STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

CAROL BETH LITKOUHI,

Plaintiff,

v.

ROCHESTER COMMUNITY SCHOOL DISTRICT, a government entity.

Defendant.

Case No.: 22-193088-CZ

Hon. D. Langford Morris

Amended Complaint

Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Patrick J. Wright (P54052)
Mackinac Center Legal Foundation
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900 – voice
(989) 631-0964 – fax
Wilcox@mackinac.org

Jackson Lewis, P.C.
Timothy J. Ryan (P40990)
Linda L. Ryan (P67686)
Attorneys for Defendant
250 Monroe NW, Suite 400
Grand Rapids, MI 49503
(616) 940-0230
Timothy.ryan@jacksonlewis.com
Linda.ryan@jacksonlewis.com

FIRST AMENDED COMPLAINT

There is no other pending or resolved civil action arising out of the same transaction or occurrence alleged in the complaint.

NOW COMES Plaintiff, Carol Beth Litkouhi, by and through her attorneys, The Mackinac Center Legal Foundation, and for her First Amended Complaint alleges and states as follows:

INTRODUCTION

The plaintiff, Carol Beth Litkouhi, is a parent within the Rochester Community School District (the "District") who, despite repeated attempts, has been stymied in her attempts to lawfully obtain records relating to the District's curriculum, training materials, and other related records. Having exhausted all reasonable attempts to obtain the records she seeks, this lawsuit follows.

The Mackinac Center for Public Policy (the "Mackinac Center") is a nonprofit organization dedicated to improving the quality of life for all Michigan residents by promoting sound solutions to state and local policy questions. To that end, its Mackinac Center Legal Foundation routinely provides legal representation to individuals, like Plaintiff, who use the Freedom of Information Act ("FOIA") to obtain relevant documents from state and local governments.

This case deals with a matter of significant public interest, namely, the ability of parents to ensure schools are transparent about the lessons being taught to the children they serve. The need for transparency in this particular area is essential, as it affords parents the opportunity to understand what their children are learning, and to fully engage with local government officials about these lessons. Unfortunately, the District has rejected Plaintiff's attempts to promote this transparency.

On December 14, 2021. Plaintiff submitted a FOIA request to the District for the release of information relating to a "History of Ethnic and Gender Studies" course that had been taught by at least one of the District's member schools. The District responded to Plaintiff's request by partially granting it. Specifically, the District granted Plaintiff's request with respect to a unit plan, which was provided to Plaintiff as part of an earlier request. The remainder of her request for curriculum materials and other records relating to the course was denied.

After receiving the District's response, Plaintiff filed an administrative appeal on January 19, 2022, in an attempt to obtain a response containing the remaining materials she had requested. In this appeal, Plaintiff specifically noted that, unless no materials had been distributed to students as part of the course, responsive records necessarily had to exist. Plaintiff further explained that, despite numerous attempts to obtain the requested records through FOIA and alternate means, she had been repeatedly rebuffed.

The District responded to Plaintiff's appeal on February 8, 2022 by denying it. In its denial, the District emphasized that it had provided those responsive records known to exist by the district, and denied the remainder of Plaintiff's appeal on the grounds that no responsive materials existed. The District failed to address any specific argument raised in Plaintiff's appeal, including the fact that the District's position would inherently mean that no classroom materials had been produced in a course that had been actively taught for over six months.

Plaintiff separately sought additional materials from the district via a FOIA request on December 27, 2021. On that date, Plaintiff sought access to materials relating to Diversity, Equity, and Inclusion trainings for the years 2020-2022. The District responded on January 21, 2022 by granting that request and requesting a deposit in the amount of $418.45. Plaintiff paid that fee on January 24, 2022, and, after some additional correspondence, the District issued a final determination on February 11, 2022. Although the District's response was styled as a full grant, a number of unidentified materials were withheld on the basis of the fact they were copyrighted materials. Based on that fact, the District produced some teacher training materials, but refused to produce copies of those materials they claimed to be copyrighted, instead requiring Plaintiff to inspect them in person.

In light of Plaintiff's partial denial of Plaintiff's December 14th request (the "History Request") and the refusal to produce copies of records in response to Plaintiff's December 27th request (the "Training Materials Request"), Plaintiff brought this action against the District. Neither the District's refusal to release curriculum materials, nor its refusal to produce copies of allegedly copyrighted materials comport with Michigan law.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, Carol Beth Litkouhi, is a natural person and resident and citizen of the State of Michigan, County of Oakland.
2. Defendant, the Rochester Community School District, is a government entity administered by the Board of Education and the Superintendent. Defendant is

headquartered at 501 W. University Drive, Rochester, Oakland County, Michigan 48307.

3. Venue is proper pursuant to MCL 15.240(1)(b).

4. Pursuant to MCL 15.240(5), this action should be "assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."

5. Pursuant to MCL 15.240(1)(b) and MCL 600.605, the circuit court has jurisdiction over this claim.

FACTUAL BACKGROUND

6. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.

7. On December 14, 2021, Plaintiff submitted a FOIA request to the District. The operative portion of this request read as follows:

> Pursuant to the state open records law Mich. Comp. Laws. Secs. 15.231 to 15.246, I write to request access to and a copy of all teacher lesson plans, curriculum, readings given to students (such as articles, publications, case studies), viewings (such as video clips), and assignments given to students (such as writing or discussion prompts) used for the "History of Ethnic and Gender Studies" Course at Rochester High School during the time period from August 30 – present. If material is electronic, I request access via email. If book(s) were given to be used, I request that the book(s) be made available for me to come and review.

Exhibit A, Plaintiff's History Request (errors original).[1]

[1] Plaintiff has submitted requests for similar requests relating to the "History of Ethnic and Gender Studies" course in the past, but for purposes of this lawsuit, Plaintiff's complaint is limited to the violations of law arising from her December 14, 2021 request, as well as those arising from her December 27, 2021 request.

8. On January 11, 2022, the District responded to Plaintiff's request by partially granting and partially denying Plaintiff's request. The District's response reads, in the relevant part, as follows:

> Your request is granted in part and denied in part. The notifications section of the FOIA, MCL 15.235, requires the District to identify the reason for any partial denial of your request. Your request is granted to the extent that a unit plan document was provided to you in our response dated October 4, 2021. The remainder of your FOIA request is denied. Your request is denied in part as the District is not knowingly in possession of any records responsive to your request for "teacher lesson plans," "readings given to students," "viewings," and "assignments used to evaluate students," or teacher prompts made on Flipgrid and Google classroom during the time period from August 30, 2021 through present. This letter serves as the District's certification that no responsive records are known to exist.

Exhibit B, District's History Denial.

9. Plaintiff appealed the District's Denial on January 19, 2022. The relevant portion of Plaintiff's appeal reads as follows:

> Dear Dr. Shaner,
>
> I would like to appeal this FOIA response I received from the District on January 12, 2022, regarding my request to access class curriculum for the History of Ethnic and Gender Studies. To date, Rochester Community Schools District ("District") responded that no responsive documents exist. I have reason to believe that responsive documents do exist, since the class has, upon information and belief, been allowed to run uninterrupted for the last 6 months. Indeed, unless the District, school, or teacher, have not distributed any materials in the class since its inception (which, based on District admissions, I do not believe is the case), the District is in direct violation of its Freedom of Information Act ("FOIA") obligations. I ask you to reconsider the District's response.
>
> As I have shared with you in a previous letter, I've tried reaching out to multiple district employees to request information informally, politely, respectfully. My requests were rebuffed by District administrators who told me and forced me to use the legal process of FOIA to obtain this information. With great disappointment, even my

formal FOIA submissions failed to produce any response other than form letter denials of the existence of letters related to my requests—even for material that obviously exists and was distributed in the past according to other communications. The FOIA requests themselves were narrowly tailored, and were reasonable within their scope. Note, the District did not object to the scope or breadth of the requests themselves, but merely stated it was not in possession of such documents. Again, based on statements made by individuals in the District, as well as common sense, I do not believe that to be true.

For example, the document provided to me on October 4, which the FOIA Coordinator called, "Unit Plan", does not appear to reasonably address topics supposedly covered in the course, and it only accounts for the first two weeks of school. This document is attached below. The fact that the District was willing to produce this document, without producing a single additional page (either the documents listed in the Unit Plan or any additional documents after it was drafted), additionally demonstrates the District's bad faith denial of my FOIA request.

I appreciate your immediate attention to this matter. While I would prefer not to escalate this issue, if you plan to proceed consistent with your prior responses and deny the requests, I plan to consider all of the legal options for obtaining these documents. I have requested this information for months, and have not received any substantive response. As I am sure you are aware, the applicable statutes allow me to collect reasonable fees and costs for my efforts to correct the wrongful denial. The District's continued attempts (now for many months) at stonewalling my legal right to obtain these documents is not only depriving the community access to information to which it is entitled, but will soon be costing taxpayer money.

Please also be aware, given the likelihood this matter proceeds to litigation, you are also put on notice to reserve, not destroy, and not alter any documents that pertain to the History of Ethnic and Gender Studies class. Any effort made by the District, or its employees, to destroy or alter those documents violates the District's legal duties. Should you wish to resolve the matter without court intervention, please let me know if you're available to discuss.

Exhibit C, Plaintiff's History Appeal.

10. The District responded to Plaintiff's appeal on February 8, 2022. The District denied that appeal on the following basis:

> On January 11, 2022, the Districts FOIA Coordinator provided you with a response that granted your request in part and denied your request in parts. You were provided the responsive materials known by the District to exist at the time. The remainder of your request was denied for the reason that additional responsive materials did not exist. I subsequently received an e-mail from you stating your desire to appeal the response you received from the District's FOIA coordinator.
>
> I have reviewed the matter, and confirm the FOIA Coordinator's response was accurate. Therefore, I uphold the FOIA Coordinator's response to you, and your appeal is denied. Please also be advised, that while all District staff strive to be helpful and accommodating to requests, the FOIA Coordinator is obliged to follow the District's FOIA procedures, which are in accord with the law. The FOIA Coordinator is not obliged to engage in additional actions outside the scope of the District's FOIA procedures.

Exhibit D, District's History Appeal Denial.

11. Plaintiff separately sought additional materials from the district via a FOIA request on December 27, 2022. This request sought:

> "access to all Diversity, Equity, and Inclusion training materials (including materials related to Implicit bias, Social Justice, Cultural Proficiency, Culturally Responsive Teacher) for the 2020/21, 2021/22, and any newly added materials in the coming school year. If material is electronic, I request access via e-mail."

Exhibit E, Training Materials Request.

12. The District responded to Plaintiff's Training Materials request on January 21, 2022 by granting that request and seeking a deposit in the amount of $418.45. **Exhibit F, Training Materials Cost Estimate**.

13. Plaintiff paid that fee on January 24, 2022 and the District issued a final determination on February 11, 2022. **Exhibit G, Training Materials Final Determination**.

14. Although the District's response was styled as a full grant, a number of unidentified materials were withheld on the basis of the fact they were copyrighted materials. *Id.* Based on that fact, the District refused to produce those materials, instead requiring Plaintiff to inspect them in person. *Id.* The District did, however, produce copies of teacher training materials it did not consider to be protected by copyright, and those materials are not as issue in this action.

COUNT I: VIOLATIONS OF THE FREEDOM OF INFORMATION ACT

A. The District's History Denial Adopts an Unlawfully Narrow Reading of the FOIA

15. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.

16. The Department's denial of Plaintiff's History Request indicates that no responsive records relating to that request, other than a unit plan, exists within the Department's position.

17. Upon information and belief, however, this statement is inaccurate.

18. In connection with prior FOIA requests, Plaintiff previously corresponded with the District's Executive Director of Secondary Education, Neil DeLuca. As part of this correspondence, Plaintiff obtained a course syllabus for the History of Ethnic and Gender Studies course, as well as a course description. These items were not produced to Plaintiff, however, in response to her subsequent History Request. **Exhibit H, 2021.08.31 Secondary Director Correspondence.**

19. Furthermore, in prior attempts to obtain information relating to the History of Ethics and Gender studies course, Plaintiff learned that a number of other

documents relating to the course exist, but these documents were not produced in response to the History Request. These documents include such material as the daily question assignments presented to students, written and video materials relating to grant writing assignments, videos contained in a PowerPoint, and Google classroom assignments. **Exhibit I, Prior Correspondence re History of Ethics and Gender Course.** These records were not produced to Plaintiff, either after her initial correspondence, or in her subsequent History Request.

20. Upon information and belief, these materials are housed either by individual schools within Rochester Community Schools, or within the records of individual teachers within those schools.

21. Upon information and belief, Beth Davis, The District's FOIA coordinator, did not ask individual schools or teachers to locate and provide the records referenced in Paragraphs 19. and 20.

22. Upon information and belief, The District's FOIA coordinator only produced those records collected and retained by the District itself, without attempting to locate responsive records housed within the District's member schools or possessed by the District's teachers.

23. In fact, in response to her initial inquiries, Plaintiff received only one lesson plan for the first two weeks of the History of Ethnic and Gender Studies course. Upon information and belief, more lesson plans for this course have been created. Plaintiff received no additional lesson plans in response to her History Request.

24. Upon information and belief, these additional records are owned, used, possessed, or retained by either individual schools within the District, or within the records of individual teachers within those schools.

25. Upon information and belief, the District did not ask the individual schools where the course that was the subject of Plaintiff's request was taught to determine whether records responsive to Plaintiff's request existed, or to produce such records.

26. Upon information and belief, the District did not ask those teachers responsible for teaching the course that was the subject of Plaintiff's request to determine whether records responsive to Plaintiff's request existed, or to produce such records.

27. In addition to correspondence with the District, Plaintiff corresponded with a curriculum consultant, who provided a PowerPoint to Plaintiff that had not been provided by the District itself. *Id.* at 16.

28. Upon information and belief, the District later instructed the curriculum consultant to not provide Plaintiff with additional course materials, and to direct her to submit a FOIA request directly to the District. *Id.*

29. At that time, Plaintiff had already submitted multiple FOIA requests, all of which had failed to produce some material that was both relevant and responsive. See, e.g., *Id.*

30. Further, when Plaintiff inquired as to whether she should be directing her request to individual schools within the District, she was informed that all FOIA requests must be presented to the District itself.

31. The District's position appears to be that the District must only produce those records it possesses as the District administration.

32. According to this line of thinking, those public records held by schools within the District, or by teachers within those schools, are not considered within the District's possession for purposes of FOIA regardless of whether they are owned, used, possessed, or maintained by either individual schools or teachers, even when in the performance of an official function.

33. Thus, Plaintiff is caught in a catch-22. The District refuses to acquire records from its schools and teachers in order to fulfill her requests, but also forbids members of the public from directly requesting those records from the parties the District considers to be in possession of those records. Practically speaking, this means that records held by a member school, but not by the District itself, are essentially unattainable through FOIA requests. This is contrary to both the purpose of FOIA and existing caselaw.

34. MCL 15.231(2) states:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to fully and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may participate in the democratic process.

35. The public body has the burden of proof in applying an exemption. MCL 15.235(5)(a)-(c); *MLive Media Group v City of Grand Rapids*, 321 Mich App 263, 271 (2017).

36. The FOIA is a pro-disclosure statute, and as a result, "exemptions to disclosure are to be narrowly construed." *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 544 (1991).

37. Here, rather than applying an exemption, the District has claimed that no responsive records exist in its possession.

38. Upon information and belief, this is because the District itself does not possess responsive records, even if its individual member schools do possess that information.

39. The District is expressly a public body pursuant to MCL 15.232(h)(iii).

40. The District's member schools are also public bodies for purposes of MCL 15.232(h).

41. Course materials, regardless of by whom they are prepared or retained, are prepared or retained in connection with the District's, and its individual member schools', public functions—public education.

42. Based on the Plaintiff's conversations with employees of the District, it appears that these materials were prepared, owned, used, possessed, or retained by individual member schools or teachers, within the District.

43. Thus, these records are public records as defined by MCL 15.232(i).

44. To the extent that schools within the District possess additional records that may be responsive to Plaintiff's request, it is the District's duty to locate and produce those records.

45. To the extent that even individual teachers within the District possess additional records that may be responsive to Plaintiff's request, it is the District's duty to locate and produce those records.

46. This issue was largely settled in the Supreme Court's *Bisio v City of Village of Clarkston* case, 506 Mich 37 (2020), in which the Court was asked to examine whether correspondence between a city attorney and an outside consultant was subject to FOIA. The Court answered in the affirmative, concluding:

> Under MCL 15.232(i) of FOIA, a "public record" is a "writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." We reiterate that such "public records" must be "prepared, owned, used, in the possession of, or retained by a *public body*" and not by a private individual or entity. In the instant case, the office of the city attorney constitutes a "public body" because it is an "other body that is created by state or local authority" pursuant to MCL 15.231(h)(iv). Furthermore, the documents at issue are "writing[s]…retained" by the public body "in the performance of an official function" under MCL 15.232(i).

Id. at 55.

47. Here, the District's member schools are public bodies pursuant to MCL 15.231(h).

48. As such, the District is obligated to produce responsive records owned, used, possessed, or retained by those schools, just as the City of Village of Clarkston was required to produce responsive records in the possession of its City Attorney.

49. In light of the above the District is legally obligated to ask its members schools for any materials in their possession that are responsive to Plaintiff's History

Request, regardless of whether the District itself is in possession of those materials.

50. For the same reasons, the District is legally obligated to ask the individual teachers responsible for teaching the courses that would contain material responsive to Plaintiff's History Request for any relevant materials, regardless of whether the District itself is in possession of those materials.

51. The Districts failure to do so violates Plaintiff's rights under MCL 15.233(1).

B. The Department's Application of a "Copyright" Exemption was Neither Properly Identified, nor Lawful.

52. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.

53. Under MCL 15.232(i), a public record is either exempt from disclosure under MCL 15.243, or it must be produced in response to a request.

54. In responding to Plaintiff's Training Request, the District's withheld certain materials on the basis that providing copies of those materials would violate an unidentified party's copyright rights. In doing so, the District failed to specifically identify a specifically applicable FOIA exemption.

55. By failing to specify the MCL 15.243 exemption justifying this withholding, the District violated MCL 15.235(5)(a).

56. Nevertheless, it can be presumed that the District's intent was to apply MCL 15.243(1)(d), which permits the withholding of materials if they are exempted by

another statute. It can further be presumed that the District's citation to "Title 17 of the US Code" was intended to indicate the statute on which the District relied.

57. 17 USC 101 *et seq*. is the federal law which governs copyright and copyright actions.

58. Thus, for the District to be able to withhold the requested records, it necessarily must be claiming that federal copyright law prevents the copying and production of copyrighted materials in response to a FOIA request.

59. Upon information and belief, no Michigan Court has evaluated the interaction between the Michigan FOIA and federal copyright law. The Michigan Attorney General, however, has opined on this issue twice.

60. In 1979, the Attorney General was asked to evaluate a wide variety of issues associated with the FOIA, including copyright. In addressing the issue, the Attorney General stated:

> Section 3(1) provides that a person has a right to receive copies of a public record of a public body. However, the Constitution of the United States provides:
>
> 'The Congress shall have Power…To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.' US Const, art 1, § 8
>
> Pursuant to that constitutional mandate, Congress has enacted 90 State 2546 (1976); 17 USC 106 and 109, which state:
>
> '§ 106 … the owner of a copyright … has the exclusive rights to do and to authorize any of the following:
>
> ****

> '(3) to distribute copies … of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; ….'
>
> § 109. (a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, of any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.'
>
> Copyright laws may not be encroached upon by the state. As stated in *Roebuck & Co v Stiffel Co*, 376 US 225, 228-229 (1964):
>
> 'Pursuant to this constitutional authority, Congress in 1790 enacted the first federal patent and copyright law, 1 State 109, and ever since that time has fixed the conditions upon which patents and copyrights shall be granted … These laws, like other laws of the United States enacted pursuant to constitutional authority, are the supreme law of the land.'
>
> It is my opinion, therefore, that copyrighted materials may not be copied and distributed in violation of the Copyright Act.

1979-1980 Mich Op Atty Gen 255 (Mich AG), 1979 WL 36558 (July 29, 1979) (cleaned up) (emphasis added)[2].

61. The Attorney General again opined on the interaction between the FOIA and copyright in 1998. In this matter, the relevant question was whether the state insurance bureau, in response to a FOIA request, must provide "copies of insurance manuals of rules and rates which are in its possession and are required by law to be filed by insurers with the bureau, without first obtaining the

[2] The full text of this opinion is 43 pages. For the Court's convenience, the relevant portion is attached as Appendix A.

permission of the copyright holder." 1997-1998 Mich Op Atty Gen 93 (Mich AG), 1998 Mich OAG No 6965 (January 16, 1998).[3]

62. This later opinion acknowledged the prior Attorney General opinion's holding, but ultimately rejected it as improper due to changed circumstance. *Id.* at 3.

63. The Attorney General first noted that interpreting the Michigan FOIA consistently with the federal FOIA was appropriate where analogous. *Id*., citing *Capitol Information Association v Ann Arbor Police*, 138 Mich App 655, 658 (1984).

64. The Attorney General then stated:

> OAG, 1979-1980, No 5500, *supra*, was issued by the U.S. Court of Appeals, D.C. Circuit, in *Weisberg v United States*, 203 US App DC 242 (1980), decided the issue of whether copyrighted materials are exempt from disclosure under the federal FOIA. In *Weisberg*, the plaintiff brought a federal FOIA action to compel disclosure of photographs in the government's possession that were taken at the scene of Dr. Martin Luther King, Jr's. assassination. Some of the requested file photos were taken and copyrighted by Life Magazine. *Id.* at 825. The government argued that, based on federal FOIA exemptions, copyrighted materials should never be subject to mandatory disclosure. *Id.* at 828. The court, however, rejected the government's argument and held as follows:
>
> We hold that mere existence of copyright, by itself, does not automatically render FOIA inapplicable to materials that are clearly agency records.
>
> *Id.* at 825.
>
> The court recognized that under the government's interpretation of the federal FOIA, an agency would be permitted to mask its processes or functions from public scrutiny by merely asserting a third party's copyright. *Id.* at 828.

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[3] Attached as Appendix B.

