ATTORNEY FEES

The FOIA 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, added as subsection (a)(4)(E) of the Act as part of the 1974 FOIA amendments, requires courts to engage in a two-step substantive inquiry: (1) Is the plaintiff eligible for an award of fees and/or costs? (2) If so, is the plaintiff 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]

Attorney Fees and Litigation Costs: Eligibility Generally

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,

---

[475](...continued)
(en banc); see also Scherer v. United States, 78 F. App'x 687, 690 (10th Cir. 2003) (upholding district court's award of costs to agency); Johnson v. Comm'r, 68 F. App'x 839, 840 (9th Cir. 2003) (awarding costs to agency because requester's appeal was frivolous).

[1] 5 U.S.C. § 552(a)(4)(E) (2000 & Supp. IV 2004).

[2] 5 U.S.C. § 552(a)(4)(E); see, e.g., Tax Analysts v. U.S. Dep't of Justice, 965 F.2d 1092, 1093 (D.C. Cir. 1992); Church of Scientology v. USPS, 700 F.2d 486, 489 (9th Cir. 1983); see also Wheeler v. IRS, 37 F. Supp. 2d 407, 411 n.1 (W.D. Pa. 1998) ("The test for whether the court should award a FOIA plaintiff litigation costs is the same as the test for whether attorney fees should be awarded.").

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

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

fees and other costs may not be awarded for services rendered at the administrative level.[5] Furthermore, the Court of Appeals for the District of Columbia Circuit recently 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

---

[4](...continued)
to award fees for plaintiff's success under Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000), in forcing 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); Sinito v. U.S. Dep't of Justice, No. 87-0814, slip op. at 3 n.2 (D.D.C. Mar. 23, 2001) (declining to consider fee-entitlement argument based on Equal Access to Justice Act, 5 U.S.C. § 504 (2000), because plaintiff relied on only FOIA in his motion), summary affirmance granted, No. 01-5168 (D.C. Cir. Oct. 15, 2001).

[5] See AutoAlliance Int'l, Inc. v. U.S. Customs Serv., No. 02-72369, slip op. at 3 (E.D. Mich. Mar. 23, 2004) (denying attorney fees for time spent on "administrative appeals that should have been completed prior to filing suit"); Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv., No. 02-6178, slip op. at 6 (D. Or. Dec. 3, 2003) (deducting hours spent on FOIA administrative process for fee-calculation purposes); Nw. Coal. for Alternatives to Pesticides v. Browner, 965 F. Supp. 59, 65 (D.D.C. 1997) ("FOIA does not authorize fees for work performed at the administrative stage."); Associated Gen. Contractors v. EPA, 488 F. Supp. 861, 864 (D. Nev. 1980) (concluding that attorney fees are unavailable for work performed at administrative level); cf. Kennedy v. Andrus, 459 F. Supp. 240, 244 (D.D.C. 1978) (rejecting attorney fees claim for services rendered at administrative level under Privacy Act, 5 U.S.C. § 552a (2000)), aff'd, 612 F.2d 586 (D.C. Cir. 1980) (unpublished table decision). But see Or. Natural Desert Ass'n v. Gutierrez, No. 05-210, 2006 WL 2318610, at *4 (D. Or. Aug. 24, 2006) (awarding fees for work performed at the administrative level, on the rationale that "exhaustion of remedies is required and provides a sufficient record for the civil action") (appeal pending); McCoy v. Fed. Bureau of Prisons, 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).

an award of attorney fees. The Supreme Court's decision in Kay v. Ehrler[7] clearly establishes that subsection (a)(4)(E) does not authorize the award of fees to a pro se nonattorney 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 stands for the proposition that no award of attorney fees should be made to a pro se plaintiff who also is an attorney.[10] Because the fee-shifting provision of the FOIA was intended "'to encourage potential claimants to seek legal advice before commencing litigation,'"[11] and because a pro se attorney, by definition, does not seek out the "'detached and

---

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

[8] Benavides v. Bureau of Prisons, 993 F.2d 257, 259 (D.C. Cir. 1993) (explaining Kay decision); see Bensman v. U.S. Fish & Wildlife Serv., 49 F. App'x 646, 647 (7th Cir. 2002) ("Even when a pro se litigant performs the same tasks as an attorney, he is not entitled to reimbursement for his time."); Deichman v. United States, No. 2:05cv680, 2006 WL 3000448, at *7 (E.D. Va. Oct. 20, 2006) (holding that pro see litigant cannot recover attorney fees under FOIA); Lair v. Dep't of the Treasury, No. 03-827, 2005 WL 645228, at *6 (D.D.C. Mar. 21, 2005) (explaining that "pro-se non-attorney . . . may not collect attorney fees" (citing Benavides)), reconsideration denied, 2005 WL 1330722 (D.D.C. June 3, 2005).

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

[10] 499 U.S. at 438 ("The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every case.") (emphasis added). But see Baker & Hostetler LLP v. U.S. Dep't of Commerce, 473 F.3d 312, 324 (D.C. Cir. 2006) (holding that law firm representing itself is eligible for attorney's fees).

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

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 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 compen-

---

[12] Id.

[13] See, e.g., Burka v. HHS, 142 F.3d 1286, 1289 (D.C. Cir. 1998) ("It is . . . impossible to conclude otherwise than that pro se litigants who are attorneys are not entitled to attorney's fees under FOIA."); Ray v. U.S. Dep't of Justice, 87 F.3d 1250, 1252 (11th Cir. 1996) (deciding that principles announced in Kay apply with "equal force" in FOIA case); Albino v. USPS, No. 01-563, 2002 WL 32345674, at *8 (W.D. Wis. May 20, 2002) (agreeing that pro se plaintiffs who are attorneys are barred from receiving attorney fees under the rationale of Kay); Manos v. Dep't of the Air Force, 829 F. Supp. 1191, 1193 (N.D. Cal. 1993) (stating that "fairness and sound policy" compel same treatment of attorney and nonattorney 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"). But see Texas v. ICC, 935 F.2d 728, 731 (5th Cir. 1991) (pointing out that "lawyers who represent themselves in FOIA actions may recover under the fee-shifting provision"); cf. Chin v. U.S. Dep't of the Air Force, No. 99-31237, slip op. at 3 (5th Cir. June 15, 2000) (assuming, but not deciding, that Cazalas v. U.S. Dep't of Justice, 709 F.2d 1051 (5th Cir. 1983), which awarded fee to a pro se attorney, has been "rendered moribund"); Barrett v. U.S. Dep't of Justice, No. 3:95-264, slip op. at 5 (S.D. Miss. Mar. 17, 1997) (declining to decide whether Fifth Circuit would overrule Cazalas in light of Kay decision, because alternative ground existed for deciding fee issue at hand), aff'd, No. 97-60223 (5th Cir. Nov. 20, 1997).

