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,

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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