# 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: First, the court must determine whether the plaintiff is eligible for an award of fees and/or costs and then it must determine whether the plaintiff is entitled to the award.[2] However, the award of fees and costs is ultimately within the discretion of the court.[3]

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[1] See 5 U.S.C. § 552(a)(4)(E)(i) (2018).

[2] See, e.g., Gahagan v. USCIS, 671 F. App'x 321 (5th Cir. 2016) (upholding two-step approach as correct inquiry in determining award of attorney fees); Brayton v. Off. of U.S. Trade Representative, 641 F.3d 521, 524 (D.C. Cir. 2011) (discussing that the FOIA "naturally divides the attorney-fee inquiry into two prongs, which our case law has long described as fee "eligibility" and fee "entitlement").

[3] See, e.g., 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with the district court."); Young v. Dir., CIA, No. 92-2561, 1993 WL 305970, at *2 (4th Cir. Aug. 10, 1993) (unpublished table decision) (noting that court has discretion to deny fees even if eligibility threshold is met); Tax Analysts v. DOJ, 965 F.2d 1092, 1094 (D.C. Cir. 1992) ("sifting of those [fee] criteria over the facts of a case is a matter of district court discretion"), superseded by statute, OPEN Gov't Act of 2007, 5 U.S.C. § 552 (a)(4)(E)(ii), as recognized in, Summers v. DOJ, 569 F.3d 500 (D.C. Cir. 2009); Hersh & Hersh v. HHS, No.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 permits attorney fees only for time spent litigating FOIA matters as opposed to matters brought pursuant to another federal statute.[4] Moreover, the Court of Appeals for the District of Columbia Circuit has endorsed the principle 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)."[5] Further, fees and other costs are generally not awarded for services rendered at the administrative level,[6] although courts have at times permitted it.[7]

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[4] See 5 U.S.C. § 552(a)(4)(E)(i) (2018) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section . . . ."); cf. Nichols v. Pierce, 740 F.2d 1249, 1252-54 (D.C. Cir. 1984) (non-FOIA case) (refusing to award fees for plaintiff's success under Administrative Procedure Act, resulting in order to agency to issue regulations, despite plaintiff's claim of victory under FOIA subsection (a)(1)), because complaint failed to assert claim under or rely specifically on FOIA).

[5] Jud. Watch, Inc. v. U.S. Dep't of Com., 470 F.3d 363, 373 (D.C. Cir. 2006) (holding that agency "should only have been liable for fees related to third parties insofar as they 'were incurred in opposing government resistance'" (citing Love v. Reilly, 924 F.2d 1492, 1496 (9th Cir. 1991))). But see Det. Watch Network v. ICE, No. 14-583, 2019 WL 442453, at *5 (S.D.N.Y. Feb. 5, 2019) (holding that when third parties pursued later phases of litigation and plaintiffs litigated on appeal out of necessity to defend their judgment, plaintiffs can recover attorney fees in FOIA cases even in phases of litigation where plaintiffs are opposed by third parties rather than federal government).

[6] See Elec. Priv. Info. Ctr. v. DHS, 811 F. Supp. 2d 216, 237 (D.D.C. 2011) ("[W]ork performed during the pre-litigation administrative phase of a FOIA request is not recoverable under FOIA."); 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 (2018)), aff'd, 612 F.2d 586 (D.C. Cir. 1980) (unpublished table decision).

[7] See Our Child.'s Earth Found. v. Nat. Marine Fisheries Serv., No. 14-01130, 2017 WL 783490, at *15 (N.D. Cal. Mar. 1, 2017) (finding work on two FOIA requests that overlapped with subject matter of litigation and that were filed close in time to pleadings compensable); Or. Nat. Desert Ass'n v. Gutierrez, 442 F. Supp. 2d 1096, 1101 (D. Or. 2006) (awarding fees for work performed at administrative level, on rationale that "exhaustion of remedies is required and provides a sufficient record for the civil action"), aff'd in part, rev'd in part on other grounds sub nom. Or. Nat. Desert Ass'n v. Locke, 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 rationale that it "was necessary to exhaust administrative remedies").

A threshold eligibility matter concerns precisely who can qualify for an award of attorney fees. The D.C. Circuit has determined that the Supreme Court's decision in Kay v. Ehrler[8] 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."[9] To be eligible for attorney fees, therefore, a FOIA plaintiff must have a representational relationship with an attorney.[10] Additionally, the D.C. Circuit has held that the FOIA's statutory authorization of attorney fees extends to legal work performed by law students.[11] 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.[12]

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[8] 499 U.S. 432 (1991) (non-FOIA case).

[9] Benavides v. BOP, 993 F.2d 257, 259 (D.C. Cir. 1993) (explaining Kay decision); accord 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."); Coven v. OPM, No. 07-01831, 2010 WL 1417314, at *2 (D. Ariz. Apr. 5, 2010) (adhering to its prior ruling that, as pro se litigant, plaintiff is 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); see also Nat'l Sec. Couns. v. CIA, 811 F.3d 22, 29 (D.C. Cir. 2016) ("attorneys who proceed pro se are . . . ineligible for FOIA fees"); Van Chase v. Bureau of Indian Affs., No. 18-2902, 2020 WL 3489469, at *3 (D.D.C. June 26, 2020) (disposing "of the demand for attorney fees because, as a pro se litigant, Plaintiff simply is not entitled to recover them"); Skurow v. DHS, 892 F. Supp. 2d 319, 334 (D.D.C. 2012) (holding pro se plaintiff not entitled to attorney fees for work performed prior to counsel entering his appearance).

[10] See Burka v. HHS, 142 F.3d 1286, 1292 (D.C. Cir. 1998) (holding that under the FOIA, "pro se attorney-litigant is not entitled to an award of attorney's fees for work performed by other attorneys on the case where the other attorneys worked in the attorney-litigant's firm under the attorney-litigant's direction"); cf. 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).

[11] Jordan v. DOJ, 691 F.2d 514, 524 (D.C. Cir. 1982) (holding "all of the rationales relied upon by the District Court or advanced by the Department to be unavailing, we discern no reason why FOIA's statutory authorization of attorneys' fee awards should not encompass student work in law school clinics"); accord Nkihtaqmikon v. Bureau of Indian Affs., 723 F. Supp. 2d 272, 282 (D. Me. 2010) (agreeing that plaintiff could recover fees for law students working under supervision of clinic attorney).

[12] See, e.g., Texas v. ICC, 935 F.2d 728, 733 (5th Cir. 1991) ("[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."); Seegull Mfg. Co. v NLRB, 741 F.2d 882, 886 (6th Cir. 1984) (noting "the Act does not

Furthermore, in Kay the Supreme Court indicated that no award of attorney fees should be made to a pro se plaintiff who also is an attorney.[13] Because the fee-shifting provision of the FOIA was intended "'to encourage potential claimants to seek legal advice before commencing litigation,'"[14] and because a pro se attorney, by definition, does not seek out the "'detached and objective perspective' necessary" to litigate the attorney's FOIA case,[15] 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.[16] As the D.C. Circuit has explained, "[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."[17]

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exclude corporations or the wealthy from obtaining fees where such would be otherwise proper"); Assembly of Cal. v. U.S. Dep't of Com., No. 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.").

[13] 499 U.S. 432, 438 (1991) ("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 Com., 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).

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

[15] Id.

[16] See, e.g., Gahagan v. USCIS, 911 F.3d 298, 305 (5th Cir. 2018) (holding that pro se attorney is not eligible for fees under FOIA because attorney has "no legal obligation to pay himself"); 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 is 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 & remanded on other grounds, 403 F. 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 rationale of Kay); Manos v. U.S. 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. 92-4841, 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 purpose of awarding fees").

[17] Burka, 142 F.3d at 1289-90; accord Falcone, 714 F.2d at 647 ("The award of attorney's fees to successful FOIA plaintiffs was intended to relieve plaintiffs with legitimate claims of the

The D.C. Circuit rejected a claim that a pro se attorney's status was merely "technical," because he represented an undisclosed client, declaring that "status as both attorney and litigant may be a 'technicality,' but it is a legally meaningful one and not to be ignored."[18] 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."[19] Of course, if an attorney actually retains outside legal counsel, those fees may be compensable.[20]

On the other hand, in Baker & Hostetler LLP v. U.S. Department of Commerce,[21] the D.C. Circuit, relying on dictum in Kay, held that a law firm representing itself is eligible for attorney fees.[22] 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*."[23] 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.[24] Similarly, the D.C. Circuit has held that a nonprofit corporation representing itself in a FOIA matter was eligible to receive an award of attorney fees despite its small size and the attorney's role in the organization.[25] The appellate court reversed a lower court's holding that the corporation was ineligible for fees because the attorney was "in effect [acting as] both the counsel *and* the party."[26] Rather, the D.C. Circuit held that a "*bona fide* corporation with a legally recognized, distinct identity from the natural person who

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burden of legal costs; it was not intended as a reward for successful claimants or as a penalty against the government.").

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

[19] Id.

[20] See, e.g., Ray v. DOJ, 856 F. Supp. 1576, 1584 (S.D. Fla. 1994), aff'd, 87 F.3d 1250 (11th Cir. 1996); Whalen, 1993 WL 532506, at *11.

[21] 473 F.3d 312 (D.C. Cir. 2006).

[22] Id. at 324.

[23] Id. at 325.

[24] Id. at 325.

[25] See Nat'l Sec. Couns. v. CIA, 811 F.3d 22, 34 (D.C. Cir. 2016).

[26] Nat'l Sec. Couns. v. CIA, 15 F. Supp. 3d 88, 93 (D.D.C. Feb. 12, 2014), rev'd, 811 F.3d 22 (D.C. Cir. 2016).

acts as its lawyer is eligible for attorney's fees under FOIA provided it substantially prevails."[27]

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.[28] Although a federal statute, 28 U.S.C. § 1920,[29] lists certain items that may be taxed as costs,[30] in some instances FOIA costs have been awarded independently of this statute.[31] "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,[32] as well as the fees paid to a special master appointed by the

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[27] Nat'l Sec. Couns., 811 F.3d at 33 (further noting that in some cases "[p]roof that a putative organization lacks a legal identity distinct from that of the natural person(s) that comprise it might suffice to render it ineligible for FOIA fees").

[28] 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. 1982); Crooker v. DOJ, 632 F.2d 916, 921-22 (1st Cir. 1980); Jordan v. DOJ, No. 07-02303, 2009 WL 2913223, at *27 (D. Colo. Sept. 8, 2009) (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. 06-170, 2007 WL 1874190, at *13 (D. Vt. June 27, 2007) (same); Wheeler v. IRS, 37 F. Supp. 2d 407, 411 (W.D. Pa. 1998).

[29] 28 U.S.C. § 1920 (2018).

[30] Id. ("A judge or clerk . . . may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees for printed or electronically recorded transcripts . . . ; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and the costs of making copies . . . ; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts . . . .").

[31] See Blazy v. Tenet, 194 F.3d 90, 95 (D.C. Cir. 1999) (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 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).

