CASE SCHEDULED FOR ORAL ARGUMENT ON APRIL 14, 1988

REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 87-5304

HAROLD WEISBERG,

Appellant

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee

On Appeal from the United States District Court for the District of Columbia, Hon. June L. Green, Judge

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REPLY BRIEF FOR APPELLANT

I. WEISBERG SUBSTANTIALLY PREVAILED WITH RESPECT TO HIS SECOND REQUEST

A. Weisberg Substantially Prevailed by Obtaining a Complete Fee Waiver for All 60,000 Pages Released

Weisberg's first argument is that he substantially prevailed with respect to his December 23, 1975 Freedom of Information Act request ("second request") because he obtained a complete fee waiver for the 60,000 pages of records which were released to him.

The district court rejected this contention on the ground that it could not "conclude that such requesters have substantially prevailed on [the fee waiver] issue where the grant of such a waiver is based on the administrative decision of the agency and not a lawsuit." JA 253 (emphasis in original).

In Weisberg's view, the district court's ruling consists of nothing more than a conclusory assertion. The court made no factual findings in support of its conclusion, nor did it undertake any analysis of the pertinent facts. Because it ignored the very substantial body of evidence indicating that the lawsuit lead to the decision to waive fees completely, the court's ruling is clearly erroneous.

Moreover, the only evidence of the basis for the court's ruling--the language quoted above--indicates that the court reasoned that because an administrative decision ultimately was made to grant Weisberg a complete fee waiver, there was no causal nexus between the lawsuit and the fee waiver. This reasoning begs the question of whether it was this lawsuit that cuased the "administrative" decision to waive fees. Thus, the district court misapplied the applicable legal principle, which is whether there was a causal nexus between the lawsuit and the relief obtained. This error of law renders the court's ruling clearly erroneous. Weisberg v. U.S. Dept. of Justice, 745 F.2d 1476, 1496 (D.C.Cir. 1984) ("findings of fact derived from the application of an improper legal standard to the facts may be deemed by an appellate court to be clearly erroneous.").

The Justice Department, of course, contends otherwise. It argues that the district court's finding is "clearly correct." Appellee's Brief at 28.

The Department stakes its primary argument in support of the district court's ruling on the claim that the appeals officer who granted the full waiver of copying fees made "a voluntary, good-faith administrative decision not causally connected to the present litigation." Id. at 29 (emphasis added). The only evidence adduced to advance this claim is the March 23, 1978 Affidavit of Quinlan J. Shea, Jr. ("Shea Affidavit"), the appeals officer who made the decision to grant the full waiver. The statements made by Shea in his affidavit were not cited by the district court in support of its ruling. They are far from being the only relevant evidence bearing on the causation issue, and they are certainly not the most probative evidence.

The critical fact is, of course, that after having opposed Weisberg's motion for a complete waiver, the Department reversed its position and granted Weisberg the relief he sought. Where an agency takes a final position on a legal issue and reverses itself after suit is filed, a requester has been held to have substantially prevailed. Seegull Mfg. Co. v. N.L.R.B., 735 F.2d 971 (6th Cir. 1984). If the requester obtains relief because the filing of a lawsuit goaded the agency into reconsidering its position, then the requester has substantially prevailed. See Lacy v. United States Dept. of the Navy, 593 F. Supp. 71 (D.Md. 1984)(causal nexus

exists when suit forces an agency to review documents and reach a thoroughly considered decision in favor of disclosure); Steenland v. C.I.A., 555 F. Supp. 907 (W.D.N.Y. 1983)(suit prompted a second look by agencies which resulted in supplemental releases. This is a fortiori the case where, as here, the agency reconsiders and abandons its position after formally opposing the plaintiff's motion. National Wildlife Federation v. Dept. of Interior, 616 F. Supp. 889 (D.D.C. 1984); Wooden v. Office of Juvenile Assistance, 2 GDS ¶81,123 (D.D.C. March 29, 1981).

The district court's ruling reflects no consideration whatsoever of the timing and circumstances of the Department's grant of a full waiver. Yet such factors are critical to determining whether a party has substantially prevailed. Church of Scientology v. U.S. Postal Service, 700 F.2d 486, 489 (9th Cir. 1983)(case remadned because district court made no finding of fact on the critical issues of the timing of and reasons for releases); Continental Cas. Co. v. Marshall, 520 F. Supp. 56, 57 (N.D.Ill.,E.D. 1981) (plaintiff substantially prevailed where consent order was produced, after long delay, solely by virtue of the persistent and diligent tactics of the plaintiff and despite the dilatory tactics of the defendant); Education-Instruccion v. U.S. Dept. of Housing, 87 F.R.D 112 (1980)(causation found where defendants made no move to surrender documents for thirteen months after review, yet disclosure closely followed filing of plaintiff's motion for summary judgment); Ford v. Selective Serv. System, U.S. Civ. Serv., 439 F.

Supp. 1262, 1265 (M.D.Pa. 1977)(plaintiff substantially prevailed where agency contended that it released documents pursuant to Privacy Act but waited until four months after effective date of that Act to make the disclosures).

The timing and circumstances of the Department's grant of a fee waiver clearly show that its decision was produced by this lawsuit. Even prior to the application for a waiver, the Department had conceded the key fact supporting a waiver when it filed an affidavit by its appeals officer stating that "[t]he assassination of Dr. King is certainly a case of sustained public interest[,]" and that "the historical importance of the fact of the assassination is obvious." July 15, 1976 Affidavit of Quinlan J. Shea, Jr. [R. 26] Despite this admission, the Department dragged its feet in deciding the fee waiver request, and nearly 17 months elapsed between the date the request was made and the date it was granted in full. In the interim, each halting step the Department took on its long march towards a full waiver was precipitated by some development in court. See Appellant's Brief at 9-12 for a detailed account of this process.)

The Department ignores these circumstances. In attempting to find a basis for the district court's ruling, it focuses on statements made by Shea which link his decision to grant a full waiver to Judge Gesell's decision granting Weisberg a full waiver in Weisberg v. Bell, Civil Action No. 77-2155 (D.D.C. January 16, 1978). The Department's arguments on this point are deeply flawed.

First, the Department argues that if anything precipitated "the decision to move from a partial waiver to a full waiver," it was Judge Gesell's decision in Weisberg v. Bell. Appellee's Brief at 29. This skirts the circumstances giving rise to the granting of a partial waiver. More fundamentally, it also ignores the fact that the immediate and direct cause of Shea's reconsideration of the fee waiver issue was Judge June Green's March 3, 1978 order in this case, not Judge Gesell's January 16, 1978 order in Weisberg v. Bell.

Judge Green's order noted that in granting Weisberg a partial waiver, Shea had stated that the investigation of the King assassination "'is a matter of great public interest and historical importance,'" and that he had "also recognized plaintiff's 'extensive study of and long-standing interest in the assassination of Dr. King.'" The order further noted that despite this, Shea "did not choose to waive all charges incurred by plaintiff" but only granted a 40% reduction. After finding that she had jurisdiction to review the fee waiver under an arbitrary and capricious standard, Judge Green observed that "no explanation was given as to how" the partial reduction was arrived at; accordingly, she ordered the Department to provide a "full explanation" within 8 days. (The March 3, 1978 order is reproduced as Addendum 1 to this brief.) In response to this order, Shea's lengthy March 23, 1978 affidavit provided the "full explanation" demanded by Judge Green.[1/] The relative speed of

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1/ Although Weisberg's main brief cites the Shea Affidavit to the appendix, it does not appear there. It is reproduced as Addendum 2 to this brief.

the response stands in marked contrast to the Department's prior delays in resolving the fee waiver issue.

In announcing his decision to reconsider the fee waiver, Shea cited "Judge Gesell's Order and the decision not to appeal therefrom. . . ." Shea Affidavit, ¶9 (emphasis added). Forty-six days passed between Judge Gesell's order and Judge Green's March 3 order in this case. Had Judge Gesell's order been the precipitating factor in Shea's decision to reconsider the fee waiver, this was ample time for him to have done so. Yet it was not until after Judge Green's order in this case that he reconsidered.

That Shea may have taken the Department's decision not to appeal Judge Gesell's order into account when he decided to reconsider the fee waiver in this case does not mean that Gesell's order caused the fee waiver. The Department was under pressure from Judge Green to justify its partial fee waiver; as a consquence, it had to consider how its assessment of its chances of winning an appeal in Weisberg v. Bell impacted on the merits of its position in this case, particularly since Shea had stated in a letter submitted to that court that the case for a fee waiver for the Kennedy assassination records at issue there was weaker than for the King records at issue in this case. See January 12, 1988 letter from Quinlan J. Shea, Jr. to James H. Lesar reproduced as Addendum 3 to this brief. But what Shea did in taking account of Judge Gesell's order and the decision not to appeal it was simply to evaluate the legal strength of the Department's position in this case; otherwise, there was no need to consider Judge Gesell's decision at all.

The Department relies on Pyramid Lake Paiute Tribe v. U.S. Dept. of Justice, 750 F.2d 117 (D.C.Cir. 1984) as support for its argument that Weisberg did not substantially prevail because the full fee waiver in this case was precipitated by Judge Gesell's order granting him a full waiver in a different FOIA case. In the Pyramid Lake case the panel held, over Judge Mikva's dissent, that the plaintiff did not substantially prevail when the agency disclosed a previously withheld document after release of the same document by a third party removed the basis for the agency's Exemption 5 claim.

Pyramid Lake is inapposite. First, as argued above, it was the district court's March 3, 1978 order which was the immediate cause of the decision to reconsider the fee waiver issue in this case. Second, the release in Pyramid Lake was not made as a result of a court decision in a related FOIA suit involving the same parties and similar issues. No legal judgment or consideration required the third party who initially released the document at issue in Pyramid Lake to do so. The third party's disclosure did not in any way call into question the legal validity or legal strength of the agency's Exemption 5 claim at the time the agency initially asserted and briefed it.

The analogous case is not Pyramid Lake but Sabalos v. Regan, 520 F. Supp. 1069 (E.D.Va. 1981). In Sabalos the plaintiffs substantially prevailed as to certain IRS memoranda which were released to them as a consequence of this Court's decision in Taxa-

tion With Representation Fund v. IRS, 646 F.2d 666 (D.D.Cir. 1981), which involved the same kind of documents.

Finally, the Department asserts that "if obtaining a fee waiver is not financially necessary in order for a requester to obtain copies of disclosed documents, it is open to serious question whether the fee waiver alone is important enough in terms of the policies of the FOIA to support a 'substantially prevailing' determination." Appellee's Brief at 31 n.31. This suggestion is refuted by the ways in which Congress has repeatedly stressed the fundamental importance of the fee waiver provision.

In 1972 a congressional report on practices under the original FOIA found that excessive fee charges had become "an effective bureacratic tool in denying information" to journalists, scholars, nonprofit public interest organziations and other noncommercial users who can best fulfill the central purpose of the FOIA. H. Rep. No. 92-1419, 93d Cong., 2d Sess. 8-10 (1972). The fee waiver provision was added to the FOIA as part of the 1974 amendments because of congressional concern over the "real possibility that search and copying fees may be used by an agency to effectively deny public access to public records." S. Rep. No. 93-854, 93d Cong., 2d Sess. 11 (1974).

