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]

---

[1] 5 U.S.C. § 552(a)(4)(E)(i) (2006 & Supp. IV 2010).

[2] See, e.g., Brayton v. Office of U.S. Trade Representative, 641 F.3d 521, 524 (D.C. Cir. 2011); 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[to grant fees] for an abuse of discretion."); Young v. Dir., No. 92-2561, 1 F.3d 1235, 2 (4th Cir. 1993) (unpublished table decision) (noting that court has discretion to deny fees even if eligibility threshold is met); Maynard v. CIA, 986 F.2d 547, 567 (1st Cir. 1993)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 Interior, 903 F. Supp. 169, 170 (D. Me. 1995) ("Awards of litigation costs and attorney fees under FOIA are left to the sound discretion of the trial court.").

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 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.

---

[4] See Nichols v. Pierce, 740 F.2d 1249, 1252-54 (D.C. Cir. 1984) (refusing to award fees for 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); see also Hajro v. U.S. Citizenship & Immigration Serv., 900 F. Supp. 2d 1034, 1044 (N.D. Cal. 2012) (refusing to award fees for due process violation claims as "nothing in [the FOIA's] history suggests the intrusion of parallel rights, like due process, resulting from the same set of actions that violate FOIA" are recoverable).

[5] See Elec. Privacy Info. Ctr. v. DHS, 811 F. Supp. 2d 216, 239 (D.D.C. 2011) ("[W]ork performed during administrative proceedings prior to litigation is not recoverable under FOIA."); 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); 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"), aff'd in part, rev'd in part and remanded in part on other grounds, 572 F.3d 610 (9th Cir. 2009); 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).

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 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

---

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

[8] Benavides v. BOP, 993 F.2d 257, 259 (D.C. Cir. 1993) (explaining Kay decision); see Pickering-George v. DEA, No. 08-5227, 2009 U.S. App. LEXIS 12064, at *3 (D.C. Cir. June 3, 2009) (unpublished summary order) (finding pro se plaintiff ineligible for award of fees); 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."); Skurow v. DHS, 892 F. Supp. 2d 319, 334 (D.D.C. 2012) (finding pro se plaintiff not entitled to attorney fees for work performed prior to counsel entering his appearance); Murray v. Lappin, No. 09-992, 2011 WL 3438883, at *5 (D.D.C. Aug. 5, 2011) (noting that D.C. Circuit has held that pro se plaintiffs are not eligible for fees, and commenting that such an award would "defeat the legislative intent of the fee provision set forth in the FOIA"); Coven v. OPM, No. 07-01831, 2010 WL 1417314, at *3 (D. Ariz. Apr. 5, 2010) (adhering to its prior ruling that, as pro se litigant, plaintiff not eligible for award of fees); Jordan v. DOJ, No. 07-02303, 2009 WL 2913223, at *27 (D. Colo. Sept. 8, 2009) (adopting magistrate's recommendation to deny pro se litigant's request for fees); Browder v. Fairchild, No. 08-15, 2009 WL 2240388, at *2 (W.D. Ky. July 24, 2009) (explaining that pro se litigants are generally not entitled to attorney fees); Deichman v. United States, No. 2:05cv680, 2006 WL 3000448, at *7 (E.D. Va. Oct. 20, 2006) (holding that pro se litigant cannot recover attorney fees under FOIA).

[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); Nulankeyutmonen Nkihtaqmikon v. BIA, 723 F. Supp. 2d 272, 282 (D. Me. 2010) (agreeing that plaintiff could recover fees for law students working under supervision of clinic attorney); 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).

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 "[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

---

[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., Pietrangelo v. U.S. Army, 568 F.3d 341, 342 (2d Cir. 2009) (joining its "sister Circuits" in holding that attorney appearing pro se in FOIA suit not eligible for award of fees); 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); Kemmerly v. U.S. Dep't of Interior, No. 07-9794, 2010 WL 2985813, at *8 (E.D. La. July 26, 2010) (finding D.C. Circuit's decision in Burka "persuasive") aff'd and remanded on other grounds, 403 Fed. App'x 303 (5th Cir. 2011); 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), which awarded fee to a pro se attorney, has been "rendered moribund"). But see Riser v. U.S. Dep't of State, No. 09-3273, 2010 WL 4284925, at *8 (S.D. Tex. Oct. 22, 2010) (explaining that "'[p]ro se litigants are not entitled to attorney fees under either the FOIA or the Privacy Act unless the litigant is also an attorney'" (quoting Smith v. O'Brien, No. 94-41371, 1995 WL 413052, at *2 (5th Cir. 1995) (unpublished per curiam)); 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.

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, 28 U.S.C. § 1920,[22] lists certain items that may be taxed as costs,[23] in some

---

[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); Jordan, 2009 WL 2913223, at *27 (explaining that pro se plaintiffs who substantially prevail may be awarded litigation costs); 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, 2007) (same); 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[.]").

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 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

---

[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 Hernandez v. U.S. Customs & Border Prot., No. 10-4602, 2012 U.S. Dist. LEXIS 14290, at *54-55 (E.D. La. Feb. 7, 2012) (awarding plaintiff deposition transcription costs and filing fees); 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").

[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.").

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 eligible for a fee award under the circumstances of the case.[30] This, in turn, requires a determination that the plaintiff has "substantially prevailed" within the meaning of subsection (a)(4)(E)(ii) of the FOIA. A FOIA complainant 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."[31] This standard was included in the FOIA as part of the FOIA amendments made in 2007 by the "Openness Promotes Effectiveness in our National Government Act of 2007," or the "OPEN Government Act of 2007."[32] 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."[33] Prior to the enactment of the OPEN Government Act, eligibility was determined based on the test set forth in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources.[34] The Court of Appeals for the District of Columbia Circuit has held that with passage of the OPEN Government Act, "Congress amended the FOIA to incorporate the catalyst theory."[35]

---

[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 Rosenfeld v. DOJ, 903 F. Supp. 2d 859, 869 (N.D. Cal. 2012) (noting that "[i]t is the Plaintiff's burden to present convincing evidence of his eligibility for a fee award under the FOIA").

[31] 5 U.S.C. § 552(a)(4)(E)(ii) (2006 & Supp. IV 2010).

[32] OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (codified at 5 U.S.C. § 552(a)(4)(E)(ii)).

[33] See id. § 4.

[34] 532 U.S. 598 (2001) (non-FOIA case) (holding that attorney fees are allowable only if there is judicially sanctioned change in relationship between parties).

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

Under the "catalyst theory" a plaintiff has been found eligible for attorney fees if his lawsuit served as a "catalyst" in achieving a voluntary change in the agency's conduct.[36] 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."[37]

The District Court for the District of Columbia has found the first statutory basis for eligibility, which requires an order, an enforceable written agreement or consent decree, satisfied through the existence of a judicial order requiring production of documents by a specific date.[38] For example, in Citizens for Responsibility & Ethics in Washington v. Department of Justice[39] the court found that a plaintiff substantially prevailed based on a scheduling order proposed by the defendant and adopted by the court that "required Defendant to complete processing of and produce all non-referred, non-exempt documents by a specified date."[40] The court determined that "[d]espite Defendant's attempt to characterize the order as mere 'housekeeping,' it does not simply 'require the parties to meet and confer and then submit a joint status or scheduling

---

[36] Buckhannon, 532 U.S. at 600 (explaining "catalyst theory"); see also Hernandez v. U.S. Customs & Border Prot., No. 10-4602, 2012 U.S. Dist. LEXIS 14290, at *15 (E.D. La. Feb. 7, 2012) (explaining that Buckhannon rule "drew considerable criticism" as it "allowed the Government to ignore valid FOIA claims but prevent an award of attorney fees by disclosing the documents at the last moment before the Plaintiff obtained a judgment"); Poett v. DOJ, No. 08-622, 2010 WL 3892249, at *5 (D.D.C. Sept. 30, 2010) (magistrate's recommendation) ("The OPEN Government Act of 2007 ('OGA') eliminated the requirement of judicial imprimatur but left the causation requirement intact."), adopted, 846 F. Supp. 2d 96 (D.D.C. 2012).

[37] Weisberg v. DOJ, 745 F.2d 1476, 1496 (D.C. Cir. 1984) (further explaining that "causation inquiry must take into account 'whether the agency upon actual and reasonable notice of the request, made a good faith effort to search out material and to pass on whether it should be disclosed'" (citing Cox v. DOJ, 601 F.2d 1, 6 (D.C. Cir. 1979))); see also Calypso Cargo Ltd. v. U.S. Coast Guard, 850 F. Supp. 2d 1, 4 (D.D.C. 2011) ("Something more than 'post hoc, ergo propter hoc must be shown.'" (citing Public Law Educ. Inst. v. Dep't of Justice, 744 F.2d 181, 183 (D.C. Cir. 1984))); 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.).

