Alleged "Duplicates" and "non-Responsive" information

Predicated upon a fiction, that all allegec efforts"to define the scope of plaintiff's requests" (which it is afalsely alleged "proved futile") it is further alleged that after the procrssing of the MURKIN records all that wasmdisclosed to me is X "15,000 pagges of nonresponsive and/or duplicative material(e.g. abstracts and indices ofmdocuments) and this in turn, in the santence ~~it was~~ it is alleged was done "simply because of the amorphous nature of plaintiff's requests." (Page 5) No part of these allegations is true. This illustrated the plaintiff's major problems, including in time and space, required to respond to official misrepresentations.

No attempt was made "to define the scope" of my request. The government's problem is that over my expressed objections it limited response to its MURKIN file, although my requests consists of specific items pertaining to ~~about~~ which the government never once claimed it lacked understanding. Its problem which it is not honest enough to admit, is that from the outset it decied not to comply with my request/ most of which, as it never even bother to deny, could not possibly be filed under MURKIN, as the case record reflects.

Imwrote the FBI repeated and it just did not respond. I filed appeals at great length and in considerable detai; and except on the few occasions on which the appeals office got it to move it did nothing at all.

The Department released nothing at all voluntarily and released only what it was compelled to release, which is quite the opposite of making a release of any kind "simply because of the amorphous nature of " my requests, which could not be more spe cific. Every one of the few disclosures here mentioned was compelled by the court after prolonged haggling and resistance by the defendant, over a period of many moths that it attributes to my alleged tactics.

While much more than the "abstracts and indices of documents" were released, those, without question, are within a specific item of my request, which asked for

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all indices. There simply is nothing at all"amorphous" about a request for all indices. In fact, government counsel originally opposed disclosure of the abstfacts, a MURKIN record, on the ground that they are no more than an index. He shifted his ground when he was remindee of the Item seeking all indices.

There is absolutely nothing at all "duplicative" about an index. It is a separate and disctinct record of unique nature and purposes. Moreover, in this inst nce, the abstracts are all MURKIN, and that the government itsel s itself said it would disclose complete.

With the processing of FBIHQ MURKIN the government again claimed mootness, only to be required to disclose the undisclosed MURKIN records of seven filed offices, not a single page of which is duplicative. (All duplicates were withheld by the government.) The records of spies, like Oliver Patterson and Marrell McCullough, which were disclosed only under compulsion, are hardly "duplicative." The withheld and pertinent inventories of all field office MURKIN records are hardly "duplicative." The other records that are within the request and originally were not provided also are not duplicative. This representation is completely false and the falsity is cannot be accidental.

Even the dep representation made to describe the stipulation at this point is not true. All the stipulation did is waive a Vaughn inventory if the provisions of the stipulation were adhered to by t e defendant, and they were not adhered to and a smaple Vaughn was ordered. In return for this waiver, the defendant agreed to process and disclose field office records it had refused to disclose. Thus even these filed office records, about six file drawers of them were disclosed under compulsion and after the claim of mootness was repeated.

Wheb all of this pertinent and responsive information was disclosed invol ntarily, the breif claims the litugation was "protracted, unproductive litigation" (Page 21), and this serves to introduce the identical misrepresentation, that all I received is "essentially duplicative or nonresponsive mat rial."

Even the representation here and throughout that what I received earlier, the FBIHQ MURKIN records, was "through the administrative process." It was by specific direction of the court. My request and my appeals until then were ignored.

There is a different but nonethess untruthful representation of alleged "duplicates" on page 26, where ignoring the specific finding of the appeals office, yhat under the stipulatoon ~~xx~~ non-duplicates were withheld. The representation that all non-dyplicates were disclosed was found to be incorrect by the appeals offfice, which found significant information on field office copies that does not appear on those of FBIHQ. Moreover, there never was any check to determine whether the claomed duplicates even existed at FBIHQ to be disclosed. Even after such a check in another lawsuit in which the identical claim was made disclosed more than 3,000 pages of claimed duplicates that did not exist at FBIHQ, no check was made to determine whether such records had been processed and disclosed in this lawsuit.

It is repeated again (pages 40-41) that all that was disclosed after the FBIHQ MURKIN record are "duplicative and non-responsive, with this time the inclusio inclusion of "tickler files" omitted in the earlier reference when the ~~XXXXXX~~ Long tickler was not disclosed voluntarily but was disclosed only after the court involved the appeals office and it found the withheld record of great significance when it followed the leads I provided after the FBI denied having it. However, that significant record is not "duplicative." It held much significant and pertinent information that is MURKIn by nature but was hidden in other files, like those o n bank robberies. This time a differ nt explanation if given for these disclosures, not that they were compelled, as all were, byt that it was "to end the matter once and for all."

