PUBLIC INTEREST

The brief claims that no public interest is served by the disclosures of defendant's records in this litigation. It is represented (on page 38) that "(t)he district court has handsomely rewarded plaintiff for profoundly abusing the Freedom of Information Act for the last eight years" (explained elsewhere as by persisting and obtaining the disclosure of thousands of pages of records ~~falsely~~ described as ~~either~~ irrelevant and/or non-responsive, but responsive, relevant and significant; that ~~xx~~"examination of the history of this litigation revelas reveals not only that plaintiff did not 'substantially prevail' in his lawsuit (in which more than 60,000 pages previously both withheld and refused were disclosed), but also has conferred no public benefit..."

These allegations are followed by,"and that the Department had a'reasonable basis in law' for all of its withholdings." This is refuted by the testimony of the defendant's own expert witness, head of its appeals office, who testified to the exact opposite. (On January 12, 1979 ~~as the defedant's own witness.)~~

It also is alleged (on page 2) that at the time I filed my first requests "the information requested was unavailable under the broad law enforcement exemption which was amended in 1974." The reason for rejecting my initial request was not the claim that the FBI was totally imune from the exemptions concerning which no lawsuit had even been filed but on the FBI's own "Reasonable basis in law," stated by T.N.Goble and in the case record, that under FOIA the FBI does not have to respond to ~~xx~~ FOIA requests from those it does not like.

Even if ~~it were assumed that~~ what the ~~xxx~~ undisputed case record ~~xxxxxxxxxxxx~~ establishes is not true with regard to me and my requests were true, that in the course of time there would have been voluntary, administrative disclosure, the case record leaves it without question that only this litigation compelled the disclosure of about 20,000 pages that were withheld after compliance was claimed with disclosure of the FBIHQ MURKIN records only.

While it is not true that there would have been a voluntary administrative disclosure of MURKIN to me, and the FBI's internal records in the case record reflect ~~state~~ the opposite, it is still a

R

fact that the defendant's baseless claim rests entirely on disclosure of the FBIHQ MURKIN file and it alone. Many thousands of pages of other and quite significant records were disclosed as a result of this litigation. Those on the "Invaders" and the Memphis sanitation workers strike, with all they disclose about the FBI's intrusion in ~~domestic~~ local, noncriminal activity; its intrusion into political and highly personal matters; its domestic espionage, by its own symbol informers and other sources as well as those of local police, are of exceptional significance and public interest and have been used in colleges and universities, by scholarly journals and have been the subject of honors papers. These were not volunatry disclosures. The withheld records whose disclosure was ~~compil~~ compelled relating to the FBI's penetration of the Ray defense and that symbol informers's political activities were the subject of four major, front-page articles in the St. Louis ~~Dispatch~~ Post and were syndicated nationally. Aside from the major disclosures in the MURKIN records, which the FBI, from a long and consistent history, would never have disclosed to me voluntarily, and what these records reveal of the nature and content of the FBI's investigation in that major case, ~~and its practises,~~ it is apparent that even within MURKIN the FBI resisted strongly and for months the disclosure of the largest and most important of all MURKIN records, the ~~MURKIN~~ abstracts. The truth about them, which is not in the brief, is that until this disclosure was compelled by the district court nobody had ever seen and nobody had even known ~~xx~~ that the FBI had abstracts, a rough ~~summary~~/index, of all FBIHQ main files. In ~~its~~ itself this is a disclosure of what is both new and significant for the public. The magnitude of the FBI's intensive operation against Dr. King was not disclosed until it was compelled in this litigation, again over prolonged resistance by the defendant. This is disclosed in the inventories of the field offices that include their MURKIN holdings. (This particular disclosure also includes how the FBI hides what ~~xxx~~ belongs in the main subject files so it can search without locating what is embarrasing while also being able to retrieve the embarrassing for its own purposes. This disclosure also reveals how the FBI can pretend to make a ~~thor~~ thorough search while seeing to it that a thorough search is not made.

The FBI'd records disclosed in this litigation reveal that it did not ~~provide~~ set aside all the information I obtained for the HSCA and that it set aside for ~~the use of that committee~~ it only the FBIHQ MURKIN records. (The same FBI internal record also discloses that with regard to that committee's investigation of the assassination of President Kennedy the FBI did not provide it with what I had obtained in another lawsuit.) Because later the FBI would have been compelled to make the MURKIN disclosure to the HSCA, it cannot ~~properly~~ honestly allege that all its claimed cost in disclosure can be charged to me, as it does (on page 54). ~~in this brief in alleging that I caused~~ the expenditure of much public money. ~~Because it had processed these records for~~ It is clearly a public benefit ~~from~~ for a private citizen to compel the disclosure of what even the Congress, in the most costly investigation in its history, did not disclose, as it also is a major public benefit to bring to light what the Congress later did use.

After I compelled disclosure and before the work of the HSCA other writers, including CBS-TV, obtained (and used) copies of what I brought to light, and this also is a public benefit.

