Attorney Fees

The Freedom of Information Act is one of more than a hundred different federal statutes that contain a "fee-shifting" provision permitting the trial court to award reasonable attorney fees and litigation costs to a plaintiff who has "substantially prevailed."[1] The FOIA's attorney fees provision requires courts to engage in a two-step substantive inquiry. The court must determine first if the plaintiff is eligible for an award of fees and/or costs and it must then determine if the plaintiff is entitled to the award.[2] Even if a plaintiff meets both of these tests, the award of fees and costs is entirely within the discretion of the court.[3]

Threshold Issues

The FOIA's attorney fees provision limits an award to fees and costs incurred in litigating a case brought pursuant to the FOIA;[4] accordingly, fees and other costs are generally

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[1] 5 U.S.C. § 552(a)(4)(E)(i) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[2] See, e.g., Tax Analysts v. DOJ, 965 F.2d 1092, 1093 (D.C. Cir. 1992); Church of Scientology v. USPS, 700 F.2d 486, 489 (9th Cir. 1983); see also Wheeler v. IRS, 37 F. Supp. 2d 407, 411 n.1 (W.D. Pa. 1998) ("The test for whether the court should award a FOIA plaintiff litigation costs is the same as the test for whether attorney fees should be awarded.").

[3] See, e.g., Lissner v. U.S. Customs Serv., 56 F. App'x 330, 331 (9th Cir. 2002) (stating that review of attorney fee award is for abuse of discretion); Anderson v. HHS, 80 F.3d 1500, 1504 (10th Cir. 1996) ("Assessment of attorney's fees in an FOIA case is discretionary with the district court."); Detroit Free Press, Inc. v. DOJ, 73 F.3d 93, 98 (6th Cir. 1996) ("We review the court's determination [to grant fees] for an abuse of discretion."); Young v. Dir., No. 92-2561, 1993 WL 305970, at *2 (4th Cir. 1993) (noting that court has discretion to deny fees even if eligibility threshold is met); Maynard v. CIA, 986 F.2d 547, 567 (1st Cir. 1993) (holding that a decision on whether to award attorney fees "will be reversed only for an abuse of . . . discretion"); Tax Analysts, 965 F.2d at 1094 ("sifting of those [fee] criteria over the facts of a case is a matter of district court discretion"); Hersh & Hersh v. HHS, No. 06-4234, 2008 WL 2725497, at *1 (N.D. Cal. July 10, 2008) ("If a plaintiff demonstrates eligibility for fees, the district court may then, in the exercise of its discretion, determine that the plaintiff is entitled to an award of fees and costs."); Bangor Hydro-Elec. Co. v. U.S. Dep't of the Interior, 903 F. Supp. 160, 170 (D. Me. 1995) ("Awards of litigation costs and attorney fees under FOIA are left to the sound discretion of the trial court.").

[4] See Nichols v. Pierce, 740 F.2d 1249, 1252-54 (D.C. Cir. 1984) (refusing to award fees for (continued...)

not awarded for services rendered at the administrative level.[5] Furthermore, the Court of Appeals for the District of Columbia Circuit has held that FOIA litigation costs related to disputes with third parties, "who are not within the government's authority or control, with respect to litigation issues that were neither raised nor pursued by the government, cannot form the basis of a fee award under 5 U.S.C. § 552(a)(4)(E)."[6]

A threshold eligibility matter concerns precisely who can qualify for an award of attorney fees. The D.C. Circuit has found that the Supreme Court's decision in Kay v. Ehrler[7] establishes that subsection (a)(4)(E)(i) of the FOIA does not authorize the award of fees to a pro se non-attorney plaintiff, because "the word 'attorney,' when used in the context of a fee-shifting statute, does not encompass a layperson proceeding on his own behalf."[8] In order to

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[4](...continued)
plaintiff's success under Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2006), resulting in order to agency to issue regulations, despite plaintiff's claim of victory under FOIA subsection (a)(1)), because Complaint failed to assert claim under or rely specifically on FOIA).

[5] See AutoAlliance Int'l, Inc. v. U.S. Customs Serv., No. 02-72369, slip op. at 3 (E.D. Mich. Mar. 23, 2004) (denying attorney fees for time spent on "administrative appeals that should have been completed prior to filing suit"); Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv., No. 02-6178, slip op. at 6 (D. Or. Dec. 3, 2003) (deducting hours spent on FOIA administrative process for fee-calculation purposes); Nw. Coal. for Alternatives to Pesticides v. Browner, 965 F. Supp. 59, 65 (D.D.C. 1997) ("FOIA does not authorize fees for work performed at the administrative stage."); Associated Gen. Contractors v. EPA, 488 F. Supp. 861, 864 (D. Nev. 1980) (concluding that attorney fees are unavailable for work performed at administrative level); cf. Kennedy v. Andrus, 459 F. Supp. 240, 244 (D.D.C. 1978) (rejecting attorney fees claim for services rendered at administrative level under Privacy Act, 5 U.S.C. § 552a (2006)), aff'd, 612 F.2d 586 (D.C. Cir. 1980) (unpublished table decision). But see Or. Natural Desert Ass'n v. Gutierrez, 442 F. Supp. 2d 1096, 1101 (D. Or. 2006) (awarding fees for work performed at the administrative level, on the rationale that "exhaustion of remedies is required and provides a sufficient record for the civil action") (appeal pending); McCoy v. BOP, No. 03-383, 2005 WL 1972600, at *4 (E.D. Ky. Aug. 16, 2005) (permitting fees for work on plaintiff's administrative appeal, on the rationale that it "was necessary to exhaust administrative remedies"), reconsideration denied, No. 03-383 (E.D. Ky. Oct. 6, 2005); cf. Tule River Conservancy v. U.S. Forest Serv., No. 97-5720, slip op. at 16-17 (E.D. Cal. Sept. 12, 2000) (allowing attorney fees for pre-litigation research on "how to exhaust [plaintiff's] administration remedies prior to filing suit" and on "how to file FOIA complaint").

[6] Judicial Watch, Inc. v. U.S. Dep't of Commerce, 470 F.3d 363, 373 (D.C. Cir. 2006).

[7] 499 U.S. 432 (1991).

[8] Benavides v. BOP, 993 F.2d 257, 259 (D.C. Cir. 1993) (explaining Kay decision); see Bensman v. U.S. Fish & Wildlife Serv., 49 F. App'x 646, 647 (7th Cir. 2002) ("Even when a pro se litigant performs the same tasks as an attorney, he is not entitled to reimbursement for his time."); Sukup v. EOUSA, No. 02-0355, 2007 WL 2405716, at *1 (D.D.C. Aug. 23, 2007) ("Pro se plaintiffs may not recover attorney's fees under the FOIA."); Deichman v. United States, No. 2:05cv680, 2006 WL 3000448, at *7 (E.D. Va. Oct. 20, 2006) (holding that pro see litigant cannot (continued...)

be eligible for attorney fees, therefore, a FOIA plaintiff must have a representational relationship with an attorney.[9]

Furthermore, Kay indicated that no award of attorney fees should be made to a pro se plaintiff who also is an attorney.[10] Because the fee-shifting provision of the FOIA was intended "'to encourage potential claimants to seek legal advice before commencing litigation,'"[11] and because a pro se attorney, by definition, does not seek out the "'detached and objective perspective necessary'" to litigate his FOIA case,[12] the overwhelming majority of courts have agreed with Kay and have held that a pro se attorney is not eligible for a fee award that otherwise would have had to be paid to counsel.[13] This is particularly so because

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[8](...continued)
recover attorney fees under FOIA); Lair v. Dep't of the Treasury, No. 03-827, 2005 WL 645228, at *6 (D.D.C. Mar. 21, 2005) (explaining that "pro-se non-attorney . . . may not collect attorney fees" (citing Benavides)), reconsideration denied, 2005 WL 1330722 (D.D.C. June 3, 2005).

[9] See Kooritzky v. Herman, 178 F.3d 1315, 1323 (D.C. Cir. 1999) (holding that for all similarly worded fee-shifting statutes, "the term 'attorney' contemplates an agency relationship between a litigant and an independent lawyer"); see also Blazy v. Tenet, 194 F.3d 90, 94 (D.C. Cir. 1999) (concluding that attorney need not file formal appearance in order for litigant to claim fees for consultations, so long as attorney-client relationship existed) (Privacy Act case); cf. Anderson v. U.S. Dep't of the Treasury, 648 F.2d 1, 3 (D.C. Cir. 1979) (indicating that when an organization litigates through in-house counsel, any payable attorney fees should not "exceed[] the expenses incurred by [that party] in terms of [in-house counsel] salaries and other out-of-pocket expenses").

[10] 499 U.S. at 438 ("The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every case.") (emphasis added). But see Baker & Hostetler LLP v. U.S. Dep't of Commerce, 473 F.3d 312, 324 (D.C. Cir. 2006) (relying on dictum in Kay and holding that law firm representing itself is eligible for attorney's fees), reh'g denied, No. 05-5185 (D.C. Cir. Apr. 24, 2007).

[11] Kay, 499 U.S. at 434 n.4 (quoting Falcone v. IRS, 714 F.2d 646, 647 (6th Cir. 1983)).

[12] Id.

[13] See, e.g., Burka v. HHS, 142 F.3d 1286, 1289 (D.C. Cir. 1998) ("It is . . . impossible to conclude otherwise than that pro se litigants who are attorneys are not entitled to attorney's fees under FOIA."); Ray v. DOJ, 87 F.3d 1250, 1252 (11th Cir. 1996) (deciding that principles announced in Kay apply with "equal force" in FOIA case); Albino v. USPS, No. 01-563, 2002 WL 32345674, at *8 (W.D. Wis. May 20, 2002) (agreeing that pro se plaintiffs who are attorneys are barred from receiving attorney fees under the rationale of Kay); Manos v. Dep't of the Air Force, 829 F. Supp. 1191, 1193 (N.D. Cal. 1993) (stating that "fairness and sound policy" compel same treatment of attorney and non-attorney pro se FOIA plaintiffs); Whalen v. IRS, No. 92C 4841, 1993 WL 532506, at *11 (N.D. Ill. Dec. 20, 1993) (finding "no satisfactory distinction between pro se FOIA litigants who are lawyers and those who are not for the propose of awarding fees"); cf. Chin v. U.S. Dep't of the Air Force, No. 99-31237, slip op. at 3 (5th Cir. June 15, 2000) (per curiam) (assuming, but not deciding, that Cazalas v. DOJ, 709 F.2d 1051 (5th Cir. 1983), (continued...)

