroneous," standard. The appropriate standard of review, however, is "the much closer scrutiny generally accorded lower court findings concerning whether litigants qualify as 'prevailing parties.'" Spencer v. National Labor Relations Board, 712 F. 2d 539, 562 (D.C. Cir. 1983).

In any event, we note that the district court, in determining that plaintiff had "substantially prevailed" for purposes of 5 U.S.C. 552(A)(4)(E), did not rely upon many of the alleged successes which plaintiff now invokes. Rather, the court simply held that plaintiff had "substantially prevailed" because he received more than 50,000 pages of material in the course of this litigation. Thus, to the extent that plaintiff's "substantially prevailed" rationale rests on matters not considered by the district court, plaintiff may not invoke a "clearly erroneous" standard of review. This is especially true in light of the fact that the Department never had an opportunity to brief the "substantially prevailed" issue in the district court. See DOJ Br. at 16-17.

Furthermore, the district court's "50,000 page" rationale plainly cannot pass muster even under a "clearly erroneous" test, since, as we demonstrated in our opening brief (DOJ Br. at 39-49), the overwhelming bulk of the material was released as a result of the administrative processing of plaintiff's enormous, prematurely-litigated request of December 23, 1975. The district court's reasoning therefore gives rise to a "definite and firm conviction that a mistake has been committed." Spencer, supra, 712 F. 2d at 563 n.88, quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

1969 requests

administrative request of December 23, 1975, which he prematurely brought into court the following day. Virtually everything plaintiff obtained as a result of the litigation was either duplicative or not responsive to his FOIA requests.

Plaintiff has failed to refute the Department's position. He cites numerous "major successes" (Pl. Cross-Appellee Br. at 9-24) including, remarkably, the "disclosure of nonexisting information." His other "major successes" prove equally flawed, either because they relate to his initial request of April 15, 1975--with respect to which the Department does not contest plaintiff's success (DOJ Br. at 40 n.15)--or because close inspection reveals them to be illusory. In this latter category are plaintiff's vaunted "abstracts" and "tickler files," the duplicative nature of which we have already demonstrated at considerable length (id. at 40-44). To these are now added two gun catalogues--both of which could have been obtained from the manufacturers--and a manuscript relating to the Bay of Pigs.[2] The significance of these "accomplishments" is open to serious question.

Plaintiff also relies on his success in obtaining FBI field office records pursuant to the 1977 stipulation between plaintiff and the Department. Plaintiff neglects to note, however, that the Department agreed to furnish the field office

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[2] The Bay of Pigs manuscript is plainly unrelated to the King assassination investigation; it was obtained by plaintiff pursuant to one of his FOIA requests concerning the assassination of President Kennedy.

records absent a specific administrative request for them only to accommodate plaintiff in the hope of ending this litigation. It is the Department's policy--embodied in its regulations--to treat requests for FBI records which do not specifically request records from particular field offices as seeking only headquarters records. See 28 C.F.R. 16.57(c); see also 28 C.F.R. 16.3 and Marks v. Department of Justice, 578 F. 2d 261, 263 (9th Cir. 1978). A district court in this Circuit has recently endorsed this very practice. Shaw v. Department of State, 559 F. Supp. 1053, 1061 (D.D.C. 1983) ("Field Offices need only be searched if specifically mentioned"). This policy is eminently reasonable, since the alternative would be to force the FBI to search scores of field offices in response to each FOIA request. The policy is even more reasonable in light of the fact that headquarters receives copies of the most significant investigative records from the field offices. Thus, plaintiff cannot be said to have "substantially prevailed" in this lawsuit merely because the Department deviated from a sound policy in this instance to spare him the necessity of filing another administrative request. Cf. Weisberg v. Department of Justice, 705 F. 2d 1344, 1357 n.12 (D.C. Cir. 1983).

Plaintiff next contends that he "substantially prevailed" by virtue of "speeding up" the processing of FBI headquarters files

and obtaining a fee waiver.[3] The Department takes issue with plaintiff's assertion that his lawsuit did indeed speed up the release of the records in question. The delay in processing the records was due to the tremendous backlog of requests filed after the effective date of the 1974 amendments, and to the magnitude of plaintiff's request. See Open America v. Watergate Special Prosecution Force, 547 F. 2d 605, 613 (D.C. Cir. 1975); see also R. 26, Affidavits of Quinlan Shea and Donald Smith. When the backlog abated somewhat, the Bureau was able to allocate more of its scarce FOIA personnel resources to plaintiff's request. The fact that, pursuant to this Court's decision in Open America, the district court retained jurisdiction over the case while the request of December 23rd was being processed administratively, does not mean that plaintiff accelerated the release of the voluminous material relating to that request through the judicial process.[4]

How else would I have gotten?

