Reprocessing and Exemptions claimed

There are ~~many~~ refuted allegationsnwith regard to ~~the~~ reprocessing that are not in accord with fact. It is referred to as "a truly monumental and time-consuming task," (Page 27) with regard to the filed office records.

The claims made to exemption to withhold are ~~referred to~~ described as "valid" and ~~that~~ allegedly this was established by a Vaunghn sampling (page 28) which actually established the exact opposite and resulted in the disclosure of what had been with held in the records sampled.

"Mamouth and repetitious" reprocessing is ~~referred to~~ alleged ~~(page 41)~~ (pages 41,48)

And it is alleged ~~that with regard to~~ my representation that "numerous exemptions, particularly ~~the~~ 7(C) and 7 (D)" were ~~improperly~~ "improperly applied" ~~simply on the basis~~ rests only ~~of~~ my alleged "suspicions regarding the identities of individuals for ~~whom~~ whose protection the exemptions were claimed." (Page 30)

The extent to which the FBI withheld names improperly is reflected by the fact that it withheld them from even ~~xerox~~ a of newspaper stories.

With regard to these claims to exemption the ~~FBI~~ Department produced its own expert, Quinlan Shea, head of the appeals office to testify on January 12, 1978. ~~He~~ then testified - as the Department's witness - that the records required re-processing because there was excessive claim to exemption.

These excessive and unjustifiable withholdings were purposeful, not accidental. The ~~records~~ MURKIN records were disclosed to me weekly, as processed. I reviewed them promptly and immediately ~~and extensively~~ informed the FBI ~~when~~ that it was withholding the public domain and was what it had ~~names~~ already disclosed. It even withheld the contents of the phone book. In an effort to reduce these problems if not entirely eliminate them I offered my knowledge and files as a subject-matter expert and I offered ~~indexe~~ indexes to the books that had been published. All such offers were refused and the FBI persisted in making ~~these~~ withholdings that were not justifiable. ~~In the end~~ I ~~even had~~ do have a consolidated index of all the published books prepared and gave it to the FBI, but it ~~also~~ still refused to use it. Instead, having learned that

I informed it promptly of its errors when I received the disclosed records weekly, it made that impossible ~~by~~ by accumulating large quantities of records, thousands of pages, and then dumping them all on me too late for me to report any errors. It did the this even ~~if~~ when it was bound not to by the stipulation it sought and thus violated that stipulation from the first.

If the FBI had not processed the records incorrectly to begin with, there would not be any question of reprocessing. If it had not ignored all the complete/accurate information I provided, it would not have any such problems to face. If it had had any interest in correct processing, after I provided it ~~with all that I did~~ reason to have questions at the least it could have taken samples up with the appeals office rather than stalling everything until it had processed all the records improperly.

The FBI had the consolidated index to the published books before it processed any field office records, but it not only did not use the index, it even withheld names that it dislcosed in disclosing its copies of newspaper clippings.

integrity of the index (see Lame v. Department of Justice, 654 F.2d 917, 928 n.11 (3d Cir. 1981)), while assuring that the overwhelming majority of the Department's exemption claims were thoroughly represented.

Plaintiff next argues that the Department improperly applied numerous exemptions, particularly 7(C) and 7(D). Pl. Br. at 40-41.[12] Regarding these exemptions, plaintiff appears to be under the misapprehension that the FBI is obligated to confirm or deny his suspicions regarding the identities of individuals for whose protection the exemptions were claimed.[13] This is

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12 Plaintiff also faults the Department for dropping a small number of exemption claims. Pl. Br. at 27. This action was praiseworthy rather than blameworthy, and it in no way undermines the Department's exemption claims. With respect to exemption 7(A), we note that this claim was properly dropped not because it was initially invalid, but rather because the "pending enforcement proceeding" justifying use of the exemption had ended. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 239-240 (1978) ((7)(A) is "a prophylactic rule that prevents harm to a pending enforcement proceeding . . ." (emphasis added)). Similarly, any exemption 1 material that was released was properly disclosed as a result of the declassification of the documents in question. R. 182, MacDonald Affidavit; R. 187, Second MacDonald Affidavit.

