No. 82-1229

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

HAROLD WEISBERG,

Appellant/Cross-Appellee,

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee/Cross-Appellant.

AND CONSOLIDATED Nos. 82-1274,
83-1722 and 83-1764

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

BRIEF FOR THE APPELLEE/CROSS-APPELLANT

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QUESTIONS PRESENTED

1. Whether the district court correctly held in this Freedom of Information Act case that the Department of Justice had conducted an adequate search of its King assassination files and that all of the Department's exemptions were valid.

2. Whether the district court correctly held that plaintiff and the Department had not entered into a consultancy agreement.

3. Whether the district court erred in awarding plaintiff $93,926.25 in attorney's fees and $14,481.95 in costs under the Freedom of Information Act, 5 U.S.C. 552(a)(4)(E).

Search
Martin (2)

STATEMENT OF THE CASE

A. Nature of the Case.

In this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, concerning King assassination records, plaintiff Harold Weisberg appeals the district court's orders of December 1, 1981, and January 5, 1982, granting summary judgment to the Department of Justice and dismissing the case after more than six years of litigation. Plaintiff also appeals the district court's orders of January 20, 1983, and April 29, 1983, insofar as they deny his claim for a "consultancy fee" and reduce his claim for $267,516 in attorney's fees.

Defendant Department of Justice cross-appeals the district court's orders of January 20 and April 29, 1983, awarding plaintiff $93,926.25 in attorney's fees and $14,481.95 in costs.

B. Facts of the Case.

1. The Merits.

On April 15, 1975, plaintiff filed an administrative request under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, for information concerning the assassination of Dr. Martin Luther King, Jr.[1] The information requested fell into seven categories:

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[1] Plaintiff initially requested information regarding the King assassination in 1969. At that time, however, the information was unavailable under the broad law enforcement exemption, which was amended in 1974.

not so dated in 1969 - not for several years

other misrepresentations

(2)

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 window sill 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, 1968.

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

Plaintiff's administrative request was filed shortly after the effective date of the 1974 FOIA amendments, at a time when the FBI was inundated with new FOIA requests and government officials were in the process of familiarizing themselves with the new statutory scheme. The sheer volume of FOIA requests occasioned a delay in the processing of plaintiff's request, and plaintiff was so advised. R. 1, Exhibits E and F. On June 27, 1975, FBI Director Clarence Kelley initially denied plaintiff's request for King assassination evidentiary material on the basis of FOIA exemption 7(A), because James Earl Ray had a habeas corpus petition pending before the Sixth Circuit. Plaintiff

thereafter brought the instant action, before the Deputy Attorney General had acted on plaintiff's administrative appeal.

On December 1, 1975, Deputy Attorney General Harold Tyler decided "to modify Director Kelley's action in this case and to grant access to every existing written document, photograph and sketch which I consider to be within the scope of [plaintiff's] request" with only minor excisions.[2] R. 10, Exhibit I. The Deputy Attorney General also noted that the Department of Justice did not have any material responsive to plaintiff's requested items 4 and 7. Id.

On December 23, 1975, plaintiff filed a second administrative request, seeking information in 28 new categories with numerous subcategories. R. 3. The following day he amended his complaint to include his new request, thereby seeking to bypass the administrative process. The Department therefore took the position that plaintiff's initial complaint was moot, since the Department had made available all the material it possessed that was responsive to plaintiff's original FOIA request. The Department also took the position that judicial review of plaintiff's second FOIA request was premature and should be stayed, since the Department had not had any opportunity to

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[2] Deputy Attorney General Tyler stated that he construed plaintiff's request for photographs narrowly, in order to spare plaintiff substantial expense. The Deputy Attorney General added, however, that additional material of this kind would be provided if plaintiff were willing to assume this expense. R. 10, Exhibit I.

process the second administrative request. See 5 U.S.C. 552. The district court, however, allowed the litigation to continue and permitted the second FOIA request to become part of the lawsuit.

For the next five years, litigation focused chiefly on the scope of plaintiff's FOIA requests and the adequacy of the Department's searches. During late 1976 and 1977, approximately 45,000 pages of material were made available to plaintiff, as a result of the processing of plaintiff's second administrative request. In August 1977, plaintiff and the Department entered into a stipulation spelling out the Department's search obligations. R. 44. Plaintiff continued to assert, however, that the Department had not conducted an adequate search of its records. Attempts to define the scope of plaintiff's requests proved futile;[3] thus, the Department released approximately 15,000 pages of nonresponsive and/or duplicative material (e.g., abstracts and indices of documents) simply because of the amorphous nature of plaintiff's requests. Moreover, the Department was forced to undertake numerous generally fruitless searches for material that plaintiff claimed was in its possession. The processing of plaintiff's FOIA requests alone

[3] Indeed, the Department of Justice even contemplated hiring plaintiff as a consultant so that he would be able to specify the material he wanted. See infra, pp. 6-15, 29-35.

cost the taxpayers $181,059.73, exclusive of attorney time and numerous other costs. Seventh Affidavit of John P. Phillips, p. 2.

On February 26, 1980, the court issued a general finding that an adequate, good faith search had been made in this case, and entered partial summary judgment regarding the scope of the search. R. 150. Plaintiff, however, continued to seek further searches and mammoth reprocessing of documents. Nonetheless, after examining a Vaughn index and a supplemental Vaughn index, the district court on December 1, 1981, conditionally granted the Department's motion for summary judgment, upholding all of the Department's claimed exemptions. R. 223. On January 5, 1982, the court found that the Department had fulfilled all of the conditions in the December 1, 1981, order; accordingly, the court entered a final order of dismissal on the merits. R. 231. The court subsequently denied plaintiff's motion to reopen the case. Order of June 22, 1982.

2. The "Consultancy Agreement."

As noted above, the Department of Justice actually contemplated hiring plaintiff as a consultant in this litigation so that he could give it a more precise idea of his innumerable objections to the Department's releases of information. The proposed consultancy never materialized, however, because the parties never agreed on its terms.

The prospect of a consultancy arrangement first arose on November 11, 1977, when Deputy Assistant Attorney General William Schaffer, several Justice Department attorneys and FBI

representatives met with plaintiff and his attorney in Mr. Schaffer's office. At that meeting, Mr. Schaffer explored ways in which the Department could accommodate plaintiff's demands for further releases of information. He first proposed giving office space to Mr. Weisberg in the Department of Justice Building, then sending a paralegal to help Mr. Weisberg at his home, and, finally, paying Mr. Weisberg as a Justice Department consultant. See Hearing Transcripts, May 17, 1978, p. 3 and May 24, 1978, p. 2. According to the affidavit of Department of Justice attorney Lynne E. Zusman filed in this case on May 12, 1978, Mr. Schaffer's consultancy proposal would have called for Mr. Weisberg to "prepare a detailed, non-narrative list of the excisions and withholdings in the MURKIN files released to Mr. Weisberg by the FBI." Affidavit of Lynne K. Zusman, attached to Report to the Court, May 12, 1978, p. 1. (Zusman Affidavit). Mr. Weisberg did not agree at this time to such an arrangement. Affidavit of James H. Lesar, attached to Plaintiff's Motion Re Consultancy Fee, May 1979, p. 3 (May 29, 1979 Lesar Affidavit).

Ten days later, on November 21, 1977, a meeting was held in the court's chambers with the court, plaintiff and his counsel and Justice Department attorneys present. According to plaintiff's counsel, the Department attorneys lobbied to have Mr. Weisberg become a paid consultant. He refused to agree to undertake such a job until the court intervened. Then, when the court "asked him if he would agree to do the consultancy, . . . he said that he would." May 29, 1979 Lesar Affidavit, p 3.

There followed a number of letters from Mr. Weisberg to Mr. Schaffer and other Department of Justice officials regarding various matters, including the project that had been discussed on November 11, and November 21, 1977. Mr. Weisberg, in several of these letters, recognized that no agreement had been reached on at least two issues: The duration of and compensation for his consultancy work. See May 29, 1979 Lesar Affidavit, pp. 3, 4. Finally Mr. Weisberg wrote on December 17, 1977:

> Because of your continued silence I must now insist upon a written contract.

May 29, 1979 Lesar Affidavit, p. 4 and Attachment 3. No such written contract was ever formulated.

On January 15, 1978, there was a telephone conversation between Mr. Lesar and Mrs. Zusman. Mr. Lesar has subsequently indicated that Mrs. Zusman contracted to pay $75 per hour in fees to Mr. Weisberg. Plaintiff's Reply, June 15, 1979, p. 2. Mrs. Zusman's recollection of this call, however, is clear and unambiguous:

> At no time did I ever discuss a specific amount of remuneration or hourly rate pursuant to the general agreement of November 11, with either Mr. Lesar or Mr. Weisberg. The reason I did not address the details of such an arrangement was and is that it is not clear to me whether in fact Mr. Weisberg has evidenced a serious commitment to undertake the work involved.

Zusman Affidavit, p. 2. Nonetheless, Mr. Lesar wrote Mr. Schaffer on January 31, 1978 requesting payment for 80 hours of consultancy work at the $75 per hour rate. Plaintiff's Motion

Re Consultancy Fee May 29, 1979, Attachment 5. A similar letter was sent to Mrs. Zusman on March 28, 1978 containing an assertion that Mr. Weisberg had been offered $75 per hour by Mrs. Zusman. Plaintiff's Motion Re Consultancy Fee, May 29, 1979, Attachment 7. Mrs. Zusman responded on April 7, 1978 explaining that in her conversation of January 15, she had indicated:

> that the only instance I am aware of where a consulting fee was offered by the Civil Division to a non-attorney for performance of a specific task relating to a FOIA suit was a proposal to pay a National Security Expert $75.00 an hour. I also stated that this proposal had not been adopted. I might add, the particular situation I had in mind involved a limited number of hours of work (12 hours).
>
> I am sorry that you misunderstood this conversation and that Harold is now upset. However, Deputy Assistant Attorney General Schaffer concurs in my judgment that the Department of Justice cannot agree to pay Harold at the rate of $75 per hour for an unlimited number of hours of this work.

never any such question

Plaintiff's Motion Re Consultancy Fee, May 29, 1979, Attachment 8 (emphasis added).

On May 12, 1978, another Justice Department counsel in the case, Ms. Betsy Ginsberg, filed the Zusman Affidavit with the district court with a report that read in part:

> Deputy Assistant Attorney General William Schaffer has indicated that he 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, p. 1. Five days later, on May 17, 1978, Ms. Ginsberg informed the court that on the previous Friday,

Consultancy

May 12, Mr. Schaffer and the then Assistant Attorney General (AAG) for the Civil Division, Barbara A. Babcock, had met and decided that an offer of $30 per hour could be made to plaintiff. Hearing Transcript, May 17, 1978, p. 4. The duration of the consultancy was not discussed in that meeting. Ms. Ginsberg stated that after Mr. Schaffer's meeting with the AAG, Mrs. Zusman apparently had called plaintiff's counsel and suggested meeting to discuss a contract with plaintiff. Mr. Lesar apparently rejected this offer to meet. Id., 4-5. At the May 17, 1978 hearing, Ms. Ginsberg reiterated the proposal of $30 per hour but explained that the duration of any consultancy would have to be "taken up between Mr. Schaffer and Mr. Lesar and Mr. Weisberg." Id., p. 5. She added that:

> . . . in addition to discussing the amount of money and the number of hours, it obviously is crucial that we reach an agreement on exactly what is going to be produced.