Id. at 3 (emphasis added).[4]

65. The Attorney General concluded by stating: "Under the *Weisberg* decision, *supra*, a government agency's public records, even if copyrighted, are subject to disclosure under the federal FOIA. A similar result should prevail under the Michigan FOIA." *Id.*

66. Subsequent cases relating to the *Weisberg* case (hereinafter *Weisberg I*) are consistent with this result. In *Weisberg v US Dept of Justice*, (*Weisberg II*) the District Court for the District of Columbia noted that that the while the *Weisberg I* decision had not explicitly reached a determination of whether copyright prevented the requested records from being disclosed, it was unlikely the documents at issue would have ever been disclosed absent the FOIA request, despite the fact they were made available for public inspection. *Weisberg v US Dept of Justice (Weisberg II)*, 745 F.2d 1476, 1481, n. 7 (DC Cir 1984).[5]

67. The situation presented in the *Weisberg* cases is largely analogous to this matter with respect to Plaintiff's Training Materials Request. In both instances, the government has attempted to prevent the copying and production of allegedly copyrighted materials on behalf of a third-party copyright holder, but has indicated a willingness to permit those records to be inspected. Yet, as in *Weisberg*

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[4] The *Weisberg* decision referenced by the Attorney General is attached as Appendix C.

[5] The *Weisberg II* decision is attached as Appendix D.

II, it is unlikely the relevant records will be meaningfully disclosed to the public absent the copying of the records sought by Plaintiff's Training Materials Request.

68. Similarly, the release of the requested records in both *Weisberg II* and in this matter relate to subjects of great public important. In the *Weisberg* cases, the public interest was gaining a greater understanding of the events surrounding the assassination of Dr. Martin Luther King Jr., a matter that is axiomatically a matter of public interest. Here, the relevant records Plaintiff seeks relate to diversity, equity, and inclusion, implicit bias, and social justice, along with any training methods related to these subjects. This subject matter and/or the implementation thereof is a matter of great public import at this time.

69. The recent public interest in these types of records can hardly escape notice. In Michigan alone, multiple records requests relating to training and education materials have received media attention.[6] The public interest is so high that bills have been introduced in the Michigan Legislature that would specifically address the disclosure of records by public schools.[7] School transparency is now a matter of national public import,[8] with 19 states having introduced school transparency

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[6] See, e.g., Kieffer, Amanda, *Parents Need a Say on Education Curricula*, Washington Examiner (October 29, 2021).

[7] See, e.g., Senate Bill No 868 of 2022, available at: https://www.legislature.mi.gov/documents/2021-2022/billintroduced/Senate/pdf/2022-SIB-0868.pdf.

[8] See, e.g., Cromwell, Rich, *Will A 'Parental Bill Of Rights' Finally Enforce Government School Transparency?*, The Federalist (February 10, 2022), available at: https://thefederalist.com/2022/02/10/will-parental-bill-of-rights-finally-enforce-government-school-transparency/; Poff, Jeremiah, *Minnesota Republicans Introduce School Transparency Bills*, *Washington Examiner* (February 15, 2022), available at:

bills as of February 23, 2022.[9] Disclosure of records such as those Plaintiff has requested would help to contribute to this public and political discourse.

70. In light of the Attorney General's most-recent opinion on this matter, and FOIA's clear public policy goal of providing all persons with "full and complete information regarding the affairs of government," Michigan law requires the District to make the relevant records available for copying.

71. Indeed, absent such a requirement, the people's ability to "fully participate in the democratic process" would be significant hindered, as citizens would lack meaningful information about a matter of high public interest.

72. Even if the Michigan FOIA does not require the copying and disclosure of requested records as a matter of Michigan law, the *Weisburg* decisions would suggest the alternate remedy would be for the third-party copyright holder to be impleaded in this action to ensure an adequate adjudication of the copyright issue.

73. Should the Court adopt this approach in the previous paragraph, Plaintiff's anticipated use of the records for purposes of commentary and/or criticism in further of political discourse on an issue of public importance clearly falls within the fair use exception to copyright as outlined in 17 USC §107.

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https://www.washingtonexaminer.com/restoring-america/community-family/minnesota-republicans-introduce-school-transparency-bills.

[9] Rufo, Christopher F., *The Fight for Curriculum Transparency*, City Journal (February 23, 2022), available at: https://www.city-journal.org/the-fight-for-curriculum-transparency.

74. Thus, under both Michigan law and the framework established by the *Weisberg* cases, Plaintiff is entitled to receive copies of the records she requested in her Training Materials Request.

75. The District's failure to produce those records violated Plaintiff's rights as established by MCL 15.233(1).

C. Statutory Damages

76. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.

77. In light of the above, the Department's improper withholding of the requested records is arbitrary and capricious under MCL 15.240(7), thereby subjecting the Department to a civil fine of $1,000.00 payable to the general treasury and a separate $1,000.00 to Plaintiff.

78. The Department's inappropriate application of the aforementioned exemptions constitutes a willful and intentional failure to comply under MCL 15.240b, thereby subjecting it to a civil fine of $2,500.00 to $7,500.00 payable to the state treasury.

79. Pursuant to MCL 15.240(6), Plaintiff, if she prevails, is entitled to attorneys' fees and costs:

> If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

RELIEF REQUESTED

Plaintiff, Carol Beth Litkouhi, respectfully requests that this Court order Defendant, Rochester Community Schools, to provide all information sought in her FOIA requests in unredacted form; apply the full penalties available under MCL 15.234(9), MCL 15.240(7), and MCL 15.240b; award attorneys' fees and costs under MCL 15.240(6); and award any other relief this Court determines to be just and equitable to remedy the District's improper withholding of the requested information and causing the need to bring this suit.

Dated: July 6, 2022 /s/ Derk A. Wilcox
Derk A. Wilcox (P66177)

Exhibit A

December 14, 2021

Elizabeth Davis
501 W. University Drive
Rochester, MI 48307

Dear Elizabeth Davis,

Pursuant to the state open records law Mich. Comp. Laws Secs. 15.231 to 15.246, I write to request access to and a copy of all teacher lesson plans, curriculum, readings given to students (such as articles, publications, case studies), viewings (such as video clips), and assignments given to students (such as writing or discussion prompts) used for the "History of Ethnic and Gender Studies" Course at Rochester High School during the time period from August 30 - present. Also, I request access to teacher prompts made on Flipgrid and Google classroom during the time period from August 30 - present. If material is electronic, I request access via email. If book(s) were given to be used, I request that the book(s) be made available for me to come and review.

If you choose to deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemption(s) upon which you rely. Also, please provide all segregable portions of otherwise exempt material.

Thank you for your assistance.

Sincerely,

Carol Beth Litkouhi
935 Homestead Ct.
Rochester Hills, MI 48309
248-701-0312
cblitko@gmail.com

Exhibit B

Robert Shaner, Ph.D.
Superintendent

Debi Fragomeni
Assistant Superintendent for Instruction

ROCHESTER COMMUNITY SCHOOLS
PRIDE IN EXCELLENCE

Dana J. Taylor, CPA, CFF
Assistant Superintendent for Business

Elizabeth A. Davis
Chief Human Resource Officer

501 W. University Drive, Rochester, Michigan 48307. Phone: 248.726.3000. Fax: 248.726.3105.

January 11, 2022

Carol Beth Litkouhi
Email: cblitko@gmail.com

Re: FOIA Request

Dear Ms. Litkouhi,

This correspondence is in response to your December 14, 2021 request for information under the Freedom of Information Act (FOIA), MCL 15.231 et seq, sent via e-mail and received by this office on December 15, 2021. You have requested records that you describe as:

"…, I write to request access to and a copy of all teacher lesson plans, curriculum, readings given to students (such as articles, publications, case studies), viewings (such as video clips), and assignments given to students (such as writing or discussion prompts) used for the "History of Ethnic and Gender Studies" Course at Rochester High School during the time period from August 30 - present. Also, I request access to teacher prompts made on Flipgrid and Google classroom during the time period from August 30 - present. If material is electronic, I request access via email. If book(s) were given to be used, I request that the book(s) be made available for me to come and review.…."

Your request is granted in part and denied in part. The notifications section of the FOIA, MCL 15.235, requires the District to identify the reason for any partial denial of your request. Your request is granted to the extent that a unit plan document was provided to you in our response dated October 4, 2021. The remainder of your FOIA request is denied. Your request denied in part as the District is not knowingly in the possession of any records responsive to your request for "teacher lesson plans," "readings given to students," "viewings," and "assignments used to evaluate students", or teacher prompts made on Flipgrid and Google classroom during the time period from August 30, 2021 through present. This letter serves as the District's certification that no responsive records are known to exist. Should you disagree with the denial of your request, you have the right to either submit a written appeal to the District's Superintendent clearly stating the word "Appeal," or you may seek judicial review pursuant to Section 10 of the FOIA. If after judicial review a circuit court determines that the denial was not in compliance with the FOIA, you may be entitled to receive attorneys' fees and damages. If you object to the partial denial of your request, before seeking appeal or judicial review, please first notify me of your disagreement so that we may attempt if possible to resolve the issue.

Sincerely,

Elizabeth Davis
FOIA Coordinator

Exhibit C

FOIA Appeal - History of Ethnic and Gender Studies Curriculum

Carol Beth Litkouhi <cblitko@gmail.com> Wed, Jan 19, 2022 at 3:56 PM
To: "Shaner, Robert" <rshaner@rochester.k12.mi.us>
Cc: "Bull, Kristin (BOE)" <kbull@rochester.k12.mi.us>, "Anness, Barbara (BOE)" <banness@rochester.k12.mi.us>, "Beers, Kevin (BOE)" <kbeers@rochester.k12.mi.us>, "Buelte, Michelle (BOE)" <mbueltel@rochester.k12.mi.us>, "Muska, Scott (BOE)" <SMuska@rochester.k12.mi.us>, "Pittel. Joe (BOE)" <JPittel@rochester.k12.mi.us>, "Zabat, Michael (BOE)" <mzabat@rochester.k12.mi.us>

January 19, 2022

Dr. Robert Shaner, Superintendent
501 W. University Drive
Rochester, MI 48307

Dear Dr. Shaner,

I would like to appeal this FOIA response I received from the District on January 12, 2022, regarding my request to access class curriculum for the History of Ethnic and Gender Studies. To date, the Rochester Community Schools District ("District") responded that no responsive documents exist. I have reason to believe that responsive documents do exist, since the class has, upon information and belief, been allowed to run uninterrupted for the last 6 months. Indeed, unless the District, school, or teacher, have not distributed any materials in the class since its inception (which, based on District admissions, I do not believe is the case), the District is in direct violation of its Freedom Of Information Act ("FOIA") obligations. I ask you to reconsider the District's response.

As I have shared with you in a previous letter, I've tried reaching out to multiple district employees to request information informally, politely, respectfully. My requests were rebuffed by District administrators who told me and forced me to use the legal process of FOIA to obtain this information. With great disappointment, even my formal FOIA submissions failed to provide any response other than form letter denials of the existence of records related to my requests - even for material that obviously exists and was distributed in the past according to other communications. The FOIA requests themselves were narrowly tailored, and were reasonable within their scope. Note, the District did not object on the scope or breadth of the requests themselves, but merely stated it was not in possession of such documents. Again, based on statements made by individuals in the District, as well as common sense, I do not believe that to be true.

For example, the document provided to me on October 4, which the FOIA Coordinator called, "Unit Plan", does not appear to reasonably address topics supposedly covered in the course, and it only accounts for the first 2 weeks of school. This document is attached below. The fact that the District was willing to produce this document, without producing a single additional page (either the documents listed in the Unit Plan or any additional documents after it was drafted), additionally demonstrates the District's bad faith denial of my FOIA request.

I appreciate your immediate attention to this matter. While I would prefer not to escalate this issue, if you plan to proceed consistent with your prior responses and deny the requests, I plan to consider all of the legal options for obtaining these documents. I have requested this information for months, and have not

received any substantive response. As I am sure you are aware, the applicable statutes allow me to collect reasonable fees and costs for my efforts to correct the wrongful denial. The District's continued attempts (now for many months) at stonewalling my legal right to obtain these documents is not only depriving the community access to information to which it is entitled, but will soon be costing taxpayer money.

Please also be aware, given the likelihood that this matter proceeds to litigation, you are also put on notice to reserve, not destroy, and not alter any documents that pertain to the History of Ethnic and Gender Studies class. Any effort made by the District, or its employees, to destroy or alter those documents violates the District's legal duties. Should you wish to resolve this matter without court intervention, please let me know if you're available to discuss.

Sincerely,

Carol Beth Litkouhi

935 Homestead Ct.

Rochester Hills, MI 48309

248-701-0312

cblitko@gmail.com

---

3 attachments

FOIA Request_ History of Ethnic and Gender Studies. Aug. 30 - Dec. 14.pdf
32K

12.14.21 FOIA Response CL 1.11.22.pdf
164K

Ethnic&Gender Unit Plan.pdf
129K

Exhibit D

Robert Shaner, Ph.D.
Superintendent

Debi Fragomeni
Deputy Superintendent of Teaching and Learning

ROCHESTER COMMUNITY SCHOOLS
PRIDE IN EXCELLENCE

Dana J. Taylor, CPA, CFF
Deputy Superintendent for Business

Elizabeth A. Davis
Chief Human Resource Officer

501 W. University Drive, Rochester, Michigan 48307. Phone: 248.726.3000. Fax: 248.726.3105.

February 8, 2022

Carol Beth Litkhouhi
Email: cblitko@gmail.com

Re: Freedom of Information Act Request

Dear Ms. Litkhouhi,

Rochester Community Schools (the "District") is in receipt of your appeal of the response you received to a request for records you submitted pursuant to Michigan's Freedom of Information Act (the "FOIA"). You requested the following:

"*…I write to request access to and a copy of all teacher lesson plans, curriculum, readings given to students (such as articles, publications, case studies), viewings (such as video clips), and assignments given to students (such as writing or discussion prompts) used for the "History of Ethnic and Gender Studies" Course at Rochester High School during the time period of August 30 – present. Also, I request access to teacher prompts made on Flipgrid and Google classroom during the time period from August 30 – present. If material is electronic, I request access via email. If book(s) were given to be used, I request that the book(s) be made available for me to come and review….*"

On January 11, 2022, the District's FOIA Coordinator provided you with a response that granted your request in part and denied your request in part. You were provided the responsive materials known by the District to exist at the time. The remainder of your request was denied for the reason that additional responsive materials did not exist. I subsequently received an email from you stating your desire to appeal the response you received from the District's FOIA Coordinator.

I have reviewed the matter, and confirm that the FOIA Coordinator's response was accurate. Therefore, I uphold the FOIA Coordinator's response to you, and your appeal is denied. Please also be advised, that while all District staff strive to be helpful and accommodating to requests, the FOIA Coordinator is obliged to follow the District's FOIA procedures, which are in accord with the law. The FOIA Coordinator is not obliged to engage in additional actions outside the scope of the District's FOIA procedures.

Sincerely,

Robert Shaner, Ph.D.
Superintendent

Exhibit E

Gmail

Carol Beth Litkouhi <cblitko@gmail.com>

FOIA DEI Training Materials

Carol Beth Litkouhi <cblitko@gmail.com> Mon, Dec 27, 2021 at 12:37 PM
To: "Davis, Elizabeth (HR)" <edavis1@rochester.k12.mi.us>

December 27, 2021

Elizabeth Davis
501 W. University Drive
Rochester, MI 48307

Dear Elizabeth Davis,

Pursuant to the state open records law Mich. Comp. Laws Secs. 15.231 to 15.246, I write to request access to all Diversity, Equity, and Inclusion training materials (including materials related to Implicit Bias, Social Justice, Cultural Proficiency, Culturally Responsive Teaching) for the 2020/21, 2021/22, and any newly added materials in the coming school year. If material is electronic, I request access via email.

As provided by the open records law, I will expect your response within five (5) business days. See Mich. Comp. Laws Sec. 15.235(2).

If you choose to deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemption(s) upon which you rely. Also, please provide all segregable portions of otherwise exempt material.

Thank you for your assistance.

Sincerely,

Carol Beth Litkouhi
935 Homestead Ct. Rochester Hills, MI 48309
248-701-0312
cblitko@gmail.com

Exhibit F

Robert Shaner, Ph.D.
Superintendent

Debi Fragomeni
Assistant Superintendent for Instruction

ROCHESTER COMMUNITY SCHOOLS
PRIDE IN EXCELLENCE

Dana J. Taylor, CPA, CFF
Assistant Superintendent for Business

Elizabeth A. Davis
Chief Human Resource Officer

501 W. University Drive, Rochester, Michigan 48307. Phone: 248.726.3000. Fax: 248.726.3105.

January 21, 2022

Carol Beth Litkouhi
Email: cblitko@gmail.com

Re: FOIA Request

Dear Ms. Litkouhi,

This correspondence is issued in response to your December 27, 2021 request for information under the Freedom of Information Act (FOIA), MCL 15.231 et seq, sent via e-mail and received by this office on December 28, 2021. You have requested records that you describe as:

"...request access to all Diversity, Equity, and Inclusion training materials (including materials related to Implicit Bias, Social Justice, Cultural Proficiency, Culturally Responsive Teaching) for the 2020/21, 2021/22, and any newly added materials in the coming school year....."

Your request is granted. Attached is a FOIA Fee Sheet setting forth a good faith estimate of the cost to process your request. Upon receipt of the 50% deposit we will begin to process the request. We estimate that upon receipt of the deposit it will take 10 business days to provide access to the responsive documents.

Sincerely,

Elizabeth Davis
FOIA Coordinator

FOIA FEE ITEMIZATION FORM
Rochester Community Schools

Requestor's Name	Date of Request
C. Litkouhi	12/27/2021

X Estimate Fee or X Actual Fee

Item Description	Hourly Rate[1]	Fringe Benefit %[2]	Overtime Rate[3]	No. of 15-minute increments[4]	Total Charge
Locating/Retrieving Records	Hourly wage $15.42 x	1. .50 +/= $7.71	$ 0 = $0.00	[5]$23.13 / 4 = $ 5.78 x 1 139(increments) = 803.77	$ 803.77
Reviewing Records	Hourly wage $15.42 x	1. .50 +/= $7.71	$ 0 = $0.00	$ 23.13 23.13/ 4 = $ 5.78 x 0 4(increments) =$23.13	$ 23.13
Redacting Records	Hourly wage $.00 x	1. 0 +/= $0.00	$ 0 = $0.00	$ $0.00 / 4 = $ 0.00 x 0 (increments) =	$ 0.00
Copying/Duplicating Records[6]	Hourly wage 0 x	1. +/= $0.00	$ = $0.00	$ $0.00 / 4 = $ 0 x (increments) =	$ 0.00
Contracted Labor Costs–Redaction	[7]Hourly wage x	N/A	N/A	$ / 4 = $ x (increments) =	$ 0.00
Name of contracted person or firm if applicable:				**Subtotal Labor Costs =**	$ 826.90

Copying Cost for Paper Copies[8]

Letter (8½" x 11") paper at $0. each[9]	Legal (8½"x 14") paper at $0. each	Size_____ paper at $0.___each	Size_____ paper at $0._each	Total Charge
No. of Sheets____x $0.___= $ 0	No. of Sheets____x $0.___= $ 0	No. of Sheets____x $0. = $ 0	No. of Sheets____x $0. = $ 0	$ 0

Mailing Cost

Cost of Packaging	Postage Cost	Cost of Delivery Confirmation	Special Shipping Cost	Insurance Cost	Total Charge
$_____	$_____	$_____	$_____	$_____	$ 0

Nonpaper Physical Media			
USB Flash Drives	**Computer Discs**	**Other Digital Media**	**Total Charge**
$ 5.00 x number used 2 = $10.00	$_____ x number used _____ = $ 0	$_____ x number used _____ = $ 0	$ 10.00
Qualified for $20 Reduction? If yes, subtract $20.			($_____)
			TOTAL FEE = $ 836.90
If estimated fee is over $50, the District shall charge a deposit of 50% of the estimated fee.		**Amount of Deposit $418.45**	**Paid? Y/N**
Subtract any good-faith deposit received.			($_____)
Reduction amount due to untimely response by District: 0.5% of fee x_____days late = $0.00 reduction.			($_____)
			TOTAL DUE= $ 418.45

[1] The hourly rate shall not be more than the hourly wage of the lowest-paid staff member capable of performing the labor in the particular instance.

[2] The District will add up to 50 percent to the applicable labor charge amount to cover or partially cover the cost of fringe benefits; 100 percent of fringe benefit costs will be added to the applicable labor charge if a requestor stipulates that requested website records must be provided in a paper format or in a specific form of electronic media. In either case, the District shall not charge more than the actual cost of fringe benefits.

[3] Overtime rates shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor.

[4] In general, labor cost shall be estimated and charged in increments of 15 minutes, with all partial time increments rounded down. (See note 6 for exception.)

[5] Divide the resulting hourly wage(s) by four to determine the charge per 15-minute increment.

[6] Labor costs for copying/duplicating records may be estimated and charged in time increments of the District's choosing, with all partial time increments rounded down.

[7] This amount shall not exceed an amount equal to six times the state minimum hourly wage rate, which is currently $8.15.

[8] The District shall utilize the most economical means available for making copies, including using double-sided printing.

[9] The fee shall not exceed 10 cents per sheet of paper for copies made on 8½" by 14" paper.

Exhibit G

Robert Shaner, Ph.D.
Superintendent

Debi Fragomeni
Assistant Superintendent for Instruction

ROCHESTER COMMUNITY SCHOOLS
PRIDE IN EXCELLENCE

Dana J. Taylor, CPA, CFF
Assistant Superintendent for Business

Elizabeth A. Davis
Chief Human Resource Officer

501 W. University Drive, Rochester, Michigan 48307. Phone: 248.726.3000. Fax: 248.726.3105.

February 11, 2022

Carol Beth Litkouhi
Email: cblitko@gmail.com

Re: FOIA Request

Dear Ms. Litkouhi,

This correspondence is issued in response to your December 27, 2021 request for information under the Freedom of Information Act (FOIA), MCL 15.231 et seq, sent via e-mail and received by this office on December 28, 2021. You have requested records that you describe as:

"...request access to all Diversity, Equity, and Inclusion training materials (including materials related to Implicit Bias, Social Justice, Cultural Proficiency, Culturally Responsive Teaching) for the 2020/21, 2021/22, and any newly added materials in the coming school year....."

Your request has been granted. An updated Final FOIA Fee Form is attached. Upon payment of the balance of the FOIA fee, you will be provided a flash drive with the responsive documents known to exist. Some of the responsive materials are copyright protected. Pursuant to Title 17 of the US Code, copyright holders are granted exclusive rights with respect to their copyrighted works. If, you wish to review these responsive copyrighted works, please contact me to make arrangements to review.

Sincerely,

Elizabeth Davis
FOIA Coordinator

Exhibit H

Gmail

Carol Beth Litkouhi <cblitko@gmail.com>

RCS HS Elective Course

Deluca, Neil <NDeluca@rochester.k12.mi.us> Tue, Aug 31, 2021 at 8:03 AM
To: Carol Beth Litkouhi <cblitko@gmail.com>

Hello Ms. Litkouhi,

I am sorry we missed each other. Please reach out at any time if you would like to speak with me by phone regarding RCS secondary curriculum. I am providing the course description of the course titled, *History of Ethnic and Gender Studies*. Regarding teaching materials, course syllabus, reading list, and assignments, I can connect you with one of our teachers teaching the course.
Please let me know when you are available, and I can set up a time to speak.