[32] See Warren v. Colvin, 744 F.3d 841, 845 (2nd Cir. 2014) (awarding pro se plaintiff filing fee costs); Kuzma, 821 F.2d at 933 (holding that costs may include photocopying, postage, covers, exhibits, typing, transportation, and parking fees, but not "cost of law books readily available in libraries"); Hernandez v. U.S. Customs & Border Prot., No. 10-4602, 2012 WL 398328, at *18 (E.D. La. Feb. 7, 2012) (awarding plaintiff deposition transcription costs and filing fees); 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 Trenerry v. IRS, No. 90-444, 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").

court to review documents on its behalf.[33] However, courts have indicated that a plaintiff cannot seek to have work done by an attorney compensated under the guise of "costs."[34]

By the same token, if it prevails, even a defendant agency may recover its costs pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, although such recoveries are uncommon.[35]

## 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.[36] 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."[37] 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."[38] 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.[39] The OPEN Government Act amended the FOIA's preexisting attorney fees provision by defining the circumstances under which a FOIA plaintiff can

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

[34] See Anderson v. HHS, 80 F.3d 1500, 1508 (9th Cir. 2002) (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").

[35] See, e.g., Baez v. DOJ, 684 F.2d 999, 1005-06 (D.C. Cir. 1982) (en banc) (assessing against unsuccessful plaintiff all costs of appeal).

[36] 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").

[37] 5 U.S.C. § 552(a)(4)(E)(ii) (2018).

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

[39] 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), superseded by statute, OPEN Govt Act of 2007, 5 U.S.C. § 552 (a)(4)(E)(ii).

be deemed to have "substantially prevailed."[40] 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."[41] Under the "catalyst theory" a plaintiff can be found eligible for attorney fees if his lawsuit served as a "catalyst" in achieving a voluntary change in the agency's conduct.[42] 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."[43]

A number of courts have found the first statutory basis for eligibility, which requires an order, an enforceable written agreement, or a consent decree, satisfied through various types of court orders,[44] including an order requiring production of

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[40] See OPEN Gov't Act § 4; cf. Batton v. IRS, 718 F.3d 522, 525-26 (5th Cir. 2013) (determining that even though complaint was filed prior to OPEN Government Act, "all relevant events took place after the effective date").

[41] Summers v. DOJ, 569 F.3d 500, 503 (D.C. Cir. 2009).

[42] Buckhannon, 532 U.S. at 601 (explaining "catalyst theory"); see also Hernandez v. U.S. Customs & Border Prot., No. 10-4602, 2012 WL 398328, at *6 (E.D. La. Feb. 7, 2012) (explaining that "Congress enacted the Open Government Act of 2007" to address how under the Buckhannon rule "the Government [could] 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."), aff'd, 846 F. Supp. 2d 96 (D.D.C. 2012).

[43] 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'" (quoting Cox v. DOJ, 601 F.2d 1, 6 (D.C. Cir. 1979))); see also Grand Canyon Tr. v. Bernhardt, 947 F.3d 94, 98 (D.C. Cir. 2020) (upholding district court's determination that catalyst theory's causation element was not satisfied when "the agencies produced all of the requested documents roughly within the schedules that they had estimated before the litigation began"); Codrea v. ATF, 272 F. Supp. 3d 49, 53 (D.D.C. 2017) (stating that "causation . . . requires more than correlation" when determining eligibility for attorney fees); Touarsi v. DOJ, 78 F. Supp. 3d 332, 350 (D.D.C. 2015) ("A plaintiff may not recover attorney's fees in a FOIA action merely because the agency released additional documents after the plaintiff filed a complaint in federal court.").

[44] See Mich. Immigrant Rts. Ctr. v. DHS, No. 16-14192, 2021 WL 855468, at *4 (E.D. Mich. Mar. 8, 2021) (finding that plaintiff substantially prevailed when the "parties reach[ed] a joint stipulated order requiring the defendant's production of documents by a certain date"); Our Child.'s Earth Found. v. Nat'l Marine Fisheries Serv., No. 14-01130, 2017 WL 783490, at *6 (N.D. Cal. Mar. 1, 2017) (finding plaintiff prevailed not only because agency "took a closer look at its searches and withholdings" and produced additional documents, but also because plaintiff "more importantly" secured "declaratory judgment recognizing that the agency failed to provide timely responses" and "had engaged in a pattern and

documents by a specific date.[45] For example, in Citizens for Responsibility & Ethics in Washington v. Department of Justice,[46] the District Court for the District of Columbia 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."[47] 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

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practice of tardy responses"); Gahagan v. USCIS, No. 14-2233, 2016 WL 1110229, at *10 (E.D. La. Mar. 22, 2016) (finding plaintiff eligible for fees due to court order compelling defendant to release ten pages originally withheld as duplicates); Hernandez, 2012 WL 398328, at *7 (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").

[45] See Poulsen v. DOD, 994 F.3d 1046, 1050 (9th Cir. 2021) (finding that order requiring production of non-exempt responsive records by date certain "changed the legal relationship between the parties" thereby making Plaintiff "eligible for a fee award"); Am. Oversight v. DOJ, 375 F. Supp. 3d 50, 61 (D.D.C. 2019) (finding that plaintiff satisfied first statutory basis when court adopted existing production schedule); Citizens for Resp. & Ethics in Wash. v. DOJ, 820 F. Supp. 2d 39, 47 (D.D.C. 2011) (finding plaintiff eligible for fees because of order specifying production of documents by specific date).

[46] 820 F. Supp. 2d at 47.

[47] Id. at 44 (noting that fact that defendants, rather than plaintiff, proposed order at issue was without consequence); accord Am. Oversight, 375 F. Supp. 3d at 62-63 (noting "who proposed the schedule" was "'besides the point'" (quoting Campaign for Responsible Transplantation v. FDA, 511 F.3d 187, 197 (D.C. Cir. 2007))); see also Jud. Watch, Inc. v. DOJ, 774 F. Supp. 2d 225, 229 (D.D.C. 2011) (citing D.C. Circuit's decisions in Jud. Watch, Inc. v. FBI, 522 F.3d 364 (D.C. Cir. 2008)), 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").

a joint status or scheduling report.'"[48] Courts in other districts have ruled otherwise, finding such orders insufficient to establish eligibility.[49]

Eligibility has 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.[50] 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, the court found the plaintiff eligible for fees.[51]

Notably, some courts have held that orders that do not result in relief on the merits are not enough to establish eligibility,[52] including orders to produce a Vaughn Index.[53]

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[48] Citizens for Resp. & Ethics in Wash., 820 F. Supp. 2d at 44; accord Jud. Watch, 774 F. Supp. 2d at 229 (noting that D.C. Circuit has "repeatedly rejected" arguments that such an order is "merely procedural"); cf. Wash. Post Co. v. U.S. Dep't of State, No. 20-1082, 2020 WL 7248322, at *3 (D.D.C. Dec. 9, 2020) (holding that an order only requiring agency to "issue a final response" as opposed to an order to "produce responsive records" insufficient to establish eligibility as the order "simply forwarded the litigation process'" (citing Campaign for Responsible Transplantation, 511 F.3d at 194)).

[49] See Pohl v. EPA, No. 09-1480, 2012 WL 762083, at *14 (W.D. Pa. Mar. 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").

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

[51] Id. at 1100; cf. Queen Anne's Conservation Ass'n. 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 was conceded).

[52] See WP Co. v. U.S. Dep't of State, 506 F. Supp. 3d 11, 15 (D.D.C. 2020) (holding an order "which simply required the agency to respond to Plaintiff's FOIA request" was insufficient to establish eligibility); Argus Leader Media v. USDA, No. 11-04121, 2020 WL 1557295, at *6 (D.S.D. Apr. 01, 2020) (holding that plaintiff "did not obtain its requested relief through a judicial order" when its "success on legal arguments" did not ultimately result in release of requested records); cf. Summers v. DOJ, 569 F.3d 500, 505 (D.C. Cir. 2009) (holding that orders requiring filing of "status reports do not affect a 'court-ordered change in the legal relationship between the plaintiff and the defendant'" (quoting Oil, Chem. & Atomic Workers Int'l Union v. DOE, 288 F.3d 452, 458 (D.C. Cir. 2002))).

[53] See Campaign for Responsible Transplantation, 511 F.3d at 196 (holding that "[a] Vaughn index, without more, does not constitute court-ordered relief for a plaintiff on the merits of its FOIA claim, so it does not change the legal relationship between the plaintiff and the defendant"); Baker v. DHS, No. 11-588, 2012 WL 5876241, at *4 (M.D. Pa. Nov. 20, 2012) (concluding that order requiring production of Vaughn Index not type of "court-ordered

The FOIA provides a second statutory basis for eligibility that rests on a determination that there was a voluntary or unilateral change in position by the agency, provided the claim "is not insubstantial."[54] Under this standard, courts determine whether the change in the agency's position would not have occurred but for the filing of the lawsuit.[55] As explained by the District Court for the District of Columbia, relief is not

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relief" that would create eligibility for fees). But see Mullen v. U.S. Army Crim. Investigation Command, No. 10-262, 2012 WL 2681300, at *8 (E.D. Va. July 6, 2012) (finding eligibility for attorney fees following production of Vaughn Index as result of court order, and additional disclosure of documents resulting from preparation and then review of Index).

[54] 5 U.S.C. § 552(a)(4)(E)(ii)(II) (2018).

[55] See First Amend. Coal. v. DOJ, 878 F.3d 1119, 1128 (9th Cir. 2017) (finding that "[the Ninth Circuit] should join our sister circuits in holding that, under the catalyst theory, there still must be a causal nexus between the litigation and the voluntary disclosure or change in position by the Government"); Harvey v. Sessions, No. 16-5200, 2017 WL 4220323, at *1 (D.C. Cir. July 14, 2017) (per curiam) (affirming district court's decision that no causal nexus existed between lawsuit and "'agency's surrender of the information'" (quoting Church of Scientology of Cal. v. Harris, 653 F.2d 584, 587 (D.C. Cir. 1981))); Batton v. IRS, 718 F.3d 522, 526 (5th Cir. 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); Mich. Immigrant Rts. Ctr. v. DHS, No. 16-14192, 2021 WL 855468, at *3 (E.D. Mich. Mar. 8, 2021) (holding that the "produc[tion of] a minimal number of documents before Plaintiffs filed suit does not undermine a finding that the lawsuit was the catalyst for later productions"); Elec. Priv. Info. Ctr. v. DHS, 218 F. Supp. 3d 27, 41 (D.D.C. 2016) (finding that agency's "'sudden acceleration' in processing a FOIA request may lead to the conclusion that the lawsuit substantially caused the agency's compliance with FOIA"); 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))); 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., 653 F.2d at 587)); cf. DaSilva v. USCIS, 599 F. App'x 535, 542 (5th Cir. 2014) (declining to award fees related to partial release where plaintiff filed complaint exactly twenty business days after submitting request, noting that statute did not intend to reward "'the "squeaky wheel" technique of prematurely filing suit in an effort to secure preferential treatment'" (quoting Arevalo–Franco v. INS, 772 F. Supp. 959, 961 (W.D. Tex. 1991))); Kriemelmeyer v. U.S. Dep't of State, No. 18-148, 2018 WL 5885537, at *2 (W.D. Wis. Nov. 9, 2018) (denying costs where agency was first made aware of request when lawsuit was filed); Lapp v. FBI, No. 14-160, 2016 WL 737933, at *10 (N.D. W. Va. Feb. 23, 2016) (rejecting plaintiff's claim that complaint was catalyst for obtaining responsive records because efforts to locate and respond to FOIA request were ongoing prior to filing suit).

limited to disclosure of records alone.[56] "[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."[57] 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.'"[58]

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.[59] For example, in Terris, Pravlik & Millian, LLP

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[56] 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").