Id., p. 6. Finally, she said:

> "I feel prepared--what I can do, in terms of the consultancy, is to arrange a meeting between Mr. Schaffer and plaintiff and his counsel and see if we can come up with an agreement."

Id., p. 9. Mr. Lesar and the court agreed to such a meeting and it was set for 11:15 a.m. on May 24, 1978.

The meeting took place as scheduled. Mr. Schaffer explained to the court the proposal that had been made on November 11, 1977 to plaintiff, indicating that he was authorized "to enter into arrangement [sic] with Mr. Weisberg whereby we would pay

Consultancy

the rate of $30.00 an hour for his time." "We offered to meet with Mr. Lesar but I guess his schedule didn't permit it and as far as I am aware this is where the matter now stands." Id., p. 4. The court responded, "Well, it sounds as though it is all wide open at the moment, doesn't it?" to which Mr. Schaffer responded:

> I would say that the question of what it is that was done and how many hours are involved is wide open. I don't think that the rate is something that is wide open, I frankly feel our hands are tied [as to the maximum offer of $30 per hour.]

Id., p. 5.

The court, apparently believing that this rate was too low, explained:

> And I think that somewhere along the line either a fair and reasonable figure is agreed to be paid the man or the whole deal is off . . . .

Id., p. 6. After further exchanges about the proper fee to be charged, Mr. Schaffer said:

> I don't view this as an attorney's fees dispute, I view this as trying to enter into a contractual arrangement.

Id., p. 7. He added, referring to the consultancy problem:

> . . . I think the way to avoid litigation is where a party is contemplating to enter into a contractual arrangement or trying to finalize terms, I would submit the way to do that is with a meeting rather than taking up the Court's time.

Id.

No such meeting was ever held. On June 26, 1978, a status hearing was held in the case and the desirability of a list of

specific deletions was again raised. Mr. Lesar remarked that "[t]hat was the object of the consultancy," to which the court responded, "I know it was and that fell apart." Hearing Transcript, June 26, 1978, p. 7. This comment was then echoed by Department counsel:

> It is true the consultancy agreement fell apart and that was unfortunate.

Id., p. 9. No response was made by Mr. Lesar. Two weeks later, in spite of these clear indications that the hoped-for agreement with plaintiff had "fallen apart," Mr. Lesar submitted two lengthy "reports" to both Ms. Ginsberg and Mr. Quinlan Shea of the Office of Privacy and Information Appeals. He also transmitted a bill to DAAG Schaffer stating that Mrs. Zusman, in spite of her previous affidavit to the contrary, had "offered to pay Mr. Weisberg at the rate of $75 an hour for the work he was doing" and that "Mr. Weisberg accepted this offer." Plaintiff's Memorandum Re Consultancy, May 29, 1979, Exhibit 1. The bill was for $15,000. Mr. Schaffer's response was to deny the existence of an enforceable contract. He returned the bill on July 14, 1978 to Mr. Lesar with a letter explaining:

> I have, on several occasions in the past, suggested that we meet to discuss both the scope of Mr. Weisberg's work and the rate of compensation. You have declined these invitations, apparently preferring to have Mr. Weisberg proceed on the basis of what you both know to be a misconception.

Defendant's Supplemental Memorandum In Opposition To Motion To Pay Consultancy Fee, Exhibit A. On July 31, 1978, plaintiff

responded to DAAG Schaffer's letter, protesting his "persisting misrepresentations" and adding:

> You stole part of my life and work, wretched man, under false pretense, and now you pretend decent purpose to defraud me further, all to deter the work that brings to light what errant officials are unwilling to have known.

offer to illustrate & have adverse/K testimony

Id., Exhibit B, p. 3.

The question of the consultancy was not addressed again in the district court until nearly a year later, on May 29, 1979, when plaintiff filed a motion for payment under the "agreement." Defendant opposed this motion, claiming:

> [a]t the very least, prior to deciding this issue the Court should request the parties to fully brief the question. . . .

Defendant's Opposition Re Consultancy Fees, June 6, 1979. The Court agreed and ordered:

> . . . that the Court will defer its ruling on this motion pending disposition of the case.

Order, July 7, 1979. In a hearing on November 28, 1979, the Court mentioned the subject of the consultancy fees, indicating that "that is a matter that's going to be determined when the case is closed," adding, however, that "certainly plaintiff is entitled to a reasonable amount for the agreement that they had with the Government for his consultancy activities." Hearing Transcript, November 28, 1979, p. 3.

Consultancy (D)

On December 1, 1981, this Court granted defendant's motion for summary judgment and, as a part of that order, ordered the Department of Justice to pay the "consultancy fee," finding that $75 per hour was "a reasonable rate of reimbursement." Memorandum Opinion, December 1, 1982, p. 2. On December 10, 1981, plaintiff filed an affidavit claiming compensable time of 204 hours and 53 minutes plus $50.31 in expenses. Plaintiff also claimed secretarial expenses for his wife amounting to 62 hours and 20 minutes at an unspecified rate of pay.

Defendant moved for reconsideration of the Court's order regarding the "consultancy" because it had not had an opportunity to brief the issue. This motion was denied on January 5, 1982. On February 25, 1982, plaintiff moved for an order compelling payment of the consultancy fee in the amount of $15,914.23. The Department of Justice opposed plaintiff's motion on the grounds that the court lacked jurisdiction over plaintiff's contract claim and that no contract was ever entered into by any Department of Justice official, authorized or otherwise.

Pursuant to plaintiff's motion, numerous depositions were taken during the summer of 1982, in the course of which Department officials reiterated the fact that no agreement was ever reached with plaintiff regarding the "consultancy." Mrs. Zusman stated that "I did not make you an offer, I did not represent that the Justice Department would make an offer at that rate, and I am willing to go into court and testify before the Judge about it." Zusman Dep., p. 17. She further declared that:

consultancy

> . . . I don't believe that I ever felt that I had the authority to offer any rate because I had absolutely no experience with consultancies . . . I would never have taken it upon myself to offer a rate.

Zusman Dep., p. 63.

In the course of her deposition, Mrs. Zusman was shown a letter from Mr. Lesar to former Deputy Assistant Attorney General William Schaffer which stated "[o]n January 15, 1978, Mrs. Zusman called me to offer a rate of payment of $75.00 per hour, and Mr. Weisberg has accepted this." Zusman Dep., p. 75. Again Mrs. Zusman was straightforward in her reaction to the letter. She said, "I dispute that fact," (Zusman Dep., p. 75) and then "[t]he statement in the letter is outrageous" (Zusman Dep., p. 77).

Mrs. Zusman's position that no contract existed with Mr. Weisberg was also never in doubt. She explained:

> There was no agreement entered into because as I've already enumerated[,] at least three, if not more, major elements for a mutual commitment. . . were lacking; the approximately [sic] number of hours for which Mr. Weisberg could reasonably expect to be compensated, the rate at which that compensation was to take place, and thirdly an agreement on what the product was.

Zusman Dep., p. 72. See also pp. 24, 25, 33-34, 47, 60, 62, 68, and 86.

In light of the evidence and arguments presented by the Department, the district court reversed itself and denied plaintiff's motion for a consultancy fee. The court first held that "[b]ecause 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)." January 20, 1983, Memorandum Opinion at 24. The court further held that, "assuming plaintiff would waive the excess of the claim over $10,000 as he is entitled to do, [citation omitted], the Court decides on the merits for the Government." Ibid. The court stated that "no contract was formed because essential terms were never agreed upon." Ibid. The court refused to infer the missing terms, because "plaintiff reasonably should have realized that further terms needed to be agreed upon before proceeding with the consultancy work" and "the defendant did not use plaintiff's work and thus derived no benefit from it." Id. at 26. The court denied a quantum meruit recovery for the same reasons. On April 29, 1983, after plaintiff had waived the excess of his claim over $10,000, the court denied plaintiff's reconsideration motion on the consultancy issue.

3. Attorney's Fees.

In June, 1979, while the litigation on the merits was still in progress, plaintiff moved for summary judgment with respect to the issue of whether he had "substantially prevailed" for purposes of attorney's fees under 5 U.S.C. 552(a)(4)(E). The Department opposed plaintiff's motion on the grounds that it was premature. The district court agreed, stating that it would "defer its ruling on this motion pending disposition of the case." Order of August 13, 1979. Nonetheless, in its memoran-

dum opinion of December 1, 1981, which closed the case on the merits, the court simply concluded that plaintiff had "substantially prevailed," without giving the Department an opportunity to brief the issue. On January 5, 1982, the court denied the Department's motion for reconsideration on this matter.

On August 23, 1982, plaintiff filed a motion for $267,516, in attorney's fees. The Department filed an opposition on October 7, 1982, asserting that "Mr. Weisberg's minimal success in this lawsuit and the lack of evidence of Government bad faith suggest that he is not 'entitled' to an award." The Department also noted that "an award of any size would encourage the type of protracted FOIA litigation practiced in this case by Mr. Weisberg and his attorney, litigation that is clearly not in the public interest." Finally, the Department maintained that in any event plaintiff should not receive fees for his attorney's nonproductive time, i.e., time spent on plaintiff's many unsuccessful motions.[4]

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[4] A partial list includes:

MOTION RE:		DISPOSITION
Aug. 1, 1977:	OPR *Vaughn* Index	Denied (Sept. 2, 1977)
Dec. 20, 1979:	Abstracts	Denied (Dec. 1, 1981)
Jan. 2, 1980:	"Kelley" documents	Denied after permitting further search (Dec. 1, 1981)
Jan. 7, 1980:	"New" *Vaughn* v. *Rosen* Inventory of all Dept.	Full *Vaughn* v. *Rosen* Inventory rejected in favor

(CONTINUED)

Sub. prevailed - pub interest
Bad faith
Stonewalling

(3)

The district court awarded plaintiff $93,926.25 in fees and $14,481.95 in costs. The court held that plaintiff's suit had benefited the public, that plaintiff derived no commerical

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[4] (FOOTNOTE CONTINUED)

	of Justice records.	of a sampling of every 200th document (Feb. 20, 1980)
Apr. 9, 1980:	"CIA referrals"	Denied (Sept. 11, 1980)
May 23, 1980:	"Civil Rights Division records"	Denied without prejudice (Sept. 11, 1980)
June 4, 1980:	"Attorney General and Deputy Attorney General Documents"	Search ordered (Sept. 11, 1980) but nothing found (Dec. 1 1980)
June 5, 1980:	"6 MURKIN Documents"	Ruled that all had been released or properly withheld (Jan. 5, 1982)
June 6, 1980:	"Reprocessing of Headquarters Documents"	Denied (Sept. 11, 1980)
July 9, 1980:	"Field office records"	Denied without prejudice (Sept. 11, 1980)
Nov. 15, 1980:	"Field Office Records Previously Processed"	Denied (Dec. 1, 1981)
Dec. 26, 1980:	"Neutron Activation and Spectrographic materials	Court ruled that they were irrelevant and need not be released (Jan. 5, 1982)
Jan. 12, 1981:	"CIA records"	Denied (Jan. 28, 1981)
Jan. 12, 1981:	"Civil Rights Division records"	Denied with three exceptions (Dec. 1, 1981)
Jan. 27, 1981:	"Quinlan Shea"	Denied (Dec. 1, 1981)
Feb. 17, 1981: in entirety	Documents withheld	Exemption held properly made after in camera review (Jan. 5, 1982)

(CONTINUED)

benefit from disclosure, and that his interest in the material was "scholarly, journalistic, or public-interest oriented." January 20, 1983 order at 12-13. The court further held that "a significant portion of the post-1977 delay can only be attributed to a deliberate effort to frustrate this requester." Id. at 15.

