

"Travel costs"

An example of the just plain dirtiness, of complete fabrication to incite prejudice, of the stating of what was known not to be true and of alleging what is not in any way in the case record that characterizes the government's brief is its ~~it~~ (in all cases uttered without citation to the case record) reference to what in keeping ~~her~~^{our} records my wife recorded as "travel costs." This item was explained in full, under oath, and the defendant ~~did not raise a question at all.~~^{did not raise a single} The unquestioned explanation is full and complete and therefore was not questioned. Instead of raising a single question before the district court the defendant now argues, misrepresents and slurs,

After arguing what is not truthful, that this was "protracted, unproductive litigation" that I delayed when the record is clear that the defendant is responsible for those delays, and adding what is entirely false, that all I received "is essentially ~~false~~ duplicative or nonresponsive material," the brief argues that the already reduced costs that were understated to begin with "must be substantially reduced" and especially, "under any circumstances, the court's indiscriminate (sic) award of 'travel costs.' " (page 21). Still without giving the relatively insignificant sum involved the award is again described as "exorbitant" with only one item mentioned, "plaintiff's ~~at~~ travel costs." (Page 39)

As the authors of this brief let their passions and imaginations flow while ~~was~~ driving to their climax, this ~~was~~^{was} embellished^{ment} at the very end:

"...to the ~~and the~~ extent that plaintiff's presence ~~increased~~ was not required in court because he was testifying, he should not be allowed to recover his travel expenses. ~~Plaintiff was represented~~... there was no need for plaintiff to be in court present at all times ...there is no basis for an award covering travel expenses of a non-attorney client who chooses to keep watch on his attorney." Then there is a long footnote

The court's award was not "indiscriminate." The court request and received

attestations, copies of which were delivered to the defendant, who raised not a single question. How this minor part of the award is "exorbitant" in any way is not stated but is expected to be assumed from the prejudicial and untruthful formulations.

It simply is not true that I was "present in court at all times" or that the costs were for this purpose. It also is not true that these are the "travel expenses of a non-attorney client who chooses to keep close watch on his attorney." Not only was no question raised at district court, there is absolutely nothing in the record to warrant this inflammatory and prejudicial fabrication.

The long footnote (pages 67 and 68) adds that "to the extent that the documentation reveals anything, it reveals that plaintiff's ~~needs~~ charged the Government for renting a car to deliver documents to his counsel. ...In short the Government clearly has a right to know what 'litigation costs' it is paying for."

long ago Obviously, if the government ever had any ^{really} ~~real~~ questions it would have raised them before the district court.

The only item singled out in all ^{this} that rhetoric is a single car rental the need for which was well known to the government and its counsel ^{at the time.}

Moreover, if any claim had been made for all the time I was present at court, which was not and the government knows it was not "at all times," it is obvious that the costs would have exceeded those for a trip to Alaska.

Before this case was filed I was hospitalized for serious circulatory impairments. I was thereafter hospitalized for surgery three times, the last two for serious and sometimes fatal emergencies. In all this time I was limited in what I was permitted to do and for most of the time it was not possible for me to drive my own car to Washington. (I live outside the city of Frederick, Maryland.) For some of the time it was possible for me to use Greyhound. When this was no longer safe and possible, I rented a car (mine is 19 years old and carries one-driver insurance) so that a student who was then helping me ^{could} drive it to Washington. There simply was no other way what I had to deliver could be delivered. The account of costs shows clearly that ^{when possible}

other means were used, including the mails and Greyhound package service. Moreover, the court requested that I cooperate with the appeals office, and I did in all possible ways, for which the director of ~~the~~ ^{that} office praised me in his testimony for the government. That also sometimes required my presence ^{and my then assistant,} and I arranged that to be following calendar calls.

One of the means by which the government protracted this litigation is to delay filings so that they would not reach me until ~~Monday~~ ^{later} a day or so before response to them was required. Indeed, when the court directed the government to send copies of filings directly to me so that I might have some time to assist my counsel and prepare affidavits, ^{government} counsel agreed to and then never once did, for years. On one occasion, when the government submitted a knowingly falsely-sworn affidavit, illuminated with phony documents, it was delayed so that ordinarily it would not have reached me until after that calendar call. By accident it did reach me, all two inches thick of it, on the Saturday before a Monday calendar call and by my being in court ^{4/} for that calendar call I was able to present the proof that the affidavit was falsely sworn, was illuminated with phony documents (~~per~~ ^{ided} I proved copies of them and the authentic documents) and the court banished that FBI SA who was case supervisor.