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

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

[16] Id.

sable.[17]

However, it is worth noting that in a recent case, 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 particular federal statute, 28 U.S.C. § 1920,[22] lists certain items that may be taxed as costs,[23] in some instances FOIA costs have been awarded independently of this statute.[24] "Costs" in a FOIA case

---

[17] See, e.g., Ray v. U.S. Dep't of Justice, 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 v. U.S. Dep't of Commerce, 473 F.3d 312, 324 (D.C. Cir. 2006) (panel rehearing pending).

[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. U.S. Dep't of Justice, 632 F.2d 916, 921-22 (1st Cir. 1980); 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); Malone v. Freeh, No. 97-3043, slip op. at 3 (D.D.C. July 12, 1999) (awarding pro se plaintiff $200 for costs); Wheeler, 37 F. Supp. 2d at 411.

[22] (2000).

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

[24] See Blazy, 194 F.3d at 95 (stating that "§ 1920 does not serve as a limit on recovery of litigation costs under either FOIA or the Privacy Act"); Kuzma v. IRS, 821 F.2d 930, 933 (2d Cir. 1987) (concluding that "the policies un-

(continued...)

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 pursuant to Rule 54(d) of the Federal

---

[24](...continued)
derlying § 1920 are antithetical to the remedial purpose" of the FOIA); Comer v. IRS, No. 97-76329, 2002 WL 31835437, at *2 (E.D. Mich. Oct. 30, 2002) (refusing to limit costs under FOIA to those contained in 28 U.S.C. § 1920); Tax Analysts v. IRS, No. 94-923, 1998 WL 283207, at *3 (D.D.C. Mar. 17, 1998) (same).

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

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

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

[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.").

Rules of Civil Procedure, although such recoveries are uncommon.[29]

Attorney Fees and Litigation Costs: The Buckhannon Standard

Assuming that a plaintiff qualifies for eligibility as described above, the next step is to determine whether the plaintiff is actually eligible for a fee award under the circumstances of the case. This, in turn, requires a determination that the plaintiff has "substantially prevailed" within the meaning of subsection (a)(4)(E) of the FOIA -- as limited by the Supreme Court's decision in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources.[30]

This eligibility determination once consumed a considerable amount of judicial attention, as courts applied the "catalyst theory" for awarding attorney fees, which held that a plaintiff could be awarded attorney fees if his lawsuit served as a "catalyst" in achieving a voluntary change in the defendant's conduct.[31] This produced a wide variety of decisions describing what circumstances were sufficient to find eligibility for attorney fees.[32] The catalyst theory was specifically rejected, however, when the Supreme Court, in Buckhannon, held that a plaintiff must obtain a judicially sanctioned "alteration in the legal relationship of the parties" before fees will be awarded.[33]

Although the FOIA was not the particular statute at issue in Buckhannon, the Supreme Court there repeated its oft-expressed view that the numerous federal fee-shifting statutes, including the FOIA, should be interpreted consistently.[34] Two years after the Buckhannon decision, the Court of Appeals for the D.C. Circuit expressly applied Buckhannon's holding to the FOIA. In Oil, Chemical & Atomic Workers International Union

---

[29] See, e.g., Chin, No. 99-31237, Order at 1 (5th Cir. June 15, 2000) (ordering plaintiff to pay defendant's costs on appeal); Donohue v. U.S. Dep't of Justice, 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, Order at 1 (D.N.J. Mar. 13, 1979) (awarding government, as prevailing party, its litigation costs in full amount of $93, effectively against ACLU, in accordance with statutory authorization contained in 28 U.S.C. § 1920); see also Baez v. U.S. Dep't of Justice, 684 F.2d 999, 1005-06 (D.C. Cir. 1982) (en banc) (assessing against unsuccessful plaintiff all costs of appeal).

[30] 532 U.S. 598 (2001) (non-FOIA case).

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

[32] See id. at 602 n.3 (collecting cases).

[33] Id. at 605.

[34] Id. at 603 n.4 (citing Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983)).

(OCAW) v. Department of Energy,[35] the D.C. Circuit declared that the "substantially prevails" language of the FOIA is the "functional equivalent of the "prevailing party" language that is found in other fee-shifting statutes.[36] Extrapolating from this conclusion and thus applying Buckhannon, the D.C. Circuit ruled that "in order for plaintiffs in FOIA actions to become eligible for an award of attorney's fees, they must have 'been awarded some relief by [a] court' either in a judgment on the merits or in a court-ordered consent decree."[37] In other words, unless a FOIA plaintiff obtains court-ordered relief on the merits of his complaint that results in a material alteration of the legal relationship between the parties,[38] there can be no eligibility for attorney fees[39] or costs.[40]

Indeed, in OCAW, the D.C. Circuit ultimately held that the plaintiff had not prevailed "[u]nder the rule of Buckhannon."[41] While the D.C. Circuit in OCAW found that a court-endorsed stipulation "arguably changed the legal status of the parties" insofar as it required the agency "to complete its record review in 60 days," that order did not in its eyes constitute "judicial relief on the merits of the [plaintiff's] complaint."[42] In its view, that order simply was an interim "procedural ruling," because both prior to and after its issuance the agency was not obliged "to turn over any documents."[43]

---

[35] 288 F.3d 452 (D.C. Cir. 2002).

[36] Id. at 455-56.

[37] Id. (quoting Buckhannon, 532 U.S. at 603); see also Campaign for Responsible Transplantation v. FDA, 448 F. Supp. 2d 146, 150 (D.D.C. 2006) (holding that plaintiff did not "substantially prevail," because FDA released documents voluntarily, not by any type of order).

