UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG)

Plaintiff)

v.) Civil Action No. 75-1996

U. S. DEPARTMENT OF JUSTICE)

Defendant)

MEMORANDUM OPINION

This Freedom of Information Act case is before the Court on plaintiff's motion for attorney's fee and litigation costs, and plaintiff's motion for an order compelling defendant to pay consultancy fee. For the reasons stated below, the Court awards attorney's fees to plaintiff in the amount of $93,926.25 orders plaintiff to submit further documentation on his litigation costs, and denies plaintiff's motion concerning the consultancy fee.

I.

Background

Section 552(a)(4)(E) of the Freedom of Information Act, 5 U.S.C. § 552, provides that a district court of the United States "(m)ay assess against the United States reasonable attorney fees and other litigation costs reasonably

incurred in any case under this section in which the complainant has substantially prevailed."

On November 28, 1975, Harold Weisberg filed this action, seeking records on the assassination of Dr. Martin Luther King, Jr. The FBI deliberately ignored previous requests for such material from Mr. Weisberg dating back to 1969. The complaint requested records on Dr. King's assassination within seven categories.

Mr. Weisberg sought all information made available by the Department of Justice to any author or writer on the assassination, disclosure of all photographs or sketches of any suspect in the assassination, and all photographs from whatever source taken at the scene of the crime on April 4, 1968, the day of the assassination, and the following day, April 5. In addition, Mr. Weisberg requested the results of any (1) ballistics tests, (2) spectrographic or neutron activation analyses, (3) scientific tests performed on the dent in the windowsill of the bathroom window frame from which Dr. King was shot, and (4) scientific tests performed on the cigarette remains found in a white Mustang abandoned in Atlanta after the assassination. Complaint, ¶ 4.

The complaint was amended on December 24 by adding a five-page request for records within 28 additional categories. The additional categories comprised an exhaustive and detailed

list: receipts for records or physical evidence; reports of tests performed on evidence, including fingerprints; the taxicab log of Memphis cab driver James McGraw or the cab company for which he worked; transcripts of radio logs of Memphis police or Shelby County Sheriff's office for April 4, 1968, records of communications between the Department of Justice and 34 named individuals; communications from the District Attorney General of Shelby County, Tennessee and the Attorney General of Tennessee to the Department of Justice; records of surveillance of the Committee to Investigate Assassinations and 23 named persons, including plaintiff and his counsel; records pertaining to any witness; reports concerning the guilty plea of James Earl Ray; records of inquiry by any member of the news media concerning the assassination; records of any re-investigation; records pertaining to two named motels; records pertaining to James Earl Ray's eyesight; records not made available to plaintiff which were provided to other writers; any list or index of evidence; records of surveillance of a group of young black radicals known as The Invaders or of any unions involved in the garbage strike in Memphis; records of any law enforcement contact with The Invaders; and last, records tending to exculpate James Earl Ray. Exhibit F to the Complaint.

The Government insisted at the start that the case was moot. See Transcript of Hearing (Tr.) on February 11, 1976, at 2-3. The Court denied the Government's motion for a protective order and ordered it to answer plaintiff's interrogatories. Id., at 3. Plaintiff filed a motion to compel answers to 32 of 39 interrogatories on March 25, 1976. By May 1976, five months later, plaintiff had received only about 100 documents. Tr., May 5, 1976, at 13. The Government continued to contend that the case was moot. Id., at 5.

In September 1976, the Court held a two-day hearing concerning the delay in processing records in this action. Special Agent John Cunningham, an official in the Freedom of Information Act/Privacy Act section of the Federal Bureau of Investigation (FBI), echoing a directive of the Attorney General, testified that "maximum disclosure would be the rule because of the historial interest--the historical nature of this case, (and) the public interest in this case" (order inverted). Tr., September 16, 1976, at 89; see also Affidavit of Quinlan Shea, Jr., director of the Office of Privacy and Information Appeals, FBI, filed August 10, 1976, ¶ 12.

In October, the Government acknowledged that plaintiff had triggered a complete review of the Martin Luther King assassination file. Tr., October 8, 1976, at 5. It was apparent to the Court and the parties at the time that Mr.

Weisberg was instrumental in causing review of the investigation of Dr. King's assassination by the Office of Professional Responsibiity of the Department of Justice and by the House Select Committee on Assassinations. Id.