"[a]n award of attorney's fees was intended to relieve plaintiffs of the burden of legal costs, not reward successful claimants or penalize the government."[14]

A pro se attorney who claims that his or her status is merely "technical" because he or she represents an undisclosed client is looked upon with disfavor. In rejecting such a claim, the D.C. Circuit has declared that "status as both attorney and litigant may be a 'technicality,' but it is a legally meaningful one and not to be ignored."[15] Finding that the pro se attorney "controlled the legal strategy and presentation" of the case, the D.C. Circuit similarly denied fees for the services of that pro se attorney's lawyer-colleagues who worked under his direction, "because there was no attorney-client relationship between them."[16] Of course, if an attorney actually retains outside counsel to represent him or her, those fees may be compensable.[17]

On the other hand, in Baker & Hostetler LLP v. U. S. Department of Commerce the D.C. Circuit, relying on dictum in Kay, held that a law firm representing itself is eligible for attorney's fees.[18] In its analysis, the D.C. Circuit explained that the Supreme Court was clear that "the exception for individual plaintiffs who represent themselves does not apply to organizations."[19] As the Supreme Court made no distinction between law firms and other types of organizations represented by in-house counsel, the D.C. Circuit concluded that a law firm representing itself is eligible for an award of attorney fees.[20]

Unlike attorney fees, the costs of litigating a FOIA suit can reasonably be incurred by, and awarded to, even a pro se litigant who is not an attorney.[21] Although a federal statute,

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[13](...continued)
which awarded fee to a pro se attorney, has been "rendered moribund"). But see Texas v. ICC, 935 F.2d 728, 731 (5th Cir. 1991) (pointing out that "lawyers who represent themselves in FOIA actions may recover under the fee-shifting provision").

[14] Burka, 142 F.3d at 1289-90; see Dixie Fuel Co. v. Callahan, 136 F. Supp. 2d 659, 661 (E.D. Ky. 2001).

[15] Burka, 142 F.3d at 1291.

[16] Id.

[17] See, e.g., Ray v. DOJ, 856 F. Supp. 1576, 1582 (S.D. Fla. 1994), aff'd, 87 F.3d 1250 (11th Cir. 1996); Whalen, 1993 WL 532506, at *11.

[18] Baker & Hostetler LLP, 473 F.3d at 324.

[19] Id. at 325.

[20] Id. at 326.

[21] See Carter v. VA, 780 F.2d 1479, 1481-82 (9th Cir. 1986); DeBold v. Stimson, 735 F.2d 1037, 1043 (7th Cir. 1984); Clarkson v. IRS, 678 F.2d 1368, 1371 (11th Cir. 1983); Crooker v. DOJ, 632 F.2d 916, 921-22 (1st Cir. 1980); Maydak v. DOJ, 579 F. Supp. 2d 105, 107-08 (D.D.C. 2008); Pietrangelo v. U.S. Dep't of the Army, No. 06-CV-170, 2007 WL 1874190, at *13 (D. Vt. June 27, (continued...)

28 U.S.C. § 1920,[22] lists certain items that may be taxed as costs,[23] in some instances FOIA costs have been awarded independently of this statute.[24] "Costs" in a FOIA case have been interpreted to include photocopying, postage, typing, transcription, parking, and transportation expenses, in addition to routine filing costs and marshals' fees paid at the trial level,[25] as well as the fees paid to a special master appointed by the court to review documents on its behalf.[26] However, a plaintiff cannot seek to have work done by an attorney compensated under the guise of "costs."[27]

Any FOIA plaintiff, including a corporation or even a State, that does engage the

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[21](...continued)
2007) (noting that litigation costs may be awarded to pro se plaintiffs); Dorn v. Comm'r, No. 03-CV5-39, 2005 WL 1126653, at *4 (M.D. Fla. May 12, 2005) (recognizing that pro se litigant "could be entitled to costs," but denying such award because "plaintiff did not substantially prevail"); Albino, 2002 WL 32345674, at *1 (awarding costs because pro se plaintiff substantially prevailed); Wheeler, 37 F. Supp. 2d at 411.

[22] (2006).

[23] 28 U.S.C. § 1920 ("A judge or clerk . . . may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees of the court reporter . . . ; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts[.]").

[24] See Blazy, 194 F.3d at 95 (stating that "§ 1920 does not serve as a limit on recovery of litigation costs under either FOIA or the Privacy Act"); Kuzma v. IRS, 821 F.2d 930, 933 (2d Cir. 1987) (concluding that "the policies underlying § 1920 are antithetical to the remedial purpose" of the FOIA); Comer v. IRS, No. 97-76329, 2002 WL 31835437, at *2 (E.D. Mich. Oct. 30, 2002) (refusing to limit costs under FOIA to those contained in 28 U.S.C. § 1920); Tax Analysts v. IRS, No. 94-923, 1998 WL 283207, at *3 (D.D.C. Mar. 17, 1998) (same).

[25] See Kuzma, 821 F.2d at 931-34 (finding that costs may include photocopying, postage, covers, exhibits, typing, transportation, and parking fees, but not "cost of law books readily available in libraries"); Williams v. Dep't of the Army, No. 92-20088, 1993 WL 372245, at *6 (N.D. Cal. Sept. 13, 1993) (agreeing that such costs are recoverable if "they are reasonable"). But see Carpa v. FBI, No. 00-2025, slip op. at 2 (D.D.C. Oct. 15, 2001) (denying pro se plaintiff reimbursement for costs of postage and office supplies because such costs "not typically recoverable" under local court rule); Trenerry v. IRS, No. 90-C-444, 1994 WL 25877, at *1 (N.D. Okla. Jan. 26, 1994) (refusing to allow costs for transportation, supplies, or "any other costs not properly taxed pursuant to 28 U.S.C. § 1920").

[26] See Wash. Post v. DOD, 789 F. Supp. 423, 424 (D.D.C. 1992) (apportioning special master's fees equally between plaintiff and government).

[27] See Anderson, 80 F.3d at 1508 (suggesting that work done by attorneys is not "properly a cost item"); see also Comer, 2002 WL 31835437, at *2 (rejecting pro se plaintiff's costs-reimbursement request for "paralegal fees").

services of an attorney for litigation is eligible to seek an award of attorney fees and costs.[28] By the same token, if it prevails, even a defendant agency may recover its costs pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, although such recoveries are uncommon.[29]

Eligibility

Assuming that a plaintiff qualifies under the threshold standards described above, the next step is to determine whether the plaintiff is actually eligible for a fee award under the circumstances of the case. This, in turn, requires a determination that the plaintiff has "substantially prevailed" within the meaning of subsection (a)(4)(E)(ii) of the FOIA.

In 2007, Congress enacted amendments to the FOIA entitled the "Openness Promotes Effectiveness in our National Government Act of 2007," or the "OPEN Government Act of 2007," which was signed into law on December 31, 2007.[30] The OPEN Government Act amended the FOIA's preexisting attorney fees provision by defining the circumstances under which a FOIA plaintiff can be deemed to have "substantially prevailed."[31] As a result, a FOIA complainant now has "substantially prevailed" if the complainant "obtained relief through either -- (I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial."[32]

In a recent case, the Court of Appeals for the District of Columbia Circuit found that

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[28] See, e.g., Texas, 935 F.2d at 733 ("[T]he goal of encouraging litigation of meritorious FOIA claims is doubtlessly furthered by reimbursing the legal fees of all complainants who substantially prevail and who meet the traditional criteria -- even those complainants, such as corporations or states, who could finance their own lawsuit."); Assembly of Cal. v. U.S. Dep't of Commerce, No. Civ-S-91-990, 1993 WL 188328, at *6 (E.D. Cal. May 28, 1993) ("Although the Assembly may have more resources than some private citizens, this does not mean the Assembly is any less restricted with respect to allocating its resources.").

[29] See, e.g., Chin, No. 99-31237, slip op. at 3 (5th Cir. June 15, 2000) (ordering plaintiff to pay defendant's costs on appeal); Donohue v. DOJ, No. 84-3451, slip op. at 1-2 (D.D.C. Mar. 7, 1988) (granting government's bill of costs for reimbursement of reporter, witness, and deposition expenses); Medoff v. CIA, No. 78-733, slip op. at 1 (D.N.J. Mar. 13, 1979) (awarding government, as prevailing party, its litigation costs in full amount of ninety-three dollars, effectively against ACLU, in accordance with statutory authorization contained in 28 U.S.C. § 1920); see also Baez v. DOJ, 684 F.2d 999, 1005-06 (D.C. Cir. 1982) (en banc) (assessing against unsuccessful plaintiff all costs of appeal).

[30] See OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[31] See id. § 4 (to be codified at 5 U.S.C. § 552(a)(4)(E)(ii)).

[32] OPEN Government Act, § 4; see, e.g., Hersh & Hersh v. HHS, No. 06-4234, 2008 WL 2725497, at *2 (N.D. Cal. July 10, 2008) (concluding that "plaintiff has demonstrated neither significant relief through a 'judicial order' nor a 'voluntary or unilateral change in position by the agency' with respect to a 'not insubstantial' claim and is therefore not eligible for fees").

"Congress amended the FOIA to incorporate the catalyst theory."[33] As two district courts have explained, subsection (a)(4)(E)(ii)(I) of the FOIA now codifies the Buckhannon[34] standard while (a)(4)(E)(ii)(II) reinstates the "catalyst theory" which was rejected by Buckhannon.[35]

In Buckhannon, the Supreme Court held that a plaintiff must obtain a judicially sanctioned "alteration in the legal relationship of the parties" before fees will be awarded.[36] The D.C. Circuit held, prior to the passage of the OPEN Government Act, that under Buckhannon, unless a FOIA plaintiff obtained court-ordered relief on the merits of his complaint that resulted in a material alteration of the legal relationship between the parties,[37] there could be no eligibility for attorney fees[38] or costs.[39] In contrast, under the "catalyst theory" a plaintiff was found eligible for attorney fees if his lawsuit served as a "catalyst" in achieving a voluntary change in the agency's conduct.[40] The D.C. Circuit has held that "the mere filing of the complaint and the subsequent release of the documents is insufficient to establish causation." [41]

With the passage of the OPEN Government Act and the reinstatement of the catalyst theory, the D.C. Circuit recently held that the new eligibility standard does not apply

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[33] Summers v. DOJ, No. 07-5315, 2009 WL 1812760, at *2 (D.C. Cir. June 26, 2009).

[34] Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001) (non-FOIA case).

[35] See Judicial Watch, Inc. v. Bureau of Land Mgmt., 562 F. Supp. 2d 159, 172-73 (D.D.C. 2008) (appeal pending); Wildlands CPR v. U.S. Forest Serv., 558 F. Supp. 2d 1096, 1098 (D. Mont. 2008) ("The Act thus restated the Buckhannon analysis on the consent-decree issue, and revived the catalyst theory . . . ."); see also Davis v. DOJ, 606 F. Supp. 2d 1, 2 (D.D.C. 2009) (although not applying new standard, because it held that OPEN Government Act did not apply retroactively, nonetheless explaining that through OPEN Government Act Congress "codified the 'catalyst theory'").

[36] Buckhannon, 532 U.S. at 605.

[37] See Oil, Chem. & Atomic Workers Int'l Union (OCAW) v. DOE, 288 F.3d 452, 458-59 (D.C. Cir. 2002) (discussing Buckhannon's requirements).

