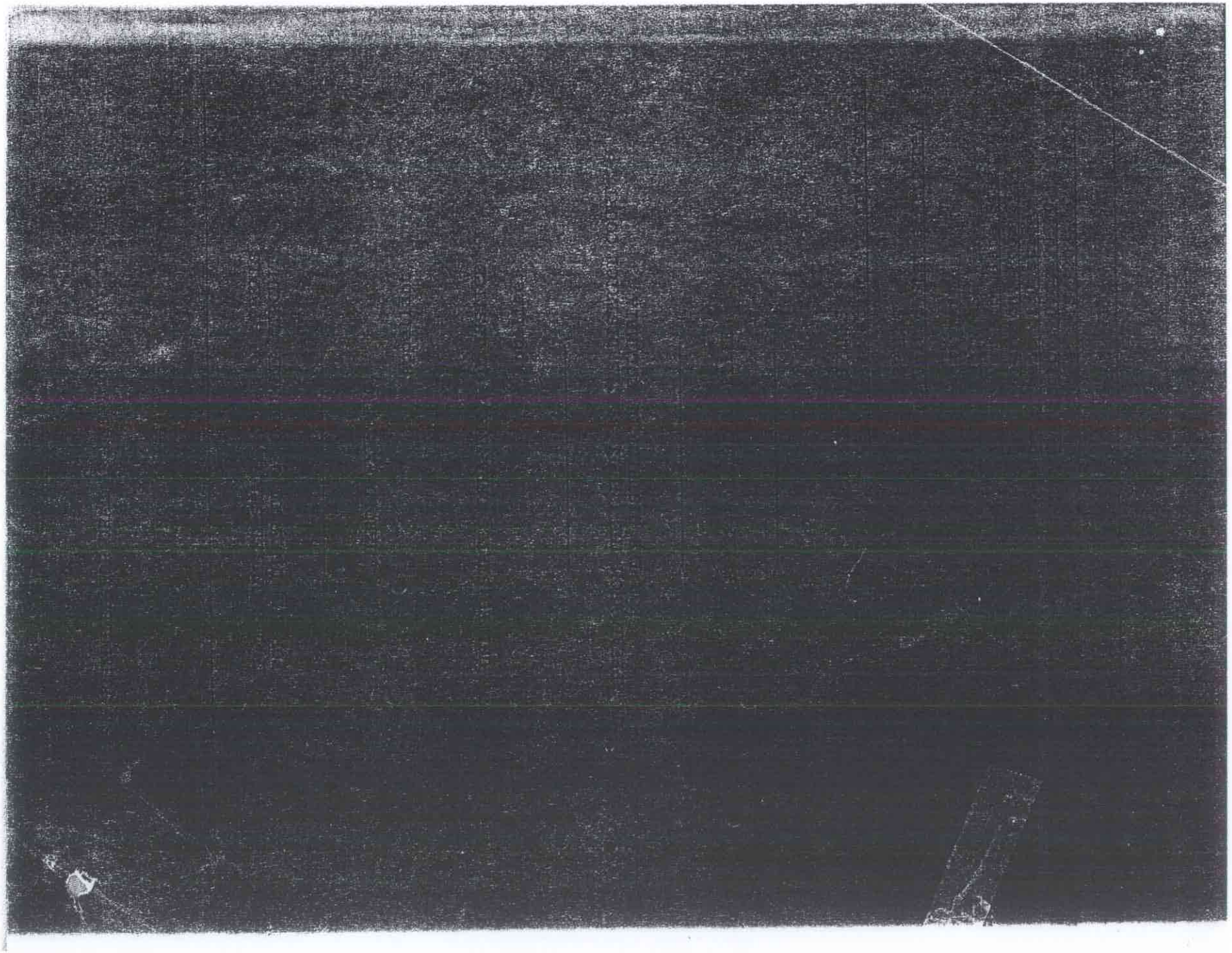
HAROLD WEISBERG, APPELLANT

V.

U.S. DOJ, APPELLEE

BRIEF FOR THE APPELLEE

No. 87-5304



CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 11(a)(1) of the Rules of this Court, the appellee hereby certifies as follows:

1. Parties and Amici. All parties appearing below and in this Court are listed in the brief of the appellant. No intervenors or amici have appeared in this case.

2. Ruling Under Review. References to the ruling below appear in the brief of the appellant.

3. Related Cases. This case has been before this Court on two prior occasions. The Court's first decision is reported as Weisberg v. U.S. Department of Justice, 631 F.2d 824 (D.C. Cir. 1980) (No. 78-1641). The Court's second decision is reported as Weisberg v. U.S. Department of Justice, 745 F.2d 1476 (D.C. Cir. 1984), rehearing denied, 763 F.2d 1436 (1985) (Nos. 82-1229, 82-1274, 83-1722 & 83-1764). Counsel for the appellee is not aware of any related cases currently pending before this Court or any other court.

Scott R. McIntosh
Counsel for Appellee

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TABLE OF AUTHORITIES

Statutes and Regulations

* Authorities chiefly relied upon are marked with an asterisk

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 87-5304

HAROLD WEISBERG,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

QUESTIONS PRESENTED

1. Whether the district court was clearly erroneous in finding that the appellant, an FOIA requester, did not "substantially prevail" in litigation over one of his two FOIA requests because the vast majority of the records obtained by the requester were disclosed as a result of the administrative processing of his FOIA request rather than as a result of his suit and because the remaining records are not of major importance.

2. Whether the district court abused its discretion in concluding that portions of the time spent by the requester's counsel were unnecessary or unrelated to issues on which the requester prevailed and therefore should be excluded from a fee award under the FOIA.

3. Whether the requester's demand for an upward adjustment in his attorney's-fee lodestar figure to reflect delay and contingency is foreclosed by the Supreme Court's decisions in Shaw v. Library of Congress, 106 S. Ct. 2957 (1986), and Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S. Ct. 3078 (1987).

APPLICABLE STATUTORY PROVISIONS

All applicable statutory provisions are contained the appendix to the appellant's brief.

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

This appeal arises from a judgment of the district court for the District of Columbia awarding attorney's fees and costs to the appellant, Harold Weisberg, against the appellee, the United States Department of Justice, for litigation conducted by Weisberg under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. In a previous decision, the district court awarded Weisberg approximately $108,000 in attorney's fees and costs. On appeal from that decision, this Court vacated the award and remanded for reconsideration. On remand, the district court concluded that its original award had been excessive under the standards set

forth in this Court's decision and awarded Weisberg approximately $23,000 in attorney's fees and costs. Weisberg filed a timely notice of appeal from the district court's judgment; the Department has not pursued a cross-appeal.

