IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFERSON MORLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 032545(RJL)**
	)	
CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S RENEWED MOTION FOR ATTORNEY'S FEES AND COSTS

Defendant, Central Intelligence Agency ("CIA"), by and through undersigned counsel, respectfully submits this opposition to Plaintiff Morley's Renewed Motion for An Award of Attorney's Fees and Costs ("Pl. Mot.") in this Freedom of Information Act ("FOIA") case.

I. STATEMENT OF RELEVANT FACTS

This litigation involves a FOIA request that Plaintiff, a journalist interested in the JFK Assassination, submitted to CIA on July 4, 2003. Plaintiff's FOIA request asked CIA to produce "all records pertaining to CIA operations officer, George Efythron Joannides, (also known as 'Howard,' or 'Mr. Howard,' or 'Walter Newby'). *See* ECF No.89, Declaration of Delores, M. Nelson, (Nelson Decl.), ¶ 9; Letter from Morley to Dyer of July 4, 2003, at 1-3, attached to Nelson Decl. as Exhibit D. Specifically, Plaintiff sought these documents because he believed they are somehow related to the JFK assassination. By letter dated November 5, 2003, CIA responded to Plaintiff's FOIA request informing him that "CIA records on the assassination of President Kennedy have been re-reviewed under the classification guidelines

for assassination related records of the President John F. Kennedy Assassination Records Collection Act of 1992," and such records "have been transferred to the National Archives and Records Administration (NARA) in compliance with this Act." *Id*., ¶10, Exhibit E.

On December 16, 2003, Plaintiff filed his complaint for injunctive relief in this Court. On April 9, 2004, CIA filed a motion to stay this proceeding under *Open America v. Watergate Special Prosecution Task Force*, 547 F.2d 605 (D.C. Cir. 1976) - pending CIA's processing of Plaintiff's request. ECF No. 7. On September 2, 2004 this Court granted CIA's motion. Pursuant to that Order, CIA filed two status reports in which CIA updated the Court of the status of its records review. ECF No. 23 & 24. In a letter dated, December 22, 2004, CIA released responsive documents and also asserted a *Glomar* response "[w]ith respect to that portion of [Plaintiff's] request seeking records regarding Mr. Joannides' participation in any covert project, operation, or assignment, unless of course previously acknowledged." ECF No. 89, Nelson Declaration, ¶15, Exhibit F at 2. CIA released additional documents under cover letters dated, February 1, 2005 and May 9, 2005, *Id*., ¶¶ 17-18. On November 15, 2005, CIA filed a Motion for Summary Judgment. ECF No. 45. On September 29, 2006, this Court granted CIA's Motion for Summary Judgment and dismissed the case, which Plaintiff appealed on November 22, 2006. ECF No. 75.

On December 7, 2007, the Court of Appeals issued a decision affirming in part and reversing in part this Court's grant of summary judgment. The Court of Appeals affirmed this Court's decision regarding CIA's use of the proper standard for a FOIA request; the adequacy of CIA's Vaughn Index; and CIA's proper assertion of FOIA exemptions (b)(1), (b)(3), and (b)(7)(E). The Court of Appeals remanded the case with instructions that CIA: a) search its

operational files for records responsive to Plaintiff's FOIA request; b) search the records CIA transferred to NARA for records responsive to Plaintiff's FOIA request; c) supplement CIA's explanation regarding its search for the allegedly "missing" monthly progress reports purportedly filed by Joannides; d) expand the description of the search it conducted for records responsive to Plaintiff's FOIA request; e) provide additional explanation in support of CIA's *Glomar* response; and f) explain in greater detail how FOIA exemptions (b)(2), (b)(5), and (b)(6) permit CIA to withhold documents responsive to Plaintiff's FOIA request. Pursuant to the Court of Appeals' decision, CIA searched its operational files and CIA records transferred to NARA for records responsive to Plaintiff's FOIA request. ECF No.89, Nelson Decl., ¶ 22. CIA released 113 responsive records on April 28, 2008 and released 293 responsive records on August 6, 2008 to the Plaintiff, as a result of the searches mandated by the Court of Appeals. *Id*., ¶¶ 24-25.