Finally, plaintiff chides (Pl. Br. at 26-27) the Department for deleting a sentence which was released by the House Select Committee on Assassinations (HSCA). Plaintiff neglects to note that the Department properly deleted the sentence in question long before the HSCA released it. This deletion thus raises no genuine question about the validity of the Department's withholdings.

13 Concerning exemption 7(C), plaintiff's assertion (Pl. Br. at 25) that the FBI "in effect conceded that it could not justify the excision of the names of FBI agents" is totally unfounded. It is well settled that the names of FBI agents involved in law enforcement investigations are exempt from (CONTINUED)

not the case. Plaintiff's theory obviously would undermine the very purpose of these exemptions, i.e., protection against unwarranted invasion of personal privacy and protection of confidential sources. In any event, as the district court correctly stated:

> the burden on defendant to reprocess over 50,000 pages, the defendant's good faith efforts in searching and releasing materials in general, the lack of harm to plaintiff regarding nondisclosure of names he knows, and the need to protect names which plaintiff merely suspects, persuade the Court that the equities are on defendant's side.

R. 223, p. 11 n.3.

Plaintiff's assertion (Pl. Br. at 27) that "the FBI's Vaughn index failed to state that the technique sought to be protected in Document 91 was not already well-known to the public" is equally devoid of merit. Special Agent Wood explained in his affidavit that releasing the investigative technique in question -- which is still used today--"would result in the subjects of FBI investigations taking added precautions to circumvent protection." R. 153, Seventh Wood Affidavit, p. 12. This clearly meets the standard of 7(E), since it shows that the

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13 (FOOTNOTE CONTINUED)

disclosure under 7(C). Lesar v. Department of Justice, 636 F.2d 472, 487-88 (D.C. Cir. 1980). Indeed, the FBI withheld the names of agents prior to a change in policy in this case, R. 153, Seventh Wood Affidavit, p. 7. In its motion for summary judgment, the Department expressly stated that it continued to consider its earlier withholding of agents' names valid under 7(C). R. 153, pp. 2 n.1, 4-5.

investigative technique is not "already well known to the public."

Finally, plaintiff's emphasis on the two minor errors acknowledged by the FBI regarding its initial Vaughn index also lacks merit. The presence of two minor errors regarding deletions does not call into question the adequacy of two Vaughn indices containing approximately 240 documents, some consisting of many pages with countless deletions. Moreover, one of the errors in question concerned exempt material which should never have been released at all, and was only released in the first Vaughn for consistency's sake when the Bureau realized that the material had inadvertently been released to another requester. See document 72, first Vaughn index, and accompanying explanation. The second incorrect deletion is obviously of no substantive importance whatsoever. See document 124, first Vaughn index, and accompanying explanation.

Thus, notwithstanding plaintiff's many cavils, the district court properly upheld all of the Department's exemption claims and granted summary judgment for the Department. The court's decision on this point should be affirmed and this apparently limitless quest for documents should finally be ended.

II. NO VALID CONSULTANCY AGREEMENT EXISTED BETWEEN PLAINTIFF AND THE DEPARTMENT, AND THE DEPARTMENT WAS NOT ENRICHED BY PLAINTIFF'S WORK.

The district court correctly held that plaintiff and the Department never entered into a consultancy agreement, because essential terms of the contract were never agreed upon. The

requiring a new search of all field office records to compare them with what has been released. The practical effect of plaintiff's request would be to require reprocessing of all field office MURKIN files, a truly monumental and time-consuming task. The district court properly refused to order this massive and unwarranted undertaking, stating:

> The parties agreed in 1977 that "duplicates of documents already processed at headquarters will not be processed as listed on the work-sheets, but attachments that are missing from headquarters' documents will be processed and included if found in field offices as well as copies of documents with notations." Stipulation of August 15, 1977, page 1. Special Agent John N. Phillips stated that this procedure was followed. Second affidavit of John N. Phillips, paragraph 4, filed December 10, 1980 as appendix D to defendant's motion for summary judgment. There is nothing to indicate Mr. Phillips' statement of compliance was made in bad faith. The Court will not require the mammoth reprocessing plaintiff seeks based on what happened in another case. Plaintiff's motion is denied.