[38] See id. (denying attorney fees under Buckhannon because plaintiff did not receive judicial relief on merits of complaint).

[39] See, e.g., McSheffrey v. EOUSA, No. 02-5401, 2003 WL 21538054, at *1 (D.C. Cir. July 2, 2003) (per curiam) (finding no distinction between the requirements for recovering attorney fees and litigation costs, and ruling that to obtain either there must be a "judgment on the merits or . . . a court-ordered consent decree" (citing OCAW, 288 F.3d at 456-57)).

[40] Buckhannon, 532 U.S. at 600 (explaining "catalyst theory").

[41] Weisberg v. DOJ, 745 F.2d 1476, 1496 (D.C. Cir. 1984); see also Frye v. EPA, No. 90-3041, 1992 WL 237370, at *4 (D.D.C. Aug. 31, 1992) ("[W]hile plaintiff's lawsuit appears to have served as a catalyst for EPA's eventual disclosures, it is not at all clear that it was the cause" of EPA's voluntary disclosure.).

retroactively to a case where the parties had entered into a settlement agreement in 2005.[42] The court found that the OPEN Government Act "is silent with regard to its temporal reach; its application here would have 'retroactive effect' because it would 'increase a party's liability for past conduct' and there is no evidence of a 'clear congressional intent favoring such a result.'"[43] The court also noted that if plaintiff's action "had been filed after the effective date of the [OPEN Government] Act, and the Government therefore knew it might be liable for attorneys' fees, then it might not have settled the case."[44]

The majority of other courts that have considered the issue have found that the OPEN Government Act's new attorney fees provision does not apply retroactively to cases that were pending at the time the OPEN Government Act was enacted,[45] while two courts have found that it does apply retroactively.[46] In cases where the provision was found not to apply retroactively, the Buckhannon standard was applied.[47]

To date, five courts have applied the OPEN Government Act eligibility standard in making fee award determinations. Two of those courts cited the new eligibility standard, however they were not required to provide any further analysis because the government

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[42] Summers, 2009 WL 1812760, at *3-4.

[43] Id. at *4 (quoting Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994)).

[44] Id. at *2.

[45] See Judicial Watch, Inc. v. FDA, 604 F. Supp. 2d 171, 173 (D.D.C. 2009) (holding that OPEN Government Act does not apply retroactively); Davis, 606 F. Supp. 2d at 2 (denying fee award because OPEN Government Act does not apply retroactively); N.Y.C. Apparel F.Z.E. v. U.S. Customs & Border Prot. Bureau, 563 F. Supp. 2d 217, 226-27 (D.D.C. 2008) (concluding that OPEN Government Act does not apply retroactively to instant case), reconsideration denied, No. 04-2105, 2009 WL 1464962 (D.D.C. May 27, 2009); Lippton v. DOJ, No. 07-0329, 2008 WL 2649516, at *7 (E.D. La. June 27, 2008) (relying on Zarcon, Inc. v. NLRB, No. 06-3161, 2008 WL 4960224 (W.D. Mo. Mar. 25, 2008) and holding that OPEN Government Act attorney fees provision is not retroactive); Zarcon, Inc. v. NLRB, No. 06-3161, 2008 WL 4960224, at *3 (W.D. Mo. Mar. 25, 2008) (holding that OPEN Government Act does not apply retroactively); cf. Cornucopia Institute v. USDA, 560 F.3d 673, 677 n. 4 (7th Cir. Mar. 26, 2009) (explaining that court need not determine whether OPEN Government Act applies retroactively in instant case, but noting generally that retroactive application of Act is uncertain).

[46] See Judicial Watch, Inc., 562 F. Supp. 2d at 171 ("[T]he FOIA amendments may apply retroactively and govern the disposition of this case."); Wildlands CPR, 558 F. Supp. 2d at 1099-1100 (concluding that OPEN Government Act applies retroactively).

[47] See, e.g., N.Y.C. Apparel F.Z.E., 563 F. Supp. 2d at 227 (denying attorney fees under Buckhannon standard); Lippton, 2008 WL 2649516, at *6 (holding that plaintiff did not substantially prevail under Buckhannon standard); Zarcon, Inc., 2008 WL 4960224, at *3 ("Buckhannon's prohibition on catalyst arguments for fee shifting purposes applies, and plaintiffs are not entitled to an award of attorney's fees in this case.").

conceded that the plaintiff was eligible for a fee award.[48]

In the third case, Hersh & Hersh, the court determined that the plaintiff had not substantially prevailed under the new standard and was therefore not eligible for fees.[49] In that case, the agency had provided a first release of documents to the plaintiff prior to the filing of the lawsuit.[50] The agency had also advised the plaintiff that additional documents were forthcoming.[51] Subsequent to the filing of the complaint, the agency provided the plaintiff with a second release of documents.[52] The court held that this second release was not provided in "response to [the plaintiff's] lawsuit," as the plaintiff argued, but was merely "a continuation of the administrative process" between both parties.[53]

The court then explained that although it had granted summary judgment in favor of the government with respect to approximately four thousand pages withheld under Exemption 4 of the FOIA,[54] it had denied the government's summary judgment with respect to its use of Exemption 6 of the FOIA,[55] resulting in the release of eighteen pages.[56] The court further explained that "[e]ven though this minuscule amount is not dispositive of the question whether plaintiff has substantially prevailed, it is a factor that the court may consider and one that suggests that plaintiff has not substantially prevailed."[57] The court explained that the information disclosed to the plaintiff, such as business addresses, business phone numbers and job titles, did not "provide critically important information to the public."[58] Thus, the court found that the plaintiff had established "neither significant relief through a 'judicial order' nor a 'voluntary or unilateral change in position by the agency' with respect to a 'not insubstantial' claim and [was] therefore not eligible for fees."[59]

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[48] See Maydak v. DOJ, 579 F. Supp. 2d 105, 108 (D.D.C. 2008); Elec. Frontier Found. v. Office of the Dir. Of Nat'l Intelligence, No. 07-05278, 2008 WL 2331959, at *1-2 (N.D. Cal. June 4, 2008).

[49] Hersh & Hersh, 2008 WL 2725497, at *2.

[50] Id.

[51] Id.

[52] Id.

[53] Id.

[54] 5 U.S.C. § 552(b)(4).

[55] Id. § 552(b)(6).

[56] Hersh & Hersh, 2008 WL 2725497, at *2.

[57] Id.

[58] Id.

[59] Id.

In the two remaining cases, both courts first held that the OPEN Government Act applied retroactively.[60] In Wildlands CPR, the court went on to find that under the OPEN Government Act, the plaintiff needs "to point to the existence of a consent decree or to a voluntary or unilateral change in the agency's position" to substantially prevail.[61] Although the parties had entered into a consent decree that provided that it was not intended to designate either party as a prevailing party for purposes of fee awards, the court found that the parties could not "circumvent the law by contract."[62] Because the amended FOIA attorney fees provision states that the existence of a consent decree is enough to establish a prevailing party, the court held that the plaintiff had substantially prevailed and was eligible for fees.[63]

Likewise, in the Judicial Watch, Inc. case, the court also determined that the plaintiff was eligible for an award of attorney fees and costs under the new standard.[64] In that case the plaintiff submitted a FOIA request on March 8, 2007.[65] The agency provided the plaintiff with anticipated release dates on four separate occasions.[66] On September 5, 2007, the plaintiff, having not received any documents from the agency, filed a lawsuit.[67] Two weeks later, the agency responded to the request by releasing to the plaintiff thirty-five pages of responsive material, withholding only one phone number.[68] The court found that under the plain meaning of the new standard the plaintiff had "clearly 'substantially prevailed' pursuant to the FOIA: it obtained its desired relief, the release of various documents, due to a voluntary change in position . . . , and its claim was substantial."[69] The court explained that although "'the mere filing of the complaint and the subsequent release of the documents is insufficient to establish causation,'"[70] based on the facts of the case, absent the filing of the complaint, the

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[60] See Judicial Watch, Inc., 562 F. Supp. 2d at 171 ("[T]he FOIA amendments may apply retroactively and govern the disposition of this case."); Wildlands CPR, 558 F. Supp. 2d at 1099-1100 (concluding that OPEN Government Act applies retroactively).

[61] Wildlands CPR, 558 F. Supp. 2d at 1098.

[62] Id. at 1100.

[63] Id. (finding plaintiff entitled to attorney fees as well).

[64] Judicial Watch, Inc., 562 F. Supp. 2d at 173-75.

[65] Id. at 162.

[66] Id. at 163.

[67] Id.

[68] Id.

[69] Id. at 172.

[70] Id. at 173 (quoting Weisberg, 745 F.2d at 1496); see also Short v. U.S. Army Corps of Eng'rs, No. 07-2260, 2009 WL 1315984, at *2-3 (D.D.C. May 13, 2009) (holding that even if OPEN Government Act hypothetically applied to instant case, causal nexus "requirement is missing when disclosure results not from the suit but from delayed administrative

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"plaintiff may not have received an appropriate response to its FOIA request."[71] Specifically, the court noted that "[i]n sharp contrast to its lackadaisical response" prior to the filing of the lawsuit, the agency "disclosed the requested documents shortly after this action was commenced by plaintiff."[72]

Entitlement

Even if a plaintiff satisfies the threshold eligibility standards, a court still must exercise its equitable discretion in separately determining whether that plaintiff is entitled to an attorney fee award.[73] This discretion ordinarily is guided by four traditional criteria that derive from the FOIA's legislative history.[74] These factors are: (1) the public benefit derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding had a reasonable basis in law.[75]

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[70](...continued)
processing").

[71] Id. at 173.

[72] Id. (finding plaintiff entitled to attorney fees as well).

[73] See Young v. Dir., No. 92-2561,1993 WL 305970, at *2 (4th Cir. Aug. 10, 1993) ("Even if a plaintiff substantially prevails, however, a district court may nevertheless, in its discretion, deny the fees."); Texas v. ICC, 935 F.2d 728, 733 (5th Cir. 1991) ("The district court did not specify which of the criteria [plaintiff] failed to satisfy. But so long as the record supports the court's exercise of discretion, the decision will stand."); Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, No. 07-05278, 2008 WL 2331959, at *3 (N.D. Cal. June 4, 2008) ("The determination of entitlement is left to the discretion of the Court."); Summers v. DOJ, 477 F. Supp. 2d 56, 63 (D.D.C. 2007) ("The entitlement inquiry allows the court to exercise its 'sound discretion' to grant or deny fees given the facts of particular cases." (quoting Church of Scientology v. Harris, 653 F.2d 584, 587 (D.C. Cir. 1981))).

[74] See S. Rep. No. 93-854, at 19 (1974); cf. Cotton v. Heyman, 63 F.3d 1115, 1123 (D.C. Cir. 1995) (declining to review remaining factors after finding no public benefit from release and recognizing reasonableness of agency's position). But cf. Judicial Watch, Inc. v. Dep't of Commerce, 384 F. Supp. 2d 163, 169 (D.D.C. 2005) (suggesting that "in addition to the four factors," the agency's conduct -- which was found to have "likely" involved the destruction and removal of documents, and which was deemed to have demonstrated a "lack of respect for the FOIA process -- would tip the balance in favor of a fee award").