But with regard to this Long Tickler and other records disclosed because of the actions of the appeals office, that office did nothing until the court moved and had Mr. Shea, tthe director, involved personally.

duplicatew-6

Here again, as in all other accountings, the brief ignores the pertinet field office MURKIN, Invaders and santitation strike files that were initially withheld and refused. That is the only reason there were included in the stipulation. They are a major, nonduplicative and quite responsive disclosure of about six full file drawers.

The same canard, only"duplicates and/or non-responsive" records were disclosed after FBIHQ MURKIN is repeated on page's 57 and 65.

Even if the government's brief were interpreted to mean what it does not says at this point but admits elsewhere, that my request, which makes no reference to MURKIN at all, were limited to MURKIN, it still would be untrue that all I received after disclosure of FBIHQ MURKIN is only duplicative and non-responsive. The indices and abstracts are MURKIN and there is no dispute that the Invaders and santiation strike files were specifically requested. So also is the e404-page inventory a MURKIN record. It is the field offices' response to the FBIHQ directive that each inventory its MURKIN and other relevant holddings.

process the second administrative request. See 5 U.S.C. 552. The district court, however, allowed the litigation to continue and permitted the second FOIA request to become part of the lawsuit.

For the next five years, litigation focused chiefly on the scope of plaintiff's FOIA requests and the adequacy of the Department's searches. During late 1976 and 1977, approximately 45,000 pages of material were made available to plaintiff, as a result of the processing of plaintiff's second administrative request. In August 1977, plaintiff and the Department entered into a stipulation spelling out the Department's search obligations. R. 44. Plaintiff continued to assert, however, that the Department had not conducted an adequate search of its records. Attempts to define the scope of plaintiff's requests proved futile;[3] thus, the Department released approximately 15,000 pages of nonresponsive and/or duplicative material (e.g., abstracts and indices of documents) simply because of the amorphous nature of plaintiff's requests. Moreover, the Department was forced to undertake numerous generally fruitless searches for material that plaintiff claimed was in its possession. The processing of plaintiff's FOIA requests alone

[3] Indeed, the Department of Justice even contemplated hiring plaintiff as a consultant so that he would be able to specify the material he wanted. See infra, pp. 6-15, 29-35.

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.

duplicative 12/23 cost-free (3)

Affidavit, R. 148, exhibit A. This outcome is hardly surprising, since ticklers are merely duplicates of material found in FBI control records, and are routinely destroyed within a specified period of time after an investigation has ended. Id., ¶ 3. These are the only "divisional files" maintained by the Bureau.

Plaintiff next contends (Pl. Br. at 38-39) that the FBI should be required to reprocess records processed from FBI field offices pursuant to the August 12, 1977, stipulation between the parties. Plaintiff must be aware, however, that his request nullifies a provision of the stipulation that states:

> [d]uplicates of documents already processed at headquarters will not be processed or listed on the worksheets.

(R. 44). As a result of this stipulation, which was duly signed by the district court, the FBI consistently processed and released only those field office records which were not processed at Headquarters, while also releasing from field office files "attachments that are missing from headquarters documents" and "copies of [Headquarters] documents with notations," as provided for by the stipulation.[9] Plaintiff now requests this Court--as he requested the district court on numerous occasions--to scrap this long-standing agreement by

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[9] Documents bearing routine administrative markings were not processed as "documents with notations". Since all FBI field office documents have such markings, such an interpretation would have made the language of the stipulation meaningless.

(D.C. Cir. 1981). The plaintiff "substantially prevails" if (1) the lawsuit is a substantial causative factor in the release of the information and (2) prosecution of the lawsuit could reasonably be regarded as necessary to obtain the information. Id. at 587-88.

The district court held that plaintiff satisfied this threshold requirement because he had received more than 50,000 pages of material in the course of the litigation. December 1, 1981, Memorandum Opinion at 2-3. The court, however, overlooked the fact that virtually all of these pages were released as a result of the processing of plaintiff's enormous administrative request of December 23, 1975, which he prematurely brought into court by amending his original complaint the following day. See 5 U.S.C. 552(a)(6)(A)(i) and (ii), (a)(6)(B) (agency has minimum of ten days to respond to FOIA request); see also Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).[15] The information he obtained as a result of the lawsuit--tickler files, abstracts, indices and index cards relating to the documents obtained through the second

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15 We assume arguendo that plaintiff "substantially prevailed" with respect to his initial request, since he did obtain the TIME/LIFE photographs through this litigation. It should be noted, however, that the FBI was merely serving as a stakeholder with respect to these photographs, since it was representing the interests of TIME, the agent for the copyright holder. Even if plaintiff did "substantially prevail" with respect to the first request, however, we demonstrate infra that he does not satisfy the "entitlement" aspect of the FOIA attorney's fee test with respect to any part of this litigation.

administrative request--was essentially duplicative or unresponsive to his request, but was released "in order to end the matter once and for all." Weisberg v. Department of Justice, supra, 705 F.2d at 1354 n.12. Furthermore, the court ultimately upheld all of the exemptions claimed by the Department.