Take care,

Neil

HISTORY OF ETHNIC AND GENDER STUDIES - # 07912 20 WEEKS GRADES: 11-12 This course will examine Ethnic and Gender Studies in the United States from the beginning of settlement through the 21st Century. With a focus on the representation of ethnic groups and gender identity in society, history, social media, film, and in text, students will work to identify misconceptions, microaggressions, and both implicit & explicit biases. Students will engage in historical and contemporary (current) perspectives through a variety of active learning strategies and selected reading, culminating in individual research projects.

Neil DeLuca
Executive Director of Secondary Education
Rochester Community Schools
501 W. University
Rochester, MI 48307
248-726-3131

ROCHESTER COMMUNITY SCHOOLS
PRIDE IN EXCELLENCE

From: Carol Beth Litkouhi <cblitko@gmail.com>
Sent: Monday, August 30, 2021 4:47 PM
To: Deluca, Neil <NDeluca@rochester.k12.mi.us>
Subject: RCS HS Elective Course

[Quoted text hidden]

Gmail Carol Beth Litkouhi <cblitko@gmail.com>

RCS HS Elective Course

Carol Beth Litkouhi <cblitko@gmail.com> Tue, Aug 31, 2021 at 3:12 PM
To: "Deluca, Neil" <NDeluca@rochester.k12.mi.us>

Dear Mr. DeLuca,

I called and left you a voicemail, but I thought maybe you are right that it would be a good idea to schedule a time to talk with you. Would you be available sometime in the early afternoon on Thursday? When is a good time for me to call you?

Thank you very much,
Carol Beth

[Quoted text hidden]

Gmail Carol Beth Litkouhi <cblitko@gmail.com>

RCS HS Elective Course

Carol Beth Litkouhi <cblitko@gmail.com> Tue, Sep 7, 2021 at 8:00 AM
To: "Deluca, Neil" <NDeluca@rochester.k12.mi.us>

Dear Neil,

Thank you for our conversation last week. I appreciate that you took the time to talk with me about the "History of Gender and Ethnic Studies" course, and you were so helpful to offer to send me the pacing guide for the course and common resources used between the 3 high schools. I just wanted to follow up with you and ask if you received these materials yet?

I hope you had a wonderful Labor Day weekend!

Thank you very much,
Carol Beth Litkouhi

On Tue, Aug 31, 2021 at 8:06 AM Deluca, Neil <NDeluca@rochester.k12.mi.us> wrote:
[Quoted text hidden]

Gmail Carol Beth Litkouhi <cblitko@gmail.com>

RCS HS Elective Course

Deluca, Neil <NDeluca@rochester.k12.mi.us> Tue, Sep 7, 2021 at 8:07 AM
To: Carol Beth Litkouhi <cblitko@gmail.com>

Hi Carol,

I did not receive a response yet. I will stop in at one of the buildings to obtain a copy. I will get back with you by the end of business today.

Take care,

Neil

[Quoted text hidden]

Gmail

Carol Beth Litkouhi <cblitko@gmail.com>

RCS HS Elective Course

Deluca, Neil <NDeluca@rochester.k12.mi.us> Tue, Sep 7, 2021 at 5:04 PM
To: Carol Beth Litkouhi <cblitko@gmail.com>

Good afternoon Carol!

Sorry for getting back with you so late. Attached is an outline of topics that our teachers will be covering in this course.

Take care, and please reach out with any questions.

Neil

Neil DeLuca
Executive Director of Secondary Education
Rochester Community Schools
501 W University
Rochester, MI 48307
248-726-31[illegible]

ROCHESTER COMMUNITY SCHOOLS
PRIDE IN EXCELLENCE

From: Carol Beth Litkouhi <cblitko@gmail.com>
Sent: Tuesday, September 7, 2021 8:00 AM

[Quoted text hidden]

[Quoted text hidden]

E&G Syllabus.docx
18K

The History of Ethnic and Gender Studies: 2021-2022 Course Syllabus

Course Description

This ***elective*** course will examine the history of Ethnic and Gender Studies in the United States from the beginning of settlement through the 21st Century. With a focus on the representation of ethnic groups and gender identity in society, history, social media, film, and in text, students will work to identify misconceptions, microaggressions, and both implicit & explicit biases. Students will engage in historical and contemporary (current) perspectives through a variety of active learning strategies and selected reading, culminating in individual research projects. An attempt will be made to identify myths and empower individuals to overcome and uncover societal stereotypes. Students will engage in various historical and contemporary (current) perspectives. This elective course is **NOT** designed to promote beliefs or values, persuade students to change their opinions or belief system, or encourage students to take on certain viewpoints or perspectives.

Code of Conduct and Classroom Expectations

There will be strict adherence to Rochester Community Schools attendance, dress policies, and "**Respect Code**." It is the student's responsibility to be familiar with the policies and ensure that they are followed. Students will be investigating and discussing topics that may result in differences of opinions or experiences; RESPECT is a simple but important expectation. Respect for each other, the classroom, various opinions, and ideas, and most importantly me.

Cell phones are only allowed during **approved**, appropriate learning moments in class. We will be adhering to all RCS Digital Citizenship Requirements and it is the student/parent responsibility to be aware of proper conduct.

The three Ps will be stressed in class daily: Promptness, Participation, and Preparation. You need to be prompt, engaged by participating, and mentally and physically prepared daily to be a valuable member in this class.

Course Overview

During this semester, elective course, we will be using selected *case studies* to guide our understanding of the History of Ethnic and Gender Studies. Each unit will consist of defining terms, selected readings and viewings, introduction of historical figures, discussion and reflection. Students will also be required to complete an individual research project by the end of the term with time given each Wednesday to compile evidence.

Unit 1: Historical Thinking Skills

- Identifying bias
- Sourcing
- Close Reading
- Claim and Reasoning
- Introduction to what is Ethnic and Gender Studies and Why it Emerged

Unit 2: Identity

- Representation
- Social Construction
- Gender
- Ethnicity and Race
- BIPOC

Unit 3: Amplifying the Voices of Marginalized Groups

- Black/African Americans
- American Indians/Native Americans/Indigenous Peoples
- Hispanic and Latino/Latinx Americans
- Asian American and Pacific Islander Americans
- Arab Americans

Unit 4: Individual Research Project

- Weekly Wednesday investigations
- Self-selected with guided, standards based rubric
- Presentation for final exam grade (20%)

Exhibit I

Robert Shaner, Ph.D.
Superintendent

Debi Fragomeni
Assistant Superintendent for Instruction

ROCHESTER COMMUNITY SCHOOLS
PRIDE IN EXCELLENCE

Dana J. Taylor, CPA, CFF
Assistant Superintendent for Business

Elizabeth A. Davis
Chief Human Resource Officer

501 W. University Drive, Rochester, Michigan 48307. Phone: 248.726.3000. Fax: 248.726.3105.

October 4, 2021

Carol Beth Litkouhi
Email: cblitko@gmail.com

Re: FOIA Request

Dear Ms. Litkouhi,

Rochester Community Schools (the "District") is in receipt of your request for records pursuant to Michigan's Freedom of Information Act (the "FOIA"). Your request was received by the District on September 13, 2021, and because the District issued a notice of extension to respond, its response is due on October 4, 2021. You requested the following:

> *all teacher training materials and references (written and video) for the "History of Ethnic and Gender Studies" course, given between August 1-September 10, 2021. If material is electronic, I request access via email. If book(s) were given to be used, I request that the book(s) be made available for me to come and review.*
>
> *Also, I request access to and a copy of all teacher lesson plans, readings given to students (articles, publications, case studies), viewings (video clips), and assignments used to evaluate students (writing prompts) used for the "History of Ethnic and Gender Studies" Course at Rochester High School, Adams High School, and Stoney Creek High School during the time period from August 30-September 10, 2021. If material is electronic, I request access via email. If book(s) were given to be used, I request that the book(s) be made available for me to come and review.*

Your request is granted in part and denied in part. The notifications section of the FOIA, MCL 15.235, requires the District to identify the reason for any partial denial of your request. Your request is denied to the extent that the District is not knowingly in the possession of any records responsive to your request for "teacher lesson plans," "readings given to students," "viewings," and "assignments used to evaluate students" during the time period from August 30, 2021 through September 10, 2021. This letter serves as the District's certification that no responsive records are known to exist. The remainder of your request, for "teacher training materials and references (written and video) for the "History of Ethnic and Gender Studies" course, given between August 1-Spetember 10, 2021" is granted. The responsive records known by the District to exist at this time have previously been provided to you, and are attached to this letter as well. Should you disagree with the partial denial of your request, you have the right to either submit a written appeal to the District's Superintendent clearly stating the word "Appeal,"

or you may seek judicial review pursuant to Section 10 of the OFIA. If after judicial review a circuit court determines that the partial denial was not in compliance with the FOIA, you may be entitled to receive attorneys' fees and damages. If you object to the partial denial of your request, before seeking appeal or judicial review, please first notify me of your disagreement so that we may attempt if possible to resolve the issue.

Sincerely,

Elizabeth Davis
Chief Human Resource
Officer FOIA Coordinator

Week 1:

- Introduction of teacher
- Sticky note activity: What makes you who you are
    - Students should write something they are proud of or they view as making them who they are
- Video: We don't eat our classmates
    - Purpose to understand we need to allow others to speak
    - Purpose to identify we have different experiences in life
- **Class community building activities (daily)**
    - Self-Introduction Flip Grid
        - Pronounce name, explain your goals for the year, why you took the course, and any other information you wish to share (not required)
    - Longest paper chain competition
        - Working together, communication
    - Marshmallow tower challenge
        - Working together, problem solving
    - Cornhole competition
    - Rock, paper, scissors ultimate survivor
- Introduce yourself to a new student each day
    - Answer daily question about yourself (project on board) and film a Flip grid
        - Get to know everyone

Week 2:

- Continue class community building
    - Continue daily meet a classmate Flip grid
    - Breakout room team building
        - Working together, communication
- Grant writing exercise
    - Review the RCS website for goals, mission statement, community
    - Review RCS Foundation website
    - Prepare a proposal for field trip to museum
        - Bussing costs/concerns
- Classroom protocols activity
    - Create classroom norms
    - Discuss how to discuss (refer to video from first week)
    - Class creation of norms and expectations
- 9/11 observance
    - Watch first responders report and review events of the day
    - Review PBS interview with Americans and their responses
    - Review department of justice website and 911 memorial website for further information
    - Compare and contrast different accounts via Cyber Sandwich activity

Appendix A

1979-1980 Mich. Op. Atty Gen. 255 (Mich.A.G.), 1979 WL 36558

Office of the Attorney General

State of Michigan
Opinion No. 5500
July 23, 1979

FREEDOM OF INFORMATION ACT:
1976 PA 442, MCLA 15.231 *et seq;* MSA 4.1801(1) *et seq*

The Freedom of Information Act, 1976 PA 442; MCLA 15.231 *et seq;* MSA 4.1801(1) *et seq*, hereinafter referred to as 'the Act', took effect April 13, 1977. Basically, the Act provides that members of the public have a right to inspect and copy certain records of governmental agencies. The purpose of the Act, as stated in section 1(2), is:
'It is the public policy of this state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with the act. The people shall be informed so that they may fully participate in the democratic process.'

As the Act requires some explanation and clarification, I have prepared this document which is divided into two parts. The first part contains a summary of the provisions of the Act and the second part contains my response to questions from public officials asking for interpretation of the Act.

I. *SUMMARY OF THE ACT*

A. *PUBLIC BODIES: DEFINITION*

The Act applies only to public bodies and, as used in the Act, a public body means '[a] state officer, employee, agency, department, division, bureau, board, commission, council or other body in the executive branch of the state government', '[a]n agency, board, commission or council in the legislative branch of state government', '[a] county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation or a board, department, commission, council, or agency thereof', or '[a]ny other body which is created by state or local authority or which is primarily funded by or through state or local authority'. Section 2(b). Excluded from the definition of a 'public body' and the following: the governor and his staff of employees, the lieutenant governor and his staff of employees, the judiciary, and the office of county clerk and employees of that office when acting as clerk to the circuit court.

B. *PUBLIC RECORDS: DEFINITION*

As used in the Act, a public record is 'a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.' Section 2(c). A writing is any form of handwritten, printed, photographic, or electronic transcription. Unless exempt under section 13 of the Act, a public record is subject to disclosure. Section 2(c).

C. *RIGHT TO ACCESS*

Upon a written or oral request sufficient for a public body to locate a public record, a person has the right to inspect, copy, or receive copies of a public record of a public body unless there exists an exemption under section 13. Section 3(1).

In *Application of Ghiran*, 442 F2d 983, 986 (Customs Court of Patent Appeals, 1971), the court also described software as a set of instructions for carrying out prearranged operations on data by use of hardware and the hardware cannot perform operations on the data without the aid of the instructions. Thus, computer software is an integral part of the computer machine.

The logic of a computer program is first written on a code sheet. These code sheets are then converted to computer language and are transcribed by machine onto printouts which are stored in notebooks. Computer programs may also be stored on paper cards in the form of decks and on reels of magnetic tape. Thus, the notebooks, the paper cards, and the magnetic tape which contain instructions to the computer are therefore different forms of the same item, namely software

With this description of computer operations in mind, it may be seen that, although the forms on which the software is recorded appear to meet the definition of a 'writing' as defined by section 2(e) of the Act, a distinction must be made between writing used to record information or ideas and an instructional form which is but an integral part of computer operation.

The purpose of the Act is to inform the people 'so that they may fully participate in the democratic process.' Section 1(2); therefore, the use of instructions developed as computer software is not to be equated with a public record any more than the ribbon of a typewriter.

It is my opinion, therefore, that computer software developed by and in the possession of a public body is not a public record.

9.

(a) May a state university refuse to disclose the report of an outside organization or the report of an internal committee of an investigation of that university's athletic department?

(b) If a public university may not withhold these documents from public disclosure, must it also release copies of the actual work papers or items of evidence that may have led to or be contained within those specific reports or findings?

***11** (a) The definition of 'public record' in section 2(c) applies only to writings in the possession of or retained by a public body in the performance of an official function. Therefore, although a state university must release a report of the performance of its official functions in its files, regardless of who prepared it, if a report prepared by an outside private agency is retained only by the private agency, it is not public record and therefore is not subject to public disclosure. See *Soucie* v *David*, 448 F2d 1067 (CA DC, 1971), and *CIBA-Geigy* v *Mathews*, 428 F Supp 523 (SD NY, 1977).

Also, if a report made by a private agency in the possession of the university contains exempt information, such information may be separated from the nonexempt material and deleted. Section 14.

(b) In response to part (b) of this question, a state university may not withhold nonexempt material from disclosure, whether they are financial reports or items of evidence contained in specific reports. If, however, the investigative data have been retained by a private organization, this material is not subject to disclosure.

It must also be noted that portions of investigative reports may be exempt from disclosure pursuant to various subsections of section 13(1), such as subsections 13(1)(a), 13(1)(b), 13(1)(m) and 13(1)(n).

10.

Are copyrighted materials subject to copying under the Act?

Section 3(1) provides that a person has a right to receive copies of a public record of a public body. However, the Constitution of the United States provides:

'The Congress shall have Power . . . To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.' US Const, art 1, § 8

Pursuant to that constitutional mandate, Congress has enacted 90 Stat 2546 (1976); 17 USC 106 and 109, which state:
'§ 106 . . . the owner of a copyright . . . has the exclusive rights to do and to authorize any of the following:

****

'(3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; . . ..'

'§ 109. (a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, of any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.'

Copyright laws may not be encroached upon by the state. As stated in *Roebuck & Co* v *Stiffel Co*, 376 US 225, 228–229; 84 S Ct 784; 11 L Ed 2d 661 (1964):
'Pursuant to this constitutional authority, Congress in 1790 enacted the first federal patent and copyright law, 1 Stat 109, and ever since that time has fixed the conditions upon which patents and copyrights shall be granted . . . These laws, like other laws of the United States enacted pursuant to constitutional authority, are the supreme law of the land.'

***12** It is my opinion, therefore, that copyrighted materials may not be copied and distributed in violation of the Copyright Act.

11.

Does the Act exempt a non-copyrighted report in the possession of a body if it is available at a price from the author publisher?

Section 3(1) provides that a person has a right to receive copies of a public record of a public body. Thus, a research report written by a private person that is in the possession of a public body in the performance of an official function, is a public record as defined by section 2(c). Therefore, unless exempt under section 13(1), if it has not been copyrighted, it must be disclosed even if available at a price from the author or publisher.

12.

Does the Act exempt from copying copyrighted manuals of rules and rates received under section 2406 of the Insurance Code?

Under Section 2406 of the Insurance Code, 1956 PA 218, as amended by 1970 PA 180; MCLA 500.2406; MSA 24.12406, manuals of rules and rates are required to be filed. This section states:
'Every insurer shall file with the commissioner every manual of classification, every manual of rules and rates, every rating plan and every modification of any of the foregoing which it proposes to use.'

As noted in the response to Question 10, if material is copyrighted, a public body may not authorize the copying of material without the permission of the copyright holder.

Appendix B

1997-1998 Mich. Op. Atty Gen. 93 (Mich.A.G.), 1998 Mich. OAG No. 6965, 1998 WL 15038

Office of the Attorney General

State of Michigan
Opinion No. 6965
January 16, 1998

FREEDOM OF INFORMATION ACT:

***1** Copyrighted Insurance Bureau filings subject to disclosure

INSURANCE:

Copyrighted Insurance Bureau filings subject to disclosure

The state Insurance Bureau, in response to a request made under the Freedom of Information Act, 1976 PA 442, must provide copies of copyrighted manuals of rules and rates which are in its possession and are required by law to be filed by insurers with the bureau, without first obtaining the permission of the copyright holder.

Honorable Christopher D. Dingell
State Senator
The Capitol
Lansing, Michigan 48909

D. A. D'Annunzio
Acting Commissioner
Insurance Bureau
P.O. Box 30220
Lansing, MI 48909

You have asked whether the state Insurance Bureau, in response to a request under the Freedom of Information Act, 1976 PA 442, must provide copies of copyrighted insurance manuals of rules and rates which are in its possession and are required by law to be filed by insurers with the bureau, without first obtaining the permission of the copyright holder.

The purpose of the Freedom of Information Act, 1976 PA 442, MCL 15.231 *et seq*; MSA 4.1801(1) *et seq* (FOIA), is recited in section 1(2) of that Act as follows:

It is the public policy of this state that all persons, except those incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

The FOIA was enacted to afford to citizens full and complete information about the activities of state government, its officers and employees. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 231; 507 NW2d 422 (1993).

Under the FOIA, a person has the right, on request, to inspect, copy, or receive copies of public records of a public body. Section 3(1). The term “public record” means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, which is not exempted from disclosure under section 13. Section 2(e). The Legislature,

through the FOIA, has commanded "full disclosure" of public records, *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 543; 475 NW2d 304 (1991), unless it has exempted the record from disclosure and statutory exemptions are to be "interpreted narrowly." *Evening News Ass'n v Troy*, 417 Mich 481, 503; 339 NW2d 421 (1983).

The Insurance Code of 1956, 1956 PA 218, MCL 500.100 *et seq*; MSA 24.1100 *et seq*, regulates the insurance business in this state. Section 2406 of the Code, which requires Michigan insurers to file rule and rate manuals with the Insurance Bureau, provides as follows:

(1) Except for worker's compensation insurance, every insurer *shall file with the commissioner every manual of classification, every manual of rules and rates, every rating plan, and every modification of any of the foregoing that it proposes to use*. Every such filing shall state the proposed effective date thereof and shall indicate the character and extent of the coverage contemplated.... *A filing and any supporting information shall be open to public inspection* after the filing becomes effective.

* * *

***2** (3) For worker's compensation insurance in this state the insurer shall file with the commissioner all rates and rating systems.

(emphasis added).

The FOIA creates twenty-five categories of public records which are expressly exempted from disclosure. Section 13. However, the FOIA provides no specific exemption for copyrighted rule and rate manuals filed with the Insurance Bureau. Research discloses no reported Michigan case involving disclosure, under the FOIA, of rule and rate manuals filed with the Insurance Bureau. However, documents filed by a health insurer with the Insurance Bureau in support of a contested rate adjustment petition are subject to disclosure under the FOIA and are not exempted as trade secrets, particularly since the price information contained in the records is readily ascertainable directly from vendors. *Blue Cross and Blue Shield of Michigan v Ins Bureau*, 104 Mich App 113, 131; 304 NW2d 499 (1981), *lv den* 412 Mich 932 (1982). Manuals of rules and rates filed by insurers with the Insurance Bureau pursuant to the Insurance Code are not exempt from disclosure under the FOIA.

It is possible that some manuals of insurance rules and rates required by law to be filed by insurers with the Insurance Bureau constitute copyrighted works. Pursuant to US Const, art 1, § 8, Congress enacted the federal copyright act, 90 Stat. 2541 (1976); 17 USC 101 *et seq*. Section 106 of the copyright act limits the copying of copyrighted material as follows:

[T]he owner of a copyright ... has the exclusive rights to do and to authorize any of the following:

* * *

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.

The question, therefore, remains whether manuals of rules and rates required by law to be filed by insurers with the Insurance Bureau, if copyrighted, are subject to disclosure pursuant to the FOIA.

Shortly after the enactment of the FOIA, this office rendered an omnibus opinion responding to inquiries concerning the FOIA. OAG, 1979-1980, No 5500, p 255 (July 23, 1979). That opinion, *inter alia*, addressed whether the FOIA exempts copyrighted materials filed by insurers pursuant to the Insurance Code of 1956, and concluded at p 267 as follows:

It is my opinion, therefore, that copyrighted materials may not be copied and distributed in violation of the Copyright Act.

* * *

It is, therefore, my opinion that the Commissioner should refuse to accept and treat as non-compliance with section 2406 an offer of a manual of classification of a copyrighted manual of rules and rates unless the copyright owner agrees to waive the copyright.

The Michigan Legislature, in enacting the FOIA, did so in relation to the federal FOIA legislative history. *Evening News Ass'n v Troy, supra*, 417 Mich at 494. In that case, the court noted that the exemptions created in the Michigan FOIA generally mirror the exemptions found in the federal FOIA. *Id.* at 495. See also, *Kestenbaum v MSU*, 414 Mich 510, 525; 327 NW2d 783 (1982), which held as follows:

***3** The similarity between the FOIA and the federal act invites analogy when deciphering the various sections and attendant judicial interpretations.