[3] We do not believe that a plaintiff in a FOIA suit can be said to "substantially prevail" on the basis of purely procedural "victories" of this kind. A FOIA plaintiff can only "substantially prevail" by obtaining information. Thus, in determining whether plaintiff "substantially prevailed," the focus must be on the material obtained by plaintiff rather than on the manner in which that material was obtained. The Court need not reach this issue, however, because review of the record demonstrates that this litigation neither accelerated the processing of plaintiff's request nor garnered him his fee waiver.

false

[4] Indeed, plaintiff himself cites a 9-10 month backlog on "project requests" like his request of December 23, 1975. We note that the first release of material relating to the request of December 23rd took place on October 28, 1976, almost ten months to the day after the filing of that request. Similarly,
(CONTINUED)

The decision to grant plaintiff a fee waiver similarly resulted from the operation of the administrative process rather than the judicial process. The fee waiver was granted by Quinlan J. Shea, Jr., Director of the Department's Office of Privacy and Information Appeals, in light of the importance of the subject matter of plaintiff's administrative requests. See Shea Affidavit, R. 60. The fact that the district court inquired into the fee waiver issue, without deciding it, in no way alters its status as part of the administrative process. As plaintiff himself observes, the district court's unpublished opinion in Wooden v. Office of Juvenile Justice Assistance, 2 GDS 81,123 (D.D.C. March 29, 1981), stands merely for the proposition that "a plaintiff who obtains a fee waiver as a result of litigation has 'substantially prevailed' within the meaning of 5 U.S.C. 552(a)(4)(E)." Pl. Cross-Appellee Br. at 40. In the case at bar, plaintiff did not receive his fee waiver "as a result of litigation."

Plaintiff further contends that "the Department has made no showing that it would have processed Weisberg's December 23rd request at all, much less in timely fashion, if there had been no suit." Pl. Cross-Appellee Br. at 39. Aside from the fact that this analysis would require the Department to prove a

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[4] (FOOTNOTE CONTINUED)

processing of the headquarters files began in October, 1976, and was concluded in August, 1977, thus consuming approximately the amount of time initially estimated by the FBI in district court proceedings. R. 31, pp. 9-10.

negative, it is also flawed because it ignores the presumption of good faith and regularity to which administrative agencies are entitled, a presumption which can only be overcome by a very strong showing to the contrary. See, e.g., Withrow v. Larkin, 421 U.S. 35, 47 (1975); United Steelworkers v. Marshall, 647 F. 2d 1189, 1208-09 (D.C. Cir.), cert. denied, 453 U.S. 913 (1981). Plaintiff has made no such showing in this case. Instead, he relies primarily on the wrongs allegedly done him in other cases, a bootstrap approach which this Court has previously rejected. Weisberg v. Department of Justice, supra, 705 F. 2d at 1362. The Court should do the same in the instant case.

Finally, plaintiff cites this Court's decision in Church of Scientology v. Harris, 653 F. 2d 584 (D.C. Cir. 1981), for the proposition that a FOIA plaintiff may "substantially prevail" merely by obtaining duplicative or non-responsive material. Church of Scientology, however, does not stand for this proposition. In Church of Scientology the plaintiffs' lawsuit led to disclosure of the existence of agency records on the Church; the agency had previously denied having any records relating to the Church. Moreover, the Scientology plaintiffs obtained forty five documents from the agency, in addition to the envelopes and routing slips upon which plaintiff relies. Here, in sharp contrast, plaintiff first sought to bypass the administrative process with respect to his mammoth request of December 23, 1975, and then spent the next eight years in litigation with the Department to secure the release of

essentially duplicative or non-responsive material. The Department never denied the existence of its voluminous records on the King assassination, and sought only to process plaintiff's huge request as expeditiously as possible at a time when the FBI's FOIA personnel resources were taxed to the limit. The case at bar is thus a far cry from Church of Scientology, and the Scientology opinion's broad language is completely inapplicable. Cf. Stein v. Department of Justice, 662 F. 2d 1245, 1263 (7th Cir. 1981) (where plaintiff's success in FOIA litigation is marginal, court may deny fees under 5 U.S.C. 552(a)(4)(E)).

