Consultancy

In its brief the government is consistent with its long record before the district court in which it never once was truthful about the consultancy agreement. Its misrepresentations range from the incredinle through the ridiculous to the outrageous.

The proposal that the plaintiff, because of his unique subject-matter knowledge and experience (as defense investigator in the case of Ray v. Rose) act as the defendant's consultant in his suit against the defendant was made, not as the defendant represents, by Mrs. Lynne Zusman, who was then at the time head of the Civil Division's FOIA litigation section, but by the second-in-command of the Division, the person the defendant states was authorized. It was made on successive Friday meetings and while I opposed it. I said I wanted to think about it further. I did not reject it. ~~by me was not rejected. But I had not accepted it, and that is what the defendant wanted me to do. So,~~ but long after my counsel and I ~~had no more than~~ left the second meeting when, without consultation with us, ~~the defendant~~ Mrs. Zusman arranged for an ~~immediate~~ in chambers conference at the first possible moment. She did not tell us why. At ~~for reasons never communicated to us. At~~ that conference I continued to resist accepting the consultancy until the judge was firm in letting ~~made~~ me know ~~it clear~~ that she wanted me to. Reluctantly, under this pressure, I accepted ~~I then did accept~~ and began work on it immediately, first by conferring about it with Mrs. Zusman, the AUSA on the case John Dugan (in his office), Charles Mathews, of the FBI's Legal Counsel Division, and SA John Hartingh, also a lawyer, FOIA case supervisors, among those representing the defendant. Pursuant to defendant's instructions, that very night I purchased the tapes required for dictation as instructed and sent the bill, along with a letter, to the Civil Division.

The government's position now is that the man who made the proposal did not make it at all and that all of those who joined in it in chambers, having assured the judge that they were authorized to, were not only not authorized but I should have known that they were not authorized, too. We are now also asked to believe that when the assurances of authorization were made to the court by Mrs Zusman I should have known that they were lies and that when the judge accepted those assurances and pressured me to accept the agreement the judge didn't know what she was doing and should have known better - and that I should also have known this, too.

During the time it took me to complete the consultancy

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The Department, which has not prosecuted or disciplined in any way those it in effect attests acted illegally and improperly, argues that there is no contract because "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,"(Page 37) He in fact, as is unquestioned in the record, is the one who made the proposal to begin with.

There is absolutely no doubt that Mrs. Zusman did propose the agreement she stated she was authorized to seek. Yet the Department,

Conversely, It also has not charged me with attempted fraud in seeking payment. Or with perjury, because of what I stated under oath to the district court,

During the time it took to complete the consultancy

While I was working on the consultancy,

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~~Throughout~~ I wrote the Civil Division often and in considerable detail, without once being told that the agreement did not exist and I should not continue working on it. ~~on the consultancy because there allegedly was no agreement.~~ My letters and progress reports - and I did provide progress reports and time estimates - were not to the clerks but to the second-in-charge of the Division and authorized to make the agreement, ~~according to the defendant~~, and to the head of the litigation unit.

All of the concotions to pretend that there was no agreement and all the untruthful representations about the agreement are after the fact, made when it came time to pay me. Meanwhile, in court and in personal meetings, the defendant kept insisting that nothing more could be done until I filed my consultancy report. At calendar call after calendar call, in the courtroom and outside it, this as the defendant's explanation for doing nothing at all for many months: it could do nothing until it received my report.

The fabrication that I was hired as a consultant because of my unique knowledge and experience when ~~the government and~~ all those lawyers and FBI agents and legions of clerks to do no more than compile a list insults this court and its intelligence. It assumes that this court will credit any fabrication, as long as it comes from this defendant. It also is a very large lie because exactly that list had been provided (and ignored) and the Civil Division claimed it needed more from me, expansion and explanation, which did require much subject-matter knowledge.

The "non-narrative list" was prepared by a pre-law student at American University, based upon the identical communications I was to use and did use in the consultancy. Mrs. Zusman agreed to pay her and welched on that, too.