Federal cases interpreting the analogous federal FOIA are highly persuasive in construing the Michigan FOIA. *Capitol Information Assoc v Ann Arbor Police*, 138 Mich App 655, 658; 360 NW2d 262 (1984).

OAG, 1979-1980, No 5500, *supra*, was issued before the U.S. Court of Appeals, D.C. Circuit, in *Weisberg v United States*, 203 US App DC 242; 631 F2d 824 (1980), decided the issue of whether copyrighted materials are exempt from disclosure under the federal FOIA. In *Weisberg*, the plaintiff brought a federal FOIA action to compel disclosure of photographs in the government's possession that were taken at the scene of Dr. Martin Luther King, Jr's. assassination. Some of the requested file photos were taken and copyrighted by Life Magazine. *Id.* at 825. The government argued that, based upon federal FOIA exemptions 3[1] and 4[2], copyrighted materials should never be subject to mandatory disclosure. *Id.* at 828. The court, however, rejected the government's argument and held as follows:

We hold that mere existence of copyright, by itself, does not automatically render FOIA inapplicable to materials that are clearly agency records.

Id. at 825.

The court recognized that under the government's interpretation of the federal FOIA, an agency would be permitted to mask its processes or functions from public scrutiny by merely asserting a third party's copyright. *Id.* at 828.

Manuals of insurance rules and rates required by law to be filed with the Insurance Bureau are public records of that state agency. Under the Insurance Code of 1956, these mandated filings are, by statute, expressly made open for public inspection. Section 2406(1). Under the *Weisberg* decision, *supra*, a government agency's public records, even if copyrighted, are subject to disclosure under the federal FOIA. A similar result should prevail under the Michigan FOIA.

It is my opinion, therefore, that the state Insurance Bureau, in response to a request made under the Freedom of Information Act, 1976 PA 442, must provide copies of copyrighted manuals of rules and rates which are in its possession and are required by law to be filed by insurers with the bureau, without first obtaining the permission of the copyright holder. To the extent that this conclusion is inconsistent with OAG, 1979-1980, No 5500, p 255 (July 23, 1979), that opinion is superseded.

Frank J. Kelley
Attorney General

Footnotes

1 5 USC 552(b)(3) (disclosure mandate not applicable to matter "specifically exempted from disclosure by statute").

2 5 USC 552(b)(4) (disclosure mandate not applicable to "commercial ... information obtained from a person and privileged or confidential").

1997-1998 Mich. Op. Atty Gen. 93 (Mich.A.G.), 1998 Mich. OAG No. 6965, 1998 WL 15038

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Appendix C

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Gilmore v. U.S. Dept. of Energy, N.D.Cal., March 13, 1998

631 F.2d 824
United States Court of Appeals,
District of Columbia Circuit.

Harold WEISBERG
v.
U. S. DEPARTMENT
OF JUSTICE, Appellant.

No. 78-1641.
|
Argued June 6, 1979.
|
Decided June 5, 1980.

Synopsis
Freedom of information action was brought to obtain copies of copyrighted photographs in possession of the FBI. The United States District Court for the District of Columbia, June L. Green, J., entered judgment in favor of party making their request and government appealed. The Court of Appeals, Bazelon, Senior Circuit Judge, held that: (1) mere existence of copyright, by itself, did not automatically render FOIA inapplicable to materials which were clearly agency records, but (2) absence of the asserted copyright owners from the action may have subjected the government to substantial risk of incurring inconsistent obligations, so that remand for further proceedings as required by Rule 19 was required.

Order accordingly.

West Headnotes (5)

[1] **Copyrights and Intellectual Property** Necessity of Registration

Although notice was required upon publication for protection under the 1909 Copyright Act, registration was not required under the 1909 Act nor the new act. 17 U.S.C.A.App. § 408(a); 17 U.S.C.A. § 10.

4 Cases that cite this headnote

[2] **Records** Nature and definition of 'record' or other material subject to requirements

Generally, materials obtained from private parties in the possession of a federal agency may be agency "records" within meaning of the Freedom of Information Act. 5 U.S.C.A. § 552(a)(3).

7 Cases that cite this headnote

[3] **Copyrights and Intellectual Property** Persons Entitled to Assert Rights; Ownership

Copyright holders are under no obligation to grant access to their work, even if they have previously made copies available to the government or to other parties. 17 U.S.C.A.App. §§ 102, 401(a).

1 Cases that cite this headnote

[4] **Records** Investigatory and Law Enforcement Matters

Photographs obtained by the FBI from the purported copyright holder in the course of its investigation into a political assassination were "agency records" for purposes of the Freedom of Information Act. 5 U.S.C.A. § 552(a)(3).

14 Cases that cite this headnote

[5] **Records** Parties

Alleged holder of copyright on photographs which were sought under the Freedom of Information Act should have been added to Freedom of Information Act action because the government was subjected to a substantial risk of incurring inconsistent obligation with respect to the Freedom of Information Act action and a possible subsequent copyright infringement action by the copyright holder. Fed.Rules Civ.Proc. Rule 19(a), 28 U.S.C.A.; 5 U.S.C.A. § 552.

10 Cases that cite this headnote

***825** ****243** Appeal from the United States District Court for the District of Columbia (D.C. Civil No. 75-1996).

Attorneys and Law Firms

Michael Kimmel, Atty., Dept. of Justice, Washington, D. C., with whom Barbara Allen Babcock, Asst. Atty. Gen., Dept. of Justice, Earl J. Silbert, U. S. Atty. and Leonard Schaitman, Atty., Dept. of Justice, Washington, D. C., were on brief, for appellant.

James H. Lesar, Washington, D. C., for appellee.

Before BAZELON, Senior Circuit Judge, TAMM, Circuit Judge and PARKER*, United States District Court Judge for the District of Columbia.

Opinion

Opinion for the Court filed by Senior Circuit Judge BAZELON.

BAZELON, Senior Circuit Judge:

In this case a novel question is presented: whether administrative materials copyrighted by private parties are subject to the disclosure provisions of the Freedom of Information Act (FOIA).[1] We hold that the mere existence of copyright, by itself, does not automatically render FOIA inapplicable to materials that are clearly agency records. However, because we find that the absence of the asserted copyright owner as a party to this action may subject the Government "to a substantial risk of incurring . . . inconsistent obligations,"[2] we remand for further proceedings as required by Rule 19 of the Federal Rules of Civil Procedure.[3]

I. BACKGROUND

Appellee Harold Weisberg brought this FOIA action to compel disclosure of all photographs in the Government's possession that were taken at the scene of the assassination of Dr. Martin Luther King, Jr. Included in the FBI's possession are 107 photographs taken by Joseph Louw, then employed by Life Magazine.[4] Louw sold the photographs to TIME, Inc., the parent company of Life Magazine,[5] and TIME submitted copies of the photos to the FBI for use in the assassination investigation.

When the FBI advised TIME of Weisberg's FOIA request, TIME stated that it had no objection to having the photographs viewed, but that it would object if they were copied because such reproduction would violate its alleged copyright on the photos.[6] The FBI notified Weisberg accordingly, and advised him that he must obtain any copies of the photos directly from TIME since it owned the photos and had not granted the Bureau authority to ***826** ****244** release copies. The FBI further claimed that FOIA Exemptions 3[7] and 4[8] applied to the photographs.

Thereafter, Weisberg learned from TIME that copies of the photos, without reproduction rights, would cost $10.00 per print. The cost for reproduction by the government under a FOIA request, according to Weisberg, would have been as little as forty cents per copy.[9] Motivated in part by this price differential, and in part by a belief that TIME was intentionally placing obstacles in his path,[10] Weisberg then pressed this FOIA claim to obtain copies of the photos from the FBI.

[1] On cross-motions, the district court entered summary judgment for Weisberg and ordered the FBI to provide him with "prints" of the requested photos.[11] The court first held that the photos were "agency records" subject to disclosure under FOIA.[12] It then decided that neither of the FOIA exemptions asserted by the Government applied to the photos. The court concluded that the Copyright Act[13] is not a statute exempting disclosure for the purposes of Exemption 3,[14] and that even if it were, only three of the 107 requested photos "have been registered for statutory copyright protection."[15] The district court ***827** ****245** further stated that even if all the photos were protected by statutory copyright, they would be subject to disclosure under the "fair use" doctrine because Weisberg intended to use them solely for scholarly purposes.[16] The court also determined the photos were not "confidential" or "privileged" by virtue of a copyright, and thus held the fourth exemption for commercial information inapplicable.[17] Although the parties and TIME were aware of TIME's interest in this litigation, they did not make any effort to bring TIME before the district court.

II. COPYRIGHTED MATERIALS AS "AGENCY RECORDS"

The district court correctly recognized that the threshold issue in this case is whether the requested photographs are identifiable "agency records" subject to the disclosure provisions of FOIA.[18] The Government contends that because of TIME's copyright they are not,[19] and therefore urges dismissal.

[2] The Government concedes, as it must, that generally materials obtained from private parties and in the possession of a federal agency may be agency "records" within the meaning of FOIA.[20] The Government argues, however, that if such materials are copyrighted by a private party[21] they should never be considered agency records because they constitute a "valuable work product."[22] For this sweeping proposition, we are directed to a Ninth Circuit case, SDC Development Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976).

The plaintiff in SDC sought through FOIA to obtain copies of tapes containing computerized medical reference data compiled by the National Library of Medicine (Library). The statute establishing the Library[23] authorized it to charge the public for using such services and materials.[24] The established charge for the requested copies was $50,000. In an attempt to avoid this expense, the plaintiff submitted a FOIA request, tendering a $500 check to cover the direct cost of search and duplication.[25] ***828** ****246** The Ninth Circuit, affirming a grant of summary judgment for the Government, held FOIA unavailable in these circumstances because the tapes were not "agency records." See 542 F.2d at 1119-21. In seeking to reconcile FOIA with the National Library of Medicine Act, the court focused on the type of material at issue:

> There is, then, a qualitative difference between the types of records Congress sought to make available to the public by passing the Freedom of Information Act and the library reference system sought to be obtained here. The library material does not directly reflect the structure, operation, or decision-making functions of the agency, and where, as here, the materials are readily disseminated to the public by the agency, the danger of agency secrecy which Congress sought to alleviate is not a consideration.
>
> Id. at 1120.

[3] **[4]** The present case is readily distinguishable. Here the requested materials plainly "reflect the . . . operation, or decision-making functions of the agency,"[26] because they will permit evaluation of the FBI's performance in investigating the King assassination. Further, absent a FOIA request, there is no guarantee that the photos would be disclosed.[27] Indeed, interpreting FOIA as the Government urges would allow an agency "to mask its processes or functions from public scrutiny"[28] simply by asserting a third party's copyright.[29] This sharply contrasts with SDC where dissemination of the medical reference data was assured by separate congressional mandate. Because FOIA was designed to provide public access to materials such as the photos requested here,[30] we agree with the district court that the photos are "agency records" within the meaning of FOIA.

III. PARTICIPATION BY THE ALLEGED COPYRIGHT HOLDER

[5] Deciding that copyrighted materials are subject to FOIA, however, does not resolve whether any particular FOIA request should be granted, and if so, under what terms. The Government argues that copyrighted materials should never be subject to mandatory disclosure because of the effect of FOIA Exemptions 3 and 4. Even if neither exemption is applicable to copyrighted materials, the Government contends further that it can fulfill its responsibility under FOIA simply by making copyrighted materials available for inspection, rather than providing copies on request.[31] In opposition, ***829** ****247** appellee Weisberg argues, and the district court agreed, that FOIA requires the Government to furnish members of the public with copies of copyrighted materials on the same terms as any other "agency records."[32]

We intimate no view with respect to these contentions concerning the proper relationship between FOIA and the copyright laws. We conclude instead that the district court should have sought the presence of the alleged copyright holder under Rule 19 before deciding this case. Because TIME was not a party, the district court has subjected the Government "to a substantial risk of incurring . . . inconsistent obligations." Fed.R.Civ.P. 19(a).[33]

The district court's rulings vitally affect the value of TIME's alleged copyright.[34] If TIME were to bring its own action challenging the Government's right to duplicate the photos,[35] the district court's determination would not necessarily serve as a bar. Non-parties generally can be bound by prior judgments only where they have been fairly represented by one of the parties in the earlier litigation.[36] And an agency's interest in FOIA suits is likely to diverge from those of private parties.[37] Indeed, the Government concedes in this case that it had no incentive to protect TIME's interests on at least one of the key copyright issues decided by the district court.[38] The possibility therefore remains that a separate action ***830 **248** by TIME would be allowed to proceed, raising the prospect of conflicting legal obligations for the Government with respect to the disposition of TIME's photos.[39]

We recognize that neither the parties nor TIME chose to invoke the procedures available to include TIME in the litigation. But under the Federal Rules, the district court has an independent responsibility to assure the just and final resolution of civil disputes.[40] Had TIME participated in the proceedings below whether by intervention,[41] joinder as a party,[42] or interpleader[43] the rights and liabilities of all interested persons would have been finally and consistently determined in one forum. As matters now stand, we are faced with the needless potential for duplicative litigation.

***831 **249** IV. CONCLUSION

For the foregoing reasons, we affirm the district court's determination that copyrighted materials may constitute agency records under FOIA, and vacate the remainder of the district court's judgment. The case is remanded for the district court to seek joinder of TIME, which claims copyright protection, under Federal Rule of Civil Procedure 19(a). If joinder should prove infeasible, the district court must make the necessary determinations under Rule 19(b) to decide upon the future course of this litigation.[44] Consistent with our decision and disposition, we intimate no view with respect to the other issues presented on appeal.

It is so ordered.

All Citations

631 F.2d 824, 203 U.S.App.D.C. 242, 29 Fed.R.Serv.2d 1010, 207 U.S.P.Q. 1080, 1978-81 Copr.L.Dec. P 25,169, 6 Media L. Rep. 1401

Footnotes

* Sitting by designation pursuant to 28 U.S.C. s 292(a).

1 5 U.S.C. s 552 (1976).

2 Fed.R.Civ.Pro. 19(a).

3 Fed.R.Civ.P. 19 (joinder of persons needed for just adjudication). See notes 33 & 44 infra ; Fed.R.Civ.P. 21 (court may order addition of parties sua sponte).

4 Appellee contends on appeal that Mr. Louw was actually “on assignment” to Public Television when he took the photographs, using this as a ground for disputing TIME's claim of copyright ownership. Appellee's Br. at 31. Nothing in the record, however, contradicts the basic fact of an employment relationship between TIME and Louw when the photographs were taken.

5 The precise nature of the agreement between TIME and Louw is unclear. Apparently TIME holds the copyright in trust for Louw, who reserved all book publication rights to the photographs. Appellants' Br. at 4.

6 Defendant's Exhibit No. 1, Joint Appendix at 50-51 (Letter of Sept. 13, 1977, from TIME, Inc. to Charles Matthews, FBI).

7 5 U.S.C. s 552(b)(3) (disclosure mandate not applicable to matter “specifically exempted from disclosure by statute”).

8 5 U.S.C. s 552(b)(4) (disclosure mandate not applicable to “commercial . . . information obtained from a person and privileged or confidential”).

9 Appellee's Br. at 15. This was the fee charged by the FBI to reproduce various government photographs of the King assassination site. Appellant's Br. at 5 n.5.

10 Weisberg asserts that TIME's behavior during his attempts to obtain the photos directly from TIME demonstrated that TIME “would spare no effort to make obtaining the Louw pictures as expensive and time-consuming as possible.” Appellee's Br. at 13.

11 Weisberg v. U. S. Dep't of Justice, Civ. Action No. 75-1996 (D.D.C. Feb. 9, 1978) (District Court Opinion).

12 District Court Opinion at 3-4. The district court cited three reasons for its conclusion: (1) the photographs relate to a "controversial matter ( ) of public concern," id. at 3; (2) Exemption 4 pertaining to commercial information "obtained from a person," 5 U.S.C. s 552(b)(4), shows that "Congress must have understood that the term 'record' would encompass material submitted to the agency by outsiders," id. at 4; and (3) agencies retain discretion to release materials even if they are found to quality for an exemption. Id. at 4.

13 17 U.S.C. ss 101-810 (1976).

14 District Court Opinion at 3-5. An Exemption 3 statute must either "(A) require( ) that the matters (specifically exempted from disclosure) be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish( ) particular criteria for withholding or refer ( ) to particular types of matters to be withheld." 5 U.S.C. s 552(b)(3). The district court held that the Copyright Act does not satisfy either of these requirements because it "has traditionally been subject to the equitable doctrine of 'fair use' and in 1976 the Law was amended to formally incorporate the doctrine." District Court Opinion at 5.

In ruling on the Exemption 3 issue, the court also made the following observation:

> In addition, the Court notes that even if it had found the Freedom of Information Act's (b)(3) exemption to have been applicable, it would have exercised its discretion to make the photos available, given the substantial controversy surrounding both the assassination of Dr. King and the thoroughness of the government's investigation of the matter.

Id. at 6. The court did not cite any authority for the proposition that it retained discretion to order disclosure of the photos even if they came within a FOIA exemption. Although the Supreme Court in Chrysler Corp. v. Brown, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208, 1712-13 (1979), affirmed some agency discretion, the Court has not addressed whether reviewing courts may order disclosure of exempted materials. See GTE Sylvania, Inc. v. Consumers Union of the United States, Inc. ("GTE"), 445 U.S. 375, 100 S.Ct. 1194, 63 L.Ed.2d 467 (1980) (under FOIA, courts may order release of records only if "improperly withheld").

15 See District Court Opinion at 5. The district court apparently assumed that registration was a prerequisite for copyright protection under the 1909 Act in force when the photos were taken. We note that although copyright notice was required upon publication under the 1909 Act, see 17 U.S.C. s 10 (1970), registration apparently was not then, Washington Publishing Co. v. Pearson, 306 U.S. 30, 59 S.Ct. 397, 83 L.Ed. 470 (1939), nor is it now, see 17 U.S.C.App. s 408(a) (1976), a precondition for statutory copyright.

16 District Court Opinion at 5-6. See 17 U.S.C.App. s 107 (fair use provision). In support of its holding, the district court stated: "In light of plaintiff's pledge to use the pictures for scholarly work and not for publication, the effect of the use 'upon the potential market for or value of the copyrighted work' will not be substantial. 17 U.S.C. s 107(4)." District Court Opinion at 6. The court did not address separately whether the Government, by making copies of the photos in response to Weisberg's (and other citizens') requests, would itself be able to assert a "fair use" defense in subsequent copyright infringement actions. This question is raised by appellants. See Appellants' Br. at 10.

17 District Court Opinion at 6-7. The court recognized that privileges under Exemption 4 may serve to protect the Government's ability to obtain necessary information in the future. But the court reasoned that an Exemption 4 privilege would serve no useful purpose in this case because most of the photos were unprotected by statutory copyright, and were subject, in any event, to disclosure under the fair use doctrine. Id. at 7.

18 5 U.S.C. s 552(a)(3) (1976). See Forsham v. Harris, 445 U.S. 169, 100 S.Ct. 978, 63 L.Ed.2d 293 (1980).

19 Thus, the Government challenges the district court's finding that 104 of the 107 photos are not protected by statutory copyright. Appellant's Br. at 27-29.

20 Appellant's Br. at 19. See, e. g., Forsham v. Harris, supra, 445 U.S. at 183-187, 100 S.Ct. at 986-88; Chrysler Corp. v. Brown, 441 U.S. 281, 99 S.Ct. 1705, 1713, 60 L.Ed.2d 208 (1979). The Government further concedes that if the photos sought in this case were not subject to a valid copyright, "the agency would be obliged to treat them as agency records." Appellant's Br. at 23 n.20.

21 The Government acknowledges that a different case would be presented where the government owns the copyright. See Appellant's Br. at 7 n.6.

22 Appellant's Br. at 17. The district court apparently misunderstood the Government's position to be that any material submitted to an agency by a third party including noncopyrighted material falls outside the scope of "agency records." See note 12 supra.

23 National Library of Medicine Act, 42 U.S.C. ss 275 to 280a-1 (1976).

24 Id. s 276(c)(2).

25 See 5 U.S.C. s 552(a)(4)(A) (1976) (FOIA fees "shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication").

26 SDC Development Corp. v. Mathews, supra, 542 F.2d at 1120.

27 Copyright holders are under no obligation to grant access to their works, even if they have previously made copies available to the Government or to other parties. See 17 U.S.C.App. ss 102, 401(a) (1976).

28 SDC Development Corp. v. Mathews, supra, 542 F.2d at 1120.

29 If the materials are not "agency records," the FBI may be able to deny requests for access as well as reproduction. See, e. g., Forsham v. Harris, supra, 445 U.S. 169, 100 S.Ct. 978, 63 L.Ed.2d 293 (because data compiled by private group receiving federal aid held not to constitute "agency record," no access afforded).

30 See Forsham v. Harris, supra, where the Court looked to the following provision of the Records Disposal Act in defining FOIA's phrase "agency records":

> "records" includes all books, papers, maps, photographs, or other documentary materials regardless of physical form of characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business . . . . 44 U.S.C. s 3301.

quoted at, 445 U.S. at 183, 100 S.Ct. at 986 (emphasis added).

31 The Government emphasizes that the FOIA disclosure provision at issue merely requires agencies to make their general records "available," it does not expressly mandate duplication of the records. See 5 U.S.C. s 552(a)(3). Compare 5 U.S.C. s 552(a)(2) (requiring each agency to "make available for public inspection and copying " final opinions, statements of policy and other specified agency materials) (emphasis added). The Government acknowledges, however, that in specifying applicable charges for fulfilling FOIA requests, the Act would seem to presume that records must be duplicated on request. See 5 U.S.C. s 552(a)(4)(A):

> In order to carry out the provisions of this section each agency shall promulgate regulations . . . specifying a uniform schedule of fees . . . . Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such and duplication. . . . (Emphasis added.)

The Government nevertheless proposes that under a "rule of reason," these provisions should be read in pari materia so as to permit agencies to disclose, but not duplicate, copyrighted materials. Appellant's Br. at 43-45. We do not reach this issue.

32 It should be noted, however, that the district court was influenced by the public importance of the photos requested in this case, as well as the alleged applicability of the fair use doctrine to Weisberg's intended use of the photos. See notes 12 & 16 supra.

33 In full, Rule 19(a) provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence completed relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

34 See at pages 826-827, supra.

35 By its literal terms, the Copyright Act gives a copyright holder the "exclusive" right to reproduce or authorize reproduction of the copyrighted work. 17 U.S.C.App. s 106(1) (1976). In actions for infringement, the courts are afforded a broad range of remedies, including: the imposition of statutory or actual damages, 17 U.S.C.App. s 504; impoundment or destruction of "all copies . . . found to have been made or used in violation of the copyright owner's exclusive rights," 17 U.S.C.App. s 503; and injunctive relief "operative throughout the United States," 17 U.S.C.App. s 502. We, of course, express no view as to whether any of these remedies would be available in an infringement action following court-ordered disclosure.