Statement of Facts

1. This case arises out of two administrative requests made by Harold Weisberg under the FOIA for records of the Federal Bureau of Investigation relating to the FBI's investigation of the assassination of Martin Luther King, Jr. Weisberg filed his first administrative request with the Justice Department on April 15, 1975. The first request sought various categories of records concerning evidence developed by the FBI during its investigation, including the results of various scientific tests and all photographs of the scene of the crime.[1] The Department informed Weisberg that because of the large volume of FOIA requests which had followed amendments to the FOIA in 1974, the administrative processing of his request would be delayed. On November 28, 1975, Weisberg brought suit under the FOIA in the district court for the District of Columbia to compel production of the records covered by his first request.

One month later, on December 23, 1975, Weisberg presented the Department with a second administrative request under the FOIA regarding the King assassination records. The second

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[1]The full text of Weisberg's first administrative request is reproduced in Weisberg v. United States Department of Justice, 745 F.2d 1476, 1479 n.3 (D.C. Cir. 1984), rehearing denied, 763 F.2d 1436 (1985).

request swept far more broadly than the first, asking for 28 different categories of records embracing almost every aspect of the FBI's investigation of the assassination.[2] Despite the exhaustive nature of the request, Weisberg did not wait for the Department to process the request administratively. Instead, within 24 hours of filing the second request with the Department, he filed an amended complaint in his pending FOIA suit demanding that the Department be ordered to produce the documents covered by the second request as well as those covered by the first request.

2. Initially, the Department and Weisberg focused their attention on the Department's processing of Weisberg's first request. The principal controversy concerning the first request involved Weisberg's access to photographs relating to the assassination which were held in the FBI's files but were copyrighted by TIME, Inc. The Department permitted Weisberg to inspect the photographs, but it declined to provide Weisberg with copies of the photographs because TIME, the copyright holder, had not granted permission for duplication of the photographs. In February 1978, the district court ordered the Department to release copies of the photographs, rejecting the Department's arguments that the photographs were not "agency records" under the FOIA and that the photographs' copyrighted status made them

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[2]The categories included, inter alia, all letters, documents, reports, memoranda and physical evidence with respect to the investigation of the assassination. The full text of Weisberg's second administrative request is reproduced in Weisberg, 745 F.2d at 1480-81 n.5.

exempt from disclosure. On appeal, this Court agreed with the district court that the photographs constituted agency records but declined to reach the exemption issue, holding that TIME as copyright holder was a necessary party to the litigation. Weisberg v. United States Department of Justice, 631 F.2d 824 (D.C. Cir. 1980). Following a remand, TIME permitted Weisberg to receive copies of the photographs, permitting the dispute to be resolved without further litigation.

The dispute over the photographs aside, the Department proceeded with its administrative processing of Weisberg's first request. At the time, the Department was laboring under what this Court has characterized elsewhere as "a virtual deluge of [FOIA] requests" -- a backlog that had grown by October 1975 to over 5,000 requests. Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 610, 613 (D.C. Cir. 1976). Nonetheless, by October 1976 the Department had largely completed its processing of the first request and had begun processing the second request. See Weisberg v. United States Department of Justice, 745 F.2d 1476, 1482 & n.8 (D.C. Cir. 1984), rehearing denied, 763 F.2d 1436 (1985).

In light of the breadth of the subject matter covered by the second request, the Department construed the request expansively as a request for the disclosure of all information in the so-called "MURKIN files," the FBI headquarters files on the King assassination. The MURKIN files contain tens of thousands of pages of records, and the processing of the files necessarily was

laborious and time-consuming. Despite the scale of the undertaking, by the summer of 1977 the Department had largely completed the processing of the MURKIN files. See Weisberg, 745 F.2d at 1482.

Weisberg's second request did not specifically request the Department to search the records of the FBI's field offices, as opposed to the MURKIN records in the FBI's headquarters. As the processing of the headquarters records proceeded, however, Weisberg made it known that he wanted the field office files to be searched as well. In August 1977, the Department entered into a negotiated stipulation with Weisberg specifying the field offices to be searched, the records to be reviewed, and the timing of the field-office processing.[3] The Department thereafter processed the designated field office records in accordance with the terms of the stipulation.

By November 1977, the Department had released over 40,000 pages of documents relating to Weisberg's second FOIA request. See Weisberg, 745 F.2d at 1482 n.8. Ultimately, the total number of documents released by the Department reached roughly 60,000 pages. Although the release of the documents followed the filing of Weisberg's civil suit -- necessarily so, since suit was filed within 24 hours of the filing of the second administrative request -- the vast majority of the documents released were

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[3]The full text of the stipulation is reproduced in Weisberg, 745 F.2d at 1482-83 n.9.

disclosed as they were processed administratively, without the compulsion of court orders.

During the course of the administrative processing of his FOIA requests, Weisberg asked the Department to grant him a waiver of the search fees and copying costs for which he otherwise would be liable under the FOIA (5 U.S.C. § 552(a)(4)(A)). In June 1977, the Department granted Weisberg a partial waiver, exempting him from 40 percent of the otherwise applicable charges. In January 1978, in different litigation by Weisberg over an FOIA request involving the Kennedy assassination, Weisberg obtained an order directing the Department to grant a complete fee waiver with respect to the documents in that case. Once the Department made a determination not to challenge the district court ruling in the Kennedy case, it voluntarily reconsidered its prior waiver ruling in this case and granted Weisberg a complete waiver. See pp. 28-30 infra.

3. Following the completion of the Department's processing of Weisberg's second FOIA request, Weisberg demanded further searches and additional disclosures by the Department. He contended, inter alia, that the Department had not adequately searched the FBI's field offices and various divisions of the Department. He also challenged the Department's withholding of records pursuant to various of the FOIA's disclosure exemptions (5 U.S.C. 552(b)).

In February 1980, the district court ruled that (with a single exception not relevant here) the Department had conducted

an adequate search of the FBI headquarters and field office records. Record ("R." 150; see Weisberg, 745 F.2d at 1483. Thereafter, following the production of two Vaughn indices by the Department (see Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974)), the district court granted summary judgment in the Department's favor with respect to the records withheld by the Department under the FOIA exemptions. Memorandum Opinion, Dec. 1, 1981 ("December 1981 Op."), at 10-13 (R. 223). With this ruling, the district court effectively concluded the litigation regarding the merits of Weisberg's FOIA suit.

At the same time that it granted the Department summary judgment, however, the district court ruled that Weisberg was eligible for an award of attorney's fees and costs. Under 5 U.S.C. § 552(a)(4)(E), a district court in its discretion may award "reasonable attorney fees and other litigation costs reasonably incurred in any [FOIA] case * * * in which the complainant has substantially prevailed." The district court ruled that Weisberg had "substantially prevailed" because "[d]efendant has released over 50,000 pages [of documents] to plaintiff in this lawsuit * * * ." December 1981 Op. at 2-3. The district court's ruling did not state what relation, if any, existed between the lawsuit and the disclosure of the documents. Neither did it distinguish between the litigation over the first FOIA request and the litigation relating to the second FOIA request. The district court subsequently awarded Weisberg

approximately $108,000 -- $93,926.25 in attorney's fees and $14,481.95 in costs.