Releases of documents to plaintiff began on October 28, 1976, nearly one year after the filing of the complaint. See Affidavit of Special Agent Horace Beckwith, March 3, 1977. Within the next year plaintiff received some 44,000 pages. Tr., November 2, 1977, at 2.

The Consultancy Arrangement

At a meeting on November 11, 1977 with plaintiff and his counsel, Mrs. Lynne Zusman, the Government attorney then assigned to this case, and Deputy Assistant Attorney General William Schaffer proposed that the Department of Justice hire Mr. Weisberg as a consultant. The purpose of the consultancy was to have Mr. Weisberg review the approximately 44,000 pages of documents which had been released and list the deletions about which he was raising questions. See tr., March 7, 1978, at 2-3 and 7 (statements of Government counsel); defendant's Report to the Court, May 12, 1978.

Mr. Weisberg agreed to the proposal in a conference in the Court's chambers on November 21, 1977. However, no hourly rate, duration, or exact nature of the work product were agreed upon. Plaintiff's counsel maintains that Mrs.

Lynne Zusman offered a rate of $75 an hour in a telephone conversation with him on January 16, 1978. Plaintiff's Memorandum to the Court, May 16, 1978. Mrs. Zusman denies making such an offer. Defendant's Report to the Court, supra. According to Mrs. Zusman, she merely indicated that the only similar consultant arrangement she knew of was for twelve hours at $75 an hour, and that was never adopted. Id.

Deputy Assistant Attorney General Schaffer testified in Court on May 24, 1978 that the Assistant Attorney General had authorized him to enter into an arrangement to pay Mr. Weisberg $30 an hour for his time. Tr., May 24, 1978, at 3. The Department of Justice rejected plaintiff's bill in June 1978. Pursuant to the Court's order on December 1, 1981, plaintiff submitted an affidavit stating that he spent 205 hours on the consultancy between January 21, 1978 and June 24, 1978. He seeks $15,914.23 for his work, including $496 for transcription of dictation by his wife and $50.31 for expenses. See Affidavit of Harold Weisberg, December 5, 1981.

* * *

In September 1978, Quinlan Shea, Jr., then director of the FBI's FOIA appeals office, was placed in charge of processing records for this action at the Court's request. Mr. Shea made extensive efforts to review the FBI's search of its headquarters files and thoroughly process responsive documents.

See, e.g., tr., September 14, 1978, at 9; September 28, 1978, at 2-3; January 12, 1979, at 4-6. Plaintiff began filing numerous motions directed at specific items of his request. The Court granted some, others it denied.

The Court granted in whole or part the following motions: disclosure of indices in the Memphis field office of the FBI, Order of August 15, 1979; disclosure of FBI abstract cards of its investigation, tr., February 8, 1980 at 7-8 and 10, cf. Weisberg v. U. S. Department of Justice, No. 75-1996, slip op. at 3 (December 1, 1981); filing of Vaughn index, granted in part by orders requiring two Vaughn samplings of every 200th document, Orders of February 26, 1980 and September 11, 1980; disclosure of records in Civil Rights Division of the Department of Justice, granted in part, Weisberg v. U. S. Department of Justice, supra, slip op. at 5-6; disclosure of records in the offices of the Attorney General and Deputy Attorney General, Order of September 11, 1980, further search ordered in part, Weisberg v. U. S. Department of Justice, supra, slip op. at 9 n.1; search for neutron activation and spectrographic materials, id., at 5; and disclosure of records described in field office inventories found by the Court not to have been released earlier in the litigation, id., at 8-9. In addition, this litigation caused a search or release of records in other ways.

Plaintiff apparently received from this action documents referred to the Central Intelligence Agency although his motions concerning them were denied. Affidavit of Harold Weisberg, October 28, 1982, ¶ 58. The Court ordered sua sponte a renewed search for the taxicab manifest sought by plaintiff. Weisberg v. U. S. Department of Justice, supra, slip op. at 10 n.1. The Government released several photographs copyrighted by Time Magazine after pursuing an appeal, tr., August 15, 1980, at 4.