Without exhaustively reviewing the details of this litigation, the Defendant notes that Plaintiff's success in this litigation was quite limited. After considering the Defendant's final Motion for Summary Judgment, this Court granted it, ruling that the Defendant adequately searched its records and justified its withholdings. *See* ECF No. 103. The D.C. Circuit Court affirmed the district court's decision in part and reversed in part, and following remand, the district court granted CIA's renewed motion for summary judgment, finding it had conducted an adequate records search and properly invoked FOIA exemptions for all withholdings.

This is the second time the issue of attorney's fees has been before this Court. Plaintiff first sought attorney's fees pursuant to 5 U.S.C. § 552 (a)(4)(E)(i) on June 1, 2010. *See* ECF No. 107. The government opposed Plaintiff's motion and this Court found that Plaintiff was not entitled to attorney's fees under the four prong test for entitlement to fees in FOIA cases. *See Morley v. CIA*, 828 F. Supp. 2d 257 (D.D.C. 2011). Plaintiff appealed the District Court's decision to the Circuit Court of Appeals. The Court of Appeals vacated and remanded the District Court's decision denying Plaintiff's entitlement to attorney's fees for consideration of the "public benefit" factor in accordance with its recent decision in *Davy v. CIA*, 550 F. 3d 1155 (D.C. Cir. 2008)(per curium). *See Morley v. CIA*, 719 F. 3d 689 (D.C. Cir. 2013). On remand, Plaintiff again seeks to obtain attorney's fees and argues that it has met all of the four requirements. For the reasons stated below, Plaintiff has failed to show his eligibility and entitlement to attorney's fees, and the fees he requests are unreasonable in light of the limited success he achieved.

II. LEGAL STANDARD

Pursuant to the FOIA's fee-shifting provision, a court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case . . . in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E). Under this provision, courts have employed a two-step inquiry to determine whether an award of attorneys' fees is proper. First, a court must determine whether the complainant has shown that it is "eligible" for an award by demonstrating that it has "substantially prevailed." Second, and equally important, a court must determine whether the complainant has shown that it is "entitled" to an award. *See Weisberg v. U.S. Dept. of Justice*, 745 F.2d 1476, 1495 (D.C. Cir.

1984). As noted above, this second inquiry entails a balancing of four factors: 1) the benefit of the release to the public; 2) the commercial benefit of the release to the Plaintiff; 3) the nature of the Plaintiff's interest; and 4) the reasonableness of the agency's withholding. *Id.* at 1498; *see also Tax Analysts v. Dep't of Justice,* 965 F.2d 1092, 1093 (D.C. Cir. 1992). The burden of establishing entitlement falls squarely on the movant. *Northwestern Univ. v. U.S. Dept. of Agric.*, 403 F. Supp. 2d 83, 87-88 & n. 5 (D.D.C. 2005). Once it is determined that a complainant is entitled to attorneys' fees, the court then calculates a reasonable fee award. *Weisberg*, 745 F.2d. at 1495.

Further, it is well-established that Congress "did not intend the award of attorney fees to be automatic." *Cuneo v. Rumsfeld,* 553 F.2d 1360, 1364 (D.C. Cir. 1977), *overruled on other grounds, Burka v. Dept. of Health and Human Services*, 142 F.3d 1286, 1290 (D.C. Cir. 1998). Rather "the 'legislative history of section 552(a)(4)(E) evinces a clear congressional intent to leave the courts broad discretion when considering a request for attorney fees,' such that there is no 'presumption in favor of awarding attorney fees' to prevailing FOIA litigants." *See Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Protection,* No. 04-0377 (JDB), 2006 WL 3060012, at *2 (D.D.C. Oct. 26, 2006) (quoting *Nationwide Bldg. Maint., Inc. v. Sampson*, 559 F.2d 704, 713-14 (D.C. Cir. 1977) and *citing Cuneo*, 553 F.2d at 1367).