4. The district court's grant of summary judgment to the Department and its award of attorney's fees and costs to Weisberg resulted in cross-appeals to this Court. In 1984, this Court issued a decision affirming the district court's rulings in favor of the Department on the merits of the litigation and vacating the fee award. Weisberg v. United States Department of Justice, 745 F.2d 1476 (D.C. Cir. 1984), rehearing denied, 763 F.2d 1436 (1985).

The Court first rejected Weisberg's assertion that the Department had not conducted an adequate search of its records in response to his FOIA requests.[4] 745 F.2d at 1485-89. After reviewing the record, the Court concluded that "the search efforts of the Department and the FBI were entirely reasonable and adequate." Id. at 1486. In so ruling, the Court affirmed the district court's refusal to order a more extensive search of Department records and its refusal to require reprocessing of the FBI field office records. Id. at 1486-89.

The Court also rejected Weisberg's challenge to the Department's witholding of records pursuant to the FOIA's disclosure exemptions. 745 F.2d at 1489-92. The Court agreed with the district court that the exemptions invoked by the Department

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[4]Weisberg contended specifically that: (1) the Department had unreasonably limited the scope of its search; (2) the Department had used improper procedures in processing the FBI field office files; and (3) the Department had not adequately reviewed the files of certain individuals. 745 F.2d at 1486.

justified the instances in which records had been withheld. Id. at 1490-92 & n.27. The Court further upheld the sufficiency of the sampling procedures ordered by the district court to generate the records included in the Department's Vaughn indices. Id. at 1489-90.[5]

With regard to the fee award, the Court directed the district court to reconsider its finding that Weisberg had "substantially prevailed" in the litigation over the second FOIA request.[6] The Court stressed that in the absence of a court order mandating the disclosure of records, a party seeking fees under FOIA "'must show that the 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 that information.'" 745 F.2d at 1496 (quoting Cox v. Department of Justice, 601 F.2d 1, 6 (D.C. Cir. 1979)). The Court also pointed out that in assessing whether the documents have been disclosed in response to litigation rather than because of normal administrative processing, a court must take into account whether the agency "'made a good faith effort to search out material and to pass on whether it should be

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[5]The Court also rejected a claim by Weisberg that the Department had entered into a binding consultancy agreement with him during the course of the litigation and had failed to comply with the agreement. 745 F.2d at 1492-94.

[6]The Department did not contest that Weisberg, by obtaining the copies of the TIME photographs, had substantially prevailed with respect to the litigation over his first FOIA request. See 745 F.2d at 1496 n.31. This Court's analysis therefore was directed toward the litigation over the second FOIA request.

disclosed.'" Ibid. (quoting Cox, 601 F.2d at 6). That determination depends in part on the number of requests pending before the agency and "the time-consuming nature of the search and decisionmaking process." Ibid.

In this case, the Court noted, "[e]ven a cursory review of the undisputed facts * * * indicates the strong possibility that the Department disclosed the vast bulk of the materials sought in the second administrative request as a result of its administrative processing of the FOIA request" rather than as a result of the litigation. 745 F.2d at 1496-97 (emphasis in original). The Court pointed out that while disclosure of the documents involved in the second request had taken time, the request itself "involved huge numbers of documents, as well as laborious and time-consuming reviews," and the delays in disclosing the documents "apparently was due, at least in part, to the voluminous nature of the request, the limited resources of the Department, and the tremendous FOIA backlog faced at the time by the [Department]." Id. at 1497.

The Court directed the district court to determine on remand whether, in light of these considerations, Weisberg's suit was in fact responsible for the release of the documents obtained pursuant to the second FOIA request. In light of the Department's argument that most of the limited number of documents which Weisberg did receive as a result of the litigation were either duplicative of other documents or unresponsive to his request, the Court also directed the district court to consider

whether "these disclosures justify a finding that [Weisberg] substantially prevailed as to his overall request." Id. at 1497 (emphasis in original). In the event that the district court found that Weisberg had substantially prevailed under these standards, the Court further directed the district court to consider whether Weisberg was entitled to attorney's fees and costs under the four-factor balancing test set forth in Church of Scientology of California v. Harris, 653 F.2d 584 (D.C. Cir. 1981). Id. at 1498-99.

Finally, this Court provided the district court with specific instructions concerning the calculation of the amount of any fee award to be made under the FOIA. 745 F.2d at 1499-1500. First, the Court directed the district court to exclude from its lodestar calculations all "'nonproductive time or * * * time expended on issues on which plaintiff ultimately did not prevail.'" Id. at 1499 (quoting National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir. 1982)). The Court found it "abundantly clear from our review of the record" that Weisberg "filed numerous non-productive and repetitive motions on issues on which he ultimately did not prevail." Ibid. Second, the Court directed the district court to reconsider in light of Blum v. Stenson, 465 U.S. 886 (1984), the district court's original conclusion that Weisberg was entitled to a 50 percent fee enhancement to reflect the difficulty and risk of the litigation. Id. at 1499-1500.

5. On remand, following an unsuccessful attempt by the parties to negotiate a settlement regarding attorney's fees and costs, Weisberg renewed his motion for fees and costs. After exhaustive briefing by the parties, the district court issued an opinion and order awarding Weisberg $20,060 in attorney's fees and $3,620.49 in costs. J.A. 239-72.

The district court first found that Weisberg had not substantially prevailed with respect to the litigation over his second FOIA request. J.A. 249-53. After repeating this Court's reminder that whether an FOIA plaintiff has substantially prevailed "is largely a question of causation," the district court found that "the majority of the disclosures in this case," including the release of the FBI field office documents pursuant to the August 1977 stipulation, "resulted from the DOJ's administrative processing of plaintiff's second FOIA request" rather than from the litigation. Id. at 250-51 (emphasis in original). In the "few instances" in which the district court had ordered the production of specific documents, a review of the documents demonstrated that their importance "in relation to the overall request is minimal and incapable of supporting a determination that [Weisberg] substantially prevailed." Id. at 252. Although Weisberg also had obtained a waiver of copying fees from the Department, that accomplishment did not advance his claim for attorney's fees because the granting of the waiver, like the release of the vast majority of the documents, was

"based on an administrative decision of the agency and not a lawsuit." Id. at 253, 262 n.2.

While denying Weisberg's request for attorney's fees and costs with respect to the litigation over the second request, the district court reaffirmed its earlier decision that Weisberg was entitled to fees and costs for his litigation over his first request. J.A. 253-61. Having done so, the district court proceeded to calculate the reasonable attorney's fee and costs incurred in connection with the litigation over the first request. Id. at 262-70.