[57] Id. at 47 (citing, as examples, decision in Jud. Watch, Inc. v. DHS, 857 F. Supp. 2d 129, 138 (D.D.C. 2012) (finding adequacy of agency's search to be only issue before court) and decision in People for the Ethical Treatment of Animals v. NIH, 853 F. Supp. 2d 146, 151-52 (D.D.C. 2012) (noting only Glomar response was contested)).

[58] Id. at 48 (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").

[59] See 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 Salgado-Rios v. DHS, No. 20-60, 2021 U.S. Dist. LEXIS 12071, at *4-5 (W.D. Mich. Jan. 22, 2021) (holding that "Plaintiff has failed to show that her litigation caused the agencies' production" when "she relie[d] only on the sequence of events" and prior to the litigation agency notified "Plaintiff that it was experiencing a high volume of requests and that it was working through a backlog"); Beagles v. U.S. Dep't of Lab., No. 16-506, 2019 WL 1085170, at *9 (D.N.M. Mar. 7, 2019) (determining that while Department of Labor did not respond for almost five years, plaintiff did not demonstrate that litigation caused agency to release information); Codrea v. ATF, 272 F. Supp. 3d 49, 54 (D.D.C. 2017) (determining plaintiffs not eligible for fees when agency "sufficiently described administrative issues" due to processing backlog); Valencia v. USCIS, 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); cf. Env't Integrity Project v. EPA, 316 F. Supp. 3d 320, 328 (D.D.C. 2018) (finding that staffing shortages, pending lawsuits, and impact of natural disasters on agency's ability to review records "support the conclusion that unintentional administrative burdens and unavoidable

v. Centers for Medicare & Medicaid Services,[60] 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.[61] 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."[62] Similarly, releases that are the result of, or a continuation of, the administrative process have been

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outside factors delayed EPA's response, and that [plaintiff's] lawsuit did not cause the eventual release").

[60] 794 F. Supp. 2d 29 (D.D.C. 2011).

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

[62] Id. at 38.

found not to establish eligibility.[63] However, when an agency does not sufficiently explain the reasons for its delayed release, eligibility has been found.[64]

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[63] See Contreras & Metelska, P.A. v. DOJ, No. 20-1261, 2020 WL 6867411, at *8 (D. Minn. Nov. 23, 2020) (finding that production after litigation commenced "fails to show that Plaintiff's lawsuit substantially caused Defendants to provide the document" when "[d]uring a significant portion of the six-month processing period, the global pandemic caused JMD and EOIR to experience disruptions" that were communicated to the requester); Beagles, 2019 WL 1085170 at *9 (finding that "Plaintiff makes no argument or showing that Defendant produced the requested information due to anything other than Defendant's consideration and processing of Plaintiff's FOIA appeal"); Env't Integrity Project, 316 F. Supp. 3d at 328 (finding plaintiff's lawsuit did not cause release of records when "unintentional administrative burdens and unavoidable outside factors delayed" agency's response); Hertz Shram PC v. FBI, No. 12-14234, 2015 WL 5719673, at *5 (E.D. Mich. Sept. 30, 2015) (holding that "the lag in the FBI's response time appears to be the product of administrative delay that is routinely associated with bureaucratic processes and procedures"); Jud. Watch, Inc. v. DOJ, 878 F. Supp. 2d 225, 230 (D.D.C. 2012) (explaining that "'causation requirement is missing when disclosure results not from the suit but from delayed administrative processing'" (quoting Short v. U.S. Army Corps of Eng'rs, 613 F. Supp. 2d 103, 106 (D.D.C. 2009))); Calypso Cargo Ltd. v. U.S. Coast Guard, 850 F. Supp. 2d 1, 5 (D.D.C. 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"); 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) (finding 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).

[64] See Am. Oversight v. DOJ, 375 F. Supp. 3d 50, 62 (D.D.C. 2019) (granting in part plaintiff's motion for fees because nothing in agency's declaration "suggests that the FBI planned to produce the relevant records on the same timeline as the one adopted by the Court, absent this litigation"); Elec. Priv. Info. Ctr. v. DHS, 811 F. Supp. 2d 216, 233 (D.D.C. 2011); (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).

Courts have found that releases resulting from agreements made prior to the filing of litigation do not constitute voluntary changes in agency positions,[65] nor does the mootness of a previously taken exemption.[66]

One district court has held that releases made as a result of a policy change do not constitute a voluntary change in position.[67] However, the District Court for the District of Columbia has found on multiple occasions that discretionary disclosures made during litigation create eligibility for a plaintiff seeking attorney fees and costs.[68] In Judicial Watch, Inc. v. Department of Justice,[69] the court found the plaintiff was eligible for fees based on the defendant's discretionary disclosure of records previously withheld under Exemption 5.[70] 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."[71] The same court again found a plaintiff was eligible for fees when

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[65] See Mattson v. FBI, 442 F. App'x 296, 297 (9th Cir. 2011) (upholding district court's determination that there was 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, 613 F. Supp. 2d at 107 (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).

[66] See Mullen v. U.S. Army Crim. Investigation Command, No. 10-262, 2012 WL 2681300, at *8 (E.D. Va. July 6, 2012) (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 Ests. v. U.S. Army Corps of Eng'rs, 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).

[67] 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").

[68] See Dorsen v. SEC, 15 F. Supp. 3d 112, 119-20 (D.D.C. 2014); Jud. Watch, Inc., 878 F. Supp. 2d at 233; ACLU v. DHS, 810 F. Supp. 2d 267, 273 (D.D.C. 2011).

[69] 878 F. Supp. 2d at 233.

[70] Id.

[71] Id.

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 revised FOIA guidelines.[72] The court again ruled that a plaintiff substantially prevailed when an agency released, as a matter of discretion, five pages of material previously withheld under Exemption 5 just less than a month after the lawsuit was filed.[73]

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."[74] Some courts assess whether a claim is insubstantial as an independent factor, whereas other courts look to the entitlement analysis when evaluating the substantiality of a plaintiff's claim.[75] Several courts have found that a plaintiff's claim was "insubstantial" and so rendered the plaintiff ineligible for attorney fees.[76]

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[72] 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).

[73] See Dorsen, 15 F. Supp. 3d at 120 (finding that "lawsuit . . . prompt[ed] a speedier release of responsive records . . . as amply confirmed by the timing of the releases shortly after the initiation of this lawsuit").

[74] 5 U.S.C. § 552(a)(4)(E)(ii)(II).

[75] Compare Century Found. v. Devos, No. 18-1129, 2018 WL 3084065, at *4 (S.D.N.Y. June 22, 2018) ("A claim is insubstantial where 'the government was correct as a matter of law to refuse a FOIA request.'" (quoting Brayton v. Off. of U.S. Trade Representative, 641 F.3d 521, 525 (D.C. Cir. 2011))), Baker v. DHS, No. 11-588, 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"), and 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."), with Brayton, 641 F.3d at 526 (explaining that question of whether claim was not insubstantial should be resolved by looking to entitlement factors), Jud. Watch, Inc. v. DOJ, 878 F. Supp. 2d 225, 233 (D.D.C. 2012) (considering, under entitlement prong, agency's argument that because only small portion of documents were ultimately released claim was insubstantial), and 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).

[76] See White v. DOJ, 460 F. Supp. 3d 725, 782 (S.D. Ill. 2020) (holding plaintiff's claim to be insubstantial when success was limited to showing that litigation served as a catalyst for only one of more than 200 FOIA requests); Century Found., 2018 WL 3084065, at *5 (finding claims insubstantial when plaintiff's claim was premature because it was brought before statutory period for agency to comply with request had ended and because agency's denial of expedited processing was justified); Mobley v. DHS, 908 F. Supp. 2d 42, 48 (D.D.C. 2012) (explaining that "if 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

## 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.[77] This discretion ordinarily is guided by four traditional criteria that derive from the FOIA's legislative history.[78] 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.[79] The Court of Appeals for the District of Columbia Circuit has held that "when the four factors point in different

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of the information plaintiff requested," claim was not substantial). But see People for the Ethical Treatment of Animals v. NIH, 130 F. Supp. 3d 156, 163 (D.D.C. 2015) ("While the Court agrees that the sum total of plaintiff's victory . . . was small, the test is not merely the size of the relief obtained but whether plaintiff obtained some judicial relief on the merits that resulted in a 'change in legal relationship' between the parties.").

[77] See Young v. Dir., CIA, 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."); 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. Off. of the Dir. of Nat'l Intel., 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." (citing Church of Scientology v. USPS, 700 F.2d 486, 492 (9th Cir. 1983))); 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))).

[78] 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. Jud. Watch, Inc. v. Dep't of Com., 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, 470 F.3d 363 (D.C. Cir. 2006).

[79] See e.g., Davy v. CIA, 550 F.3d 1155, 1159 (D.C. Cir. 2008) (listing the four factors); Detroit Free Press, Inc. v. DOJ, 73 F.3d 93, 98 (6th Cir. 1996) (same), rev'd & remanded on other grounds, 829 F.3d 478 (6th Cir. 2016).

directions, the [] court has very broad discretion in deciding how to balance those factors."[80]

The first factor – 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.'"[81] The D.C. Circuit has noted that 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.[82] Such a determination, which necessarily entails an evaluation of the nature of the specific information disclosed,[83] has

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[80] Morley v. CIA, 894 F.3d 389, 392 (D.C. Cir. 2018) (affirming lower court's denial of entitlement determination); Peter S. Herrick's Customs & Int'l Trade Newsl. v. U.S. Customs & Border Prot., No. 04-0377, 2006 WL 3060012, at *11 (D.D.C. Oct. 26, 2006) (holding that 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"); see also Assassination Archives & Rsch. Ctr. v. CIA, No. 19-5165, 2019 U.S. App. LEXIS 27111, at *3 (D.C. Cir. Sept. 6, 2019) (per curiam) (holding that district court "did not abuse its discretion in concluding that appellant was not entitled to fees because the fourth factor, which weighed against a fee award, outweighed the other three factors, which marginally favored appellant").

[81] Fenster v. Brown, 617 F.2d 740, 744 (D.C. Cir. 1979) (quoting Blue v. BOP, 570 F.2d 529, 534 (5th Cir. 1978)); cf. Hernandez v. U.S. Customs & Border Prot., No. 10-4602, 2012 WL 398328, at *8 (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" (citing Miller v. U.S. Dept. of State, 779 F.2d 1378, 1389 (8th Cir. 1985))).