III. ARGUMENT

A. Plaintiff Is Not Eligible For Attorney's Fees As It Did Not Substantially Prevail

Plaintiff is not eligible for attorney's fees[1]. To establish eligibility to attorney's fees, a plaintiff must first show that he has "substantially prevailed" in his suit. 5 U.S.C. § 552(a)(4)(E)(ii). In *Davy v. CIA,* the Court of Appeals explained that "in order for plaintiff's in FOIA actions to become eligible for an award of attorney fees, they must have 'been awarded some relief by [a] court', either in a judgment on the merits or in a court-ordered consent decree." 456 F. 3d 162, 165 (D.C. Cir. 2006). Plaintiff must show that "prosecution of the suit was reasonably necessary to obtain the requested records and that a causal nexus existed between the suit and the agency's disclosure of the records. *Nash v. U.S. Dept. of Justice,* 992 F. Supp. 447, 450 (D.D.C. 1998) *citing Maynard v. CIA*, 986 F.2d 547, 568 (1st Cir.1993). Further, the D.C. Circuit has emphasized that the simple fact that the requested documents were not released until after the suit was instituted without more, is not enough to establish that a complainant has substantially prevailed. "The mere release of documents during the pendency of litigation does not necessarily prove causation." *Nash*, 997 F. Supp. at 450. The facts here do not support a finding that Plaintiff substantially prevailed for the purpose of being eligible for attorney's fees. First, some of the documents responsive to Plaintiff's requests

[1]This issue is not precluded under the law of the case doctrine or the mandate rule because it was not previously decided by either this court or the appellate court. In *U.S. On Behalf of DOL v. Ins. Co. of N. America*, the Circuit Court explained that the "mandate rule," an application of the "law of the case" doctrine, states that a district court is bound by the mandate of a federal appellate court and generally may not reconsider issues decided on a previous appeal. Unlike the doctrine of *res judicata,* however, the "law of the case" doctrine does not seek to sweep under its coverage all possible issues arising out of the facts of the case. Rather, the scope of the "law of the case" doctrine is limited to issues that were decided either explicitly or by necessary implication-"[t]he mere fact that [an issue] could have been decided is not sufficient to foreclose the issue on remand."131 F. 3d 1037, 1041 (D.C. Cir. 1997)(*Internal Citations Omitted).*

were already publically available at the NARA, and this suit clearly was not necessary to obtain the records. Second, Plaintiff's success was minimal on the first appeal. The Circuit Court upheld the adequacy of CIA's Vaughn Index, and CIA's proper assertion of FOIA Exemptions.

B. Plaintiff Is Not Entitled To Attorneys' Fees

Even if the Court was to find that Plaintiff is entitled to attorney's fees, it is settled law that eligibility for attorneys' fees does not, *ipso facto,* establish that a prevailing party is entitled to such fees. *See Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 470 F.3d 363, 369 (D.C. Cir. 2006). Here, the equitable factors simply do not support an award. To begin, while the D.C. Circuit has recognized that the purpose for allowing attorneys' fees in FOIA cases is "to remove the incentive for administrative resistance to disclosure requests based not on the merits of exemption claims, but on the knowledge that many FOIA plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation," the D.C. Circuit has also repeatedly "embraced the view that a distinction is to be drawn between the plaintiff who seeks to advance his private commercial interests and thus needs no incentive to file suit, and a newsman who seeks information to be used in a publication or the public interest group seeking information to further a project benefitting the general public." *Davy* v. *CIA*, 550 F.3d 1155, 1158 (D.C. Cir. 2008) (*citing Nationwide Bldg. Maint., Inc.*, 559 F.2d at 711 (internal quotations omitted)). The rule makes sense. A litigant suing the federal government for his own purposes has already taxed the system; to allow him attorneys' fees in addition – and at the government's expense – is not supported by the law.

Polynesian Cultural Ctr. v. NLRB, 600 F.2d 1327, 1330 (9th Cir. 1979) (*quoting Blue v. Bureau of Prisons*, 570 F.2d 529, 533-34 (5th Cir. 1978) (holding that attorneys' fees award should not "'merely subsidize a matter of private concern' at taxpayer expense.").

In determining whether a prevailing party is entitled to attorneys' fees in FOIA cases, courts consider the four-factor test of *Cotton and Weisberg*, enumerated above. *See also Tax Analysts*, 965 F.2d at 1093. Failure to satisfy even one of these factors can be grounds for finding that a prevailing party is not entitled to fees. *See, e.g., Chesapeake Bay Fdn., Inc. v. U.S. Dep't of Agriculture*, 11 F.3d 211, 216 (D.C. Cir. 1993), *abrogated on other grounds, OCAW v. Dep't of Energy*, 288 F.3d 452, 454 D.C. Cir. 2002). Although Plaintiff purports to be entitled to an award of attorneys' fees upon a weighing of these four factors, Plaintiff's analysis of each of the four factors conveniently ignores the relevant case law, sidesteps the fact that it brought suit to advance its own private interest, and relies upon an overstatement of the import of his case.