In short, plaintiff has very little to show for eight years of litigation. His principal success was in forcing the Department repeatedly to search its files, to no avail. Indeed, even the district court noted plaintiff's many 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. Surely plaintiff's success in this litigation is not to be measured by his ability to make the Department conduct fruitless searches. See Hanrahan v. Hampton, 446 U.S. 754, 757-759 (1980) (procedural victories do not entitle a party to an award of attorney's fees). Thus, given the breadth of plaintiff's request of December 23, 1975, it is clear that whatever he may have received as a result of the litigation pales in comparison to what he did not receive from the litigation. See, e.g., Stein v. Department of Justice, 662 F.2d 1245, 1263 (7th Cir. 1981).

A review of plaintiff's tangible "successes" cited by the district court (R. 263, pp. 7-8) confirms this view:

(1) Disclosure Of Indices In The Memphis Field Office.

On October 10, 1979, the Government released to plaintiff 34 index cards in response to the Court's order of August 15,

> the abstracts are essentially duplicative of information already released to plaintiff. The abstracts reveal less information than the documents which plaintiff received.

R. 223, p. 3. Regarding item (6), as we have already stated at page 46, supra, it is clear that this item was not the source of any page one item in the L.A. Times.

Finally, plaintiff's success in obtaining the TIME/LIFE photos--which were withheld solely because they had been copyrighted by TIME, Inc.--also did not confer a public benefit. As explained by this Court in its opinion on this issue:

> When the FBI advised TIME of Weisberg's FOIA request, TIME stated it had no objection to having the photographs viewed, but that it would object if they were copied because such reproduction would violate its alleged copyright on the photos.

Weisberg v. Department of Justice, 631 F.2d 824, 825 (D.C. Cir. 1980). Consequently, plaintiff's accomplishment of having TIME, Inc. eventually voluntarily agree to give copies of the documents to him, involved no "disclosure" at all. The photos had always been available for his or the public's viewing; indeed, plaintiff had viewed them himself at FBI headquarters. Plaintiff's need to possess copies of the photos was a matter of purely private concern with no public benefit whatsoever.

Thus, it is plain that plaintiff's lawsuit has not benefited the public in any meaningful sense. Plaintiff has succeeded only in forcing the Department to undertake countless futile searches and to release thousands upon thousands of pages of

numerous denials of plaintiff's repetitive motions for reprocessing and further searching, and by the duplicative and/or non-responsive nature of the documents obtained by plaintiff after 1977. It is equally clear that the Department had a reasonable basis for withholding copyrighted photographs at the copyright holder's request: indeed, this Court recognized that plaintiff's request for copyrighted materials raised a "novel question" under the FOIA (631 F.2d at 825), and the Court reversed the district court's exemption holding and remanded the case to the district court for further consideration of the exemption claims after joinder of the copyright holder, TIME, Inc., as a party. At this point, TIME--whose interests the Department had been representing--decided not to become embroiled in this litigation and authorized release of the photos to plaintiff. Thus, it is apparent that the Department had a "reasonable basis in law" for every position it took in this case.

In sum, there can be no question but that the "public benefit" and "reasonable basis" prongs weigh heavily in the Department's favor in this case, and outweigh plaintiff's non-commercial interest in disclosure. Accordingly, plaintiff is not entitled to fees or costs for this litigation.

C. Assuming Arguendo That Plaintiff Is Entitled To Fees And Costs, The District Court's Award of $93,926.25 In Fees Is Plainly Excessive.

Even if plaintiff is entitled to an award of fees in this case, the district court's exorbitant award of $93,926.25 is

cases, contrary to the will of Congress. This issue is currently before the Supreme Court in Blum v. Stenson, No. 81-1374. We realize that this position is contrary to the existing law of this Circuit; of course, if the Supreme Court adopts our position, its decision will be controlling. If this Court so desires, we will furnish a copy of our brief in Blum.

Assuming arguendo that a multiplier is available absent extraordinary circumstances, however, the district court's decision to award one here remains indefensible. The court awarded a 50 percent "risk" premium chiefly because of its view that "[t]his case was unnecessarily prolonged, preventing counsel from taking many other cases over a six-year period." R. 263, p. 15. This statement overlooks a crucial point that we have already made repeatedly: plaintiff and his counsel, not the Department of Justice, prolonged this case unnecessarily, first by amending plaintiff's complaint prematurely and later by filing repeated motions for reprocessing of documents already adequately processed, and for release of duplicative or non-responsive documents. Plaintiff and his counsel chose their litigation strategy; they alone decided to amend plaintiff's complaint one day after filing his enormous second request of December 23, 1975; the Department of Justice should not be penalized for their choices.

Furthermore, the notion that plaintiff's counsel was prevented from taking other cases is irrelevant, since the court fully compensated plaintiff's counsel for all of his time spent

stonewalling duplicative reprocessing amend complaint