[38] See Citizens for Responsibility & Ethics in Wash. v. DOJ, 820 F. Supp. 2d 39, 47 (D.D.C. 2011); Judicial Watch, Inc. v. DOJ, 774 F. Supp. 2d 225, 229 (D.D.C. 2011) (citing D.C. Circuit's decisions in Judicial Watch, Inc. v. FBI, 522 F.3d 364 (D.C. Cir. 2008), and Davy v. CIA, 456 F.3d 162 (D.C. Cir. 2006), which found that FOIA plaintiffs "prevailed" on basis of joint stipulations approved by district courts that required production of documents, then concluding that minute order in this case "fits squarely within the holdings of these cases").

[39] 820 F. Supp. 2d at 47.

[40] Id. at 44 (noting fact that defendants proposed order rather than plaintiff was without consequence).

report.'"[41] Courts in other districts have ruled otherwise, finding such orders insufficient to establish eligibility.[42]

A court has held that an order to produce a Vaughn Index was enough to establish eligibility,[43] while another court held to the contrary.[44]

Orders resulting from summary judgment motions have also been found to create eligibility for fees, even when the plaintiff only prevails on a portion of the motion.[45]

Eligibility has also been found to be satisfied by a consent decree even when the parties agreed that neither party was a prevailing party for purposes of a fee award.[46] The court explained that the parties could not "circumvent the law by contract," and because the amended attorney fee provision states that the existence of a consent decree is enough to establish a prevailing party, found the plaintiff eligible for fees.[47]

---

[41] Id.; see also Judicial Watch, 774 F. Supp. 2d at 229 (noting that D.C. Circuit has "repeatedly rejected" arguments that such an order is "merely procedural").

[42] See Pohl v. EPA, No. 09-1480, 2012 WL 762083, at *14 (W.D. Pa. March 7, 2012) (finding order directing production of data by certain date "merely memorialized the representations of Government counsel during a case management conference"); Waage v. IRS, 656 F. Supp. 2d 1235, 1239 (S.D. Cal. 2009) (concluding that magistrate's order "merely documented the agreement reached between the parties" and did "not make the Plaintiff the prevailing party").

[43] Mullen v. U.S. Army Crim. Investigation Command, No. 10-262, 2012 WL 2681300, at *8 (E.D. Va. July 6, 2012).

[44] Baker v. DHS, No. 3:11-CV-588, 2012 WL 5876241, at *4 (M.D. Pa. Nov. 20, 2012) (concluding that order requiring production of Vaughn Index not type of "court-ordered relief" that would create eligibility for fees).

[45] See Hernandez v. U.S. Customs & Border Prot., No. 10-4602, 2012 U.S. Dist. LEXIS 14290, at *21 (E.D. La. Feb. 7, 2012) (determining that order granting plaintiff's motion for partial summary judgment "altered the legal relationship of the parties in Plaintiff's favor, which is all that is required to establish his eligibility for a fee award under FOIA"); United Am. Fin., Inc. v. Potter, 770 F. Supp. 2d 252, 255 (D.D.C. 2011) (finding eligibility conceded by defendant where court granted in part and denied in part its final motion for summary judgment); cf. Harrison v. BOP, 681 F. Supp. 2d 76, 85 (D.D.C. 2010) (noting that plaintiff would not be eligible for attorney fees based on order denying motion for summary judgment in part because "a denial of summary judgment without prejudice means only that the movant [] has not prevailed; it does not mean that the non-movant has prevailed").

[46] Wildlands CPR v. U.S. Forest Service, 558 F. Supp. 2d 1096, 1100 (D. Mont. 2008).

[47] Id. at 1100; cf. Queen Anne's Conservation Assoc. v. U.S. Dep't of State, 800 F. Supp. 2d 195, 197 (D.D.C. 2011) (accepting stipulation between parties in which entitlement to fees and costs conceded).

The FOIA provides a second statutory basis for eligibility and that rests on a determination that there was a voluntary or unilateral change in position by the agency, provided the claim "is not insubstantial."[48] This standard requires courts to determine whether the change in the agency's position would have occurred but for the filing of the lawsuit.[49] As recently explained by the District Court for the District of Columbia, relief

---

[48] 5 U.S.C. § 552(a)(4)(E)(i) (2006 & Supp. IV 2010).

[49] See Batton v. IRS, No. 12-20401, 2013 WL 3104986, at *2 (5th Cir. June 20, 2013) (vacating lower court determination under Buckhannon standard, and finding plaintiff eligible for fees under OPEN Government Act where "a fraction" of documents were produced only after complaint filed, and remainder were not produced until years later); Von Grabe v. DHS, No. 10-15002, 440 F. App'x 687, 689 (11th Cir. 2011) (refusing to award costs to pro se plaintiff when plaintiff failed to file a proper FOIA request and agency never refused to provide document and made full release after filing of lawsuit); Baker, 2012 WL 5876241, at *5 (finding casual nexus where documents released almost two years after request was submitted and three weeks after lawsuit filed); Rosenfeld v. DOJ, 904 F. Supp. 2d 988, 998 (N.D. Cal. 2012) (concluding that "both the timing and the circumstances of [the defendant's] release of documents in this case indicate that [the plaintiff's] FOIA lawsuit was, at root, 'what actually triggered the documents' release'" (citing Church of Scientology v. USPS, 700 F.2d 486, 492 (9th Cir. 1983))); Hajro v. U.S. Citizenship & Immigration Serv., 900 F. Supp. 2d 1034, 1046 (N.D. Cal. 2012) (finding plaintiff substantially prevailed where lawsuit was necessary to bring defendant into compliance with settlement agreement); Elec. Privacy Info. Ctr. v. DHS, 892 F. Supp. 2d 28, 49 (D.D.C. 2012) (finding that "the sequencing of DHS's disclosures as well as the department's change of position as to the propriety of withholding them suggests that this lawsuit was the catalyst for the record release); Judicial Watch v. DOJ, 878 F. Supp. 2d 225, 232 (finding it reasonable to think that records would not have been released but for lawsuit); Yonemoto v. VA, No. 06-378, 2012 WL 1980818, at *2 (D. Haw. June 1, 2012) (finding plaintiff substantially prevailed when there was "no indication from the record that Plaintiff could have obtained the requested documents without filing the instant action"); Calypso Cargo Ltd. v. U.S. Coast Guard, 850 F. Supp. 2d 1, 4 (D.D.C. 2011) ("The key question under the 'catalyst theory' is whether 'the institution and prosecution of the litigation cause[d] the agency to release the documents obtained during the pendency of the litigation . . . .'" (citing Church of Scientology of Cal. v. Harris, 653 F.2d 584, 587 (D.C. Cir. 1981))); Moffat v. DOJ, No. 09-12067, 2012 WL 113367, at *1 (D. Mass. Jan. 12, 2012) (concluding that defendant's release of records discovered after "more thorough search . . . may be sufficient to establish that [plaintiff] substantially prevailed at least with regard to [one defendant]"); ACLU v. DHS, 810 F. Supp. 2d 267, 275 (D.D.C. 2011) (finding plaintiff substantially prevailed where "defendants' own submissions admit that at least some of the documents were produced as a result of preparing Vaughn indexes" and records would "not have been produced without the litigation"); Elec. Priv. Info. Ctr. v. DHS, 811 F. Supp. 2d 216, 232-233 (D.D.C. 2011) (noting that "plaintiff's lawsuit has clearly elicited a 'voluntary or unilateral change in [the defendant's] position'" when documents were only produced after litigation was initiated and agency did not "seek to take advantage of the statutory mechanisms available to extend its response time"); Waage, 656 F. Supp. 2d at 1239 (finding plaintiff substantially prevailed where approximately 1700 additional pages were released after litigation commenced);

is not limited to disclosure of records alone.[50] "[A]lthough the ultimate goal of any FOIA requester is, of course, to obtain records from the government," the court explained, "a FOIA requester must sometimes obtain interim relief [such as an order to search or confirm or deny the existence of records] that is antecedent or incident to any dispute about the production or non-production of records themselves."[51] Therefore, the court reasoned, "[i]f an agency were to provide this sort of interim relief to a plaintiff by way of a voluntary and unilateral change in the agency's position, then it could be reasonable to conclude that, under the catalyst theory, the plaintiff has 'substantially prevailed.'"[52]

When delay in release is due to backlog, some courts have found the filing of the lawsuit not to be the cause of the release.[53] For example, in Terris, Pravlik & Millian,

---

Nulankeyutmonen Nkihtaqmikon v. BIA, 672 F. Supp. 2d 154, 174 (D. Me. 2009) (concluding plaintiff "substantially prevailed to the extent it forced [defendant] to unearth undisclosed documents buried within the agency"); Church of Scientology, 700 F.2d at 489 ("[P]laintiff must show that: (1) the filing of the action could reasonably have been regarded as necessary to obtain the information; and (2) the filing of the action had a substantial causative effect on the delivery of the information.").