Having determined that plaintiff was entitled to an award of fees under the FOIA, the district court proceeded to compute the amount of the award. The court held that $75 per hour would be a reasonable hourly rate for plaintiff's counsel's services. Id. at 17-19. The court also held that plaintiff's counsel was entitled to compensation for 834.9 hours of work in this litigation (id. at 16-17); the court deducted a mere seven (7) hours out of 791.9 hours spent by plaintiff's counsel on the merits for "truly fractionable" unsuccessful motions on the merits, although litigation on the merits had consumed more than six years, and the court itself stated it had denied motions by plaintiff for "mammoth and repetitious searches or reprocessing." January 20, 1983, Memorandum Opinion at 8. The court therefore arrived at a lodestar award of $62,617.50. Id. at 19-

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4 (FOOTNOTE CONTINUED)

July 13, 1981:	Dismissal of Case without prejudice	Denied (Dec. 1, 1981)
Jan. 15, 1982:	Motion to Reopen Case	Denied (June 22, 1982)

20. The district court then added a 50 percent premium for the risk that plaintiff's counsel would receive no fee for his services, resulting in a total fee award of $93,926.25. On April 20, 1983, the court held that plaintiff is also entitled to an award of $14,481.95 for litigation costs. Plaintiff had requested costs of $16,481.95. The court deducted $1,000 for excessive copying of excessively long affidavits, and another $1,000 for excessively long long-distance telephone calls between plaintiff and his counsel. April 29, 1983 Memorandum Opinion at 5-6.

SUMMARY OF ARGUMENT

After more than six years of litigation, the district court correctly determined that the Department of Justice had adequately searched its files and properly invoked exemptions in this Freedom of Information Act case seeking disclosure of records relating to the asssassination of Dr. Martin Luther King, Jr. The Department searched its filed repeatedly and exhaustively, and the reasonableness of its search for documents cannot be seriously disputed. Furthermore, the district court correctly held, on the baasis of a sample Vaughn index, that the Department's exemption claims were valid. Plaintiff, who received some 60,000 pages of material in response to his FOIA requests, has no legitimate cause for complaint.

The court also properly held that plaintiff was not entitled to a "consultancy fee," since he and the Department had never entered into a consultancy agreement. As the court recognized,

Dunhs (1)

plaintiff reasonably should have realized that no agreement had been reached, and the Department did not benefit from plaintiff's work product.

The district court erred grossly, however, in awarding plaintiff $93,926.25 in attorney's fees and $14,481.95 in litigation costs for this protracted, unproductive litigation. Plaintiff, who commenced litigation on his enormous administrative request of December 23, 1975, one day after filing it with the Department, satisfies neither the eligibility nor the entitlement prong of the FOIA fees and costs provision, 5 U.S.C. 552(a)(4)(E): he received essentially duplicative or non-responsive material from this litigation, while receiving approximately 45,000 pages of original, substantive material through the administrative process. Moreover, even assuming arguendo that plaintiff is entitled to an award, the district court's award must be substantially reduced, since the court failed to deduct attorney time spent on unsuccessful or unproductive matters and awarded a wholly unwarranted fifty percent premium. Finally, to the extent that the lodestar fee award is reduced, the court's exorbitant costs award must be reduced correspondingly. Under any circumstances, the court's indiscriminate award of "travel costs," xeroxing expenses and long-distance telephone costs to plaintiff is especially egregious and cannot be permitted to stand.

1969

duplicative 12/23 Costs-travel (3)

ARGUMENT

I. THE DEPARTMENT CONDUCTED A THOROUGH INSPECTION OF ITS KING ASSASSINATION RECORDS AND PROPERLY WITHHELD ONLY EXEMPT MATERIAL.

After more than six years of litigation on the merits of his FOIA claim, plaintiff continues to assert that the Department failed to conduct an adequate search and withheld nonexempt records. The district court, however, correctly rejected both of these assertions. It cannot seriously be contended that the exhaustive searches undertaken by the Department in the course of this litigation were deficient, or that its Vaughn index was inadequate. Plaintiff, who has received in some 60,000 pages of material in response to his open-ended request, has no cause for complaint.

A. The Numerous Searches For King Assassination Materials Undertaken During This Litigation Were Entirely Adequate.

It is well settled that the test for the adequacy of an agency response to a FOIA request is one of reasonableness. E.g., Weisberg v. U.S. Department of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). It is equally well settled that an agency may rely upon detailed and nonconclusory affidavits to establish the reasonableness of its search for responsive documents. Ibid. Plaintiff may not defeat the agency's showing with "purely speculative claims about the existence and discoverability of other documents." Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981). Moreover, "the issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate. " Weisberg v. Department of Justice, supra, 705 F.2d

at 1351, quoting Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (per curiam) (emphasis in original).

The affidavits provided in this case correctly led the district court to determine that the FBI had conducted a thorough, good faith search of headquarters and field office files in this case. R. 150. The affidavits relied on by the district court are incorporated in the Department's summary judgment motion of December 13, 1979 (R. 128); they reveal the tremendous effort undertaken by the FBI to respond to plaintiff's request. The affidavit of Douglas Mitchell, who supervised this process, spells out the painstaking manner in which some 40,000 pages of material were made available to plaintiff. R. 91, Mitchell Affidavit. Other affidavits attest to equally thorough searches of other Justice Department divisions and offices. See affidavits incorporated into R. 128; see also R. 196, Blizard and Daugherty affidavits.

Plaintiff faults the FBI for "ma[king] no showing that it had searched the individual items of Weisberg's December 23, 1975, request." Pl. Br. at 37. As this Court has stated repeatedly, however, "it is well established that an agency is not required to reorganize [its] files in response to [a plaintiff's] request . . . and that if an agency has not previously segregated the requested class of records production may be required only where the agency [can] identify that material with reasonable effort." Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1979) (quotation omitted); see also id. at 369-370. Plaintiff's twenty-eight cate-

gories are not the FBI's categories. The FBI searched those files in which it was most likely to find the information requested by plaintiff, and released those files to plaintiff.[5] It thus complied with plaintiff's requests and with the August, 1977 stipulation. Thus, the Bureau plainly "conducted a search reasonably calculated to uncover all relevant documents." Weisberg v. Department of Justice, supra, 705 F.2d at 1351.

Plaintiff further alleges that "[t]he Department of Justice failed to search all of its components which might have responsive documents." (Pl. Br. at 37). The Department, however, has absolutely no reason to believe that the "components" named by plaintiff have any documents relevant to plaintiff's request. Having searched thoroughly the files of those components which it reasonably believed to have information pertinent to plaintiff's request, the Department legitimately refrained from searching other components on the strength of plaintiff's speculation.[6] Ground Saucer Watch v. CIA, supra, 692 F.2d at 771, 772; cf. Weisberg v. Department of Justice, supra, 705 F.2d at 1357 n.22.

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[5] Plaintiff's statement that "the FBI attempted to restrict its search to its MURKIN file" (Pl. Br. at 37) is flatly incorrect. As the Mitchell affidavit and the August, 1977 stipulation clearly show, the FBI searched numerous files other than MURKIN. R. 91, Mitchell Affidavit at ¶2; R. 44.

[6] Indeed, at plaintiff's behest the district court ordered the Department to search the files of the office of the Attorney General and the office of the Deputy Attorney General. R. 182. No relevant documents were found. R. 187, App. B. (Affidavit of Quinlan J. Shea).

Plaintiff also argues that the FBI's response to his request was inadequate because the Bureau failed to conduct particularized searches on J.C. Hardin, Raul Esquivel, Sr. and the "Lawn Tickler." Pl. Br. at 39-40. It has always been the FBI's position that any information about individuals relevant to the King assassination is contained in the Bureau's MURKIN file (see, e.g., Transcript of June 30, 1977 status call, R. 41 at p. 31) and plaintiff has presented no meaningful evidence to refute this position.[7] Moreover, plaintiff's FOIA request make no mention of Messrs. Hardin and Equivel, and we are unaware of any significant proceedings in the district court regarding their records. Finally, we note that Messrs. Hardin and Esquivel have not waived their rights under the Privacy Act, 5 U.S.C. 552a, regarding their personal files.[8]

With respect to the "Lawn Tickler," the FBI has conducted a thorough, fruitless search of the files of the General Investigative Division, in which Special Agent Lawn worked. Fifth Wood

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[7] Plaintiff's reliance (Pl. Br. at 22) on the fact that an FBI memorandum concerning a request by a writer to interview FBI agents for a book on the King assassination was not filed in the MURKIN file is plainly misguided; it is self-evident that a request by a writer for an interview about an event is not part of the substantive investigation of the event itself.

[8] Plaintiff's argument that the FBI wrongfully refused to search certain items of his December 23, 1975, request without a privacy waiver from the individuals involved has no merit. See, e.g., Terkel v. Kelly, 599 F.2d 214, 216 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980); Rushford v. Civiletti, 485 F. Supp. 477, 479 (D.D.C. 1980), aff'd without opinion, 656 F.2d 900 (D.C. Cir. 1981)

Affidavit, R. 148, exhibit A. This outcome is hardly surprising, since ticklers are merely duplicates of material found in FBI control records, and are routinely destroyed within a specified period of time after an investigation has ended. Id., ¶ 3. These are the only "divisional files" maintained by the Bureau.

Plaintiff next contends (Pl. Br. at 38-39) that the FBI should be required to reprocess records processed from FBI field offices pursuant to the August 12, 1977, stipulation between the parties. Plaintiff must be aware, however, that his request nullifies a provision of the stipulation that states:

> [d]uplicates of documents already processed at headquarters will not be processed or listed on the worksheets.