[38] See id. at 458-59 (discussing Buckhannon's requirements).

[39] See id. at 457 ("Because Buckhannon controls, the existing law of our circuit must give way."); see also Davis v. Dep't of Justice, 460 F.3d 92, 106 (D.C. Cir. 2006) (denying fee eligibility where FBI released requested audiotapes voluntarily, rather than "pursuant to any judgment or order").

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

[41] OCAW, 288 F.3d at 459.

[42] Id. at 458.

[43] Id.; see also Davis, 2006 WL 2411393, at *11 (holding that an appellate court order remanding the case for a segregability determination "is insuf-

(continued...)

ATTORNEY FEES

In two significant decisions following OCAW, though, the D.C. Circuit found that fee eligibility had been established under the Buckhannon standard. Two years ago, in Edmonds v. FBI,[44] it found that Buckhannon's requirements can be satisfied even where there is no "judgment by the court regarding the legality of the government's withholding of documents."[45] It concluded there that a district court order that compelled expedited processing and directed production of nonexempt records by a specific date altered the legal relationship of the parties and provided the plaintiff with relief on the merits.[46] Specifically, according to the D.C. Circuit in that case, the order did so by moving the plaintiff's request "to the head of the line" -- thereby providing "full relief" on a statutorily-provided expedited-processing claim -- and by mandating disclosure under "the court-designated deadline."[47] This, in turn, rendered the plaintiff eligible for an award of attorney fees.[48]

A year later, in Davy v. CIA,[49] the D.C. Circuit held that a district court order (memorializing a joint stipulation) that simply required production of nonexempt records by particular dates also satisfied Buckhannon.[50] It reached this conclusion even though the order, unlike the one at issue in Edmonds, did not concern expedited processing,[51] which is an independent cause of action under the FOIA.[52] The D.C. Circuit in Davy reasoned that the legal relationship of the parties had been altered because the order required the CIA to take an action that it otherwise had no duty to take

---

[43](...continued)
ficient to satisfy the OCAW test").

[44] 417 F.3d 1319 (D.C. Cir. 2005).

[45] Id. at 1323; see also Cooke v. Ronald Reagan Presidential Library, No. 05-6518, slip op. at 7-8 (C.D. Cal. Sept. 1, 2006) (awarding fees based upon "lenient" application of Buckhannon in Ninth Circuit (citing Carbonell v. INS, 429 F.3d 894, 898 (9th Cir. 2005) (non-FOIA case)).

[46] See id. at 1322-23.

[47] Id. at 1323-24.

[48] Id. at 1324.

[49] 456 F.3d 162 (D.C. Cir. 2006), reh'g en banc denied, No. 05-5151 (D.C. Cir. Sept. 18, 2006).

[50] See id. at 165.

[51] See id. at 164-65

[52] See 5 U.S.C. § 552(a)(6)(E)(i); see also Edmonds, 417 F.3d at 1324 (explaining that "right of expedition [is] judicially enforceable").

-- "producing documents by specific dates."[53] Further, it said, the order amounted to "relief on the merits," as opposed to a mere procedural ruling, because it provided the plaintiff with the "precise relief [that] his complaint sought" -- prompt disclosure of the requested records.[54] Notably, the D.C. Circuit attempted to distinguish its prior opinion in OCAW, which had denied fee eligibility by explaining that the OCAW order merely required the agency to conduct a search.[55] As the dissent in OCAW had pointed out, however, the order in that case not only required the agency to complete its record review, it also directed the agency to disclose nonexempt portions of any documents within sixty-days.[56]

Following the D.C. Circuit's overall lead, an increasing number of courts have similarly recognized Buckhannon's applicability in the FOIA context.[57] A few courts, however, have continued to adhere to the catalyst

---

[53] Davy, 456 F.3d at 165; see also Piper v. U.S. Dep't of Justice, 339 F. Supp. 2d 13, 19 (D.D.C. 2004) (concluding that an order reducing the FBI's Open America stay from four years to two years "changed the parties' legal status" by requiring processing of documents two years earlier than planned). But see Nw. Coal. For Alternatives to Pesticides v. EPA, No. 99-437, 2007 U.S. Dist. LEXIS 8763, at *6-8 (D.D.C. Feb. 7, 2007) (finding that under Davy plaintiff has not "substantially prevailed" because, although Court's 2003 order remanding case to agency had changed legal relationship of parties, plaintiff was not awarded relief on merits of his claim when Court later found that agency had properly withheld contested documents); Campaign, 448 F. Supp. 2d at 151 (finding that order requiring FDA to produce more detailed Vaughn Index was "a procedural, rather than [a] substantive order," and that it did not change any legal relationship or provide the plaintiff with relief on merits).

[54] Davy, 456 F.3d at 165; see also Jarno v. DHS, 365 F. Supp. 2d 733, 737 (E.D. Va. 2005) (finding fee eligibility under Buckhannon, because the court-approved settlement agreement provided for release of nonexempt records by certain dates, and declaring that the plaintiff received "the relief he sought in his claim" -- documents responsive to his request).

[55] See Davy, 456 F.3d at 165 (distinguishing order in OCAW as one that "was procedural -- conduct a search[,] as opposed to substantive -- produce documents").

[56] See OCAW, 288 F.3d at 465 (Rogers, J., dissenting) (summarizing district court order).