[75] See Davy v. CIA, 550 F.3d 1155, 1159 (D.C. Cir. 2008); Detroit Free Press, Inc. v. DOJ, 73 F.3d 93, 98 (6th Cir. 1996); Cotton, 63 F.3d at 1117; Tax Analysts v. DOJ, 965 F.2d 1092, 1093 (D.C. Cir. 1992); Church of Scientology v. USPS, 700 F.2d 486, 492 (9th Cir. 1983); Fenster v. Brown, 617 F.2d 740, 742-45 (D.C. Cir. 1979); Cuneo v. Rumsfeld, 553 F.2d 1360, 1364-66 (D.C. Cir. 1977); Nat'l Sec. Archive v. DOD, 530 F. Supp. 2d 198, 201 (D.D.C. 2008); Peter S. Herrick's Customs & Int's Trade Newsletter v. U.S. Customs & Border Prot., No. 04-0377, 2006 WL 3060012, at *11 (D.D.C. Oct. 26, 2006) (holding that an award of attorney fees is inappropriate
(continued...)

While any FOIA disclosure hypothetically benefits the public by generally increasing public knowledge about the government, this "broadly defined benefit" is not what Congress had in mind when it provided for awards of attorney fees.[76] Rather, the "public benefit" factor """speaks for an award [of attorney fees] when the complainant's victory is likely to add to the fund of information that citizens may use in making vital political choices."""[77] Such a determination, which necessarily entails an evaluation of the nature of the specific information disclosed,[78] has led to findings of "public benefit" in a variety of contexts.[79] Highly pertinent

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[75](...continued)
"[g]iven the modest amount of court-ordered relief, the minimal public benefit conferred by the released information, plaintiff's overriding commercial and professional interest in the materials, and Customs' reasonable and largely correct legal position"). But see Burka v. HHS, 142 F.3d 1286, 1293 (D.C. Cir. 1998) (Randolph, J., concurring) ("Although we have applied these criteria in the past, they deserve another look.").

[76] Cotton, 63 F.3d at 1120 (citing Fenster, 617 F.2d at 744); see Klamath Water Users Protective Ass'n v. U.S. Dep't of the Interior, 18 F. App'x 473, 475 (9th Cir. 2001) (declining to award attorney fees for the release of documents "having marginal public interest and little relevance to the making of political choices by citizens"); Bangor Hydro-Elec. Co. v. U.S. Dep't of the Interior, 903 F. Supp. 169, 171 (D. Me. 1995) ("[A] successful FOIA plaintiff always confers some degree of benefit on the public by bringing the government into compliance with FOIA and securing for society the benefits assumed to flow from the disclosure of government information; [t]hat general benefit alone, however, does not necessarily support an award of litigation costs and attorney fees.").

[77] Cotton, 63 F.3d at 1120 (quoting Fenster, 617 F.2d at 744 (quoting, in turn, Blue v. BOP, 570 F.2d 529, 534 (5th Cir. 1978))).

[78] See id.

[79] See, e.g., Am. Small Bus. League v. SBA, No. 08-00829, 2009 WL 1011632, at *3 (N.D. Cal. Apr. 15, 2009) (finding that plaintiff meets public benefit requirement because by requesting such information plaintiff is "holding [defendant] publicly accountable for the accuracy of its statements in a press release and ensuring [defendant's] compliance with its Congressional mandate"); Campaign for Responsible Transplantation v. FDA, 593 F. Supp. 2d 236, 241-42 (D.D.C. 2009) (concluding that public benefit factor favors plaintiff who tailored request to further its mission as non-profit designed to alert public of risks associated with xenotransplantation); Judicial Watch, Inc. v. Bureau of Land Mgmt., 562 F. Supp. 2d 159, 174 (D.D.C. 2008) (finding that plaintiff meets public benefit standard because its "attempts at identifying the precise connection between three high-ranking elected officials and a real estate developer surely would aid individuals in making a most 'vital political choice'" (quoting plaintiff's filing)); L.A. Gay & Lesbian Cmty. Servs. Ctr. v. IRS, 559 F. Supp. 2d 1055, 1059-60 (C.D. Cal. 2008) (recognizing public benefit in disclosure of documents pertaining to struggle between organization and IRS to obtain tax-exempt status for the first openly gay organization); Hull v. U.S. Dep't of Labor, No. 04-CV-1264, 2006 U.S. Dist. LEXIS 35054, at *6 (D. Colo. May 30, 2006) (finding public benefit from disclosure of records concerning Department of Labor's investigation of corporate pension plan, because "millions of Americans" have interest in agency's effort to ensure "that private pension plans remain solvent and (continued...)

considerations in this "public benefit" inquiry are "the degree of dissemination and [the] likely public impact that might be expected from a particular disclosure."[80] When the information released is already in the public domain courts have found that this factor does not weigh in favor of a fee award.[81]

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[79](...continued)
viable"); PETA v. USDA, No. 03-195, 2006 WL 508332, at *3 (D.D.C. Mar. 3, 2006) (recognizing public benefit in disclosure of records that permit public to "assess" whether USDA complied with regulations when it made loan guarantee to large distributor of puppies); McCoy v. BOP, No. 03-383, 2005 WL 1972600, at *1 (E.D. Ky. Aug. 16, 2005) (concluding that the release of records concerning the death of an inmate in BOP's custody served the public's interest "in ensuring that the BOP fulfills its statutory duty to safeguard the well-being of individuals in its custody"); Jarno v. DHS, 365 F. Supp. 2d 733, 738 (E.D. Va. 2005) (finding public interest to have been served by release of records regarding DHS's handling of plaintiff's high-profile asylum case); Piper v. DOJ, 339 F. Supp. 2d 13, 21 (D.D.C. 2004) (finding public benefit through disclosure of information concerning allegations of evidence tampering by FBI personnel); Landano v. DOJ, 873 F. Supp. 884, 892 (D.N.J. 1994) ("[T]he public benefits from the Supreme Court's [guidance in Landano] which permits much easier access to government-held information, particularly in the circuits which adopted a nearly irrebutable presumption of confidentiality to information related to criminal investigations.").

[80] Blue, 570 F.2d at 533; see Church of Scientology, 769 F. Supp. at 331 (recognizing a public interest in "the apparently improper designation of a religion as a 'tax shelter' project"); Polynesian Cultural Ctr. v. NLRB, 600 F.2d 1327, 1330 (9th Cir. 1979) (per curiam) (denying fees when "disclosure was unlikely to result in widespread dissemination, or substantial public benefit"); Elec. Frontier Found., 2008 WL 2331959, at *3 (determining that public benefit factor was met by dissemination of released information through plaintiff's website, press releases, and reporting in three media outlets); Hull, 2006 U.S. Dist. LEXIS 35054, at *5 (finding planned dissemination -- free of charge -- through posting on association's website to be "key factor" in public benefit analysis); Long v. IRS, No. 74-724, 2006 WL 1041818, at *5 (W.D. Wash. Apr. 3, 2006) (finding public benefit based on plaintiff's assertion that statistical data requested from IRS was "critical" to her organization's "efforts to monitor and [publicly] disseminate information on IRS activities") (appeal pending); Jarno, 365 F. Supp. 2d at 738-40 ("The wide dissemination to the press and public . . . establish[ed] that the public benefitted from the government's FOIA response."); OCAW v. DOE, 141 F. Supp. 2d 1, 5 & n.7 (D.D.C. 2001) (concluding that public benefit factor was met by wide dissemination of information released as result of lawsuit), rev'd on other grounds, 288 F.3d 452 (D.C. Cir. 2002). Compare Piper, 339 F. Supp. 2d at 22 (accepting "plaintiff's unequivocal representations . . . that he is going to write a book," and viewing it as "unlikely that plaintiff would continually engage in this litigious battle had he just planned to store . . . 80,000 documents in a room somewhere and browse through them at his leisure"), with Frydman v. DOJ, 852 F. Supp. 1497, 1503 (D. Kan. 1994) (deciding that requester's suggestion that he might write book was "too speculative to warrant much weight"), aff'd, 57 F.3d 1080 (10th Cir. 1995) (unpublished table decision).

[81] See, e.g., Tax Analysts, 965 F.2d at 1094 (affirming district court's finding that more prompt reporting by Tax Analysts of additional twenty-five percent of publicly available district court tax decisions was "less than overwhelming" contribution to public interest); Laughlin v. Comm'r, 117 F. Supp. 2d 997, 1002 (S.D. Cal. 2000) (declining to award fees for
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Moreover, "[m]inimal, incidental and speculative public benefit will not suffice" to satisfy the public interest requirement.[82] Courts have also found it unavailing to show simply that the prosecution of the suit has compelled an agency to improve the efficiency of its FOIA processing.[83]

The Court of Appeals for the District of Columbia Circuit has also held that the notion of "public benefit" should not be grounded solely on "the potential release of present and future information" resulting from the legal precedent set by the case in which fees are sought.[84] As

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[81](...continued)
disclosure of document that is "readily accessible commercially"); Petroleum Info. Corp. v. U.S. Dep't of the Interior, No. 89-3173, slip op. at 5-6 (D.D.C. Nov. 16, 1993) (holding that public benefit is only "slight" where litigation resulted in disclosure of information in electronic form that was previously publicly available in printed form). But cf. PETA, 2006 WL 508332, at *4 (finding the existence of a "limited" public benefit, despite the agency's release of "the bulk of the requested information" before the lawsuit was commenced).

[82] Aviation Data Serv. v. FAA, 687 F.2d 1319, 1323 (10th Cir. 1982); see Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at *14 (D. Minn. Aug. 23, 2007) (finding public benefit minimal and incidental because information sought is to be sold to plaintiff's subscribers); Texas, 935 F.2d at 733-34 (suggesting that there is "little public benefit" in disclosure of documents that fail to reflect agency wrongdoing: "Texas went fishing for bass and landed an old shoe. Under the circumstances, we decline to require the federal government to pay the cost of tackle.").

[83] See Read v. FAA, 252 F. Supp. 2d 1108, 1110-11 (W.D. Wash. 2003) (refusing to find that mere act of bringing lawsuit without resultant release of records conferred public benefit warranting attorney fees); Ellis v. United States, 941 F. Supp. 1068, 1078 (D. Utah 1996) (holding that public benefit factor weighed against attorney's fees award because "[a]lthough there may have been some slight public benefit in bringing the government into compliance with FOIA and providing information of general interest to the public, the disclosure of the records did not add to the fund of information necessary to make important political choices"); Solone v. IRS, 830 F. Supp. 1141, 1143 (N.D. Ill. 1993) ("While the public would benefit from the court's imprimatur to the IRS to comply voluntarily with the provisions of the FOIA, this is not the type of benefit that FOIA attorneys' fees were intended to generate."); Muffoletto v. Sessions, 760 F. Supp. 268, 277 (E.D.N.Y. 1991) (maintaining that public benefit in compelling FBI to act more expeditiously is insufficient).