As an alternative to this particular stalling tactic the government delayed its filings even longer and then hand-delivered them in the courtroom prior to the beginning of the calendar call.

Moreover, there were always questions about the claims to excisions, on which, ^{government's} ^{its own} despite the lavish self-praise ~~the~~ appeals office found for me and against the defendant (and after a short interval the director of appeals was removed by assignment to a different duty). This required that I deliver copies of the records not only to my counsel but, as the case record reflects, to the court and to the defendant.

I live in the country and have rural mail service, delivery and pickup ~~the~~

at the same time. Normally, my communications with my counsel were placed in my box and picked up by the rural carrier. This included affidavits when there was time. When there was a rush and when mail or Greyhound would suffice, I had the travel cost of mileage from my home to and from the post office or the bus station. *insert from §*

For the most part my actual mail costs are not included, as much of my other costs are not. This is because I ~~am not used~~ have never had to keeping such expense records and at the pace at which I work, never gave such things a thought.

The government does not question the charge for postage or Greyhound package service. It questions this item, only now and with a clearly dishonest, inflammatory and prejudicial formulation, for the sole purpose of inflaming and prejudicing.

Although it long had been the government's practise to mail at the last minute or hand-deliver in the courtroom, when it was not possible for me to deliver what my counsel required before sessions and they were then hand-delivered to the government, its counsel waxed indignant and complained loudly, as the case record shows - when it had long done the same thing and it had made any earlier response impossible.

Actually, part of this cost represents a distinct value to the government. I did an enormous amount of work ~~for~~ for it, pursuant to the court's request, without charge or asking for any payment, the extent in paper alone running close to two file drawers. Aside from providing my own knowledge and records to the appeals office, it also had the services of my then assistant free, for she is the one who then tended my files and did such things as the searching of them.

The government's brief rambles on by referring to delivery costs as "truly remarkable expenditures" which it alleges are not "reasonably incurred." (page 68) and alleges again, knowing it to be untrue, unjustified and not in the record in any event, that my costs for such things as "personally monitoring the efforts of" my attorney. This is, additionally, slanderous.

As the government also knows very well, at the request of the court I also met

repeatedly with the FBI at its offices. There were times when ~~it~~ I was so weak and ill I could not walk to its offices from a parking space, and the FBI and its counsel know very well that it parked my counsel's car inside the FBI building so I could meet with it. The FBI got paid for that time, I did not, and I provided it, too, with copies of records that were pertinent. If I had not had the "travel cost" of getting to Washington, I could not have assisted the FBI this way, at the court's request. I remember one occasion on which the appeals office kept me so late there was no bud I could take and I had to take a cab from Washington to my home. This, too, I emphasize was for the government and at the request of the court.

No charge is included for delivery of what in itself represents a major cost requested of me by both the court and the government's appeals director, about two full file drawers of material consisting of memoranda prepared from my subject's matter expertise and copies of documents and the postage alone for this volume of mailing is a not inconsiderable sum. ~~(Some was hand-delivered when I was in Washington for the other state purposes)~~ The amount of time entailed is obvious considerable.

Insert on 4 after line 4

There were times when I could get others to take what my counsel required to Washington. On those occasions - and I doubt these are included in the claim - I had the ^{travel} ~~delivery~~ cost of taking the package to the persons who carried them. There then was no postage or any other charge, ^{and} ~~although~~ my counsel, as with Greyhound, had to pick these packages up, which took his time I have not seen in his itemization.

plaintiff reasonably should have realized that no agreement had been reached, and the Department did not benefit from plaintiff's work product.

The district court erred grossly, however, in awarding plaintiff \$93,926.25 in attorney's fees and \$14,481.95 in litigation costs for this protracted, unproductive litigation. Plaintiff, who commenced litigation on his enormous administrative request of December 23, 1975, one day after filing it with the Department, satisfies neither the eligibility nor the entitlement prong of the FOIA fees and costs provision, 5 U.S.C. 552(a)(4)(E): he received essentially duplicative or non-responsive material from this litigation, while receiving approximately 45,000 pages of original, substantive material through the administrative process. Moreover, even assuming arguendo that plaintiff is entitled to an award, the district court's award must be substantially reduced, since the court failed to deduct attorney time spent on unsuccessful or unproductive matters and awarded a wholly unwarranted fifty percent premium. Finally, to the extent that the lodestar fee award is reduced, the court's exorbitant costs award must be reduced correspondingly. Under any circumstances, the court's indiscriminate award of "travel costs," xeroxing expenses and long-distance telephone costs to plaintiff is especially egregious and cannot be permitted to stand.