Only three years later a Senate subcommittee held four days of oversight hearings "to ensure congressional intent [regarding FOIA] is being carried out." A report on these hearings found that despite passage of the fee waiver provision, "excessive fee charges . . . and refusal to waive fees in the public interest remain . . .

'toll gate[s] on the public road to information," and that "the potential for abuse of agency discretion of FOIA fees remains high." SUBCOMM. ON ADMIN. PRACT. & PROC. OF THE SENATE JUDICIARY COMM., 95th Cong., 2d Sess., AGENCY IMPLEMENTATION OF THE 1974 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT: REPORT ON OVERSIGHT HEARINGS 1 (Comm. Print 1980).

In 1986 Congress ammended the fee waiver provision "to make it easier for more requesters, especially noncommercial requesters, to qualify for fee waivers." 132 Cong. Rec. H 9464 (daily ed. Oct. 8, 1986)(Joint Statement of Rep. English, Chairman of the Government Information, Justice, and Agriculture Subcommittee, and Rep. Tom Kindness, ranking minority member). The amended fee waiver provision contains several limitations on the imposition of fees in order "to prevent agencies from using procedural ploys over fees to discourage requesters or delay the disclosure of information." Id.

The history of the fee waiver provision shows that Congress considers it crucial to the vindication of citizen rights under the FOIA. Nothing in the FOIA or its legislative history even hints that fee waivers are conditional on a showing of "financial necessity," whatever that vague phrase may mean. To the contrary, Congress has specified that certain types of requesters--authors, newspapers, publishers--are deemed noncommercial for purposes of the fee waiver provision, even though they may be engaged in profit-making ventures. English/Kindness Joint Statement, 132 Cong. Rec. H 9464. The Department's suggestion would thwart the use of the FOIA by such requesters in violation of the clear congressional intent to foster it.

B. Weisberg Substantially Prevailed by Obtaining Field Office Records and Other Records

Weisberg argues that he substantially prevailed by obtaining more than 17,000 pages of FBI field office records, as well as other records. The Department responds by pointing out that the field office records were obtained pursuant to stipulation, and it characterizes the stipulation as "a product of the Department's administrative processing of the second request. . . rather than the litigation." Appellee's Brief at 25.

But the stipulation was negotiated between counsel for the parties, signed by counsel for the parties, and approved by the district court. The stipulation made binding on the FBI what previously had not been binding. Thus, it was the product of the lawsuit rather than the administrative handling of the request. Whether styled as consent decrees, settlement agreements or stipulations, such instruments have supported rulings that a requester has substantially prevailed. Continental Cas. Co. v. Marshall, 520 F. Supp. 56, 57 (N.D.Ill. 1981)(consent decree approved by court); Public Citizen v. EPA, C.A. No. 86-316 (D.D.C. Feb. 3, 1987)(plaintiff held to have substantially prevailed because suit resulted in settlement agreement in which defendant made binding a previously non-binding policy regarding release of certain documents)(reproduced as Addendum 4); Dennis, et al. v. FBI, et al., C.A. No. 83-1422 (Magistrate's Opinion and Recommendation, Dec. 12, 1986)(plaintiffs held to have substantially prevailed where they entered into stipulation waiving all fees and modifying docu-

ment request)(reproduced as Addendum 5), approved, May 1, 1987 Memorandum of Judge June L. Green (reproduced as Addendum 6).

The Department's attempt to characterize the stipulation as the product of its administrative processing of the second request is also at odds with (1) FBI policy regarding searches of FBI field office files, (2) the Department's actions and statements during the course of this case, (3) the circumstances surrounding the stipulation, and (4) the terms of the stipulation itself.

As previously noted, see Appellant's Brief at 31, at a time when Weisberg already had constructively exhausted his administrative remedies, the FBI had a policy that searches of its Headquarters files alone constituted sufficient complience with FOIA requests. It is highly implausible that the FBI would have abandoned this entrenched policy absent a lawsuit. This is bourne out by the fact that although Weisberg had demonstrated early on that a search of field office files was necessary to comply with his request--by compelling a search of the Memphis field office for crime scene photographs--the FBI nevertheless continued to resist any more such searches. FBI Special Agent Donald L. Smith testified that "everything that is in the field office, particularly in a case like this, would be at headquarters, particularly in the assassination of Dr. King." September 8, 1976 Hearing, Tr. at 33 [R. 40]. In a memorandum filed October 27, 1976, the Department represented that a search of field office files would be "counterproductive." Memorandum of Points and Authorities in Opposition to Plaintiff's

Motion for Compliance and in Support of Defendant's Motion to Stay at 5 [R. 32]. Such statements are analogous to a claim that responsive records do not exist. Where an agency claims that documents do not exist and later produces them as a result of a suit, the plaintiff has been held to have substantially prevailed. Republic of New Afrika v. FBI, 645 F. Supp. 117 (D.D.C. 1986).

The timing of the stipulation and other circumstances belie the Department's claim that it was the product of the administrative handling of the second request. The negotiations which led to the August 15, 1977 stipulation "extended over several days or weeks." Hartingh Deposition at 79. Thus they ensued the June 30, 1977 hearing at which Weisberg presented several demands, including demands that the records of several field offices be processed and released by September 1, 1977, that they be accompanied by legible worksheets listing each document, and that the releases be reviwed by the appeals office prior to disclosure. June 30, 1977 Hearing, Tr. at 17-20. The stipulation included these demands, with minor variations.

Although the Department's counsel declared that "it would be impossible" to complete a search of the Memphis field office by September 1, 1977 (Tr. at 13), pursuant to the stipulation the FBI processed nearly as many documents in the succeeding two months as it had in the preceding ten months. The terms of the stipulation and the speed with which these documents were processed clearly betoken the impact of litigation pressures rather than the

imprint of administrative plans. Where court action speeds disclosure, a plaintiff substantially prevails. Steenland, supra, 555 F. Supp. at 907; Exner v. Federal Bur. of Investigation, 443 F. Supp. 1349, 1353 (S.D.Cal. 1978).

The Department has put forward no evidence that it had any plans to deal administratively with the issue of searching the field office files. It had 18 months prior to the June 30 hearing during which it could have dealt with this issue administratively, but the record is devoid of any such action. Its only action was to tell plaintiff and the court that the field offices had no records not duplicated at Headquarters.

"The unambiguous meaning of the term 'substantially prevailed' is not that plaintiff prevail in the entirety but only that plaintiff prevail in an adequate or considerable manner." Aronson v. HUD, C.A. No. 86-333-S, slip op. at 6 (D.Ma. March 3, 1988)(reproduced as Addendum 7, citing Webster's New Third International Dictionary (Unabridged 1979). Even if the more than 17,000 pages of field office records are excluded, Weisberg still obtained another 12,000 pages after the processing of the field office files pursuant to the stipulation was completed. See Appellant's Brief at 39 n.20, which lists these records. This is more than sufficient to warrant a finding that Weisberg substantially prevailed, particularly since these releases included some of the most significant records obtained, such as informant files, the Long Tickler, inventories of the FBI's holdings on Dr. King, and the "misfiled" records on a major witness before the House Select Committee on

Assassinations.

C. Necessity of Suit to Compel Reasonably Prompt Disclosure

As the Department notes, Weisberg contends that the Department would have delayed responding to his second request in the absence of this lawsuit. It complains that Weisberg has not substantiated his claim by reference to the facts of this case, but instead has invoked a pattern of delay in a variety of FOIA cases involving the Department. It contends that the delays in the other cases are "simply irrelevant." Appellee's Brief at 26.

The pattern of delay shown by Weisberg--and not denied by the Department--is not irrelevant to the need to file suit to overcome delay with respect to the second request. However, the record also shows delays in this case. To begin with, the Department delayed with respect to his April 15, 1975 request (first request). Although this was a small-volume ("nonproject") request, the FBI did not release any materials until after Weisberg filed suit more than seven months later, and when it did make this response it provided only a fraction of the responsive materials, and it provided these only because CBS News had made a request for similar materials in September, 1975 [JA 110] and the Department's FOIA Unit feared that it might be "'blasted' (on the air) by CBS for being 'uncooperative'" [JA 111-112].

Also highly relevant is the delay encountered in obtaining a fee waiver in this case. Since it took 17 months to get a favorable fee waiver decision when Weisberg was already in court, one

can only imagine the delay he would have encountered even to obtain an unfavorable decision administratively without bringing suit. Also relevant is the fact that the Department did not respond to Weisberg's administrative appeal of his second request within the statutory time or otherwise.

The Department says that Weisberg has not pointed to evidence that processing of his second request would have taken materially longer if he had not sued. Appellee's Brief at 26. But this is the only conclusion that reasonably can be reached in light of (1) the universal pattern of delay in all of Weisberg's requests, (2) the delays in this case cited above, and (3) the rapid processing of the field office files pursuant to court-approved stipulation.

Additionally, note must be taken of the FBI's attitudes and responses in this case. When Weisberg brought to the court's attention the fact that the FBI had not responded to his 1969 requests for information on the King assassination, FBI Project Chief John F. Cunningham rejected this as a basis for giving priority to Weisberg's second request because they were not "the exact same request."[2/]

2/ The district court stated that Weisberg should have exhausted administrative remedies as to his second request if he had referred to the FOIA in his April 1969 letter and had made reference to his unanswered requests in his amended complaint. [JA 242] The FBI has never claimed that it did not identify Weisberg's requests as subject to the FOIA. At least since 1975 Department of Justice regulations have required Department personnel to treat "[a]ny request for information" not marked and addressed in accordance with the Department's FOIA regulations as a FOIA request. See 28 C.F.R. 16.3 (1976). Although Weisberg did not affix these requests to his amended complaint, he brought them to the attention of the FBI and the court at the September 16-17, 1976 hearing, and the court requested that he furnish copies to counsel and the court, which he did. See Tr. at 227-228. In a subsequent hearing, the court noted that on the basis of the FBI's own first-in first-out system, "Weisberg was first in. . . ." October 8, 1976 Hearing, Tr. at 4.

September 16, 1976 Hearing, Tr. at 121-122. Furthermore, the FBI took the position that it could not assign more than one analyst to process his voluminous second request, id. at 90, unless "threatened with a law suit, a court order--." Id. at 97. The district court repeatedly pressed this point during the hearing on the Department's Open America motion. Later the FBI did assign a second analyst to work on Weisberg's second request, and this inevitably quickened the pace of the disclosures.

II. THE ISSUE OF A CONTINGENCY ENHANCEMENT SHOULD BE REMANDED TO THE DISTRICT COURT

The Department argues that under the standards established by Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S. Ct. 3078 (1987)(Delaware Valley II), as construed by this Court decision in Thompson v. Kennickell, Nos. 85-5241 & 5242 (D.C.Cir. Jan. 8, 1988), Weisberg must establish (1) that the rates of compensation in the private market for contingent fee cases as a class differ from those for which attorneys are paid at a non-contingent rate; and (2) that "without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" 107. S. Ct. at 3090. Appellee's Brief at 3090.

This Court remanded Thompson v. Kennickell to the district court because neither the district court nor the parties were aware of this new standard at the time of the lower court's decision. Slip op. at 10. The same is true here. Accordingly,

this case, too, should be remanded to the district court for further proceedings on this issue.