[82] Cotton, 63 F.3d at 1120 (citing Fenster, 617 F.2d at 744); accord 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 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.'" (quoting 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"); see also Dorsen v. SEC, 15 F. Supp. 3d 112, 121 (D.D.C. 2014) ("[R]eleased documents have an insufficient public benefit when they pertain to such highly particularized interactions with an agency that non-participants would have only a limited interest in the records as a means of learning what the agency was doing.").

[83] See Cotton, 63 F.3d at 1120 (holding that the "only way to comport with this directive is to evaluate the specific documents at issue in the case at hand").

led to findings of "public benefit" in a variety of contexts.[84] Highly pertinent considerations in this "public benefit" inquiry are "the degree of dissemination and [the]

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[84] See, e.g., Yonemoto v. VA, 549 F. App'x 627, 629 (9th Cir. 2013) (holding that district court correctly found that suit "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"); Davy, 550 F.3d at 1159, 1162 n.3 (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"); Det. Watch Network v. ICE, No. 14-583, 2019 WL 442453, at *3 (S.D.N.Y. Feb. 5, 2019) (determining that records about Government's practices regarding private prison contractors and guaranteed minimums served public interest); Our Child.'s Earth Found. v. Nat. Marine Fisheries Serv., No. 14-01130, 2017 WL 783490, at *7 (N.D. Cal. Mar. 1, 2017) (determining that disclosure of history of untimely responses, significant FOIA backlog, and attempts to cure these issues benefitted public); Elec. Priv. Info. Ctr. v. DHS, 218 F. Supp. 3d 27, 44 (D.D.C. 2016) (determining that national security and privacy issues constitute public interest and have "'modest probability' of generating new information" (quoting Morley v. CIA, 810 F.3d 841, 844 (D.C. Cir. 2016))); Elec. Priv. Info. Ctr. v. DHS, 999 F. Supp. 2d 61, 68 (D.D.C. 2013) (finding public benefit exceptional in "ongoing national debate" surrounding social media monitoring initiatives); Baker v. DHS, No. 11-588, 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) (holding that public has interest in "'knowing the extent of the FBI's involvement in furthering Reagan's political aspirations'" (quoting Rosenfeld v. DOJ, No. 07-3240, 2010 WL 3448517, at *14 (N.D. Cal. Sept. 1, 2010))); 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); 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" (quoting Fenster, 617 F.2d at 744)); 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 first openly gay organization); Hull v. U.S. Dep't of Lab., No. 04-1264, 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 release of records concerning death of inmate in BOP's custody served 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

likely public impact that might be expected from a particular disclosure."[85] When the information released is already in the public domain, courts have found that this factor does not weigh in favor of a fee award.[86]

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been served by release of records regarding DHS's "handling of plaintiff's high-profile political asylum case").

[85] Blue, 570 F.2d at 533; see, e.g., W. Energy All. v. U.S. Fish & Wildlife Serv., 608 F. App'x 615, 617 (10th Cir. 2015) (affirming district court's finding that even if records obtained through FOIA request would be of substantial public interest, no public benefit found when plaintiff used records "exclusively for the benefit of its [dues-paying] members" and provided no evidence to demonstrate public dissemination); 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"); Diocesan Migrant & Refugee Servs., Inc. v. ICE, No. 19-00236, 2021 WL 289548, at *5 (W.D. Tex. Jan. 28, 2021) (holding that public benefit factor was met because "information is both of public concern and useful to political decision making, the diffusion of documents will spread beyond legal service providers to the wider public"); Menasha Corp. v. DOJ, No. 11-682, 2012 WL 1034933, at *5 (E.D. Wis. Sept. 4, 2012) (noting that "likelihood that these particular internal DOJ communications and memoranda will be disseminated beyond the NCR litigation remains entirely 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 plan[ned] to disseminate any information to public"); United Am. Fin., Inc. v. Potter, 770 F. Supp. 2d 252, 256 (D.D.C. 2011) (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"); Elec. Frontier Found. v. Off. of the Dir. of Nat'l Intel., No. 07-05278, 2008 WL 2331959, at *3 (N.D. Cal. June 4, 2008) (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 *4 (finding planned dissemination — free of charge — through posting on association's website to be "key factor" in public benefit analysis); cf. Prison Legal News v. EOUSA, No. 08-1055, 2010 WL 3170824, at *2 (D. Colo. Aug. 10, 2010) (finding public benefit based on placement on plaintiff's website despite fact that "the population to which this information is likely to be disseminated is relatively small," because, "[w]hether the public is the public at large or a more limited group," information would inform public about BOP's "effectiveness in maintaining security and order inside of [a] prison"). Compare Piper v. DOJ, 339 F. Supp. 2d 13, 22 (D.D.C. 2004) (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).

[86] See, e.g., Tax Analysts v. DOJ, 965 F.2d 1092, 1094 (D.C. Cir. 1992) (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), superseded by statute, OPEN Government Act of 2007, 5 U.S.C. § 552 (a)(4)(E)(ii), as recognized in Summers v. DOJ, 569 F.3d 500 (D.C. Cir. 2009);

Moreover, "[m]inimal, incidental and speculative public benefit will not suffice" to satisfy the public benefit factor.[87] 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.[88] However, courts have found a public benefit when litigation

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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"). But cf. Jud. Watch, Inc. v. DOJ, 774 F. Supp. 2d 225, 230 (D.D.C. 2011) (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).

[87] Aviation Data Serv. v. FAA, 687 F.2d 1319, 1323 (10th Cir. 1982); see McKinley v. Fed. Hous. Fin. Agency, 739 F.3d 707, 711 (D.C. Cir. 2014) (finding that heavily redacted records contributed only "scant" information to the public record); Texas v. ICC, 935 F.2d 728, 733-34 (5th Cir. 1991) (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."); 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, 2012 WL 1034933, at *5 (finding only minimal public benefit in "helping to ensure and demonstrate the Superfund program is being implemented in a fair and consistent manner"); 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. Ctrs. 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, No. 09-2405, 2011 WL 3659591, at *1 (D.D.C. Mar. 17, 2011) (noting that "only real beneficiaries" of information about why IRS confiscated plaintiffs' assets are plaintiffs); Thomas v. USDA, No. 08-534, 2009 WL 3839463, at *4 (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 *3 (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).

[88] 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

"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.'"[89]

The D.C. Circuit has stated that "the public-benefit factor requires an *ex ante* assessment of the potential public value of the information requested, with little or no regard to whether any documents supplied prove to advance the public interest."[90] In other words, "if it's plausible *ex ante* that a request has a decent chance of yielding a public benefit, the public-benefit analysis ends there."[91] However, "to have potential public value, the request must have at least a modest probability of generating useful new information about a matter of public concern."[92]

The second factor — the commercial benefit to the plaintiff — requires an examination of whether the plaintiff had an adequate private commercial incentive to

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

[89] 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, 549 F. App'x at 629 (affirming district court's decision that lawsuit resulted in some public benefit by "forcing the VA to comply with [the FOIA]" (quoting Yonemoto v. VA, No. 06-00378, 2012 WL 1980818, at *4 (D. Haw. June 1, 2012 ))); Nkihtaqmikon v. Bureau of Indian Affs., 672 F. Supp. 2d 154, 173 (D. Me. 2009) (finding lawsuit "served the public interest by requiring [defendant] to assess and reassess its responses to [plaintiff's] FOIA requests . . . and to defend a confused and inefficient internal FOIA response process").

[90] Morley v. CIA, 810 F.3d 841, 844 (D.C. Cir. 2016).

[91] Id.

[92] Id.; see also 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 v. Heyman, 63 F.3d 1115, 1120 (D.C. Cir. 1995))); ACLU of Ariz. v. DHS, No. 17-01083, 2020 WL 1494328, at *4 (D. Ariz. Mar. 27, 2020) (finding modest probability of generating useful new information when information "could provide further information regarding the implementation and practical impact of the Executive Orders" even if "not widely disseminated"); Bangor Hydro-Elec. Co. v. U.S. Dep't of the Interior, 903 F. Supp. 169, 170 (D. Me. 1995) (rejecting argument that public benefitted by precedent that would "allow other utilities to easily acquire similar documents for the benefit of those utilities ratepayers"); cf. Cotton, 63 F.3d at 1120 (holding that notion of "public benefit" should not be grounded solely on "the potential release of present and future information" resulting from legal precedent set by case in which fees are sought because "[s]uch an inherently speculative observation is . . . inconsistent with the structure of FOIA itself").

litigate its FOIA demand even in the absence of an award of attorney fees.[93] If so, then fees are typically denied,[94] although in some cases courts have not found such an interest disqualifying.[95]

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[93] LaSalle Extension Univ., Inc. v. FTC, 627 F.2d 481, 484 (D.C. Cir. 1980) (holding that, as to the second factor, "parties such as [plaintiff] who have a sufficient private interest in the requested information do not need the additional incentive of recovering their fees and costs to induce them to pursue their request in the courts"); All. for Responsible CFC Pol'y v. Costle, 631 F. Supp. 1469, 1471 (D.D.C. 1986) (holding that, under the second factor "[t]he proper question, however, is not whether the disclosures resulted in commercial benefit, but whether the 'potential for private commercial benefit was sufficient incentive to encourage [plaintiff] to pursue his FOIA claim'" (quoting Cuneo v. Rumsfeld, 553 F.2d 1360, 1368 (D.C. Cir. 1977))); cf. Davy v. CIA, 550 F.3d 1155, 1158 (D.C. Cir. 2008) (discussing limited purpose of FOIA's attorney fees provision and distinguishing between those "who seek to advance his private commercial interests" and those who seek "to further a project benefitting the general public").

[94] See, e.g., Klamath Water Users Protective Ass'n v. U.S. Dep't of the Interior, 18 F. App'x 473, 475 (9th Cir. 2001) (finding that plaintiff association sought documents to advance and protect interests of its members, and recognizing fact that members might be "nonprofit" does not make their interests less commercial for FOIA purposes); Fenster v. Brown, 617 F.2d 740, 743-45 (D.C. Cir. 1979) (affirming denial of fees to law firm that obtained disclosure of government auditor's manual used in reviewing contracts of type entered into by firm's clients); Chamberlain v. Kurtz, 589 F.2d 827, 842-43 (5th Cir. 1979) (concluding that plaintiff who faced $1.8 million deficiency claim for back taxes and penalties "needed no additional incentive" to bring FOIA suit against IRS for documents relevant to his defense); Dorsen v. SEC, 15 F. Supp. 3d 112, 123 (D.D.C. 2014) (finding plaintiff had commercial interest in disclosure when purpose of securing records was to "'obtain relief from a $63 million judgment against him'"); Menasha Corp. v. DOJ, No. 11-682, 2012 WL 1034933, at *6 (E.D. Wis. Sept. 4, 2012) (finding plaintiff had "pecuniary (if not strictly commercial)," interest and "more than sufficient incentive to pursue disclosure" without fee award); Mullen v. U.S. Army Crim. Investigation Command, No. 10-262, 2012 WL 2681300, at *10 (E.D. Va. July 6, 2012) (concluding there was evidence of "commercial interest in documents related to investigations about [company's] use of government funds"); Viacom Int'l v. EPA, No. 95-2243, 1996 WL 515505, at *2 (E.D. Pa. Aug. 29, 1996) (dismissing corporation's contention that its "'knowing the extent of its potential liability will not promote any commercial interests'"); 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").