In sum, it is clear that plaintiff, who received virtually nothing of consequence from this litigation, as opposed to the administrative process, did not "substantially prevail" in this litigation. Accordingly, plaintiff is ineligible for an award of fees and costs under the FOIA.

B. The District Court Abused Its Discretion In Awarding Plaintiff Fees And Costs For This Interminable, Unproductive Litigation.

As we demonstrated in our opening brief (DOJ Br. at 49-57), the lack of public benefit deriving from this litigation and the Department's reasonable basis in law for its withholdings preclude an award of attorney's fees and litigation costs in this case. These factors weigh so heavily in the Department's favor that they lead inescapably to a "definite and firm conviction that a mistake has been committed." Spencer, supra, 712 F. 2d at 563 n.88.

With respect to the "public benefit" factor, we reiterate that the "benefits" cited by the district court derived not from this litigation, but rather from the administrative processing of plaintiff's FOIA request of December 23, 1975 and/or general public interest in the King assassination investigation. See DOJ Br. at 50-54. Contrary to plaintiff's intimations, this lawsuit is not responsible for the general interest in the King case; the tragic death of Dr. King is one of the central events of our epoch, and it would have been a subject of great controversy with or without this time-consuming, unproductive litigation.

Turning to plaintiff's few tangible "successes" in this litigation (see DOJ Br. at 41-47), we stress once again the duplicative nature of the abstracts, indices and tickler files released as a result of this case.[5] It is simply

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[5] Plaintiff attaches great significance to the release of the "Long tickler file" (Pl. Cross-Appellee Br. at 15, 48, 62), which he mistakenly characterizes as a "major case control file." In fact, as we explained in our opening brief (DOJ Br. at 25-26), ticklers are merely duplicates of FBI control files; thus, plaintiff received only the relatively small portion of the Long tickler file that he had not already received from the MURKIN control file. The non-duplicative portion of the Long tickler given to plaintiff consists of information copies of documents from control files other than MURKIN; much of this material therefore is not directly related to the subject of plaintiff's request, i.e., the King assassination and ensuing investigation, but was provided to plaintiff in an effort to accommodate him.

In a transparent attempt to clothe the Long tickler with some social significance, plaintiff labels it "largely a political file." Pl. Cross-Appellee Br. at 15. In reality, the Long tickler is simply FBI Agent Long's work file on the King assassination investigation. Plaintiff, in his zeal to satisfy

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inconceivable that documents of such marginal utility could justify more than six years of litigation on the merits in district court, especially since even the court recognized--in denying release of the very abstracts it had ordered released some two years earlier--that "[t]he abstracts reveal less information than the documents which plaintiff received." R. 223, p. 3.

The release to plaintiff of the TIME/LIFE photos--which were found in the Memphis field office, rather than at FBI headquarters, long before the FBI entered into the 1977 stipulation requiring it to search field office files, but which the FBI nonetheless immediately showed to plaintiff anyway--similarly conferred no benefit upon the public. As we have previously stated (DOJ Br. at 47, 53), these photographs had already been made available for public viewing, and the FBI refused to provide plaintiff with copies only because of the copyright holder's objections. The copyright holder's subsequent decision to allow plaintiff to obtain copies of photos which he and the public already had access to plainly

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5 (FOOTNOTE CONTINUED)

the "public benefit" criterion, imputes to the Long tickler a sinister character which it does not possess.