36 See generally F. James & G. Hazard, Civil Procedure 575-589 (1977).

37 Even an agency's self-interest may be unclear in a given case, since it often faces the conflicting pressures of disclosure to foster appearances of "openness," see, e. g., Note, Protection from Government Disclosure The Reverse FOIA Suit, 1976 Duke L.J. 330, 359, and of nondisclosure to protect itself from embarrassment or to further its institutional objectives, see, e. g., H.R.Rep.No. 1497, 89th Cong., 2d Sess. 5-6 (1966), reprinted in (1966) U.S.Cong. & Admin.News, pp. 2418, 2422-23.

38 The Government states that unless a copyright holder participates in litigation addressing the issue of fair use of his copyright, "the only entity with any direct personal interest in showing that reproduction would not be a fair use would not

be present in the lawsuit. The government has no real or direct interest in that issue. . . .” Appellant's Br. at 35. As noted before, see note 16 supra, the district court's judgment in this case depended largely on its determination that Weisberg's intended use of TIME's photos fell within the fair use exception.

39 This prospect is not eliminated by the Supreme Court's decision in GTE, supra note 14. In GTE, the Court reversed this court's decision permitting a FOIA action to proceed despite a prior nondisclosure order by the District Court of Delaware under the Consumer Product Safety Act. 100 S.Ct. at 1202, reversing Consumers Union of the United States v. Consumer Product Safety Comm'n, 590 F.2d 1209 (D.C.Cir.1978). The Court relied on the fact that FOIA authorizes judicially-mandated disclosure of agency records only where those records are “wrongly withheld.” See 5 U.S.C. s 552(a)(4)(B). The Court ruled that when an agency refuses to disclose its records pursuant to a valid prior court order, the agency records are not “wrongly withheld” and thus courts lack power under FOIA to compel disclosure. Because the Delaware order preceded this court's ruling, the Court ordered the FOIA action in this circuit to be dismissed.

Unlike GTE, the instant case presents the possibility of an initial disclosure order under FOIA, followed by a later suit brought under a separate statute such as the Copyright Act to reverse or remedy that initial order. The Court's interpretation of the phrase “improperly withheld” in FOIA therefore does not resolve whether such subsequent actions will be permissible. Especially where, as here, an initial ruling does not merely address the relationship between FOIA and the statute underlying the second action, but actually invalidates or limits the scope of an interested party's copyright, equitable considerations might favor granting the purported copyright holder its day in court.

We need not decide this question today, however. Under Rule 19, a trial court should seek joinder of interested parties when there otherwise would be a “substantial risk” of exposing one of the litigants to inconsistent obligations. See Fed.R.Civ.Pro. 19(a); Pegues v. Miss. State Employment Serv., 57 F.R.D. 102 (N.D.Miss.1972); Hodgson v. School Bd., New Kensington-Arnold School Dist., 56 F.R.D. 393 (W.D.Penn.1972). We find that risk was present here for the government. The district court therefore should have sought to join TIME the purported copyright owner before disposing of the case on the merits.

40 As we have said before with specific reference to Rule 19, “the rule puts the burden on existing parties and the court to bring in those whose presence is necessary or desirable, and to work out a fair solution when joinder is jurisdictionally impossible.” Consumers Union of the United States v. Consumer Product Safety Comm'n, supra, 590 F.2d at 1223 (emphasis added), rev'd on other grounds sub nom. GTE, supra, 100 S.Ct. 1202. See Advisory Committee's Note to Fed.R.Civ.P. 19, reprinted in 39 F.R.D. 89, 92 (1966). See also Fed.R.Civ.P. 1 (The Federal Rules “shall be construed to serve the just, speedy, and inexpensive determination of every action.”); Fed.R.Civ.P. 21 (“Parties may be dropped or added by order of the court on . . . its own initiative at any stage of the action and on such terms as are just.”). Cf. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111, 88 S.Ct. 733, 738, 19 L.Ed.2d 936 (1968) (court of appeals should take steps “on its own initiative” to fulfill Rule 19 policies).

41 Fed.R.Civ.P. 24; see Fisher v. Renegotiation Bd., 355 F.Supp. 1171, 1173 (D.D.C.1973) (reverse-FOIA advocate permitted to intervene as of right in FOIA action).

42 Fed.R.Civ.P. 19.

43 Fed.R.Civ.P. 22.

44 Rule 19(b) provides:

> If a person as described in (19(a)) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

We expressly do not determine at this stage what actions these factors might dictate should TIME's joinder prove infeasible.

Appendix D

745 F.2d 1476
United States Court of Appeals,
District of Columbia Circuit.

Harold WEISBERG
v.
U.S. DEPARTMENT OF JUSTICE, Appellant. (Two cases).
Harold WEISBERG, Appellant,
v.
U.S. DEPARTMENT OF JUSTICE. (Two cases).

Nos. 82–1229, 82–1274, 83–1722 and 83–1764.
|
Argued May 8, 1984.
|
Decided Oct. 5, 1984.

Synopsis

After remand, 631 F2d 824, requester of materials concerning assassination of Dr. Martin Luther King Jr., appealed from rulings of the United States District Court for the District of Columbia that Department of Justice had performed adequate and good-faith search of its records, that the Freedom of Information Act exemptions claimed by the Department were properly invoked, and that the Department did not owe consultancy fee to requester. The Department of Justice, as appellee and cross appellant, challenged award of attorney fees to requester. The Court of Appeals, Starr, Circuit Judge, held that: (1) Department of Justice made an adequate search of their records concerning assassination of Dr. King; (2) claimed exemptions from disclosure were proper; (3) no consultancy agreement existed; but (4) order awarding attorney fees would be vacated and remanded for reconsideration of whether requester substantially prevailed in litigation, and, if so, whether requester was entitled to award of attorney fees.

Affirmed in part, vacated in part, and remanded.

West Headnotes (17)

[1] **Federal Civil Procedure** Burden of proof

To meet burden to show that no genuine issue of material fact exists, warranting grant of summary judgment to agency as to its claim of compliance to Freedom of Information Act disclosure obligations, agency must demonstrate, with facts viewed in light most favorable to requester, that it has conducted a search reasonably calculated to uncover all relevant documents. 5 U.S.C.A. § 552.

360 Cases that cite this headnote

[2] **Records** Sufficiency and Specificity of Response

Issue to be resolved in ruling on agency's claim of compliance with Freedom of Information Act disclosure obligations is not whether there might exist any other documents possibly responsive to request, but rather, whether search for those documents was adequate. 5 U.S.C.A. § 552.

274 Cases that cite this headnote

[3] **Records** Sufficiency and Specificity of Response

Adequacy of an agency's search for documents requested under Freedom of Information Act is judged by a standard of reasonableness and depends upon facts of each case. 5 U.S.C.A. § 552.

289 Cases that cite this headnote

[4] **Records** Sufficiency and Specificity of Response

In demonstrating adequacy of its search for documents requested under Freedom of Information Act, an agency may rely upon reasonably detailed nonconclusory affidavits submitted in good faith. 5 U.S.C.A. § 552.

412 Cases that cite this headnote

[5] **Records** Particular cases

Department of Justice made adequate search of its records concerning assassination of Dr. Martin Luther King Jr., in complying with request filed under Freedom of Information Act, despite contentions of requestor that search was unreasonably limited, that field office files should have been reprocessed, and that FBI wrongfully failed to search any individual files as listed in request. 5 U.S.C.A § 552.

11 Cases that cite this headnote

[6] **Records** Findings and conclusions

District court's use of sampling procedure to examine Department of Justice's claims of exemption from Freedom of Information Act request for records concerning assassination of Dr. Martin Luther King Jr., by which Department was ordered to provide a sample index of every 200th page of responsive material, was not improper in view of fact that district court clearly could not have undertaken review of each document from which Department, pursuant to FOIA's exemptions, excised material. 5 U.S.C.A § 552.

34 Cases that cite this headnote

[7] **Records** Segregability; Excision, Redaction, or Deletion

Department of Justice acted properly in withholding names of federal agents and certain individuals who had given information to FBI during its investigation of assassination of Dr. Martin Luther King Jr., from material produced in response to request filed under the Freedom of Information Act for records concerning Dr. King's assassination. 5 U.S.C.A. §§ 552, 552(b)(7)(C).

17 Cases that cite this headnote

[8] **Records** Informants and confidential sources

Department of Justice properly withheld information supplied by confidential sources and information supplied by local and foreign law enforcement agencies from material disclosed in response to request for search of their records concerning the assassination of Dr. Martin Luther King Jr. 5 U.S.C.A. §§ 552, 552(b)(7)(D).

12 Cases that cite this headnote

[9] **Public Contracts** Validity and Sufficiency of Contract

United States Validity and Sufficiency of Contract

Absence from alleged consultancy agreement between Department of Justice and requester of material under Freedom of Information Act concerning assassination of Dr. Martin Luther King Jr., of material term of duration of agreement precluded finding that contract had been entered into. 5 U.S.C.A. § 552.

1 Cases that cite this headnote

[10] **United States** Actions in general

Jurisdiction as to contract claims against the United States under Tucker Act extends only to actual contracts, either express or implied-in-fact; it does not extend to contracts implied-in-law. 28 U.S.C.A. § 1346.

3 Cases that cite this headnote

[11] **United States** Actions in general

Jurisdiction as to contract claims against the United States under Tucker Act did not extend to claim for compensation based on principles of quasi-contract or contract implied-in-law. 28 U.S.C.A. § 1346.

2 Cases that cite this headnote

[12] **Estoppel** Particular United States officers, agencies, or proceedings

Where it was undisputed that work was commenced on reports which were subject of alleged consultancy agreement long before conversation concerning compensation for such reports, and where entire course of dealings

between parties, the Department of Justice and requester of materials under Freedom of Information Act concerning assassination of Dr. Martin Luther King Jr., evidenced sufficient uncertainty that requester was on notice that further negotiations were necessary, requester could not have reasonably relied on any promise or representation by Department, and thus Department would not be required to pay a consultancy fee on basis of promissory or equitable estoppel. 5 U.S.C.A. § 552.

1 Cases that cite this headnote

[13] **Records** Costs and Fees

Whether an award of attorney fees under Freedom of Information Act is proper depends upon two-step inquiry in which complainant must show that he or she is eligible for an award by demonstrating that he or she substantially prevailed, and secondly, that he or she is "entitled" to an award. 5 U.S.C.A. § 552(a)(4)(E).

26 Cases that cite this headnote

[14] **Records** Costs and Fees

Although an agency cannot prevent award of attorney fees under Freedom of Information Act simply by releasing requested information without requiring complainant to obtain a court order, mere filing of complaint and subsequent release of documents is insufficient to establish causation. 5 U.S.C.A. § 552(a)(4)(E).

66 Cases that cite this headnote

[15] **Federal Courts** "Clearly erroneous" standard of review in general

Findings of fact derived from application of improper legal standard to facts may be deemed by an appellate court to be clearly erroneous.

[16] **Records** Determination and disposition

In view of district court's failure to take into account such factors as whether Department of Justice, upon actual and reasonable notice of request for records concerning assassination of Dr. Martin Luther King Jr., had made good-faith effort to search out such material and to pass on whether it should be disclosed, number of requests pending before agencies, and time-consuming nature of search and decision-making process, and in view of strong possibility that Department disclosed vast bulk of material sought as result of administrative process in handling Freedom of Information Act request, determination that requester had substantially prevailed in subsequent suit for disclosure of materials for purpose of award of attorney fees would be vacated and remanded for further consideration of whether requester had substantially prevailed, and, if so, whether requester was entitled to fee award. 5 U.S.C.A. § 552.

58 Cases that cite this headnote

[17] **Records** Costs and Fees

Even if a court concluded that a plaintiff in Freedom of Information Act suit has substantially prevailed, further inquiry must be made into entitlements of plaintiff to attorney fee award, entailing balancing factors of benefit of release to public, commercial benefit of release to plaintiff, nature of plaintiff's interest, and reasonableness of agency's withholding. 5 U.S.C.A. § 552.

69 Cases that cite this headnote

***1478** ****341** Appeals from the United States District Court for the District of Columbia (Civil Action No. 75–01996).

Attorneys and Law Firms

James H. Lesar, Washington, D.C., for Weisberg, appellant in Nos. 82–1274 and 83–1764 and cross appellee in Nos. 82–1229 and 83–1722.

John S. Koppel, Atty., Dept. of Justice, Washington, D.C., with whom Richard K. Willard, Acting Asst. Atty. Gen., Stanley S. Harris, U.S. Atty., Washington, D.C., at the time the brief was filed and Leonard Schaitman, Atty., Dept. of

Justice, Washington, D.C., were on the brief for U.S. Dept. of Justice, appellee in Nos. 82–1274 and 83–1764 and cross appellant in Nos. 82–1229 and 83–1722.

John M. Rogers and Marilyn S.G. Urwitz, Attys., Dept. of Justice, Washington, D.C., also entered appearances for U.S. Dept. of Justice.

Before MIKVA, BORK and STARR, Circuit Judges.

Opinion

Opinion for the Court filed by Circuit Judge STARR.

STARR, Circuit Judge:

This Freedom of Information Act suit concerns a nine-year quest for information from the Department of Justice ("the Department" or "DOJ") and its various components with respect to the investigation of the assassination of Dr. Martin Luther King, Jr. In these cross-appeals, the parties challenge various orders of the District Court. Appellant and cross-appellee Harold Weisberg[1] challenges the District Court's rulings that the Department performed an adequate and good-faith search of its records; that the FOIA exemptions claimed by the Department were properly invoked; and that the Department did not owe a consultancy fee to Mr. Weisberg. The Department of Justice as appellee and cross-appellant primarily challenges the District Court's award of attorneys' fees to appellant, arguing that Mr. Weisberg did not substantially prevail in this litigation; that even if eligible for such an award he is not entitled to an award of attorneys' fees; and that even if Mr. Weisberg was both eligible for and entitled to an attorneys' fees award, the award was excessive. Appellant Weisberg, on cross-appeal, contends that the District Court's calculation of attorneys' fees was erroneous because it excluded certain amounts of time; improperly determined the hourly rate; and refused to adjust the award to take account of the delay in receiving the fees.

***1479** ****342** We affirm the District Court's award of summary judgment in favor of the Department as to the adequacy of its search, the propriety of the claimed exemptions and the absence of a consultancy agreement. We vacate the District Court's order awarding attorneys' fees and remand for reconsideration of whether appellant substantially prevailed in this litigation. Should the District Court conclude that he did substantially prevail, we direct the court on remand to reconsider whether appellant is entitled to an award of attorneys' fees. If the District Court concludes that Mr. Weisberg is so entitled, we further direct the court to consider exclusion of any non-productive time devoted to this litigation and to consider whether the Supreme Court's intervening decision in *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), permits an upward adjustment of the lodestar award in the circumstances of this case.

I

Before embarking on a discussion of the issues presented by these appeals, we first chronicle the most significant events in the lengthy history of this litigation.

A

On April 15, 1975, Harold Weisberg filed an administrative request with the Attorney General under the Freedom of Information Act ("FOIA" or the "Act"), 5 U.S.C. § 552 (1982), for information concerning the assassination of Dr. Martin Luther King, Jr.[2] The request sought disclosure of certain categories of information concerning evidence developed by the FBI during its investigation of the assassination.[3] It requested the results of ballistics tests, neutron activation and spectrographic analyses,[4] scientific tests conducted on certain physical evidence, photographs and ***1480** ****343** sketches of any suspects, photographs of the crime scene, and any information provided to other authors. The FBI wrote Mr. Weisberg acknowledging the request, but advised him that the large volume of requests reviewed in the wake of the FOIA amendments of 1974 would necessitate a delay in processing the request. Joint Appendix ("JA") 32, 34, 35. *See Open America v. Watergate Special Prosecution Force,* 547 F.2d 605, 610 (D.C.Cir.1976) (describing "virtual deluge of requests since the effective date of the FOIA amendments"). Mr. Weisberg brought suit seeking compliance with this first request on November 23, 1975. JA 28–35.

One month after filing suit, on December 23, 1975, Mr. Weisberg filed another administrative request under the Act. Far more expansive than his April 1975 request, this second request specified twenty-eight different categories of information concerning Dr. King's assassination. The categories of information included, to list only a few, all letters, documents, reports, memoranda, and

physical evidence with respect to the investigation of the King assassination, reports concerning fingerprints, and communications relating to the investigation between state prosecutors and DOJ officials. JA 37–41.[5] One day later, before expiration of the ten-day statutory response period, ***1481** ****344** 5 U.S.C. § 552(a)(6)(A)(i), Mr. Weisberg amended his previously filed complaint pursuant to Fed.R.Civ.P. 15(a) to include the second administrative request. JA 36.

The Department filed an answer, contending that the first complaint, based on the April 1975 request, was moot because DOJ had already disclosed information responsive to that request. JA 42–43. The Department further contended that the amended complaint was premature inasfar as it was based on the unexhausted requests for information in appellant's second request. *Id.* Despite these contentions, the District Court permitted the litigation to continue. Transcript of Hearing, May 5, 1976, JA 107. Between April and August 1976, appellant was provided with information responsive to his first request from the files of the Department's Civil Rights Division.[6]

At this early stage of the litigation, the issues focused primarily on the first FOIA request (in April 1975) and on Mr. Weisberg's desire to have copies of certain photographs copyrighted by TIME, Inc., but located in the FBI files. The Department, however, refused by virtue of TIME's copyright[7] to copy the photographs for release ***1482** ****345** to Mr. Weisberg, although the Department did provide access to them.

Thereafter, the litigation focused primarily upon the adequacy of the Department's searches of its files for information responsive to Mr. Weisberg's two requests. The Department completed the processing of much of the first request by October 1976, *see* R. 25, but by that time had only begun processing appellant's second request. Transcript of Hearing, Oct. 8, 1976, JA 244–45. The Department construed Mr. Weisberg's second request broadly, interpreting it to include not only the specific items requested, but also the entirety of the FBI's headquarters files concerning the investigation of the King assassination, the so-called "Murkin" files (an FBI abbreviation for the King murder case). *See, e.g.,* R. 32; Transcript of Hearing, Oct. 8, 1976, JA 243–45. The FBI interpreted the request in this manner primarily because of the voluminous quantity of the FBI's Murkin files and the correspondingly large size of the request, the historical significance of the King assassination investigation, and the public's interest in the FBI's investigation. During late 1976 and through 1977, the FBI processed the great bulk of these files, which resulted in the disclosure of approximately 45,000 pages of documents.

Not content with the extent of DOJ's disclosures, however, Mr. Weisberg continued to maintain that the FBI had failed to conduct an adequate search. In particular, appellant wanted the FBI to search the files of certain FBI field offices, in addition to the files at FBI headquarters. In an attempt to resolve amicably the disagreements pertaining to the scope of the search, the Department and appellant entered into a stipulation on August 11, 1977, defining the Department's search obligations. JA 268. Approved by the District Court, the stipulation provided a timetable for completion of the Department's processing of Mr. Weisberg's two requests.[8] It specified, among other things, that the FBI would provide copies of the contents of some of the FBI's field office files; that duplicates of the headquarters' Murkin files which had already been provided would not be reprocessed; but that attachments not provided to appellant would be processed and provided; and finally, that duplicates with notations would be provided. The stipulation further provided that documents pertaining to the Sanitation Workers Strike in Memphis and "the Invaders," *see supra* note 5, items 25–26, would be provided.[9] Appellant agreed in the stipulation ***1483** ****346** that if the Department complied with its terms, he would forgo filing a motion under *Vaughn v. Rosen,* 484 F.2d 820 (D.C.Cir.1973), *cert. denied,* 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974). Subsequent to entering into the stipulation, the Department processed Mr. Weisberg's request in accordance with the agreed-upon timetable, and in consequence, Mr. Weisberg received an additional 15,000 pages of documents. *See supra* note 8.[10]

Despite receiving approximately 60,000 pages of documents, Mr. Weisberg continued to assert that the Department had not adequately searched its files. He also contended that the Department improperly withheld material in documents that had been processed. In particular, he contended that the various field office files had not been fully disclosed and should have been reprocessed; that he should be furnished with the indices to the FBI Memphis Field Office files, R. 101; and that various components of DOJ should have been searched. He further claimed that an inadequate search had been conducted with regard to the so-called "Long tickler" file, a temporary file of various Murkin documents

maintained by FBI Special Agent Long, who was assigned to the assassination investigation. R. 135.[11]

On February 26, 1980, the District Court ruled that the Department's search was adequate. JA 477. Despite this clear-cut ruling, Mr. Weisberg nonetheless sought further searches and reprocessing of documents already furnished to him. The litigation thereafter shifted to the issue of the Department's use of exemptions to excise certain material from disclosed documents. Acting on appellant's motion, the District Court ordered a *Vaughn* index of every two hundredth document. The court later ordered a supplemental *Vaughn* index when the first index produced a large number of pages containing no excisions, in order to evaluate the propriety of DOJ's claimed exemptions. Transcript of Hearing, Feb. 26, 1980, at 52–56; Transcript of Hearing, Aug. 15, 1980, at 6–8. In a memorandum decision issued December 1, 1981, the District Court conditionally granted the Department's motion for summary judgment, upholding all of the claimed exemptions. JA 572. On January 2, 1982, the District Court ruled that the Department had met all specified conditions. JA 604. The District Court later declined to reopen the litigation on the merits of the case. Order, June 22, 1982, JA 611.

***1484 **347** B

In the midst of all these disputations over the completeness of FOIA disclosures, the Department during late 1977 and early 1978 considered entering into a consultancy arrangement with Mr. Weisberg. The goal of this contemplated arrangement was to clarify the exact nature of appellant's manifold objections to the disclosure process and the results thereof.[12] The discussions between Mr. Weisberg and Department officials in this respect began on November 11, 1977, and included a meeting between the parties with the District Judge in chambers. Affidavit of James H. Lesar, JA 311–18. Although Mr. Weisberg did not agree at that time, *id.,* he did correspond with various Department officials concerning the alleged agreement. *Id.* Further, it is undisputed that the parties engaged in discussions concerning the hourly rate to be paid. There is vigorous dispute, however, as to whether the Department offered to pay Mr. Weisberg $75 per hour. *Id.* The parties again met with the court in chambers to discuss the arrangement. Transcript of Hearing, May 24, 1978. Finally, after delivering two reports to the Department, Mr. Weisberg submitted a bill for $15,000 as well. Plaintiff's Memorandum Re Consultancy, Exhibit 1, JA 419. Faced with this request, the Department ardently maintained that no consultancy had ever been entered into and therefore rejected Mr. Weisberg's demands for payment at an hourly rate of $75.[13] Defendant's Memorandum in Opposition to Motion to Pay Consultancy Fee, Exhibit A, JA 614. It is undisputed that no written contract was ever reached.