[95] See W. Energy All. v. U.S. Fish & Wildlife Serv., 608 F. App'x 615, 619 (10th Cir. 2015) (noting that "private benefit to the plaintiff in obtaining disclosure under FOIA does not preclude a fee award 'if the record discloses an adequate public benefit'" (quoting Aviation Data Serv. V. FAA, 687 F.2d 1319, 1388 (10th Cir. 1982))); 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."); Aronson v. HUD, 866 F.2d 1, 3 (1st Cir. 1989) (finding that "potential for commercial personal gain did not negate the public interest served" by private tracer's lawsuit because "failure of HUD to

The third factor — the nature of the plaintiff's interest in the records — often is evaluated in tandem with the second factor[96] and militates against awarding fees in cases where the plaintiff had an adequate personal incentive to seek judicial relief.[97] For the second and third factors to weigh against a plaintiff, the D.C. Circuit has held that "a

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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. 02-306, 2006 WL 1036786, at *3 (D. Alaska Apr. 19, 2006) (awarding portion of requested fees, even though plaintiff's FOIA request "clearly implicate[d] her own pecuniary interests" in obtaining documents concerning her gender discrimination claim); cf. Elec. Priv. Info. Ctr. v. DHS, 218 F. Supp. 3d 27, 45 (D.D.C. 2016) (finding that "a link for donations does not transform a nonprofits' interests from public interest to commercial or self-interest").

[96] See, e.g., Nat'l Sec. Archive v. DOD, 530 F. Supp. 2d 198, 201 (D.D.C. 2008) ("The second and third factors, commercial benefit and the plaintiff's interest in the records, are closely related and often considered together." (citing Tax Analysts v. DOJ, 965 F.2d 1092, 1095 (D.C. Cir. 1992))).

[97] See, e.g., Polynesian Cultural Ctr. v. NLRB, 600 F.2d 1327, 1330 (9th Cir. 1979) (per curiam) (ruling that attorney fees award should not "'merely subsidize a matter of private concern' at taxpayer expense" (quoting Blue v. BOP, 570 F.2d 529, 533-34 (5th Cir. 1978))); Urb. Air Initiative, Inc. v. EPA, 442 F. Supp. 3d 301, 318 (D.D.C. 2020) (holding that third factor "weigh[ed] in some small measure against plaintiffs" when "plaintiffs made it clear that they requested the documents to aid their judicial challenge"); United Am. Fin., Inc. v. Potter, 770 F. Supp. 2d 252, 257 (D.D.C. 2011) (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 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. United States, 715 F. Supp. 2d 44, 48 (D.D.C. 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" (quoting agency declaration)); 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); 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 v. DOJ, 852 F. Supp. 1497, 1504 (D. Kan. 1994) ("Although plaintiff's interest in the information in this case is not pecuniary, it is strictly personal.").

motive need not be strictly commercial; any private interest will do."[98] 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,[99] although some courts have ruled otherwise, particularly when FOIA is the only avenue available to obtain the information.[100] The Court of Appeals for the Tenth Circuit has found that when a FOIA plaintiff's motives change over the course of the litigation, the fee award should be divided

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[98] 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))); accord Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at *15 (D. Minn. Aug. 23, 2007) (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. Co. v. U.S. Dep't of Interior, 903 F. Supp. 169, 171 (D. Me. 1995) (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)); see also 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").

[99] See, e.g., Dorsen, 15 F. Supp. 3d at 123 (finding personal interest in disclosure where plaintiff sought access to documents not produced in discovery in hopes of vacating civil judgment); Valencia v. USCIS, 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 Guar. Corp., No. 10-1167, 2012 WL 253407, at *8 (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"); Muffoletto v. Sessions, 760 F. Supp. 268, 275 (E.D.N.Y. 1991) (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").

[100] Gahagan v. USCIS, No. 14-2233, 2016 WL 1110229, at *13 (E.D. La. Mar. 22, 2016) (finding that plaintiff had no other option but to obtain records using FOIA as there is no right to discovery in deportation proceedings); McCoy v. BOP, No. 03-383, 2005 WL 1972600, at *2 (E.D. Ky. Aug. 16, 2005) (finding fee entitlement, even though plaintiff's FOIA request "served her personal interest in obtaining . . . evidence" for use in related tort litigation); Jarno v. DHS, 365 F. Supp. 2d 733, 740 (E.D. Va. 2005) (concluding that plaintiff's interest in 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").

on the basis of such shifting interests.[101] 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,[102] particularly in cases involving scholarly and journalistic endeavors.[103]

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

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[101] 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).

[102] See, e.g., Yonemoto v. VA, 549 F. App'x 627, 629 (9th Cir. 2013) (finding public benefit outweighs plaintiff's personal and commercial interests); Crooker v. U.S. Parole Comm'n, 776 F.2d 366, 368 (1st Cir. 1985) (finding third factor to favor plaintiff where "interest was neither commercial nor frivolous, [but] to ensure that the Parole Commission relied on accurate information in making decisions affecting his liberty"); Hernandez v. U.S. Customs & Border Prot., No. 10-4602, 2012 WL 398328, at *11 (E.D. La. Feb. 7, 2012) (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 v. DOJ, No. 09-12067, 2012 WL 113367, at *2 (D. Mass. Jan. 12, 2012) (finding prisoner not precluded from award of fees despite "intense personal interest in using the records sought to protest his innocence"); Williams v. FBI, 17 F. Supp. 2d 6, 9 (D.D.C. 1997) (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).

[103] See, e.g., Kwoka v. IRS, 989 F.3d 1058, 1064–65 (D.C. Cir. 2021) (holding that "[t]hese two factors should therefore generally aid scholars and journalists even if, in some cases, they do not weigh strongly in a plaintiff's favor and therefore ultimately 'do little to advance [their] position' when weighing all four factors'" (quoting McKinley v. Fed. Hous. Fina. Agency, 739 F.3d 707, 712 (D.C. Cir. 2014))); Davy v. CIA, 550 F.3d 1155, 1161 (D.C. Cir. 2008) (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"); Rosenfeld v. DOJ, 904 F. Supp. 2d 988, 999 (N.D. Cal. 2012) (concluding that both commercial benefit and public interest factors weigh in plaintiff's favor "[g]iven the unique treatment afforded journalists and scholars"); Rosenfeld v. DOJ, 903 F. Supp. 2d 859, 869 (N.D. Cal. 2012) (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, 550 F.3d at 1160)); Piper v. DOJ, 339 F. Supp. 2d 13, 21-22 (D.D.C. 2004) (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).

information at issue was exempt.[104] If an agency's position is correct as a matter of law, this factor is often dispositive.[105] 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.[106]

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[104] See, e.g., Schoenberg v. FBI, 2 F.4th 1270, 1277 (9th Cir. 2021) (holding that "[c]orrect or not, the FBI's reliance on the SDNY sealing order was reasonable"); McKinley, 739 F.3d at 713 (noting that it was "not unreasonable" to assert work-product privilege even though exemption could not provide "blanket protection"); Brayton v. Off. Of U.S. Trade Representative, 641 F.3d 521, 528 (D.C. Cir. 2011) (noting that "the fact that [defendant's] initial nondisclosure decision rested on a solid legal basis creates a safe harbor against the assessment of attorney fees"); Elec. Priv. Info. Ctr. v. DHS, 218 F. Supp. 3d 27, 45-46 (D.D.C. 2016) ("The question is not whether [the Plaintiff] has affirmatively shown that the agency was unreasonable, but rather whether the agency has shown that it had any colorable or reasonable basis for not disclosing the material until after [the Plaintiff] filed suit.'" (quoting Davy, 550 F.3d at 1162)).

[105] See Hall & Assocs. v. EPA, No. 16-5315, 2018 WL 1896493, at *2 (D.C. Cir. Apr. 9, 2018) (finding that "'[i]f the Government's position [in refusing a FOIA request] is correct as a matter of law, that will be dispositive'" (quoting Davy, 550 F.3d at 1162)); Morley v. CIA, 894 F.3d 389, 396 (D.C. Cir. 2018) (affirming denial of attorney fees even though factors one through three slightly favored plaintiff, factor four "heavily favored" agency); Brayton, 641 F.3d at 526 (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 v. Heyman, 63 F.3d 1115, 1117 (D.C. Cir. 1995) ("[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."). But see N.Y. Times Co. v. CIA, 251 F. Supp. 3d 710, 714 (S.D.N.Y. 2017) (finding fourth factor not dispositive and noting that "[w]hile this arguably is the position of the D.C. Circuit, there is no Second Circuit decision adopting it").

[106] See Yonemoto, 549 F. App'x at 629 (affirming district court's grant of attorney fees where withholding of emails was "*not entirely reasonable*" because court requires "'the agency's decision . . . be based upon legal authority that reasonably supports its position that the documents should be withheld'" (quoting United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus., Loc. 598 v. Dep't of the Army, 841 F.2d 1459, 1463 (9th Cir. 1988))); Gahagan v. USCIS, No. 14-2233, 2016 WL 1110229, at *13 (E.D. La. Mar. 22, 2016) (determining "the agency's failure to disclose was unreasonable" because "there was no language in FOIA capable of supporting an exemption on the basis that a document is a 'duplicate' of another, and even if such language existed, Defendant did not furnish the Court with any information that would permit it to determine de novo whether the documents were actually duplicates"); 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, 2012 WL 113367, at *2 ("[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'" (quoting Davy, 550 F.3d at 1163));

Even when an agency's withholding is not correct as a matter of law, withholdings have been found reasonable if there is a "colorable" basis in law.[107] Courts have found agencies' positions to be colorable or reasonable in a variety of circumstances.[108] One

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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); Nkihtaqmikon v. Bureau of Indian Affs., 723 F. Supp. 2d 272, 277 (D. Me. 2010) (finding agency's withholdings "manifestly unreasonable" "in light of the cascade of subsequent released documents" (citing Nkihtaqmikon v. Bureau of Indian Affs., 453 F. Supp. 2d 193, 196 (D. Me. 2006))); Campaign for Responsible Transplantation v. FDA, 593 F. Supp. 2d 236, 244 (D.D.C. 2009) (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 v. U.S. Customs & Border Prot., No. 06-1743, 2007 WL 160945, at *2 (N.D. Cal. Jan. 17, 2007) (holding that agency's position was not substantially justified because, in many instances, agency's redactions were "inconsistent and seemingly without reasoned basis"); Long v. IRS, No. 74-724, 2006 WL 1041818, at *4-5 (W.D. Wash. Apr. 3, 2006) (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 v. BOP, No. 03-383, 2005 WL 1972600, at *2 (E.D. Ky. Aug. 16, 2005) (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").