Respectfully submitted,

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A D D E N D U M 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG :

Plaintiff :

v. : Civil Action No. 75-1996

U.S. DEPARTMENT OF JUSTICE : FILED

Defendant :

OPINION AND ORDER

On November 2, 1977, plaintiff in this case moved the Court for an order waiving all search fees and copying costs for government records made available as a result of this action. Plaintiff moved also for an order requiring that all fees and costs previously charged the plaintiff in this action be refunded to him. On January 17, 1978, defendant filed its opposition to these motions.

The Freedom of Information Act at 5 U.S.C. § 552(a)(4)(A) provides:

> Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

The Department of Justice has promulgated a regulation implementing this provision of the Act. Departmental officials may waive or reduce the charges if they find that these charges "are not in the public interest because furnishing the information primarily benefits the general public." 28 C.F.R. § 16.9(a).

On November 4, 1976, plaintiff's counsel wrote the Deputy Attorney General, requesting that he make the determination prescribed by the regulation. In a letter dated July 12, 1977, Mr.

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Quinlan J. Shea, Jr., Director of the Office of Privacy and Information Appeals within the Office of the Deputy Attorney General, replied to plaintiff's request.

The letter stated that the investigation of the King assassination "is a matter of great public interest and historical importance," and that the Director of the FBI had "acknowledged this fact very early in the processing" of the records which are the subject of this lawsuit. Shea also recognized plaintiff's "extensive study of and long-standing interest in the assassination of Dr. King." However, he did not choose to waive all charges incurred by plaintiff. Instead, he determined that these charges would be reduced from 10 cents a page to 6 cents a page.

5 U.S.C. § 552(a)(4)(B) gives this Court jurisdiction to review violations of the FOIA. This authority to review extends to questions concerning the fee waiver provisions of § 552(a)(4)(A). Alan F. Fitzgibbon v. C.I.A., C.A. No. 76-700 (D.D.C. October 29, 1976). The issue before the Court is whether the government's decision to deny plaintiff a complete waiver of all search and copying charges was "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." 5 U.S.C. § 706.

The Court finds that no explanation was given as to how this sum was arrived at. Accordingly, the Court orders this matter remanded to the U.S. Department of Justice for full explanation. This information is to be filed in the Court within 8 days of this date.

JUNE L. GREEN
U.S. District Judge

Dated: March 2 1978

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ADDENDUM 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG Plaintiff v. U. S. DEPARTMENT OF JUSTICE Defendant	)	Civil Action No. 77-1996

AFFIDAVIT OF

QUINLAN J. SHEA, JR.

1. My name is Quinlan J. Shea, Jr. I am the Director of the Office of Privacy and Information Appeals, Office of the Deputy Attorney General, U. S. Department of Justice.

2. My initial consideration of Mr. Weisberg's request for a fee waiver in connection with his requests for records pertaining to the assassination of Dr. Martin Luther King, Jr., was prior to the designation of me by Attorney General Griffin B. Bell to act on administrative appeals (and, at least impliedly, such ancillary matters as fee waiver requests). This designation was dated July 11, 1977. I had raised the matter of a partial waiver and had encountered considerable resistance to the idea. Notwithstanding that resistance, I formally recommended to (then) Deputy Attorney General Peter F. Flaherty that he waive reproduction costs by a factor of 40%, thereby reducing the cost to Mr. Weisberg from $.10 per page to $.06 per page. My belief was and is that no search fees had been assessed by the F.B.I. for these records, so I never specifically addressed the matter of search fees.

3. My formal recommendation was the subject of at least one discussion with (then) Associate Deputy Attorney General Bruce D. Campbell -- I believe there were two such discussions. On either July 11 or 12, 1977, at the same time that Mr. Campbell passed on to me Judge Bell's designation memorandum of July 11, he returned the fee waiver documents to me, indicating that I

was free to grant the partial waiver myself if I still saw fit to do so. By letter dated July 12, 1977 -- very deliberately the first formal action taken by me -- I granted Mr. Weisberg the 40% partial fee waiver I had previously recommended to Mr. Flaherty.

4. I have now reviewed my file and refreshed my recollection of the reasoning process by which I concluded that the 40% waiver was appropriate. I reached my conclusion in light of my knowledge of other fee waiver "appeals" that had been granted, granted in part, and denied during the period from March 1975 (when I joined the staff of the Deputy Attorney General) through July 1977, as well as my general attitude that a public servant charged with responsibility for the expenditure (or waiver of collection) of public funds owes to the taxpayers of this country the exercise of a degree of care to ensure that those funds are not expended improperly or imprudently. Moreover, because this particular case was somewhat different from other cases in which I had been involved, and because I felt there were some unusual factors that should be considered, I had a very lengthy discussion (well in excess of one hour) about this case with Mr. Robert L. Saloschin, Office of Legal Counsel (and Chairman of the Department's Freedom of Information Committee).

5. As contained in the letters from Attorney James H. Lesar to Deputy Attorney General Tyler (November 4, 1976) and Attorney General Bell (February 8, 1977), the only basis on which the requested waiver was sought was the statutory standard of "primary benefit to the general public" [5 U.S.C. 552(a)(4)(A)]. The facts of Mr. Weisberg's age, "scant financial resources" and poor health were only mentioned in the letter to Judge Bell as reasons why Mr. Weisberg considered gaining access to the records to be "a matter of some urgency . . . ." I did, however, view all three of these as "sympathetic" factors in reaching my

conclusion that a partial waiver was appropriate, but, as indicated below [paragraph 8], I concluded that there was no independent "indigency" basis for a fee waiver in this case.

6. When I make a decision myself, I often do not articulate in written form my reasons for reaching a particular result. In this case, however, I did make a written recommendation to Mr. Flaherty (who was also familiar with the various "background" factors I have already mentioned). Two paragraphs in that memorandum set forth the reasons why I felt a partial fee waiver was appropriate:

> "Fees should be waived, according to the legislative history of the Freedom of Information Act, when it is in the public interest to do so because of public benefit flowing from the particular release. There can be no doubt that release of the King materials is of the greatest possible public interest. The Bureau itself recognized this fact very early and decided to put the releasable material in the public reading room and not to attempt to charge any search fees. The initial question is whether the grant of a full fee waiver to a private citizen who hopes to profit from the sale of his writings on the King murder can be considered as 'primarily benefiting the general public.' 5 U.S.C. 552(a)(4)(A). Although I am unconvinced that the answer to that question is yes, I have concluded that a partial fee waiver is justified in this case, in view of other pertinent and significant factors."

> "Mr. Weisberg has devoted many years to a study of the assassinations of President Kennedy and Dr. King. He has written at least two books on the Kennedy assassination (neither of which has been overly favorable to the Department or the F.B.I.). Nevertheless, he does possess a wealth of knowledge and information on these cases and is recognized as something of an 'expert' on them in many circles. Mr. Weisberg is also unique in the sense that his early efforts to obtain access, and particularly this lawsuit, have contributed materially to the more ready accessibility of these materials to the general public. 2/ In sum, the efforts he has expended and the expense he has incurred are so significant that they will not reoccur in the person of any other requester. His familiarity with the case has also enabled the Bureau to evaluate more quickly the privacy interests of many of the hundreds of individuals involved. The public, therefore, has benefited both from Mr. Weisberg's tenacious efforts to make the King materials public and, to some extent, from a shortening of the time necessary to process the case. For these reasons, I feel that a reduction of the standard charge of $.10 per copy to $.06 per copy is justified. This reduction will require some refund of fees already paid, as well as the imposition of no charge for the materials still to be released."

2/ "His earlier lawsuit, which we won, was probably the single greatest factor in the decision of Congress to amend exemption 7 from a file exemption to what it is today. Some victory!"

7. To sum up, in light of all of the factors indicated above, it seemed to me that the F.B.I.'s position against any waiver of reproduction fees was wrong, but that Mr. Weisberg had not established that the release to him of these records could be said to be of primary benefit to the general public. Nonetheless, I felt that there was sufficient public interest present, viewed in the light of Mr. Weisberg's unique role in the history of freedom of information, to warrant a partial waiver. I can neither recall in any detail nor find any written record of why I had decided specifically that a 40% waiver would be appropriate. I do recall that I also considered 25%, one-third, and 50%. I recall that the first two seemed too low and that Mr. Weisberg's overall case for a waiver did not strike me as being as strong as another instance in which I had recommended a 50% waiver of reproduction costs, coupled with a total waiver of search fees. There were probably other factors as well, because I do recall that I spent a considerable amount of time, over a considerable period of time, thinking about both whether to recommend a fee waiver in this case and, then, just how much of a partial waiver to recommend.

8. As indicated above, I did briefly consider the "indigency factor" in this case, even though the sole basis on which a waiver was requested was public benefit/interest. For purposes of fee waivers under the Freedom of Information Act, the consistent position of the Department of Justice has been that that "indigency" means a total (or, as appropriate, partial) inability to pay the fees properly assessed under the statute and our implementing regulations. Mr. Weisberg had in fact paid for the releases he received from the King files. Accordingly, on the basis of the record before me at the time, no independent "indigency" ground for a fee waiver could be said to exist.

9. If there are any remaining questions, I would be willing to attempt to supplement this Affidavit, or to testify personally in Court. I do wish to advise the Court, however, that

this Department has now decided not to appeal the Order pertaining to fees recently entered by Judge Gesell in the context of another case involving Mr. Weisberg and the Department of Justice. In view of Judge Gesell's Order and the decision not to appeal therefrom, it seems to me that I should, sua sponte, reconsider my own various prior actions on fee waivers sought by Mr. Weisberg, including the one now before this Court. I have begun that process and am consulting with the affected components within the Department. I will communicate my final decision to Mr. Weisberg not later than Friday, March 31, 1978.

Quinlan J. Shea, Jr.

Subscribed and sworn to before me this 23d day of March, 1978

Notary Public

My Commission Expires October 31, 1980

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A D D E N D U M 3

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

James H. Lesar, Esquire
Suite 500
910 Sixteenth Street, N. W.
Washington, D. C. 20006

JAN 12 [redacted]

Dear Mr. Lesar:

On November 19, 1977, on behalf of your client, Mr. Harold Weisberg, you wrote to former Deputy Attorney General Flaherty requesting a waiver of all fees that might be assessed as a result of your client's request for access to records of F.B.I. Headquarters pertaining to the assassination of President John F. Kennedy. That request was forwarded to Director Kelley for initial consideration and response to you. I have now been informed that Director Kelley has decided not to waive reproduction charges (as in the case of records pertaining to the assassination of Dr. Martin Luther King, Jr., no search fees were assessed), and that he has communicated his decision to you.

The release to the public of the second portion of the Bureau's files on the Kennedy assassination is scheduled to occur on Wednesday, January 18. I am aware of the legal action you have filed on behalf of Mr. Weisberg, seeking, inter alia, to enjoin that release, or, in the alternative, to obtain a complete fee waiver on his behalf. Although no formal appeal from Director Kelley's denial of the fee waiver request has been received by me, it is my judgment that the circumstances of this particular case are now such that both simple fairness and the interests of justice would be served by my independent consideration of the fee waiver request.