(R. 44). As a result of this stipulation, which was duly signed by the district court, the FBI consistently processed and released only those field office records which were not processed at Headquarters, while also releasing from field office files "attachments that are missing from headquarters documents" and "copies of [Headquarters] documents with notations," as provided for by the stipulation.[9] Plaintiff now requests this Court--as he requested the district court on numerous occasions--to scrap this long-standing agreement by

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[9] Documents bearing routine administrative markings were not processed as "documents with notations". Since all FBI field office documents have such markings, such an interpretation would have made the language of the stipulation meaningless.

requiring a new search of all field office records to compare them with what has been released. The practical effect of plaintiff's request would be to require reprocessing of all field office MURKIN files, a truly monumental and time-consuming task. The district court properly refused to order this massive and unwarranted undertaking, stating:

> The parties agreed in 1977 that "duplicates of documents already processed at headquarters will not be processed as listed on the work-sheets, but attachments that are missing from headquarters' documents will be processed and included if found in field offices as well as copies of documents with notations." Stipulation of August 15, 1977, page 1. Special Agent John N. Phillips stated that this procedure was followed. Second affidavit of John N. Phillips, paragraph 4, filed December 10, 1980 as appendix D to defendant's motion for summary judgment. There is nothing to indicate Mr. Phillips' statement of compliance was made in bad faith. The Court will not require the mammoth reprocessing plaintiff seeks based on what happened in another case. Plaintiff's motion is denied.

R. 223, p.4. This Court should affirm the district court's action regarding reprocessing.[10]

In short, the record in this case clearly reflects that the Department searched its files thoroughly and repeatedly in response to plaintiff's FOIA requests. Accordingly, this Court

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[10] Plaintiff unsuccessfully employed a similar bootstrap approach to attack the FBI's good faith in Weisberg v. Department of Justice, supra, 705 F.2d at 1362 and n.29. In that case, this Court rejected plaintiff's attempt to impeach the Department's good faith on the basis of alleged improprieties in another of plaintiff's many lawsuits.

should not require the Department to perform the mammoth work of supererogation which plaintiff seeks.

B. The Department's Vaughn Index Was Compiled In A Reasonable Manner, And The District Court Correctly Upheld All Of The Exemptions Claimed By The Department.

Faced with the need to determine the validity of the Department's FOIA exemptions in a case involving more than 50,000 pages of material, the district court took the eminently reasonable approach of requiring a sample Vaughn index covering every 200th page of the material. R. 151. When this approach resulted in a Vaughn index which consisted of a substantial number of pages with no deletions (due to the large number of documents released to plaintiff without any excision), the district court modified its order and required a supplemental Vaughn consisting only of documents with deletions. R. 182. Finally, in its order of December 1, 1981, the court upheld every exemption claimed by the Department, while ordering in camera review of a number of documents withheld in their entirety. R. 223, pp. 10-13. On January 5, 1982, the court upheld the Department on these documents as well. R. 231, pp. 2-3.

The sampling device has frequently been employed to resolve exemption claims in cases where, as here, there are so many pages subject to such claims that a comprehensive Vaughn index covering all such pages is unfeasible. See, e.g., Vaughn v. Rosen, 383 F. Supp. 1049, 1052 (D.D.C. 1974), aff'd, 523 F.2d

1136 (1975); Deering Milliken, Inc. v. Nash, 90 L.R.R.M. 3138, 3140-3141 (D.S.C. 1975), rev'd. in part on other grounds, 548 F.2d 1131 (4th Cir. 1977); cf. EPA v. Mink, 410 U.S. 73, 93 (1973) and Ash Grove Cement Co. v. FTC, 511 F.2d 815, 818 (D.C. Cir. 1975) (approving sampling of documents for in camera inspection). The validity of sampling in a case of this magnitude cannot be gainsaid. As the district court correctly stated, "[a]s a practical matter, it is impossible for the Court to review a Vaughn index of 50,000 pages." R. 223, p. 10. The supplemental Vaughn index reviewed by the court consisted of 93 documents totaling some 400 pages, and gave the court a thoroughly satisfactory overview of the Department's exemption claims.

Plaintiff contends, however, that the sample Vaughn was inadequate because it did not contain examples of a number of exemptions. Pl. Br. at 41. The district court properly rejected this objection, stating "[i]t is immaterial that no documents involving use of exemptions 3, 5, 6 and 7(F) were included, because the agency used such exemptions in less than 2% of the documents." R. 223, p. 10.[11] Moreover, the benefits of this random sampling procedure far outweighed any liabilities, since it eliminated any possible doubts about the

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[11] Exemptions 5, 6 and 7(F) did appear in the in camera documents submitted pursuant to the court's December 1, 1981, order. The court upheld them. R. 231, p. 2.

integrity of the index (see Lame v. Department of Justice, 654 F.2d 917, 928 n.11 (3d Cir. 1981)), while assuring that the overwhelming majority of the Department's exemption claims were thoroughly represented.

Plaintiff next argues that the Department improperly applied numerous exemptions, particularly 7(C) and 7(D). Pl. Br. at 40-41.[12] Regarding these exemptions, plaintiff appears to be under the misapprehension that the FBI is obligated to confirm or deny his suspicions regarding the identities of individuals for whose protection the exemptions were claimed.[13] This is

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12 Plaintiff also faults the Department for dropping a small number of exemption claims. Pl. Br. at 27. This action was praiseworthy rather than blameworthy, and it in no way undermines the Department's exemption claims. With respect to exemption 7(A), we note that this claim was properly dropped not because it was initially invalid, but rather because the "pending enforcement proceeding" justifying use of the exemption had ended. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 239-240 (1978) ((7)(A) is "a prophylactic rule that prevents harm to a pending enforcement proceeding . . ." (emphasis added)). Similarly, any exemption 1 material that was released was properly disclosed as a result of the declassification of the documents in question. R. 182, MacDonald Affidavit; R. 187, Second MacDonald Affidavit.

Finally, plaintiff chides (Pl. Br. at 26-27) the Department for deleting a sentence which was released by the House Select Committee on Assassinations (HSCA). Plaintiff neglects to note that the Department properly deleted the sentence in question long before the HSCA released it. This deletion thus raises no genuine question about the validity of the Department's withholdings.

13 Concerning exemption 7(C), plaintiff's assertion (Pl. Br. at 25) that the FBI "in effect conceded that it could not justify the excision of the names of FBI agents" is totally unfounded. It is well settled that the names of FBI agents involved in law enforcement investigations are exempt from (CONTINUED)

not the case. Plaintiff's theory obviously would undermine the very purpose of these exemptions, i.e., protection against unwarranted invasion of personal privacy and protection of confidential sources. In any event, as the district court correctly stated:

> the burden on defendant to reprocess over 50,000 pages, the defendant's good faith efforts in searching and releasing materials in general, the lack of harm to plaintiff regarding nondisclosure of names he knows, and the need to protect names which plaintiff merely suspects, persuade the Court that the equities are on defendant's side.

R. 223, p. 11 n.3.

Plaintiff's assertion (Pl. Br. at 27) that "the FBI's Vaughn index failed to state that the technique sought to be protected in Document 91 was not already well-known to the public" is equally devoid of merit. Special Agent Wood explained in his affidavit that releasing the investigative technique in question -- which is still used today--"would result in the subjects of FBI investigations taking added precautions to circumvent protection." R. 153, Seventh Wood Affidavit, p. 12. This clearly meets the standard of 7(E), since it shows that the

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13 (FOOTNOTE CONTINUED)

disclosure under 7(C). Lesar v. Department of Justice, 636 F.2d 472, 487-88 (D.C. Cir. 1980). Indeed, the FBI withheld the names of agents prior to a change in policy in this case, R. 153, Seventh Wood Affidavit, p. 7. In its motion for summary judgment, the Department expressly stated that it continued to consider its earlier withholding of agents' names valid under 7(C). R. 153, pp. 2 n.1, 4-5.

investigative technique is not "already well known to the public."

Finally, plaintiff's emphasis on the two minor errors acknowledged by the FBI regarding its initial Vaughn index also lacks merit. The presence of two minor errors regarding deletions does not call into question the adequacy of two Vaughn indices containing approximately 240 documents, some consisting of many pages with countless deletions. Moreover, one of the errors in question concerned exempt material which should never have been released at all, and was only released in the first Vaughn for consistency's sake when the Bureau realized that the material had inadvertently been released to another requester. See document 72, first Vaughn index, and accompanying explanation. The second incorrect deletion is obviously of no substantive importance whatsoever. See document 124, first Vaughn index, and accompanying explanation.

Thus, notwithstanding plaintiff's many cavils, the district court properly upheld all of the Department's exemption claims and granted summary judgment for the Department. The court's decision on this point should be affirmed and this apparently limitless quest for documents should finally be ended.

II. NO VALID CONSULTANCY AGREEMENT EXISTED BETWEEN PLAINTIFF AND THE DEPARTMENT, AND THE DEPARTMENT WAS NOT ENRICHED BY PLAINTIFF'S WORK.

The district court correctly held that plaintiff and the Department never entered into a consultancy agreement, because essential terms of the contract were never agreed upon. The

court correctly refused to infer those terms, since (1) "plaintiff should reasonably have realized that further terms needed to be agreed upon before proceeding with the consultancy work" and (2) "the defendant did not use plaintiff's work and derived no benefit from it." R. 263, pp. 25-26. For the same reasons, the court denied a quantum meruit recovery. Id. at 26. The court subsequently rejected (R. 281, pp. 1-4) plaintiff's promissory and equitable estoppel theories, also for these reasons.

The district court correctly held that the parties never agreed upon the duration of plaintiff's proposed consultancy, and the court's finding in this regard plainly is not clearly erroneous. Moreover, it is well settled that quantum meruit claims do not lie against the United States. Hatzlachh Supply Co. v. United States, 444 U.S. 460, 465 n.5 (1980).

A. The Amount Of Time To Be Spent on The Consultancy Was Never Agreed Upon.

Both parties need to agree to the duration of a contract. Under basic principles of contract law, there must be an agreement, a "meeting of the minds," before an enforceable contract exists. See 1A Corbin, Contracts § 107 (1950 and Supp. 1982). Defendant never consented to plaintiff's spending an unlimited number of hours on the alleged consultancy.

As the district court stated, "[t]he amount of time to be spent was crucial because the total cost to the defendant would depend primarily on it." R. 263, p. 25. Plaintiff also had an

interest in determining the amount of time he was to spend on the consultancy since he did not want to do the work and would rather have spent the time doing his own work. See Lesar Declaration, Exhibits 7, 9, 13, 20. Defendant and plaintiff never agreed on the amount of time to be spent. Since this would have been an essential term of any consultancy agreement, no contract was created. "Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement" prevent the formation of an enforceable contract. 1A. Corbin, Contracts §95 (1950 & Supp. 1982). See also Restatement (Second) of Contracts, §33; Memorandum Opinion, January 20, 1983, p. 25.

B. Defendant Did Not Receive Any Benefit From Plaintiff's Work.

Plaintiff contends that his work benefited defendant because he sent copies of his consultancy reports to Mr. Quinlan J. Shea and because Mr. Shea acknowledged receiving and reviewing the reports. Pl. Br. at 45. However, plaintiff himself has admitted in a previous affidavit that defendant Civil Divison and FBI did not use his report. See Weisberg Affidavit filed August 23, 1982, ¶18 ("After I provided my consultancy report, neither the Civil Division nor the FBI ever addressed it . . . .") and ¶80 (". . . while simultaneously they [the Civil Division] ignore my consultancy report and its specifications of noncompliance").