At no time, particularly not after I filed a written account of the time I had spent and what I had done, did anyone representing the defendant write or phone me to tell me not to continue because there allegedly was no agreement nor were my counsel or I told this on any of the many times we met with the defendant's representatives. It was entirely the opposite, pressure for me to complete my consultancy and report on it.

When the defendant was representing that it was impossible to do anything more in this litigation until I filed my report, my counsel pointed out that it had requested this list, that it had been provided, and that the defendant had done nothing with this list. The court directed that the defendant respond. A month later a lengthy affidavit, with 52 exhibits - two inches thick in all - was mailed certified to me the Friday before a Monday calendar call, ~~certified mail return receipt requested~~. Ordinarily it would not have reached my home until after I had left to attend that calendar call but when it reached certified mail section of the post office just before it closed for the weekend, it attracted attention and I was phoned because the package was from the FBI ~~and I picked it up~~. I drove into Frederick and picked it up. I examined the affidavit and attachments immediately and then began the preparation of an affidavit, working on it until the next afternoon, Sunday, when I spent several hours locating a notary. I hand delivered my affidavit and documents to my counsel the next morning at the calendar call. The defendant's affidavit was by SA Horace P. Beckwith, FBI FOIPA case supervisor. It was falsely sworn and used phony documents as exhibits. When my counsel reported this to the court, with copies of the genuine documents and Beckwith's phonies, and reported in addition that the FBI was using as an affiant a man then an unindicted co-conspirator in the criminal case filed against former FBI Acting Director L. Patrick Gray, the court banished Beckwith.

That he swore falsely and also swore that phony records were genuine was not and could not be disputed. Yet the government claims there has been no showing of any bad faith in this litigation. (Brief, page____)

That the "non-narrative list" was prepared and delivered, accepted and responded to (in the fashion set forth above) is in the case record and has never been disputed and cannot be disputed. This list itself is in the case record as an attachment to the Beckwith affidavit.

It is obvious that when a perfectly accurate and competent list was provided to the defendant it did not need a worst any other list covering the same material. It also is obvious that when my communications indicated I was not preparing a list, if the defendant had wanted only a list, it would have immediately written me and so informed me. The fact is that the defendant is untruthful about this ~~and fabricated the claim that I was to prepare a list and nothing else.~~ ex post facto claim

Insert 9A

(It is Goble who earlier drafted the FBI policy statement ~~for the FBI~~ that because the FBI does not like me it does not have to respond to my FOIA requests and he stated that the Act itself provides for this.)

neither copy

After I filed my report it was not returned as unacceptable. It was retained by the defendant and contrary to the representarion that it was not used, it was used by the defendant. It consisted of exactly what it was supposed to consist.

I filed a lengthy affidavit stating the foregoing in much greater detail after the defendant filed its fabrications. My affidavit has not been disputed and, ~~of course,~~ I was not charged with swearing falsely or trying to defraud the government.

The FBIHQ MURKIN records were disclosed weekly, as they were processed. I reviewed them promptly. It became apparent immediately that the processing was a very bad job, that most of the withholdings were neither justified nor necessary. I informed the FBI immediately, both in writing andin person. Because from the worksheets I was able to indentify those who ~~proced~~ processed each avolume, I did. It finally came to the point where I absolutely refused to accept any records processed by FBI SA T.N. Goble, a lawyer, ~~He was removed~~ because he asserted spurious claims to exemption and withheld unjustifiably. He was removed, but the harm he had done was not ~~remedix~~ remedied. In addition to what I wrote the FBI, I made a few notes for my counsel having to do with noncompliances. Despite my having informed the FBI of the flaws in its processing, as, for example, withholding of the public domain under 7(C) ~~and~~ and (D) claims, it persisted in them. I offered it the indexed books on the subject. ~~and identified~~ It did not accept them saying it had them and was using them. The latter was obviously untrue or the FBI was engaging in improper withholdings deliberately. I finally gave it and the Department a copy of the consolidated indexes of all the books and it never used this index, either.