There are certain obvious parallels between Mr. Weisberg's efforts to obtain access to the Kennedy assassination records and those pertaining to the King assassination. In each case we are concerned with records pertaining to an event of great historical importance and substantial interest on the part of the general public. It is in recognition of this that Director Kelley did not assess search fees in either case and, on his own initiative, made arrangements for the released materials to be made available

at a number of different public locations, which I do not believe has been done with the King records. There are other similarities and distinctions between the two cases as well.

In acting on Mr. Weisberg's appeal from Director Kelley's refusal to grant any fee waiver as to the King records, I modified that decision and granted a partial waiver, in the amount of forty cents on the dollar. I was well aware of the fact that Mr. Weisberg has a commercial motive in seeking access to those records. In my view, this is ordinarily a more than sufficient reason to deny any fee waiver under the Freedom of Information Act. This statute is intended to ensure that the public is informed as to the workings of its Government, not that individuals can profit thereby. On the other hand, I felt that there was a sufficient counterbalancing public interest in that case to grant him the partial waiver. By examining your most recent complaint filed on behalf of Mr. Weisberg, I have become considerably more aware of just how blatantly commercial is the nature of what appears to be Mr. Weisberg's primary goal in seeking access to all of these records. By means of the content of the attachments to that complaint, however, as well as similar information from other sources, I am also somewhat more aware of the real, albeit limited, extent to which Mr. Weisberg does function in this area in support of the public interest.

On balance, I have concluded that the case for any fee waiver on behalf of Mr. Weisberg in the instant case is weaker than was true with the King records, but that the distinction does not warrant a difference in result. Accordingly, it is my decision that, to whatever extent Mr. Weisberg chooses to obtain copies of the Kennedy assassination records, he will be charged therefor at the rate of six cents per page, rather than ten cents.

Sincerely,

Benjamin R. Civiletti
Acting Deputy Attorney General

By: Quinlan J. Shea, Jr., Director
Office of Privacy and Information Appeals

ADDENDUM 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Public Citizen,

Plaintiff,

v.

Environmental Protection Agency,

Defendant.

Civil Action No. 86-316

ORDER

On November 24, 1986, the Court approved a "Settlement Agreement and Stipulation of Dismissal with Prejudice" in the above-captioned case. The Court today held a hearing on plaintiff's application for reimbursement of costs and attorney's fees in connection with counsel's work in this case. After carefully considering the oral arguments, the motions for and in opposition to fees, and the memoranda supporting those motions, the Court has concluded that plaintiff substantially prevailed on the merits of this suit. The Court bases this conclusion primarily on the fact that plaintiff's suit resulted in a settlement agreement in which defendant made binding a previously non-binding policy regarding release of certain documents. The Court also bases its conclusion on the fact that, as a result of plaintiff's lawsuit, plaintiff obtained certain documents that it otherwise would not have obtained and that the record, taken as a whole, demonstrates they requested.

The Court is satisfied that defendant had control over the documents at issue and that plaintiff's FOIA action triggered the release of the documents to which plaintiff now has access by virtue of the settlement agreement. The Court has further

found that, as the record in this case demonstrates, defendant did not have a reasonable basis in law for withholding the information sought. The Court has also found that the public will benefit substantially from plaintiff's actions in this suit and that plaintiff undertook its suit not for any corporate or commercial gain but solely for the benefit of the public. Accordingly, the Court finds that attorney's fees are warranted for plaintiff's counsel in this case.

Plaintiff submitted declarations as to the extensive experience of plaintiff's counsel and provided the Court with affidavits to show that the hourly fees requested were within or below market rates charged by lawyers with comparable experience and qualifications. The Court finds that the requested hourly rates of $90 for Ms. Goldman, $125 for Mr. Schultz, and $150 for Mr. Morrison are fair and reasonable and, if anything, less than the market rate that lawyers of comparable experience and qualificaiton would command. The Court also finds that the requested rate of $20 per hour for the time of a third-year law student clerk is fair and reasonable.

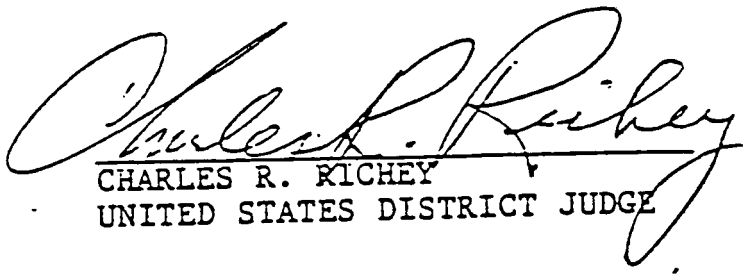
The Court further finds that all hours expended by plaintiff's counsel on this suit were actually and reasonably spent on the action, with these exceptions only: the Court will disallow 7-and-1/2 of the 17-and-1/2 hours spent by Ms. Goldman in reviewing the government's opposition to the fees petition, and will disallow all time claimed by Mr. Morrison and Mr. Schultz for their own review of the government's opposition to the fees petition and for their time in court today. The Court also finds that sums claimed as costs by plaintiff, $40 for duplication and the $10 filing fee, are fair and reasonable.

Accordingly, the Court orders payment of $12,320 to plaintiff for attorney's fees and costs in this case. This sum breaks down as follows:

Ms. Goldman: 104.25 hours at $90 per hour:	$ 9382.50
Mr. Schultz: 17 hours at $125 per hour:	2125.00
Mr. Morrison: 2.75 hours at $150 per hour:	412.50
Law clerk time: 17.50 hours at $20 per hour:	350.00
Costs:	50.00
TOTAL	$12320.00

Accordingly, it is this 2nd day of February, 1987,

ORDERED that defendant shall pay the sum of $12,320 in costs and attorney's fees to plaintiff within ten days of the date of this Order.



CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

A D D E N D U M 5

Judge June Green

PJA:eil

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PEGGY DENNIS, et al. :

V. : CIVIL ACTION NO. 83-1422

FBI, et al. :

OPINION AND RECOMMENDATION

This matter was referred to the undersigned by the Honorable June Green, Judge, for determination of the issue of attorney fees and costs arising out of this Freedom of Information Act (FOIA), 5 U.S.C. §552 et seq. litigation. The following constitutes the undersigned's report and recommendations.

INTRODUCTION

Before the Court is plaintiffs' Petition for Attorney's Fees in connection with an action brought under the FOIA. Plaintiffs argue they have "substantially prevailed" in this action within the meaning of 5 U.S.C. §552(a)(4)(E) and are therefore eligible and entitled to attorney's fees as provided in the statute. Plaintiffs contend the central issue in the FOIA action was whether or not the defendant, Federal Bureau of Investigation ("FBI"), would grant a waiver of the costs of duplicating the documents which it had agreed to produce. Eventually, the FBI did grant such a waiver and on that basis plaintiffs claim they have substantially prevailed. Conversely,

(N)

the FBI contends the central issue in the FOIA action was how quickly it would provide the documents to which plaintiffs were entitled. In light of the fact that they were provided to plaintiffs three months ahead of schedule (instead of five months ahead of schedule as requested by the plaintiffs) the FBI contends plaintiffs can not be viewed as having substantially prevailed.

BACKGROUND

The plaintiffs, Peggy Dennis and Eugene Dennis Vrana, the widow and son of Eugene Dennis, deceased, at one time General Secretary of the Communist Party, U.S.A., have filed suit against the Department of Justice (DOJ) and the FBI seeking an injunction permanently enjoining the defendants from withholding documents requested under FOIA as well as a waiver of all fees and reproduction costs and for attorney's fees and costs.

On October 22, 1982, prior to the filing of the suit, the plaintiffs filed simultaneous requests under FOIA to eleven components of the Department of Justice seeking, inter alia, all documents other than "records, routine transmittal memos, newspaper clippings and documents in the public domain,pertaining to Eugene Dennis, Peggy Dennis, and Eugene Dennis Vrana." The requests, which also sought waiver of all fees and duplicating costs, were accompanied by an affidavit from the acting associate director of the State Historical Society of Wisconsin stating that the requested material constituted "an invaluable historical source", as well as affidavits from the plaintiffs stating their

financial inability to pay research and copying fees.[1]

Having received responses from but a few of the eleven components, the plaintiffs on December 8, 1982, filed an administrative appeal with the Assistant Attorney General, Office of Legal Policy, seeking expedited release of the requested documents and fee waiver.

DOJ responded on February 7, 1983, confirming that some of its components had already responded to plaintiffs' request adding that it could not further act until initial determinations had been made by its remaining components. DOJ further advised that the Assistant Attorney General had not had an opportunity to act on the plaintiffs' appeal and that the plaintiffs, therefore, could consider the response as a denial of their appeal for purposes of initiating suit in federal court.

Shortly after the complaint was filed, the FBI, by letter dated June 29, 1983, informed counsel for the plaintiffs that 6,830 pages of documents responsive to their requests were found in the headquarters files but that the Bureau would only grant a 10% waiver of duplicating costs since it was of the view that only 10% of the papers would be of primary benefit to the general public. A commitment to reimburse the Bureau in the sum

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1. The standard for waiving search and duplicating fees is the public benefit to be derived from release of the information. The financial inability of the requestor to pay fees is not the test for release. Ely v. U.S. Postal Service, 243 U.S. App. D.C. 345, 753 F.2d 163 (1985), cert. denied, 105 S.Ct. 2338, 85 L.Ed.2d 854.

of $614.70 was sought prior to release of the materials.

The plaintiffs rejected this offer and moved this Court for a waiver of search fees and copying costs.[2]

On September 1, 1983, the FBI further informed the plaintiffs that its field office files contained approximately 19,130 pages responsive to their requests but that a substantial portion of the information contained in the field office files, excluding public documents, were already contained in the headquarters files for which a partial fee waiver had been granted. The FBI further stated that the headquarters files contained approximately 4,300 "see" references. The Bureau concluded that the total number of additional pages responsive to the plaintiffs' requests as found in headquarters files was approximately 11,160 pages for which a commitment to reimburse FBI headquarters in the sum of $1,116.00 was sought from the plaintiffs.

On September 20, 1983, the Assistant Attorney General responded to the plaintiffs' appeal of December 8, 1982, and authorized a partial waiver of 70% of 700 pages of the FBI headquarters security files, a 10% waiver of the FBI headquarters contempt of court files, and no waiver on the New York field office files or any of the records pertaining to Peggy Dennis and Eugene Dennis Vrana. The Assistant Attorney General advised that

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2. The memorandum in support of the motion consisted of 29 pages of discussion and 28 pages of exhibits.

the headquarters security file contained 3,500 pages about Edward Dennis, 1,200 of which were exempt from release. Of the remaining 2,300, 1,600 of those pages were copies of greetings to Dennis from the public while Dennis was in prison. The remaining 700 pages were those subject to the 70% waiver.

After an exchange of affidavits and letters, the plaintiffs voluntarily narrowed the scope of their requests so as to encompass only a small fraction of the total number of pages originally requested.[3] Thereafter, the parties resolved their differences with respect to the nature and extent of the documents to be produced and also the waiver of the applicable copying fees. By virtue of a written stipulation, the plaintiffs limited their document requests and the defendants agreed to waive all copying costs and search fees applicable to the modified requests.