[84] Cotton, 63 F.3d at 1120; see Chesapeake Bay Found. v. USDA, 108 F.3d 375, 377 (D.C. Cir. 1997) ("Nor is the establishment of a legal right to information a public benefit for the purpose of awarding attorneys' fees." (citing Cotton, 63 F.3d at 1120)); see also Bangor Hydro-Elec., 903 F. Supp. at 170 (rejecting argument that public benefitted by precedent that would "allow other utilities to easily acquire similar documents for the benefit of those utilities ratepayers"). But see Church of Scientology, 700 F.2d at 493 (declaring that an appellate ruling that a specific statutory provision does not qualify under Exemption 3 "in our view, benefits the public"); Aronson v. HUD, 866 F.2d 1, 3 (1st Cir. 1989) (suggesting that public interest is served by disclosure to "private tracer" of information concerning mortgagors who were owed "distributive share" refunds); Cottone v. FBI, No. 94-1598, slip op. at 2 (D.D.C. Mar. 16, 2001), appeal dismissed voluntarily, No. 01-5159 (D.C. Cir. July 26, 2001) (accepting plaintiff's (continued...)

the D.C. Circuit noted in one case: "Such an inherently speculative observation is . . . inconsistent with the structure of FOIA itself."[85]

The second factor -- the commercial benefit to the plaintiff -- requires an examination of whether the plaintiff had an adequate private commercial incentive to litigate its FOIA demand even in the absence of an award of attorney fees. If so, then fees are typically denied,[86] except in the case of news media interests, which generally "should not be considered commercial interests."[87]

The third factor -- the nature of the plaintiff's interest in the records -- often is evaluated

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[84](...continued)
argument of public benefit deriving from the "precedential effect of [his] victory," while at the same time recognizing "binding circuit precedent" to the contrary).

[85] Cotton, 63 F.3d at 1120.

[86] See, e.g., Klamath, 18 F. App'x at 475 (finding that plaintiff association sought documents to advance and protect interests of its members, and recognizing that fact that members might be "nonprofit" does not make their interests less commercial for FOIA purposes); Fenster, 617 F.2d at 742-44 (affirming denial of fees to law firm that obtained disclosure of government auditor's manual used in reviewing contracts of type entered into by firm's clients); Chamberlain v. Kurtz, 589 F.2d 827, 842-43 (5th Cir. 1979) (concluding that plaintiff who faced $1.8 million deficiency claim for back taxes and penalties "needed no additional incentive" to bring FOIA suit against IRS for documents relevant to his defense); Horsehead Indus. v. EPA, 999 F. Supp. 59, 69 (D.D.C. 1998) (finding that requester would have brought suit regardless of availability of fees); Viacom Int'l v. EPA, No. 95-2243, 1996 WL 515505, at *2 (E.D. Pa. Aug. 29, 1996) (dismissing as "divorced from reality" corporation's contention that its "'knowing the extent of its potential liability will not promote any commercial interests'"); Frye v. EPA, No. 90-3041, 1992 WL 237370, at *4 (D.D.C. Aug. 31, 1992) (denying fees where "plaintiff does not effectively dispute that the prime beneficiaries of the information requested will be commercial entities with commercial interests that either are, or might become, his clients"); Hill Tower, Inc. v. Dep't of the Navy, 718 F. Supp. 568, 572 (N.D. Tex. 1989) (ruling that a plaintiff who had filed tort claims against the government arising from aircraft crash "had a strong commercial interest in seeking [related] information [as] it was [its] antenna that was damaged by the crash"). But see Aronson, 866 F.2d at 3 (finding that the "potential for commercial personal gain did not negate the public interest served" by private tracer's lawsuit since "failure of HUD to comply reasonably with its reimbursement duty would probably only be disclosed by someone with a specific interest in ferreting out unpaid recipients"); Windel v. United States, No. 3:02-CV-306, 2006 WL 1036786, at *3 (D. Alaska Apr. 19, 2006) (awarding portion of requested fees, even though plaintiff's FOIA request "clearly implicated her own pecuniary interests" in obtaining documents concerning her gender discrimination claim).

[87] S. Rep. No. 93-854, at 19 (1974); see also Davy, 550 F.3d at 1160 ("Surely every journalist or scholar may hope to earn a living plying his or her trade, but that alone cannot be sufficient to preclude an award of attorney's fees under FOIA."). But see Nat'l Sec. Archive, 530 F. Supp. 2d at 203 (noting that news organization is not "ipso facto entitled to attorney fees whenever it wins a FOIA case").

in tandem with the second factor[88] and militates against awarding fees in cases where the plaintiff had an adequate personal incentive to seek judicial relief.[89] To disqualify a fee applicant under the second and third factors, "a motive need not be strictly commercial; any private interest will do."[90] In this regard, the use of the FOIA as a substitute for discovery has routinely been found to constitute the pursuit of a private, noncompensable interest.[91] The

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[88] See, e.g., Church of Scientology, 700 F.2d at 494 (noting that it is "logical to read the two criteria together where a private plaintiff has pursued a private interest"); Nat'l Sec. Archive, 530 F. Supp. 2d at 201 ("The second and third factors, commercial benefit and the plaintiff's interest in the records, are closely related and often considered together.").

[89] See, e.g., Polynesian Cultural Ctr., 600 F.2d at 1330 (ruling that attorney fees award should not "'merely subsidize a matter of private concern' at taxpayer expense" (quoting Blue, 570 F.2d at 533-34)); Maydak v. DOJ, 579 F. Supp. 2d 105, 109 (D.D.C. 2008) (refusing to award litigation costs where plaintiff requested records pertaining to himself and matters affecting his detention); Nw. Univ. v. USDA, 403 F. Supp. 2d 83, 88 & n.7 (D.D.C. 2005) (denying fee award where plaintiff sought records concerning investigations into its activities for apparent purpose of challenging agency's findings); Viacom, 1996 WL 515505, at *2 ("[W]e harbor strong doubts that Viacom entered into this proceeding to foster the public interest in disclosure. Its motivation, as evinced by its conduct of this litigation, was to assert its own interests as a potentially responsible party to the clean up operation."); Abernethy v. IRS, 909 F. Supp. 1562, 1569 (N.D. Ga. 1995) (suggesting that when plaintiff sought records of investigation of which he was target to challenge his removal from management position, his "strong personal motivation for filing this lawsuit outweigh[ed] any public interest which may result from disclosure"); Frydman, 852 F. Supp. at 1504 ("Although plaintiff's interest in the information in this case is not pecuniary, it is strictly personal.").

[90] Tax Analysts, 965 F.2d at 1095 ("'[P]laintiff was not motivated simply by altruistic instincts, but rather by its desire for efficient, easy access to [tax] decisions.'" (quoting Tax Analysts v. DOJ, 759 F. Supp. 28, 31 (D.D.C. 1991))); see Nat'l Sec. Archive, 530 F. Supp. 2d at 203 (finding that non-profit organization had "powerful commercial and private motive to win the lawsuit to defeat the government's attempt to charge search fees in order to make NSA's retrieval of FOIA documents as cheap as possible"); Gavin, 2007 WL 2454156, at *15 (holding that second and third factors weigh against fee award because plaintiff's primary interest is to advance purely personal goal of publishing and selling requested information to his subscribers); Bangor Hydro-Elec., 903 F. Supp. at 171 (rejecting public utility's argument that it incurred no commercial benefit because under "'traditional regulatory principles'" utility would be obliged to pass any commercial gain on to its ratepayers (quoting plaintiff's filing)); Mosser Constr. Co. v. U.S. Dep't of Labor, No. 93CV7525, slip op. at 4 (N.D. Ohio Mar. 29, 1994) (explaining that factor weighs against not-for-profit organization whose actions are motivated by commercially related concerns on behalf of its members).

[91] See, e.g., Ellis, 941 F. Supp. at 1079 (compiling cases); Muffoletto, 760 F. Supp. at 275 (rejecting plaintiff's entitlement to fees on grounds that "[t]he plaintiff's sole motivation in seeking the requested information was for discovery purposes, namely, to assist him in the defense of a private civil action"); Republic of New Afrika v. FBI, 645 F. Supp. 117, 121 (D.D.C. 1986) (stating that purely personal motives of plaintiff -- to exonerate its members of criminal charges and to circumvent civil discovery -- dictated against award of fees), aff'd sub nom.

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Court of Appeals for the Tenth Circuit has found that when a FOIA plaintiff's motives change over the course of the litigation, the fee award should be divided on the basis of such shifting interests.[92] At the same time, courts have also weighed the second and third factors in favor of a fee applicant even in situations where a personal interest was present.[93]

The fourth factor -- the reasonableness of the agency's withholding -- counsels against a fee award when the agency had a reasonable basis in law for concluding that the information in issue was exempt. If an agency's position is correct as a matter of law, this factor is often dispositive.[94] The converse, however, also has been found to be true -- namely,

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[91](...continued)
Provisional Gov't of the Republic of New Afrika v. ABC, 821 F.2d 821 (D.C. Cir. 1987) (unpublished table decision); Simon v. United States, 587 F. Supp. 1029, 1033 (D.D.C. 1984) (articulating that use of FOIA as substitute for civil discovery "is not proper and this court will not encourage it by awarding fees"). But see McCoy, 2005 WL 1972600, at *2 (finding fee entitlement, even though plaintiff's FOIA request "served her personal interest in obtaining . . . evidence" for use in related tort litigation); cf. Jarno, 365 F. Supp. 2d at 740 (concluding that the plaintiff's interest in the requested documents "support[ed] an award of attorney's fees," despite his motivation to seek disclosure in order to "facilitate the fair adjudication of his political asylum claim").

[92] See Anderson v. HHS, 80 F.3d 1500, 1504-05 (10th Cir. 1996) (affirming district court's denial of fees for first phase of litigation -- when plaintiff's primary motive was to obtain records for state court action, while approving them for second phase -- when plaintiff's primary interest in records was public dissemination).

[93] See, e.g., Davy, 550 F.3d at 1161 (concluding that second and third factors favor plaintiff as plaintiff's "scholarly interest in publishing publicly valuable information in a book . . . is at most 'quasi-commercial'" and "nothing in the record would suggest that his private commercial interest outweighs his scholarly interest"); Crooker v. U.S. Parole Comm'n, 776 F.2d 366, 368 (1st Cir. 1985) (finding the third factor to favor plaintiff where the "interest was neither commercial nor frivolous, [but] to ensure that the Parole Commission relied on accurate information in making decisions affecting his liberty"); Summers, 477 F. Supp. 2d at 69 (relying on Piper and finding that second and third factors may well "favor the Plaintiff regardless of the Plaintiff's desire that his book be a commercial success"); Piper, 339 F. Supp. 2d at 21-22 (concluding that because plaintiff's "distinct personal interest" in writing book about his mother's kidnapping was not separable from public interest in this "scholarly endeavor," second factor will not weigh against fee award); Cottone, No. 94-1598, slip op. at 3 (D.D.C. Mar. 16, 2001) (relying on Williams to justify awarding fees in order to encourage service on Civil Pro Bono Counsel panel); Williams, 17 F. Supp. 2d at 9 (awarding fees "[e]ven if [the requester's] own interest in the records is personal," in order to "serve the larger public purpose of encouraging" representation by pro bono counsel); cf. Assembly of Cal. v. U.S. Dep't of Commerce, No. Civ-S-91-990, 1993 WL 188328, at *5 (E.D. Cal. May 28, 1993) (refusing to preclude fees where state legislature sought information to challenge federal census count, even though benefits could accrue to state, because "plaintiffs did not stand to personally benefit but acted as public servants").