[107] See Schoenberg, 2 F.4th at 1276 (holding that "the lodestar of this analysis is not whether the agency was correct, but whether the application of its legal basis was 'colorable'"); Nationwide Bldg. Maint., Inc. v. Sampson, 559 F.2d 704, 712 (D.C. Cir. 1977) (holding "under the fourth criterion a court would not award fees where the government's withholding had a colorable basis in law but would ordinarily award them if the withholding appeared to be merely to avoid embarrassment or to frustrate the requester").

[108] See e.g., Schoenberg, 2 F.4th at 1275 (affirming district court's decision that it was reasonable for defendant to rely on sealing order to withhold information even though reliance on sealing order was "legally insufficient"); Menasha Corp. v. DOJ, No. 11-682, 2012 WL 1034933, at *7 (E.D. Wis. Sept. 4, 2012) (finding that despite determination that defendant was not justified in withholding documents under exemption, court could not agree that defendant's position was "unreasonable"); Nat'l Sec. Archive v. DOD, 530 F. Supp. 2d 198, 205 (D.D.C. 2008) (upholding decisions that found agency's interpretation of undefined terms in a statute to be reasonable); Kaye v. Burns, 411 F. Supp. 897, 904 (S.D.N.Y. 1976) (holding agency had a reasonable basis to withhold a letter under Exemption 8 because it was a "'record 'related to'" information protected by that Exemption); cf. United Ass'n of Journeymen & Apprentices, Loc. 598, 841 F.2d at 1462-64 (finding withholding unreasonable where agency relied on one case that was "clearly distinguishable" and where "strong contrary authority [was] cited by the [plaintiff]"); Nw.

court has found, even in the absence of supporting authority, withholding to be "reasonable" where no precedent directly contradicted the agency's position.[109] Also, an agency's withholding has been found reasonable if legal authority supported the determination, at the time it was made, even if subsequent developments lead to the release of the information.[110]

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.[111]

When the delay in releasing records, rather than the agency's substantive claim of exemption, is challenged, the D.C. Circuit has held that "some delay past the 20–day mark is not necessarily so unreasonable in and of itself as to require an award of attorney's fees."[112] Courts generally require agencies to provide a meaningful justification for their delay,[113] and some courts have found claims of administrative backlog insufficient to

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Coal. for Alts. 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").

[109] See Frydman v. DOJ, 852 F. Supp. 1497, 1504 (D. Kan. 1994) ("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.").

[110] See Brayton, 641 F.3d at 528 (classified records subsequently declassified); see also Dorsen v. SEC, 15 F. Supp. 3d 112, 125 (D.D.C. 2014) (records originally withheld under attorney-client privilege subsequently released discretionarily); Weisner v. Animal & Plant Health Inspection Serv., No. 10-568, 2012 WL 2525592, at *3 (E.D.N.C. June 29, 2012) (records initially withheld pursuant to Exemption 7(A) subsequently released when that temporal Exemption ceased to apply).

[111] See Cotton v. Heyman, 63 F.3d 1115, 1119 (D.C. Cir. 1995) ("The Smithsonian did not forfeit its right to argue *the reasonableness* of its position that it is not an agency – the basis on which it withheld the non-exempt documents – even though it forfeited its right to appellate review of the *correctness* of that position.").

[112] Morley v. CIA, 894 F.3d 389, 393 (D.C. Cir. 2018).

[113] See Jud. Watch, Inc. v. DOJ, 878 F. Supp. 2d 225, 237 (D.D.C. 2012) (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'" (quoting Davy v. CIA, 550 F.3d 1155, 1163 (D.C. Cir. 2008))); Hernandez v. U.S. Customs & Border Prot., No. 10-4602, 2012 WL 398328, at *12 (E.D. La. Feb. 7, 2012) (finding delay unreasonable when defendant failed to explain reason for not responding to request until suit was filed); Jud. Watch, Inc. v. Bureau

establish reasonableness.[114] Other courts have found delay not to favor a fee award so long as the agency has not engaged in "obdurate behavior or bad faith."[115] (For further

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of Land Mgmt., 562 F. Supp. 2d 159, 174 (D.D.C. 2008) (indicating that agency is, at minimum, required to "provide meaningful justification for inactivity or refusal to turn over requested information"), rev'd, 610 F.3d 747 (D.C. Cir. 2010) (vacating attorney fees award because 2007 amendments cannot be retroactively applied); Elec. Frontier Found. v. Off. of the Dir. of Nat'l Intel., No. 07-05278, 2008 WL 2331959, at *4 (N.D. Cal. June 4, 2008) (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").

[114] 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); Rosenfeld v. DOJ, 904 F. Supp. 2d 988, 999 (N.D. Cal. 2012) (rejecting defendant's argument that '"bureaucratic difficulty, not recalcitrant behavior, delayed [its] response to Plaintiff's requests'"); Citizens for Resp. & 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 v. DHS, 810 F. Supp. 2d 267, 277 (D.D.C. 2011) (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. v. DHS, 811 F. Supp. 2d 216, 236 (D.D.C. 2011) (determining agency's "administrative delay and a generic claim of a FOIA backlog do not form a 'reasonable basis in law' for withholding"); Jud. Watch, Inc. v. DOJ, 774 F. Supp. 2d 225, 231 (D.D.C. 2011) (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"); Nkihtaqmikon v. Bureau of Indian Affs., 672 F. Supp. 2d 154, 173 (D. Me. 2009) (finding defendant's "multi-year failure to locate responsive documents not reasonable"); Jarno v. DHS, 365 F. Supp. 2d 733, 740 (E.D. Va. 2005) (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").

[115] Ellis v. United States, 941 F. Supp. 1068, 1080 (D. Utah 1996) (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., Edelman v. SEC, 356 F. Supp. 3d 97, 108 (D.D.C. 2019) (finding that fourth factor did not weigh in favor of fee award when "[t]he Court previously concluded that, although the SEC exceeded the statutory time period, there is 'no evidence that it did so in an extreme or egregious way' and that 'there is nothing about the SEC's delay [suggesting] that it conducted its searches in anything other than good faith'" (quoting Edelman v. SEC, 172 F. Supp. 3d 133, 158 (D.D.C. 2016))); United Am. Fin., Inc. v. Potter, 770 F. Supp. 2d 252, 258 (D.D.C. 2011) (finding fact that "litigation stretched on for a period of almost four years, . . . not evidence of 'obdurate behavior'" (quoting Tax Analysts v. DOJ,

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

## Timing of Attorney Fees Motions

Attorney fees are normally reserved for the conclusion of a FOIA case.[116] Even when the underlying action has been decided, a petition for attorney fees "survive[s] independently under the court's equitable jurisdiction."[117] 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.[118]

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965 F.2d 1092, 1097 (D.C. Cir. 1992))); 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 v. U.S. Dep't of Lab., No. 04-1264, 2006 U.S. Dist. LEXIS 35054, at *12 (D. Colo. May 30, 2006) (viewing agency delays as "more suggestive of ineptitude than bad faith" and thus "fall[ing] short of bad faith or obdurate behavior"); Frye v. EPA, No. 90-3041, 1992 WL 237370, at *3 (D.D.C. Aug. 31, 1992) (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); cf. Baker v. DHS, No. 11-588, 2012 WL 5876241, at *7 (M.D. Pa. Nov. 20, 2012) (finding "ample evidence that the agency was recalcitrant or obdurate" where it took two years for agency to release records); 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).

[116] See Allen v. FBI, 716 F. Supp. 667, 672 (D.D.C. 1989) (holding that "[i]nterim awards, if allowed, must be granted sparingly," pointing to four factors that should be considered: "'First, the court should consider the degree of hardship which delaying a fee award . . . would work on plaintiff and his or her counsel . . . [s]econd, the court should consider whether there is unreasonable delay on the government's part . . . [t]hird, . . . the length of time the case has been pending prior to the motion, and fourth, the period of time likely to be required before the litigation is concluded.'" (quoting Powell v. DOJ, 569 F. Supp. 1200 (N.D. Cal. 1983))); see also Clemente v. FBI, 867 F.3d 111, 121 (D.C. Cir. 2017) (finding no error in district court's decision to use "four factors, drawn from Allen v. FBI").

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

[118] 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))).

Some FOIA plaintiffs, however, have sought "interim" attorney fees before the conclusion of a case,[119] although such relief has been termed "inefficien[t]"[120] and "piecemeal."[121] 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.[122] If interim fees are approved, payment of the fees need not await final judgment in the action.[123] 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.[124]

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[119] See, e.g., Batton v. Evers, 598 F.3d 169, 184 (5th Cir. 2010) (determining that "issue of whether [plaintiff] is entitled to attorneys' 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); Potomac Navigation, Inc. v. U.S. Mar. Admin., No. 09-217, 2009 WL 5030710, at *7 n.3 (D. Md. Dec. 15, 2009) (determining motion for attorney fees "not ripe").

[120] Biberman v. FBI, 496 F. Supp. 263, 265 (S.D.N.Y. 1980) (noting "inefficiency" of interim fee award); see Allen, 716 F. Supp. at 669-71 (recognizing that although court may order payment of interim fees, it should be done only "in limited circumstances").

[121] 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); cf. Mich. Immigrant Rights Ctr. v. DHS, No. 16-14192, 2020 WL 91539, at *3 (E.D. Mich. Jan. 8, 2020) (declining motion for interim fees when "the goal line is in sight" and "[a] motion seeking a final award of attorney fees and costs may be filed shortly").

[122] 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, 13 (D.D.C. 1989) (awarding interim fees, but only "for work leading toward the threshold release of non-exempt documents").

[123] See Rosenfeld v. United States, 859 F.2d 717, 727 (9th Cir. 1988) ("Since Congress waived sovereign immunity from attorney's fees in the FOIA actions . . . no additional waiver is required for interim fees."); Wash. Post, 789 F. Supp. at 425 (noting "[c]ourts in this Circuit repeatedly have awarded interim fees in FOIA litigation before a final adjudication on the merits of an action").

[124] See Nat'l Ass'n of Crim. Def. Laws. 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) (holding that interim review of attorney fees decision is unavailable until final judgment is reached) (non-FOIA case).

## Calculations

Pursuant to Section 4 of the OPEN Government Act, FOIA attorney fees and costs are paid directly by the agency, using funds "annually appropriated for any authorized purpose."[125]

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.[126] Accordingly, courts have held that attorney fees and costs should be supported by well-documented, contemporaneous billing records.[127] While some

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[125] OPEN Government Act of 2007 § 4, Pub. L. No. 110-175, 121 Stat. 2524.

[126] See DaSilva v. USCIS, 599 F. App'x 535, 542 (5th Cir. 2014) (finding "no error in the district court's rulings" for awarding amount "in accordance with our general precedents on attorneys fees" where fees are "awarded only for hours reasonably expended"); Citizens for Resp. & Ethics in Wash. v. DOJ, 142 F. Supp. 3d 1, 16 (D.D.C. 2015) (determining "review of Vaughn indices to be reasonable 'litigation cost' that merits recovery"); cf. Havemann v. Colvin, 537 F. App'x 142, 149 (4th Cir. 2013) (finding that claims for attorney fees must be made by motion and state amount sought or provide fair estimate of it in order to comply with Federal Rule of Civil Procedure 54).