The district court found that Weisberg's counsel reasonably had spent approximately 200 hours on the issues with respect to which Weisberg had prevailed. The district court disallowed approximately 175 additional hours claimed by Weisberg, either because the hours related to issues on which Weisberg did not prevail or because the district court found that the amounts of time spent had been unreasonable. J.A. 262-67. The district court accepted Weisberg's request to be reimbursed at his counsel's current rate of $100 per hour, even though counsel's rates during the course of the litigation had been lower. Id. at 267-68. Finally, the district court denied Weisberg an upward adjustment in the lodestar figure, finding that the litigation over the TIME photographs had not involved particularly complex issues and that reimbursing Weisberg at a rate of $100 per hour adequately compensated him for any "difficulties" or

"complications" in the litigation. Id. at 269. The Department has paid Weisberg the full amount awarded by the district court.

SUMMARY OF ARGUMENT

1. The district court, applying the standards set forth in this Court's prior decision in this case, found that Weisberg had not "substantially prevailed" in his litigation over his second FOIA request and therefore was not eligible for attorney's fees and costs with respect to that litigation under the FOIA. As this Court itself noted in its prior opinion in this case, the determination whether a party has substantially prevailed is a factual determination and is subject to review under the clearly-erroneous standard. The district court's findings relating to Weisberg's lack of success in his litigation over the second FOIA request are not erroneous at all, much less clearly erroneous.

Weisberg was almost wholly unsuccessful in his efforts to persuade the district court and this Court to disturb the results of the Department's administrative processing of his second request. Those few instances in which Weisberg did obtain orders from the district court directing disclosure of documents fall far short of showing, as this Court ruled that Weisberg must show, that he "substantially prevailed as to his overall request" (Weisberg, 745 F.2d at 1497). Although the Department released an enormous volume of records to Weisberg relating to the second request, the district court had ample grounds for finding that the release of those documents was due to the Department's normal administrative processing of the request rather than Weisberg's

suit. And the record is equally clear that the remaining result on which Weisberg relies, the obtaining of a waiver of copying fees, was unrelated to his litigation.

2. The district court's conclusions regarding the hours reasonably incurred by Weisberg's counsel in connection with the litigation over Weisberg's first FOIA request are well within the scope of the district court's discretion. The district court carefully assessed the hours claimed by Weisberg and disallowed them only where it had a substantial basis for concluding that the time was unreasonably long or unrelated to the issues on which Weisberg prevailed. Weisberg's challenges to the district court's findings simply invite this Court to substitute its own judgment for that of the district court, a course that this Court has rejected in the past.

3. Weisberg claims to be entitled to an upward adjustment in the "lodestar" attorney's-fee figure used by the district court in order to reflect the delay in reimbursement and the contingent nature of the underlying fee arrangement. His claim is foreclosed by two recent Supreme Court decisions, Shaw v. Library of Congress, 106 S. Ct. 2957 (1986), and Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S. Ct. 3078 (1987) (Delaware Valley II). Shaw prohibits the upward adjustment of attorney's-fee lodestars to compensate for delay unless Congress explicitly authorizes such adjustments, and no such authorization exists under the FOIA. Delaware Valley II imposes stringent limitations on the circumstances in which

lodestars may be adjusted to reflect contingency, and Weisberg has not even claimed, much less shown, that he can satisfy those limitations.

ARGUMENT

In its decision remanding this case to the district court for reconsideration of Weisberg's original fee award, this Court provided the district court with detailed guidelines for determining whether Weisberg should be awarded attorney's fees and costs and, if so, how much. As the district court's 30-page opinion shows, the district court was faithful in its attention to those guidelines. The court gave careful heed to the applicable legal standards and paid equally close attention to the record, a record with which it necessarily had become intimately familiar over the decade-long course of the litigation. The final decision reached by the district court gives neither side all that it sought on remand. At the same time that the court rejected Weisberg's request for fees and costs with respect to the second FOIA request, it rejected the Department's arguments that Weisberg was not entitled to recover fees and costs for the first request, and while it disallowed a portion of the hours claimed by Weisberg and declined to make an upward adjustment in the lodestar figure, it increased the allowable hourly rate from $75/hour to $100/hour.

In challenging the district court's revised fee award, Weisberg principally contests the court's findings of fact. Those findings, like all findings of fact by a district court,

may not be disturbed unless they are clearly erroneous. See Weisberg, 745 F.2d at 1496. Deference is particularly warranted in this case because of the district court's familiarity with the long history and record of this litigation. The court's decision would pass muster even under de novo review; a fortiori, it stands when reviewed under the clearly-erroneous standard.

I. THE DISTRICT COURT'S FINDING THAT WEISBERG DID NOT SUBSTANTIALLY PREVAIL IN THE LITIGATION OVER HIS SECOND FOIA REQUEST IS NOT CLEARLY ERRONEOUS

A. Weisberg's Judicial Challenges To The Department's Administrative Processing Of His Second Request Were Almost Wholly Unsuccessful

As noted in the statement of the case, and as discussed in further detail below, the Department voluntarily disclosed a massive number of records to Weisberg pursuant to his second administrative request. The starting point in analyzing whether a plaintiff has "substantially prevailed" in FOIA litigation, however, is not with those parts of the plaintiff's request which the agency voluntarily honors but with those parts which the agency declines to process to the plaintiff's satisfaction. In this case, Weisberg vigorously contested the adequacy of the Department's search pursuant to the second FOIA request and also contested a number of decisions by the Department not to disclose documents which were identified during the search. When put to the test of litigation, Weisberg's challenges were almost wholly unsuccessful: in the words of the district court, "[p]laintiff * * * may have won a battle or two but he lost the war." J.A. 253. Particularly when viewed in the context of Weisberg's

defeats, his handful of litigation successes are, as the district court found, wholly inadequate in quantity and quality to support a finding that he has substantially prevailed.

1. As this court noted in its prior opinion, after the Department voluntarily had released roughly 60,000 pages of documents, Weisberg "continued to assert that the Department had not adequately searched its files." Weisberg, 745 F.2d at 1483. Weisberg contested the adequacy of the Department's search before the district court, demanding inter alia that the Department reprocess the records located in the FBI field offices. The district court rejected Weisberg's contentions, ruling that the Department's search had been entirely adequate. Ibid. When Weisberg renewed his claims on appeal, this Court was equally emphatic: "We reject each of Mr. Weisberg's contentions that the search was unreasonably limited, that the field office files should have been reprocessed, and that the FBI wrongfully failed to search any individual files as listed in the [second] administrative request." Id. at 1489 (emphasis added). Weisberg's underlying attempt to compel the Department to conduct a more extensive search than it was willing to conduct voluntarily was thus a complete failure, rejected both by the district court and by this Court.