Defendant wanted the consultancy arrangement to produce a detailed nonnarrative list of the specific deletions plaintiff took issue with. Affidavit of Lynne K. Zusman attached to Report to the Court, May 12; 1978, p. 1. See also Lesar Declaration, Exhibits 22a and 23. Plaintiff, however, prepared lengthy narrative reports which he submitted two weeks after the district court acknowledged that the consultancy had fallen apart (see Hearing Transcript, June 26, 1978, p. 7), and defendant's counsel had agreed. Id. at p. 9. Plaintiff and his counsel, nevertheless, ignored these clear indications that no agreement had ever been reached. Since defendant did not even receive the work product it had wanted and, in addition, did not make use of the "report" it received, it is clear that defendant did not receive a benefit from plaintiff's work. The district court's finding in this regard plainly is not clearly erroneous.

C. Further Terms Needed To Be Agreed To Before Plaintiff Proceeded With The Consultancy Work.

The district court was correct in finding that plaintiff should reasonably have realized that further terms needed to be agreed upon before proceeding with the work. Memorandum Opinion, January 20, 1983, pp. 25-26. Not only did the amount of time involved in the consultancy need to be worked out, but also the fee to be paid plaintiff for his work was never agreed upon. See pp. 8-9, 14-15, supra.

In addition, plaintiff's own exhibits reveal other terms upon which agreement was never reached. From the earliest discussion of the consultancy it was clear that there were

misunderstandings as to what plaintiff was to do. As discussed above, defendant wanted a non-narrative list of the deletions plaintiff was contesting. Lesar Declaration, Exhibits 22A and 23. Plaintiff recognized that his work product was to be a list. Lesar Declaration, Exhibits 3 and 5, p. 2. The purpose of the consultancy was to facilitate the identification of the issues remaining to be resolved in the lawsuit. Lesar Declaration, Exhibit 2. Plaintiff himself recognized that there were limitations as to what could be expected of him under the arrangement. See Lesar Declaration, Exhibit 5. Plaintiff's counsel also admitted that the defendant might have some "false expectations" as to what the consultancy arrangement would produce. See, e.g., Lesar Declaration, Exhibits 15 & 16. In short, there was a basic misunderstanding as to what was meant by the term "consultant." Defendant simply wanted plaintiff to specify what deletions he took issue with as he was required to do by an earlier stipulation (see Lesar Declaration, Exhibit 2), while plaintiff had a more expansive idea that included giving advice and comments as the Department's "consultant." See e.g., Lesar Declaration, Exhibit 9, p. 2.

Based on these few examples, it is clear that plaintiff should reasonably have realized that there were further essential terms which needed to be agreed upon before proceeding with the consultancy. In fact, plaintiff's letter of December 17, 1977, in which he insisted on a written contract, presents uncontested evidence that plaintiff knew that there was a need for

further terms to be agreed upon. See Lesar Declaration, Exhibit 9. Plaintiff's counsel also admitted that there was no contract until the amount of the fee could be worked out. See Lesar Declaration, Exhibit 20. No fee was ever agreed upon.[14]

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[14] We believe that the court's holding that Mrs. Zusman offered plaintiff a rate of $75 per hour is clearly erroneous (See pp. 8-9, 14-15, supra), although the court correctly held that plaintiff did not rely on this alleged offer, since he had commenced his work before it was made. In any event, the Court need not address this issue if it affirms on the basis of the district court's holdings of January 20, 1983, and April 29, 1983. There are numerous additional grounds precluding a consultancy fee in this case, which the Court likewise need not reach:

1. No documentary evidence supports the existence of a contract as required by 31 U.S.C. 1501 (formerly 31 U.S.C. 200). See United States v. American Renaissance Lines, Inc., 494 F.2d 1059 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974).

2. The officials with whom plaintiff and his attorney dealt were not authorized to enter into a consultancy agreement, and their statements would have had to be ratified by an authorized official in the Department. The authorized official under 41 U.S.C. §252(c) would have been the Attorney General, who has delegated his authority to the Assistant Attorney General for Administration, who has primary responsibility for procurement actions involving the retention of consultants by the Department. See 28 C.F.R. §0.76(j) and (l); see also 28 C.F.R. §0.139. This authority to commit the United States to the expenditure of funds has been further delegated only to designated contracting officers. See 41 C.F.R. §28-1.404-50 and §28-1.404-51. No contracting officer became involved in negotiations with plaintiff and his counsel because, presumably, DAAG Schaffer did not believe that contract negotiations had proceeded to the point where such authorized officers should be involved.

(CONTINUED)

Clearly, the district was correct in holding that no enforceable contract existed and that a contract should not be inferred here.

III. THE DISTRICT COURT ERRED IN AWARDING PLAINTIFF $93,926.25 IN ATTORNEY'S FEES AND $14,481.95 IN LITIGATION COSTS IN THIS CASE.

The district court has handsomely rewarded plaintiff for profoundly abusing the Freedom of Information Act for the last eight years. An examination of the history of this litigation reveals not only that plaintiff did not "substantially prevail" in his lawsuit, but also that the case has conferred no "public benefit" and that the Department had a "reasonable basis in law" for all of its withholdings. Under the circumstances, plaintiff should not receive any fees or costs under the FOIA, 5 U.S.C. 552(a)(4)(E).

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14 (FOOTNOTE CONTINUED)

3. The United States is not estopped from denying the unauthorized acts or representations of its agents. Schweiker v. Hansen, 450 U.S. 785 (1981); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

4. There was no intent to deceive or mislead plaintiff, and his reliance on any statements made to him was unreasonable; plaintiff unreasonably embarked on his project prematurely, before the necessary agreement had been reached. These factors preclude the application of any form of estoppel in this case, assuming arguendo that estoppel is available against the Government. See, e.g., GAO v. GAO Personnel Appeals Board, 698 F.2d 516, 525-527 (D.C. Cir. 1982); NTEU v. Reagan, 663 F.2d 239, 249 (D.C. Cir. 1980).

Even assuming arguendo that plaintiff satisfies the basic criteria for an award of fees and costs, it is clear that the court's award of $93,926.25 in fees and $14,485.91 in costs was grossly excessive, especially in light of the court's own recitation of the numerous motions filed by plaintiff which it denied. R. 263, pp. 8-9. National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir. 1982), requires the district court to deduct plaintiff's unproductive time and time spent on losing issues. It is simply inconceivable that only seven hours of the 791.9 hours of plaintiff's time on the merits were spent on "truly fractionable" unsuccessful matters. Moreover, the district court's award of a fifty percent multiplier in this case was totally unwarranted; accordingly, at the very least, the district court's award must be substantially reduced.

Finally, to the extent that plaintiff is not entitled to an award of attorney's fees under 5 U.S.C. 552(a)(4)(E), he also is not entitled to an award of costs. Assuming arguendo that plaintiff is entitled to any costs, the court's exorbitant costs award of $14,481.95--including plaintiff's travel costs--must be significantly reduced.

A. Plaintiff Did Not "Substantially Prevail" In This Litigation.

It is well established that, in order even to be eligible for an award of attorney's fees under the FOIA, the plaintiff must "substantially prevail" in the litigation. 5 U.S.C. 552(2)(4)(E); Church of Scientology v. Harris, 653 F.2d 584

(D.C. Cir. 1981). The plaintiff "substantially prevails" if (1) the lawsuit is a substantial causative factor in the release of the information and (2) prosecution of the lawsuit could reasonably be regarded as necessary to obtain the information. Id. at 587-88.

The district court held that plaintiff satisfied this threshold requirement because he had received more than 50,000 pages of material in the course of the litigation. December 1, 1981, Memorandum Opinion at 2-3. The court, however, overlooked the fact that virtually all of these pages were released as a result of the processing of plaintiff's enormous administrative request of December 23, 1975, which he prematurely brought into court by amending his original complaint the following day. See 5 U.S.C. 552(a)(6)(A)(i) and (ii), (a)(6)(B) (agency has minimum of ten days to respond to FOIA request); see also Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).[15] The information he obtained as a result of the lawsuit--tickler files, abstracts, indices and index cards relating to the documents obtained through the second

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15 We assume arguendo that plaintiff "substantially prevailed" with respect to his initial request, since he did obtain the TIME/LIFE photographs through this litigation. It should be noted, however, that the FBI was merely serving as a stakeholder with respect to these photographs, since it was representing the interests of TIME, the agent for the copyright holder. Even if plaintiff did "substantially prevail" with respect to the first request, however, we demonstrate infra that he does not satisfy the "entitlement" aspect of the FOIA attorney's fee test with respect to any part of this litigation.

administrative request--was essentially duplicative or unresponsive to his request, but was released "in order to end the matter once and for all." Weisberg v. Department of Justice, supra, 705 F.2d at 1354 n.12. Furthermore, the court ultimately upheld all of the exemptions claimed by the Department.

In short, plaintiff has very little to show for eight years of litigation. His principal success was in forcing the Department repeatedly to search its files, to no avail. Indeed, even the district court noted plaintiff's many motions which "sought mammoth and repetitious searches or reprocessing for documents which the Department of Justice had processed previously in reasonably thorough fashion . . . ." R. 263, pp. 8-9. Surely plaintiff's success in this litigation is not to be measured by his ability to make the Department conduct fruitless searches. See Hanrahan v. Hampton, 446 U.S. 754, 757-759 (1980) (procedural victories do not entitle a party to an award of attorney's fees). Thus, given the breadth of plaintiff's request of December 23, 1975, it is clear that whatever he may have received as a result of the litigation pales in comparison to what he did not receive from the litigation. See, e.g., Stein v. Department of Justice, 662 F.2d 1245, 1263 (7th Cir. 1981).

A review of plaintiff's tangible "successes" cited by the district court (R. 263, pp. 7-8) confirms this view:

(1) Disclosure Of Indices In The Memphis Field Office.

On October 10, 1979, the Government released to plaintiff 34 index cards in response to the Court's order of August 15,

1979. R. 116. The cards were a part of of the Memphis field office document retrieval system and contained no substantive information (R. 108, Affidavit of William Earl Whaley). In its memorandum opposing production of these cards the Department quoted from a 1979 order of Judge Pratt denying the release of similar file cards because of the "very slight possibility" that such cards would have releasable information not already provided.

(2) Disclosure Of FBI Abstract Cards.