[94] See Cotton, 63 F.3d at 1117 ("[T]here can be no doubt that a party is not entitled to fees (continued...)

that "[r]ecalcitrant and obdurate behavior 'can make the last factor dispositive without consideration of any of the other factors.'"[95]

In general, an agency's legal basis for withholding has been found "reasonable" if pertinent authority exists to support the claimed exemption.[96] Even in the absence of

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[94](...continued)
if the government's legal basis for withholding requested records is correct."); Chesapeake Bay Found. v. USDA, 11 F.3d 211, 216 (D.C. Cir. 1993) ("If the Government was right in claiming that the [records] were exempt from disclosure under FOIA, then no fees are recoverable."); Educ./Instruccion, Inc. v. HUD, 649 F.2d 4, 8 (1st Cir. 1981) (stating that government's withholding must "have 'a colorable basis in law' and not appear designed 'merely to avoid embarrassment or to frustrate the requester'" (quoting S. Rep. No. 93-854, at 19)); Polynesian Cultural Ctr., 600 F.2d at 1330 (denying fees, despite court-ordered disclosure, because "[t]he Board's claim of exemption was not only reasonable, but correct," based upon subsequent Supreme Court decision); Horsehead Indus., 999 F. Supp. at 64 (ruling that "fees will not be awarded" when agency's withholding "is correct as a matter of law"); see also Wheeler v. IRS, 37 F. Supp. 2d 407, 413 (W.D. Pa. 1998) (finding that reasons for government's refusal to disclose records "may even be dispositive"). But see Hull, 2006 U.S. Dist. LEXIS 35054, at *11 (finding agency's withholding determination, based on "colorable legal argument," to be reasonable, but concluding that other factors weighed in favor of fee award); Williams, 17 F. Supp. 2d at 8 (stating that "'courts must be careful not to give any particular factor dispositive weight'" (quoting Nationwide Bldg. Maint., Inc. v. Sampson, 559 F.2d 704, 714 (D.C. Cir. 1977))).

[95] Read, 252 F. Supp. 2d at 1112 (quoting Horsehead Indus., 999 F. Supp. at 68); see Cottone, No. 94-1598, slip op. at 3-4 (D.D.C. Mar. 16, 2001) (awarding fees even though agency's position was reasonable; relying on fact that agency's defense was "determined, dilatory, and expensive to confront"); see also Tax Analysts, 965 F.2d at 1097 ("[T]he reasonable-basis-in-law factor is intended to weed out those cases in which the government was 'recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior.'" (quoting Cuneo, 553 F.2d at 1366)); LaSalle Extension Univ. v. FTC, 627 F.2d 481, 486 (D.C. Cir. 1980) ("[T]he Government need not prove that the information 'was in fact exempt,' only that the Government 'had a reasonable basis in law for concluding that the information in issue was exempt and that it had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior (quoting Fenster, 617 F.2d at 744)); Ellis, 941 F. Supp. at 1080 (explaining that government need show only "reasonable or colorable basis for the withholding" and that it has not engaged in recalcitrant or obdurate behavior); Solone, 830 F. Supp. at 1143 (noting that government acted reasonably when agency had "at least a colorable basis in law for its decision to withhold" and there are no allegations of harassment of requester or avoidance of embarrassment by the agency).

[96] See Adams v. United States, 673 F. Supp. 1249, 1259-60 (S.D.N.Y. 1987); see also Am. Commercial Barge Lines v. NLRB, 758 F.2d 1109, 1112-14 (6th Cir. 1985); Maydak, 579 F. Supp. 2d at 109 ("Although plaintiff obtained two orders compelling the release of BOP records, the BOP rightly asserts that the orders resulted from its inability to satisfy its evidentiary burden with respect to reasonably asserted exemptions, rather than from evidence of agency recalcitrance or bad faith."); Republic of New Afrika, 645 F. Supp. at 122. But see United Ass'n
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supporting authority, withholding has been found to be "reasonable" where no precedent directly contradicted the agency's position.[97]

In an illustrative example, the D.C. Circuit upheld a district court's finding of reasonableness in a case in which there was "no clear precedent on the issue,"[98] even though the district court's decision in favor of the agency's withholding was reversed unanimously by the court of appeals, which, in turn, was affirmed by a near-unanimous decision of the Supreme Court.[99] Similarly, the mere fact that an agency foregoes an appeal on the merits of a case and complies with a district court disclosure order does not foreclose it from asserting the reasonableness of its original position in opposing a subsequent fee claim.[100]

When the delay in releasing records, rather than the agency's substantive claim of exemption, is challenged, that delay has been found not to favor a fee award so long as the agency has not engaged in "obdurate behavior or bad faith."[101] On the other hand, courts have

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[96](...continued)
of Journeymen & Apprentices, Local 598 v. Dep't of the Army, 841 F.2d 1459, 1462-64 (9th Cir. 1988) (withholding held unreasonable where agency relied on one case that was "clearly distinguishable" and where "strong contrary authority [was] cited by the [plaintiff]"); Nw. Coal. for Alternatives to Pesticides v. Browner, 965 F. Supp. 59, 64 (D.D.C. 1997) (finding that an EPA decision "to rely solely on manufacturers' claims of confidentiality, rather than conduct more extensive questioning of the manufacturers' claims or make its own inquiry . . . was essentially a decision not to commit resources to questioning claims of confidentiality but instead to confront issues as they arise in litigation -- and to pay attorneys' fees if EPA loses").

[97] See Frydman, 852 F. Supp. at 1504 ("Although the government did not offer case authority to support its position regarding the [records], we believe the government's position had a colorable basis. There is little, if any, case authority which directly holds contrary to the government's position.").

[98] Tax Analysts, 965 F.2d at 1096-97.

[99] Tax Analysts v. DOJ, 492 U.S. 136 (1989).

[100] See Cotton, 63 F.3d at 1119.

[101] Ellis, 941 F. Supp. at 1080 (noting that agency was "in frequent contact with plaintiffs' counsel" and that "[d]ue to the scope of plaintiffs' request, some delay was inherent"); see Hull, 2006 U.S. Dist. LEXIS 35054, at *12 (viewing agency delays as "more suggestive of ineptitude than bad faith"); Read, 252 F. Supp. 2d at 1112 ("[D]elay due to bureaucratic ineptitude alone is not sufficient to weigh in favor of an award of attorney's fees."); Horsehead Indus., 999 F. Supp. at 66 (finding that narrow reading of request is not "bad faith"); Republic of New Afrika, 645 F. Supp. at 122; Smith v. United States, No. 95-1950, 1996 WL 696452, at *7 (E.D. La. Dec. 4, 1996) (finding that "[t]he government did not act with due diligence, and has offered no reason to find that the delay was 'unavoidable[,]'" but holding in favor of the government on this factor as "[t]he evidence in this case is that the Coast Guard's noncompliance was due to administrative ineptitude rather than any unwillingness to comply with [plaintiff's] FOIA request"), aff'd per curiam, 127 F.3d 35 (5th Cir. 1997); Frye, 1992 WL 237370, at *3 (explaining
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at times required agencies to provide a meaningful justification for the delay,[102] and have awarded fees when they found the delay to be unreasonable.[103] An agency's decision to withhold entire documents when it could have processed them relatively easily has been found "unreasonable" for purposes of the entitlement analysis.[104] (For further discussions of

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[101](...continued)
that although agency failed to adequately explain plaintiff's more-than-two-year wait for final response (such delay previously having been found "unreasonable" by court), agency's voluntary disclosure of documents two days before Vaughn Index deadline did not warrant finding of "obdurate" behavior absent affirmative evidence of bad faith).

[102] See Judicial Watch, Inc., 562 F. Supp. 2d at 174 (indicating that agency is, at minimum, required to "provide meaningful justification for inactivity or refusal to turn over requested information"); Elec. Frontier Found., 2008 WL 2331959, at *4 (concluding that agency "failed to establish a reasonable basis for withholding the requested documents" by not "explaining why it needed four months to process plaintiff's FOIA request").

[103] See, e.g., Miller v. U.S. Dep't of State, 779 F.2d 1378, 1390 (8th Cir. 1985) (concluding that government's reasons for delay -- namely processing backlogs, confusion, and administrative error -- are not reasonable legal bases and, because "[t]he FOIA does not contain a statutory exception for administrative inefficiency," plaintiff is entitled to fees); Judicial Watch, Inc., 562 F. Supp. 2d at 174 (concluding that agency's justifications for delay were unreasonable when it "continually assured plaintiff that its request would soon be released, only to subsequently renege on these commitments, citing as justification sweeping assertions that [agency] was 'short-staffed' and saddled with other FOIA requests demanding immediate attention"); Jarno, 365 F. Supp. 2d at 740 (determining that fourth factor favored fee award, because agency "failed to comply with the requirements of [the] FOIA by not responding to Plaintiff's request for information within the statutory time frame"); United Merchants & Mfrs. v. Meese, No. 87-3367, slip op. at 3 (D.D.C. Aug. 10, 1988) (declaring it unnecessary for plaintiff to show "that defendant was obdurate in order to prevail" where there was "no reasonable basis for defendant to have failed to process plaintiff's [FOIA request] for nearly a year"); cf. Claudio v. SSA, No. H-98-1911, 2000 WL 33379041, at *11 (S.D. Tex. May 24, 2000) (finding all four factors unmet, nevertheless awarding fees because of "the Government's action in not delivering the majority of the documents until after suit was filed and in failing to provide a Vaughn Index until after ordered to do so by the Court").

[104] See Campaign for Responsible Transplantation, 593 F. Supp. 2d at 244 (finding that "FDA has not demonstrated a reasonable basis in law for withholding nonexempt documents beyond the twenty day deadline set forth in FOIA"); Wildlands CPR v. U.S. Forest Serv., 558 F. Supp. 2d 1096, 1102 (D. Mont. 2008) (concluding that agency had no reasonable basis in law for not disclosing requested information; based on record, it appears agency was most concerned with size and scope of request, not its ability to understand request); Poulsen, 2007 WL 160945, at *2 (holding that agency's position was not substantially justified because, in many instances, agency's redactions were "inconsistent and seemingly without reasoned basis"); Long, 2006 WL 1041818, at *4-5 (concluding that IRS lacked reasonable basis to fully withhold audit statistics on grounds that disclosure could somehow identify individual taxpayer returns; if necessary, "IRS could [have] redact[ed]" this information); McCoy, 2005 WL 1972600, at *2 (finding that BOP had no reasonable basis to withhold requested documents
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an agency's obligation to segregate and release nonexempt information, see Procedural Requirements, "Reasonably Segregable" Obligation, above, and Litigation Considerations, "Reasonably Segregable" Requirements, above.)