Three of plaintiff's motions which the Court denied involved few documents, i.e., disclosure of six documents from the MURKIN file; disclosure of FBI laboratory ticklers of three documents; disclosure of 114 documents from the MURKIN file withheld in their entirety. Before denying the motions, the Court reviewed in camera the six documents (the Government had released three previously), the laboratory ticklers, and 26 of the documents withheld in their entirety. Weisberg v. U. S. Department of Justice, No. 75-1996, slip op. at 3-4, 5 and 7-8 (December 1, 1981); id., memorandum order at 2-3 (January 5, 1982).

The other motions of plaintiff denied by the Court did not deny him specific records. Those motions sought mammoth and repetitious searches or reprocessing for documents which the Department of Justice had processed previously in

reasonably thorough fashion, i.e., releasing field office records offered by letter of Clarence Kelly, Director of the FBI; reprocessing FBI field office records withheld as previously processed; appointing Quinlan Shea, Jr., in charge of the case or in the alternative, requiring him to process plaintiff's administrative appeals; and reprocessing records at FBI headquarters, id., slip op. at 3, 4, 6, and 10 n.1 (December 1, 1981).

The Court denied the Government's first motion for partial summary judgment on the thoroughness and scope of the search for responsive documents. Order, August 24, 1979. After three hearings and numerous oral orders to search for specific items, the Court granted the Government's second such motion in part by declaring that the FBI had made a proper and good faith search of its headquarters files on Dr. King's assassination (labeled MURKIN files) and in the files of its field offices. Order, February 26, 1980; see generally tr., January 1, February 8 and 26, 1980.

On September 11, 1980, the Court denied the Government's motion for summary judgment on the deletions in documents released to plaintiff, and ordered the preparation of a second sampling for a Vaughn index. The Government filed a second dispositive motion for summary judgment on December 10, 1980. After resolving numerous motions by plaintiff, the

Court ultimately granted the Government's motion for summary judgment, Weisberg v. U. S. Department of Justice, No. 75-1996 (December 1, 1981), and dismissed the case after in camera review of documents, id. (memorandum order) (January 5, 1982).

Both parties appealed. The Court of Appeals stayed those proceedings until this Court disposed of all motions. Weisberg v. U. S. Department of Justice, Nos. 82-1229 and 1274 (order) (D. C. Cir. April 8, 1982).

II.

Discussion

A.

The Court ruled previously that plaintiff substantially prevailed. Weisberg v. U. S. Department of Justice, slip op., at 3 (December 1, 1981); memorandum order, at 2 (January 5, 1982). Four criteria are relevant under the Freedom of Information Act (FOIA) in deciding whether or not the Court should exercise its discretion to grant an award of attorney's fees and costs:

(1) the benefit to the public, if any, derived from the case;

(2) the commercial benefit to the plaintiff;

(3) the nature of the plaintiff's interest in the records sought; and

(4) whether the government's withholding of the records had a reasonable basis in law.

Fenster v. Brown, 617 F.2d 740, 742 (D. C. Cir. 1979).

The four criteria were taken from S. 2543, 93d Cong., 2d Sess. (1974), a bill to amend the FOIA. The House and Senate conferees omitted specific reference to the criteria from the final version because they believed that courts already applied them. An explicit reference to the four criteria in the statute, the conferees stated, could be too delimiting and was unnecessary. H.R. Rep. No. 1380, 93d Cong., 2d Sess. 10 (1974).

1. Public Benefit

The Senate report indicated that "a court would ordinarily award fees, for example, where a newsman was seeking information to be used in a publication or a public interest group was seeking information to further a project benefitting the public." Fenster v. Brown, supra, at 742 n.4, quoting S. Rep. No. 854, 93d Cong., 2d Sess. 19 (1974).

Several factors indicate the public benefitted from this litigation. The FBI placed the King assassination file in its public reading room after plaintiff filed suit. The Department of Justice granted plaintiff a waiver of fees for searching and copying. Numerous Department of Justice officials, including an attorney general, declared the records

released to plaintiff of historical significance and public interest. Plaintiff's persistence in this action and others was largely responsible for two audits of the FBI's investigation of Dr. King's assassination: one by Congress and the other by the Office of Professional Responsibility of the Department of Justice. The abstract cards, indices, and tickler files released to plaintiff contained data which are valuable to historians. Newspaper articles have been published based on records released to plaintiff in this action. Plaintiff intends to write a book using the records, and a major university has arranged to store the records released to plaintiff in its archives.