5A → Insert 5 A here

It is my letters to the FBI that the prelaw student was to use to prepare a short, chronological list of my complaints about withholdings. Most of her items were about three lines of typing, including identification of the communications

In finally accepting the consultancy, as I had indicated before then, I stated I could not possibly review 60,000 pages again and would have to limit myself to my letters to the FBI and any other pertinent information my brief notes to my

counsel. ~~XXXXXXXXX~~ This was clearly understood, agreed to, and there was no question about it. Because no purpose was served in doing over again what the student had done, which the FBI's clerks could have done much more rapidly, it is obvious that I was expected to use my knowledge in explanations, which is what I did. I was as fully informative as I could be.

For all his knowledge and experience - he was approaching retirement -for all the information and assistance others in the FBI coudd provide, and for all his knowing what was obliterated on the records provided to me, Beckwith and the FBI were not able to fault the list, except by ~~the means~~ swearing falsely and using phony documents, and I caught him at that. There was even less chance of faulting my much more detailed consultancy report, and this is where the defendant's problem is. That report established that at the very least ~~all those~~ the MURKIN records required reprocessing. This was later testified to on January 17, 1979 by the Departments director of ~~FOIPA~~ FOIPA appeals, Quinlan J. Shea, Jr., when he testified as the defendant's own expert witness, after he examined his copy of my report and ~~had access to the processed materials and examined the~~ the FBI's copies of the records disclosed to me. When he had questions I answered them. I provided him with copies of records, those disclosed by the FBI and others. I took all the time required, without thought of payment for it, after the judge asked me to cooperate with him, and this was much time.

On cross examination Mr. Shea was asked about what was omitted on direct, the very extensive withholdings, particular ~~withholding~~ under 7(C) and (D) claims. He replied, "I want to thank you for asking that question, Mr. Lesar. I'm under oath. The answer to your question is I'd put them back in."(Transcript, page 30)

~~References~~ Statements in the government's brief relating to what I was supposed to do in the consultancy, aside from being untruthful, are inconsistent with each other. One of the referenes to ~~the alleged~~ what I was supposed to do is, "for Mr. Weisberg to prepare a detailed, non-narrative list of the withholdings and excisions in the MURKIN files released to Mr. Weisberg."(page 7, emphasis added) This is more or less repeated (on page 36), where it also is made to appear that I did not do what I was expected to do, as "defendant wanted a non-narrative list of the deletions

plaintiff was contesting."

plaintiff was contesting." (Why anything ta at all was required when I had already provided exactly this information on almost a weekly basis is never stated anywhere.)

On the same page, this is enlarged upon, "defendant simply wanted plaintiff to specify what deletions he took issue with as he was required to do by an earlier stipulation. (The latter statement is entirely untrue. The stipulation pertained to the field office MURKIN records only and with regard to them, I was not "required" to do anything at all. The stipulation merely stated that I did not waive my rights to conplain about the processing of the field office records and that the FBI recognized my right to do that.)

Earlier, however, the brief states that I was to do more, to "specify the material he (I) wanted." (page 5) This clearly refers to ~~material~~ records not disclosed, not to excisions.

~~What~~ is ~~is~~ "so that he could give it (defendant) a more precise idea of his innumerable objections to the Department's release of information," is entirely inconsistent with limitation to a list. ~~There is no apparent way in which this can be done in a "non-narrative list."~~

Moreover, this is what I ~~did~~ had already done, on an almost weekly basis, as the FBIHQ MURKIN records were disclosed. There is no apparent way in which this can be done in a "non-narrative list" and if this were what was wanted, there was no reason not to use what I provided regularly, in writing, as the records were released. ~~Or to~~ There also then was no reason to hire me as a consultant to do it all over again and pay me "generously," Mrs. Zusman's word to the court, for doing it all over again.

Likewise each and every allegation that I knew and should have known that there was no agreement is false.