[127] See DaSilva, 599 F. App'x at 543 (reducing requested attorney fees by fifteen percent for "serious concerns" regarding counsel's timesheets and "lack of billing judgment"); 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 WL 398328, at *14 (E.D. La. Feb. 7, 2012) (finding billing records "sufficiently clear and detailed"); 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 future 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 v. U.S. Customs & Border Prot., No. 06-1743, 2007 WL 160945, at *3 (N.D. Cal. 2007) (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. Cnty. of Nev., 67 F.3d 248, 255 (9th Cir. 1995))).

courts will consider reconstructed records,[128] the amount ultimately awarded may be reduced accordingly.[129]

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."[130] Not all hours expended in litigating a case will be deemed to have been "reasonably" expended.[131] For example, courts have directed attorneys to subtract hours

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[128] See, e.g., Jud. Watch, Inc. v. Dep't of Com., 384 F. Supp. 2d 163, 173-74 (D.D.C. 2005) (awarding reduced 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, 470 F.3d 363 (D.C. Cir. 2006). But see Ajluni v. FBI, No. 94-325, 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))).

[129] 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"); Citizens for Resp. & Ethics in Wash. v. DOJ, 825 F. Supp. 2d 226, 231 (D.D.C. 2011) (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 202 (reducing award by twenty percent due to inadequate documentation). But see Jud. Watch, 384 F. Supp. 2d at 174 (declining to reduce 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"), aff'd in part, rev'd in part on other grounds, 470 F.3d 363 (D.C. Cir. 2006).

[130] See Hensley v. Eckerhart, 461 U.S. 424, 433 (1982) (non-FOIA case) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."); Copeland v. Marshall, 641 F.2d 880, 890-91 (D.C. Cir. 1980) (en banc) (non-FOIA case) ("Any fee-setting inquiry begins with the 'lodestar': the number of hours reasonably expended multiplied by a reasonable hourly rate."); Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973) (non-FOIA case) (describing the product of a reasonable hourly rate and the hours actually worked as "the lodestar of the court's fee determination").

[131] See, e.g., ACLU of Ariz. v. DHS, No. 17-01083, 2020 WL 1494328, at *6 (D. Ariz. Mar. 27, 2020) (reducing fee award because "Plaintiff has not established that the substantial time spent on counsel communications was efficient and essential"); Rosenfeld, 903 F. Supp. 2d at 874 (reducing lodestar amount to eliminate hours spent monitoring compliance of settlement agreement); Citizens for Resp. & Ethics in Wash., 825 F. Supp. 2d at 231

spent litigating claims upon which the party seeking the fee ultimately did not prevail.[132] 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,'"[133] and "'nonproductive time or for time expended on issues on which plaintiff ultimately did not

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(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'"); cf. Audubon Soc'y of Portland v. U.S. Nat. Res. Conservation Serv., No. 10-1205, 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).

[132] See, e.g., Hensley, 461 U.S. at 40 ("Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee."); Yonemoto v. VA, 549 F. App'x 627, 630 (9th Cir. 2013) (reducing "fee award to reflect [] limited success"); Anderson, 80 F.3d at 1506 (affirming district court's reduction in fee award for "time expended on a matter on which plaintiff did not prevail"); Copeland, 641 F.2d at 891-92; Elec. Priv. Info. Ctr. v. DHS, 218 F. Supp. 3d 27, 51 (D.D.C. 2016) (finding that plaintiff should not be awarded fees for work on summary judgment when arguments on summary judgment were rejected and those claims were wholly independent from those on which plaintiff succeeded); 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); Jud. Watch, Inc. v. DOJ, 878 F. Supp. 2d 225, 240 (D.D.C. 2012) (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. Colo. 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. Nat. Desert Ass'n v. Locke, No. 05-210, 2010 WL 56111, at *4 (D. Or. Jan. 5, 2010) (awarding plaintiff one-fourth fees for time spent on remand when argument not accepted by court).

[133] Copeland, 641 F.2d at 892 n.18 (quoting Lamphere v. Brown Univ., 610 F.2d 46, 47 (1st Cir. 1979)); see also Our Child.'s Earth Found. v. Nat'l Marine Fisheries Serv., No. 14-01130, 2017 WL 783490, at *13 (N.D. Cal. Mar. 1, 2017) (finding unsuccessful claims "part and parcel" of successful claims); cf. Lissner v. U.S. Customs Serv., 56 F. App'x 330, 332 (9th Cir. 2003) (permitting award for preparation of initial attorney fees motion, even though it was unsuccessful, because it was a "necessary step to . . . ultimate victory"); Jud. Watch, 384 F. Supp. 2d at 171 (awarding attorney fees for discovery phase of litigation, even though it "was not productive in the sense of getting tangible results," because it gave "effect to" court's prior order granting plaintiff an opportunity "to reconstruct or discover documents" that agency "destroyed or removed" during its initial search), aff'd in part, rev'd in part on other grounds, 470 F.3d 363 (D.C. Cir. 2006).

prevail.'"[134] 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.[135]

Fees have been reduced when the prevailing party did not exercise sound billing judgment.[136] Although "contests over fees should not be permitted to evolve into

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[134] Weisberg v. DOJ, 745 F.2d 1476, 1499 (D.C. Cir. 1984) (quoting Nat'l Ass'n of Concerned Veterans v. Sec'y of Def., 675 F.2d 1319, 1327 (D.C. Cir. 1982) (per curiam)); see, e.g., Elec. Priv. Info. Ctr. v. DHS, 811 F. Supp. 2d 216, 239 (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"); 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).

[135] McDonnell v. United States, 870 F. Supp. 576, 589 (D.N.J. 1994) (describing its approach as "[r]ather than attempting to apply a mechanical formula, this Court has exhaustively reviewed plaintiff's relative success and finds that the accepted lodestar figure should be reduced by sixty percent" because "the amount of relief denied was greater than that awarded"); see, e.g., Citizens for Resp. & Ethics in Wash. v. DOJ, 142 F. Supp. 3d 1, 14 (D.D.C 2015) (reducing fees by eighteen percent due to "deficiencies" in the fee petition that "make the exact calculation of [plaintiff's] time difficult"); Or. Natural Desert Ass'n, 2010 WL 56111, at *3 (awarding twenty-five percent of fees given plaintiff's success on only one of its four claims and noting it was "impossible" to determine amount of time spent on successful claim with time sheets provided); Hull v. U.S. Dep't of Lab., No. 04-1264, 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"); cf. Elec. Priv. Info. Ctr v. DHS, 999 F. Supp. 2d 61, 76 (D.D.C. 2013) (determining that plaintiff's "limited defeats . . . are insufficient to justify a significant reduction in [plaintiff's] fee award"); Jud. 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").

[136] See, e.g., DaSilva v. USCIS, 599 F. App'x 535, 543 (5th Cir. 2014) (finding that percentage-based reduction for lack of billing judgment can be used when counsel's timesheet failed to differentiate between FOIA claims and non-FOIA claims); Auto All. 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 "relatively unexceptional FOIA case"); Reyes v. NARA, 356 F. Supp. 3d 155, 169 (D.D.C. 2018) (finding

exhaustive trial-type proceedings,"[137] when attorney fees are awarded, courts have found that the hours expended by counsel for the plaintiff pursuing the fee award also are ordinarily compensable,[138] but can be reduced if the court finds them excessive.[139]

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that "the use of two attorneys was unreasonable given the circumstances of this case" and reducing fee award accordingly); Rosenfeld, 904 F. Supp. 2d at 1008 (reducing overall fee award by ten percent where Plaintiff failed to show sound billing judgment was exercised); ACLU v. DHS, 810 F. Supp. 2d 267, 280-81 (D.D.C. 2011) (excluding billing entries related to press communications, retention letter, and excessive time spent by junior associate in drafting complaint); Elec. Priv. Info. Ctr., 811 F. Supp. 2d at 238 (reducing award due to "several instances of duplicative or excessive billing," including billing amount for "complaints in this case consist[ing] largely of boilerplate language and uncomplicated factual history"); 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 (E.D. Ky. Aug. 16, 2005) (reducing fees by approximately thirty percent because some hours submitted were "duplicative, unnecessary to the outcome of the case, and excessive for an experienced attorney"); Smith v. Ashcroft, No. 02-0043, 2005 WL 1309149, at *4 (W.D. Mich. May 25, 2005) (reducing fees by twenty-five percent because amount sought included compensation for "work not reasonably necessary to prosecute the case," such as "attorney time spent responding to media inquiries").

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

[138] See, e.g., Lissner, 56 F. App'x at 331 (holding "district court abused its discretion by . . . failing to award attorney's fees for the preparation of [plaintiff's] initial motion for attorney's fees and costs"); Copeland v. Marshall, 641 F.2d 880, 896 (D.C. Cir. 1980) (en banc) (non-FOIA case) (noting that "time spent litigating the fee request is itself compensable"); Am. Small Bus. League, 2005 WL 2206486, at *2 (allowing portion of fees for "time spent on the fee motion").

[139] See Auto All. 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); Urb. Air Initiative, Inc. v. EPA, 442 F. Supp. 3d 301, 318 (D.D.C. 2020) (reducing fee award where "fees-on-fees represent[ed] almost 30% of the claimed total litigation costs" and finding that full "award would constitute an unsupportable windfall"); VA-Pilot Media Co., LLC v. DOJ, No. 14-577, 2016 WL 4265742, at *6 (E.D. Va. Aug. 10, 2016) (reducing "fees on fees" by sixty percent because significant reduction is appropriate where there is "'no dispute as to the attorney's entitlement to fees'" (quoting Daly v. Hill, 790 F.2d 1071, 1080 (4th Cir. 1986) (non-FOIA case))); Rosenfeld, 904 F. Supp. 2d at 1009 (reducing fees on fees award by twenty percent); Rosenfeld v. DOJ, 903 F. Supp. 2d 859, 879 (N.D. Cal. 2012) (finding request for "'fees-on-fees'" award "'grossly inflated'" (quoting Farris v. Cox, 508 F. Supp. 222, 227 (N.D. Cal. 1981))); Jud. Watch, Inc. v. DOJ, 878 F. Supp. 2d 225, 241 (D.D.C. 2012) (allowing for fees on fees award, but reducing in order for award to be commensurate with reduced fee award); Prison Legal News v. EOUSA, No. 08-1055, 2010 WL 3170824, at *4 (D. Colo. Aug. 10, 2010) (reducing award for time spent litigating fee issue as "legal issues

To determine a reasonable hourly rate — which has been defined "as that prevailing in the community for similar work"[140] — 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.[141] The pertinent legal market, for purposes of calculating legal fees, is the jurisdiction in which the district court sits.[142] Within the Court of Appeals for the District

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associated with a request for legal fees are neither novel or complicated"); Or. Nat. 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"), aff'd in part, rev'd in part on other grounds, 572 F.3d 610 (9th Cir. 2009) (concluding that plaintiff only prevailed on one claim under 2007 amendments); McCoy, 2005 WL 1972600, at *3 (allowing fees for time spent "reviewing entitlement to fees and drafting the related motion"); Assembly of Cal. v. U.S. Dep't of Com., No. 91-990, 1993 WL 188328, at *16 (E.D. Cal. May 28, 1993).