Appellant filed a motion for payment of the consultancy fee on May 29, 1979. R. 94. The District Court, after deferring judgment on the issue and at one point granting the motion,[14] ultimately denied appellant's motion. Memorandum Opinion, Jan. 20, 1983. JA 733–36. The court concluded that no contract had ever been formed, because the parties did not agree on material terms. The court also refused to imply those terms. *Id.* In a subsequent decision, the court rejected appellant's theories of recovery based on promissory estoppel and equitable estoppel. Memorandum Opinion, April 29, 1983, JA 877–83.

C

Now the final issue: in June 1979, Mr. Weisberg moved for summary judgment on the issue whether he had substantially prevailed for purposes of obtaining attorneys' fees under 5 U.S.C. § 552(a)(4)(E). After deferring as premature any ruling on the motion on August 13, 1979, JA 440, the District Court ruled in 1981 that Mr. Weisberg had substantially prevailed. Memorandum Opinion, Dec. 1, 1981, JA 585. Appellant moved for $267,516 in attorneys' fees and costs. Affidavit of James H. Lesar, JA 636–69. The Department opposed the motion on several grounds, but the District Court awarded $93,926.25 in fees and $14,481.95 in costs. JA 722. The ***1485 **348** court reasoned that because (1) Mr. Weisberg had substantially prevailed, (2) the suit had benefited the public, (3) and Mr. Weisberg derived no commercial benefit from the disclosure, an award of attorneys' fees was proper. *Id.* The District Court then computed the award at $75 per hour and deducted seven hours out of 791.9 hours. The "lodestar" award was thus $62,617.50, which the District Court increased by granting a fifty percent "risk" premium. *Id.* The court deducted $2,000 for excessive copying costs and long distance calls from appellant's $16,481.95 claim for costs. Memorandum Opinion, April 29, 1983, JA 881–82.

These appeals followed.

II

A

On appeal, Mr. Weisberg argues that the District Court erred in granting summary judgment to the Department on the adequacy of its search and the propriety of its withholdings. First, he contends that the scope of the Department's search was unreasonably limited, that the FBI withheld many of the so-called "field office files" as previously processed, and that the Department failed adequately to search for certain specified documents. Appellant's Brief 33–37. Second, he argues that the Department improperly withheld and excised information from those documents which it did disclose and that the two *Vaughn* indices were inadequate. *Id.* at 37–39. Despite Mr. Weisberg's numerous complaints with respect to the Department's disclosures, we reject each of these arguments and affirm the District Court's grant of summary judgment.

1

[1] **[2]** **[3]** **[4]** As this court made clear in its recent decision in another of Mr. Weisberg's FOIA suits, the standard is well established for granting an agency summary judgment as to its claim of compliance with FOIA disclosure obligations. To meet its burden to show that no genuine issue of material fact exists, with the facts viewed in the light most favorable to the requester, the agency must demonstrate that it has conducted a "search reasonably calculated to uncover all relevant documents." *Weisberg v. Department of Justice,* 705 F.2d 1344, 1350–51 (D.C.Cir.1983). Further, the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate. Id.* at 1351 (citing *Perry v. Block,* 684 F.2d 121, 128 (D.C.Cir.1982) (per curiam)). The adequacy of the search, in turn, is judged by a standard of reasonableness and depends, not surprisingly, upon the facts of each case. *Id.* (citing *McGehee v. CIA,* 697 F.2d 1095, 1100–01 (D.C.Cir.1983) *modified on petition for rehearing in other respects,* 711 F.2d 1076, 1077 (D.C.Cir.1983)). In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith. *Id.* (citing *Goland v. CIA,* 607 F.2d 339, 352 (D.C.Cir.1979) (per curiam), *cert. denied,* 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980)). With the guiding principle of reasonableness in mind, we turn to each of appellant's contentions.

The District Court issued its "Finding as to Scope of Search" on February 26, 1980, holding that the Department was entitled to summary judgment on that issue. JA 477. The District Court expressly found that a "proper and good faith search has been made for all items responsive to plaintiff's request in the FBI headquarters' Murkin files and in all files of the FBI field offices, with the exception of the Frederick residency." *Id.*[15] Mr. Weisberg's primary ***1486** ****349** contention is that this determination is erroneous. Mr. Weisberg argues that the search was inadequate because (1) it was "unreasonably limited," (2) the FBI's procedures for processing the various FBI field office files were improper, and (3) certain files of individuals were not adequately examined. Appellant's Brief 21–23, 33–37. We address each of these arguments in turn.

First, appellant generally argues that the search was unreasonably limited because the FBI and the Department attempted to restrict the search to the Murkin files. In support of this contention, Mr. Weisberg argues that the Department failed to meet its burden by refusing to search the "individual items of Weisberg's December 23, 1975 request" as well as two particular components of the Department, the Office of Legal Counsel (OLC) and the Community Relations Service (CRS).[16] Further, Mr. Weisberg argues that the Department did not search what he calls the FBI's "divisional files."

[5] We are fully persuaded, however, that the search efforts of the Department and the FBI were entirely reasonable and adequate. At the outset of this branch of our inquiry, it must again be borne in mind that Mr. Weisberg received approximately 60,000 documents. The Department submitted numerous, extremely detailed, nonconclusory affidavits in support of its motion for summary judgment on the scope issue. *See, e.g.,* Affidavits filed in support of Defendant's Motion for Partial Summary Judgment, May 14, 1979, R. 128, R. 187; Affidavit of Douglas F. Mitchell, JA 403–08; Fourth Affidavit of Janet L. Blizard, JA 561–69; Affidavit of Salliann M. Dougherty, JA 565–69. Despite Mr. Weisberg's repeated attacks on the integrity of the Department's affidavits, they cannot seriously be challenged as having been made in bad faith. Moreover, our review of the voluminous record in this case demonstrates that the District Court repeatedly required the Department to undertake searches at appellant's request.

In the face of these detailed affidavits and the record in this case, Mr. Weisberg levels only speculative assertions that other documents exist or were not located in the numerous searches which were in fact conducted by the Department and the FBI. His general contention that the FBI tried to limit the search to its Washington, D.C. headquarters' Murkin files is, as the record clearly demonstrates, patently without foundation. As Mr. Weisberg himself points out as to the attorneys' fees issues, the FBI, pursuant to the parties' stipulation, searched and disclosed approximately 15,000 pages of documents from the Memphis and other FBI field offices. Many of these documents were *not* from the headquarters' Murkin files. Rather, the documents came from FBI field offices, files concerning "the Invaders," the "Memphis Sanitation Workers Strike," and James Earl Ray. Mitchell Affidavit, JA 403–04. Moreover, the Department searched the files of the Attorney General and the Deputy Attorney General pursuant to a District Court order, and did not locate any responsive materials in the course of that search. Order of Sept. 11, 1980, JA 523; Affidavit of Quinlan J. Shea, R. 1987. Nor is the Department's effort in this respect flawed simply because it did not search the "individual items" of the request. As this court has recognized repeatedly, "an agency is not required to reorganize [its] files in response to [a plaintiff's] request." *Goland v. CIA,* 607 F.2d 339, 353 (D.C.Cir.1979), *cert. denied,* 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980). The FBI's files on the King assassination investigation clearly were not organized along the lines of Mr. Weisberg's request; rather than treat the twenty-eight individual requests separately, ***1487 **350** the FBI reasonably chose to disclose the *entire* Murkin files to Mr. Weisberg.

Appellant's contention that the files of two individual components of the Department, OLC and CRS, should have been searched fares no better. Mr. Weisberg has utterly failed to rebut the Department's showing of adequacy by coming forward with evidence to suggest that responsive documents might be found there. The only "evidence" he proffers in this respect is that a letter from a writer requesting an interview regarding the investigation was located in a file other than a Murkin file. As shown above, however, there can no longer be any dispute in this case that *some* materials sought by Mr. Weisberg were not located in the Murkin file. This example, however, in no way suggests that these *particular* components of DOJ contain responsive materials. The Department's detailed affidavits stating that it has no reason to believe materials will be found in those components withstand Mr. Weisberg's generalized attack. Therefore, in the absence of such evidence, we decline to require the Department to search OLC and CRS files.

We also reject the contention that the search was unreasonable because the FBI did not search its "divisional files."[17] Appellant claims that he has proof that unsearched files do indeed exist. The support for this claim, however, consists of an affidavit submitted by Mr. Weisberg himself, stating that information which he received in his FOIA action for the JFK assassination records indicates that such divisional files exist. JA 423–24. No further support is provided. In contrast, the Department submitted an affidavit that sets forth in a detailed and nonconclusory fashion both (1) that these carbon copy (or "divisional") files are destroyed after a brief period and (2) that although Department officials searched for other divisional files, reorganizations of these divisions and their files of the FBI prevented location of those particular files. Affidavit of Martin Wood, JA 472–74. In sum, Mr. Weisberg's general contention that the search was unreasonably limited and that various other files should have been searched fails in the face of the Department's more than adequate showing that it conducted a good-faith effort to locate responsive materials. The search was quite plainly "reasonably calculated to uncover all relevant documents." *Weisberg v. Department of Justice, supra,* 705 F.2d at 1351.

Appellant's second major argument with respect to the adequacy of the search is that the District Court should have ordered reprocessing of the entirety of the FBI's field office files. He argues that evidence from another of Mr. Weisberg's FOIA suits, in which he requested information on the JFK assassination, shows that the FBI's method of processing field office files was inadequate and that duplicative documents with notations were not provided. Appellant's Brief 36–37. We note that this is not the first time appellant has attempted to utilize evidence developed in one of his FOIA actions in another action. *See Weisberg IV, supra,* 705 F.2d at 1361–62. Here, however, as in *Weisberg IV,* the argument fails. The fact that the FBI's Dallas Field Office, in processing files in response to appellant's request concerning the assassination of President Kennedy, erroneously failed to provide some 2,000 nonduplicative documents in no way casts doubt on the FBI's methods of searching the Murkin files of other FBI field offices. This feeble evidence drawn from other litigation scarcely creates a genuine issue of material fact when contrasted with the Department's specific affidavits on this issue. ***1488 **351** Affidavit of John Phillips, Defendant's Motion for Summary Judgment, R. 187.[18] We

therefore reject appellant's invitation to order mammoth reprocessing of some 15,000 pages of Field Office files.

Appellant next argues that reprocessing is required, inasmuch as he was not provided with duplicates of documents containing notations already furnished to him from the headquarters' Murkin files. The District Court rejected this contention, finding that this request would have violated the explicit terms of the August 1977 stipulation. That stipulation provided, as we have seen, that "duplicates of documents already processed at headquarters will not be processed and included if found in field offices as well *as copies of documents with notations,*" JA 268 (emphasis added). As the Department notes, and the record bears out, *all* the field office documents have *some* notations on them, e.g., routing stamps. The stipulations, therefore, must be read with this fact fully in mind. The FBI reasonably provided only documents with *substantive* notations. The effect of requiring reprocessing of all field office files containing *any* notation would plainly nullify the stipulation's provisions. The District Court therefore properly credited the Department's affidavits on this point and refused to require reprocessing of the field office files on this ground.

Finally, Mr. Weisberg's concluding contention with respect to the scope and adequacy of the search is that the FBI wrongfully refused to search the separate individual files of the numerous persons listed in appellant's December 23, 1975 request. *See supra* note 5. Appellant's Brief 33–36.[19] The Department has maintained throughout this litigation that searches of the files of *individuals* would implicate serious privacy concerns under exemption 7(C), and it therefore concededly has not searched these individual files. More to the point, however, the Department consistently has interpreted, with appellant's knowledge, the request as pertaining to its files on the King assassination, rather than to individual files, if such files do in fact exist. We believe this interpretation was entirely reasonable in light of the circumstances of this case. The December 23, 1975 request from Mr. Weisberg sought access to twenty-eight categories of information "pertaining to the assassination of Dr. Martin Luther King, Jr." *See supra* note 5. The Department has consistently maintained that information concerning the King assassination would be found in its Murkin files. *See, e.g.,* Transcript of Hearing, June 30, 1977, JA 267.[20] Thus, as discussed above, the FBI treated Mr. Weisberg's FOIA request as a request for processing the entire Murkin files; furthermore, the Department always maintained ***1489 **352** that information pertinent to the individuals listed in his request and to the King assassination investigation would be located in the FBI's Murkin files.

We believe that the FBI and the Department reasonably interpreted the request to include information about these individuals as related to the Murkin files and not to individual files, if any exist. First, as shown above, the request itself was framed in this manner. Second, the stipulation is indicative of this understanding, in that absolutely no mention of searching individual files is made. Third, the parties conducted this litigation consistently with this understanding for almost five years before Mr. Weisberg's objections finally came to the fore in November 14, 1980, some nine months *after* the District Court entered its February 1980 finding as to the scope of the search. Moreover, no mention of this issue was made in the papers and oral argument on the summary judgment motion. The tardiness of Mr. Weisberg in raising this issue clearly prevented its adequate resolution by the District Court. Given the long standing interpretation of this request in this litigation, we are fortified in our view that the FBI's interpretation was a reasonable one.[21] The District Court properly refused to reopen the issue in response to appellant's eleventh-hour motion and to modify the scope of the request. In view of our conclusion that the individual files were not within the scope of the December 23, 1975 request as the parties interpreted it, we need not address the issue of privacy waivers as they relate to disclosure of individual files to third party requesters.[22]

In sum, we affirm the District Court's grant of summary judgment concerning the adequacy of the Department's search. 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 December 23, 1975 request. The Department conducted a search reasonably calculated to respond to Mr. Weisberg's request, and he in turn has raised no genuine issue of material fact with respect to the adequacy of that search.

2

Appellant's second line of attack on the grant of summary judgment below is that the Department's claims of exemption were improper and that the District Court accordingly erred in upholding them. First, he argues that the sampling procedure utilized for the *Vaughn* index was defective because it did not include samples of "all of the kinds of exemption claims

made." Appellant's Brief 37–38. Second, appellant argues that the District Court erred in upholding the Department's use of FOIA exemptions 7(C) and 7(D). We address each of these arguments in turn.

Again, we must bear in mind the circumstances of this case. In response to his FOIA requests, Mr. Weisberg has received almost 60,000 pages of documents. Given this magnitude of disclosure, the District Court clearly could not have undertaken a review of each of the documents from which the Department, pursuant to FOIA's ***1490 **353** exemptions, excised material. Thus, as we have previously noted, the District Court required the Department to provide a sample index of every two hundredth page of responsive material under *Vaughn v. Rosen,* 484 F.2d 820 (D.C.Cir.1973), *cert. denied,* 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974) (requiring agency to produce index specifying exemptions claimed and reasons for exemptions). Order, Feb. 26, 1980, R. 151. Because this approach resulted in an index with a sampling of a large number of pages with no excisions or deletions whatever, the District Court required a second *Vaughn* index consisting only of documents containing deletions. Order, Sept. 11, 1980, JA 523. In December 1981, the District Court granted the Department's Motion for Summary Judgment, ruling that the Department properly withheld information under exemptions 7(C), 7(D), 7(E), and (b)(1).[23] Memorandum Opinion, Dec. 1, 1981, JA 581–84. At the same time, the court required *in camera* submission of a number of documents withheld in their entirety. *Id.* On January 5, 1982, the District Court upheld the Department's withholding of those documents as well.

[6] Appellant primarily complains that the sampling provided by the District Court's methodology did not provide examples of the Department's use of exemptions 3, 5, 6, and 7(F). Appellant's Brief 26, 38. However, we discern no error whatever in the District Court's decision to require sampling rather than examining each and every document on which challenged exemptions were claimed. The District Court ordered not one, but two *Vaughn* indices when the random sampling provided by the first index produced many documents with no excisions whatever. The second index in this case consisted of ninety-three documents totalling 400 pages. JA 581. The exemptions that Mr. Weisberg claims were not represented on the *Vaughn* indices are exemptions used in only two percent of the total documents disclosed. Thus, on its face, the procedure provided the District Court with an adequate sampling of the Department's use of exemptions. The sampling procedure is appropriately employed, where as here the number of documents is excessive and it would not realistically be possible to review each and every one. *See Vaughn v. Rosen,* 383 F.Supp. 1049, 1052 (D.D.C.1974), *aff'd,* 523 F.2d 1136 (1975); *cf. Ash Grove Cement Co. v. FTC,* 511 F.2d 815, 818 (D.C.Cir.1975) (sampling of documents for *in camera* inspection). There is no contention that the integrity of the *Vaughn* index is questionable, nor could there be in view of the fact that the sampling was random. *Cf. Lame v. Department of Justice,* 654 F.2d 917, 928 n. 11 (3d Cir.1981) (integrity of sample index questionable when government, rather than court, selects samples). In sum, we find no error in the District Court's use of the sampling procedure for the *Vaughn* index.

Appellant next contends, rather vaguely, that there were "many examples" of wrongful withholding.[24] Appellant's Brief 39. He apparently is referring to the Department's use of Exemptions 7(C) and 7(D). Specifically, with regard to the 7(C) exemptions, Mr. Weisberg claims that the names of Claude and Leon Powell were withheld, notwithstanding the fact that "their names had been released by the FBI in other documents and had been publicized on countless TV news stories and in the print media." Appellant's Brief 24. He ***1491 **354** also argues that the FBI wrongfully withheld the names of FBI agents under Exemption 7(C). *Id.*

Exemption 7(C) permits an agency to withhold "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would ... constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (1982). At the outset, it is clear, as the District Court observed, that the records sought here were compiled for law enforcement investigatory purposes. The District Court concluded that the FBI properly withheld the "identities of persons investigated or interviewed, information about third persons appearing in the documents and the names of FBI Special Agents," relying primarily upon this Court's decision in *Lesar v. Department of Justice,* 636 F.2d 472, 486–88 (D.C.Cir.1980). *See also Baez v. Department of Justice,* 647 F.2d 1328, 1338–39 (D.C.Cir.1980). In *Lesar,* the court upheld the withholding of information almost identical to that withheld here. Specifically, this court concluded that, despite the fact that FBI agents are public officials, they have a "legitimate interest in preserving the secrecy of matters that conceivably could subject them to annoyance or harassment in either their official or private lives." 636 F.2d at 487.

The great public interest in the tragic assassination of Dr. King did not outweigh the privacy interests at stake in *Lesar,* and we discern no reason for reaching a different conclusion here. The same privacy interests are at stake here as there; and, the same risk of harassment and annoyance as in *Lesar* would inhere in any release of agents' identities in this case.[25] In *Lesar,* we found that similar reasons justified the withholding of the names of those investigated, and third persons mentioned in the documents. " 'Those who cooperated with law enforcement should not pay the price of full disclosure of personal detail.' " *Id.* at 488 (quoting *Lesar v. Department of Justice,* 455 F.Supp. 921, 925 (D.D.C.1978)).

[7] As noted above, Mr. Weisberg claims that he knows the identities of two persons who gave information to the FBI, and that the names of those persons were also disclosed to the House Select Committee on Investigations. That is neither here nor there, however. The fact that Mr. Weisberg has apparently been able to piece together the manner in which the identities of these alleged informants fit in with the FBI's Murkin investigation in no way undermines the privacy interests of these individuals in avoiding harassment and annoyance that could result should the FBI *confirm* to Mr. Weisberg the presence of their names in the King documents. Release of such information to a member of the public interested in scholarly analysis and publication has the potential to result in greater dissemination than would release to an investigative committee of Congress. We therefore uphold the District Court's grant of summary judgment for the Department on the use of Exemption 7(C).[26]

[8] Exemption 7(D) protects from disclosure

> investigatory records compiled for law enforcement purposes, but only to the extent that production of such records would ... disclose the identity of a confidential source, and in the case of a record compiled by a criminal law enforcement agency during the course of a criminal investigation ... confidential information furnished only by the confidential source.

5 U.S.C. § 552(b)(7)(D) (1982). Under this exemption, the FBI withheld information supplied by confidential sources and information ***1492** ****355** supplied by local and foreign law enforcement agencies. As we held in *Lesar,* the confidential information supplied by foreign and local law enforcement agencies is clearly within the purview of Exemption 7(D). *Lesar, supra,* 636 F.2d at 488–91. Moreover, as the *Lesar* court observed, the availability of Exemption 7(D) depends not upon the factual contents of the document sought, but upon whether the *source* was confidential and the information was compiled during a criminal investigation. *Id.* at 492. The affidavits submitted by the Department clearly demonstrate the propriety of the FBI's use of this exemption. *See* Seventh Affidavit of Martin Wood, JA 478–90. We discern no error in the District Court's grant of summary judgment for the Department on the use of Exemption 7(D).[27]

In sum, we uphold the District Court's grant of summary judgment on the various exemption claims. Appellant has pointed to nothing whatever that calls into question the propriety of the Department's use of those exemptions.

B

We turn now to the second of Mr. Weisberg's three major contentions on appeal. Appellant claims that he and the Department entered into a consultancy agreement for the purpose of his specifying with greater precision the deletions with which he took issue, in order to aid the Department in the resolution of the FOIA disclosure issues. Specifically, he claims that the Department, through Ms. Lynne Zusman, a DOJ attorney, offered him $75 per hour for this work and that he accepted the offer. Mr. Weisberg also asserts that he in fact completed the contemplated task, and that he submitted reports to the Department from which the Department benefited. Mr. Weisberg submitted a claim for payment of approximately $16,000, including costs, and sought an order from the District Court compelling the Department to pay that fee. The Department objected, contending that no contract had ever been entered into and that such material terms as the rate of compensation, the duration, and the precise nature of the work product were never agreed upon.

After initially granting appellant's motion,[28] the District Court ultimately agreed with the Department and held that no contract was formed by virtue of the parties' failure to supply a material term, namely the amount of time to be spent on the project. Memorandum Opinion, Jan. 20, 1983, JA 134–35; Memorandum Opinion, April 29, 1983, JA 880. The court also refused to imply a contract-in-fact by supplying the missing terms, reasoning that "plaintiff should reasonably have realized that further terms needed to be agreed upon before proceeding with the consultancy work," and that "the defendant did not use plaintiff's work and thus derived no benefit from it." JA 735–36. The court ***1493** ****356**

further declined to award recovery in *quantum meruit* for the same reasons. JA 736. Finally, in a later opinion, the District Court rejected appellant's argument that the Department should have been required to pay the fee on promissory and equitable estoppel theories. JA 887–90.[29]

[9] We agree with the District Court that no contract, either express or implied in fact, was ever entered into by the parties here. It is, of course, elementary that in order to create an enforceable contract, the parties must manifest their mutual assent. *See Restatement (Second) of Contracts* § 3 (1977). The facts of this case clearly indicate that no contract was formed because the terms of the contract were not "reasonably certain." *Id.* § 33. In this case, no written contract was ever executed. But what is more, the District Court specifically found, after carefully examining the evidence, that the parties never agreed upon the duration of the consultancy, the court thus quite reasonably concluded that an agreement on that term was essential "because the total cost would depend primarily upon it." JA 735. Mr. Weisberg does not contest the fact that the parties did not agree on the duration of the alleged agreement. Rather, he argues that the duration, and thus the total cost of the contract, was not an essential term, and that the parties did not agree on that term because they could not predict the length of time it would take Mr. Weisberg to perform the contemplated services. Appellant's Brief 40.