[57] See, e.g., Union of Needletrades v. INS, 336 F.3d 200, 206 (2d Cir. 2003) (declaring that although plaintiff "accomplished the objective it sought to achieve" by bringing a FOIA suit, "its failure to secure either a judgment on the merits or a court-ordered consent decree renders it ineligible for an award of attorney's fees"); Poulsen v. U.S. Customs & Border Prot., No. 06-1743, 2007 WL 160945, at *1 (N.D. Cal. Jan. 17, 2007) (following Buckhan-

(continued...)

theory of fee eligibility.[58]

---

[57](...continued)
non standard to determine whether plaintiff is eligible for attorney fees); Peter S. Herrick's Customs & Int's Trade Newsletter v. United States Customs & Border Prot., No. 04-0377, 2006 WL 3060012, at *3 (D.D.C. Oct. 26, 2006) (applying Buckhannon standard to determine plaintiff's eligibility for fee award); Or. Natural Desert Ass'n, 2006 WL 2318610, at *1 (explaining that Buckhannon applies to fee eligibility determination in FOIA cases); Roberts v. Principi, No. 02:02-166, 2006 WL 169726, at *11 (E.D. Tenn. June 16, 2006) (finding, under Buckhannon standard, that plaintiff did not substantially prevail, because VA voluntarily disclosed requested records); Pac. Fisheries, Inc. v. IRS, No. 04-2436, 2006 WL 1635706, at *5 (W.D. Wash. June 1, 2006) (denying fees, even though the "lawsuit was necessary to compel the Service to provide an appropriate response to the FOIA request"); McCoy, 2005 WL 1972600, at *1 (finding plaintiff eligible for fee award under Buckhannon standard); Kahn v. Comm'r, No. 03-CV-6169, 2005 WL 1123733, at *2 (S.D.N.Y. May 11, 2005) (applying Buckhannon and finding that plaintiff was not prevailing party, because he obtained records sought in his Amended Complaint "without Court intervention"); Martinez v. EEOC, No. 04-CA-0271, 2005 U.S. Dist. LEXIS 3864, at *19 (W.D. Tex. Mar. 3, 2005) (rejecting plaintiff's assertion that he substantially prevailed based on mere fact that his suit prompted agency to release records); W&T Offshore, Inc. v. U.S. Dep't of Commerce, No. 03-2285, 2004 WL 2984343, at *2-3 (E.D. La. Dec. 23, 2004) (applying Buckhannon to reject plaintiff's claim for fees predicated on catalyst theory); Landers v. Dep't of the Air Force, 257 F. Supp. 2d 1011, 1012 (S.D. Ohio 2003) (finding no entitlement to attorney fees, despite the fact that lawsuit caused release of documents, because plaintiff "obtained no relief from this Court").

[58] See, e.g., Windel v. United States, No. 3:02-CV-306, 2006 WL 1036786, at *3 (D. Alaska Apr. 19, 2006) (explaining that fee eligibility is based on whether filing a lawsuit was "necessary" to obtain information and whether it had "a substantial causative effect on the delivery of information"); Pohlman, Inc. v. SBA, No. 4:03-CV-1241, slip op. at 27 (E.D. Mo. Sept. 30, 2005) (suggesting that plaintiff substantially prevailed because, in addition to court-ordered disclosure of some records, his lawsuit appeared to prompt agency's earlier voluntary release of other information); AutoAlliance Int'l, Inc. v. U.S. Customs Serv., 300 F. Supp. 2d 509, 513-14 (E.D. Mich. 2004) (declaring that Buckhannon standard applies to fee awards under FOIA, but finding eligibility based only on court-ordered agency review of records after which agency made voluntary disclosures), aff'd on other grounds, 155 F. App'x 226 (6th Cir. 2005); Read v. FAA, 252 F. Supp. 2d 1108, 1110-11 (W.D. Wash. 2003) (same); cf. Beacon Journal Publ'g Co. v. Gonzalez, No. 05-CV-1396, 2005 U.S. Dist. LEXIS 28109, at *3-8 (N.D. Ohio Nov. 16, 2005) (finding fee eligibility based on grant of summary judgment in favor of plaintiff, which followed agency's voluntary production of requested "mug shot" photographs); Albino, 2002 WL 32345674, at *8 (applying catalyst theory to find that plaintiff substantially prevailed because agency re-
(continued...)

Attorney Fees and Litigation Costs: 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.[59] This discretion ordinarily is guided by four traditional criteria that derive from the FOIA's legislative history.[60] 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.[61] These four entitlement factors, of course, have nothing to do with determining an appropriate fee amount; therefore, they cannot be considered in that entirely sepa-

---

[58](...continued)
sponded to FOIA request after suit was filed, but denying fees because plaintiff was proceeding pro se).

[59] See Young v. Dir., No. 92-2561,1993 WL 305970, at *2 (4th Cir. Aug. 10, 1993) ("Even if a plaintiff substantially prevails, however, a district court may nevertheless, in its discretion, deny the fees."); Texas v. ICC, 935 F.2d 728, 733 (5th Cir. 1991) ("The district court did not specify which of the criteria [plaintiff] failed to satisfy. But so long as the record supports the court's exercise of discretion, the decision will stand.").

[60] 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").

[61] See Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93, 98 (6th Cir. 1996); Cotton, 63 F.3d at 1117; Tax Analysts v. U.S. Dep't of Justice, 965 F.2d 1092, 1093 (D.C. Cir. 1992); Church of Scientology v. USPS, 700 F.2d 486, 492 (9th Cir. 1983); Fenster v. Brown, 617 F.2d 740, 742-45 (D.C. Cir. 1979); Cuneo v. Rumsfeld, 553 F.2d 1360, 1364-66 (D.C. Cir. 1977). But see also 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."); see also Herrick's Newsletter, 2006 WL 3060012, at *11 (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").

rate analysis.[62]

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.[63] Rather, the "public benefit" factor ""speaks for an award [of attorney fees] when the complainant's victory is likely to add to the fund of information that citizens may use in making vital political choices.""[64] Such a determination, which necessarily entails an evaluation of the nature of the specific information disclosed,[65] has led to findings of "public benefit" in a variety of contexts.[66] Highly pertinent considerations in this "public benefit" inquiry are "the degree of dissemination and [the] likely public impact that might be expected from a particular disclosure."[67] When

---

[62] See Long v. IRS, 932 F.2d 1309, 1315-16 (9th Cir. 1991).

[63] Cotton, 63 F.3d at 1120 (citing Fenster, 617 F.2d at 744); see Klamath Water Users Protective Ass'n v. U.S. Dep't of the Interior, 18 F. App'x 473, 475 (9th Cir. 2001) (declining to award attorney fees for the release of documents "having marginal public interest and little relevance to the making of political choices by citizens").