[140] Nat'l Ass'n of Concerned Veterans v. Sec'y of Def., 675 F.2d 1319, 1323 (D.C. Cir. 1982) (per curiam) (citing Copeland, 641 F.2d at 891).

[141] See id. at 1325-26 (discussing factual showings needed to support fee claims); see also Hiken v. DOD, 836 F.3d 1037, 1046 (9th Cir. 2016) ("[A] fee applicant's decision to request a higher rate does not permit a court to disregard different rates if the evidence in the record supports them."); 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 defendants"); Mich. Immigrant Rts. Ctr. v. DHS, No. 16-14192, 2021 WL 855468, at *8 (E.D. Mich. Mar. 8, 2021) (holding as reasonable hourly rates that were supported by "declarations from practicing attorneys uninvolved in the present litigation, who attested to the reasonableness of the rates"); WP Co. v. SBA, 514 F. Supp. 3d 267, 275 (D.D.C. 2021) (rejecting use of Legal Services Index (LSI) Matrix when Plaintiff "decline[d] to explain — such as through exhibits or affidavits of the sort that typically accompany motions for attorney fees — why the methodology underlying the LSI Matrix renders it appropriate for this particular case"); Our Child.'s Earth Found. v. Nat'l Marine Fisheries Serv., No. 14-01130, 2017 WL 783490, at *11 (N.D. Cal. 2017) (finding that rates requested by plaintiff not reasonable when plaintiffs did not provide justification for "significant" upward departure from previous, significantly lower rates sought by plaintiff for same attorneys); Audubon Soc'y of Portland v. U.S. Nat. Res. Conservation Serv., No. 10-1205, 2012 WL 4829189, at *2 (D. Or. Oct. 8, 2012) (noting that fee applicant has burden of demonstrating hourly rates are reasonable); Elec. Frontier Found. v. Office of the Dir. of Nat'l Intel., 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").

[142] See, e.g., Auto All. Int'l, Inc. v. U.S. Customs Serv., 155 F. App'x 226, 228 (6th Cir. 2005) (affirming district court's use of market rate for judicial district within which it sits); Hernandez v. U.S. Customs & Border Prot., No. 10-4602, 2012 WL 398328, at *15 (E.D. La.

of Columbia 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.[143] In the FOIA context, courts within the D.C. Circuit have differed in accepting one of two "competing"[144] versions of the updated Laffey Matrix: the United States Attorney's Office ("USAO") Matrix and the Legal Services Index ("LSI") Matrix.[145]

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Feb. 7, 2012) (reducing hourly rates based on review of recent case law within district); Nw. Coal. for Alts. to Pesticides v. Browner, 965 F. Supp. 59, 65 (D.D.C. 1997) (explaining that fees are properly calculated based on legal market for jurisdiction "in which the district court sits" (citing Donnell v. United States, 682 F.2d 240, 251 (D.C. Cir. 1982))).

[143] Laffey v. Nw. Airlines, Inc., 746 F.2d 4, 24-25 (D.C. Cir. 1984) (non-FOIA case), 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) (non-FOIA case) (noting circuit court approval of use of "Laffey Matrix") (non-FOIA case); Citizens for Resp. & Ethics in Wash. v. DOJ, 142 F. Supp. 3d 1, 23 (D.D.C. 2015) (determining that plaintiffs are not constrained by Laffey matrix where prevailing rate differs in "relevant market" for "attorneys with similar qualifications doing similar work"); Elec. Priv. Info. Ctr. v. FBI, 72 F. Supp. 3d 338, 354 (D.D.C. 2014) (finding that attorneys who handled FOIA case in their first year of practice covered by Laffey Matrix category for "'1-3 years'" of experience because Laffey Matrix does not provide category for licensed attorneys below "'1–3 years'" of experience); 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. Priv. Info. Ctr. v. DHS, 811 F. Supp. 2d 216, 238 (D.D.C. 2011) (applying "paralegal/clerk" Laffey Matrix rate for time on work conducted before attorney was admitted to bar).

[144] See Urb. Air Initiative, 442 F. Supp. 3d at 322 (discussing "two competing Laffey matrices" and how "while the LSI Matrix is designed to reflect the hourly rates charged by federal court practitioners who litigate complex cases in Washington, D.C., the USAO Matrix has been based, since 2015, on 'data for all types of lawyers – not just those who litigate complex federal cases – from the entire metropolitan area'" (quoting DL v. District of Columbia, 924 F.3d 585, 587 (D.C. Cir. 2019))).

[145] Compare, e.g., WP Co., 514 F. Supp. at 276 (D.D.C. 2021) (finding "[i]n light of Plaintiffs' failure to justify the reasonableness of the LSI Matrix rates for the present litigation, and since SBA consents to application of the USAO Matrix, the Court will base the fee award on the latter"), Nat'l Sec. Couns. V. CIA, No. 11-444, 2017 WL 5633091, at *6 (D.D.C. Nov. 21, 2017) (applying USAO Laffey Matrix "where the plaintiff did not meet his burden for demonstrating that the LSI Laffey Matrix is superior"), and Citizens for Resp. & Ethics in Wash., 142 F. Supp. 3d at 22 (finding that "[i]n the absence of evidence from CREW satisfying its burden to establish that the LSI Matrix represents the prevailing rate in the relevant market, the USAO Matrix will be used"), with Mattachine Soc'y of Washington, D.C. v. DOJ, 406 F. Supp. 3d 64, 71 (D.D.C. 2019) (finding "that the [LSI] Laffey Matrix is applicable here"); Elec. Priv. Info. Ctr. v. DHS, 197 F. Supp. 3d 290, 294–95 (D.D.C. July 18, 2016) ("accept[ing] the LSI Laffey Matrix hourly rates" when "parties agree that the LSI Laffey Matrix acts as a starting point"); Citizens for Resp. & Ethics in Wash. V. DOJ, No. 11-374, 2016 WL 554772, at *1 (D.D.C. Feb. 11, 2016) (finding that "the affidavits, billing-rate surveys, and prior district-court orders that [plaintiff] has offered to support the

In 2021, the United States Attorney's Office for the District of Columbia published a revised fee matrix, titled the "Fitzpatrick Matrix," for resolving requests for attorney's fees in complex civil cases in District of Columbia federal courts handled by its Civil Division.[146]

The lodestar is strongly presumed to yield the reasonable fee.[147] 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.[148] Likewise, in the FOIA context, courts have denied fee enhancements in a variety of other circumstances.[149] 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."[150]

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reasonableness of LSI-adjusted rates in 'complex federal litigation' are sufficient to meet its evidentiary burden").

[146] See The Fitzpatrick Matrix.

[147] See, e.g., Hiken v. DOD, 836 F.3d 1037, 1044 (9th Cir. 2016) (holding that lodestar figure is "'presumed to be [a] reasonable fee'" (quoting Blum v. Stenson, 465 U.S. 886 (1984))); Baker v. D.C. Pub. Schs., 815 F. Supp. 2d 102, 107–08 (D.D.C. 2011) (non-FOIA case) (plaintiff's properly documented lodestar is presumed reasonable).

[148] City of Burlington v. Dague, 505 U.S. 557, 562 (1992) (non-FOIA case) (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]" (citing Flight Attendants v. Zipes, 491 U.S. 754, 758 n.2 (1989))).

[149] See, e.g., Hernandez v. U.S. Customs & Border Prot., No. 10-4602 2012 WL 398328, at *18 (E.D. La. Feb. 7, 2012) (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. Priv. Info. Ctr. v. DHS, 811 F. Supp. 2d 216, 240 (D.D.C. 2011) (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) (declining to decide whether precedent 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); Jud. Watch, Inc. v. Dep't of Com., 384 F. Supp. 2d 163, 174 (D.D.C. 2005) (denying request for an enhancement, because plaintiff failed to explain "why the lodestar does not offer sufficient compensation"), aff'd in part, rev'd in part on other grounds, 470 F.3d 363 (D.C. Cir. 2006); Assembly of Cal. v. U.S. Dep't of Com., No. 91-990, 1993 WL 188328, at *14 (E.D. Cal. May 28, 1993) (refusing to grant approval for any upward adjustment in lodestar calculation).

[150] Nw. Coal. for Alts. to Pesticides v. Browner, 965 F. Supp. 59, 66 (D.D.C. 1997) (citing Libr. of Cong. v. Shaw, 478 U.S. 310, 322 (1986)).

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.[151]

Upon appeal, legal conclusions underpinning an award of attorney fees receive de novo review,[152] and the awards of such fees are reviewed for abuse of discretion.[153]

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[151] See Hensley v. Eckerhart, 461 U.S. 424, 437 (1982) (non-FOIA case) (holding that "[i]t remains important . . . for the district court to provide a concise but clear explanation of its reasons for the fee award"); cf. Union of Concerned Scientists v. NRC, 824 F.2d 1219, 1228 (D.C. Cir. 1987) (remanding grant of attorney's fees to District Court for further explanation of award); Citizens for Resp. & Ethics in Wash. v. DOJ, 142 F. Supp. 3d 1, 11 (D.D.C. 2015) (requiring court to make "an independent determination" regarding hours expended).

[152] See, e.g., Nat'l Sec. Couns. v. CIA, 811 F.3d 22, 27 (D.C. Cir. 2016) (holding that "[w]e review de novo questions of law, including the legal standards governing fee eligibility under FOIA"); Batton v. IRS, 718 F.3d 522, 525 (5th Cir. 2013) (holding "we review a district court's denial of attorneys' fees for abuse of discretion, assessing fact findings for clear error and legal conclusions de novo"); Pietrangelo v. U.S. Army, 568 F.3d 341, 343 (2d Cir. 2009) (holding that "[a]lthough we generally review a district court's award of attorneys' fees for an abuse of discretion, [plaintiff's] contention on appeal is that the District Court made an error of law in denying such an award, and we review rulings of law de novo").

[153] See Schoenberg v. FBI, 2 F.4th 1270, 1276 (9th Cir. 2021) (holding that "[f]irst 'we review for abuse of discretion the district court's analysis of each of the four individual factors' . . . [and s]econd, 'we review for abuse of discretion the district court's balancing of the four factors'" (quoting Morley v. CIA, 894 F.3d 389, 391 (D.C. Cir. 2018))); Kwoka v. IRS, 989 F.3d 1058, 1064 (D.C. Cir. 2021) (holding that "[w]e review a district court's entitlement determination for abuse of discretion"); Yagman v. Haspel, 769 F. App'x 484, 487 (9th Cir. 2019) (holding, as an abuse of discretion, a denial of costs when district court "provide[d] no logical explanation" for its decision); Gahagan v. USCIS, 671 F. App'x 321, 322 (5th Cir. 2016) (finding that district court "thoroughly and properly considered each of the relevant four factors" and thus, denial of attorney fees by district court was not an abuse of discretion); Auto All. Int'l, Inc. v. U.S. Customs Serv., 155 F. App'x 226, 228-229 (6th Cir. 2005) (determining that grant of fees by district court was not abuse of discretion).