[50] Mobley v. DHS, 908 F. Supp. 2d 42, 46 (D.D.C. 2012) (noting that "[a]lthough a garden-variety of FOIA plaintiff may only seek the production of records, a substantial number of FOIA plaintiffs seek relief that, even when freely given by a unilateral action of the agency, does not necessarily lead to the production of any records").

[51] Id. (citing, as examples, decisions in Judicial Watch v. DHS, 857 F. Supp. 2d 129, 138 (D.D.C. 2012) (finding adequacy of agency's search to be only issue before court); PETA v. NIH, 853 F. Supp. 2d 146, 151-152 (D.D.C. 2012) (noting only Glomar response was contested).

[52] Id. (holding, ultimately, that plaintiffs were not eligible for fees because "a FOIA plaintiff must obtain the essential elements of the relief that it seeks in its complaint in order to substantially prevail, which the plaintiffs did not do here.").

[53] Id. (finding that "[a]lthough it would have been ideal for the defendant to process the plaintiff's request from the very beginning, the government's compliance with the plaintiff's request so early in the litigation is not the sort of agency behavior that Congress intended to prevent by awarding attorney's fees"); see also Valencia v. U.S. Citizenship & Immigration Serv., No. 12-102, 2012 WL 3834938, at *2 (D. Utah Sept. 4, 2012) (finding that agency "followed its own normal procedures in producing the documents," and did not voluntarily or unilaterally change its position); Beltranena v. U.S. Dep't of State, 821 F. Supp. 2d 167, 180 (D.D.C. 2011) (refusing to award fees despite "appreciat[ing] that the delays encountered by [plaintiff] were frustrating" when defendant's actions were reasonable). But see Elec. Priv. Info. Ctr., 811 F. Supp. 2d at 233 (finding "insufficient" agency defendant's "generic statements" that delay was due to "backlog as well as administrative error"); Uhuru v. U.S. Parole Comm'n, 734 F. Supp. 2d 8, 13 (D.D.C. 2010) (concluding that despite backlog, release of records after lawsuit was filed still constituted voluntary or unilateral change in position).

LLP v. Centers for Medicare & Medicaid Services,[54] the District Court for the District of Columbia found that the reduction in backlog by a task force created by the agency led to a post-litigation disclosure, not the lawsuit itself.[55] The court noted that "it must be recalled that Congress did not enact the fee-shifting provision of FOIA to punish agencies for their slowness in processing FOIA requests, but to reward plaintiffs whose filing of lawsuits alters the government's slowness and brings about disclosure."[56]

Courts have also found that releases resulting from agreements made prior to the filing of litigation do not constitute voluntary changes in agency positions,[57] nor does the mootness of a previously taken exemption.[58] Similarly, releases that are the result of, or a continuation of, the administrative process have been found not to establish eligibility.[59]

---

[54] 794 F. Supp. 2d 29 (D.D.C. 2011).

[55] Id. at 34 (explaining that "[u]nfortunately for [plaintiff], there is no evidence whatsoever that [defendant] ever changed its position after [plaintiff] sued").

[56] Id. at 38.

[57] See Mattson v. FBI, 442 F. App'x 296, 297 (9th Cir. 2011) (finding no change in defendant's position when prior to filing lawsuit defendant agreed to conduct further search for cross-references); Thomas v. USDA, No. 08-534, 2009 WL 3839463, at *3 (N.D. Okla. Nov. 12, 2009) (denying eligibility when prior to filing suit defendants offered to provide plaintiff with all of documents at issue in case, except for one document properly withheld pursuant to FOIA exemption which was later released); Short v. U.S. Army Corps of Eng'rs, 613 F. Supp. 2d 103, 107 (D.D.C. 2009) (concluding plaintiff not eligible for award of fees under OPEN Government Act when prior to filing suit defendant indicated it would grant plaintiff's request and release records).

[58] See Mullen, 2012 WL 2681300, at *8 (determining that closure of administrative investigation and not FOIA lawsuit led to release of documents originally withheld under Exemption 7(A)); Weisner v. Animal & Plant Health Inspection Serv., No. 10-568, 2012 WL 2525592, at *3 (E.D.N.C. June 29, 2012) (concluding plaintiff not eligible for fees when defendant released records withheld pursuant to Exemption 7(A) after exemption no longer applied); Tchefuncta Club Estates v. U.S. Army Corps of Eng'nrs, No. 10-1637, 2011 WL 2037667, at *2 (E.D. La. May 24, 2011) (finding release of information after Exemption 4 was no longer applicable did not create change in agency position).

[59] See Judicial Watch, 878 F. Supp. 2d at 230 (explaining that "'causation requirement is missing when disclosure results not from the suit but from delayed administrative processing'") (citing Short, 613 F. Supp. 2d at 106); Calypso Cargo Ltd. v. U.S. Coast Guard, 850 F. Supp. 2d 1, 5 (D.D.C. March 23, 2011) (finding plaintiff did not substantially prevail when "delay in the [defendant's] release was not due to intransigence, but rather was the result of a diligent ongoing process that began before the initiation of the instant lawsuit"); Bigwood v. Defense Intelligence Agency, 770 F. Supp. 2d 315, 321 (D.D.C. March 22, 2011) (denying motion for attorney fees despite FOIA request being "extraordinarily delayed" when defendant conducted multiple searches and reviewed documents prior to filing of suit); Contreras v. DOJ, 729 F. Supp. 2d 167, 170 (D.D.C. 2010) (finding no casual

One district court has held that releases made as a result of a policy change do not constitute a voluntary change in position.[60] However, the District Court for the District of Columbia has found on two occasions that discretionary disclosures made during litigation as a result of the application of the Attorney General's FOIA Guidelines[61] do constitute a change in position and create eligibility for a plaintiff seeking attorney fees and costs.[62] In Judicial Watch, Inc. v. Department of Justice, the court found the plaintiff was eligible for fees based on the defendant's discretionary disclosure of records previously withheld under Exemption 5.[63] The court reasoned that "[f]or purposes of determining fee eligibility, the DOJ's 'discretionary' disclosure of documents that it had previously withheld as exempt plainly constitutes 'a voluntary or unilateral change in position by the agency' caused by [the] litigation."[64] Not even two months later, the same court again found a plaintiff was eligible for fees when records were released after litigation commenced, including records originally withheld in full under Exemption 5 which were partially released as a matter of discretion under the new FOIA guidelines.[65]

---

connection between release of documents and filing of lawsuit where plaintiff failed to give his full name when submitting his original request); Mattson v. FBI, No. 08-04331, 2010 WL 1461595, at *5 (N.D. Cal. Apr. 12, 2010) (finding plaintiff ineligible for fees because release of documents "could have been the final result of [a partial remand on the defendant's action at the administrative appeal stage] rather than a change in position in response to [plaintiff's lawsuit]"), aff'd, 442 F. App'x 296 (9th Cir. 2011)); Sterrett v. Dep't of the Navy, No. 09-2083, 2010 WL 330086, at *6 (S.D. Cal. Jan. 20, 2010) (plaintiff not eligible for fees where delay was due to time needed to complete report, and decision to release was made prior to filing of lawsuit); Hart v. HHS, 676 F. Supp. 2d 846, 857 (D. Ariz. Dec. 18, 2009) (finding untimely response was due to administrative delay); Hersh & Hersh v. HHS, No. 06-4234, 2008 WL 2725497, at *2 (N.D. Cal. July 10, 2008) (finding plaintiff did not substantially prevail when second release of documents occurred after lawsuit filed as release was merely "a continuation of the administrative process" between both parties).

[60] See Coven v. OPM, No. 07-01831, 2010 WL 1417314, at *3 (D. Ariz. Apr. 5, 2010) (finding agency's declaration explaining that release occurred due to change in policy "substantially undermines any theory plaintiff might have that the filing of [the] lawsuit had a substantial causative effect on [plaintiff's] ultimate receipt of the requested information").