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

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

[66] See, e.g., 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"); PETA v. USDA, No. 03-195, 2006 WL 508332, at *3 (D.D.C. Mar. 3, 2006) (recognizing public benefit in disclosure of records that permit public to "assess" whether USDA complied with regulations when it made loan guarantee to large distributor of puppies); McCoy v. Fed. Bureau of Prisons, 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 the Bureau of Prisons' 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"), reconsideration denied (E.D. Ky. Oct. 6, 2005); Jarno v. DHS, 365 F. Supp. 2d 733, 738 (E.D. Va. 2005) (finding public interest to have been served by release of records regarding DHS's handling of plaintiff's high-profile asylum case); Piper v. U.S. Dep't of Justice, 339 F. Supp. 2d 13, 21 (D.D.C. 2004) (finding public benefit through disclosure of information concerning allegations of evidence tampering by FBI personnel).

[67] Blue, 570 F.2d at 533; Church of Scientology, 769 F. Supp. at 331 (recognizing a public interest in "the apparently improper designation of a religion as a 'tax shelter' project"); see Polynesian Cultural Ctr. v. NLRB, 600

(continued...)

the information released is already in the public domain, of course, this factor does not weigh in favor of a fee award.[68]

On the other hand "[m]inimal, incidental and speculative public benefit will not suffice" to satisfy the requirements of subsection (a)(4)(E).[69] It is

---

[67](...continued)
F.2d 1327, 1330 (9th Cir. 1979) (per curiam) (denying fees when "disclosure was unlikely to result in widespread dissemination, or substantial public benefit"); Hull, 2006 U.S. Dist. LEXIS 35054, at *5 (finding planned dissemination -- free of charge -- through posting on association's Web site to be "key factor" in public benefit analysis); Long v. IRS, No. 74-724, 2006 WL 1041818, at *5 (W.D. Wash. Apr. 3, 2006) (finding public benefit based on plaintiff's assertion that statistical data requested from IRS was "critical" to her organization's "efforts to monitor and [publicly] disseminate information on IRS activities") (appeal pending); Jarno, 365 F. Supp. 2d at 738-40 ("The wide dissemination to the press and public . . . establish[ed] that the public benefitted from the government's FOIA response."); OCAW v. U.S. Dep't of Energy, 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. Dep't of Justice, 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).

[68] See, e.g., Tax Analysts, 965 F.2d at 1094 (affirming district court's finding that more prompt reporting by Tax Analysts of additional twenty-five percent of publicly available district court tax decisions was "less than overwhelming" contribution to public interest); Laughlin v. Comm'r, 117 F. Supp. 2d 997, 1002 (S.D. Cal. 2000) (declining to award fees for disclosure of document that is "readily accessible commercially"); Petroleum Info. Corp. v. U.S. Dep't of the Interior, No. 89-3173, slip op. at 5-6 (D.D.C. Nov. 16, 1993) (holding that public benefit is only "slight" where litigation resulted in disclosure of information in electronic form that was previously publicly available in printed form). But cf. PETA, 2006 WL 508332, at *4 (finding the existence of a "limited" public benefit, despite the agency's release of "the bulk of the requested information" before the lawsuit was commenced).

[69] Aviation Data Serv. v. FAA, 687 F.2d 1319, 1323 (10th Cir. 1982); see Ellis v. United States, 941 F. Supp. 1068, 1078 (D. Utah 1996) ("[T]he successful FOIA plaintiff always achieves some degree of public benefit by bringing the government into compliance with FOIA and by the benefit assumed to flow from public disclosure of government information."); Bangor
(continued...)

similarly unavailing to show simply that the prosecution of the suit has compelled an agency to improve the efficiency of its FOIA processing.[70]

Moreover, it has been held by the D.C. Circuit 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.[71] As the D.C. Circuit perceptively noted in

---

[69](...continued)
Hydro-Elec. Co. v. U.S. Dep't of the Interior, 903 F. Supp. 169, 171 (D. Me. 1995) ("[B]y definition a successful FOIA plaintiff always confers some degree of benefit on the public by bringing the government into compliance with FOIA . . . ."); 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."). But see Cottone v. FBI, No. 94-1598, slip op. at 3 (D.D.C. Mar. 16, 2001) (citing Williams v. FBI, 17 F. Supp. 2d 6, 9 (D.D.C. 1997), to justify awarding fees in order to encourage service on Civil Pro Bono Counsel panel), appeal dismissed voluntarily, No. 01-5159 (D.C. Cir. July 26, 2001); Landano v. U.S. Dep't of Justice, 873 F. Supp. 884, 892 (D.N.J. 1994) ("Here, the public clearly benefits from this disclosure since it has an interest in the fair and just administration of the criminal justice system as [applied to the plaintiff].").

[70] 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); Solone v. IRS, 830 F. Supp. 1141, 1143 (N.D. Ill. 1993) ("While the public would benefit from the court's imprimatur to the IRS to comply voluntarily with the provisions of the FOIA, this is not the type of benefit that FOIA attorneys' fees were intended to generate."); Muffoletto v. Sessions, 760 F. Supp. 268, 277 (E.D.N.Y. 1991) (maintaining that public benefit in compelling FBI to act more expeditiously is insufficient).

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

one case: "Such an inherently speculative observation is . . . inconsistent with the structure of FOIA itself."[72]

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 should be denied,[73] except in the case of news media interests, which generally "should not be considered commercial interests."[74]

---

[71](...continued)
same time recognizing "binding circuit precedent" to the contrary).

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

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

[74] S. Rep. No. 93-854, at 19 (1974), quoted in Fenster, 617 F.2d at 742 n.4;
(continued...)

The third factor -- the nature of the plaintiff's interest in the records -- often is evaluated in tandem with the second factor[75] and militates against awarding fees in cases where the plaintiff had an adequate personal incentive to seek judicial relief.[76] To disqualify a fee applicant under the second and third factors, "a motive need not be strictly commercial; any private interest will do."[77] In this regard, the use of the FOIA as a substitute for dis-

---

[74](...continued)
accord FOIA Update, Vol. VIII, No. 1, at 10 ("New Fee Waiver Policy Guidance").

[75] 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").

[76] 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)); 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); Tran v. U.S. Dep't of Justice, No. 01-0238, 2001 U.S. Dist. LEXIS 21552, at *15 (D.D.C. Nov. 20, 2001) (refusing to award fees, because suit was brought "entirely for [plaintiff's] own benefit, [his] having requested only documents and records pertaining to himself"); 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."). But see 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"); 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); 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).