"Plaintiff should have realized that further terms needed to be agreed upon before proceeding (sic) with the consultancy work," the representation of page 33, flies into the face of the fact that the defendant asked me to start work immediately and knew I did that very day and the fact that I kept the defendant informed of my progress regularly. The defendand knew I was working on the consultancy and never once told me not to. Moreover, when the judge accepted the assurance that I would be paid "generously," I had no reason to have any doubts at all. Nor did I when the judge did not at any point thereafter, on all the occasions The cpnsultancy was referred to, indicate that there was anything irregular in the agreement she had virtually forced me into as a means of speeding up the lawsuit. ✓SA Insert

Without actually stating that I did keep the defendant informed in letters (and in person and through counsel), the brief states that I, "in several of these letters, recognized that no agreement had been reached on at least two issues: duration and compensation for his consultancy work."(page 18)

One of these representations is false, the other is a distortion. The judge had left me without doubt that I should be the defendant's consultant and from that moment on I never questioed this or had doubt about it or reason to believe I should have any doubts. I know of no reason why I should have doubted that the judge knew what she was doing. It is true that the compensation was not initially specified, and it is true that I wrote to ask. But this is not at all the same as my having any reason to believe that there was not any agreement, particularly not because the defendant never once even suggested this and kept pressing me to finish up and provide my report. Also, before long the defendant offered a specific rate and I accep it. Insert S.B.

There are other unfaithful representations ~~that the duration was not agreed upon.~~ One is that the defendant could not agree to "an unlimited number of hours of this work."(page 9) Mrs. Zusman's self-serving testimony, which even the district court did not believe was truthful, is quoted (at page 19) She said there was

Throughput this period, the defendant never even suggested that there was no agreement or that working out any details was a prerequisite. All defendant's representations were the exact opposite, including pressures for me to complete it.

The consultancy

The judge, on several occasions, in open court, stated explicitly that I would be paid and on one occasion specified the lowest rate she would be willing to consider.

there was no agreement because "what was lacking" included "the approximately(sic) number of hours for which Mr. Weisberg could reasonably expect to be compensated."

In another formulation (at page 33) "the parties never agreed upon the duration" of the consultancy, emphasized by making it a heading lower on the same page, "The Amount of Time on the Consultancy Was Never Agreed Upon." The text following adds an irrelevancy, there never having been any such question, "Defendant never consented to plaintiff's spending an unlimited number of hours on the alleged consultancy." (This is the only such use of "alleged.") And on the next page, "Defendant and plaintiff never agreed to the amount of time to be spent." And on the next page, "the amount of time involved in the consultancy need(ed) to be worked out."

Conspicuously, the experts in civil law in the Civil Division do not include any claim that they ever raised any such question or ever asked for any such information and were refused it, or even had any reason to believe that "an unlimited number of hours" was involved.

The nature of what I was to do made it impossible to provide an estimate at the outset. Until I collected and reviewed all the raw material, there was no basis for making any estimate or asking for one. These letters and notes related to some 60,000 pages of records. However, what is so studiously avoided and is in the case record is the fact that the very moment I reached the point at which I believed I could provide a reasonably dependable estimate, when I completed this initial review, without ever being asked I did provide a written estimate and it was 98 percent accurate when I completed the consultancy and filed the report.

The defendant raised no objections and asked no questions after receiving this written estimate.

In addition, the defendant had virtually 100 percent of the raw material I was to use and thus was able to make a rough estimate of the time that would be involved. It never complained about the time that was required, either. It is probable that I actually spent more time because I have never had occasion to keep such records and

without doubt forgot to record some of the periods of time.

~~Those arguments were raised after the fact and are inapplicable, unless~~

The brief misrepresents the meaning of a statement by the court ~~The actual meaning of what the court stated,~~ "It is true that the consultancy agreement fell apart and that was unfortunate." (page 12) That the court did not mean there had not been any such agreement is clear by the court's subsequent statements. The court meant only that the Department was not living up to its end.

That in fact I had by this time completed my report and ~~was having it~~ it was being typed is ~~clear~~ entirely by ~~Further~~ tricky language in the ~~six~~ brief, "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 ~~bich~~ both defendant's counsel and the director of appeals. That the defendant knew this and that it took 62 hours to type my two consultancy reports is acknowledged on page 14 ("...claimed compensable time of 204 hours and 53 minutes plus $50.31 in expenses" and and " secretarial expenses of for his wife amounting to 62 hours and 20 minutes." Emphasis added.) This is repeated (on page 35), "...reports which he submitted two weeks after the district court acknowledged that the consultancy had fallen apart." (The brief also misrepresents in stating that my counsel agreed with its interpretation of this language, which he never did.)

