

# FIRST AMENDMENT PROJECT

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A federal judge has ordered the FBI to pay nearly half a million dollars to an author who successfully forced the bureau to release records concerning its secret relationship with Ronald Reagan in the years before he was president and other records concerning the FBI's covert activities at the University of California.

U.S. District Judge Edward M. Chen of Northern California ruled in two orders dated October 17, 2012 that the FBI must pay journalist Seth Rosenfeld of San Francisco \$470,459.75 because he "substantially prevailed" in two long-running lawsuits he brought under the federal Freedom of Information Act (FOIA).

The U.S. Department of Justice, which represented the FBI in the cases, had argued in court that the FBI should pay no fees because Rosenfeld did not prevail in court and the FBI would have released the information any way.

But Judge Chen ruled, "If anything, the record demonstrates quite the opposite." Chen added, "The record demonstrates both that Rosenfeld's suit against the FBI resulted in his receiving judicial orders granting the relief sought in his complaint, and that the suit acted as the 'catalyst' in prompting the FBI's ... disclosure of documents he sought." (Quotes are from page 6 of the 07-03240 order.)

Judge Chen ruled that his review of the litigation showed that were it not for Rosenfeld's lawsuit the records on Reagan would not have been released. (p. 9, Ibid.) Judge Chen also ruled that releasing the records was of public benefit. (p. 10, Ibid) He ruled that the FBI had unreasonably withheld the records. (p. 12, 13, Ibid.)

Rosenfeld said Thursday in response to the rulings, "These are terrific decisions that uphold the public's right to know. They affirm that government agencies, including the FBI, should not

improperly withhold public information, and that when they do they face substantial penalties. He added, "The FBI could have avoided this cost to the taxpayers if it had reasonably complied with the law."

Although the fee award was made to Rosenfeld, he will receive none of money. The award will go to the First Amendment Project of Oakland, the non-profit organization which litigated the lawsuits pro bono over a span of 20 years.

James Wheaton, an attorney with the First Amendment Project, said, "These decisions promote the goals of free speech and a free press that are vital to democracy."

Part of the award will cover the costs of Bryan Cave, the law firm whose San Francisco office successfully brought the motions for fees on behalf.

David Greene, an attorney with Bryan Cave, said, "We are pleased that the court recognized the importance of Mr. Rosenfeld's work and the unreasonableness of the positions the FBI took in failing to search for and in withholding public records."

As a result of the two lawsuits covered by Chen's rulings, the FBI released more than 10,000 pages of records showing that Ronald Reagan, in the years before he became president, had been a more active FBI informant than previously known, and that the FBI, under the late director J. Edgar Hoover, subsequently did personal and political favors for Reagan even though it was outside of the bureau's jurisdiction.

The FBI released more than 10,000 additional pages concerning its operations at UC during the Cold War.

The released FBI records were among the key material Rosenfeld used in his book *Subversives: The FBI's War on Student Radicals, and Reagan's Rise to Power*, published in August by Farrar, Straus and Giroux. An examination of the FBI's covert activities at the University of California during the Cold War, *Subversives* traces the FBI's secret involvement with three iconic figures at Berkeley during the 1960s: the ambitious neophyte politician Ronald Reagan, the fierce but fragile student radical Mario Savio, and the liberal university Clark Kerr.

Rosenfeld is a former investigative reporter for the San Francisco Examiner and San Francisco Chronicle and a winner of the George Polk Award.

The fee decision was made under a provision of the FOIA that says that if requesters substantially prevail in court they may demand that the government pay their legal fees. The provision is intended to discourage agencies from improperly withholding public information.

Chen's fee awards are in addition to more than \$560,000 in attorney's fees that the FBI previously paid to Rosenfeld as a result of his FOIA litigation seeking records on the FBI's activities concerning the University of California during the Cold War.

All told, the FBI has released more than 300,000 pages in response to five lawsuits Rosenfeld has brought under the Freedom of Information Act since 1985. The released records were the basis for articles in the San Francisco Examiner and San Francisco Chronicle as well as Rosenfeld's book, *Subversives*.

The fee awards totaling more than \$1 million are in addition to the FBI's own legal costs, and the more than \$1 million the FBI says it spent processing the requested records.

The two lawsuits covered by Chen's rulings are Rosenfeld v. U.S. Department of Justice, et al, No. C-07-3240 EMC, and Rosenfeld V. U.S. Department of Justice, et al, No. C-90-3576-EMC, both filed in the Northern District of California.

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