[77] 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. U.S. Dep't of Justice, 759 F. Supp. (continued...)

covery has routinely been found to constitute the pursuit of a private, non-compensable interest.[78] And if a FOIA plaintiff's motives, in a rare case, should change over the course of the litigation, in that case a court should bifurcate the fee award on the basis of such shifting interests.[79]

The fourth factor -- the reasonableness of the agency's withholding -- counsels against a fee award when the agency had a reasonable basis in law for concluding that the information in issue was exempt. If an agency's position is correct as a matter of law, this factor should be disposi-

---

[77](...continued)
28, 31 (D.D.C. 1991))); see 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); 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). But see 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").

[78] See, e.g., Ellis, 941 F. Supp. at 1079 (compiling cases); Muffoletto, 760 F. Supp. at 275 (rejecting plaintiff's entitlement to fees on grounds that "[t]he plaintiff's sole motivation in seeking the requested information was for discovery purposes, namely, to assist him in the defense of a private civil action"); Republic of New Afrika v. FBI, 645 F. Supp. 117, 121 (D.D.C. 1986) (stating that purely personal motives of plaintiff -- to exonerate its members of criminal charges and to circumvent civil discovery -- dictated against award of fees), aff'd sub nom. Provisional Gov't of the Republic of New Afrika v. ABC, 821 F.2d 821 (D.C. Cir. 1987) (unpublished table decision); Simon v. United States, 587 F. Supp. 1029, 1033 (D.D.C. 1984) (articulating that use of FOIA as substitute for civil discovery "is not proper and this court will not encourage it by awarding fees"). But see McCoy, 2005 WL 1972600, at *2 (finding fee entitlement, even though plaintiff's FOIA request "served her personal interest in obtaining . . . evidence" for use in related tort litigation); cf. Jarno, 365 F. Supp. 2d at 740 (concluding that the plaintiff's interest in the requested documents "support[ed] an award of attorney's fees," despite his motivation to seek disclosure in order to "facilitate the fair adjudication of his political asylum claim").

[79] See, e.g., 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).

tive.[80] The converse, however, also may be true -- namely, that "[r]ecalcitrant and obdurate behavior 'can make the last factor dispositive without consideration of any of the other factors.'"[81]

Of course, if an agency had even so much as a "colorable basis in law" for withholding information, then this factor should be weighed with other relevant considerations to determine entitlement.[82] In general, an agency's

---

[80] See 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."); 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."); Polynesian Cultural Ctr., 600 F.2d at 1330 (denying fees, despite court-ordered disclosure, because "[t]he Board's claim of exemption was not only reasonable, but correct," based upon subsequent Supreme Court decision); Horsehead Indus., 999 F. Supp. at 64 (ruling that "fees will not be awarded" when agency's withholding "is correct as a matter of law"); see also Wheeler v. IRS, 37 F. Supp. 2d 407, 413 (W.D. Pa. 1998) (finding that reasons for government's refusal to disclose records "may even be dispositive"). But see 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"); 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))); cf. Nw. Coal. for Alternatives to Pesticides v. EPA, 421 F. Supp. 2d 123, 128-29 (D.D.C. 2006) (finding plaintiff entitled to a fee award, even though the court never ruled that the agency's withholdings were improper, on the basis that a previous remand order obligated the EPA to articulate its reasons for withholding and "[a]t that juncture . . . the EPA had not demonstrated a reasonable basis for withholding").

[81] Read, 252 F. Supp. 2d at 1112 (quoting Horsehead Indus., 999 F. Supp. at 68); see also Allen v. INS, No. 80-2246 (D.D.C. July 20, 1981) (awarding attorney fees based upon single factor of "reasonableness").

[82] Tax Analysts, 965 F.2d at 1097 (quoting Cuneo, 553 F.2d at 1365-66)); Educ./Instruccion, Inc. v. HUD, 649 F.2d 4, 8 (1st Cir. 1981) (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, 484-86 (D.C. Cir. 1980); Fenster, 617 F.2d at 744; Hull v. U.S. Dep't of Labor, No. 04-CV-1264, 2006 U.S. Dist. LEXIS 35054, at *11 (D. Colo. May 30, 2006) (finding agency's withholding determination, based on "colorable legal argument," to be reasonable, but concluding that other factors weighed in favor of fee award); Ellis, 941 F. Supp. at 1080 (government need show only "reasonable or colorable basis for the withholding" and that it has not engaged in recalcitrant or obdurate behavior); Solone, 830 F. Supp. at 1143

(continued...)

legal basis for withholding is "reasonable" if pertinent authority exists to support the claimed exemption.[83] Even in the absence of supporting authority, withholding may also be "reasonable" where no precedent directly contradicts the agency's position.[84]

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,"[85] even though the district court's decision in favor of the agency's withholding was reversed unanimously by the court of appeals, which decision, in turn, was affirmed by a near-unanimous decision of the Supreme Court.[86] 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.[87] When the delay in releasing records, rather than the agency's substantive claim of exemption, is challenged, that delay does not favor a fee award so long as the agency has not

---

[82](...continued)
(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).

[83] See Adams v. United States, 673 F. Supp. 1249, 1259-60 (S.D.N.Y. 1987); see also Am. Commercial Barge Lines v. NLRB, 758 F.2d 1109, 1112-14 (6th Cir. 1985); Republic of New Afrika, 645 F. Supp. at 122. 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) (withholding held unreasonable where agency relied on one case that was "clearly distinguishable" and where "strong contrary authority [was] cited by the [plaintiff]"); Nw. Coal. for Alternatives to Pesticides v. Browner, 965 F. Supp. 59, 64 (D.D.C. 1997) (finding that an EPA decision "to rely solely on manufacturers' claims of confidentiality, rather than conduct more extensive questioning of the manufacturers' claims or make its own inquiry . . . was essentially a decision not to commit resources to questioning claims of confidentiality but instead to confront issues as they arise in litigation -- and to pay attorneys' fees if EPA loses").

[84] 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.").

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

[86] Tax Analysts v. Dep't of Justice, 492 U.S. 136 (1989).