Even the brief cannot hide its and the defendant's deliberate misinterpretation of what the Ccourt had in mind. The brief states (page 13) that the court stated two months later "certainly ~~plin~~ plaintiff is entitled to a reasonable amount for the agreement they had with the Government for his consultancy activities." (page 13, emphasis added)

The court stated repeatedly that there had been an agreement and that if not paid voluntarily and sooner I would be paid at her order at the end of the lawsuit.

The brief states that defendant's counsel ~~pro~~ proposed to ~~proposed~~ "arrange a meeting between Mr. Schaffer and plaintiff and his attorney" and ~~the brief states~~ that this "meeting took place as scheduled." (page 10) This is false.

There never was any such meeting. I ~~so~~ subponaed Mr. Schaffer, he ducked the subpoena by having the marshal's told he was out of town when he wasn't, my counsel then notified him of the calendar call that morning and of the duces tecum provision, and Mr. Schaffer appeared in court without any of the records subpoenaed. It is conspicuous that he never ~~even~~ suggested to the court that he or the defendant considered that there was no agreement. All he said is diametrically the opposite.

The claim that the defendant did not use my consultancy report is false and was known to be false when it was uttered and refuted in district court, with no effort made to rebut my refutation. The brief state (page page 33) that "the defendant did not use plaintiff's work and dervived no benefit from it." (page 16) ~~(quote Shea and refer back to where he got one of the sets of copies)~~

The brief acknowledges that the director of the appeals office accepted and kept a copy of each section of the consultancy report (on page 12). Tacitly the brief also admits that ~~Mr. Shea~~ made us of my consultancy reports (page 34) in stating, under the untruthful heading, "Defendant Did Not Receive Any Benefit From Plaintiff's Work," that "Mr. Shea acknowledged receiving and reviewing(sic) the reports." The brief here takes what I stated out of context to misrepresnt its meaning, "plaintiff himself as admitted in a previous affidavit that the defendant Civil Division and FBI did not use his report." (The actual quotation of my affidavit here does not say ~~exactly~~ this. As quoted I stated that "After ~~the~~ I provided my consultancy report, neither the Civil Division nor the FBI ever addressed it."(emphasis added) It also quotes that affidavit as stating that the Civil Division "ignore(d) my consultancy report and its specifications of noncompliance." (emphasis added)

This is embellished upon with the addition of, "Since the defendant did not had even receive the work product it wanted (referring to the fabrication that only another "non-narrative list" was to have been provided) and, in addition, did not make use of the 'report' it received, it is clear that defendant did not receive any benefit from plaintiff's work".(page 35)

The conclusion

The last paragraph of Mr. Shea's direct testimony for the defendant, as the defendant's expert witness, is, "And lastly, but not put there because it has been least, but really for emphasis, early on he made a promise to help me at any time I sought it and as much as he possibly could Mr. Weisberg has kept that promise and I want to make that very clear on the record. He and I have communicated extensively and we have worked, I think, very well together on this." (Trans Transcript, page23)

Mr. Shea did use my report, he did compare it with the FBI's unexcised copies of the records in question, and he did testify that the records required reprocessing.

In an effort to make me appear to be unreasonable part of one of my letters to Mr. Schaffer is wuoted without context (on page 13). I did accuse him of trying to defraud me and I did state that my work "brings to light what errant officials are unwilling to have disclosed have known." He did defraud me and I can provide innumerable illustrations of "what errant officials are unwilling to have known" that I have "brought to light."

Bearing on the honesty of defendant's representations and quotations, in that letter I also reported that I nonetheless was continuing on the consultancy consultancy that Mr. Schaffer neither then nor at any other time told me not to do.

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.

Needs 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,

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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

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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.

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.

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-

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

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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").

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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.

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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

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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)

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.

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.