[61] Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51879 (Oct. 8, 2009).

[62] See Judicial Watch, 878 F. Supp. 2d at 233; ACLU v. DHS, 810 F. Supp. 2d at 273.

[63] Judicial Watch, 878 F. Supp. 2d at 233.

[64] Id.

[65] See ACLU, 810 F. Supp. 2d at 276 (rejecting agency's argument that policy change was cause of release of previously processed records and finding that such records would not have been reevaluated but for pending litigation at time new FOIA guidelines were issued).

Other courts have similarly found that a "voluntary" release after litigation commenced created eligibility,[66] although another court rejected that approach.[67]

Finally, the FOIA provides that even if an agency has a voluntary or unilateral change in position, the plaintiff's claim must not be "insubstantial."[68] To date, two courts have found that a plaintiff's claim was "insubstantial" and so rendered the plaintiff ineligible for attorney fees.[69]

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.[70] This discretion ordinarily is guided by four

---

[66] See Yonemoto v. VA, No. 06-00378, 2012 WL 1980818, at *5 (D. Haw. June 1, 2012) (concluding plaintiff eligible for fees where emails voluntarily produced during litigation); Waage v. IRS, 656 F. Supp. 2d 1235, 1241 (S.D. Cal. July 15, 2009) (finding plaintiff eligible for fees as result of additional release made as part of voluntary settlement, but ultimately denying fee request because initial decision to withhold records under Exemption 7(E) was reasonable).

[67] See Thomas, 2009 WL 3839463, at *3 (rejecting plaintiff's argument that voluntary production of document withheld under Exemption 5 was "change in position" that made plaintiff eligible for fees).

[68] 5 U.S.C. § 552(a)(4)(E)(i) (2006 & Supp. IV 2010); see also Baker v. DHS, No. 3:11-CV-588, 2012 WL 5876241, at *6 (M.D. Pa. Nov. 20, 2012) (finding plaintiff "has shown a causal nexus between this action, which is not insubstantial, and the release of the requested documents"); Browder v. Fairchild, No. 08-15, 2009 WL 2240388, at *2 (W.D. Ky. July 24, 2009) ("The claim is not insubstantial if the lawsuit was reasonably necessary to obtain the requested information."); cf. Brayton v. Office of U.S. Trade Representative, 641 F.3d 521, 526 (D.C. Cir. 2011) (explaining that question of whether claim was not insubstantial should be resolved by looking to entitlement factors); Judicial Watch v. DOJ, 878 F. Supp. 2d 225, 233 (considering, under entitlement prong , agency's argument that because only small portion of documents were ultimately released claim was not insubstantial); Bryant v. CIA, 742 F. Supp. 2d 90, 95 (D.D.C. 2010) (noting that court must determine whether change in position was "not insubstantial" by looking to entitlement factors).

[69] See Mobley, 908 F. Supp. 2d at 48 ("[I]f a plaintiff obtains only one small piece of the relief it seeks in its complaint, such as the plaintiffs did here, calling such prevalence 'substantial' is clearly incorrect"); Dasta v. Lappin, 657 F. Supp. 2d 29, 33 (D.D.C. 2009) (concluding that because public would not "derive[ ] some benefit from plaintiff's claim or the BOP's release of the information plaintiff requested," claim was not substantial).

[70] 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

traditional criteria that derive from the FOIA's legislative history.[71] 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.[72]

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.[73] Rather, the

---

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."); Bryant v. CIA, 818 F. Supp. 2d 153, 156 (D.D.C. 2011) ("The decision to award attorneys' fees and costs is left to the Court's discretion after consideration of the relevant factors."); 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))).

[71] 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"), aff'd in part, rev'd in part on other grounds in 470 F.3d 363 (D.C. Cir. 2006)).

[72] 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); Long v. IRS, 932 F.2d 1309, 1313 (9th Cir. 1991); 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 "[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 Morley v. CIA, 2013 WL 2995930, at *2 (D.C. Cir. June 18, 2013) (Kavanaugh, C.J., concurring) ("We should ditch the four-factor standard."); Davy v. CIA, 550 F.3d 1155, 1166 (D.C. Cir. 2008) (Randolph, J., dissenting) (calling test "a legal relic"); 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.").

[73] 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 release of documents "having marginal public interest and little relevance to the making of political choices by citizens"); Moffat v. DOJ, No. 09-12067, 2012

"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.'"[74] Such a determination, which necessarily entails an evaluation of the nature of the specific information disclosed,[75] has led to findings of "public benefit" in a variety of contexts.[76] Highly pertinent considerations in this "public benefit"

WL 113367, at *2 (D. Mass. Jan. 12, 2012) ("'[A] successful FOIA plaintiff always acts in some degree for the benefit of the public, both by bringing the government into compliance with the language of the Act and by securing for society the benefits assumed to flow from the disclosure of government information.'" (citing Crooker v. U.S. Parole Comm'n, 776 F.2d 366, 367 (1st Cir. 1985))); Bangor Hydro-Elec. Co. v. U.S. Dep't of the Interior, 903 F. Supp. 169, 171 (D. Me. 1995) (noting "[t]hat general benefit alone [ ] does not necessarily support an award of litigation costs and attorney fees").

[74] 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))); see also Hernandez v. U.S. Customs & Border Prot., No. 10-4602, 2012 U.S. Dist. LEXIS 14290, at *23 (E.D. La. Feb. 7, 2012) (explaining that "[t]he public benefit factor has been described as perhaps the most important factor in determining entitlement to a fee award").

[75] See Cotton, 63 F.3d at 1120.

[76] See, e.g., Davy, 550 F.3d at 1159 (agreeing that release of records "about individuals allegedly involved in President Kennedy's assassination" provided public benefit because while information was "not of immediate public interest, [it] nevertheless enables further research ultimately of great value and interest"); Baker v. DHS, No. 3:11-CV-588, 2012 WL 5876241, at *6 (M.D. Pa. Nov. 20, 2012) (finding public benefit in information related to plaintiff's Merit Systems Protection Board case alleging discrimination by Secret Service as it "is likely to assist military personnel working within the government"); Rosenfeld v. DOJ, 904 F. Supp. 2d 988, 998 (N.D. Cal. 2012) (agreeing that public has interest in "'knowing the extent of the FBI's involvement in furthering Reagan's political aspirations'"); Rosenfeld v. DOJ, 903 F. Supp. 2d 859, 869 (N.D. Cal. 2012) (determining that public benefit existed where requester sought to disseminate information about FBI activities during Cold War); Hajro v. U.S. Citizenship & Immigration Serv., 900 F. Supp. 2d 1034, 1047 (N.D. Cal. 2012) (finding public benefit factor weighed in plaintiff's favor where plaintiff "obtain[ed] injunctive relief mandating Defendants comply with its obligation under the Settlement Agreement and FOIA"); Elec. Priv. Info. Ctr. v. DHS, 892 F. Supp. 2d 28, 51 (D.D.C. 2012) (determining that information about body scanners can be used by public to make "'vital political choices' about what level of crowd and pedestrian scanning is acceptable, especially in light of the radiation exposure and lack of prior notice to scanned subjects"); Judicial Watch v. DOJ, 878 F. Supp. 2d 225, 234 (noting that, "[g]iven the national media coverage garnered by this issue" there is "little doubt" that information about agency's decision to dismiss civil claims in lawsuit had "potentially significant public value"); Yonemoto v. VA, No. 06-378, 2012 WL 1980818, at *4 (D. Haw. June 1, 2012) (finding that litigation "resulted in a public benefit by shedding light on the VA's treatment of its personnel, forcing the VA to comply with FOIA, and uncovering other emails bearing on problems with the agency's operations"); Hernandez, 2012 U.S. Dist. LEXIS 14290, at *25-26 ("Plaintiff has used the records disclosed as a result of this case to increase public awareness of [immigration enforcement issues and the plight of immigrant workers], as well as to

inquiry are "the degree of dissemination and [the] likely public impact that might be expected from a particular disclosure."[77] When the information released is already in