Typically, FOIA plaintiffs seek attorney fees only at the conclusion of a case. Even when the underlying action has been decided, a petition for attorney fees "survive[s] independently under the court's equitable jurisdiction."[105] The fact that an attorney fees petition is pending, moreover, has been found not to preclude appellate review of the district court's decision on the merits.[106]

Some FOIA plaintiffs, however, have sought "interim" attorney fees before the conclusion of a case -- although such relief has been termed "inefficient"[107] and "piecemeal."[108] Sometimes a plaintiff has been able to point to a threshold determination concerning eligibility to receive records that sufficiently supports eligibility for an interim award.[109] If interim fees

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[104](...continued)
in their entireties in order to protect the privacy of third parties; "[w]hile the duty to withhold certain identifying information . . . is supported by case law, withholding the information in its entireties was not necessary"); cf. Davy, 550 F.3d at 1163 (holding that agency's lack of resistance to disclose records after lawsuit was filed does not constitute "colorable basis in law" for failing to respond to plaintiff's second request); Nw. Coal. for Alternatives to Pesticides v. EPA, 421 F. Supp. 2d 123, 128-29 (D.D.C. 2006) (finding plaintiff entitled to a fee award, even though the court never ruled that the agency's withholdings were improper, on the basis that a previous remand order obligated the EPA to articulate its reasons for withholding and "[a]t that juncture . . . the EPA had not demonstrated a reasonable basis for withholding").

[105] Carter v. VA, 780 F.2d 1479, 1481 (9th Cir. 1986); see Anderson v. HHS, 3 F.3d 1383, 1385 (10th Cir. 1993) ("[T]he fee issue is ancillary to the merits of the controversy.").

[106] See McDonnell v. United States, 4 F.3d 1227, 1236 (3d Cir. 1993) ("Even if a motion for attorney's fees is still pending in the district court, that motion does not constitute a bar to our exercise of jurisdiction under § 1291." (citing Budinich v. Becton Dickinson & Co., 486 U.S. 196, 198-202 (1988))).

[107] Biberman v. FBI, 496 F. Supp. 263, 265 (S.D.N.Y. 1980) (noting "inefficiency" of interim fee award); see Allen v. FBI, 716 F. Supp. 667, 669-72 (D.D.C. 1989) (recognizing that although court may order payment of interim fees, it should be done only "in limited circumstances").

[108] Hydron Labs., Inc. v. EPA, 560 F. Supp. 718, 722 (D.R.I. 1983) (refusing to deal "piecemeal" with questions concerning entitlement to attorney fees); see also Allen, 716 F. Supp. at 671 (suggesting that interim fee awards should be made only in unusual case of protracted litigation and financial hardship).

[109] See Nat'l Ass'n of Criminal Def. Lawyers v. DOJ, No. 97-372, slip op. at 2 (D.D.C. June 26, 1998) (awarding interim fees based on court's conclusion that, inter alia, even brief litigation had "imposed concrete hardship on Plaintiff's counsel"), interlocutory appeal dismissed for lack of juris., 182 F.3d 981 (D.C. Cir. 1999); Wash. Post v. DOD, 789 F. Supp. 423, 424-26 (D.D.C.
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are approved, payment of the fees need not await final judgment in the action.[110] The D.C. Circuit has held that an agency must wait for a final court decision on the underlying merits of the case before it can appeal an interim award of fees.[111]

Calculations

As an initial matter, attorney fees and costs are no longer paid by the Claims and Judgment Fund of the United States Treasury.[112] Pursuant to Section 4 of the OPEN Government Act of 2007, FOIA attorney fees and costs are now paid directly by the agency, using funds "annually appropriated for any authorized purpose."[113]

If a court decides to make a fee award -- either interim or otherwise -- its next task is to determine an appropriate fee amount, based upon attorney time shown to have been reasonably expended. Accordingly, attorney fees and costs should be supported by well-documented, contemporaneous billing records;[114] while some courts will consider

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[109](...continued)
1992) (awarding interim fees for special master whose work established plaintiff's right to receive certain records); Allen v. DOD, 713 F. Supp. 7, 12-13 (D.D.C. 1989) (awarding interim fees, but only "for work leading toward the threshold release of non-exempt documents").

[110] See Rosenfeld v. United States, 859 F.2d 717, 727 (9th Cir. 1988); Wash. Post, 789 F. Supp. at 425.

[111] See Nat'l Ass'n of Criminal Def. Lawyers v. DOJ, 182 F.3d 981, 986 (D.C. Cir. 1999) (concluding that prior to conclusion of case in district court, appellate court has no jurisdiction to review attorney fees award); see also Petties v. District of Columbia, 227 F.3d 469, 472 (D.C. Cir. 2000) (emphasizing that interim review of attorney fees decision is unavailable until final judgment is reached) (non-FOIA case).

[112] See OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[113] Id. § 4.

[114] See Blazy v. Tenet, 194 F.3d 90, 92 (D.C. Cir. 1999) (rejecting otherwise-valid claim for attorney fees "for want of substantiation"); Nat'l Ass'n of Concerned Veterans v. Sec'y of Def., 675 F.2d 1319, 1327 (D.C. Cir. 1982) (per curiam) ("Attorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney."); Pohlman, Inc. v. SBA, No. 4:03-CV-1241, slip op. at 27-28 (E.D. Mo. Sept. 30, 2005) (chiding plaintiff for failing to support fee request with documentation of time expended on lawsuit); Ajluni v. FBI, No. 94-CV-325, 1997 WL 196047, at *2 (N.D.N.Y. Apr. 14, 1997) ("Moreover, '[t]he rule in this Circuit prohibits the submission of reconstructed records, where no contemporaneous records have been kept.'" (quoting Lenihan v. City of N.Y., 640 F. Supp. 822, 824 (S.D.N.Y. 1986))); cf. Poulsen, 2007 WL 160945, at *3 (finding that agency's "challenge to the reasonableness of plaintiff's fee request is conclusory and that [agency] did not meet its 'burden of providing specific evidence to challenge the accuracy and reasonableness of the hours charged'" (quoting McGrath v. County of Nev., 67 F.3d 248, 255 (9th Cir. 1995))).

reconstructed records,[115] the amount ultimately awarded may be reduced accordingly.[116]

The starting point in setting a fee award is to multiply the number of hours reasonably expended by a reasonable hourly rate -- a calculation that yields the "lodestar."[117] Not all hours expended in litigating a case will be deemed to have been "reasonably" expended. For example, courts have directed attorneys to subtract hours spent litigating claims upon which the party seeking the fee ultimately did not prevail.[118] In such cases, a distinction has been made between a loss on a legal theory where "the issue was all part and parcel of one [ultimately successful] matter,"[119] and "'nonproductive time or [claims] for time expended on

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[115] See, e.g., Judicial Watch, Inc. v. Dep't of Commerce, 384 F. Supp. 2d 163, 173-74 (D.D.C. 2005) (awarding fees based on records reconstructed by former colleague of attorney who handled FOIA suit).

[116] See Anderson v. HHS, 80 F.3d 1500, 1506 (10th Cir. 1996) ("Reconstructed records generally do not accurately reflect the actual time spent; and we have directed district courts to scrutinize such records and adjust the hours if appropriate."). But see Judicial Watch, 384 F. Supp. 2d at 174 (declining to reduce a fee award where billing records were reconstructed from transcripts and videotapes, which "though not contemporaneous time records in the traditional sense, nonetheless . . . indicate[d] precisely the length and nature of the work done" and were deemed to be "perhaps even more reliable . . . than a mere time record").

[117] See Hensley v. Eckerhart, 461 U.S. 424, 433 (1982) (civil rights case); Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (Title VII case); Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973) (describing the product of a reasonable hourly rate and the hours actually worked as "the lodestar of the court's fee determination") (non-FOIA case).

[118] See, e.g., Hensley, 461 U.S. at 434-40; Anderson, 80 F.3d at 1506; Copeland, 641 F.2d at 891-92; Nat'l Sec. Archive v. DOD, 530 F. Supp. 2d 198, 205 (D.D.C. 2008) (finding that "[a]warding NSA its entire fee, and thus compensating it at least in part for time spent on a losing claim, would be an abuse of discretion"); Nw. Coal. for Alternatives to Pesticides v. EPA, 421 F. Supp. 2d 123, 129-30 (D.D.C. 2006) (holding that "plaintiff should not be compensated for its unnecessary and unsuccessful 'Motion for Entry of Judgment'"); Ajluni, 947 F. Supp. at 611 (limiting fees to those incurred up to point at which "the last of the additional documents were released"); McDonnell v. United States, 870 F. Supp. 576, 589 (D.N.J. 1994). But see Lissner v. U.S. Customs Serv., 56 F. App'x 330, 331 (9th Cir. 2003) (permitting award for preparation of initial attorney fees motion, even though it was unsuccessful, because it was "necessary step to . . . ultimate victory"); cf. Judicial Watch, 384 F. Supp. 2d at 171 (awarding attorney fees for the discovery phase of litigation, even though it "was not productive in the sense of getting tangible results," because it gave "effect to" the court's prior order granting the plaintiff an opportunity "to reconstruct or discover documents" that the agency "destroyed or removed" during its initial search).

[119] Copeland, 641 F.2d at 892 n.18; see Nat'l Ass'n of Concerned Veterans, 675 F.2d at 1327 n.13; Nat'l Ass'n of Atomic Veterans v. Dir., Def. Nuclear Agency, No. 81-2662, slip op. at 7 (D.D.C. July 15, 1987) (deciding that because plaintiff "clearly prevailed" on its only claim for relief, it is "entitled to recover fees for time expended on the few motions upon which it did not

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issues on which plaintiff ultimately did not prevail.'"[120] In some cases when the plaintiff's numerous claims are so intertwined that the court can discern "no principled basis for eliminating specific hours from the fee award," courts have employed a "general reduction method," allowing only a percentage of fees commensurate with the estimated degree to which that plaintiff had prevailed.[121]

Additionally, prevailing plaintiffs' counsel are obligated to exercise sound billing judgment. This means that "[c]ounsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary."[122] Furthermore, the Court of Appeals for the District of Columbia Circuit has

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[119](...continued)
prevail"); Badhwar v. U.S. Dep't of the Air Force, No. 84-154, slip op. at 3 (D.D.C. Dec. 11, 1986) ("[D]efendants' attempts to decrease [fees] on the grounds that the plaintiffs did not prevail as to all issues raised . . . are not persuasive. [The FOIA] requires only that the plaintiff should have 'substantially prevailed.'").