Perhaps most importantly, however, the release of the "Long tickler" clearly was accomplished through the administrative process. It occurred in the course of the second administrative review of plaintiff's FOIA request. R. 84 ("Both letters relate to the progress of the second administrative review being conducted by Mr. Shea"). Thus, like all of the "public benefits" relied upon by plaintiff and the district court, it did not stem from this litigation.

does not bestow a benefit upon the public justifying an award of fees and litigation costs under the FOIA.[6]

With respect to the Department's "reasonable basis in law" for withholding certain material, our position is fully set forth in our opening brief (DOJ Br. at 54-57). We demonstrated therein that: (1) the Department at no time sought to discourage plaintiff from pursuing his FOIA claim; (2) any initial delays in processing plaintiff's request were due to the magnitude of that request, and to the fact that the FBI was inundated with FOIA requests after the 1974 amendments to the FOIA; (3) the Department's mootness argument regarding plaintiff's April 15, 1975, request was a legitimate argument made in good faith; (4) plaintiff, not the Department, was responsible for the post-1977 delays in this case; the Department simply opposed plaintiff's repeated requests for "mammoth and repetitious reprocessing" (R. 263, p. 8) and the release of essentially duplicative documents such as abstracts, indices and tickler files; (5) the district court ultimately upheld all of the Department's exemption claims; (6) the Department's position regarding the alleged "consultancy" provides no basis for questioning the Department's good faith; and (7) the Department had a

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[6] Plaintiff also claims to have conferred a benefit upon the public by making files on Oliver Patterson available to the St. Louis Post-Dispatch. Pl. Cross-Appellee Br. at 6. Assuming arguendo that plaintiff supplied the Patterson records to the Post-Dispatch, the fact remains that those records were provided to plaintiff through the administrative process, not the litigation.

"reasonable basis in law" for refusing to provide plaintiff with copies of the copyrighted TIME/LIFE photographs until TIME consented to the release of copies.

Plaintiff does not refute any of these points. Instead, he takes the Department to task for numerous alleged procedural defaults which either did not occur or are of no significance whatsoever.[7] Plaintiff thus has failed to buttress the

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[7] Plaintiff faults the Department for not filing written responses to numerous motions that he filed in 1976. It must be pointed out, however, that frequent calendar calls were taking place at this time, in the course of which the Department made its position with respect to these matters clear. The mere absence of written responses cannot reasonably be construed as a sign of bad faith or obduracy under the circumstances. Indeed, if plaintiff had regarded it as such at the time, he undoubtedly would have moved the court to impose sanctions. The fact that he did not, and the fact that the district court never even ruled on the motions and requests in question, gives some idea of the merit of this argument.

Plaintiff's assertion that the Department deceived him or acted in bad faith when it argued that his April 15, 1975, request was moot, is equally devoid of merit. As we have already explained (pp. 4-5, 11, supra), the crime scene photos were eventually found in the Memphis field office rather than at FBI headquarters, although plaintiff's request did not specify any field offices. See also R. 121, pp. 130, 155 (Deposition of Special Agent Thomas Wiseman). Moreover, Special Agent Wiseman's deposition testimony and affidavits demonstrate that the FBI dealt with plaintiff's request of April 15th in good faith in all respects. See id. at 116; see also R. 13 (Affidavit of Special Agent Thomas Wiseman), and R. 19 (Second Affidavit of Special Agent Thomas Wiseman).

Finally, plaintiff contends that the promised review of "obliterations" on documents was never conducted. This assertion is incorrect. The second administrative review, conducted by Director Shea of the Office of Information and Privacy Appeals, covered this subject. See R. 89, p. 5 and R. 142, pp. 28-29. Once again, it is clear that the Department did not act in bad faith in this case.

district court's insupportable finding that the Department was recalcitrant in responding to plaintiff's claim.[8]

In sum, given the manifest lack of public benefit deriving from this litigation and the Department's eminently reasonable stance throughout the case, the district court's decision to award plaintiff attorney's fees and litigation costs under the FOIA is indefensible and must be reversed.

C. Assuming Arguendo That Plaintiff Is Entitled To An Award Of Fees And Costs In This Case, The District Court's Award Of $93,926.25 In Fees And $14,481.95 In Litigation Costs is plainly excessive And Must Be Substantially Reduced.

In our opening brief (DOJ Br. at 57-68), we demonstrated that the district court's award in this case is exorbitant and that the court failed to conduct the inquiry into plaintiff's relative success mandated by this Court's decision in National Association of Concerned Veterans v. Secretary of Defense, 675 F. 2d 1319 (D.C. Cir. 1982) ("NACV"). Plaintiff has failed utterly to address these points.

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[8] Plaintiff makes numerous other ill-considered charges in his diffuse attack on the Department's good faith. For example, he contends that the Department prolonged the litigation unnecessarily by opposing his 1981 motion to dismiss the case. He neglects to mention, however, that he sought to have the case dismissed without prejudice. The Department understandably opposed a dismissal which would have left plaintiff free to bring another action based on the same subject matter, thereby rendering pointless almost six years of litigation in this case.