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

engaged in "obdurate behavior or bad faith."[88] But an agency's decision to withhold entire documents when it could have redacted them relatively easily has been found "unreasonable" for purposes of the entitlement analysis.[89] (For further discussions of an agency's obligation to segregate and

---

[88] Ellis, 941 F. Supp. at 1080 (noting that agency was "in frequent contact with plaintiffs' counsel" and that "[d]ue to the scope of plaintiffs' request, some delay was inherent"); see Hull, 2006 U.S. Dist. LEXIS 35054, at *12 (viewing agency delays as "more suggestive of ineptitude than bad faith"); Read, 252 F. Supp. 2d at 1112 ("[D]elay due to bureaucratic ineptitude alone is not sufficient to weigh in favor of an award of attorney's fees."); Horsehead Indus. 999 F. Supp. at 66 (finding that narrow reading of request is not "bad faith"); Republic of New Afrika v. FBI, 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, No. 97-30184 (5th Cir. Sept. 12, 1997); Frye, No. 90-3041, 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). But see Jarno, 365 F. Supp. 2d at 740 (determining that the fourth factor favored a fee award, because the agency "failed to comply with the requirements of [the] FOIA by not responding to Plaintiff's request for information within the statutory time frame"); Miller v. U.S. Dep't of State, 779 F.2d 1378, 1390 (8th Cir. 1985) ("While these reasons [for delay] are plausible, and we do not find them to be evidence of bad faith . . . they are practical explanations, not reasonable legal bases."); Claudio v. Soc. Sec. Admin., No. H-98-1911, 2000 WL 33379041, at *11 (S.D. Tex. May 24, 2000) (despite finding all four factors unmet, nevertheless awarding fees because of "the Government's action in not delivering the majority of the documents until after suit was filed and in failing to provide a Vaughn Index until after ordered to do so by the Court"); United Merchants & Mfrs. v. Meese, No. 87-3367, slip op. at 3 (D.D.C. Aug. 10, 1988) (declaring it unnecessary for plaintiff to show "that defendant was obdurate in order to prevail" where there was "no reasonable basis for defendant to have failed to process plaintiff's [FOIA request] for nearly a year").

[89] See 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 the Bu-

(continued...)

release nonexempt information, see Procedural Requirements, "Reasonably Segregable" Obligation, above, and Litigation Considerations, "Reasonably Segregable" Requirements, above.)

Typically, FOIA plaintiffs seek attorney fees only at the conclusion of a case. Even when the underlying action has been decided, a petition for attorney fees "survive[s] independently under the court's equitable jurisdiction."[90] The fact that an attorney fees petition is pending, moreover, does not preclude appellate review of the district court's decision on the merits.[91]

Some FOIA plaintiffs, however, have sought "interim" attorney fees before the conclusion of a case -- although such relief has been termed "inefficient"[92] and "piecemeal."[93] It is almost always clearer at the end of a FOIA case whether a plaintiff has "substantially prevailed," but sometimes a plaintiff can point to a threshold determination concerning eligibility to receive records that sufficiently supports eligibility to an interim award.[94] Of course, a plaintiff still must prove entitlement to an interim award.[95] If

---

[89](...continued)
reau of Prisons 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").

[90] 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.").

[91] 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))).

[92] 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").

[93] 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).

[94] See 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").

[95] See Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice, No.
(continued...)

interim fees are approved, payment of the fees need not await final judgment in the action.[96] If an agency wishes to appeal an interim award, however, it must wait for a final court decision on the underlying merits of the case.[97]

Attorney Fees and Litigation Costs: Calculations

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. Fee claims should be supported by well-documented, contemporaneous billing records;[98] while

---

[95](...continued)
97-372, slip op. at 2 (D.D.C. June 26, 1998) (awarding interim fees based on court's conclusion that, inter alia, even brief litigation had "imposed concrete hardship on Plaintiff's counsel"), interlocutory appeal dismissed for lack of juris., 182 F.3d 981 (D.C. Cir. 1999); Allen v. FBI, 716 F. Supp. at 671 (suggesting that interim fee awards should be made only in unusual case of protracted litigation and financial hardship); Powell v. U.S. Dep't of Justice, 569 F. Supp. 1192, 1200 (N.D. Cal. 1983) (listing four factors to be considered in court's discretion for award of interim fees).

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

[97] See Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice, 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).

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

some courts will consider reconstructed records,[99] the amount ultimately awarded may be reduced accordingly.[100]

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."[101] Not all hours expended in litigating a case will be deemed to have been "reasonably" expended. For example, courts have directed attorneys to subtract hours spent litigating claims upon which the party seeking the fee ultimately did not prevail.[102] In such cases, a distinction has been made between a loss on a legal theory where "the issue was

---

[99] 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).

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

[101] 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).

[102] See, e.g., Hensley, 461 U.S. at 434-40; Anderson, 80 F.3d at 1506; Copeland, 641 F.2d at 891-92; Nw. Coal. for Alternatives to Pesticides v. EPA, 421 F. Supp. 2d 123, 129-30 (D.D.C. 2006) (holding that the "plaintiff should not be compensated for its unnecessary and unsuccessful 'Motion for Entry of Judgment'"); Ajluni, 947 F. Supp. at 611 (limiting fees to those incurred up to point at which "the last of the additional documents were released"); McDonnell v. United States, 870 F. Supp. 576, 589 (D.N.J. 1994). But see Lissner v. U.S. Customs Serv., 56 F. App'x 330, 331 (9th Cir. 2003) (permitting award for preparation of initial attorney fees motion, even though it was unsuccessful, because it was "necessary step to . . . ultimate victory"); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/5/04) (describing Supreme Court's truly ultimate repudiation of bases for Ninth Circuit's ruling); cf. Judicial Watch, 384 F. Supp. 2d at 171 (awarding attorney fees for the discovery phase of litigation, even though it "was not productive in the sense of getting tangible results," because it gave "effect to" the court's prior order granting the plaintiff an opportunity "to reconstruct or discover documents" that the agency "destroyed or removed" during its initial search).

all part and parcel of one [ultimately successful] matter,"[103] and a rejected claim that is "truly fractionable" from the successful claim.[104] 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.[105]