In addition to contesting the adequacy of the Department's search, Weisberg litigated the Department's justification for withholding various categories of information under the FOIA's exemptions. Once again, Weisberg's litigation was completely

unsuccessful. The district court, after reviewing two separate Vaughn indices prepared by the Department, concluded that the Department's reliance on the various exemptions at issue was fully legitimate. December 1981 Op. at 10-13 (R. 223). On appeal, this Court affirmed the district court's ruling, agreeing that nondisclosure of the contested information was proper. Weisberg, 745 F.2d at 1490-91. In short, with respect to both of the principal issues which the courts were called upon to decide concerning the Department's processing of Weisberg's second FOIA request -- the adequacy of the Department's search and the propriety of its withholdings -- Weisberg soundly lost rather than "substantially prevailed."

2. During the long course of this litigation, Weisberg did manage to obtain a handful of orders from the district court directing the Department to disclose particular documents relating to his second administrative request. But as the district court found, the documents to which Weisberg now points simply are not significant enough to justify a finding that Weisberg substantially prevailed with respect to his overall request.

The only substantial body of records released pursuant to court order was abstracts of the MURKIN records maintained by the FBI. As this Court noted in its prior opinion, the district court effectively retracted its original order requiring production. We question whether obtaining documents pursuant to an order that the district court subsequently retracts can ever

count as "substantially prevailing," regardless of the contents of the documents. In any event, the district court determined in 1981 that the abstracts "are essentially duplicative of information already released" and "reveal less information than the documents which [Weisberg] received" (December 1981 Op. at 3 (R. 223)), and the district court reiterated that conclusion in its most recent opinion. J.A. 251. The possibility that the abstracts may simplify the task of reviewing the underlying records by summarizing those records, as Weisberg suggests, can hardly outweigh the fact (which Weisberg has not disputed) that the abstracts add nothing to the information disclosed in the documents which they summarize.

Although Weisberg has identified several other documents which were released pursuant to court order, such as a commercial gun scope catalogue and several files from the Memphis and Savannah field offices, he has not made a serious effort to demonstrate that they are important enough to support a finding that he has substantially prevailed "as to his overall request." Weisberg, 745 F.2d at 1497. His own discussion of the documents illustrates that they form at best a tiny and not especially significant portion of the vast body of evidence gathered by the FBI in connection with its investigation of the King assassination.[7]

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[7]For example, Weisberg asserts (at 14) that the gun scope catalogue was significant because "it showed that the telescopic sight on the alleged murder weapon was set grossly wrong even when it reached the FBI lab." But the fact that the scope may (continued...)

B. The Vast Majority Of The Records Released To Weisberg Were Disclosed As A Result Of Normal Administrative Processing Rather Than Because Of This Litigation

It is undisputed that the Department did provide Weisberg with a vast number of records relating to the King assassination -- some 60,000 pages in all. But apart from the few categories of documents noted above, none of these documents was released pursuant to court order. In order for the release of these documents to support Weisberg's claim that he substantially prevailed, Weisberg therefore had to show "something more than post hoc, ergo prompter hoc." Cox, 601 F.2d at 6; accord, Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509, 514 (2d Cir. 1976). He bore the burden of persuading the district court that "'the 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 that information.'" Weisberg, 745 F.2d at 1496 (quoting Cox, 601 F.2d at 6). The district court correctly found that Weisberg had not carried that burden.

The bulk of the documents disclosed to Weisberg (over 40,000) originated in the FBI's Washington headquarters. Apart

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7(...continued)
have been set incorrectly by the time it reached the FBI lab says nothing whatsoever about the condition of the scope at the time the gun was used. In any case, the Department never denied Weisberg access to the catalogue; the only issue was whether Weisberg was entitled to copy the catalogue. To take another example, notwithstanding its title, the "Memorandum to the Attorney General re James Earl Ray Possible Evidence of Conspiracy" does not itself set forth evidence showing a conspiracy to assassinate Doctor King.

from the abstracts, discussed above, Weisberg does not even suggest that the release of these documents was a product of his suit. The record clearly shows that the Department took up the processing of these files systematically as soon as it had completed the processing of Weisberg's first administrative request and continued with the processing until complete. See Weisberg, 745 F.2d at 1482 & n.8. Although Weisberg chose to bring suit before the Department had an opportunity to begin its response to his second request, the administrative processing of the headquarters files nonetheless was carried out thoroughly and diligently.[8]

The only substantial body of documents voluntarily released by the Department which Weisberg claims to have obtained as a result of this litigation are the records released from the FBI's field offices pursuant to the August 1977 stipulation. An examination of the record confirms that the stipulation was entered into not because of the threat of litigation, as Weisberg suggests, but rather because the Department was seeking to simplify the task of processing Weisberg's administrative request by clarifying precisely what records Weisberg sought.

The circumstances leading up to the stipulation have been described in detail by John Hartingh, an FBI special agent who

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[8]Weisberg's failure to properly exhaust his administrative remedies before filing suit further severs the causal connection between the suit and the release of the headquarters documents, for exhaustion of administrative remedies is normally a precondition to the entertaining of an FOIA suit. See, e.g., Stebbins v. Nationwide Mutual Ins. Co., 757 F.2d 364 (D.C. Cir. 1984).

was assigned to the processing of Weisberg's second FOIA request and who participated directly in the drafting of the stipulation. See Deposition of John Hartingh, Dec. 6-7, 1979, at 4-5, 79 (R. 138-39) ("Hartingh Dep.") (describing role in processing request and drafting stipulation). As Hartingh explained, "our first goal was the complete processing of the Headquarters King assassination file[;] [t]hat took quite a bit of time and wasn't finished until the summer of 1977." Hartingh Dep. at 190-91. At that point, the Department prepared to turn to the processing of any other files necessary to respond to Weisberg's request.[9] However, Weisberg's request had not specifically asked for the Department to search the FBI's field offices, and the scope of the records which Weisberg wanted following the processing of the headquarters files was unclear. Id. at 80, 83, 186. The stipulation grew out of discussions concerning Weisberg's interest in having the field offices searched. Id. at 186-87, 192 (the Department "sat down * * * over and over to identify what [Weisberg] wanted in this case," "try[ing] to locate what [he] wanted"). The stipulation resulted from "our desire to identify exactly what documents were responsive to this request so that we could somehow frame it out and get this thing resolved * * * ." Id. at 20.

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[9]Prior to the completion of the processing of the headquarters files, it was unclear to what extent the field office files contained non-duplicate records, and hence unclear to what extent it would be necessary to process those files. See Transcript of Hearing, May 2, 1977, at 5.