The abstract cards are similar to the index cards in that they were part of the FBI's document retrieval system, referring only to information already included in the document itself (R. 130, Affidavit of Martin Wood). These cards have been prepared in order to account for every piece of correspondence entering or exiting the FBI. Yet no previous FOIA requester had been given them in addition to the underlying documents because of the substantial additional work required to process this duplicative material. The reasons for this policy were made clear to the district court. Id. The court nonetheless ordered the Department to process and deliver these cards to plaintiff, on February 8, 1980 in a status conference. They were produced and copies of the documents were included in the Vaughn v. Rosen sampling ordered by the Court. In finally responding to plaintiff's motion of December 20, 1979 to release these cards, however, the court remarkably denied the previously granted motion "because the abstracts are essentially duplicative of

information already released to plaintiff. The abstracts reveal less information than the documents which plaintiff received" (R. 223, p. 3).

(3) Disclosure Of Civil Rights Division Records.

In the Order of Dec. 1, 1981, the Court ordered to be released an index of documents that was prepared by a Civil Rights Division attorney in 1977-78 "to determine whether Mr. Weisberg had received records responsive to his request." (R. 223, p. 7). The court read plaintiff's FOIA request "in liberal fashion . . . even though the index was not in existence at the time of the request". Ibid. Again, as with the Memphis field office index and the "abstracts", the information in the Civil Rights index was merely duplicative of the underlying documents which had been released to plaintiff. The one difference, as the court noted, is that this index was specifically prepared to deal with claims in this lawsuit and was prepared 2 1/2 years after receiving plaintiff's request.

Other Civil Rights Division releases ordered by the court in its December 1, 1981, order (R. 223, pp. 5 and 6) were dealt with as follows:

> (a) D.J. file 41-157-147, which the Department had sworn did not exist (R. 196, affidavit of Janet Blizard) continued not to exist (R. 228, declaration of R.J. D'Agostino). This was not a case of losing a file. Justice simply had no file number of this type. (R. 228, declaration of Robert Yahn).
>
> (b) D.J. file 144-19-0, which the Department had sworn had nothing to do with the assassination of Dr. King (it was citizen mail received by the Division complaining of civil rights

violations in Georgia) (affidavit of Blizard, p. 4) was not produced for inspection because plaintiff withdrew his request to see it, and

(c) with respect to DJ file 144-72-662, one item in this file was released to plaintiff as the result of the Court's Order: the "Memorandum to Attorney General re James Earl Ray Possible Evidence of Conspiracy". (This memo suggested that a warrant should be sought to search for notes written by James Earl Ray in the possession of an assassination author which had been bought from Ray). This document was not released earlier by oversight; plaintiff had already received the rest of the file containing this document.

The court found the numerous other items requested by plaintiff to "have either been released to him or do not exist" (R. 223, p. 6).

(4) Disclosure Of Records In The Office Of The Attorney General And Deputy Attorney General.

The Department long held that no records relevant to this matter were kept in these offices. R. 187, Shea Affidavit. The denial was in specific reference to a court order of September 11, 1980 requiring that such documents be produced (R. 182). The further search mentioned by the court in its footnote in the Dec. 1, 1981 opinion, mentioned possibly relevant items in Ramsey Clark's files. No such search could be done since we had no files of any kind from the former attorney general. The court did not require the production of these items in its Order of December 1, 1981 and the matter was never raised again.

(5) Neutron Activation And Spectrographic Materials.

The Department long argued that these items either had been released to plaintiff or did not exist. The Department claimed that this was sufficiently attested to by the deposition of John Kilty of the FBI (see Transcript of April 6, 1981, p. 42). Nonetheless, the court ordered the Department to search again. The FBI accordingly re-released items previously given to plaintiff in 1977 because he had apparently lost his earlier copies (this time releasing names of FBI Special Agents withheld under now-superseded policy, see n.13, supra) and submitted an affidavit from John Kilty stating again that nothing else existed to be turned over (R. 228).

(6) Field Office Investigatory Records.

The December 1, 1981 Order credited the FBI with having already released to plaintiff all of the items which he claimed not to have received--with three exceptions. The first exception consisted of evidentiary items (e.g., a case of Clairol hair spray, an ashtray) which the court held non-retrievable under the FOIA. The other items, "the Memphis files" and "the Savannah files," were ordered released (Dec. 1, 1981 Order, pp. 8-9). The Memphis files had not been turned over because they were not responsive to plaintiff's FOIA request (they dealt with a threat to bomb a plane on which Dr. King was once a passenger and with a file entitled "Martin Luther King Security Matters" that was unrelated to the assassination). Since the 1977 Stipulation between Justice and plaintiff's counsel had called for records only of the assassination investigation (the MURKIN

files) to be released to plaintiff, these items were not turned over until the court's order. The Savannah Field Office was not one of the offices included in the search, pursuant to the Stipulation. The three internal Savannah memos ordered released were of slight and peripheral significance (see 2nd affidavit of John Phillips, R. 187, pp. 8-9).

(7) "CIA Documents."

On January 28, 1981, the Court denied plaintiff's motion for documents referred to the CIA. The explanation for this is contained in the Department's memorandum of January 26, 1981 (R. 187 and exhibits). The Department explained that nine of ten of the CIA documents had already been dealt with in one of plaintiff's lawsuits against the CIA. The tenth document--which apparently had also been requested in the other litigation--concerned an individual whose name bore a resemblance to James Earl Ray. The document was eventually released by CIA. It is clear that this one item was not the source of any "page-one story" in the L.A. Times as indicated by plaintiff on paragraph 58 of his October 26 affidavit, cited by the court. A look at the item clearly demonstrates that it was, like the others, insignificant.[16]

(8) The Court's Sua Sponte Order For A Renewed Search For A Taxicab Manifest.

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[16] Of course, the CIA was not a defendant in this case and thus could not be compelled to produce documents by the court.

Plaintiff claimed that the FBI had taken the taxicab records from a Memphis taxicab driver, James McGraw, and the Department was ordered by the court to search for such documents (Opinion of Dec. 1, 1981, p. 10 n.1 and Order, p. 4). After a thorough search, no evidence of any FBI records on a taxicab driver named James McGraw were found. R.228, Fourth Affidavit of John Phillips.

(9) TIME/LIFE Photos.

The FBI had in its files some copyrighted photographs which the copyright holder, with TIME, Inc., acting as its agent, refused to release to plaintiff. The copyright holder and TIME had no objection to plaintiff's looking at the pictures in the FBI files or negotiating a purchase of them. It did object to the FBI's giving them to plaintiff. The issue was litigated before the district court, which ordered the photos released, and in this Court, which remanded the case to the district court with orders that TIME, Inc. be joined as a party. Weisberg v. Department of Justice, 631 F.2d 824 (D.C. Cir. 1980). Rather than do this, TIME wrote to the Department waiving its objections and permitting release of the photos to plaintiff. The FBI promptly did so (Tr. August 15, 1980, pp. 3-4).[17]

* * * * *

[17] Our position with respect to this item of plaintiff's initial request is discussed at n.15, supra.

The above recites all of the specific releases mentioned by the court in justifying the attorney's fee in this case. The only document released relating to plaintiff's enormous second request that appears to have any substantive weight at all is the Civil Rights memo "James Earl Ray--Possible Evidence of Conspiracy". The finding of one arguably substantive, relevant nine-page document in the five years of litigation following the Justice Department's release to plaintiff of nearly 45,000 pages of documents speaks very well of the original search done by all the divisions of Justice involved.

While the court stated that the many motions filed by plaintiff which it denied involved few or no documents (R. 263, p. 8), this misses the point. The Justice Department claimed to have released all relevant documents. Therefore, the Department's position was always that it had nothing left to give to plaintiff, not that it wanted an order withholding items from him. Consequently, plaintiff sought primarily to demonstrate that the Department searches had been inadequate and thus to require what the court correctly deemed "mammoth and repetitious searches or reprocessing" (ibid.). The Department succeeded in proving that its original searches were adequate, and consequently was not required to search or produce the vast majority of the records again. Where the Department was required to do a further search, no new records were discovered, except for the one Civil Rights Division document. Moreover,

the exemptions taken in the sample Vaughn index were upheld in their entirety by the court. R. 223, pp. 10-13.

In light of this history, it is evident that plaintiff did not "substantially prevail" in this litigation with respect to his FOIA request of December 23, 1975. Since plaintiff therefore is ineligible for an award of attorney's fees regarding his prematurely litigated second administrative request, the bulk of the district court's fee award must be reversed on this ground alone.

B. The Lack Of Public Benefit From This Litigation And The Department's Reasonable Basis In Law For Withholding Material Preclude An Award Of Attorney's Fees In This Case.

Assuming arguendo that plaintiff "substantially prevailed" with respect to either or both of his administrative requests, this fact merely establishes plaintiff's eligibility for an attorney's fee award under the FOIA (Fund for Constitutional Government v. National Archives, 656 F.2d 856, 872 (D.C. Cir. 1981)); in order to find plaintiff entitled to a FOIA fee award, the district court had to weigh the four criteria enunciated by the Senate in 1974 and subsequently adopted by this Court:

(1) the benefit to the public, if any, 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.

Cuneo v Rumsfeld, 553 F.2d 1360, 1367 (D.C. Cir. 1977); see Senate Report No. 854, 93d Cong., 2d Sess. 17 (1974), reprinted in House Comm. on Gov't. Operations & Senate Comm. on the Judiciary, 94th Cong., 1st Sess.; Legislative History of the Freedom of Information Act Amendments of 1974, 171. The district court found that all four factors militated in favor of an award. Even assuming arguendo that factors (2) and (3) favor plaintiff, however, the court's analysis of factors (1) and (4) was thoroughly misguided, and the latter factors plainly outweigh the former in the instant case.[18] Accordingly, the district court's fee award must be reversed.

1. The Public Did Not Benefit From This Interminable, Expensive Litigation.

The district court found that the public benefited from plaintiff's lengthy lawsuit because:

(1) the FBI placed its King assassination records in its public reading room after plaintiff filed suit;

(2) the Justice Department granted plaintiff a fee waiver;

(3) the Justice Department, through several Attorneys General, declared the records to be "of historical significance and public interest";

(4) the lawsuit led to the Justice Department's Office of Professional Responsibility (OPR)

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[18] Moreover, as this Court has recognized, "[a] decision to grant or deny fees in a particular case is an implicit decision, respectively, to encourage or discourage that type of Freedom of Information Act claim." Cox v. Department of Justice, 601 F.2d 1, 7 n.4 (D.C. Cir. 1979). The history of this protracted, costly and unproductive litigation demonstrates compellingly that encouraging this type of litigation is not "in the national interest." Ibid.

investigation and the House Select Committee investigation;

(5) the abstracts, indices and tickler files were valuable to historians;

(6) newspaper articles have been published which are based on the information released;

(7) plaintiff intends to write a book; and

(8) the University of Wisconsin (Stevens Point) has agreed to store the records.

(R. 263, pp. 11-12). Once again, however, the court overlooked the fact that these alleged benefits derived not from this litigation, but rather from the processing of plaintiff's second administrative request and/or general public interest in the King case.[19] The years of litigation regarding the second request produced only one arguably substantive document, thousands of duplicative documents, and no releases based on improper withholdings.