---

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

[104] See, e.g., Weisberg v. Webster, No. 78-322, slip op. at 3 (D.D.C. June 13, 1985); Newport Aeronautical Sales v. Dep't of the Navy, No. 84-0120, slip op. at 10-11 (D.D.C. Apr. 17, 1985); see also Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1499 (D.C. Cir. 1984) (declining to award fees for issues on which plaintiff did "not ultimately prevail" and for "non-productive time"); Piper v. U.S. Dep't of Justice, 339 F. Supp. 2d 13, 24 (D.D.C. 2004) (refusing to grant fees for time spent on claims that ultimately were unsuccessful); Steenland v. CIA, 555 F. Supp. 907, 911 (W.D.N.Y. 1983) (declaring that award for work performed after release of records, where all claims of exemptions subsequently upheld, "would assess a penalty against defendants which is clearly unwarranted"); Agee v. CIA, No. 79-2788, slip op. at 1 (D.D.C. Nov. 3, 1982) ("[P]laintiff is not entitled to fees covering work where he did not substantially prevail."); Dubin v. Dep't of Treasury, 555 F. Supp. 408, 413 (N.D. Ga. 1981) (holding that fees awarded "should not include fees for plaintiffs' counsel for their efforts after the release of documents by the Government . . . since they failed to prevail on their claims at trial"), aff'd, 697 F.2d 1093 (11th Cir. 1983) (unpublished table decision); cf. Anderson, 80 F.3d at 1504 (affirming district court's denial of fees for portion of lawsuit during which plaintiff's primary motivation was her personal interest, while allowing fees for remainder of suit when public interest was paramount motivation). But see 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.'").

[105] See, e.g., Hull v. U.S. Dep't of Labor, No. 04-CV-1264, 2006 U.S. Dist. LEXIS 35054, at *20 (D. Colo. May 30, 2006) (reducing number of hours for which plaintiff may recover fees by sixty percent, because she was only "about forty percent successful"); Kempker-Cloyd v. U.S. Dep't of Justice, 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, (continued...)

Additionally, prevailing plaintiffs' counsel are obligated to exercise sound billing judgment. This means that "[c]ounsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary."[106] Furthermore, the D.C. 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."[107] Although "contests over fees should not be permitted to evolve into exhaustive trial-type proceedings,"[108] when attorney fees are awarded, the hours expended by counsel for the plaintiff pursuing the fee award also are ordinarily compensable.[109]

---

[105](...continued)
870 F. Supp. at 589 (reducing plaintiff's requested award by sixty percent because "the amount of relief denied was greater than that awarded").

[106] Hensley, 461 U.S. at 434, quoted in Assembly of Cal. v. U.S. Dep't of Commerce, No. Civ-S-91-990, 1993 WL 188328, at *11 (E.D. Cal. May 28, 1993); see AutoAlliance 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"); 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. Fed. Bureau of Prisons, 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"), reconsideration denied (E.D. Ky. Oct. 6, 2005); Smith v. Ashcroft, No. 02-CV-0043, 2005 WL 1309149, at *4 (W.D. Mich. May 25, 2005) (reducing fees by twenty-five percent because the amount sought included compensation for "work not reasonably necessary to prosecute the case," such as "attorney time spent responding to media inquiries"); City of Detroit, No. 93-CV-72310, slip op. at 3-4 (E.D. Mich. Mar. 24, 1995) (reducing requested fees by sixty percent because city employed eight attorneys when two would have sufficed, utilized two principal litigators when one would have sufficed, and generated nearly half of all fees sought in connection with its fees petition).

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

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

[109] See Lissner, 56 F. App'x at 331; Copeland, 641 F.2d at 896; see also AutoAlliance Int'l, 155 F. App'x at 228 (affirming district court's limitation of "fees on fees" to three percent of hours in main case, absent unusual circumstances); Or. Natural Desert Ass'n v. Gutierrez, No. 05-210, 2006 WL 2318610, at *6 (D. Or. Aug. 24, 2006) (reducing "fees on fees" by fifteen percent "to match the reduction for [plaintiff's] partial success") (appeal pend-
(continued...)

To determine a reasonable hourly rate -- which has been defined "as that prevailing in the community for similar work"[110] -- courts will accept affidavits from local attorneys to support hourly rate claims, but they should be couched in terms of specific market rates for particular types of litigation and they must be well supported.[111] The pertinent legal market, for purposes of calculating legal fees, is the jurisdiction in which the district court sits.[112] Within the D.C. Circuit, the standard rate most often employed is an updated version of the "Laffey Matrix," based on the eponymous court case of that name.[113]

The lodestar calculation is strongly presumed to yield the reasonable fee. Indeed, the Supreme Court has clarified that such enhancements are not available under statutes authorizing an award of attorney fees to a

---

[109](...continued)
ing); 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. v. Dep't of Commerce, No. S91-990, 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).

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

[111] See id.; 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 the area market rate for calculation of fees because plaintiff's attorneys in fact contracted to work for their client at a substantially lower rate).

[112] See, e.g., AutoAlliance 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").

[113] 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).

"prevailing or substantially prevailing party," such as the FOIA.[114] 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.[115] Also, if a case has been in 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."[116]

Lastly, in ruling on a petition for attorney fees and costs, a court should provide a concise but clear explanation of its reasons for any award encompassing eligibility, entitlement, and the rationale for its calculations.[117] Upon appeal, such rulings are reviewed for abuse of discretion.[118]

"REVERSE" FOIA

The Court of Appeals for the District of Columbia Circuit has defined a "reverse" FOIA action as one in which the "submitter of information -- usually a corporation or other business entity" that has supplied an agency with "data on its policies, operations or products -- seeks to prevent the agency that collected the information from revealing it to a third party in

---

[114] City of Burlington v. Dague, 505 U.S. 557, 562 (1992) (prohibiting contingency enhancement in environmental fee-shifting statutes and noting that case law "construing what is a 'reasonable' fee applies uniformly to all [federal fee-shifting statutes]"); see Ray v. U.S. Dep't of Justice, 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 the lodestar calculation).

[115] See Library of Cong. v. Shaw, 478 U.S. 310, 314 (1986) ("In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award."); Weisberg v. U.S. Dep't of Justice, 848 F.2d 1265, 1272 (D.C. Cir. 1988).

[116] 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)).

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

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