We conclude that the District Court's finding as to the materiality of this term was entirely correct. The course of negotiations between appellant and the Department, which undisputably focused upon the amount of compensation to be paid, reveals the materiality of this term. It strains credulity to believe that the Department could have agreed to appellant's spending an unlimited amount of time on the project, especially in view of the nature of the elaborately regulated government contracting process. We therefore agree with the District Court that, under settled principles of the law of contract, the absence of agreement by the parties on a material term prevented the formation of a legally enforceable contract. 1 *Corbin on Contracts,* § 95, at 394 (1963 & Supp.1984); *Restatement (Second) of Contracts,* § 33 (1981) ("the fact that one or more terms ... are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance").[30]

[10] **[11]** Appellant next argues that, notwithstanding the absence of a contract, he is entitled to an award based on principles of quasi-contract or contract implied-in-law. *See* 1 *Corbin on Contracts,* § 95, ***1494** ****357** at 407–08 (1963 & Supp.1984). Under settled principles, such restitutionary relief is available when no contract has been formed because of indefiniteness of terms, and the party has in good faith, believing that a contract existed, performed part of the services promised in reliance on that belief. In this respect, it is clear that Mr. Weisberg produced two reports and provided them to the Department. Appellant earnestly contends that those reports were prepared specifically within the compass of the alleged consultancy agreement. Nonetheless, as the District Court held, appellant should have realized that additional terms had to be agreed upon before a binding contract could be formed. JA 735–36. This finding is not clearly erroneous. Further, jurisdiction as to contract claims against the United States under the Tucker Act extends only to actual contracts, either express or implied-in-fact; it does not extend to contracts implied-in-law. *Hatzlachh Supply Co. v. United States,* 444 U.S. 460, 465 n. 5, 100 S.Ct. 647, 650 n. 5, 62 L.Ed.2d 614 (1980); *Narva Harris Constr. Corp. v. United States,* 216 Ct.Cl. 238, 574 F.2d 508, 511 (1978).

Similar reasons compel the identical conclusion with respect to appellant's theories of promissory and equitable estoppel. First, as we have only recently observed, "there has been much controversy concerning when an estoppel will run against the government." *National Juvenile Law Center v. Regnery,* 738 F.2d 455 at 459 (D.C.Cir.1984) (citing *Heckler v. Community Health Services of Crawford County, Inc.,* 467 U.S. 51, 104 S.Ct. 2218, 2223–24, 81 L.Ed.2d 42 (1984)). Assuming *arguendo* that promissory estoppel or equitable estoppel is available against the Government, it is nonetheless clear that these doctrines require the element of reasonable reliance. *See Restatement (Second) of Contracts,* § 90 (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if the injustice can be avoided only by enforcement of promise."); *Heckler, supra,* 104 S.Ct. at 2223 ("the party claiming estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse' and that reliance must have been reasonable ....") (citations omitted).

The District Court found that "Mr. Weisberg did not act reasonably in proceeding with work on the consultancy agreement." JA 878. The court based this conclusion on (1) the history of the negotiations, (2) the correspondence between the parties on the consultancy, and (3) on the fact that Mr. Weisberg did most of the work on the consultancy *before* March 1978, the time when he contends the offer of $75 per

hour was made. *Id.* at 878–79. As if more were needed, the District Court found that the Department did not obtain any benefit from the two narrative reports. *Id.* at 879.

[12] The District Court's findings in this regard do not even remotely approach the domain of "clearly erroneous." First, it is undisputed that Mr. Weisberg commenced his work on the reports long before the March 15, 1978 conversation between Ms. Zusman and Mr. Lesar. Second, the entire course of dealings between the parties—in particular, the disputes concerning the amount to be paid and the specific form of the work product to be produced—evidence sufficient uncertainty that appellant was on notice that further negotiations were necessary. Thus, he could not have *reasonably* relied on any promise or representation. Most important, as the District Court found, the Department in no way benefited from the Weisberg reports; DOJ did not receive the work product it had sought in the first instance and thus did not benefit from that which Mr. Weisberg did produce. We therefore decline, as did the District Court, to require payment of a consultancy fee on the basis of promissory or equitable estoppel.

C

Finally, we turn to the last of the three principal issues on this appeal, the District Court's award of $93,926.25 in attorneys' ***1495** ****358** fees and $14,481.15 in costs. The District Court ruled that appellant had substantially prevailed in this litigation, and that he was entitled to an award because (1) the public benefited from the disclosure, (2) appellant did not benefit commercially, (3) appellant's interest in the documents was scholarly in nature, and (4) the Department lacked a reasonable basis in law for its actions. Memorandum Opinion, Jan. 20, 1983, JA 720–25. The District Court then calculated the award on the basis of an hourly rate of $75 per hour. The court deducted seven out of 791.9 hours claimed by Mr. Lesar as having been spent on the merits of the case, excluded 44 hours for time spent on the consultancy fee, and 36.7 hours spent on the fee application. *Id.* at 26–27. The District Court then awarded a 50 percent premium on the lodestar award. *Id.* at 729–30. Finally, the District Court awarded $10,437.67 in litigation costs.

The Department challenges the attorneys' fees and costs award, arguing that appellant did not substantially prevail, and that even if it did, he is not entitled to an award under the four criteria enunciated in *Fenster v. Brown,* 617 F.2d 740, 742 (D.C.Cir.1979). *See* discussion *infra,* at 45. The Department also argues that an increase in the lodestar rate was unjustified and that appellant is unentitled to costs. Appellant argues, in contrast, that the District Court's decision should be upheld, except insofar as (1) he was awarded only $75 per hour, (2) time spent on the fee application was excluded, and (3) the lodestar rate was not adjusted to take account of delay in receipt of fees.

1

[13] Section 552(a)(4)(E) permits a District Court to "assess against the United States reasonable attorneys' fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed. 5 U.S.C. § 552(a)(4)(E) (1982). Whether an award of attorneys' fees is proper depends upon a two-step inquiry. First, the complainant must show that he or she is "eligible" for an award by demonstrating that he or she substantially prevailed." But eligibility alone is not enough. Second, and equally important, the complainant must show that he or she is "entitled" to an award. *Church of Scientology of California v. Harris,* 653 F.2d 584, 587 (D.C.Cir.1981). *See* discussion *infra,* at ——. Once it is determined that a complainant is entitled to attorneys' fees, the court must then calculate the award by multiplying the hourly rate and the number of hours expended on the litigation—the so-called "lodestar award." *National Association of Concerned Veterans v. Secretary of Defense,* 675 F.2d 1319, 1323 (D.C.Cir.1982). Thereafter, the court may consider whether an adjustment in the lodestar rate is appropriate. *Id.* at 1328–29. Finally, the court may consider awarding "reasonable litigation costs." With this framework in mind, we turn to each of the elements of the District Court's award.

2

The District Court concluded that appellant had substantially prevailed in this FOIA litigation, stating simply that "[d]efendant has released over 50,000 pages to plaintiff in this lawsuit; there is no question that plaintiff has substantially prevailed." Memorandum Opinion, Dec. 1, 1981, JA 573–74. When DOJ requested reconsideration of this issue, the District Court reiterated this conclusion, stating that "[t]he record in this action reflects that defendant stonewalled plaintiff's request for more than a year after plaintiff filed this complaint. There is no question that the prosecution of this action was

necessary and that the action had a substantial causative effect on the delivery of the information." Memorandum Order, Jan. 5, 1982, JA 605.

The Department challenges this determination, arguing, first, that the great majority of the approximately 60,000 pages released to Mr. Weisberg in response to his two administrative requests were released as a result of the *administrative* processing of his voluminous second request of December 23, 1975, which appellant concededly ***1496** ****359** brought into court before exhausting his administrative remedies.[31] Second, the Department contends that those documents that Mr. Weisberg concededly *did* receive by virtue of the litigation—tickler files, abstracts, indices, and index cards relating to the documents contained in the Murkin files—were either duplicative of or not responsive to his request, and were disclosed in an effort to end the matter once and for all. Appellee's Brief 40–41.

[14] To evaluate the merits of this argument, we begin by noting the task before the District Court in determining whether a FOIA complainant has substantially prevailed. It is well established in this circuit that this inquiry is largely a question of causation. "[T]he party seeking such fees in the absence of a court order 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." *Cox v. Department of Justice,* 601 F.2d 1, 6 (D.C.Cir.1979); *Church of Scientology of California v. Harris, supra,* 653 F.2d at 587–88. Although an agency cannot prevent an award of attorneys' fees simply by releasing the requested information without requiring the complainant to obtain a court order, the mere filing of the complaint and the subsequent release of the documents is insufficient to establish causation. *See Crooker v. Department of the Treasury,* 663 F.2d 140, 141 (D.C.Cir.1980) (per curiam).

[15] The question whether an FOIA litigant has substantially prevailed is, of course, a question of fact entrusted to the District Court and the appellate court is to review that decision under a clearly-erroneous standard. *See Cox v. Department of Justice, supra,* 601 F.2d at 6; *Crooker v. Department of the Treasury, supra,* 663 F.2d at 142; *Sweatt v. United States Navy,* 683 F.2d 420, 425 (D.C.Cir.1982). Nevertheless, it is equally well established that findings of fact derived from the application of an improper legal standard to the facts may be deemed by an appellate court to be clearly erroneous. *See United States v. Singer Mfg. Co.,* 374 U.S. 174, 194 n. 9, 83 S.Ct. 1773, 1784 n. 9, 10 L.Ed.2d 823 (1963); *FTC v. Texaco, Inc.,* 555 F.2d 862, 876 n. 29 (D.C.Cir.), *cert. denied,* 431 U.S. 974, 97 S.Ct. 2940, 53 L.Ed.2d 1072 (1977). *See also* 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2585, at 733–34 (1971).

Applying these standards to the case at hand, it is evident that the District Court's determination that appellant substantially prevailed must be vacated. The District Court, as noted above, provided only the barest outline of the reasoning underlying its conclusion that Mr. Weisberg substantially prevailed. The District Court merely concluded that because Mr. Weisberg had obtained over 50,000 pages, he had substantially prevailed. This conclusion evidences no consideration whatever of several factors that this court expressly recognized in *Cox v. Department of Justice,* 601 F.2d 1 (D.C.Cir.1979). In *Cox,* we explained that the causation inquiry must take into account "whether the agency upon actual and reasonable notice of the request, made a good faith effort to search out material and to pass on whether it should be disclosed." *Id.* at 6. We further noted the relevance of such factors as the number of requests pending before the agency and the time-consuming nature of the search and decisionmaking process. *Id.* (citing *Open America v. Watergate Special Prosecution Force,* 547 F.2d 605 (D.C.Cir.1976)).

[16] The District Court utterly failed, in evaluating the record in this case, to take account of these factors in concluding that appellant had substantially prevailed. Even a cursory review of the undisputed facts in the record indicates the strong ***1497** ****360** 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. First, appellant filed his second administrative request on December 23, 1975, and then amended his previously filed complaint regarding the first administrative request the *very next day.* He therefore did not exhaust his administrative remedies by allowing the Department ten days within which to respond to the second request.[32] Appellant thus pretermitted the administrative stage of the processing of FOIA requests. Second, and more important, the District Court paid no heed to the Department's overwhelming backlog of FOIA requests, which this court had occasion to consider in *Open America.* In this case, it is clear beyond peradventure that appellant's request involved huge numbers of documents, as well as laborious and time-consuming reviews. Although no disclosures were made pursuant to the second request until October 1976, the delay

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 that time by DOJ. Further, once the disclosures began, they continued at a steady pace until completed in 1977. The suggestion that the Department "stonewalled" appellant's request must be viewed in light of Mr. Weisberg's litigation strategy—choosing to short-circuit the administrative process—and the Department's legitimate response to that strategy—a motion to stay for failure to exhaust. In sum, as to the overwhelming majority of documents received by Mr. Weisberg during the pendency of this lawsuit, it is not at all clear from the record that the lawsuit actually caused the Department to release the documents or, conversely, whether the release was in reality pursuant to the administrative request.[33] Because the District Court failed to take account of the factors established by this court in *Cox,* we must vacate the District Court's award of attorneys' fees as clearly erroneous.

On remand, the District Court should consider the specific argument advanced by the Department that the bulk of documents that Mr. Weisberg did receive as a result of the litigation—the Long tickler, abstracts, indices, and index cards—were either duplicative or unresponsive to his requests. Some documents were released, DOJ argues, just to put Mr. Weisberg's incessant demands behind it once and all. Appellant, in contrast, relies heavily on these successes in urging that the District Court's causation determination be upheld.

Accordingly, the District Court should consider whether these disclosures justify a finding that appellant substantially prevailed as to his *overall* request. *See Goland v. CIA, supra,* 607 F.2d at 356 n. 103 (although FOIA plaintiffs need not obtain a judgment in court to be eligible for an award of fees, the plaintiffs must "*substantially* prevail") (emphasis in original). In particular, it appears that appellant obtained only thirty-four index cards from the Memphis Field Office. JA 440. Appellant also received abstract cards to the Murkin files pursuant to an oral court order. JA 470. Nevertheless, after the disclosure had already been made, the District Court ***1498 **361** actually *denied* appellant's motion to compel production of these cards, stating that the abstracts are "essentially duplicative of information already released.... The abstracts reveal less information than the documents which plaintiff received." *Id.* at 574. Appellant also received the Civil Rights Division's index of documents, an index developed during the processing of his second request. *Id.* at 577–78. It is very difficult to discern how this index could have been encompassed in appellant's request, which had been formulated long before the index was even created. *See Cox, supra,* 601 F.2d at 6 (defendant must have had *actual* notice of request). This sampling of the types of documents received by appellant as a result of the litigation reveals that a much closer look at the results of the litigation is warranted before it can be concluded that appellant substantially prevailed.

We therefore remand the issue of the attorney's fees awards by the District Court for reconsideration of whether Mr. Weisberg substantially prevailed.

3

[17] Even if a court concludes that a plaintiff in an FOIA suit has substantially prevailed, a further inquiry must be made into the entitlements of the plaintiff to a fees award. This inquiry entails a balancing of four factors: (1) the benefit of the release to the public; (2) the commercial benefit of the release to the plaintiff; (3) the nature of the plaintiff's interest; and (4) the reasonableness of the agency's withholding. *Church of Scientology, supra,* 653 F.2d at 590 (citing *Fenster v. Brown,* 617 F.2d 740 (D.C.Cir.1979)). The District Court concluded that all four criteria were met in the instant case, ruling that Mr. Weisberg's efforts had resulted in an increase in the amount of information available to the public, that Mr. Weisberg had derived no commercial benefit, and that his interest in the documents was loftily scholarly and journalistic. Finally, the court concluded that the Department lacked a reasonable basis for withholding the documents ordered to be disclosed. JA 720–25.

Inasmuch as we vacate and remand for reconsideration the District Court's conclusion that appellant substantially prevailed, we also remand to the District Court for consideration of the balance of factors under the entitlement analysis should the District Court conclude that appellant did indeed substantially prevail in this litigation. In particular, the District Court should reconsider whether the Department had a reasonable basis in law for its withholding. In analyzing this factor, we have noted, and the District Court has recognized, that there must be a showing that the "government had a reasonable basis in law for concluding that the information in issue was exempt and that it had not been recalcitrant or otherwise engaged in obdurate behavior." *Cuneo v. Rumsfeld,* 553 F.2d 1360, 1366 (D.C.Cir.1979). Here, the District Court

focused primarily on the adequacy of the Department's search efforts, rather than upon the information it withheld.

On remand, the District Court should first bear in mind that *all* of the Department's claimed exemptions were properly upheld. Second, the District Court should give adequate weight to the unique circumstances of this case—appellant's failure to exhaust his administrative remedies, the voluminous nature of his request, his frequent reformulations of his request, and the length of time obviously required to process such a large request. Third, as recounted above, many of the delays in this suit were unquestionably the appellant's own doing. He filed numerous, repetitive motions and sought unwarranted reprocessing of documents and repeated searches, most of which were to no avail. Plainly, simple justice requires that the Government not be penalized for delays it did not cause. Finally, we note that the District Court improperly considered the "repudiation of the consultancy agreement" in evaluating the Department's reasonable basis for withholding. Thus, on remand, should the District Court conclude that appellant is eligible for an award of attorneys' fees, it should also reconsider ***1499 **362** whether he is entitled to such fees, bearing in mind that under FOIA, attorneys' fees are to be awarded in light of that Act's basic policy—"the encouragement of maximum feasible access to government information." *Nationwide Building Maintenance, Inc. v. Sampson,* 559 F.2d 704, 715 (D.C.Cir.1977).

4

In determining a fee award (after a court has concluded that an FOIA complainant is both eligible and entitled to an award), the District Court must next determine the hourly rate and the number of hours or "lodestar award." *National Association of Concerned Veterans v. Secretary of Defense,* 675 F.2d 1319, 1323 (D.C.Cir.1982) (hereafter "NACV"). On remand, should the District Court determine that an award of fees is proper, it should reconsider the calculation of the lodestar fee in this case, taking into account the following factors. Under *NACV,* a prevailing FOIA plaintiff is not entitled to an attorneys' fees award for "nonproductive time or for time expended on issues on which plaintiff ultimately did not prevail." *Id.* at 1327. The District Court properly excluded the time spent on the unsuccessful consultancy fee issue and the excessive time spent on the fee application itself. The District Court, however, excluded only seven hours from the fees attributable to the merits of the case. On appeal, appellant candidly concedes that additional hours should have been deducted from his fee application. Appellant's Brief 57–58. Moreover, it is abundantly clear from our review of the record that appellant filed numerous nonproductive and repetitive motions on issues on which he ultimately did not prevail.[34] Although the District Court need not chronicle each and every event or activity in analyzing the attorney's nonproductive time, a considerably more careful distinction between productive and nonproductive time is required than was provided here.

5

The District Court also awarded a fifty percent "risk premium" on top of the lodestar rate, reasoning that this litigation was "unnecessarily prolonged" and that the outcome was "highly uncertain." JA 729–30. The Department argues that the award was completely unjustified, while appellant contends that it was not enough. On remand, should the court conclude that an award of fees is proper, it should also reconsider the upward adjustment awarded here in light of the Supreme Court's intervening decision in *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

In *Blum,* the Court held that although an upward adjustment of the lodestar fee in a case under 42 U.S.C. § 1988 is permissible "in some cases of exceptional success," the plaintiff had made no such showing in that case. *Id.* 104 S.Ct. at 1549. The Court in reaching that conclusion analyzed the novelty and complexity of the issues, the quality of the representation, and the riskiness of the litigation. The Court found that despite the high quality of the representation there, and the fact that the litigation benefited a large class of persons, there was no support for the conclusion that the litigation was risky or involved novel theories. Finally, the Court indicated that such factors as the quality of representation, the results of the litigation, and the riskiness of the litigation will "ordinarily be subsumed within other factors used to calculate a reasonable fee." *Id.* Thus, the clear teaching of *Blum* is that courts should be cautious in adjusting the lodestar rate to avoid duplication of fee awards that have already been accounted for in the basic fee calculation.

***1500 **363** In this case, the District Court's unsupported conclusions that the riskiness of the litigation and the prolonged nature of the litigation justified the upward adjustment do not pass muster under the Supreme Court's

decision in *Blum.* First, it does not appear that this litigation involved highly complex or novel issues, although the litigation was cumbersome and involved numerous issues. Thus, an upward adjustment of the award based on the risk factor would, under *Blum,* appear unwarranted. Second, the fact that this litigation was lengthy and time consuming provides no justification for an upward adjustment under *Blum;* the hourly rate awarded Mr. Lesar was based on present rates, rather than past rates, and adequately compensates him for time spent on this litigation. Further, much of the delay was not the fault of the Government. Similarly, we do not think that whether Mr. Lesar was prevented from taking on other cases as a result of this litigation can be a factor in the lodestar adjustment analysis. *See NACV, supra,* 675 F.2d at 1328–29 (listing factors).

In sum, the District Court on remand should reconsider the upward adjustment of the lodestar in light of this court's decisions in *NACV* and *Copeland v. Marshall,* 641 F.2d 880 (D.C.Cir.1980) (en banc) and the Supreme Court's decision in *Blum.*[35]

IV

For the foregoing reasons, we affirm the District Court's grant of summary judgment to the Department on the adequacy of the search, the propriety of its use of the exemptions, and the absence of a consultancy fee arrangement. We vacate and remand for reconsideration of the award of attorneys' fees, with specific directions that the court consider whether appellant substantially prevailed and whether he is entitled to an award of fees. Should the court conclude that an award is appropriate, it should nonetheless exclude all nonproductive time and reconsider under *Blum* the appropriateness of an upward adjustment of the lodestar fee, as well as costs.

It is so ordered.

All Citations

745 F.2d 1476, 240 U.S.App.D.C. 339

Footnotes

1 Harold Weisberg is the author of numerous books on the assassinations of President Kennedy and Dr. King. Second Affidavit of Harold Weisberg, Joint Appendix ("JA") 190–91. In addition, Mr. Weisberg was the investigator for James Earl Ray, who pled guilty to the assassination of Dr. King. Letter from James H. Lesar, Esq. to Harold R. Tyler, Jr., Nov. 4, 1976, JA 249–51. Mr. Lesar, Mr. Weisberg's attorney, represented James Earl Ray in various proceedings challenging his guilty plea. *Id.*

2 Mr. Weisberg had sought some information on the King assassination from the FBI in an earlier request dated March 10, 1969. JA 238. This request, however, did not identify the Freedom of Information Act as its basis. Nor did Mr. Weisberg include the FBI's alleged refusal to answer this request as a basis for his subsequently filed suit. Complaint, JA 28–29, 36. Thus, although Mr. Weisberg has made frequent mention of this "request" throughout this litigation, only his two FOIA requests submitted in 1975 are the subject of this lawsuit. At the time of Mr. Weisberg's first request, however, it is unlikely that the information sought would have been subject to release because the Act's exemption for investigatory files compiled for law enforcement purposes would probably have prevented disclosure. In *Weisberg v. Department of Justice,* 489 F.2d 1195 (D.C.Cir.1973) (en banc), *cert. denied,* 416 U.S. 993, 94 S.Ct. 2405, 40 L.Ed.2d 772 (1974), a suit in which Mr. Weisberg sought information concerning the assassination of President John F. Kennedy, this court upheld that broad construction of the law enforcement investigatory files exemption. In 1974, Congress amended the FOIA and narrowed the scope of that exemption. Act of Nov. 21, 1974, Pub.L. No. 93–502, § 2, 88 Stat. 1561, 1563–64 (codified at 5 U.S.C. § 552(b)(7) (1982)).