There remained, however, the issue as to the production schedule. The plaintiffs, in a letter dated October 21, 1984, advised the FBI that since the stipulation had excluded many if not most of the original request for documents, the FBI should be able to provide the remaining documents in three to four months, but nonetheless, the plaintiffs would agree to a six month production deadline. The FBI responded that a three to four months schedule was unrealistic but that it would complete the

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3. Letter from Edward Greer, Esquire to David H. White, Esquire, attorney for DOJ dated October 5, 1983.

production of 101 volumes regarding Eugene Dennis by June, 1985.

The production having been completed, the sole remaining issue is that of attorney's fees and costs. The plaintiffs contend that they "substantially prevailed" in this litigation for attorney's fees purposes and that therefore they are not only eligible but entitled to reasonable attorney's fees and costs.

The defendants vigorously opposes the petition arguing that the plaintiffs are not eligible for attorney's fees and costs nor are they entitled to them since the plaintiffs did not "substantially prevail". In the alternative, the defendants contend that the request for attorney's fees are excessive. The defendants concede that "[t]he only matters at issue after commencement of the litigation were the waiver by the FBI of duplication costs and the establishment of a schedule by which the FBI's production of documents would be completed" and both issues were resolved by agreement.[4] Thus, to the extent that there were any adversary proceedings, the litigation primarily focused on the duplication fee waiver.

DISCUSSION

Section 552(a)(4)(E) of the FOIA permits the Court ". . .to access against the United States reasonable attorney's fees and costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." (Emphasis

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4. Defendants' opposition to petition for attorney's fees, page 2, docket number 23.

added).

The purpose of this section was "to remove the incentive for administrative resistance to disclosure requests based not on the merits of the exemption claims, but on the knowledge that many FOIA plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation." Nationwide Building Maintenance, Inc. v. Sampson, 182 U.S. App. D.C. 83, 90, 559 F.2d 704, 711 (1977). This section was not intended to reward a complainant who forced the government to provide documents it wished to withhold, but rather, "to encourage private persons to assist in furthering the national policy that favors disclosure of government documents." Cox v. Department of Justice, 195 U.S. App. D.C. 189, 193, 601 F.2d 1, 5 (1979).

Whether the party has "substantially prevailed" and thus becomes eligible for an award is largely a question of causation. Weisberg v. Department of Justice, 240 U.S. App. D.C. 339, 745 F.2d 1496 (1984). Where, as here, there has been no court ordered compelling agency disclosure the complainant must show that prosecution of the action could reasonably be regarded as necessary to obtain the information and that a causal nexus exists between that action and the agency's surrender of the information. Cox v. Department of Justice, 195 U.S. App. D.C. 189, 194, 601 F.2d 1, 6 (1979).

The mere filing of the complaint and the subsequent release of the documents is insufficient to establish causation,

Weisberg v. Department of Justice, supra, 745 F.2d at 1496; Crooks v. Department of Treasury, 213 U.S. App. D.C. 376, 663 F.2d 140 (1980); Cox v. Department of Justice, supra, 601 F.2d at 6. What is important is the causal nexus between the litigation and the agency's ultimate release of the requested information. The number of documents ultimately disclosed, in and of itself, is not controlling. See, Church of Scientology of California v. Harris, 209 U.S. App. D.C. 329, 653 F.2d 584 (1981).

At first glance it may appear that the stipulation agreed upon by the parties to this case could be construed as a quid pro quo, i.e., a fee waiver in return for an agreement to substantial reduction of the documents requested, however, upon further study it appears that the plaintiffs obtained that which they sought. The plaintiffs never challenged the government's assertion that many of the materials were exempt from production. Nor did they request material already in the public domain.[5] Nonetheless, the defendants insisted that the plaintiffs pay for those copies which the defendants determined were not in the public interest and primarily benefitting the general public - a position they ultimately abandoned when the plaintiffs agreed to exclude 1600 pages of greetings to Dennis, all public source information and copies of speeches except where those documents

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5. Original requests specifically excluded "court records, routine transmittals of such records, newspaper clippings, and other documents in the public domain (including) published articles by or about the requestors."

had written commentary. Materials, for the most part, not included in their original request. As a practical matter, it appears that the plaintiffs received all the requested materials and ultimately without the payment of any fees. There was no litigation over the nature and extent of disclosure. The primary focus of this litigation, if not the sole focus, was the waiver of copying fees. Extensive briefings were filed by both sides with respect to the plaintiffs' motion for waiver, search fees, and costs. A number of status calls and hearings were held during this period in an attempt to ascertain the FBI's policies with respect to fee waiver. The record amply demonstrates that the litigation focused on the copying fee waiver and went beyond the "mere filing fo a complaint". Based on the record, it is only reasonable to conclude that the litigation was, indeed, necessary in order to obtain the fee waiver. The Court is convinced that, but for this suit, the defendants would not have provided the requested information without the payment of, at least, a partial fee. The plaintiffs can not be penalized for stipulating with defendants concerning a reduction in the number of documents requested in return for a total fee waiver insofar as it relates to the modified request. The law does not require the plaintiffs to obtain a court order in order to "substantially prevail", Cuneo v. Ramsfeld, 180 U.S. App. D.C. 184, 553 F.2d 1360 (1977).

Although the relevant case law discusses the causation issue in terms of obtaining materials and documents from a government agency, the causation analysis remains the same when the primary issue is that of fee waiver.

The discretionary attorney fee provision of 5 U.S.C. §552(a)(4)(E) is not limited to instances in which the plaintiff have substantially prevailed solely on his request for documents. It also encompasses all issues that may arise in any case under section 552(a). Subpart (4)(A) of section 552(a) authorizes the furnishing of documents without charge or at reduced charge where it is determined that such a waiver or reduction is in the public interest. Thus, fee waiver cases encompass separate and distinct issues than issues of document production but are subject to the same "substantially prevailed" criteria as other cases which arise under section 552(a) in determining whether a complainant is eligible for an award of reasonable attorney's fees and litigation costs. See also, Ettlinger v. FBI, 596 F.Supp. 867 (D. Mass. 1984).

Having determined that the plaintiffs have "substantially prevailed" on the fee waiver issue and thus become "eligible" for attorney's fees, the Court must next decide whether or not the plaintiffs are "entitled" to attorney's fees. Among the factors to be considered and weighted are: 1) the public benefit resulting from the release; 2) the commercial benefit to the requestor; 3) the nature of the requestor's interest; and 4) the reasonableness of the agency's refusal to

release. Weisberg v. Department of Justice, supra, 745 F.2d at 1498.

The unchallenged affidavit of an associate director of a state historical society articulated the public benefit to be occasioned by the release of these documents. Hence, this factor is weighed in favor of the complainants. The complainants had a certain degree of personal interest in learning the nature and extent of the government's surveillance of their past activities. However, after their curiosity had been satisfied, they intended, and in fact did, deliver the disclosures to the Wisconsin State Historical Society for use by that organization and members of the public interested in historical and political research. Thus the second and third factor also weighed in favor of the complainants.

In evaluating the last factor, we must consider a number of subfactors. Did the agency make a good faith effort to search for the requested material? Did it respond with reasonable promptness to the complainants' request? Did the scope of the request cause delay in disclosure? Was the agency burdened by other previous requests that delayed its response? Cox v. Department of Justice, supra, 601 F.2d at 6.

There is evidence in the record from which it can be concluded that the defendants made good faith attempts to seek out and disclose the voluminous amount of material requested. Plaintiffs' original FOIA request was sent on October 23, 1982 to 11 components of the DOJ and various offices of the FBI. Written

confirmation of receipt of the request was sent to plaintiffs by the headquarter office of the FBI within the ten day statutory period. Acknowledgement, responses and status reports were sent to the plaintiffs by FBI field offices in Milwaukee, New York, San Francisco, San Diego on October 28, November 2, 8, 22, December 3, 6, 30, 1982, January 13, 31, February 23 and March 11, 1983. Plaintiffs filed an administrative appeal on December 8, 1982. The DOJ responded to plaintiffs' appeal in a letter dated Feburary 7, 1983. The letter specifically addressed the substantial backlog of pending appeals and defendant's lack of personnel resources necessary to conduct the record reviews necessary to make initial determinations regarding document requests. Plaintiffs treated this letter as a denial of the appeal and filed an appropriate action in federal court on May 18, 1983. Additional correspondence was sent to plaintiffs by the defendants on June 29, indicating that 6,830 pages of documents were contained at FBI headquarters, and on September 1, that 19,130 pages of documents were contained in the field office records, as well as September 20, 1983. By August 22, 1983, the DOJ criminal division had begun processing the requested documents; the Bureau of Prisons had nearly completed its processing and the Executive Office of the U.S. Attorney had been unable to respond because of unexpected difficulty in obtaining the records from the Federal Records Center. (Defendants' Motion for Protective Order, Docket No. 9).

On the other hand, the defendants document by document

subjective determination that disclosure of one was in the public interest while disclosure of another page was not, has been found to be arbitrary and capricious. Ettlinger v. FBI, supra. Therefore, at best, this last factor may be said to be evenly balanced.

Given the purpose of the FOIA and in considering the "entitlement" factors in toto, the Court concludes that the plaintiffs are not only "eligible" but also "entitled" to an attorney fee.

ATTORNEY FEES AND COSTS

"Any fee-setting inquiry begins with the 'lodestar'; the number of hours reasonably expended multiplied by a reasonable hourly rate." Copeland v. Marshall, 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (1980).

The key element in determining the lodestar is establishing the reasonable hourly rate prevailing in the community for similar work. Thus, an applicant for attorney fees ". . .is required to provide specific evidence of the prevailing community rate for the type of work for which he seeks an award . . ." National Association of Concerned Veterans v. Secretary of Defense, 219 U.S. App. D.C. 94, 100, 675 F.2d 1319, 1325 (1982). "For lawyers engaged in customary private practice, who at least in part charge their clients on an hourly basis regardless of the outcome, the market place has set that value. For these attorneys, the best evidence of the value of their time is the hourly rate which they most commonly charge their

fee-paying clients for similar legal services. This rate reflects the training, background, experience, and previously demonstrated skill of the individual attorney in relation to other lawyers in that community." Laffey v. Northwest Airlines, Inc., 241 U.S. App. D.C. 11, 746 F.2d 4, 18 (1984), cert. denied, 105 S.Ct. 3488 (1985), 87 L.Ed.2d 622. ". . .[G]eneralized and conclusory information and belief affidavits from friendly attorneys presenting a wide range of hourly rates will not suffice. To be useful an affidavit stating an attorney's opinion as to the market rate should be as specific as possible. For example, it should state whether the stated hourly rate is a present or past one, whether the rate is for a specific type of litigation or for litigation in general, and whether the rate is an average one or one specifically for an attorney with a particular type of experience or qualifications. The affidavit should also state the factual basis for the affiant's opinion. . ." National Association of Copncerned Veterans v. Secretary of Defense, supra, 746 F.2d at 1325.