Moreover, it is clear that at least three of the benefits cited by the district court are either unrelated to plaintiff's FOIA activities or otherwise incorrect. With respect to item (4), the Department never acknowledged--and it does not appear to be true--that plaintiff's FOIA request caused the legislative and executive branch reviews of the King assassination

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[19] We question whether some of these "benefits"--such as the fee waiver, which resulted in a $181,059.93 administrative expense to the public (Second Phillips Affidavit, p. 2)--are indeed public benefits.

investigation noted on pages 4-5 and 12 of the district court's January 20, 1983, Memorandum Opinion. When read in context, the hearing transcript quoted by the court to support this proposition appears instead to be a refutation.[20] H.T., October 8, 1976, at 5. The court's assertion that the abstracts, indices and tickler files are valuable to historians is equally erroneous, since the Department's affidavits establish the duplicative nature of these materials. See, e.g., R. 130, Affidavit of Martin Wood; R. 108, Affidavit of William Earl Whaley; R. 148, Fifth Affidavit of Martin Wood, ¶ 3. Indeed, even the district court appeared to recognize this fact, since, in its order denying release of the abstracts--apparently having forgotten ordering their release almost two years earlier--the court stated that:

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20 A remark (ibid.) by the Assistant U.S. Attorney that Weisberg had triggered a [FOIA] review of the entire King file did not refer either to the OPR investigation or the proposed release to the House Select Committee. The Court apparently misunderstood, saying:

> You see, they wouldn't have made this investigation if it hadn't been for Mr. Weisberg.

(ibid.). The AUSA immediately tried to correct his misapprehension, saying:

> I am sorry. I am a talking about the complete [FOIA] review.

(Ibid.). The AUSA explained that the FBI was processing Weisberg's FOIA request for release to the public. The OPR and House Select Committee releases were not for public release, but for totally separate purposes that had no bearing on this case. (Id. at 8)

> the abstracts are essentially duplicative of information already released to plaintiff. The abstracts reveal less information than the documents which plaintiff received.

R. 223, p. 3. Regarding item (6), as we have already stated at page 46, supra, it is clear that this item was not the source of any page one item in the L.A. Times.

Finally, plaintiff's success in obtaining the TIME/LIFE photos--which were withheld solely because they had been copyrighted by TIME, Inc.--also did not confer a public benefit. As explained by this Court in its opinion on this issue:

> When the FBI advised TIME of Weisberg's FOIA request, TIME stated 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.

Weisberg v. Department of Justice, 631 F.2d 824, 825 (D.C. Cir. 1980). Consequently, plaintiff's accomplishment of having TIME, Inc. eventually voluntarily agree to give copies of the documents to him, involved no "disclosure" at all. The photos had always been available for his or the public's viewing; indeed, plaintiff had viewed them himself at FBI headquarters. Plaintiff's need to possess copies of the photos was a matter of purely private concern with no public benefit whatsoever.

Thus, it is plain that plaintiff's lawsuit has not benefited the public in any meaningful sense. Plaintiff has succeeded only in forcing the Department to undertake countless futile searches and to release thousands upon thousands of pages of

duplicative material, at great expense to the taxpayers. Seventh Phillips Affidavit, p. 2. He also has flooded the court with numerous repetitive motions to reprocess material already released and to re-search files already adequately searched. Whatever he accomplished was accomplished at the adminstrative level, not in court. We can discern no benefit to the public deriving from this litigation; the litigation, with its tremendous cost to the taypayers, can only be characterized as a public detriment.

2. The Department Had A "Reasonable Basis In Law" For Its Withholdings.

The district court held that the Department lacked a reasonable basis in law because it had engaged in "a deliberate effort to frustrate this requester." R. 263, p. 15. The notion that the Department sought to frustrate plaintiff is patently erroneous. The Department was neither recalcitrant nor obdurate in its opposition to plaintiff's claim. The Department had a "reasonable basis in law" for all of its actions in this case.

The court contends that "the Government stalled by claiming mootness." R. 263, p. 14. The Department's mootness argument, however, was eminently reasonable and bona fide. The Department considered the case moot because it claimed to have turned over to Mr. Weisberg all documents within the scope of plaintiff's April 15, 1975 FOIA request, the request that formed the basis for his lawsuit. The Department argued that plaintiff could not supplant this lawsuit with an amended complaint dated December 24, 1975

incorporating a letter to the Justice Department dated one day earlier directing the production of twenty-eight categories of additional documents pertaining to Dr. King's assassination. The court did not limit the case as requested by the Department, which eliminated the mootness argument. The mootness claim, however, furnishes no basis to question the Department's good faith.

The district court also faults the Department for "delaying" this action, although the court is forced to concede that "[c]ertainly some of the delay stemmed from the searching and processing of an enormous number of records." R. 263, p. 15; see also R. 26, Shea and Smith Affidavits. The court's assertion that "a signficant portion of the post-1977 delay can only be attributed to a deliberate effort to frustrate this requester" (ibid.) is untenable; by the end of 1977, the Department had already released some 45,000 pages of material to plaintiff, and therefore correctly took the position that it had no new substantive material left to give. Consequently, it opposed plaintiff's repeated requests for "mammoth and repetitious reprocessing" (R. 263, p. 8) and the release of essentially duplicative documents such as abstracts, indices and tickler files. The dearth of new material unearthed after 1977, despite repeated searches, attests to the correctness of the Department's position. Most importantly, it is clear that the post-1977 delay was caused not by the Department but by plaintiff, who filed mountains of motions during this period,

virtually all of which were decided in the Department's favor.[21] At no time, either before or after 1977, did the Department seek to frustrate this requester.

The district court relies on the Department's purported early "stonewalling" and its denial of a consultancy agreement with plaintiff to support its conclusion that the Department delayed the post-1977 proceedings to frustrate plaintiff. We have already demonstrated that the Department's "mootness" argument, far from constituting "stonewalling," was simply a reasonable, good faith position that the court rejected; we have also shown that plaintiff, not the Department, bears the onus for dragging out these proceedings after 1977. We discuss the consultancy issue at pp. 32-37, supra, and show that it was simply a potential arrangement between the parties which miscarried, rather than an instance of governmental bad faith.[22] The district court's "reasonable basis" analysis is utterly devoid of support.

The reasonableness of the Department's position is demonstrated by the fact that the court ultimately upheld all of the Department's exemption claims. R. 223, pp. 10-13; R. 231, pp. 2-3. It is further demonstrated by the district court's

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21 See n.4, supra.

22 Moreover, since the court itself held that there was no valid consultancy agreement, we do not understand how the Department's denial of such an agreement could possibly constitute evidence of a desire to frustrate this requester.

numerous denials of plaintiff's repetitive motions for reprocessing and further searching, and by the duplicative and/or non-responsive nature of the documents obtained by plaintiff after 1977. It is equally clear that the Department had a reasonable basis for withholding copyrighted photographs at the copyright holder's request: indeed, this Court recognized that plaintiff's request for copyrighted materials raised a "novel question" under the FOIA (631 F.2d at 825), and the Court reversed the district court's exemption holding and remanded the case to the district court for further consideration of the exemption claims after joinder of the copyright holder, TIME, Inc., as a party. At this point, TIME--whose interests the Department had been representing--decided not to become embroiled in this litigation and authorized release of the photos to plaintiff. Thus, it is apparent that the Department had a "reasonable basis in law" for every position it took in this case.

In sum, there can be no question but that the "public benefit" and "reasonable basis" prongs weigh heavily in the Department's favor in this case, and outweigh plaintiff's non-commercial interest in disclosure. Accordingly, plaintiff is not entitled to fees or costs for this litigation.

C. Assuming Arguendo That Plaintiff Is Entitled To Fees And Costs, The District Court's Award of $93,926.25 In Fees Is Plainly Excessive.

Even if plaintiff is entitled to an award of fees in this case, the district court's exorbitant award of $93,926.25 is

insupportable. It is inconceivable that plaintiff's counsel spent only seven hours out of 791.9 in the course of more than six years of district court litigation on the merits on "truly fractionable" unsuccessful or unproductive matters, especially in light of the numerous repetitive motions for reprocessing and additional searches which the district court denied. See n.4, supra.

Furthermore, the court's award of a 50% premium in this case to compensate plaintiff's counsel for the risk of loss in this case was absolutely unwarranted. Indeed, plaintiff's conduct of this litigation precludes any upward adjustment of the lodestar award.

Finally, the court's exorbitant award of $14,481.95 in costs must be substantially reduced. To the extent that plaintiff cannot recover fees under the FOIA, he also cannot recover costs. Moreover, many of plaintiff's costs in this litigation either are not valid "litigation costs" or were not "reasonably incurred" for purposes of 5 U.S.C. 552(a)(4)(E). Thus, if plaintiff is entitled to any fees or costs under the FOIA, this case must be remanded for the limited purpose of properly computing plaintiff's fees and costs.

1. Plaintiff Should Not Be Compensated For Attorney Time Spent On Non-Productive Activities And On Issues On Which He Did Not Ultimately Prevail.

A review of the record in this case reveals the remarkable variety of insupportable claims made by plaintiff on which he

did not prevail in any way whatever. On one occasion in 1980, the district court was faced with what it called "a plethora of motions filed by plaintiff" (Order, September 11, 1980). The partial listing of motions denied, n.4, supra, gives some indication of the extent to which plaintiff's plethora of paper led to negligible results.

Consequently, it is clear that even if plaintiff is entitled to some attorney fees, he should not recover attorney fees for the entire breadth of activities engaged in by him in this lawsuit. As explained by this Court in National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982) ("NACV"):

> Fees are not recoverable for nonproductive time nor, at least in the context of . . . the FOIA, for time expended on issues on which plaintiff did not ultimately prevail.

Id. at 1327. The Court added that a fee application:

> should therefore indicate whether nonproductive time or time expended on unsuccessful claims was excluded and, if time was excluded, the nature of the work and the number of hours involved.

Id. at 1327. Plaintiff has not even attempted to comply with this requirement in the instant case,[23] and the district court

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[23] On the contrary, plaintiff's fee application clearly indicates that counsel included time spent on unsuccessful and/or unproductive matters. See, e.g., Itemization of Attorney's Time, Attachment 2 to Fee Application, at 20 (time spent on unsuccessful motion for voluntary dismissal); id. at 16 (CONTINUED)

(unsuccessful opposition to defendant's motion for partial has ignored his failure to comply.

This Court's requirement for indicating non-productive time is particularly apt in a case such as this which is, in essence, a scatter-shot effort to expand a search for documents, not a case where different legal theories were proposed in order to obtain a single recovery. See Copeland v. Marshall, 641 F.2d 880, 890 (D.C. Cir. 1980), en banc and cases cited therein. Here, plaintiff filed a volley of discrete motions, challenging whether certain records had been searched, exemptions properly taken, or documents produced. This makes the required accounting for "successful claims" and "productive time" clearly appropriate and quite feasible.