[120] Weisberg v. DOJ, 745 F.2d 1476, 1499 (D.C. Cir. 1984) (quoting Nat'l Ass'n of Concerned Veterans, 675 F.2d at 1327); see, e.g., Piper v. DOJ, 339 F. Supp. 2d 13, 24 (D.D.C. 2004) (refusing to grant fees for time spent on claims that ultimately were unsuccessful); Steenland v. CIA, 555 F. Supp. 907, 911 (W.D.N.Y. 1983) (declaring that award for work performed after release of records, where all claims of exemptions subsequently upheld, "would assess a penalty against defendants which is clearly unwarranted"); Agee v. CIA, No. 79-2788, slip op. at 1 (D.D.C. Nov. 3, 1982) ("[P]laintiff is not entitled to fees covering work where he did not substantially prevail."); Dubin v. Dep't of Treasury, 555 F. Supp. 408, 413 (N.D. Ga. 1981) (holding that fees awarded "should not include fees for plaintiffs' counsel for their efforts after the release of documents by the Government . . . since they failed to prevail on their claims at trial"), aff'd, 697 F.2d 1093 (11th Cir. 1983) (unpublished table decision); cf. Anderson, 80 F.3d at 1504 (affirming district court's denial of fees for portion of lawsuit during which plaintiff's primary motivation was her personal interest, while allowing fees for remainder of suit when public interest was paramount motivation).

[121] See, e.g., Hull v. U.S. Dep't of Labor, No. 04-CV-1264, 2006 U.S. Dist. LEXIS 35054, at *20 (D. Colo. May 30, 2006) (reducing number of hours for which plaintiff may recover fees by sixty percent, because she was only "about forty percent successful"); Kempker-Cloyd v. DOJ, No. 5:97-253, slip op. at 14 (W.D. Mich. Apr. 2, 1999) (magistrate's recommendation) (dividing claimed amount of attorney fees in half, because "[s]egregating litigation efforts spent on intertwined issues . . . is impracticable, if not impossible"), adopted, (W.D. Mich. Aug. 17, 1999); McDonnell, 870 F. Supp. at 589 (reducing plaintiff's requested award by sixty percent because "the amount of relief denied was greater than that awarded").

[122] Hensley, 461 U.S. at 434; see Auto Alliance Int'l, Inc. v. U.S. Customs Serv., 155 F. App'x 226, 228 (6th Cir. 2005) (upholding district court's twenty-five percent reduction of fees for "general excessiveness in billing" in this "relatively unexceptional FOIA case"); L.A. Gay & Lesbian Cmty. Servs. Ctr. v. IRS, 559 F. Supp. 2d 1055, 1061-62 (C.D. Cal. 2008) (reducing fees "to account for duplication caused by the number of attorneys involved and excessive time spent on certain tasks"); Am. Small Bus. League v. SBA, No. 04-4250, 2005 WL 2206486, at *1 (N.D. Cal. Sept. 12, 2005) (reducing fees for "unnecessary" time that was spent "thinking about,
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admonished that "[s]ome expense items, though perhaps not unreasonable between a first class law firm and a solvent client, are not supported by indicia of reasonableness sufficient to allow us justly to tax the same against the United States."[123] Although "contests over fees should not be permitted to evolve into exhaustive trial-type proceedings,"[124] when attorney fees are awarded, the hours expended by counsel for the plaintiff pursuing the fee award also are ordinarily compensable.[125]

To determine a reasonable hourly rate -- which has been defined "as that prevailing in the community for similar work"[126] -- courts will accept affidavits from local attorneys to support hourly rate claims, but they should be couched in terms of specific market rates for particular types of litigation and they must be well supported.[127] The pertinent legal market,

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[122](...continued)
researching and drafting" fee petition); McCoy v. BOP, No. 03-383, 2005 WL 1972600, at *3-4 (E.D. Ky. Aug. 16, 2005) (reducing fees by approximately thirty percent because some of the hours submitted were "duplicative, unnecessary to the outcome of the case, and excessive for an experienced attorney"); Smith v. Ashcroft, No. 02-CV-0043, 2005 WL 1309149, at *4 (W.D. Mich. May 25, 2005) (reducing fees by twenty-five percent because the amount sought included compensation for "work not reasonably necessary to prosecute the case," such as "attorney time spent responding to media inquiries"); City of Detroit, No. 93-CV-72310, slip op. at 3-4 (E.D. Mich. Mar. 24, 1995) (reducing requested fees by sixty percent because city employed eight attorneys when two would have sufficed, utilized two principal litigators when one would have sufficed, and generated nearly half of all fees sought in connection with its fees petition); Assembly of Cal. v. U.S. Dep't of Commerce, No. Civ-S-91-990, 1993 WL 188328, at *11 (E.D. Cal. May 28, 1993).

[123] In re North (Schultz Fee Application), 8 F.3d 847, 852 (D.C. Cir. 1993) (non-FOIA case).

[124] Nat'l Ass'n of Concerned Veterans, 675 F.2d at 1324.

[125] See Lissner, 56 F. App'x at 331; Copeland, 641 F.2d at 896; see also Auto Alliance Int'l, 155 F. App'x at 228 (affirming district court's limitation of "fees on fees" to three percent of hours in main case, absent unusual circumstances); Or. Natural Desert Ass'n v. Gutierrez, 442 F. Supp. 2d 1096, 1102 (D. Or. 2006) (reducing "fees on fees" by fifteen percent "to match the reduction for [plaintiff's] partial success") (appeal pending); McCoy, 2005 WL 1972600, at *3 (allowing fees for time spent "reviewing entitlement to fees and drafting the related motion"); Am. Small Bus. League, 2005 WL 2206486, at *1 (allowing portion of fees for "time spent on the fee motion"); Nat'l Veterans Legal Servs. Program v. VA, No. 96-1740, 1999 WL 33740260, at *5 (D.D.C. Apr. 13, 1999) (approving award of "fees-on-fees"); Assembly of Cal., 1993 WL 188328, at *16 (E.D. Cal. May 28, 1993); Katz v. Webster, No. 82-1092, slip op. at 4-5 (S.D.N.Y. Feb. 1, 1990).

[126] Nat'l Ass'n of Concerned Veterans, 675 F.2d at 1323.

[127] See id.; Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, No. 07-05278, 2008 WL 2331959, at *5 (N.D. Cal. June 4, 2008) (finding that plaintiff produced satisfactory evidence by submitting declarations from four attorneys of comparable education, expertise, experience and within the same community); McCoy, 2005 WL 1972600, at *3 (requiring (continued...)

for purposes of calculating legal fees, is the jurisdiction in which the district court sits.[128] Within the D.C. Circuit, the standard rate most often employed is an updated version of the "Laffey Matrix." [129]

The lodestar, which is the calculation of the number of hours reasonably expended multiplied by a reasonable hourly rate, is strongly presumed to yield the reasonable fee. Indeed, the Supreme Court has clarified that contingency enhancements are not available under statutes authorizing an award of attorney fees to a "prevailing or substantially prevailing party," such as the FOIA.[130] Moreover, FOIA fee awards may not be increased to provide plaintiffs' attorneys "interest" to compensate for delays in their receipt of payments for legal services rendered.[131] Also, if a case has been in litigation for a prolonged period of time,

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[127](...continued)
plaintiff to verify reasonableness of requested hourly rate by submitting "one or more affidavits from area attorneys who are experienced in and familiar with reasonable hourly rates in similar cases"); Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv., No. 02-6178, slip op. at 5 (D. Or. Dec. 3, 2003) (reducing plaintiff's claimed hourly rate due to counsel's lack of FOIA experience and noncomplexity of case); Confederated Tribes v. Babbitt, No. 96-197, slip op. at 3 (D. Or. Sept. 30, 1997) (rejecting plaintiff's proposed use of area market rate for calculation of fees because plaintiff's attorneys in fact contracted to work for their client at substantially lower rate).

[128] See, e.g., Auto Alliance Int'l, 155 F. App'x at 127 (affirming district court's use of market rate for judicial district within which it sits); Nw. Coal. for Alternatives to Pesticides v. Browner, 965 F. Supp. 59, 65 (D.D.C. 1997) (explaining that fees are properly calculated based on the legal market for the jurisdiction "in which the district court sits").

[129] Laffey v. Nw. Airlines, 746 F.2d 4, 24-25 (D.C. Cir. 1984), overruled in part on other grounds by Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516, 1524 (D.C. Cir. 1988) (en banc); see, e.g., Covington v. District of Columbia, 57 F.3d 1101, 1109 (D.C. Cir. 1995) (noting circuit court approval of use of "Laffey Matrix") (non-FOIA case); Judicial Watch, Inc. v. Bureau of Land Mgmt., 562 F. Supp. 2d 159, 175 (D.D.C. 2008) ("Courts use the Laffey matrix to determine reasonable hourly rates in calculating an appropriate award of attorney's fees.").

[130] City of Burlington v. Dague, 505 U.S. 557, 562 (1992) (prohibiting contingency enhancement in environmental fee-shifting statutes and noting that case law "construing what is a 'reasonable' fee applies uniformly to all [federal fee-shifting statutes]"); see Ray v. DOJ, 856 F. Supp. 1576, 1583 (S.D. Fla. 1994) (noting that "Dague calls into question the applicability of an enhancement for contingency cases," but declining to decide whether the decision also forbids a fee enhancement for "exceptional" cases by holding that this FOIA case result was not exceptional), aff'd, 87 F.3d 1250 (11th Cir. 1996); Judicial Watch, 384 F. Supp. 2d at 174 (denying a request for an enhancement, because the plaintiff failed to explain "why the lodestar does not offer sufficient compensation"); Assembly of Cal., 1993 WL 188328, at *14 (refusing to grant approval for any upward adjustment in lodestar calculation).

[131] See Library of Cong. v. Shaw, 478 U.S. 310, 314 (1986) ("In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award."); Weisberg v. DOJ, 848 F.2d 1265, (continued...)

"[a]ttorneys' fees awarded against the United States must be based on the prevailing market rates at the time the services were performed, rather than rates current at the time of the award."[132]

Lastly, in ruling on a petition for attorney fees and costs, the Supreme Court has emphasized that courts have discretion in awarding fees, however it has also noted the importance of courts providing a concise but clear explanation of the reasons for any award encompassing eligibility, entitlement, and the rationale for the calculations.[133] Upon appeal, such rulings are reviewed for abuse of discretion.[134]

[131](...continued)
1272 (D.C. Cir. 1988).

[132] Nw. Coal., 965 F. Supp. at 66 ("Contrary to plaintiffs' assertions, it is not proper to adjust historic rates to take inflation into account." (citing Library of Cong., 478 U.S. at 322)).

[133] Hensley, 461 U.S. at 437; Union of Concerned Scientists v. NRC, 824 F.2d 1219, 1228 (D.C. Cir. 1987).

[134] See Weisberg, 848 F.2d at 1272 (citing Copeland, 641 F.2d at 901).