Where, as here, the plaintiff's "victory is likely to add to the fund of information that citizens may use in making vital political choices," the benefit to the public favors an award. Blue v. Bureau of Prisons, 570 F.2d 529, 534 (5th Cir. 1978). Some of the documents released to plaintiff reflected FBI surveillance of individuals or civil rights groups exercising constitutional rights, including Dr. King and his associates. Disclosure of these documents "adds important knowledge to the public domain, and adds to the collective knowledge of our society and the Government's activity in it." Katz v. Department of Justice, 498 F.Supp. 177, 186 (S.D. N.Y. 1979).

2. Commercial Benefit

The Court agrees with both parties that no commercial benefit to plaintiff has resulted or is likely to result from this action, even though plaintiff has been working on a book about Dr. King's assassination. Beginning in 1969 and continuing throughout several years of this litigation, the FBI supplied other writers with information intentionally withheld from Mr. Weisberg. Most of the potential commercial benefit was erased by those actions. To the extent potential for commercial benefit remains, plaintiff's interest closely resembles a news interest. The Senate report expressly excluded news interests from consideration as a commercial interest under this factor. Fenster v. Brown, supra, at 542 n.4, quoting S. Rep. No. 854, 93d Cong., 2d Sess. 19 (1974).

3. Nature of Interest

Where the plaintiff's interest in the information is scholarly, journalistic, or public-interest oriented, a court will generally award fees. Id. Plaintiff has distributed some of the records to news media. He is writing a book using the information. A university will keep the records for posterity. These circumstances favor an award, even though other FOIA cases have been brought seeking similar information. See Goldstein v. Levi, 415 F.Supp. 303, 305 (D.D.C. 1976)

(person who worked as producer of television show and intended to write a book on the Rosenberg spy case deserved award even though other FOIA cases sought similar information).

4. Reasonable Basis for Withholding

Under this criterion, "a court would not award fees where the government's withholding had a colorable basis in law but would ordinarily award them if the withholding appeared to be merely to avoid embarrassment or to frustrate the requester." Fenster v. Brown, supra, at 542 n.4, quoting S. Rep. No. 854, 93d Cong., 2d Sess. 19 (1974). Our Court of Appeals has emphasized that "(w)hat is required is 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. 1977).

An agency has a "duty to take reasonable steps to ferret out requested documents" (emphasis in original). McGehee v. Central Intelligence Agency, No. 82-1096, slip op. at 10 (D. C. Cir. January 4, 1983). For nearly a year after the filing of this action, the Government stalled by claiming mootness. Two more years passed before the Court found that the FBI had made a proper and good faith search of its files. The Court required many further searches and releases before

upholding the withholdings of records from plaintiff six years after he filed suit.

Certainly some of the delay stemmed from the searching and processing of an enormous number of records. When considered in the context of the earier stonewalling and the repudiation of the consultancy arrangement, however, a significant portion of the post-1977 delay can only be attributed to a deliberate effort to frustrate this requester. The delay attributable to the Government's effort to frustrate Mr. Weisberg more than offsets the reasonable basis of the Government for concluding that the information ultimately withheld was exempt. Cuneo v. Rumsfeld, supra, at 1366.

Since all four factors favor plaintiff, he is entitled to an award of reasonable attorney's fees and other litigation costs reasonably incurred in this case.

B.

A fee-setting inquiry "begins with the lodestar: the number of hours reasonably expended multiplied by a reasonable hourly rate." Copeland v. Marshall, 641 F.2d 880, 891 (D. C. Cir. 1980) (en banc) (Copeland III).

The fee application must provide "fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiation . . ." Jordan v. U. S. Department of Justice, 691 F.2d 514,

520 (D. C. Cir. 1982). "(D)etailed summaries based on contemporaneous time records" are desirable. National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D. C. Cir. 1982) (National Veterans). At least in Title VII and FOIA cases, fees are not recoverable for time expended on issues on which plaintiff did not ultimately prevail. Id. However, "time should be excluded only when the claims asserted are truly fractionable." Id., at 1327 n.13.