The district court's calculation of an appropriate fee amount was deficient in several respects. Most troubling is the fact that, with minor obvious exceptions, the court utterly failed to discriminate between hours expended on aspects of the case in which plaintiff prevailed and those expended on matters in which plaintiff was not at all successful. The complainant in a FOIA action cannot recover attorney's fees for time spent on matters on which he did not ultimately prevail. NACV, supra, 675 F.2d at 1327; Copeland v. Marshall, supra, 641 F.2d at, 891. Indeed, one court recently held that to allow attorney's

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23 (FOOTNOTE CONTINUED)

summary judgment re scope of search); id. at 6 (unsuccessful motion for OPR Vaughn index).

fees for work performed after a defendant agency had made a release of documents in the course of litigation, to the extent that the remaining documents were ruled exempt, "would assess a penalty against defendants which is clearly unwarranted." Steenland v. CIA, 555 F. Supp. 907, 911 (W.D.N.Y. 1983). The only effort the district court even attempted to make in this connection appears to have overlooked a significant number of motions filed by plaintiff which were denied. Compare R. 263 at 8-9, 16, with n. 4, supra. This does not even approach the the level of scrutiny called for by this Court in NACV, supra, 675 F.2d at 1327.

Moreover, with respect to those matters on which plaintiff did prevail, the district court disallowed no portion of counsel's fee request as representing unproductive time or time unreasonably claimed, except for thirty-six hours on the fee application itself. See R. 223 at 17. It is inconceivable that a case spanning more than six years on the merits could have been handled so efficiently that not a single hour was wasted. A substantial amount of time was expended in efforts to obtain further searches which led to the production of no additional records. Even if plaintiff can be deemed to have prevailed on these issues, it is difficult to see how this time can be considered productive, especially in view of the repetitive nature of many of plaintiff's motions. If plaintiff's counsel, in preparing his fee application, excluded time spent on such matters, he should have specified the type of work and the

number of hours so excluded.[24] See NACV, supra, 675 F.2d at 1327-28. By failing both to require and to conduct a detailed analysis of the compensable hours claimed by plaintiff's counsel, the district court has departed from the proper method of calculating the lodestar fee amount. See Copeland v. Marshall, supra, 641 F.2d at 891.

Additionally, the district court utterly failed to articulate the reasons underlying its conclusions with the specificity generally required by this Court. See, e.g., ITT World Communications, Inc. v. FCC, 699 F.2d 1219, 1236 (D.C. Cir. 1983) (courts should "take care to provide a sufficiently detailed analysis to enable thorough appellate review"); Schwartz v. IRS, 511 F.2d 1303, 1307 (D.C. Cir. 1975) (district court abused its discretion in denying plaintiff's motion to clarify legal basis for finding documents exempt). Moreover, while Rule 52(a) of the Federal Rules of Civil Procedure eliminates the requirement of findings of fact and conclusions of law for most motions, it does not excuse a court from the duty to articulate the legal reasoning underlying its rulings in a manner sufficient to permit appellate review. See id. at 1306-1307. The need for such an articulation is particularly acute in this case. As noted above, plaintiff filed a plethora of motions during the course of this litigation, meeting with

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[24] As noted above at n.23, it is clear that he did not do so.

varying degrees of success. The district court awarded fees for 834 hours of work by plaintiff's counsel, not one of which was deemed unreasonably expended. The district court's statement that defendant did not challenge the reasonableness of hours claimed or work expended by counsel (see R. 263, p. 16) is puzzling and plainly erroneous in view of the entire thrust of defendant's opposition to plaintiff's fee application. Moreover, the district court's opinion treats the calculation of the "reasonable hours" prong of the lodestar in such a cursory fashion as to be virtually per se deficient.

The danger arising from generalized analyses such as the district court conducted here is that litigants will be encouraged to file a multiplicity of pleadings, motions, or discovery requests, and engage in other time-consuming activities, knowing that if they ultimately prevail, this type of conduct will augment the amount of the fee.[25] Indeed, this Court has already recognized this danger. See National Building Maintenance, Inc. v. Sampson, 559 F.2d 704, 714 (D.C. Cir. 1977) (". . . it is not far fetched to imagine FOIA requests motivated by the potential economic gain which could result from disclosure"). It should be remembered in this connection that the attorney's fees provision "was not enacted to provide a reward for any litigant who successfully forces the

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[25] We do not intend to suggest that plaintiff and his counsel in the instant case were so motivated.

government to disclose information it wished to withhold." Id. at 711. It was rather designed to eliminate the incentive for resisting disclosure arising from the economic barriers confronting prospective FOIA litigants. Id. As such, the fee award should recompense counsel for only such efforts as are necessary to bring about the desired goal of the litigation--release of documents not properly withheld. The district court's award in this case subsidizes dilatory actions by litigants which Congress surely did not intend to encourage. Accordingly, the award cannot be allowed to stand.[26]

2. An Upward Adjustment Of The Lodestar Is Manifestly Unwarranted In This Case.

The district court awarded plaintiff a 50% premium for the risk that his counsel would receive no compensation for this lawsuit. There is, however, no basis for any upward adjustment of the lodestar in this case.

The Government takes the position that no "multiplier" is warranted in any case absent extraordinary achievements through litigation, and that risk multipliers are particularly inappropriate under statutes that authorize fees only for "prevailing" or substantially prevailing" parties, since the effect of multipliers in such cases is to subsidize counsel for their losing

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[26] Plaintiff contends that the district court erred in awarding fees for only 50 hours spent on attorney's fee litigation, rather than the 86.7 hours he claimed, and in setting his hourly rate at $75. There is no basis for holding that the district court abused its discretion on these points.

cases, contrary to the will of Congress. This issue is currently before the Supreme Court in Blum v. Stenson, No. 81-1374. We realize that this position is contrary to the existing law of this Circuit; of course, if the Supreme Court adopts our position, its decision will be controlling. If this Court so desires, we will furnish a copy of our brief in Blum.

Assuming arguendo that a multiplier is available absent extraordinary circumstances, however, the district court's decision to award one here remains indefensible. The court awarded a 50 percent "risk" premium chiefly because of its view that "[t]his case was unnecessarily prolonged, preventing counsel from taking many other cases over a six-year period." R. 263, p. 15. This statement overlooks a crucial point that we have already made repeatedly: plaintiff and his counsel, not the Department of Justice, prolonged this case unnecessarily, first by amending plaintiff's complaint prematurely and later by filing repeated motions for reprocessing of documents already adequately processed, and for release of duplicative or non-responsive documents. Plaintiff and his counsel chose their litigation strategy; they alone decided to amend plaintiff's complaint one day after filing his enormous second request of December 23, 1975; the Department of Justice should not be penalized for their choices.

Furthermore, the notion that plaintiff's counsel was prevented from taking other cases is irrelevant, since the court fully compensated plaintiff's counsel for all of his time spent

stonewalling duplicative reprocessing amendment

on this case in its lodestar award. There is no basis in logic for the proposition that plaintiff's counsel was prevented from taking other cases when, by his own choice, he was spending a great deal of time on this case and the district court has fully compensated him for that time.

Plaintiff contends (Pl. Br. at 46-47) that the court erred in refusing to adjust the lodestar for delay in receipt of payment. The court correctly held on this point that a delay adjustment is inapplicable, because the hourly rate is based on present hourly rates. R. 263, p. 20, citing NACV, supra, 675 F.2d at 1329. Plaintiff has not refuted the district court's analysis on this point. Moreover, as this Court has stated, "[d]elay solely attributable to dilatory actions by plaintiff should also be discounted." Id. at 1328. As we have already demonstrated, this statement is entirely apposite to the case at bar.

Thus, there is no basis for an upward adjustment of the lodestar here. Indeed, plaintiff's counsel's flood of dilatory, repetitive motions for reprocessing and additional searches militates strongly against such an adjustment.

3. The District Court's Award of $14,481.95 In Costs Was Excessive.

Under 5 U.S.C. 552 (a)(4)(E), the court may assess "other litigation costs reasonably incurred"--as well as reasonable attorney's fees--against the United States (emphasis added). To the extent that plaintiff is not eligible for or entitled to a

fee award, his costs award must of course be eliminated or reduced correspondingly. In any case, however, the costs award is excessive and must be substantially reduced.

Assuming arguendo that "litigation costs" in 5 U.S.C. 552(a)(4)(E) are not limited to "court costs" under 28 U.S.C. 1920 and Rule 54(d), Fed. R. Civ. P., the fact remains that the court's award was excessive. Plaintiff's "travel costs," in particular, must be reduced: to the extent that plaintiff's presence was not required in court because he was testifying, he should not be allowed to recover his travel expenses. Plaintiff was represented by counsel, and there was no need for plaintiff to be present in court at all times. Since fees and costs are not available for duplicative attorney appearances at status conferences, there is no basis for an award covering travel expenses of a non-attorney client who chooses to keep close watch on his attorney. This duplication of effort also necessitates a further reduction of the district court's award for xeroxing expenses and long-distance telephone calls.[27]

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[27] We note further that plaintiff's documentation regarding his "litigation costs" is so abstruse as to be virtually incomprehensible. See, e.g., Lesar Declaration filed January 31, 1983; Affidavit of Lillian Weisberg, filed August 23, 1982. We do not believe that such vague "guesswork" documentation satisfies the requirements of this Circuit. Cf. NACV, supra, 675 F.2d at 1327 ("contemporaneous, complete and standardized time records" required for attorney's fee award). To the extent that plaintiff's costs documentation reveals anything, it reveals that plaintiff charged the Government for renting a car to deliver documents to his counsel (Affidavit of Lillian Weisberg,

(CONTINUED)

CONCLUSION

For the foregoing reasons:

(1) The decision of the district court granting summary judgment to defendant and dismissing plaintiff's FOIA claim should be affirmed;

(2) The decision of the district court denying plaintiff's motion for a consultancy fee should be affirmed; and

(3) The decision of the district court awarding plaintiff attorney's fees and costs under the FOIA, 5 U.S.C. 552(a)(4)(6) should be reversed; alternatively, the issue of fees and costs

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27 (FOOTNOTE CONTINUED)

filed January 31, 1983, ¶2); the district court apparently accepted this as a "litigation cost [ ] reasonably incurred."

In short, the Government clearly has a right to know what "litigation costs" it is paying for. Not only do plaintiff's vague costs submissions violate that right, but they reveal truly remarkable expenditures which cannot be characterized as "reasonably incurred litigation costs" by any stretch of the imagination.

Furthermore, plaintiff clearly is not entitled to any costs regarding litigation on the consultancy issue, an issue on which he clearly did not prevail. We are aware of no indication in plaintiff's documentation of any attempt to ferret out filings regarding this issue.

Thus, it is clear that plaintiff's "laundry list" of costs is profoundly abusive of the costs provision of the FOIA. Plaintiff's documentation indicates that the district court awarded plaintiff costs for, e.g., personally monitoring the efforts of his attorney and for renting cars in order to deliver documents to his counsel. This award cannot stand.

should be remanded to the district court for a substantial reduction of the court's award.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 1983, I served the foregoing Brief for the Appellee/Cross-Appellant upon counsel involved, by causing copies to be mailed, postage prepaid, to:

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no up to [illegible], [illegible]

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