Hartingh's testimony makes clear that, Weisberg's speculation about the Department's motives notwithstanding, the stipulation itself was a product of the Department's administrative processing of the second request (and more particularly its desire to simplify that task) rather than the litigation.[10] As a result, Weisberg necessarily is foreclosed from showing that the field office documents released pursuant to the stipulation were disclosed as a result of the litigation.

Weisberg also points (at 33-34) to the Department's voluntary release of the so-called Long tickler file, a file containing duplicates of various MURKIN documents maintained by an FBI special agent. Even if the contents of the tickler file are assumed to have been significant, which is far from obvious, the Department's release of the file was simply unrelated to this litigation. As the district court noted (J.A. 252), the Department initially was unable to locate the file; once the file was located, its contents were promptly processed and disclosed to Weisberg. Weisberg has failed altogether to demonstrate a nexus between his suit and the release of the file.

In addition to contending that his litigation was responsible for the Department's administrative decision to disclose the various documents discussed above, Weisberg evidently

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[10]As part of the stipulation, Weisberg agreed to forego a previously-considered request for a Vaughn index. As Hartingh's testimony shows, however, the Department entered into the stipulation for reasons unrelated to the prospect of Weisberg's Vaughn request. Contrary to Weisberg's assertion (at 32), the district court did not suggest during the June 30, 1977 hearing that it believed a Vaughn index was necessary.

contends (at 34-35) that the Department would have delayed its overall administrative response to the second FOIA request indefinitely in the absence of Weisberg's litigation. Weisberg makes no effort, however, to substantiate this claim by reference to the facts of this case. Instead, he merely invokes what he characterizes as a pattern of delay in a variety of FOIA cases involving the Department.[11]

The only question relevant to Weisberg's present fee request is whether this litigation was necessary to overcome delay in this case. Delay in other cases, assuming that it has occurred, is simply irrelevant. In this case, the record clearly shows that the Department made a deliberate effort to process Weisberg's second request as quickly as possible consistent with its obligations to other requesters. Processing was delayed, to be sure, by what this Court has characterized as the Department's "tremendous FOIA backlog" and by the sheer volume of records encompassed by the second request itself. Weisberg, 745 F.2d at 1497. But Weisberg has pointed to no evidence that the Department deliberately delayed its processing of his second administrative request or that the processing would have taken materially longer if he had not sued.[12] As this Court has

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[11]For example, to demonstrate "specific instances" of extended delay, he cites (at 22-23) correspondence between himself and the Department concerning requests for documents relating to the Kennedy assassination. See J.A. 114-17.

[12]Normally, an FOIA plaintiff who wishes to prove that litigation has speeded the release of documents will seek to contrast a pattern of delay prior to the filing of suit with more (continued...)

recognized, "[i]f * * * an unavoidable delay accompanied by due diligence in the administrative processes was the actual reason for the agency's failure to respond [sooner] to a request, then it cannot be said that the complainant substantially prevailed in his suit." Cox, 601 F.2d at 6.

Before leaving the subject of the records voluntarily disclosed by the Department, a comment is warranted concerning Weisberg's assertions (at 4-8) that the public interest was advanced by the disclosure of the documents obtained pursuant to his second FOIA request. For purposes of argument, it can be assumed that the release of the documents indeed has served the public interest. It is a non sequitur, however, to conclude that Weisberg therefore should be able to recover the attorney's fees and costs expended in litigating over the second request. If a plaintiff cannot make the threshhold showing that he has substantially prevailed, it is immaterial whether he can show that disclosure produced the kind of public benefits which might otherwise support a fee award. See Weisberg, 745 F.2d at 1495. Regardless of whether the disclosure of the documents served the

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[12](...continued)
expeditious processing after suit has been brought. Conversely, the agency will attempt to show that the pace at which it processed the request did not vary materially before and after the commencement of the suit. In this case, by filing suit over his second FOIA request within 24 hours after making the request, Weisberg has made unavailable this kind of probative before-and-after evidence. As a result, it is even more appropriate here than in the typical case that the plaintiff bear the burden of proof and suffer the consequences of any uncertainty on the causal issue.

public interest, the district court found that it was not Weisberg's litigation that led to the vast bulk of the disclosure, and that finding precludes the awarding of fees for the litigation.

C. The Administrative Decision To Grant Weisberg A Full Waiver Of Copying Fees Was Not Caused By This Litigation

Weisberg's remaining argument (at 27-30) is that he substantially prevailed because the Justice Department waived the copying fees which he otherwise would have been required to pay under the FOIA. The district court rejected this argument on remand, finding that the Department's grant of a fee waiver was "based on an administrative decision of the agency" rather than Weisberg's suit (J.A. 253) (emphasis in original). That finding is clearly correct.

The circumstances surrounding the Department's administrative decision to grant Weisberg a fee waiver are set forth in detail in a 1978 affidavit by Quinlan Shea, Jr., then the Director of the Department's Office of Privacy and Information Appeals. See March 23, 1978, Affidavit of Quinlan J. Shea, Jr. (R. 60) ("Shea Aff."). In July 1977, Shea was designated by then-Attorney General Bell to handle FOIA administrative appeals and ancillary matters such as fee waiver requests. Shea Aff. ¶ 2. The same day that Shea received the Attorney General's designation, he granted Weisberg a 40 percent fee waiver. Id. ¶ 3. He based the 40 percent waiver on the Department's treatment of other fee waiver requests and his assessment of the extent to

which the release of the documents requested by Weisberg would serve the public interest rather than Weisberg's private interests. Id. ¶¶ 4-8. Subsequently, Weisberg obtained a decision from Judge Gesell in a different FOIA suit against the Department which directed the Department to grant a complete fee waiver in that case. Weisberg v. Bell, No. 77-2155 (D.D.C. Jan. 16, 1978); see Shea Aff. ¶ 9. In his affidavit, filed with the district court in March 1978, Shea advised the court that "[i]n light 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." Ibid. The Department granted Weisberg a full waiver in this case shortly thereafter.

Shea's affidavit makes clear that the Department's decision to grant Weisberg a full waiver of copying fees was a voluntary, good-faith administrative decision not causally connected to the present litigation. If any event can be said to have precipitated the decision to move from a partial waiver to a full waiver, it was Judge Gesell's order granting Weisberg a full waiver in a different FOIA suit. Weisberg must prove that he obtained the fee waiver as a result of the litigation in this case, and the fact that the Department chose to grant a full waiver in this case because of a ruling in another case does not advance Weisberg's argument but rather defeats it. Cf. Pyramid Lake Paiute Tribe of Indians v. United States Department of

Justice, 750 F.2d 117 (D.C. Cir. 1984) (FOIA plaintiff did not substantially prevail when Department released previously withheld document after release of same document by third party removed basis for FOIA exemption). There is not a shred of evidence that, once the Department decided not to contest Judge Gesell's order in the other case on appeal, the Department would have continued to deny Weisberg a full waiver in this case absent the threat of litigation. Shea's testimony is precisely to the contrary. In light of that testimony, the district court had more than sufficient basis to conclude that Weisberg failed to prove a "causal nexus" (Cox, 601 F.2d at 6) between Weisberg's litigation in this case and the fee waiver.