Plaintiff filed a 24-page itemization of his attorney's time, based for the most part on contemporaneous records. The list is thorough and detailed. In view of the Court's decision on plaintiff's consultancy fee motion today, the Court excludes the 44 hours plaintiff's counsel spent on it between February 3, 1982 and July 22, 1982. See attachment 2 to motion for attorney's fee and litigation costs, at 21-23. Only 2.5 hours were expended on compensable issues during that period (the time spent on plaintiff's appeal is also excluded).

In addition, the Court excludes seven hours spent on unsuccessful motions which were reasonably fractionable. Those motions sought reprocessing of FBI headquarters and field office records, attachment, supra, at 18, and placing Mr. Shea in charge of the case, id., at 20.

Defendant did not challenge the reasonableness or adequacy of description of the number of hours and nature of work expended by plaintiff's counsel. The Court finds them reasonable, with one exception. Plaintiff's counsel expended 86.7 hours preparing the attorney's fee application and reply. With due recognition to the complexity and length of the case and the fee motion, that amount of time claimed is excessive. He is not entitled to compensation, for example, for reconstructing time when a contemporaneous accounting should have been retained. Given the scope of this case and the fee motion, the Court finds an award for 50 hours would be reasonable.

The number of hours reasonably expended by plaintiff's counsel in this case is therefore 922.6 hours (total claimed by plaintiff including the reply brief) minus 87.7 hours (exclusions for 44 hours spent on unsuccessful consultancy fee motion, 7 hours on other fractionable unsuccessful issues, and 36.7 hours spent unreasonably on fee application), or 834.9 hours.

To determine a reasonable hourly rate, a court looks to the prevailing rate in the community for similar work. Relevant considerations include "the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case."

Copeland III, 641 F.2d, at 892. The rate should also depend on the experience of the attorney and type of work involved. Id.

The Court of Appeals established further guidelines to determine reasonable hourly rates in the National Veterans case:

> An applicant is required to provide specific evidence of the prevailing community rate for the type of work for which he seeks an award. For example, affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases provide prevailing community rate information. Recent fees awarded by the courts or through settlement to attorneys of comparable reputation and experience performing similar work are also useful guides in setting an appropriate rate.

675 F.2d, at 1325.

Plaintiff's counsel settled two similar but less time-consuming cases for $75 an hour in 1978 and 1982. Affidavit of James Lesar, August 19, 1982, ¶ 21. Other fee awards cited by plaintiff are not relevant because they did not involve FOIA cases and contained no description of the attorneys' background. The Court has considered Mr. Lesar's extensive experience in litigating FOIA cases the past twelve years and the comparative undesirability of this case due to plaintiff's unpopularity with many government officials. Mr. Lesar claimed a rate of $100 an hour. The Court finds a reasonable rate in this case to be $75 an hour, the same rate

plaintiff's counsel obtained in settling two other FOIA cases recently. Accordingly, the lodestar award is $62,617.50 (834.9 hours x $75).

An adjustment to the lodestar may be appropriate "for the risk that the lawsuit would be unsuccessful and that counsel would receive no fee"; "for delay in receipt of payment for services"; or "to reflect unusually good or bad representation, taking into account the level of skill normally expected of an attorney commanding the hourly rate used to compute the lodestar." National Veterans, 675 F.2d, at 1328.

Plaintiff's counsel has presented convincing support for the requested risk premium of 50%. This case was unnecessarily prolonged, preventing counsel from taking many other cases over a six-year period. Exhaustive examination of the thoroughness of the search for records in multiple offices was required. Plaintiff and his counsel incurred substantial out-of-pocket expenses. The outcome was highly uncertain, and plaintiff's counsel would not have received significant remuneration if the suit were unsuccessful. The lodestar does not reflect a risk allowance; the use of a rate arrived at by settlement negotiations represented a reasonable, market-rate compensation. See National Veterans, 675 F.2d, at 1328. In the unusual circumstances of this case, the Court grants

plaintiff's request for a risk premium of 50%. The lodestar therefore rises $31,308.75 to $93,926.25.