---

facilitate public oversight of CBP's enforcement of federal immigration law in the New Orleans area."); Citizens for Responsibility & Ethics in Wash. v. DOJ, 820 F. Supp. 2d 39, 47 (D.D.C. 2011) (recognizing public benefit in records intended to "'inform the public about whether and to what extent the destruction of [certain] email[s] may have violated DOJ policy and federal laws,'" and "determine 'to what extent the destruction of emails was limited to [a former DOJ attorney's] role in drafting the terror memoranda and may have been the result of willful actions'"); ACLU v. DHS, 810 F. Supp. 2d 267, 277 (D.D.C. 2011) (awarding fees due to "immense public benefit derived from the disclosure of information concerning ten previously undisclosed deaths"); Judicial Watch, Inc. v. DOJ, 774 F. Supp. 2d 225, 230 (D.D.C. 2011) (finding public interest in records on Terrorist Surveillance Program); United Am. Fin., Inc. v. Potter, 770 F. Supp. 2d 252, 256 (D.D.C. 2011) (concluding that public benefited from disclosure on how United States Postal Service uses resources to "label insurance salesmen" as identity thieves); Judicial Watch, Inc. v. DHS, No. 08-2133, 2009 WL 1743757, at *7 (D.D.C. June 15, 2009) (magistrate's recommendation) (finding public interest in issues related to control of American borders), adopted, (D.D.C. July 17, 2009); 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"); 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 viable"); 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); Church of Scientology v. IRS, 769 F. Supp. 328, 331 (C.D. Cal 1991) (recognizing public interest in "the apparently improper designation of a religion as a 'tax shelter' project"); see also Citizens for Responsibility & Ethics in Wash., 820 F. Supp. 2d at 46 (noting defendant acknowledged public interest and benefit in release when granting plaintiff's request for expedited processing).

[77] Blue, 570 F.2d at 533; see 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"); Menasha, 2012 WL 1034933, at *5 (noting that "likelihood of dissemination beyond litigation was 'speculative'"); Mullen v. U.S. Army Crim. Investigation Command, No. 10-262, 2012 WL 2681300, at *9 (E.D. Va. July 6, 2012) (finding no evidence that plaintiff planned to disseminate information to public); Shannahan v. IRS, No. 08-0452, slip op. at 6 (W.D. Wash. 2010) (concluding documents "not intended for public dissemination"); Citizens for Responsibility & Ethics in Wash., 820

the public domain courts have found that this factor does not weigh in favor of a fee award.[78]

F. Supp. 2d at 47 (noting that documents previously unavailable to public "are now publically available on [plaintiff's] various websites"); Potter, 770 F. Supp. 2d at 256 (finding "little evidence that there is a large interested group or even that plaintiff is able to disseminate the disclosed information to the allegedly interested public"); Prison Legal News v. EOUSA, No. 08-1055, 2010 WL 3170824, at *2 (D. Col. Aug. 10, 2010) (finding public benefit despite fact that "the population to which this information is likely to be disseminated is relatively small," as "information about how the BOP responded to the murder may inform the public as to its effectiveness in maintaining security and order inside of [a] prison"); 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") aff'd in part, rev'd in part by 395 F. App'x 472 (9th Cir. 2010); 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).

[78] See, e.g., Morley v. CIA, 828 F. Supp. 2d 257, 262-362 (D.D.C. 2011) (declining to award fees where "Kennedy-assassination documents obtained by [plaintiff] through this FOIA litigation [were] identical to documents which were previously released under the President John F. Kennedy Assassination Records Act of 1992 . . . to NARA and were already in the public domain") (vacated and remanded in 2013 WL 2995930 (D.C. Cir. June 18, 2013) (concluding lower court failed to consider Davy court's analysis of public benefit factor)); 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 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 see Judicial Watch, Inc. v. DOJ, 774 F. Supp. 2d at 230 (rejecting agency's argument that no public benefit existed because documents were released in prior FOIA request as agency failed to provide evidence of extent of public dissemination).

Moreover, "[m]inimal, incidental and speculative public benefit will not suffice" to satisfy the public interest requirement.[79] Generally, 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.[80] However, courts have found a public

---

[79] Aviation Data Serv. v. FAA, 687 F.2d 1319, 1323 (10th Cir. 1982); see Weisner v. Animal & Plant Health Inspection Serv., No. 10-568, 2012 WL 2525592, at *4 (E.D. N.C. June 29, 2012) (finding gain was personal despite plaintiff "vaguely allud[ing] to an animal-rights agenda"); Menasha v. DOJ, 11-682, 2012 WL 1034933, at *5 (E.D. Wis. March 26, 2012) (finding only minimal public benefit in "helping to ensure and demonstrate the Superfund program is being implemented in a fair and consistent manner"); Morley, 828 F. Supp. 2d at 262 (rejecting plaintiff's argument that public benefited from use of FOIA to "sidestep" copying costs imposed by NARA, and also noting that "[w]hile the Kennedy assassination is surely a matter of public interest, . . . this litigation has yielded little, if any, public benefit); Bryant v. CIA, 818 F. Supp. 2d 153, 157 (D.D.C. 2011) (finding lack of public benefit "crucial defect" in request for fees when only two documents pertaining to airborne encounters with unidentified flying objects were turned over); Pinson v. Lappin, 806 F. Supp. 2d 230, 236 (D.D.C. 2011) (finding "at best . . . minimal public benefit" in release of lists of names and job titles of BOP staff); Terris, Pravlik & Millian, LLP v. Cntrs. for Medicare & Medicaid Servs., 794 F. Supp. 2d 29, 39 (D.D.C. 2011) (finding no public benefit in disclosures pertaining to lawsuit despite public benefit in prosecution of suit); Urdaneta v. IRS, 09-2405, 2011 WL 3659591, at *1 (D.D.C. March 17, 2011) (noting that "only real beneficiaries" of information about why the IRS confiscated plaintiffs' assets are plaintiffs); Thomas v. USDA, No. 08-534, 2009 WL 3839463, at *3 (N.D. Okla. Nov. 12, 2009) (finding no evidence to suggest documents pertaining to wheat scandal during Nixon Administration would provide public benefit); Browder v. Fairchild, No. 08-15, 2009 WL 2240388, at *4 (W.D. Ky. July 24, 2009) (concluding public benefit minimal because "[a]lthough information regarding embezzlement [plaintiff] may have personally experienced could be relevant to [a related] public news story, [plaintiff's] motive was not to further that story nor to shed light on any other person's plight"); 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.").

[80] 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

benefit when litigation "produced 'extraordinary information regarding how the [agency] maintains its records and the baseline methods by which it will search for and respond to FOIA requests, unless a FOIA requester has information to demand otherwise.'"[81]

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.[82] As the D.C. Circuit noted in one case: "Such an inherently speculative observation is . . . inconsistent with the structure of FOIA itself."[83]

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,[84] except in the case of news media interests, which generally "should not be considered commercial interests."[85]

---

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).

[81] Negley v. FBI, 818 F. Supp. 2d 69, 75 (D.D.C. 2011) (noting this is first FOIA attorney fees case to "address this anomaly"); see also Yonemoto v. VA, No. 06-378, 2012 WL 1980818, at *4 (D. Haw. June 1, 2012) (concluding that lawsuit resulted in some public benefit "by bringing the VA into compliance with FOIA"); Nulankeyutmonen Nkihtaqmikon v. BIA, 672 F. Supp. 2d 154, 172 (D. Me. 2009) (finding lawsuit "served the public interest by required [defendant] to assess and reassess its responses to [plaintiff's] FOIA requests . . . and to defend a confused and inefficient internal FOIA response process").

[82] 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 appellate ruling that 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).

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

[84] 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

The third factor — the nature of the plaintiff's interest in the records — often is evaluated in tandem with the second factor[86] and militates against awarding fees in cases where the plaintiff had an adequate personal incentive to seek judicial relief.[87] To

---

additional incentive" to bring FOIA suit against IRS for documents relevant to his defense); Menasha, 2012 WL 1034933, at *6 (finding plaintiff had "pecuniary (if not strictly commercial)," interest and "more than sufficient incentive to pursue disclosure" without fee award); Mullen, 2012 WL 2681300, at *10 (concluding there was evidence of "commercial interest in documents related to investigations about [company's] use of government funds"); Morley, 828 F. Supp. 2d at 264 (denying fees where plaintiff has "interest in obtaining the NARA records 'from the CIA at little or no charge under FOIA' to avoid expending his own time and money to obtain the documents from NARA"); Urdaneta, 2011 WL 3659591, at *2 (finding plaintiffs had commercial incentive to obtain information related to refund they sought from government); 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 plaintiff who had filed tort claims against 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 "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).

[85] 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").

[86] 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.").