3 The complete text of Mr. Weisberg's first FOIA request reads as follows:

1. The results of any ballistics tests.
2. The results of any spectrographic or neutron activation analyses.
3. The results of any scientific tests made on the dent in the windowsill of the bathroom window from which Dr. King was allegedly shot.
4. The results of any scientific tests performed on the butts, ashes or other cigarette remains found in the white Mustang abandoned in Atlanta after Dr. King's assassination and all reports made in regard to said cigarette remains.
5. All photographs or sketches of any suspects in the assassination of Dr. King.
6. All photographs from whatever source taken at the scene of the crime on April 4th or April 5th, 1969.

7. All information, documents, or reports made available to any author or writer, including but not limited to Clay Blair, Jeremiah O'Leary, George MacMillan, Gerold Frank, and William Bradford Huie.

4 In *Weisberg v. Department of Justice,* 705 F.2d 1344 (D.C.Cir.1983), another of Mr. Weisberg's suits under the FOIA, this court explained that

> spectrographic and neutron activation analyses are designed to determine the composition of small samples of materials. In spectrographic analysis, samples are sparked or burned to produce a spectrum of light that is exposed to a photographic plate; the plate may be analyzed to measure elements present in the sample. In neutron activation analysis, samples are bombarded in a nuclear reactor; the energy samples they emit may be measured for the same purpose.

Id. at 1347 n. 1. In *Weisberg v. Department of Justice,* Mr. Weisberg filed suit on an FOIA request for information concerning the assassination of President Kennedy that he had submitted on the first day after the Act's amendments went into effect.

5 The complete text of Mr. Weisberg's second request reads as follows:

1. All receipts for any letters, cables, documents, reports, memorandums [*sic*], or other communications in any form whatsoever.
2. All receipts for any items of physical evidence.
3. All reports or memorandums on the results of any tests performed on any item of evidence, including any comparisons normally made in the investigation of a crime.
4. All reports or memorandums on any fingerprints found at the scene of the crime or on any item allegedly related to the crime. This is meant to include, for example, any fingerprints found in or on the white Mustang abandoned in Atlanta, in any room allegedly used or rented by James Earl Ray, and on any registration card. It should also include all fingerprints found on any item considered as evidence in the assassination of Dr. Martin Luther King, Jr.
5. Any taxicab log or manifest of Memphis cab driver James McCraw or the cab company for which he worked.
6. Any tape or transcript of the radio logs of the Memphis Police Department or the Shelby County Sheriff's Office for April 4, 1968.
7. All correspondence and records of other communications exchanged between the Department of Justice or any division thereof and: [listing names].
8. All correspondence or records of other communications pertaining to the guilty plea of James Earl Ray exchanged between the Department of Justice or any division thereof and: [listing names].
9. All notes or memorandums pertaining to any letter, cable, or other written communication from or on behalf of the District Attorney General of Shelby County, Tennessee, or the Attorney General of Tennessee to the Department of Justice or any division thereof.
10. All notes or memorandums pertaining to any telephonic or verbal communications from or on behalf of the District Attorney General of Shelby County, Tennessee, or the Attorney General of Tennessee to the Department of Justice or any division thereof.
11. All tape recordings and all logs, transcripts, notes, reports, memorandums or any other written record of or reflecting any surveillance of any kind whatsoever of the following persons: [listing names].

This is meant to include not only physical shadowing but also mail covers, mail interception, interception by any telephonic, electronic mechanical or other means, as well as conversations with third persons and the use of informants.

12. All tape recordings and all logs, transcripts, notes, reports, memorandums or any other written record of or reflecting any surveillance of any kind whatsoever on the Committee to Investigate Assassinations (CTIA) or any person associated with it in any way.

This is meant to include not only physical shadowing but also mail covers, mail interception, interception by any telephonic, electronic, mechanical or other means, as well as conversations with third persons and the use of informants.

13. All records pertaining to any alleged or contemplated witness, including any statements, transcripts, reports, or memorandums from any source whatsoever.
14. All correspondence of the following persons, regardless of origin or however obtained: [listing names].
15. All letters, cables, reports, memorandums or any other form of communication concerning the proposed guilty plea of James Earl Ray.
16. All records of any information request or inquiry from or any contact by, any member or representative of the news media pertaining to the assassination of Dr. Martin Luther King, Jr. since April 15, 1975.

17. All notes, memoranda, correspondence or investigative reports constituting or pertaining to any re-investigation or attempts at re-investigation of the assassination of Dr. King undertaken in 1969 or anytime thereafter, and all documents setting forth the reason or guidelines for any such re-investigation.
18. Any and all records pertaining to the New Rebel Motel and the DeSoto Motel.
19. Any records pertaining to James Earl Ray's eyesight.
20. Any records made available to any writer or news reporter which have not been made available to Mr. Harold Weisberg.
21. Any index or table of contents to the 96 volumes of evidence on the assassination of Dr. King.
22. A list of all evidence conveyed to or from the FBI by legal authority, whether state, local, or federal.
23. All reports, notes, correspondence, or memorandums pertaining to any efforts by the Department of Justice to expedite the transcript of the evidentiary hearing held in October, 1974, on James Earl Ray's petition for a writ of habeas corpus.
24. All reports, notes or memorandums on information contained in any tape recording delivered or made available to the FBI or the District Attorney General of Shelby County by anyone whomsoever. All correspondence engaged in with respect to any investigation which was made of the information contained in any of the foregoing.
25. All records of any contact, direct or indirect, by the FBI, any other police or law enforcement officials, or their informants, with the Memphis group of young black radicals known as The Invaders.
26. All records of any surveillance of any kind of The Invaders or any member or associate of that organization. This is meant to include not only physical shadowing but also mail covers, mail interception, interception by telephonic, electronic, mechanical or other means, as well as conversations with third persons and the use of informants.
27. All records of any surveillance of any kind of any of the unions involved in or associated with the garbage strike in Memphis or any employees or officials of said unions. This is meant to include not only physical shadowing but also mail covers, mail interception, interception by any telephonic, electronic, mechanical or other means, as well as conversations with third persons and the use of informants.
28. All records containing information which exculpates or tends to exculpate James Earl Ray of the crime which he allegedly committed.
This request for disclosure is made under the Freedom of Information Act, 5 U.S.C. § 552, as amended by Public Law 93–502, 88 Stat. 1561.

6 Other responsive documents located in those files which had been initially provided to the Division by another DOJ component were referred for processing to other divisions of the Department. Affidavit of Mark L. Gross, Record ("R") 25.

7 The Department contended that the copyrighted photographs were not agency records within the meaning of the Act, and that they were exempted from disclosure pursuant to exemption 3, 5 U.S.C. § 552(b)(3), under the Copyright Act, 17 U.S.C. §§ 101–810 (1976), and exemption 4. The District Court, however, ruled that the photographs were agency records and that neither exemption 3 or 4 precluded disclosure. R. 57. This court, on appeal, affirmed the District Court's conclusion that the photographs were agency records, but declined to reach the issue whether the copyright laws precluded disclosure under exemptions 3 and 4 because it concluded that TIME, Inc. should have been joined as a party in the action pursuant to Fed.R.Civ. P. 19(a). *Weisberg v. Department of Justice,* 631 F.2d 824, 828–29 (D.C.Cir.1980). On remand, the parties resolved the dispute without further litigation and TIME, Inc. permitted Mr. Weisberg to copy its photographs. Transcript of Hearing, Aug. 15, 1980, 3–4.

8 The FBI had already begun processing the Murkin file in response to Mr. Weisberg's December 23, 1975 request in October 1976, almost a year before the stipulation. Between October 1976 and February 1977, the FBI had made available some 7,200 pages. Affidavit of Horace P. Beckwith, R. 39. By June 30, 1977, appellant had been given approximately 20,000 pages of documents. Transcript of Hearing, June 30, 1977, at 2. By September 9, 1977, appellant had received approximately 23,000 pages of documents. Transcript of Hearing, Sept. 15, 1977, at 2. By November 1977, Mr. Weisberg had received approximately 45,000 pages of documents, consisting primarily of the Murkin files. Transcript of Hearing, Nov. 2, 1977 at 2.
In addition to these documents, Mr. Weisberg also received between 15,000–20,000 field office files pursuant to the stipulation. Appellant's Reply Br. 13. In addition, he received indices to the Memphis Field Office files, pursuant to the District Court's order of August 15, 1979. R. 124. He further received 6,500 of the FBI's abstract cards, which are similar to the indices to the field office files. JA 574.
Finally, as we noted previously, appellant also had previously received documents in response to his April 15, 1975 request. *See supra* text accompanying note 6 & note 6.

9 The stipulation provided as follows:

It is hereby stipulated by and between counsel for the parties, that upon Federal Bureau of Investigation's representation to the Court herewith, that processing of the FBI Memphis Field Office files pertaining to "the Invaders," the Sanitation Workers Strike, James Earl Ray, and the MURKIN file is undertaken immediately by defendants, and will be completed by October 1, 1977; that defendants will provide a worksheet inventory of the released documents; that processing of MURKIN files from the FBI field offices in Atlanta, Birmingham, Los Angeles, New Orleans, and Washington, D.C., as well as the processing of files relating to John Ray, Jerry Ray, James Earl Ray, Carol and Albert Pepper in the Chicago and St. Louis field offices MURKIN files, will be completed by November 1, 1977; that duplicates of documents already processed at headquarters will not be processed or listed on the worksheets, but attachments that are missing from headquarters documents will be processed and included if found in field office files as well as copies of documents with notations; that releases of documents and accompanying worksheets will be made periodically as they are processed; that administrative appellate review of the documents will take place prior to their release; that in the course of this processing all exemptions will only be assessed in strict conformance with the May 5, 1977, guidelines of Attorney General Griffin Bell relating to the Freedom of Information Act, and the provisions of the Freedom of Information Act itself; that in consideration of the foregoing commitment by the FBI and the Department of Justice, plaintiff will hold in abeyance filing a motion to require a *Vaughn v. Rosen* showing with respect to the foregoing FBI files, including the Headquarters' files already processed; and further that, upon defendants' performance of these commitments by the specified dates, plaintiff will forego completely the filing of said motion; that plaintiff will hold in abeyance objections to specific deletions until the target dates specified above have passed, with the clear understanding of both parties that plaintiff has not waived his right to contest specific deletions after the passing of these dates.

10 In addition, Mr. Weisberg moved for a waiver of all search fees and copying costs, R. 52, arguing that the public interest in the case warranted such a waiver. *See* 5 U.S.C. § 552(a)(4)(A). The District Court ordered the Department to reconsider and explain its decision not to waive fees entirely, but instead to reduce the charges. JA 292–93. Ultimately, the Department waived the fees and costs. Affidavit of Quinlan J. Shea, JA 298–300.

11 In addition to these principal complaints, Mr. Weisberg raised numerous other objections that we will not recount here. *See, e.g.,* Transcript of Hearing, Feb. 26, 1980.

12 Although the parties vigorously contest the facts concerning Mr. Weisberg's alleged consultancy agreement, there is no dispute that the parties discussed such an arrangement. Also in hot dispute is the exact form of the work product the Department wanted Mr. Weisberg to produce. *Compare* Affidavit of Lynne Zusman, JA 308 *with* Transcript of Hearing, June 26, 1978.

13 The Department did represent that it "is prepared to discuss with Mr. Weisberg a consultancy fee of thirty ($30) dollars per hour for the work he has performed to date." Report to the Court, JA 306–07.

14 The District Court deferred ruling on the issue in an order dated July 6, 1979, JA 439, and at a subsequent hearing. Transcript of Hearing, Nov. 28, 1979, at 3. JA 452. In a memorandum opinion, the District Court, in granting the Department's motion for summary judgment, also addressed the consultancy motion. The court ordered the Department to pay the fee and found that $75 per hour was a reasonable rate. JA 572. The Department moved for reconsideration, but the court denied that motion. JA 604. When appellant moved for an order compelling payment, the Department argued that no contract existed, and that even if one did, the District Court lacked jurisdiction over the claim because it exceeded $10,000. The District Court then permitted additional discovery on the fee issue and ultimately, as noted above, reversed its decision on the consultancy arrangement.

15 The exception to this finding—the "Frederick residency"—mentioned by the District Court apparently refers to the FBI's search efforts to locate two photographs of a suspect provided by Mr. Weisberg to an FBI agent. Mr. Weisberg believed the photographs to be located at the Frederick residency, which is part of the FBI's Baltimore Field Office. *See* Transcript of Hearing, February 26, 1980, at 31–35. No argument is pressed by appellant that the DOJ's search was inadequate for this reason. Thus, this aspect of the District Court's order is not at issue in the present appeals.

16 Mr. Weisberg has withdrawn from the appeal a challenge to the Department's refusal to search another component, the Internal Security Division (ISD). Transcript of Oral Argument, May 8, 1984, at 6–7.

17 One such divisional file, the "Long tickler" file, which was a file of duplicates of Murkin documents temporarily maintained by FBI Special Agent Long, was disclosed, at least in part, to appellant. At oral argument, Mr. Weisberg withdrew that portion of the appeal. Transcript of Oral Argument, May 8, 1984, at 6–7. We pause here to note, however, that appellant's brief is exceedingly vague, with the exception of the Long tickler file, concerning his complaints about *other* divisional files. *See* Appellant's Brief 22, 36. We assume, nevertheless, that he refers to the alleged divisional files referenced at the hearing on February 8, 1980. *See* Transcript of Hearing, February 8, 1980, at 40–41.

18 This issue arose pursuant to appellant's Motion to Compel Disclosure of Field Office Files Withheld as Previously Processed, November 14, 1980, R. 184. This motion was one of a flurry of motions filed subsequent to the District Court's February 26, 1980 Finding as to Scope of Search. JA 477. *See, e.g.,* R. 167 (seeking reprocessing of entirety of Murkin files); R. 183 (seeking further search of individual files of names listed in second request); R. 189 (seeking further search of materials involved in neutron activation testing); R. 190 (seeking further search for Long tickler file); R. 194 (seeking further disclosure of Civil Rights Division files); R. 203 (seeking disclosure of index compiled by CRD in course of responding to appellant's requests); R. 210 (seeking disclosure of Field Office files inventories). The District Court granted many of these requests, Memorandum Opinion, Dec. 1, 1981, JA 572–84. It nevertheless declined to order "mammoth reprocessing" of the Field Office files. *Id.* at 575.

19 Although Mr. Weisberg's brief is extraordinarily vague on what these "certain items" are, it became clear at oral argument that the brief was referring to these particular requests. Transcript of Oral Argument, May 8, 1984, at 10–11. Further, the parties submitted supplemental briefs on this issue which we have fully considered in our resolution of this issue. We also note that at oral argument appellant dropped this aspect of the appeal insofar as it refers to Raul Esquivel and J.C. Hardin. *Id.* at 6–7.

20 To be sure, the Department did in fact disclose information concerning, for example, the Invaders, and the Memphis Sanitation Workers Strike, but it did this pursuant to the August 1977 stipulation, JA 268–69, in order to preclude a *Vaughn* motion by Mr. Weisberg and in order to end the disputes between the parties as to the scope of the Department's duty to search.

21 Indeed, at a hearing in which this issue was discussed, Mr. Lesar, counsel for Mr. Weisberg, even offered to stipulate to limiting these requests regarding individuals to the King assassination. Transcript of Hearing, April 6, 1981, at 58–59. We note that in this and other litigation, Mr. Weisberg has employed similar tactics of delay in raising objections. While the size of the request makes some delay understandable, we think that such delay was not justifiable, particularly when the issue of the scope of the search was expressly litigated and the District Court had decided the issue before Mr. Weisberg even brought the matter to the District Court's attention. Such tactics serve only to handicap the court and the opponent, and we expressly disapprove of them. Even when appellant did bring them to the attention of the court, it was only in the context of a flurry of motions dealing with myriad issues that for the most part had already been litigated. *See supra* note 19. See *Weisberg IV, supra,* 705 F.2d at 1355, for another example of Mr. Weisberg's propensity for delay in raising issues.

22 Thus, we have no occasion to consider the applicability of the Seventh Circuit's decision in *Antonelli v. FBI,* 721 F.2d 615 (7th Cir.1983), to the instant case.

23 Mr. Weisberg apparently does not challenge the District Court's approval of the Department's use of exemption (b)(1). 5 U.S.C. § 552(b)(1) (1982) (exemption for classified information). Even if appellant were appealing this issue, however, he would be very unlikely to prevail in view of the Department's detailed affidavits and the weight accorded an agency's affidavits in support of a decision to withhold information on this ground. *See Ray v. Turner,* 587 F.2d 1187, 1194 (D.C.Cir.1978).

24 We take Mr. Weisberg's exceptions to the Department's use of these exemptions from the "Statement of the Case," rather than from the "Argument" section of Mr. Weisberg's brief. *See* Appellant's Brief 26–27. Thus, as we see it, Mr. Weisberg objects to the Department's use of Exemptions 7(C) and 7(D).

25 We of course observe, consistent with *Lesar,* that "this is not to imply a blanket exemption for the names of all FBI personnel in all documents." *Lesar, supra,* 636 F.2d at 487.

26 Mr. Weisberg has made no claim on appeal that the District Court lacked an adequate factual basis for assessing the Department's use of exemptions. The Department's affidavits and the documents examined by the District Court *in camera* clearly provided such a basis for the court's determinations. *Cf. Lesar, supra,* 636 F.2d at 488.

27 Although Mr. Weisberg's brief is vague on exactly which exemptions he objects to, *see supra* note 25, for the sake of completeness, we deal briefly with some complaints specified only in the section of his brief styled "Statement of the Case."

First, Mr. Weisberg appears to argue that the Department improperly excised, pursuant to Exemption 7(E), which protects from disclosure law enforcement investigatory techniques and procedures, information regarding "Document 91." He argues that the law enforcement techniques described in that document are already well-known. Mr. Weisberg asserts that such techniques included wiretapping, bugging, and mail interception. As the Wood Affidavit explains, however, the technique used during the interview that is the subject of Document 91 is still in use today. To release the particular technique, in the context of that particular investigation, would obviously undermine its use in other similar circumstances. We do not think that the exemption for law enforcement techniques can be read so narrowly.

Second, appellant apparently contends that the Department erred in dropping a number of exemption claims. Appellant's Brief 26. We discern absolutely no error on the part of the Department in dropping claims under exemption (b)(1), when declassification made the documents disclosable. *See* MacDonald Affidavit, JA 525; Second MacDonald Affidavit, JA 556. Nor do we detect any error in DOJ's dropping exemptions under 7(A), since those claims were dropped when the proceeding at issue was no longer pending.

28 *See supra* note 14.

29 The District Court properly exercised jurisdiction over appellant's claim pursuant to 28 U.S.C. § 1346(a)(2) (1976 & Supp. V 1981), since Mr. Weisberg waived his right to recover the amount in excess of $10,000. Memorandum Opinion, April 27, 1980, JA 877; Memorandum Opinion, Jan. 20, 1983, JA 734.

30 Because we agree with the District Court that the term as to duration was an essential term of the proposed consultancy, we need not address the Department's contentions that other material terms were also missing. Accordingly, we do not consider whether the Department, through Ms. Zusman, ever actually offered appellant $75 per hour, as Mr. Weisberg claims, or whether the only offer extended to him was $30 per hour. We note that the District Court appeared uncertain about this issue, finding somewhat ambiguously that it was "more likely than not" that Ms. Zusman in a conversation with appellant's counsel in March 1978 offered to pay Mr. Weisberg $75 an hour. JA 879. In any event, we note that the District Court expressly found that "further terms needed to be agreed upon before proceeding with the consultancy work," JA 736, and that there appears to have been a basic misunderstanding about the work product the Department wanted, with DOJ maintaining that it wanted Mr. Weisberg to produce a list of deletions that he contested, but with appellant actually producing two very lengthy narrative reports. Thus, even were we to agree with Mr. Weisberg that duration was not a material term, we would still have difficulty finding the existence of an enforceable contract in view of the numerous areas of uncertainty revealed by the record. Finally, in view of our resolution of this issue, we need not address the Department's other grounds for affirming the District Court. *See* Appellee's Brief 37 & n. 14.

31 The Department apparently does not challenge the conclusion that appellant substantially prevailed with regard to his first request, by virtue of the fact that he received the TIME, Inc. photographs as a result of the litigation. *See Weisberg v. Department of Justice,* 631 F.2d 824 (D.C.Cir.1980).

32 The District Court in March 1976 indicated that although the amendment of the complaint, which as amended brought in its sweep the vast majority of the documents sought in this litigation, might technically be subject to dismissal for failure to exhaust, she would permit appellant to refile, since over three months had passed and the ten day response period had also been superseded by the passage of time. JA 107. The District Court subsequently denied the Department's formal motion for a stay to permit it to process the voluminous request administratively.

33 We also detect some confusion on the part of the District Court regarding the first and second requests. As noted earlier, the Department does not challenge that appellant substantially prevailed in the litigation regarding the first administrative request. (It does however challenge the District Court's entitlement finding as to that request.) We further note in this regard that appellant began receiving documents responsive to his first request in April 1976. *See supra* note 8. On remand, the District Court should evaluate separately the Department's responses to each of Mr. Weisberg's two requests.

34 There are many examples, too numerous to list here, of such nonproductive time in this litigation. Thus, the court should consider whether the time spent on the many motions listed *supra,* at note 18, resulted in success. Similarly, the court should consider appellant's fruitless challenges to the Department's use of exemptions, the numerous motions seeking reprocessing of both Murkin headquarters and field office files; and the motions for searches of various offices of the Department (including the Attorney General and the Deputy Attorney General). Although this listing is in no way exhaustive, it is meant to illustrate the types of nonproductive time clearly expended in the litigation of this case.

35 With regard to costs, the District Court obviously should reconsider that element as well. We note that the District Court properly excluded copying costs for excessively lengthy affidavits and deducted amounts expended for excessive telephone calls. The District Court should reconsider the award of costs in total, however, particular in view of any deductions from any fee award for nonproductive time.