Weisberg attempts to circumvent the district court's finding by arguing (at 27-28) that the district court in fact ruled that Weisberg did not substantially prevail on the fee waiver issue simply because the Department granted the fee waiver without being formally ordered to do so by the district court. This reading of the district court's opinion is baseless. Both the district court's review of the governing legal standards (J.A. 249) and its application of those standards to the fee waiver and the various other results relied on by Weisberg (J.A. 250-53) make it plain that the court fully understood that a FOIA plaintiff can substantially prevail without formally obtaining a judgment in his favor. Given the clarity of this Court's prior opinion on this point, the district court hardly could have had a different understanding. See Weisberg, 745 F.2d at 1496 ("an

agency cannot prevent an award of attorney's fees simply by releasing the requested information without requiring the complainant to obtain a court order").[13]

II. THE DISTRICT COURT DID NOT ERR IN DISALLOWING A PORTION OF THE TIME SPENT BY WEISBERG'S COUNSEL AS UNREASONABLE

For the foregoing reasons, the district court did not err in denying Weisberg attorney's fees and costs with respect to the litigation regarding his second FOIA request. As noted above, the district court did award Weisberg attorney's fees and costs for the litigation regarding his first FOIA request -- an award which the Department contested below but does not contest on appeal. The remaining issues in this case concern Weisberg's attacks on the adequacy of the amount awarded by the district court in connection with the first request.

On remand, Weisberg asked the district court to calculate the fee award on the basis of 376 hours of attorney time (J.A. 262-63).[14] The district court concluded that Weisberg's counsel reasonably had expended 201 hours of effort, disallowing the balance as either unnecessary or unrelated to the litigation on

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[13]Because the district court correctly found that the Department's decision to grant a waiver was not caused by Weisberg's litigation in this case, it is unnecessary for this Court to decide when, if ever, obtaining an FOIA fee waiver through litigation constitutes "substantially prevailing." We merely note 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.

[14]For the sake of simplicity, all references to attorney hours in the following discussion are rounded to the nearest whole hour.

which Weisberg prevailed. This determination is subject to a deferential standard of review: "because an appellate court is not well situated to assess the course of litigation and the quality of counsel," while "[t]he District Court judge * * * closely monitors the litigation on a day-to-day basis," "an attorney's fee award by the District Court will be upset on appeal only if it represents an abuse of discretion." Copeland v. Marshall, 641 F.2d 880, 901 (D.C. Cir. 1980) (en banc); accord, Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 29-30 (D.C. Cir. 1984). A brief review of Weisberg's specific complaints shows that the district court's fee award was carefully reasoned and well within the bounds of its discretion.

1. The district court disallowed 17 hours of time spent by Weisberg's attorney litigating Weisberg's request for a waiver of FOIA copying fees. J.A. 262 n.2. Weisberg objects (at 39) that his request for a fee waiver pertained to both his first and second FOIA requests. This objection misses the point of the district court's reasoning. The district court disallowed the hours not because they pertained exclusively to his second FOIA request, but rather because "the fee waiver * * * resulted from an administrative decision of the DOJ rather than [from] plaintiff's FOIA litigation * * * ." J.A. 262 n.4. Weisberg was denied credit for the hours expended, in other words, simply because the litigation effort did not produce the waiver. As this Court noted in its prior opinion, "a prevailing FOIA plaintiff is not entitled to an attorney's fee award for

'nonproductive time or for time expended on issues on which plaintiff ultimately did not prevail.'" Weisberg, 745 F.2d at 1499 (quoting National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir. 1982)).

2. The district court awarded Weisberg 30 hours for the time spent litigating the TIME photograph issue in the district court and 26 hours for the time spent litigating that issue in this Court on appeal. J.A. 264. The district court disallowed 75 percent of the 103 hours claimed by Weisberg for the appellate phase of the litigation, concluding that the amount of hours claimed was "highly unreasonable" because the arguments presented before this Court "were the same as those presented previously" to the district court "and required no large additional expenditure of time for the purposes of appeal." Ibid. The district court also pointed out that the Department, which lost before the district court in the litigation over the TIME photographs, effectively bore the burden of persuasion on appeal. Ibid.

Weisberg argues here (at 40-41), as he did below, that the issues involved in the TIME photograph litigation were complicated and required more extensive briefing on appeal. But even taken on its own terms, that argument simply shows that additional time had to be spent developing the arguments already briefed and argued before the district court. The district court recognized as much; it simply found that given the identity of the issues briefed before the two courts, the amount of

additional time required in the appellate litigation was significantly less than that claimed by Weisberg. The district court's finding was based on a careful consideration of Weisberg's representations concerning the appellate litigation and a comparison of that litigation with the prior proceedings in the district court; the district court's determination was a reasonable one.

3. The district court awarded Weisberg 33 hours for the time spent litigating the attorney's fee issues on remand, disallowing 50 percent of the 94 hours requested by Weisberg as excessive and unnecessary and disallowing an additional 15 percent to account for time expended on Weisberg's unsuccessful attempt to obtain attorney's fees concerning the second FOIA request. J.A. 265-66. Weisberg argues (at 41) that the 50 percent exclusion was erroneous because this Court's opinion raised new issues and required more elaborate briefing on remand. But as the district court pointed out, Weisberg's fees motion and reply brief on remand were not significantly different from his fees motion and reply brief prior to appeal: "[b]oth the fees motions and [both] the reply briefs contain basically the same discussion of facts and law in support of an award." J.A. 265. Moreover, the district court did recognize the need for Weisberg's counsel to spend additional time responding to the new issues posed by this Court's remand; the district court simply found that 33 hours was a sufficient period of time to deal with those issues as they bore on the first FOIA request.

4. Finally, the district court disallowed 38 out of 50 hours spent by Weisberg's counsel in connection with the attorney's fee issues litigated in the prior appeal, finding that the disallowed hours were spent in connection with Weisberg's ultimately unsuccessful attempt to obtain a fee award for the second FOIA request. J.A. 266. Weisberg does not appear seriously to question the district court's reasoning on this point; his principal concern seems to be simply to argue (at 42) that this portion of the district court's decision is contingent on the correctness of the court's disallowance of his application for fees for the second FOIA request. For the reasons given above, the district court correctly disallowed that application, and as a result, the district court's disallowance of fees for time spent litigating the application is also correct.