Edward Greer, the plaintiffs' principal attorney seeks fees at an hourly rate of $125.00. James Lesar, co-counsel, seeks fees at an hourly rate of $100.00. Greer's affidavit states that he specializes in litigation under the Freedom of Information Act and that up until January 1, 1983 his billing rate was $100.00 per hour. Commencing with January 1, 1983, his standard and normal rate has been $125.00. In support of both rates Greer further states that in 1984 the First Circuit upheld

a District Court's determination that the rate of $100.00 per hour was reasonable and in December, 1984, the District Court for the District of Massachusetts granted him a request for an award of $125.00 per hour. Greer submitted no documentation of the prevailing rate in this community for the type of work for which he seeks an award other than an affidavit from an attorney attesting to an award of $125.00 an hour to her in a FOIA case by the First Circuit and her opinion that $125.00 an hour for FOIA litigation is at or below the market rate in this community.. The affidavit states no factual basis for her opinion nor the nature and extent of her knowledge of attorney fees in FOIA matters in this community. Therefore it has no probative value.

Lesar's request for an hourly rate of $100.00 is accompanied by an affidavit from a partner in a law firm which practices in the Washington, D.C. metropolitan area and with whom Lesar practices as a part-time associate. The affidavit opines that the average hourly fee in the Washington, D.C. area for an attorney of Lesar's experience and the rate at which they bill for his services is $125.00. The affidavit does not state if the rate is for this specific type of litigation nor does it set forth the affiant's factual basis for his opinion other than generalized familiarity with the range of hourly rates in the Washington, D.C. area. Also accompanying Lesar's request was a copy of a paid retainer dated July, 1983 together with billings for 1984 and 1985, all of which charged $100.00 an hour for Freedom of Information Act litigation.

Lesar's submissions are pertinent, relevant and establish to the undersigned's satisfaction the prevailing community rates in this community for attorneys with qualifications similar to Lesar and Greer in FOIA litigation. The detailed supporting documentation of Lesar, who customarily engages in FOIA litigation in this community[6] is the best evidence of the prevailing hourly rate in this area for FOIA litigation. See, Murray v. Weinberger, 239 U.S. App. D.C. 264, 741 F.2d 1423 at 1428 and n. 21 (1984). The affidavit submitted by Lesar's partners establishes that the $100.00 an hour charged by Lesar for FOIA litigation in this community falls within the area of rates charged by others for similar type work. "So long as the (applicant's) own rate falls within the rate bracket, it is the market rate for the purposes of calculating the lodestar." Laffey v. Northwestern Airlines, Inc., supra, 746 F.2d at 25. The burden of establishing that an applicant's customary rate is below the market rate is on the applicant, a burden which Lesar has not sought to undertake in these proceedings. The Court is satisfied that the previling hourly rate for attorneys of Lesar's knowledge and experience in FOIA matters in this community is $100.00 an hour.

Greer claims fees of $125.00 an hour. He relies principally on fees approved in that sum by the First Circuit. "It should be recognized that fees awarded in other cases are

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6. Weisberg v. Department of Justice, 240 U.S. App. D.C. 339, 745 F.2d 1476 (1984); Allen v. FBI, 551 F.Supp. 694 (D.D.C. 1982); Lesar v. Department of Justice, 455 F.Supp. 921 (D.D.C. 1978).

probative of the appropriate community rate only if they were determined based on actual evidence of prevailing market rates, the attorneys involved had similar qualifications, and the issues of comparable complexity were raised."[7] Notwithstanding the awards made by the First Circuit, this Court has no evidence that the First Circuit had actual evidence of the prevailing market rate before it nor does this Court have any evidence of the complexity of the issues involved in those proceedings. Therefore, those rates are of little value in helping to ascertain the market rate in this community. The same can be said of Greer's contention that the defendant is estopped to deny the prevailing hourly rate of $125.00 that it consented to in other litigation with him.

In a contested matter it is for the Court to determine the appropriate market rate and, in the absence of a stipulation, it can only be determined by specific evidence of the community rate.[8] It appears, however, that Lesar and Greer are both knowledgeable attorneys with similar experience and expertise in FOIA matters.[9] Accordingly, the Court is satisfied that a prevailing hourly rate of $100.00 an hour is also applicable to

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7. National Association of Concerned Veterans v. Secretary of Defense, supra, 675 F.2d at 1325 n. 7.

8. Id. at 1325.

9. Ettlinger v. FBI, 596 F.Supp. 867 (D. Mass. 1984).

Greer. Although the defendants formally object to the hourly rates claimed by plaintiffs' counsel, their objection goes no further than that. They have failed to carry their burden of proceeding to come forward with some evidence tending to show that a lower rate would be more appropriate. National Association of Concerned Veterans v. Secretary of Defense, supra, 675 F.2d at 1326 (1982).

Having established the applicable market rate is only part of the equation in determining the appropriate lodestar, an attorney is entitled to compensation for all the reasonable time expended on the litigation which is not non-productive, not duplicative and not expended on issues on which the plaintiffs did not prevail. Id. at 1327.

Greer's time sheets disclose that he travelled to the District of Columbia from Boston, Massachusetts on two occasions for court appearances in this Court. He seeks reimbursement for 10.5 hours of travel time to and from the Court on July 25, 1983 and 2.5 hours for a Court hearing on that day. Lesar's time sheet discloses that he spent 2.7 hours in preparation for and presentation of an oral argument in Court also on July 25, 1983. Greer also seeks reimbursement for 4 hours travel time to and from the District of Columbia in connection with a Court hearing on September 27, 1983 at which time he also conferred with Lesar and two FBI agents, for which he seeks an additional 2 hours. Lesar claims reimbursement for 1.1 hours attendance at a Court status hearing on that date. Greer argues vigorously that almost

every Circuit Court that has considered the matter of travel time reimbursement has approved an award of fees for that expenditure. However, a review of the cases he relies on disclose that, for the most part, the reimbursement involved time expended for travel within the territorial jurisdiction of the Court. Furthermore, one of the cases relied on by Greer specifically held that "the exclusion of out of town counsel's travel time is proper only if it was unreasonable not to hire qualified local counsel. . ." Johnson v. University College of Univeristy of Alabama, 706 F.2d 1205, 1208 (11th Cir. 1983), cert. denied, 104 S.Ct. 489 (1983), 78 L.Ed.2d 684 (1983). Prior to the hearings at issue, in fact prior to instituting this litigation, Greer had contacted local qualified counsel (Lesar) to review the pleadings and assist in the litigation. That counsel also attended the court hearings and, according to his time sheets, was prepared for oral argument on the primary issue in this litigation. The subject matter was not that unique and novel so as to require counsel to spend time entirely disproportionate to the issues at hand in traveling to and from Boston to Washington, D.C. when experienced and qualified local counsel could have just as adequately presented and protected the plaintiffs' position. Neither the time records, nor the submissions in support of his application for attorney fees, provides any justification for Greer's travel to and attendance at the Court proceedings in view of the fact that qualified experienced co-counsel was in attendance and prepared to proceed.

From this a reasonable person can only conclude that the time incurred by Greer in travelling to and from the District of Columbia and in attending the Court proceedings, an aside to which, on one occasion, was a conference with FBI agents who had submitted affidavits in this litigation, was unnecessarily duplicative and non-productive and therefore a claim of 19 hours will be disallowed together with the costs incidental to that travel.

Furthermore, the plaintiffs failed to supply any information by way of affidavit or otherwise to supplement the claim of $50.00 an hour for associate litigation time of 4.9 hours shown on the time sheets other than a conclusory statement by Greer that "Ms. Goldzwerg is a member of the Bar of the Commonwealth of Massachusetts with two years experience, and the billing rate which I maintain in my office for Ms. Goldzwerg is generally at the rate of $50.00 per hour."

This falls far short of the specificity required by Copeland, Concerned Veterans and Laffey. Accordingly, this item will be disallowed.

Lesar seeks reimbursement for 2 hours spent preparing interrogatories, request for production of documents and review of the opinion in Open America. Upon receipt of the defendants' motion for a protective order precluding the discovery sought by the plaintiffs, the plaintiffs withdrew their discovery requests. They can not be said to have prevailed on this issue. Consequently, recovery for this time is not compensable and will

be disallowed.

The next item of consequence is Greer's request for so called pre-litigation time, i.e., time incurred at the administrative level wherein he, on the plaintiffs' behalf, submitted requests to the various Justice Department components for documents. Reimbursement for 5.4 hours is sought.

The plaintiffs, relying principally on 2 cases from our Circuit, contend that work performed at the agency level has always been compensable. However, those cases[10] were not FOIA cases. The matter of attorney fees and costs for services rendered at the administrative level in a FOIA proceeding was discussed in Kennedy v. Andrus, 459 F.Supp. 240, 243-44 (D.D.C. 1978) wherein Judge Gasch found that such fees and costs are not recoverable under the statute in FOIA litigation. Judge Gasch's ruling was affirmed by the Circuit Court in memorandum opinion No. 78-2217, January 30, 1980. That disposition is binding on this Court. Accordingly, the plaintiffs' request for recovery of pre-litigation time of 5.4 hours is disallowed.

Lastly, the plaintiffs seek an upward adjustment of the lodestar of 10% for having served the public interest and for delay of payment. The latter item, in effect, is the functional equivalent of interest which the Supreme Court specifically

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10. Kulkarni v. Alexander, 213 U.S. App. D.C. 243, 662 F.2d 758 (1978) and Parker v. Califano, 182 U.S. App. D.C. 322, 561 F.2d 320 (1977).

disallowed. Library of Congress v. Shaw, _____, U.S. _____, 106 S.Ct. 2957, 2961, 92 L.Ed.2d 250, 262 (1986). With respect to an adjustment for having served the public interest, the Supreme Court in Blum v. Stenson, 465 U.S. 886 at 898, 104 S.Ct. 1541 at 1548, 79 L.Ed.2d 891 at 900 (1984) writes that "the burden of proving that an adjustment is necessary to the determination of a reasonable fee is on the fee applicant. The record before us contains no evidence supporting an upward adjustment to fees calculated under the basic standard of reasonable rates times reasonable hours." The same can be said of this litigation. The "results obtained" generally are ". . .subsumed within other factors used to calculate a reasonable fee, (and) normally should not provide an independent basis for increasing the fee award." Id. 465 U.S. at 898. Nor did this litigation produce any common fund from which plaintiffs counsel can be said to be reasonably entitled to share. Accordingly, the plaintiffs request for an upward adjustment to the lodestar is denied.

CONCLUSION

The following table constitutes the undersigned's summary of allowance of attorney fees and costs as a consequence of this FOIA litigation.

Attorney and Type of Work	Hours	Rate	Total
Edward Greer - Preparation of pleadings and affidavit	28	$100	$2,800
Edward Greer - File review, telephone calls, conferences and correspondence	9.8	100	980
Edward Greer - Preparation			

of fee petition, review and research, conferences	22.5	100	2,250
Total Lodestar			$6,030
James Lesar - Preparation and review of pleadings	8.1	100	810
James Lesar - Telephone calls, conferences and correspondence	14.2	100	1,420
James Lesar - Court appearances	7.1	100	710
Total Lodestar			$2,940

Edward Greer - Costs

Postage	79.90
Xerox	111.40
Telephone	28.63
Total costs	$219.93

It is recommended that Edward Greer's petition for attorney fees be granted in the sum of $6,030.00; that James Lesar's petition for attorney fees be granted in the sum of $2,940.00 and that Edward Greer be allowed costs in the sum of $219.93 plus accrued filing fees.