1969

My
costs
12/23
duplicative
(3)

Even assuming arguendo that plaintiff satisfies the basic criteria for an award of fees and costs, it is clear that the court's award of \$93,926.25 in fees and \$14,485.91 in costs was grossly excessive, especially in light of the court's own recitation of the numerous motions filed by plaintiff which it denied. R. 263, pp. 8-9. National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir. 1982), requires the district court to deduct plaintiff's unproductive time and time spent on losing issues. It is simply inconceivable that only seven hours of the 791.9 hours of plaintiff's time on the merits were spent on "truly fractionable" unsuccessful matters. Moreover, the district court's award of a fifty percent multiplier in this case was totally unwarranted; accordingly, at the very least, the district court's award must be substantially reduced.

Finally, to the extent that plaintiff is not entitled to an award of attorney's fees under 5 U.S.C. 552(a)(4)(E), he also is not entitled to an award of costs. Assuming arguendo that plaintiff is entitled to any costs, the court's exorbitant costs award of \$14,481.95--including plaintiff's travel costs--must be significantly reduced.

A. Plaintiff Did Not "Substantially Prevail" In This Litigation.

It is well established that, in order even to be eligible for an award of attorney's fees under the FOIA, the plaintiff must "substantially prevail" in the litigation. 5 U.S.C. 552(2)(4)(E); Church of Scientology v. Harris, 653 F.2d 584

note
all while
travel
not
what

did

Travel (1)

fee award, his costs award must of course be eliminated or reduced correspondingly. In any case, however, the costs award is excessive and must be substantially reduced.

Assuming arguendo that "litigation costs" in 5 U.S.C. 552(a)(4)(E) are not limited to "court costs" under 28 U.S.C. 1920 and Rule 54(d), Fed. R. Civ. P., the fact remains that the court's award was excessive. Plaintiff's "travel costs," in particular, must be reduced: to the extent that plaintiff's presence was not required in court because he was testifying, he should not be allowed to recover his travel expenses. Plaintiff was represented by counsel, and there was no need for plaintiff to be present in court at all times. Since fees and costs are not available for duplicative attorney appearances at status conferences, there is no basis for an award covering travel expenses of a non-attorney client who chooses to keep close watch on his attorney. This duplication of effort also necessitates a further reduction of the district court's award for xeroxing expenses and long-distance telephone calls.²⁷

This is included to del Heroku

²⁷ We note further that plaintiff's documentation regarding his "litigation costs" is so abstruse as to be virtually incomprehensible. See, e.g., Lesar Declaration filed January 31, 1983; Affidavit of Lillian Weisberg, filed August 23, 1982. We do not believe that such vague "guesswork" documentation satisfies the requirements of this Circuit. Cf. NACV, supra, 675 F.2d at 1327 ("contemporaneous, complete and standardized time records" required for attorney's fee award). To the extent that plaintiff's costs documentation reveals anything, it reveals that plaintiff charged the Government for renting a car to deliver documents to his counsel (Affidavit of Lillian Weisberg,

(CONTINUED)

Travel costs

CONCLUSION

For the foregoing reasons:

(1) The decision of the district court granting summary judgment to defendant and dismissing plaintiff's FOIA claim should be affirmed;

(2) The decision of the district court denying plaintiff's motion for a consultancy fee should be affirmed; and

(3) The decision of the district court awarding plaintiff attorney's fees and costs under the FOIA, 5 U.S.C. 552(a)(4)(6) should be reversed; alternatively, the issue of fees and costs

27 (FOOTNOTE CONTINUED)

filed January 31, 1983, ¶2); the district court apparently accepted this as a "litigation cost [] reasonably incurred."

In short, the Government clearly has a right to know what "litigation costs" it is paying for. Not only do plaintiff's vague costs submissions violate that right, but they reveal truly remarkable expenditures which cannot be characterized as "reasonably incurred litigation costs" by any stretch of the imagination.

Furthermore, plaintiff clearly is not entitled to any costs regarding litigation on the consultancy issue, an issue on which he clearly did not prevail. We are aware of no indication in plaintiff's documentation of any attempt to ferret out filings regarding this issue.

Thus, it is clear that plaintiff's "laundry list" of costs is profoundly abusive of the costs provision of the FOIA. Plaintiff's documentation indicates that the district court awarded plaintiff costs for, e.g., personally monitoring the efforts of his attorney and for renting cars in order to deliver documents to his counsel. This award cannot stand.

*had
consultancy
plan attorney fees (3)*

*or that
it is in
only a
part of
the
file*