The Court disagrees with plaintiff's other requests for adjustment of the lodestar. An adjustment for delay in receipt is not applicable since the hourly rate is based on present hourly rates. National Veterans, 675 F.2d, at 1329. Plaintiff seeks an increase of 100% in the lodestar because of deliberate delay and obdurate conduct. The Court has found no support for doubling an award of attorney's fees on that asserted basis. It is true that "a federal court may award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Hall v. Cole, 412 U. S. 1, 5 (1973). However, that equitable power has been displaced by the explicit statutory provision in FOIA for an award of fees. Cf. Fleischmann Distilling Corporation v. Maier Brewing Company, 386 U. S. 714, 720 (1967) ("When a cause of action has been created by statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied"). The Court already considered defendant's conduct in deciding that plaintiff was entitled to an award. See LaSalle Extension University v. Federal Trade Commission, 627 F.2d 481 (D. C. Cir. 1980) (noting that court may award fees to requesters who had a private self-interest for, and received a

pecuniary benefit from their FOIA request where government officials were "recalcitrant on their opposition to a valid claim or . . . otherwise engaged in obdurate behavior"). To double the lodestar because of the defendant's conduct in this case would constitute an award of damages, not fees.

C.

Plaintiff asserted costs in the amount of $12,389.85. His counsel claimed other costs amounting to $4,201.78. The costs were divided into eight categories. Consolidating the costs of plaintiff and his counsel, plaintiff seeks $7,245.27 for photocopying; $4,045.87 for telephone calls; $3,556 for transcripts of depositions and court hearings; $1,212.23 for travel expenses; $255.18 for postage; $157.50 for Nimmer on Copyright; $108.08 for photographs; and $11.50 for notary fees.

The Government argued that "other litigation costs reasonably incurred," 5 U.S.C. S 552(a)(4)(E), permits only the award of court costs. The Government did not define what it meant by court costs except to state that cost of living and research costs were excluded. While the Court agrees with the Government that costs of living and research costs should be excluded, the plain language of the FOIA and its legislative history reveal a practical understanding of the costs of a FOIA lawsuit that go beyond filing fees and other obligatory court costs.

In 1972, the House Committee on Government Operations recommended amending the FOIA to permit awards of "court costs and reasonable attorneys' fees." H. Rep. No. 92-1419, 92nd Cong., 2d Sess. 83 (1972). Both Senate and House bills to amend the FOIA were phrased using broader terms. They provided for "attorney fees and other litigation costs reasonably incurred." H.R. 12471, 93d Cong., 2d Sess. (1974), reprinted in Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts, and Other Documents, 94th Cong., 1st Sess. 145, 147 (1975) (Source Book); S. 2543, 93d Cong., 2d Sess. (1974), reprinted in Source Book, at 194, 202. This language passed both houses without revision.

The House report referred to recovery of costs, not court costs. H. Rep. No. 93-876, 93d Cong., 2d Sess. (1974), reprinted in Source Book, at 121, 126. The Conference Report referred to litigation costs. H. Rep. No. 93-1380, 93d Cong., 2d Sess. (1974), reprinted in Source Book, at 219, 227. Only the Senate report referred to court costs, and that report also referred to litigation costs. S. Rep. No. 93-854, 93d Cong. 2d Sess. (1974), reprinted in Source Book, 153, 169-70. See Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509, 512-13 (1st Cir. 1976). The legislative history shows that Congress did not intend a narrow construction of "litigation costs reasonably incurred."

With the exception of $157.50 for purchase of a treatise, plaintiff's categories of costs amply fit within the rubric of "litigation costs reasonably incurred." However, in view of the considerable sums involved, some explanation is necessary concerning the timing and reasonableness of the asserted expenses. Without requiring exact computation, the Court needs to know the approximate cost per page of photocopying; distribution of photocopying between court filing and copies for parties on the one hand, and research use; the need for multiple long-distance telephone calls in this case and their general nature; and a calculation of travel expenses incurred by plaintiff in meeting with his counsel, government officials, or coming to court. An explanation of the year in which these expenses were approximately incurred would also aid the Court's inquiry.

Accordingly, after plaintiff submits adequate documentation for the costs of this lawsuit, the Court will determine the specific amount reasonably incurred.

D.