DATED: December 24, 1986

PATRICK J. ATTRIDGE
UNITED STATES MAGISTRATE

ADDENDUM 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

MAY 1 1987

JAMES F. DAVEY, Clerk

PEGGY DENNIS, et al.)

Plaintiffs)

v.) Civil Action No. 83-1422

FEDERAL BUREAU OF INVESTIGATION, et al.)

Defendants)

M E M O R A N D U M

On December 24, 1986, the United States Magistrate issued an opinion recommending that plaintiffs' attorneys, James H. Lesar and Edward Greer, be awarded approximately $9,000 in attorney fees and $220 in related costs of the underlying action. Upon plaintiffs' motion, the Magistrate amended his opinion and recommendation on March 16, 1987, to add an award for additional fees incurred and for certain costs which were overlooked in the original findings. Mr. Greer's award was increased by $1,740, Mr. Lesar received an additional $1,460 in fees and another $269.41 in costs. This matter is before the Court on the parties' objections to the Magistrate's recommendations on the fees issue. See Local Rule 503(b).

(2)

Plaintiffs brought the underlying action seeking an injunction to enjoin permanently defendants from withholding documents requested under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1982), as well as a waiver of all fees and reproduction costs, and for attorney fees and costs.[1] The Magistrate concluded correctly in his well-reasoned opinion and recommendation that plaintiffs had substantially prevailed on the underlying litigation and were entitled to attorney fees. Magistrate's Opinion and Recommendation of December 24, 1986, at 6-13; 5 U.S.C. § 552(a)(4)(E) (1982). The Court adopts this portion of the Magistrate's opinion and, accordingly, rejects defendants' renewed objections that plaintiffs are neither eligible nor entitled to an award of attorney fees.

Plaintiffs make four specific objections to the Magistrate's resolution of the fee issue. They contend that (1) Mr. Greer should be compensated at an hourly rate of $125 per hour rather than $100 per hour; (2) that the exclusion of all of Mr. Greer's travel time as unnecessarily duplicative and nonproductive is erroneous; (3) that the exclusion of 18.6 hours expended by Mr. Lesar in preparing certain papers is erroneous; and (4) that the exclusion of another one-half hour

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[1] For a more complete history of this case, see the Magistrate's opinion and recommendation of December 24, 1986, at 2-6.

spent by Mr. Lesar in reviewing certain transcripts of hearings before this Court is also erroneous.

Citing Donnell v. United States, 682 F.2d 240, 252 (D.C. Cir. 1982), plaintiffs argue that Mr. Greer should be awarded the higher hourly rate of $125 per hour because that is the prevailing rate for FOIA litigation in Massachusetts, from where Mr. Greer hails. In addition, it is alleged that plaintiffs' inability to retain local counsel made Mr. Greer's participation in this action a necessity. The Court does not find these reasons so compelling as to increase the $100 per hour rate customary for FOIA litigation in this jurisdiction. Generally, FOIA litigation is not so peculiar as to require an exceptional level of expertise, and, this case not being the exception, the Court endorses the Magistrate's recommendation that Mr. Greer be compensated at the prevailing rate for FOIA-related work in the District of Columbia of $100 per hour.

Plaintiffs also seek reimbursement for 14.5 hours of Mr. Greer's travel time from Boston to Washington, D.C., and 4.5 hours of related court time. The Magistrate recommended tht these hours be excluded as time expended unreasonably because plaintiffs' local counsel, Mr. Lesar, could have adequately performed this work alone. The Court concurs with the Magistrate's recommendation to exclude these hours and, in doing so, adopts his reasoning:

> The subject matter was not that unique and novel so as to require counsel to spend time entirely disproportionate to the issues at hand in traveling to and from Boston to Washington, D.C. when experienced and qualified counsel could have just as adequately presented and protected the plaintiffs' position. Neither the time records, nor the submissions in support of his application for attorney fees, provides any justification for Greer's travel to and attendance at the Court proceedings in view of the fact that qualified experienced co-counsel was in attendance and prepared to proceed.

Magistrate's Opinion and Recommendation of December 24, 1986, at 19.

While this Circuit has not yet adopted a controlling rule on the compensability of attorney travel time, see Environmental Defense Fund v. Environmental Protection Agency, 672 F.2d 42, 58 (D.C. Cir. 1982), plaintiffs argue that every circuit that has addressed this issue has held that fees are awardable at the full rate. The Court does not find the case authority cited by plaintiffs persuasive as none of the cases concerned FOIA issues, and each was distinguished as involving complex issues or only intracircuit travel. See, e.g., Craik v. Minnesota State University Board, 738 F.2d 348, 350 (8th Cir. 1984); Henry v. Webermeir, 738 F.2d 188, 194 (7th Cir. 1984); Danny Kresky Enterprises Corp. v. Magid, 716 F.2d 215, 217-18 (3d Cir. 1983); Johnson v. University College of University of Alabama in Birmingham, 706 F.2d 1205, 1208 (11th Cir. 1983).

The Magistrate's exclusion of 18.6 hours expended by Mr. Lesar on the plaintiffs' reply to defendants' opposition to the petition for attorney fees appears to have been in error. The Magistrate assumed that Mr. Lesar's efforts were duplicative of 9.2 hours that Mr. Greer expended on the same reply. As represented to the Court at the hearing on this matter and as indicated in affidavits sworn by Messrs. Greer and Lesar, plaintiffs' attorneys agreed to work concurrently on separate parts of this reply and did not duplicate any work of the other. Affidavit of Edward Greer, ¶ 7; Addendum to Supplemental Declaration of James H. Lesar, ¶ 4. Such a division of labor is common where two or more attorneys present a case.

Last, plaintiffs object to the Magistrate's exclusion of one half-hour expended by Mr. Lesar in reviewing transcripts of hearings before this Court on the fee waiver issue. Plaintiffs cited extensively these transcripts in a reply memorandum of April 7, 1986, submitted to the Magistrate. Accordingly, the Court will add this one half-hour to Mr. Lesar's total hours.

The following table summarizes the Court's award of attorney fees and costs as a consequence of this FOIA litigation. This table includes the fees calculated by the Magistrate in his opinion and recommendation of December 24,

1986, his memorandum opinion and recommendation of March 16, 1987, as well as the additional fees awarded in this memorandum.

Attorney		Hours	Rate	Total
Edward Greer	- Fees	77.7	$100	$7,770.00
	- Costs			$ 219.93
James Lesar	- Fees	63.1	$100	$6,310.00
	- Costs			$ 269.41

An appropriate order is attached.

JUNE L. GREEN
U. S. DISTRICT JUDGE

Dated: May 1, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PEGGY DENNIS, et al.)

Plaintiffs)

v.) Civil Action No. 83-1422

FEDERAL BUREAU OF INVESTIGATION, et al.)

Defendants)

FILED

MAY 1 1987

JAMES F. DAVEY, Clerk

O R D E R

Upon consideration of the Magistrate's opinion and recommendation of December 24, 1986; the Magistrate's memorandum opinion and recommendation of March 16, 1987; plaintiffs' objections to the Magistrate's recommendations of December 24, 1986, and March 16, 1987; defendants' objections to the Magistrate's recommendations of March 16, 1987; the hearing in this matter; the entire record herein; and for the reasons stated in the accompanying memorandum, it is by the Court this 1st day of May 1987,

ORDERED that plaintiffs' objections are accepted in part and rejected in part; it is further

ORDERED that defendants' objections are rejected; it is further

ORDERED that pursuant to 5 U.S.C. § 552(a)(4)(E) (1982) defendants pay plaintiffs' attorney fees and costs as follows:

(M)

Attorney	Fees	Costs	Total
Edward Greer	$7,770.00	$219.93	$ 7,989.93
James Lesar	$6,310.00	$269.41	6,579.41
			$14,569.34

and it is further

ORDERED that defendants pay the sum of $14,569.34 to plaintiffs no later than 15 days from the date of this order.

JUNE L. GREEN
U. S. DISTRICT JUDGE

A D D E N D U M 7

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT A. ARONSON,
Plaintiff,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.,
Defendants

CIVIL ACTION
NO. 86-333-S

DOCKETED

MEMORANDUM AND ORDER
ON PLAINTIFF'S PETITION
FOR AN AWARD OF ATTORNEYS' FEES

March 3, 1988

SKINNER, D.J.

Plaintiff Robert A. Aronson petitions this court for an award of attorneys' fees and costs reasonably incurred, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(E).[1] Plaintiff argues that he is eligible for attorneys' fees because he has substantially prevailed in his original action and that he is entitled to attorneys' fees because his action appreciably served the public interest.

Defendants Department of Housing and Urban Development ("HUD") and Donald C. Demitros, Director, Mortgage Insurance and Accounting, U. S. Department of Housing and Urban Development

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1 5 U.S.C. § 552(a)(4)(E) provides: "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."

(3)

oppose this petition on the ground that Aronson has not substantially prevailed and, even if he has substantially prevailed, that he is not entitled to attorneys' fees because the public interest served by this action is marginal while the private, commercial benefit to Aronson is great. For the reasons set forth in this opinion, plaintiff's petition is allowed in its entirety.

Background

On January 7, 1986, Aronson submitted a FOIA request to HUD seeking records of:

> vested, unpaid Home Mortgage Distributive Shares which are presently being held by the United States Department of Housing and Urban Development and/or The Treasury for distribution to persons who were the legal owners of real property in or within ninety (90) days of the date when mortgages insured by the federal Housing Administration pursuant to the National Housing Act, sections 203-207, terminated.

HUD received this request on January 8, 1986 but failed to respond to it within ten working days as required by the FOIA. Plaintiff commenced this action on January 28, 1986 to compel disclosure of the requested records. HUD replied to plaintiff's request on February 3, 1986, informing him that distributive share records for the period December 31, 1979 to December 31, 1983 would be released, and that records for the period prior to December 31, 1979 and for the years 1984 and 1985 would be

withheld under Exemption 6 of FOIA, 5 U.S.C. § 552(b)(6).[2] HUD explained that all claims for distributive shares vested prior to December 31, 1979 were time-barred, and that HUD must be allowed two years to locate the owners before 1984 and 1985 records could be released under FOIA.

Defendants filed an answer, and each party filed a motion for summary judgment. I issued a memorandum and order on October 3, 1986 on these cross-motions and found that the requested records were "similar files" within the scope of Exemption 6. However, I found that a clearly unwarranted invasion of personal privacy would result only as to those records for distributive shares vesting after December 31, 1983. I ordered defendants to disclose records of distributive shares vested prior to December 31, 1979.

On appeal, the First Circuit modified this judgment to allow disclosure of distributive share records pertaining to shares that had been vested for greater than one year, Aronson v. United States Department of Housing and Urban Development, 822 F.2d 182 (1st Cir. 1987). The Court of Appeals agreed that the requested records were "similar files" within the scope of Exemption 6, and that the public interest in disclosure of these records did not

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5 U.S.C. § 552(b)(6) provides: "This section does not apply to matters that are personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;..."

outweigh the potential invasions of privacy while HUD actively searched for the share owners, provided that the search was conducted in a reasonable time. The court noted that Aronson had not shown that HUD's procedures for locating eligible mortgagors within the first year after their shares had vested were unreasonable, ineffective or not in accord with accepted practice, and concluded that it was not unreasonable to allow HUD one year to search for eligible mortgagors. However, the court found HUD's activities during the second year of its search to be murky and ill-explained, leaving in doubt the nature and merit of HUD's search procedures in the second year.