Plaintiff's assertion that the FBI sought to frustrate "project requesters" like himself is also totally without merit. As the testimony of Special Agent John Howard clearly shows, the FBI attempted to utilize its very limited FOIA personnel resources as efficiently as possible in order to accommodate both project and non-project requesters. R. 29, pp. 19-29; see also id. at 85-87 (testimony of Special Agent John Cunningham).

Plaintiff contends (Pl. Cross-Appellee Br. at 51-52) that he "prevailed" on six of the motions we cited in our opening brief (DOJ Br. at n.4). His notion of "success" apparently encompasses the granting of motions, such as his motion for a search of the files in the offices of the Attorney General and the Deputy Attorney General, which resulted in additional searches that unearthed no documents. Time spent on such motions clearly is not "productive" time within the meaning of NACV, supra, 675 F. 2d at 1327.

Plaintiff next argues that the eighteen motions cited in our opening brief consumed only approximately 40 hours of his time, and that he is willing to deduct the 22.8 hours of this time spent on admittedly unproductive matters. Pl. Cross-Appellee Br. at 52. This argument misses the point. Under NACV, supra, a fee application "should . . . indicate whether nonproductive time or time expended on unsuccessful claims was excluded and, if time was excluded, the nature of the work and the number of hours involved." Ibid. Plaintiff's fee application, which by plaintiff's own admission contains time spent on at least twelve unsuccessful motions, clearly does not satisfy the requirements of NACV, supra, and is totally unreliable.

Moreover, despite plaintiff's offer in the district court to deduct 14.5 hours for time spent on unsuccessful matters, the district court, for reasons known only to itself, deducted only seven hours. R. 263, pp. 16-17. This fact alone evidences the inadequacy of the district court's inquiry into the hours

expended by plaintiff's counsel. The inadequacy of that inquiry becomes even more glaring when one considers that the district court held that, out of some 790 hours spent by plaintiff's counsel on the merits, only 7 were unsuccessful, unproductive or unreasonably expended, notwithstanding the court's recognition that it had denied numerous motions filed by plaintiff in the course of the litigation, including motions which "sought mammoth and repetitious searches or reprocessing for documents which the Department of Justice had processed previously in reasonably thorough fashion." R. 263, pp. 8-9. In short, the district court's cursory analysis of the "hours reasonably expended" prong of the lodestar in this case is so manifestly deficient as to require a remand.

Regarding the district court's award of a 50% multiplier for counsel's "risk of nonpayment" in this case, our position is fully set forth in the opening brief (DOJ Br. at 64-66). Assuming arguendo that a multiplier is available absent extraordinary circumstance, we reiterate that the district court's lodestar award fully compensated counsel for his efforts in this case, and that plaintiff, rather than the Department, was responsible for unnecessarily prolonging this litigation. The underpinnings of the court's multiplier award therefore do not exist.

Finally, we note that plaintiff does not even attempt to address our criticism of the district court's inordinate costs award of $14,481.95. DOJ Br. at 66-68. This is entirely understandable, since a costs award which allows, inter alia,

travel expenses to plaintiff for his unnecessary attendance at virtually every status call and for renting a car to deliver documents to his counsel, is indefensible on its face. Consequently, the district court should also be required to conduct a more searching inquiry into plaintiff's litigation costs on remand.

CONCLUSION

For the foregoing reasons, and for those set forth in our opening brief, the decision of the district court awarding plaintiff attorney's fees and litigation costs under the FOIA, 5 U.S.C. 552(a)(4)(E), should be reversed. Alternatively, the issue of fees and costs should be remanded to the district court for a substantial reduction of the court's award.

Respectfully submitted

RICHARD K. WILLARD
Acting Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

LEONARD SCHAITMAN
JOHN S. KOPPEL
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530

Telephone: (202) 633-5459

DECEMBER 1983

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 1983, I served the foregoing Reply Brief for the Appellee/Cross-Appellant upon counsel involved, by causing copies to be mailed, postage prepaid, to:

James H. Lesar, Esquire
1000 Wilson Blvd., Suite 900
Arlington, VA 22209

JOHN S. KOPPEL
Attorney