1. Public Benefit

Plaintiff fails to show that he has met the public benefit factor for entitlement to fees. 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." *Cotton v. Heyman*, 63 F.3d at 1120 (*quoting Fenster v. Brown* , 617 F.2d 740,744 (D.C.Cir. 1979)). Such a determination necessarily entails an evaluation of the nature of the specific information disclosed. *See id*. In other words, does the information released contribute to the public's ability to make "vital political choices?" *Id*. An assessment of "the public

benefit derived from the case," *Tax Analysts v. U.S. Dep't of Justice*, 9 65 F.2d 1092 (D.C. Cir. 1992), requires consideration of both the effect of the litigation for which fees are requested and the potential value of the information sought. *See Davy v. CIA*, 550 F.3d 1155 (D.C. Cir. 2008) (*Davy* II).

The plaintiff in *Davy*, as in this case, sought records which he alleged provided "important new information" bearing on the assassination of President John F. Kennedy. 550 F.3d at 1159. The court in *Davy* stated that "[t]he information Davy requested-about individuals allegedly involved in President Kennedy's assassination-serves a public benefit." As discussed in more detail below, this case can easily be distinguished from *Davy*. Central to the court's determination in *Davy* was the fact that "the agency did not challenge Davy's description of the released documents as providing 'important new information bearing on the controversy over ... Garrison's contention that CIA was involved' in the assassination plot" and that all of the material was not previously available to the public. *Id.* at 1159. As a result, the court accepted Davy's unchallenged characterization that the requested records provided "important new information" related to the activities of the CIA in relation to an "event of national importance" - the Kennedy assassination. Because all of the "important" material released was not previously available to the public, the court determined the public benefit factor weighed in favor of the Plaintiff in that case. Plaintiff contends that the case here in terms of overall success is actually stronger than in *Davy*, based largely on "the nature of the information obtained and the quantity released substantially exceeded what was obtained in Davy." Fee Mot. at 22-23. However, Plaintiff mischaracterizes both the nature of the information at issue and the success of the litigation.

As noted above, central to the court's determination of public benefit in the *Davy* case was the fact that CIA did not challenge Davy's characterization that the of the released documents as providing "'important new information' ... on the controversy over ... Garrison's contention that the CIA was involved" in the plot to assassinate President Kennedy and that "at least one of the documents was not previously available to the public." 550 F.3d at 1159. One of the two searches that the D.C. Circuit Court of Appeals ordered the CIA to conduct (and the basis for Plaintiff's claim to attorney's fees) was of records transferred to NARA under the JFK Assassination Records Act. As Plaintiff has acknowledged, he received 113 records (totaling over 1,040 pages) relating to Joannides from this search. However, all of these records are *identical* to those released pursuant to the JFK Act (*see* Nelson Declaration, dated November 21, 2008) and thus, all were in the public domain, i.e., they were publicly available for public consumption at the National Archives prior to the instant lawsuit. Plaintiff has not identified any document from this collection that was not already publicly available and, in his renewed motion does not challenge the fact that all of the records from this collection were publically available. Thus, notwithstanding the fact that these records are unquestionably assassination-related, their further release does not meet the public benefit criteria of *Davy*. *See also Campbell v. U.S. Dep't of Justice,* 164 F.3d 20, 36 (D.C. Cir. 1998) (material that has met a threshold level of public dissemination will not further "public understanding").

Nor can it be said that Plaintiff's success in procuring the assassination-related records from the CIA as opposed to NARA "is likely to add to the fund of information that citizens may use in making vital choices" - the standard for assessing public benefit. As this Court has previously recognized, Plaintiff has failed to "explain how any of this information is

distinguishable from that already available at NARA." *Morley*, 828 F. Supp. 2d 263 at n.5. Consequently, even that portion of Plaintiff's request that ordinarily would give rise to public benefit, i.e., records which reasonably may be assassination-related, does not meet that standard in this case.