The extensiveness of FBI distribution of domestic intelligence among other agencies, including the military and involving perfectly legal activities by private citizens (and organizations), even the extent of FBI cross-filing of such information, in as many as 150 different files on ~~individuals and organizations~~, is important for the public to know and is a public benefit that even the HSCA did not disclose.

The "tremenduous cost to the taxpayers" which the brief alleges this litigation was and describes as "only a public detriment," (page 54) comes ~~almost entirely~~ largely from the FBI's stonewalling and refusing for months on end to make the searches and disclosures it was finally forced to make, its refusal to search to comply with the actual items of my request, and its excessive, unjustified and ~~entirely~~ unnecessary withholdings from the disclosed records of what its own expert, Director of FOIPA appeals Shea, testified should not have been withheld and should be restored. It is not the compliance that accounts for the major costs, it is the noncompliances and what they necessitated.

Clearly, the district was correct in holding that no enforceable contract existed and that a contract should not be inferred here.

III. THE DISTRICT COURT ERRED IN AWARDING PLAINTIFF $93,926.25 IN ATTORNEY'S FEES AND $14,481.95 IN LITIGATION COSTS IN THIS CASE.

The district court has handsomely rewarded plaintiff for profoundly abusing the Freedom of Information Act for the last eight years. An examination of the history of this litigation reveals not only that plaintiff did not "substantially prevail" in his lawsuit, but also that the case has conferred no "public benefit" and that the Department had a "reasonable basis in law" for all of its withholdings. Under the circumstances, plaintiff should not receive any fees or costs under the FOIA, 5 U.S.C. 552(a)(4)(E).

---

14 (FOOTNOTE CONTINUED)

3. The United States is not estopped from denying the unauthorized acts or representations of its agents. Schweiker v. Hansen, 450 U.S. 785 (1981); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

4. There was no intent to deceive or mislead plaintiff, and his reliance on any statements made to him was unreasonable; plaintiff unreasonably embarked on his project prematurely, before the necessary agreement had been reached. These factors preclude the application of any form of estoppel in this case, assuming arguendo that estoppel is available against the Government. See, e.g., GAO v. GAO Personnel Appeals Board, 698 F.2d 516, 525-527 (D.C. Cir. 1982); NTEU v. Reagan, 663 F.2d 239, 249 (D.C. Cir. 1980).

Cuneo v Rumsfeld, 553 F.2d 1360, 1367 (D.C. Cir. 1977); see Senate Report No. 854, 93d Cong., 2d Sess. 17 (1974), reprinted in House Comm. on Gov't. Operations & Senate Comm. on the Judiciary, 94th Cong., 1st Sess.; Legislative History of the Freedom of Information Act Amendments of 1974, 171. The district court found that all four factors militated in favor of an award. Even assuming arguendo that factors (2) and (3) favor plaintiff, however, the court's analysis of factors (1) and (4) was thoroughly misguided, and the latter factors plainly outweigh the former in the instant case.[18] Accordingly, the district court's fee award must be reversed.

1. The Public Did Not Benefit From This Interminable, Expensive Litigation.

The district court found that the public benefited from plaintiff's lengthy lawsuit because:

(1) the FBI placed its King assassination records in its public reading room after plaintiff filed suit;

(2) the Justice Department granted plaintiff a fee waiver;

(3) the Justice Department, through several Attorneys General, declared the records to be "of historical significance and public interest";

(4) the lawsuit led to the Justice Department's Office of Professional Responsibility (OPR)

---

[18] Moreover, as this Court has recognized, "[a] decision to grant or deny fees in a particular case is an implicit decision, respectively, to encourage or discourage that type of Freedom of Information Act claim." Cox v. Department of Justice, 601 F.2d 1, 7 n.4 (D.C. Cir. 1979). The history of this protracted, costly and unproductive litigation demonstrates compellingly that encouraging this type of litigation is not "in the national interest." Ibid.

duplicative material, at great expense to the taxpayers. Seventh Phillips Affidavit, p. 2. He also has flooded the court with numerous repetitive motions to reprocess material already released and to re-search files already adequately searched. Whatever he accomplished was accomplished at the adminstrative level, not in court. We can discern no benefit to the public deriving from this litigation; the litigation, with its tremendous cost to the taypayers, can only be characterized as a public detriment.

2. The Department Had A "Reasonable Basis In Law" For Its Withholdings.

The district court held that the Department lacked a reasonable basis in law because it had engaged in "a deliberate effort to frustrate this requester." R. 263, p. 15. The notion that the Department sought to frustrate plaintiff is patently erroneous. The Department was neither recalcitrant nor obdurate in its opposition to plaintiff's claim. The Department had a "reasonable basis in law" for all of its actions in this case.

The court contends that "the Government stalled by claiming mootness." R. 263, p. 14. The Department's mootness argument, however, was eminently reasonable and bona fide. The Department considered the case moot because it claimed to have turned over to Mr. Weisberg all documents within the scope of plaintiff's April 15, 1975 FOIA request, the request that formed the basis for his lawsuit. The Department argued that plaintiff could not supplant this lawsuit with an amended complaint dated December 24, 1975