[87] 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)); United Am. Fin., Inc., 770 F. Supp. 2d at 257 (finding plaintiff's interest in records on identity theft scam to be private); Poett v. DOJ, No. 08-622, 2010 WL 3892249, at *6 (D.D.C. Sept. 30, 2010) (magistrate's recommendation) (concluding that

disqualify a fee applicant under the second and third factors, "a motive need not be strictly commercial; any private interest will do."[88] 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.[89] The Court of Appeals for the Tenth Circuit has found that

---

despite lack of commercial benefit, fee request should be denied as "lack of a public benefit inherently illuminates the fact that Plaintiff's relationship to the disclosed document is of a private and personal nature"), adopted, 846 F. Supp. 2d 96 (D.D.C. 2012); Calvert v. U.S., No. 08-1659, 2010 WL 2198224, at *48 (D.D.C. June 3, 2010) (determining plaintiff not entitled to costs because plaintiff sought records for personal reasons — namely, "'for the specific purpose'" of comparing agent's signature "'with the signature that appears on [the criminal] complaint' sworn against him"); 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.").

[88] 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 Bryant v. CIA, 818 F. Supp. 2d 153, 159 (D.D.C. 2011) (rejecting argument that decision of agency to grant news media fee status entitled plaintiff to fees as grant was "merely a personal benefit to plaintiff"); 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).

[89] See, e.g., Valencia v. U.S. Citizenship & Immigration Serv., No. 12-102, 2012 WL 3834938, at *3 (D. Utah Sept. 4, 2012) (denying attorney fees after finding no evidence of public benefit where plaintiff sought records to prepare for immigration removal hearing); Menasha, 2012 WL 1034933, at *6 (finding plaintiffs had strong private incentive to use FOIA process to "secure discovery in the related [] lawsuit"); Morales v. Pension Benefit

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.[90] 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.[91]

Guar. Corp., No. 10-1167, 2012 U.S. Dist. LEXIS 9101, at *22 (D. Md. Jan. 26, 2012) (declining to award fees when it was "clear that the overwhelming majority of [plaintiff's] requests were made, not to serve the public interest or inform the public about the action of government agencies, but to substitute for or supplement discovery in [plaintiff's] personal Title VII suit"); 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. 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); Hernandez, 2012 U.S. Dist. LEXIS 14290, at *36 (noting that deportation cases do not provide respondents with formal discovery, leaving FOIA as "essentially the only means available for an individual to obtain information for use in a deportation proceeding"); 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").

[90] 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).

[91] 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"); Rosenfeld, 904 F. Supp. 2d at 999 (concluding that both commercial benefit and public interest factors weigh in plaintiff's favor "[g]iven the unique treatment afforded journalists and scholars"); Rosenfeld, 903 F. Supp. 2d at 869 (finding commercial benefit factor weighed in plaintiff's favor as "'mere intention to publish a book does not necessarily mean that the nature of the plaintiff's interest is purely commercial'" (citing Davy v. CIA, 550 F.3d 1155, 1160 (D.C. Cir. 2008))); Hajro v. U.S. Citizenship & Immigration Serv., 900 F. Supp. 2d 1034, 1048 (N.D. Cal. 2012) (agreeing with plaintiff, an immigration attorney, that interest in changing

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 at issue was exempt. If an agency's position is correct as a matter of law, this factor is often dispositive.[92] The converse, however, also has been found to be

---

defendant's "patterns and practices violating FOIA" was not commercial, despite plaintiff's potential financial benefit); Yonemoto v. VA, No. 06-378, 2012 WL 1980818, at *2 (D. Haw. June 1, 2012) (finding public benefit outweighs plaintiff's personal and commercial interests); Hernandez, 2012 U.S. Dist. LEXIS 14290, at *34 (awarding fees despite plaintiff's personal interest in documents dealing with deportation case as interest "also implicates the strong public interest in preserving the administration of justice in our nation's immigration courts"); Moffat, 2012 WL 113367, at *2 (finding prisoner not precluded from award of fees despite "intense personal interest in using the records sought to protest his innocence"); 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").

[92] See Brayton v. Office of U.S. Trade Representative, 641 F.3d 521, 526 (D.C. Cir. 2011) (noting "circuit's long-established rule of never granting a fee award to a plaintiff whose FOIA claim was incorrect as a matter of law"); Cotton, 63 F.3d at 1117 ("[T]here can be no doubt that a party is not entitled to fees 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)); 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)); 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); Morley, 828 F. Supp. 2d at 265 (concluding that defendant acted reasonably in relying on "reasonable legal interpretations," directing plaintiff "to the logical repository of such records – NARA," asserting "Glomar" response in connection with CIA officer's supposed covert activities, and "for initially contesting [plaintiff's] request to search its operational files"); Browder, 2009 WL 2240388, at *3 (finding "ministerial errors [in the processing of plaintiff's request] do not shift balance of equities to justify awarding costs and fees); Ellis, 941 F. Supp. at 1080 (explaining that government need show only "reasonable or colorable basis for the withholding" and that it

true — namely, that "[r]ecalcitrant and obdurate behavior 'can make the last factor dispositive without consideration of any of the other factors.'"[93] In other instances, courts have found agency actions to be "unreasonable" and have weighed this factor in favor of the plaintiff when the agency did not adequately explain why records were not released or why other actions, such as specific searches, were not undertaken.[94]

---

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); 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); 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 Menasha, 2012 WL 1034933, at *7 (finding that despite determination that defendant was not justified in withholding documents under exemption, court could not agree that defendant's position was "unreasonable"); 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))).

[93] 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)).

[94] See Rosenfeld, 903 F. Supp. 2d at 870 (concluding that defendant failed to demonstrate that refusal to produce requested records had "'a colorable basis in law'"); Moffat v. DOJ, No. 09-12067, 2012 WL 113367, at *2 (D. Mass. Jan. 12, 2012) ("[T]he [defendant] has not provided a colorable basis in FOIA law for its refusal to perform 'cross-reference' searches in response to [plaintiff's] administrative request until after he filed his lawsuit."); Negley v. FBI, 818 F. Supp. 2d 69, 75 (D.D.C. 2011) (finding defendant's failure to demonstrate it had reasonable basis for refusing to release documents and conduct certain searches "'was exactly the kind of behavior the fee provision was enacted to combat'" (citing Davy, 550 F.3d at 1163)); Pinson v. Lappin, 806 F. Supp. 2d 230, 236 (D.D.C. 2011) (determining agency behavior to be unreasonable where "[o]nly after this litigation commenced did the [agency] fulfill its obligation under the FOIA" by releasing information to plaintiff); Nulankeyutmonen Nkihtaqmikon v. BIA, 723 F. Supp. 2d 272, 277 (D. Me. 2010) (finding

In general, an agency's legal basis for withholding has been found "reasonable" if pertinent authority exists to support the claimed exemption.[95] Even in the absence of

---

agency's withholdings "manifestly unreasonable" "in light of the cascade of subsequent released documents"); 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 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").

[95] See Brayton, 641 F.3d at 528 (explaining that agency's "initial nondisclosure decision rested on a solid legal basis [and] create[d] a safe harbor against the assessment of attorney fees"); 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."); Weisner v. Animal & Plant Health Inspection Serv., No. 10-568, 2012 WL 2525592, at *3 (E.D. N.C. June 29, 2012) (finding that "[d]efendants withheld the records only as long as was necessary under Exemption 7(A), releasing them promptly when the exception ceased to apply"); Urdaneta v. IRS, 09-2405, 2011 WL 3659591, at *1 (D.D.C. March 17, 2011) (noting that defendant had reasonable basis for using Exemption 7(A) to withhold documents); Prison Legal News v. EOUSA, No. 08-1055, 2010 WL 3170824, at *3 (D. Col. Aug. 10, 2010) (finding defendant had reasonable basis for withholding video and photographs in full); Jordan v. DOJ, No. 07-02303, 2009 WL 2913223, at *27 (D. Colo. Sept. 8, 2009) (concluding that agency's initial withholding under Exemption 7(C) was not done in bad faith); Republic of New Afrika, 645 F. Supp. at 122; Adams v. United States, 673 F. Supp. 1249, 1259-60 (S.D.N.Y. 1987). But see United Ass'n of Journeymen & Apprentices, Local 598 v. Dep't of the Army, 841 F.2d 1459, 1462-64 (9th Cir. 1988) (finding withholding 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 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").

supporting authority, withholding has been found to be "reasonable" where no precedent directly contradicted the agency's position.[96]

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,"[97] 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.[98] 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.[99]

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."[100] On the other hand, courts have at times required agencies to provide a meaningful justification for the delay,[101] and have awarded fees when they found the delay to be unreasonable.[102] (For

---

[96] 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.").

