DANIEL G. BOGDEN
United States Attorney

HOLLY A. VANCE
Assistant United States Attorney
100 West Liberty Street, Suite 600
Reno, NV 89501
Tel: (775) 784-5438
Fax: (775) 784-5181

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JED MARGOLIN, Plaintiff, v. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, Defendant.	Case No. 3:09-CV-00421-LRH-VPC **RESPONSE TO MOTION FOR COSTS (#64)**

COMES NOW Defendant National Aeronautics and Space Administration ("Defendant") and submits this response to Plaintiff's Motion for Costs. (#64). Defendant opposes Plaintiff's motion because Plaintiff has not substantially prevailed in this Freedom of Information Act ("FOIA") action. Even if Plaintiff had substantially prevailed, this Court should exercise its discretion and not award costs because Plaintiff does not satisfy the criteria for such an award. Accordingly, this Court should deny the Motion for Costs, as explained more fully below.

BACKGROUND[1]

Plaintiff made a FOIA request to the National Aeronautics and Space Administration ("NASA") for all documents pertaining to Plaintiff's patent infringement claim with the agency. In response to that request, NASA produced a number of documents but withheld others pursuant to

[1]The facts in this section come from this Court's Order dated March 31, 2011 (# 62) and the declaration of Courtney Graham, attached herewith.

exemptions 3, 4, 5 and 6. This Court upheld NASA's withholding of all documents except for one two-page letter for which NASA asserted the deliberative process privilege under exemption 5.

ARGUMENT

A. Plaintiff is not entitled to an award of costs because he has not "substantially prevailed" in this action.

Plaintiff asks this Court to award him costs in the amount of $1,640.68. (# 64 at 4). The FOIA authorizes this Court to award reasonable costs to a plaintiff who has "substantially prevailed" in a FOIA action. 5 U.S.C. § 552(a)(4)(E)(I) (2006), *amended by* OPEN Government Act of 2007, Publ. L. No. 110-175, 121 Stat. 2524. Plaintiff has not "substantially prevailed" here because this Court upheld Defendant's withholding of all documents except for the two-page letter referenced above. As Plaintiff himself readily concedes, he "basically lost this lawsuit." (#64 at p. 3). Under the circumstances, he is not entitled to costs.

B. Even if Plaintiff had "substantially prevailed" in this action, this Court should exercise its discretion and deny costs because Plaintiff does not satisfy the criteria for such an award.

Even if Plaintiff had substantially prevailed in this action, this Court should decline to exercise its discretion to award costs. *See Young v. Dir.*, No. 92-2561, 1993 WL 305970, at *2 (4th Cir. Aug. 10, 1993) ("Even if a plaintiff substantially prevails, however, a district court may nevertheless, in its discretion, deny the fees."). Courts consider four factors in deciding whether to exercise their discretion to award costs to a plaintiff who has substantially prevailed in a FOIA action. Those factors are: (1) the public benefit derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding had a reasonable basis in law. *Church of Scientology v. USPS*, 700 F.2d 486, 492 (9th Cir. 1983).

Applying those factors here militates against awarding costs to Plaintiff. First, there is no public benefit derived from this case — the letter that Defendant has been ordered to produce is a decision in a patent infringement claim filed by someone other than Plaintiff; its production will provide no benefit to the public at large. *See Cotton v. Heyman*, 73 F.3d 1115, 1123 (D.C. Cir. 1995) (the "public benefit" factor speaks for an award [of costs] when the complainant's victory is

likely to add to the fund of information that citizens may use in making vital political choices."); *Klamath Waters Users Protective Ass'n v. U.S. Dep't of Interior*, 18 F. App'x 473, 475 (9th Cir. 2001) (declining to award fees for the release of documents "having marginal public interest and little relevance to the making of political choices by citizens").

Under the second factor, costs are typically denied where a plaintiff has an adequate private commercial incentive to litigate his FOIA demand even in the absence of an award of costs. *See Chamberlain v. v. Kurtz,* 589 F.2d 827, 842-43 (5th Cir. 1979) (concluding that plaintiff who faced $1.8 million deficiency claim for back taxes and penalties "needed no additional incentive" to bring FOIA suit against IRS for documents relevant to his defense). The third factor is similar to the second factor; costs are generally not awarded in cases where the plaintiff had an adequate personal incentive to seek judicial relief. *See Maydak v. DOJ*, 579 F. Supp. 2d 105, 109 (D.D.C. 2008) (refusing to award litigation costs where plaintiff requested records pertaining to himself and matters affecting his detention). Applying the second and third factors here, Plaintiff clearly had an incentive to litigate this FOIA action to gather information related to the investigation of his patent infringement claim. Under the circumstances, an award of costs is not warranted.

As for the fourth factor, there is no evidence that NASA acted in bad faith in withholding the two-page letter. *See Read v. FAA*, 252 F. Supp. 2d 1108, 1110-11 (W.D. Wash. 2003) ("[r]ecalcitrant and obdurate behavior 'can make the last factor dispositive without consideration of any of the other factors.'"). The letter was inadvertently included with documents gathered in response to Plaintiff's FOIA request. (*See* Graham Dec. at page 3). The letter, however, has nothing to do with Plaintiff's patent infringement case and should not have been included with either Plaintiff's patent infringement claim records or Plaintiff's FOIA request record . (*See* Graham Dec. at page 2). Surely, NASA's inadvertente in including the letter as part of the agency's response to Plaintiff's FOIA request does not constitute bad faith. Accordingly, an application of the fourth factor also militates against an award of costs.

CONCLUSION

For the reasons explained above, this Court should deny Plaintiff's Motion for Costs.[2]

Respectfully submitted,

DANIEL G. BOGDEN
United States Attorney

/s/ Holly A. Vance
HOLLY A. VANCE
Assistant United States Attorney

[2]Plaintiff appears to argue that he is entitled to costs based on NASA's delay in producing the requested documents. A delay in producing documents, however, is an insufficient reason to award costs. *See Muffoletto v. Sessions*, 760 F.Supp. 268, 277 (E.D. N.Y. 1991) (maintaining that public benefit in compelling FBI to act more expeditiously is insufficient).

CERTIFICATE OF SERVICE

JED MARGOLIN, Plaintiff, v. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, Defendant.	Case No. 3:09-CV-00421-LRH-VPC

The undersigned hereby certifies that service of the foregoing **RESPONSE TO MOTION FOR COSTS (#64)** has been made by electronic notification through the Court's electronic filing system or, as appropriate, by sending a copy by first-class mail to the following addressee(s) on April 20, 2011:

Addressee:

JED MARGOLIN
1981 Empire Road
Reno, NV 89521-7430

/s/ Holly A. Vance
Holly A. Vance