R. 223, p.4. This Court should affirm the district court's action regarding reprocessing.[10]

In short, the record in this case clearly reflects that the Department searched its files thoroughly and repeatedly in response to plaintiff's FOIA requests. Accordingly, this Court

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[10] Plaintiff unsuccessfully employed a similar bootstrap approach to attack the FBI's good faith in Weisberg v. Department of Justice, supra, 705 F.2d at 1362 and n.29. In that case, this Court rejected plaintiff's attempt to impeach the Department's good faith on the basis of alleged improprieties in another of plaintiff's many lawsuits.

should not require the Department to perform the mammoth work of supererogation which plaintiff seeks.

B. The Department's Vaughn Index Was Compiled In A Reasonable Manner, And The District Court Correctly Upheld All Of The Exemptions Claimed By The Department.

Faced with the need to determine the validity of the Department's FOIA exemptions in a case involving more than 50,000 pages of material, the district court took the eminently reasonable approach of requiring a sample Vaughn index covering every 200th page of the material. R. 151. When this approach resulted in a Vaughn index which consisted of a substantial number of pages with no deletions (due to the large number of documents released to plaintiff without any excision), the district court modified its order and required a supplemental Vaughn consisting only of documents with deletions. R. 182. Finally, in its order of December 1, 1981, the court upheld every exemption claimed by the Department, while ordering in camera review of a number of documents withheld in their entirety. R. 223, pp. 10-13. On January 5, 1982, the court upheld the Department on these documents as well. R. 231, pp. 2-3.

The sampling device has frequently been employed to resolve exemption claims in cases where, as here, there are so many pages subject to such claims that a comprehensive Vaughn index covering all such pages is unfeasible. See, e.g., Vaughn v. Rosen, 383 F. Supp. 1049, 1052 (D.D.C. 1974), aff'd, 523 F.2d

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 above recites all of the specific releases mentioned by the court in justifying the attorney's fee in this case. The only document released relating to plaintiff's enormous second request that appears to have any substantive weight at all is the Civil Rights memo "James Earl Ray--Possible Evidence of Conspiracy". The finding of one arguably substantive, relevant nine-page document in the five years of litigation following the Justice Department's release to plaintiff of nearly 45,000 pages of documents speaks very well of the original search done by all the divisions of Justice involved.

While the court stated that the many motions filed by plaintiff which it denied involved few or no documents (R. 263, p. 8), this misses the point. The Justice Department claimed to have released all relevant documents. Therefore, the Department's position was always that it had nothing left to give to plaintiff, not that it wanted an order withholding items from him. Consequently, plaintiff sought primarily to demonstrate that the Department searches had been inadequate and thus to require what the court correctly deemed "mammoth and repetitious searches or reprocessing" (ibid.). The Department succeeded in proving that its original searches were adequate, and consequently was not required to search or produce the vast majority of the records again. Where the Department was required to do a further search, no new records were discovered, except for the one Civil Rights Division document. Moreover,

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)

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[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.

incorporating a letter to the Justice Department dated one day earlier directing the production of twenty-eight categories of additional documents pertaining to Dr. King's assassination. The court did not limit the case as requested by the Department, which eliminated the mootness argument. The mootness claim, however, furnishes no basis to question the Department's good faith.

The district court also faults the Department for "delaying" this action, although the court is forced to concede that "[c]ertainly some of the delay stemmed from the searching and processing of an enormous number of records." R. 263, p. 15; see also R. 26, Shea and Smith Affidavits. The court's assertion that "a signficant portion of the post-1977 delay can only be attributed to a deliberate effort to frustrate this requester" (ibid.) is untenable; by the end of 1977, the Department had already released some 45,000 pages of material to plaintiff, and therefore correctly took the position that it had no new substantive material left to give. Consequently, it 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. The dearth of new material unearthed after 1977, despite repeated searches, attests to the correctness of the Department's position. Most importantly, it is clear that the post-1977 delay was caused not by the Department but by plaintiff, who filed mountains of motions during this period,

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