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

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

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

[100] 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, e.g., Morley, 828 F. Supp. 2d at 265 (refusing to award fees where defendant did not engage in "any recalcitrant or obdurate behavior"); United Am. Fin., Inc., 770 F. Supp. 2d at 258 (finding fact that "litigation stretched on for a period of almost four years, . . . not evidence of 'obdurate behavior'"); Barnard v. DHS, 656 F. Supp. 2d 91, 100 (D.D.C. 2009) (determining plaintiff not entitled to fees despite delays because agency had "colorable basis in the law for withholding the records"); Hull, 2006 U.S. Dist. LEXIS 35054, at *12 (viewing agency delays as "more suggestive of ineptitude than bad faith"); Frye, 1992 WL 237370, at *3 (explaining 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).

[101] See Judicial Watch v. DOJ, 878 F. Supp. 2d 225, 237 (explaining that it is agency's burden to "'show[] that it had a[] colorable or reasonable basis for not disclosing the material until after [the plaintiff] filed suit'" (citing Davy, 550 F.3d at 1163); 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.

further discussions of an agency's obligation to segregate and release nonexempt information, see Procedural Requirements, "Reasonably Segregable" Obligation, above, and Litigation Considerations, "Reasonably Segregable" Requirements, above.)

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").

[102] 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); Baker, 2012 WL 5876241, at *7 (finding "ample evidence that the agency was recalcitrant or obdurate" where it took two years for agency to release records); Rosenfeld, 904 F. Supp. 2d at 999 (rejecting defendant's argument that '"bureaucratic difficulties, not recalcitrant behavior, delayed [its] response to Plaintiff's requests'"); Hajro, 900 F. Supp. 2d at 1048 (rejecting defendant's argument that delay was due to "bureaucratic difficulty" where delay in responding to plaintiff's request was "not an isolated event" but rather actions that "teeter[ed] on the edge of obduracy"); Elec. Priv. Info. Ctr. v. DHS, 892 F. Supp. 2d 28, 52 (D.D.C. 2012) (finding "obstructive approach" in failing to respond to request or administrative appeal within statutory deadline weighed in favor of fee award); Hernandez, 2012 U.S. Dist. LEXIS 14290, at *39 (finding delay unreasonable when defendant failed to explain reason for not responding to request until suit was filed); Citizens for Responsibility & Ethics in Wash. v. DOJ, 820 F. Supp. 2d 39, 48 (D.D.C. 2011) (finding "agency's failure even to respond" within time required by FOIA statute "hardly reasonable"); ACLU, 810 F. Supp. 2d at 277 (finding "defendants did not have a reasonable basis for withholding the 8,500 pages of records that were produced after the defendants had 'completed processing and production of all records,' . . . because 'defendant's failure to produce documents due to backlog or administrative issues does not constitute a "reasonable basis in law"'"); Elec. Priv. Info. Ctr., 811 F. Supp. 2d at 236 (determining agency's "administrative delay and a generic claim of a FOIA backlog do not form a 'reasonable basis in law' for withholding"); Judicial Watch, Inc. v. DOJ, 774 F. Supp. 2d at 231 (finding agency's initial failure to respond to request granted expedited processing within statutory time deadline "weighs in favor a fee award"); Deininger & Wingfield, P.A. v. IRS, No. 08-00500, 2009 WL 2241569, at *6 (E.D. Ark. July 24, 2009) (awarding fees based on failure of agency to explain delays, noting that agency's "excuse of administrative ineptitude falls short of a meaningful justification"); Nulankeyutmonen Nkihtaqmikon v. BIA, 672 F. Supp. 2d 154, 173 (D. Me. 2009) (finding defendant's "multi-year failure to locate responsive documents not reasonable"); 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").

Timing of Attorney Fees Motions

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."[103] 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.[104]

Some FOIA plaintiffs, however, have sought "interim" attorney fees before the conclusion of a case[105] — although such relief has been termed "inefficient"[106] and "piecemeal."[107] 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.[108] If interim fees are approved, payment of the fees

---

[103] 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.").

[104] 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))).

[105] See, e.g., Batton v. Evers, 598 F.3d 169, 184 (5th Cir. 2010) (determining that "issue of plaintiff's entitlement to fees and costs is not yet ripe for review"); Beltranena v. Clinton, 770 F. Supp. 2d 175, 187 (D.D.C. 2011) (finding request for fees "premature" where plaintiff has "not articulated any need for an interim award of fees"); Coven v. OPM, No. 07-1831, 2009 WL 3174423, at *20 (D. Ariz. Sept. 29, 2009) (deciding that motion for costs premature when final judgment not yet entered); Hussain v. DHS, 674 F. Supp. 2d 260, 272-273 (D.D.C. 2009) (concluding motion for fees premature where final judgment not yet entered and plaintiff gave no reason for need of interim award); Potomac Navigation, Inc. v. U.S. Maritime Administration, No. 09-217, 2009 U.S. Dist. LEXIS 116673, at *7 (D. Md. Dec. 15, 2009) (determining motion for attorney fees "not ripe").

[106] 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").

[107] 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).

[108] See Hajro v. U.S. Citizenship & Immigration Serv., 900 F. Supp. 2d 1034, 1039 (N.D. Cal. 2012) (agreeing to entertain motion for attorney fees before appeal decided where plaintiff's "inability to collect post judgment interest would be injurious"); 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

need not await final judgment in the action.[109] The Court of Appeals for the District of Columbia 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.[110]

Calculations

As an initial matter, attorney fees and costs are no longer paid by the Claims and Judgment Fund of the United States Treasury.[111] 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."[112]

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, the Court of Appeals for the District of Columbia Circuit has held that attorney fees and costs should be supported by well-documented, contemporaneous billing records;[113] while some courts will consider reconstructed records,[114] the amount ultimately awarded may be reduced accordingly.[115]

---

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. 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").

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

[110] 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).

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

[112] Id. § 4 (codified at 5 U.S.C. § 552(a)(4)(E)(ii)).

[113] 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."); see also Hernandez v. U.S. Customs & Border Prot., No. 10-4602, 2012 U.S. Dist. LEXIS 14290, at *44 (E.D. La. Feb. 7, 2012) (finding billing records "sufficiently clear and detailed"); Citizens for Responsibility & Ethics in Wash. v. DOJ, 825 F. Supp. 2d 226, 230 (D.D.C. 2011) (concluding that counsel's "timekeeping practices fell significantly below what is expected of fee applicants in this Circuit"); ACLU v. DHS, 810 F. Supp. 2d 267, 279 (D.D.C. 2011) (allowing submission of billing records reflecting quarter-hour time increments, but cautioning that in the future

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."[116] Not all hours expended in litigating a case will be deemed to have been

---

time sheets must be done in six-minute increments); Queen Anne's Conservation Assoc. v. U.S. Dep't of State, 800 F. Supp. 2d 195, 201 (D.D.C. Aug. 3, 2011) (finding court could not determine reasonableness where "description of the tasks are not sufficiently detailed"); Coven v. OPM, No. 07-01831, 2010 WL 1417314, at *2 (D. Ariz. Apr. 5, 2010) (explaining that without proof of litigation costs, court could not determine if costs were "'reasonably incurred'"); 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))).

[114] 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), aff'd in part, rev'd in part on other grounds in 470 F.3d 363 (D.C. Cir. 2006)). But see Ajluni v. FBI, No. 94-CV-325, 1997 WL 196047, at *2 (N.D.N.Y. Apr. 14, 1997) (finding that "'[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))).

[115] 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."); Rosenfeld v. DOJ, 903 F. Supp. 2d 859, 876 (N.D. Cal. 2012) (reducing fee award by ten percent where plaintiff "failed to demonstrate and document in the record that he exercised appropriate billing judgment to eliminate inefficiencies" and for "lack of billing detail"); Hajro v. U.S. Citizenship & Immigration Serv., 900 F. Supp. 2d 1034, 1053 (N.D. Cal. 2012) (reducing entries for block-billing by twenty percent); Citizens for Responsibility & Ethics in Wash., 825 F. Supp. 2d at 231 (reducing fee award by 37.5 percent "to account for any inaccuracies and overbilling that may have occurred as a result of its unacceptable timekeeping habits"); Negley v. FBI, 818 F. Supp. 2d 69, 78-79 (D.D.C. 2011) (reducing award for insufficient billing detail pertaining to settlement discussions); Queen Anne's Conservation Assoc., 800 F. Supp. 2d at 201 (reducing award by twenty percent due to inadequate documentation). 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").

[116] 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).