III. THE DISTRICT COURT DID NOT ERR IN DECLINING TO ADJUST WEISBERG'S LODESTAR AWARD TO REFLECT DELAY IN REIMBURSEMENT AND THE CONTINGENT NATURE OF THE FEE ARRANGEMENT

Weisberg argues (at 42-43) that the lodestar figure should have been enhanced to reflect two factors: the delay in reimbursing him for his legal expenses and the fact that his counsel undertook the representation on a contingent-fee basis. His argument with respect to both factors is squarely foreclosed by precedents of the Supreme Court.

A. The Supreme Court's Decision in Shaw v. Library of Congress Forecloses Federal Courts From Enhancing Fee Awards To Compensate For Delay

In its prior opinion in this case, this Court ruled that "the fact that this litigation was lengthy and time consuming

provides no justification for an upward adjustment under Blum [v. Stenson, 465 U.S. 886 (1984)]." 745 F.2d at 1500. By itself, that ruling appears to preclude Weisberg from arguing that his lodestar figure should be enhanced to compensate for the delay between the incurring of legal expenses and the eventual awarding of attorney's fees. Even if this Court had not already rejected that argument, however, the argument is foreclosed by the Supreme Court's subsequent decision in Shaw v. Library of Congress, 106 S. Ct. 2957 (1986).

In Shaw, a district court increased a Title VII attorney's-fee lodestar by 30 percent "to compensate counsel for the delay in receiving payment for the legal services rendered" (106 S. Ct. at 2960) -- the same kind of adjustment (and indeed the same degree of increase) that Weisberg seeks here. The Supreme Court overturned the award, ruling that the enhancement was prohibited by principles of sovereign immunity. The Court began with the premise that "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award," including an award of interest on attorney's fees. 106 S. Ct. at 2961 (emphasis added). Although the district court had denominated its award "compensation for delay" rather than interest, the Court found interest and compensation for delay to be economically and legally indistinguishable. Id. at 2965-66. The question therefore became whether Congress had shown an unambiguous intent to waive sovereign immunity with respect to

interest on attorney's fees under Title VII, and neither Title VII's provision for awarding "reasonable" attorney's fees nor its provision for awarding "costs" was deemed sufficient to demonstrate the necessary Congressional intent. Id. at 2964-65.

Shaw's rejection of interest and other forms of delay-related fee enhancement controls this case. Like the attorney's-fees provisions of Title VII at issue in Shaw, the FOIA's provisions for the award of "reasonable attorney fees" (5 U.S.C. § 552(a)(4)(E)) do not expressly waive the government's sovereign immunity with respect to interest or other forms of compensation for delay.[15] Accordingly, fee awards in this and other FOIA cases may not be enhanced to compensate for delay. Indeed, to the extent that the district court used Weisberg's counsel's current hourly rate of $100 rather than his lower past rates in order to compensate for delay, as it appears to have done (see J.A. 268), the district court's award may well have been unduly high under Shaw. See Thompson v. Kennickell, Nos. 85-5241 & 5242 (D.C. Cir. Jan. 8, 1988), petition for rehearing filed (Feb. 22, 1988), slip op. at 5-6 (holding that Shaw prohibits "using current billing rates in the lodestar figure to compensate attorneys for delay in payment").[16]

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[15]This Court has made clear that Shaw's reasoning is not confined to the fee-shifting provisions of Title VII. See Thompson v. Kennickell, Nos. 85-5241 & 85-5242 (D.C. Cir. Jan. 8, 1988), slip op. at 5-6 (applying Shaw to fee-shifting provisions of Equal Pay Act).

[16]We have not cross-appealed and do not seek a reduction in the award on this ground; our point is merely that far from being (continued...)

B. Weisberg Has Not Satisfied the Standards Necessary To Support A Contingency Adjustment under the Supreme Court's Decision in Delaware Valley II

The standards governing adjustment of fee awards to reflect the contingent character of a fee arrangement are controlled by Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S. Ct. 3078 (1987) (Delaware Valley II). In Delaware Valley II, the Supreme Court reversed a lower-court decision awarding a contingency adjustment of an attorney's-fee lodestar. Four members of the five-member majority concluded that contingency enhancements are never appropriate under federal fee-shifting statutes. See Delaware Valley II, 107 S. Ct. at 3081-89 (plurality opinion). The fifth member of the majority, Justice O'Connor, concluded that contingency enhancements are not foreclosed altogether but are available only in extremely limited circumstances. Id. at 3089-91 (concurring opinion).

Under the standards recognized by Justice O'Connor, a plaintiff must etablish two prerequisites in order to be eligible for a contingency adjustment. First, he must show 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. 107 S. Ct. at 3090. Second, he must show 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.

16(...continued)
inappropriately low under Shaw, the district court's award may be if anything too high.

As this Court recently acknowledged, because Justice O'Connor provided the fifth vote in Delaware Valley II, her concurrence "in effect set[s] the limited standard for permissible contingency enhancements." Thompson, supra, slip op. at 9.[17] Weisberg has made no attempt to show that his case satisfies this standard. Apart from pointing to the bare fact that the case was handled on a contingent basis -- a fact that self-evidently is inadequate to warrant an adjustment under Delaware Valley II -- Weisberg has argued only that a contingency adjustment is due because the litigation has been complex and protracted and its outcome has been uncertain. Even if these assertions are taken at face value -- and this Court stated in its prior opinion that "it does not appear that this litigation involved highly complex or novel issues" (745 F.2d at 1500 (emphasis added)) -- they do not suffice. For under Justice O'Connor's standard, "neither the legal risks, nor the novelty and complexity of the issues, nor the protracted nature of the litigation [is] relevant to the propriety of contingency enhancements." Thompson, slip op. at 9; see Delaware Valley II, 107 S. Ct. at 3091. In light of Weisberg's failure to make an adequate showing below, and his equally stark failure even to

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[17] A petition for rehearing currently is pending in Thompson, as noted above, but the petition does not concern the portion of the decision analyzing contingency adjustments under Delaware Valley II.

suggest on appeal that such a showing could be made, the district court's rejection of an upward adjustment must be affirmed.[18]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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[18] In Thompson, the plaintiffs argued vigorously in their appellate brief that they satisfied the standards set forth in Justice O'Connor's Delaware Valley II opinion. See Thompson, slip op. at 10. This Court therefore remanded the case to the district court for reconsideration under Delaware II, which was decided more than eight years after the case was heard by the district court. Ibid. Here, in contrast, Weisberg has made no effort to suggest on appeal that he can satisfy the Delaware II standards. As a result, unlike in Thompson, there is no occasion in this case for a remand for still further proceedings.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 1988, I have served the foregoing appellee's brief on the appellant by causing copies to be delivered by hand to his counsel, James H. Lesar, 918 F Street, N.W., Suite 509, Washington, D.C. 20004.

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