Upon review of the discovery conducted by plaintiff and further examination of the law, the Court vacates its order granting plaintiff a consultancy fee and denies plaintiff's motion for order compelling payment of a consultancy fee. First, the consultancy arrangement is not a

litigation cost reasonably incurred; plaintiff made no out-of-pocket payment for which he seeks reimbursement. (The $50.31 listed in expenses for the consultancy arrangement should be treated in the documentation to be submitted by plaintiff on costs.) Rather, plaintiff seeks an award in the nature of payment of wages under a contractual agreement. Both parties agreed that the arrangement had no parallel in other FOIA litigation. Because the claim is for over $10,000 and is not a normal litigation cost under the Freedom of Information Act, exclusive jurisdiction for enforcing it rests with the Court of Claims (now the United States Claims Court). 28 U.S.C.A. § 1346(a)(2) (Supp. 1982); Village of Kaktovik v. Watt, 689 F.2d 222, 231 n.76 (D. C. Cir. 1982) (enforcement of settlement contract is within exclusive jurisdiction of Court of Claims).

Assuming plaintiff would waive the excess of the claim over $10,000 as he is entitled to do, see Stone v. United States, 683 F.2d 449, 452 (D. C. Cir. 1982), the Court decides on the merits for the Government.

In the first place, no contract was formed because essential terms were never agreed upon: the amount of time to be spent on the consultancy and the place where plaintiff was to work. The Restatement (Second) of Contracts states in relevant part:

> (1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
> (2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.
> (3) The fact that one or more terms of a proposed bargain 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.

§ 33 (1981).

The place of work was important because if plaintiff was to work at the defendant's offices, the defendant's assent to the arrangement would have been clear. The amount of time to be spent was crucial because the total cost to the defendant would depend primarily on it. The lack of agreement on these terms prevented a contract from coming into existence, even accepting that Mrs. Zusman had offered plaintiff $75 an hour. Restatement (Second) of Contracts § 33 (1981). Courts have often found that "(v)agueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement" prevented the creation of an enforceable contract. 1 A. Corbin, Contracts § 95 (1950 & Supp. 1982).

Ordinarily, since an agreement was intended by both parties, the Court would infer a reasonable time and place for performance and a reasonble hourly rate. Id. Two factors persuade the Court otherwise here. First, plaintiff should

reasonably have realized that further terms needed to be agreed upon before proceeding with the consultancy work. Second, the defendant did not use plaintiff's work and thus derived no benefit from it.

Contrary to the Government's contention, the lack of a writing would not bar recovery through quantum meruit or implied in fact contract. Narva Harris Construction Corporation v. United States, 574 F.2d 508, 510-11 (Ct.Clms. 1978). For the same reasons the Court declined to infer essential contractual terms, the Court concludes that it would be unfair to defendant to award plaintiff in quantum meruit or for breach of an implied in fact contract. While the Court does not approve of the Government's repudiation of the consultancy arrangement, an award to plaintiff for time spent voluntarily on this lawsuit would duplicate the fee award to his counsel.

An appropriate order accompanies this opinion.

JUNE L. GREEN
U. S. DISTRICT JUDGE

January 18, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG)
Plaintiff)
v.) Civil Action No. 75-1996
U. S. DEPARTMENT OF JUSTICE)
Defendant)

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DISTRICT OF COLUMBIA

O R D E R

Upon consideration of plaintiff's motions for attorney's fee and litigation costs and for an order compelling defendant to pay consultancy fee, defendant's oppositions thereto, plaintiff's replies thereto, plaintiff's motion for leave to file October 31, 1982 affidavit of Harold Weisberg in camera, defendant's opposition thereto, and the entire record in this action, for the reasons stated in the accompanying memorandum opinion, it is by the Court this 18th day of January 1983,

ORDERED that plaintiff's motion for attorney's fee and litigations costs is granted; it is further

ORDERED that plaintiff is awarded the sum of $93,926.25 reasonable attorney fees incurred in this action; it is further

ORDERED that plaintiff shall file an affidavit or other documentation within ten (10) days of the date of this order providing information on costs as requested by the Court in the accompanying memorandum opinion on page 23; it is further

ORDERED that the Court's orders of December 1, 1981 and January 5, 1982 granting plaintiff's motion for an order requiring defendant to pay consultancy fee and denying defendant's motion for reconsideration thereof are vacated; it is further

ORDERED that plaintiff's motion for an order compelling defendant to pay consultancy fee is denied; it is further

ORDERED that plaintiff's motion for leave to file October 31, 1982 affidavit of Harold Weisberg in camera is denied as moot.

JUNE L. GREEN
U. S. DISTRICT JUDGE