Discussion

An award of attorney fees and costs under the FOIA is a matter for the discretion of the court. Education/Instruccion, Inc. v. United States Department of Housing and Urban Development, 649 F.2d 4, 7 (1st Cir. 1981). Plaintiff bears the dual burden of showing that he is "eligible" for such an award and, if so, that he is "entitled" to such an award. New England Apple Council, Inc. v. Donovan, 640 F. Supp. 16, 17 (D. Mass. 1985), citing Church of Scientology v. Harris, 653 F.2d 584, 587 (D.C. Cir. 1981); Fund for Constitutional Government v. National Archives, 656 F.2d 856, 870 (D.C. Cir. 1981). A plaintiff is eligible when he has "substantially prevailed," that is, where

plaintiff shows that the action was necessary to obtain the information and that the action had a causative effect on the disclosure of the requested information. Crooker v. United States Department of Justice, 632 F.2d 916, 922 (1st Cir. 1980); Accord Vermont Low Income Council, Inc. v. Usery, 546 F.2d 509, 513 (2d Cir. 1976); Cuneo v. Rumsfeld, 553 F.2d 1360, 1365 (D.C. Cir. 1977).

Under these criteria, I conclude that plaintiff has substantially prevailed. Plaintiff pursued his request through established administrative channels, and defendants failed to respond to his request within the statutory period. Subsequent to plaintiff's filing of this action, defendants agreed to make a partial disclosure, but a substantial portion of plaintiff's request was withheld. It was only after this action and the appeal taken therefrom that defendants agreed to disclose those records of distributive shares vested prior to December 31, 1979 and those shares that had been vested greater than one year. On these facts, I infer a causal relationsip between plaintiff's action and defendants' eventual release of the requested records.

Defendants contend that plaintiff has not substantially prevailed because his "primary objective" - obtaining the most current unpaid distributive share records - was not achieved. This argument is flawed in two respects. First, the record is void of any evidence that even remotely suggests that Aronson's

primary objective was to obtain the most current unpaid distributive share records. Defendants' argument here is at best speculative. Second, defendants' argument conveniently overlooks the significant volume of records disclosed as a direct result of this action. The unambiguous meaning of the term "substantially prevailed" is not that plaintiff prevail in the entirety but only that plaintiff prevail in an adequate or considerable manner.[3] I conclude that plaintiff has substantially prevailed in this action within the meaning of the statute and is thus eligible to receive attorneys' fees.

The second inquiry is whether plaintiff is "entitled" to attorneys' fees. I am guided in the exercise of my discretion by four criteria enumerated by the Senate in its consideration of the 1974 amendments to the FOIA:

(1) The benefit to the public if any, deriving from the case;

(2) the commercial benefit to the complainant;

(3) the nature of the complainant's interest in the records sought; and

(4) whether the government's withholding of the records sought had a reasonable basis in law.

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[3] Webster's Third New International Dictionary (Unabridged 1979).

S. Rep. No. 93-854, 93d Cong., 2d Sess. 19 (1974).[4] These criteria are not "airtight, independently indispensable prerequisites." Crooker v. United States Parole Commission, 776 F.2d 366, 367 (1st Cir. 1985).

Defendants suggest that the benefit to the public of this action, if any, is marginal as the beneficial effect is to accelerate disclosure of vested distributive share owner records by a mere twelve months. Defendants' argument flies in the face of the evidence and is directly contradictory to the conclusion of the Court of Appeals:

> It cannot be gainsaid that there is a strong public interest in disclosure when that disclosure would lead to the distribution of refunds that would otherwise have little chance of reaching their rightful owners. HUD recognized this public interest in its pre-1984 policy of releasing information on all eligible mortgagors....The public interest is manifestly served by the disclosure and consequent disbursement of funds the government owes its citizens. The problem of nondisbursement in this context is dramatized by the alarming figure of $52 million the government had failed to distribute as of March 1980. The public interest in the release of information...[is also] consistent with FOIA's goal of the exposure of agency action to public inspection and oversight.

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4 This specific listing of factors was deleted from the final version of the amendment in order to avoid limiting the court to only those factors, see H.R. Rep. No. 1380, 93d Cong. 2d Sess. 10 (Conference Report) (1974), but numerous courts have adopted these criteria in their consideration of attorney fee awards in FOIA cases. See, e.g., Education/Instruccion, Inc., 649 F.2d at 7; Crooker, 632 F.2d at 922; VLIAC, 546 F.2d at 512.

Aronson, 822 F.2d at 185. I agree with the conclusion of the Court of Appeals that plaintiff's action has conferred a significant benefit upon the public.

The second and third factors are appropriately considered together. New England Apple Council, Inc., 640 F. Supp. at 17. Application of these factors was explored in the Senate Judiciary Committee Report to Senate Bill S. 2543:

> Under the second criterion a court would usually allow recovery of fees where the complainant was indigent or a nonprofit public interest group versus [sic] but would not if it was a large corporate interest (or a representative of such an interest). For the purposes of applying this criterion, news interests should not be considered commercial interests.
>
> Under the third criterion a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented, but would not do so if his interest was of a frivolous or purely commercial nature.

S. Rep. No. 93-854, supra. The import of these guidelines is that attorneys' fees are not to be awarded where the public does not derive benefit and where the primary objective of the action is to advance the private commercial interests of the complainant. Ettlinger v. F.B.I., 596 F. Supp. 867, 880 (D. Mass. 1984) (Where public derives some benefit from action and plaintiff was not motivated primarily by personal or commercial considerations, first three criteria are satisfied.).

Defendant has portrayed plaintiff's motivations as purely personal and commercial in nature. While the potential for personal commercial gain is present, this alone does not negate or outweigh the public interest served by plaintiff's action, as discussed supra. Further, the commercial interests served by Aronson's action are not exclusively personal to him. Plaintiff is but one of many persons who act as "tracers," that is, locating persons who are owed money and receiving a fixed percentage of the money owed in payment for this tracing service. Cases in which the complainant's personal, commercial interest were held to be contrary to the FOIA attorney's fees provisions are readily distinguishable. See, e.g., New England Apple Council, Inc., supra (Notwithstanding defendant's concession that plaintiff was not motivated by commercial gain, nature of plaintiff's interest was primarily personal rather than public since only plaintiff and its members benefited by ascertaining the impropriety of prior investigations and by putting the agency on guard about future investigations); Kendland Co., Inc. v. Department of Navy, 599 F. Supp. 936 (D. Me. 1984) (private self-interest of complainant sufficient to insure vindication of rights under the FOIA, thus making award of attorney's fees unnecessary, where information was sought solely for use in private litigation concerning plaintiff's business interests); Alliance for Responsible CFC Policy, Inc. v. Costle, 631 F. Supp.

1469 (D. D.C. 1986) (Plaintiff, a well-funded entity created solely for advancement of the private interests of its constitutent chlorofluorocarbon producers and users, was clearly motivated by private commercial benefit and had sufficient incentive to pursue FOIA claim without expectation of attorney's fee award.)

The remaining question is whether the government's withholding of the records sought had a reasonable basis in law. I conclude that it did not. The Senate Report suggests that:

> a court would not award fees where the government's withholding had a colorable basis in law but would ordinarily award them if the withholding appeared merely to avoid embarrassment or to frustrate the requester....

S. Rep. No. 93-854, supra. Defendants argue that they did not withhold the requested records to avoid embarrassment and that their withholding was based on the reasonable determination that disclosure of the personal and financial information contained in the requested records prior to HUD's completion of its 24-month search efforts constituted a clearly unwarranted invasion of personal privacy. Defendants argue that since the Court of Appeals held that reliance on Exemption 6 was reasonable as long as the search is conducted within a reasonable time, their entire response to plaintiff's request had a colorable basis in law.

Finally, defendants argue that the 24-month period had a colorable basis in law because it would allow HUD to pursue its expanded search procedures after the first year without interference from private tracers.

Defendants' arguments do not persuade me. In my opinion, it appears that defendants refused to disclose these records to avoid the embarrassment of public scrutiny that would result from disclosure of the amount of funds HUD failed to distribute. More importantly, though, it is disingenuous for defendants to argue that their withholding of records was colorable when the Court of Appeals held that, while Exemption 6 generally applies to these records, the exemption did not apply to the vast majority of plaintiff's request. The court specifically held that HUD's "expanded search procedures" after the first year were murky and lacking in both definition and merit, and that defendants were justified in withholding records only for the first year after the vesting of the shares. Defendants' position was also contrary to the policy established by its prior general counsel. Defendants' withholding of records was ill-conceived and served little purpose other than to frustrate the efforts of Aronson to expose the inefficiencies of HUD's Mortgage Insurance and Accounting office.

With respect to the appropriate amount of an attorneys' fees award, the award should be based on the quantity and fair market value of the legal services rendered, including those in connection with the motion itself. Consumers Union of United States, Inc. v. Board of Governors of the Federal Reserve System, 410 F. Supp. 63, 64 (D. D.C. 1976). Robert Aronson and Kennard Mandell prosecuted this action in the district court, and James Lesar handled the appeal and this petition. All three attorneys are experienced and seek compensation at the rate of $125.00 an hour for their services. This hourly rate is consistent with fees awarded in other FOIA cases in this circuit. See, e.g., Crooker v. United States Parole Commission, 776 F.2d 366, 369 (1st Cir. 1986). I conclude the amount of time spent and the hourly rate sought are reasonable in this instance.

Defendants argue that Aronson may not recover fees for his own time, since the First Circuit generally disallows pro se litigants from collecting fees, even where the litigant is an attorney. See Crooker, 632 F.2d at 922. I agree with plaintiff that Crooker is distinguishable, as Aronson is himself an attorney and as he was represented by other counsel. The rationale expressed in Crooker further distinguishes its application to these facts:

> little, if any, of FOIA's purpose [is] achieved by permitting a litigant to recover for a non-performed service or to be reimbursed for an expense not incurred. Rather, in actions where the complainant

> represents himself, sometimes as a hindrance instead of an aid to the judicial process, an award of attorney fees does nothing mroe than subsidize the litigant for his own time and personal effort.

Id., 632 F.2d at 920, citing White v. Arlen Realty & Dev. Corp., 614 F.2d 387 (4th Cir. 1980). Aronson is not seeking to recover fees for non-performed services or for unincurred expenses, and his role in this litigation has certainly not been a hindrance to the judicial process.

While this circuit has not yet squarely addressed this issue, other circuits have concluded that attorneys appearing in propia persona in a FOIA case may recover attorney fees. See, e.g., Cuneo, 553 F.2d at 1366; Cazalas v. United States Department of Justice, 709 F.2d 1051 (5th Cir. 1983); see also, Note, Awarding Fees to the Self-Represented Attorney Under the Freedom of Information Act, 53 George Washington L.R. 291,291 (1984-85). In the exercise of my discretion, I conclude that Aronson should not be denied attorney's fees for his own time spent prosecuting this action.

Conclusion

For the foregoing reasons, plaintiff's petition for an award of attorneys' fees is ALLOWED in the amount of $35,095.80.

United States District Judge