"reasonably" expended.[117] 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

---

[117] See, e.g., Rosenfeld, 903 F. Supp. 2d at 874 (reducing lodestar amount to eliminate hours spent monitoring compliance of settlement agreement); Citizens for Responsibility & Ethics in Wash., 825 F. Supp. 2d at 231 (refusing to award fees for time spent reviewing records received in response to FOIA request and draft Vaughn Index as "the cost of reviewing documents produced in response to a FOIA request is simply the price of making such a request"); Moffat v. DOJ, No. 09-12067, 2012 WL 113367, at *2 (D. Mass. Jan. 12, 2012) (limiting recoverable amount of attorney's fees to "time period that 'includes the preparation and filing of the complaint and stops when the FBI released documents to [plaintiff's] counsel'"); see also Audubon Society of Portland v. NRCS, 2012 WL 4829189, at *1 (D. Or. Oct. 8, 2012) (noting that lodestar figure is presumed reasonable, but that court may consider variety of factors and make adjustments).

[118] See, e.g., Hensley, 461 U.S. at 434-40; Anderson, 80 F.3d at 1506; Copeland, 641 F.2d at 891-92; Rosenfeld v. DOJ, 904 F. Supp. 2d 988, 1006 (N.D. Cal. Oct. 17, 2012) (reducing award by ten percent for time spent on unsuccessful claims); Judicial Watch v. DOJ, 878 F. Supp. 2d 225, 240 (finding that at most, plaintiff could recover fees "incurred as a result of its initiation of this lawsuit," but not for "unsuccessful and 'nonproductive' activities"); Queen Anne's Conservation Assoc., 800 F. Supp. 2d at 201 (determining that plaintiff is not entitled to fees for work performed after voluntary dismissal by plaintiff); Prison Legal News v. EOUSA, No. 08-1055, 2010 WL 3170824, at *4 (D. Col. Aug. 10, 2010) (granting plaintiff's request for forty percent of total fees incurred in litigating action, commensurate with amount of time spent litigating successful claims); Or. Natural Desert Ass'n, 2010 WL 56111, at *4 (awarding plaintiff one-fourth fees for time spent on remand when argument not accepted by court); Barnard v. DHS, 656 F. Supp. 2d 91, 100 (D.D.C. 2009) (finding amount requested unreasonable when "[p]laintiff offer[ed] no authority in support of his application of a 'production factor to calculate his request'" and "appear[ed] to include hours for legal work as to which he was not successful"); 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).

[119] Copeland, 641 F.2d at 892 n.18; see, e.g., 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"); 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); 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,

"'nonproductive time or [claims] for time expended on 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

---

it is "entitled to recover fees for time expended on the few motions upon which it did not 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., Elec. Privacy Info. Ctr. v. DHS, 811 F. Supp. 2d 216, 238 (D.D.C. 2011) (finding fee award not appropriate for unsuccessful motion for summary judgment that "can be reasonably separated from the portion of the litigation that catalyzed the release of responsive records," as well as work for motion that was never entered); 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).

[121] See, e.g., Or. Natural Desert Ass'n, 2010 WL 56111, at *3 (reducing fee award amount where plaintiff only successful on one of its four claims); 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"). But see Judicial Watch, Inc. v. DOJ, 774 F. Supp. 2d 225, 233 (D.D.C. 2011) (refusing to adjust lodestar amount downward by fifty percent when plaintiff only recovered less than one quarter of documents requested because agency's argument "appear[ed] to neglect the fact that FOIA cases routinely result in the disclosure of a relatively small proportion of the documents originally requested").

unnecessary."[122] Furthermore, the Court of Appeals for the District of Columbia Circuit has 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, but can be reduced if the court finds them excessive.[125]

---

[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"); Rosenfeld, 904 F. Supp. 2d at 1006 (reducing overall fee award by ten percent where Plaintiff failed to show sound billing judgment was exercised); Rosenfeld, 903 F. Supp. 2d. at 876 (adjusting award downward due to plaintiff's failure to "demonstrate and document that he exercised appropriate billing judgment to eliminate inefficiencies"); Audubon Society, 2012 WL 4829189, at *5 ("It is excessive to charge for tasks of less than a minute."); Yonemoto v. VA, No. 06-378, 2012 WL 1980818, at *6 (D. Haw. June 1, 2012) (reducing award for excessive time spent reviewing files, communicating, and researching); ACLU, 810 F. Supp. 2d at 279-281 (excluding billing entries related to press communications, retention letter, and excessive time spent by junior associate in drafting complaint); Elec. Privacy Info. Ctr., 811 F. Supp. 2d at 238 (reducing award due to "several instances of duplicative or excessive billing," including billing amount for "complaint consist[ing] largely of boilerplate language and uncomplicated factual history"); Negley v. FBI, 818 F. Supp. 2d 69, 79 (D.D.C. 2011) (reducing fee award by twenty percent for excessive time spent on drafting motion for attorneys' fees); Nulankeyutmonen Nkihtaqmikon v. BIA, 723 F. Supp. 2d 272 (D. Me. 2010) (finding plaintiff properly excluded from billing work where redactions were ultimately upheld); Judicial Watch, Inc. v. DHS, No. 08-2133, 2009 WL 1743757, at *8 (D.D.C. June 15, 2009) (magistrate's recommendation) (reducing excessive claim by twenty percent where "disputed matters in this litigation were not complex and the requested records were released early in the litigation"); 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, 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").

[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

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 have held that they should be couched in terms of specific market rates for particular types of litigation and must be well supported.[127] The pertinent legal market, for purposes of calculating legal fees, is the

---

hours in main case, absent unusual circumstances); Rosenfeld, 904 F. Supp. 2d at 1009 (reducing fees on fees award by twenty percent); Rosenfeld, 903 F. Supp. 2d. at 879 (finding request for '"fees-on-fees'" award "'grossly inflated'"); Judicial Watch v. DOJ, 878 F. Supp. 2d 225, 241 (allowing for fees on fees award, but reducing in order for award to be commensurate with reduced fee award); Citizens for Responsibility & Ethics in Wash., 825 F. Supp. 2d at 233 (agreeing that fees on fees should be awarded because plaintiff "prevailed on the major issues raised in the Motion for Attorney Fees — namely, the questions of whether [plaintiff] was eligible for and entitled to fees in the first place — very little of the time expended on fee issues related to the issues on which it did not prevail"); Elec. Privacy Info. Ctr., 811 F. Supp. 2d at 240 (awarding "fees on fees" because "upon close scrutiny of the record, that the hours spent by the plaintiff on these tasks were reasonably expended and do not constitute a 'windfall' for the attorneys"); Prison Legal News v. EOUSA, No. 08-1055, 2010 WL 3170824, at *4 (D. Col. Aug. 10, 2010) (reducing award for time spent litigating fee issue as "legal issues associated with a request for legal fees are neither novel or complicated"); 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.; Moffat v. DOJ, 716 F.3d 244, 256 (1st Cir. 2013) (upholding lower court fee award calculation based on "value that [the Committee for Public Counsel Services] had placed on attorneys representing indigent defendant"); Audubon Society, 2012 WL 4829189, at *2 (noting that fee applicant has burden of demonstrating hourly rates are reasonable); 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 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).

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," which categorizes hourly rates by years in practice, and is adjusted each year for inflation. [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

---

[128] See, e.g., Hernandez, 2012 U.S. Dist. LEXIS 14290, at *47 (reducing hourly rates based on review of recent case law within district); 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); Negley v. FBI, 818 F. Supp. 2d 69, 77 (D.D.C. 2011) (noting that courts award fees "based on the applicable Laffey Matrix rates for any given year"); Elec. Privacy Info. Ctr., 811 F. Supp. 2d at 238 (applying "paralegal/clerk" Laffey Matrix rate for time on work conducted before attorney was admitted to bar); 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."), rev'd on other grounds, 610 F.3d 747 (D.C. Cir. 2010).

[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 also Hernandez, 2012 U.S. Dist. LEXIS 14290, at *53 (finding that "fee award in this case is not disproportionate to those awarded in other similar cases" and so declining to adjust lodestar amount); Elec. Privacy Info. Ctr., 811 F. Supp. 2d at 240 (refusing to award fee enhancement for work performed on "unusually exhaustive administrative filings" as "work performed at the administrative level is not compensable under FOIA"); 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

litigation for a prolonged period of time, "[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]

---

to suit, the United States is immune from an interest award."); Weisberg v. DOJ, 848 F.2d 1265, 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 Auto Alliance Int'l, 155 F. App'x at 228-229 (determining that grant of fees by district court was not an abuse of discretion).