Notwithstanding that the records in the JFK Act collection would satisfy the public benefit test but-for the fact that they were all previously available to the public, the same cannot be said of the remaining CIA records subject to this litigation. As noted above, central to the court's determination that the public benefit test was met in *Davy* was the fact that "the agency did not challenge Davy's description of the released documents as providing 'important new information bearing on the controversy over ... Garrison's contention that the CIA was involved' in the assassination plot." 550 F.3d at 1159. Here, the CIA has consistently challenged the Plaintiff's characterization that the documents released in response to Plaintiff's request reveal "important new information" relating to the assassination of President Kennedy. Excluding records from the JFK Act collection discussed above, the CIA records released to Plaintiff by their nature do not relate to the assassination. Most, if not all, of these records are administrative in nature, relating to the Joannides' leave, insurance, training, pay, personnel actions, etc. over the course of his entire career which spanned nearly 29 years, beginning in 1950.

Plaintiff specifically alleges that all records relating to "Joannides 'activities in 1962-1964 and 1978 unquestionably fall within the scope of the JFK Act as was consistently held by the [Assassination Records] Review Board." This is not the case. In a memo to ARRB Executive Director Jeremy Gunn, the ARRB Special Assistant for Research Review reports

reviewing Joannides personnel file for that specific time period, and informs him that the file contains "no specific reference to ... [Joannides'] relationship with the DRE and ... no information relevant to the assassination." See ECF No. 89, Nelson Decl. 21 November, Attachment L. The memo further states that the AARB designated only performance evaluation reports from 1962-64 and a memorandum regarding his duties during 1978-79 for inclusion in the JFK Act records collection. *Id.* Thus, this memorandum clearly demonstrates that the ARRB did not consider all documents that referred to Joannides as assassination-related, even those from the time period identified by Plaintiff.

The public benefit analysis requires an evaluation of the specific documents at issue. *Browner*, 965 F. Supp. 59, 63 (citing *Cotton v. Heyman*, 63 F. 3d 1115, 1120 (D.C. Cir. 1195)). Plaintiff alleges "[t]he records obtained by Morley revealed a 'treasure trove' of information regarding Joannides and the JFK assassination controversy," Pl. Mtn at 26 of 43, but this claim is demonstrably false. With respect to these records (i.e., those not part of the JFK Act collection), Plaintiff identifies only four records as the basis for his claim that "new" information relating to the assassination was revealed, and therefore the court's analysis should be confined to those four records. These four documents include two travel records, one photograph and one citation for an award Mr. Joannides' received recognizing his work at the CIA. Plaintiff argues that the travel documents were significant because the Warren Commission traveled to New Orleans to interview members of the anti-Castro group at or near the same time Mr. Joannides traveled there, thus alleging some type of conspiracy or cover up. Plaintiff believes the photograph and record of Mr. Joannides' award is significant because

they show that "CIA honored Joannides for the action he took in relation to the JFK assassination." *Id.* at 28 of 43.

As a threshold historical matter, Plaintiff completely fails to show how Joannides was involved with the JFK assassination in any way, and his nexus to Lee Harvey Oswald is extremely attenuated. While it is true that Joannides was a CIA officer and liaison to DRE, an anti-Castro group that had a couple of encounters with Oswald, this doesn't implicate either Joannides or DRE in the assassination. Even then, the records cited for support by Plaintiff do not pertain to this attenuated connection, and those that do have already been publicly released in the JFK Act collection. Thus, it is appropriate to be skeptical of Plaintiff's claim that records about Joannides that are unrelated to the DRE and Oswald are somehow "assassination-related."

The first two documents, which Plaintiff describes as "travel" documents, are dated April 1, 1964 and May 20, 1964. Plaintiff states the first document "shows that Joannides traveled to New Orleans on the same day the Warren Commission sent a letter to DRE delegate Carlos Bringuier in New Orleans saying a Commission attorney would like to interview him." Plaintiff contends that this indicates that "Joannides went to New Orleans to perform duties related to his service as chief of the psychological warfare operations branch in Miami at the same time the Warren Commission was interviewing" a member of the DRE. Similarly, the second document purportedly "shows that Joannides traveled [to New Orleans] on May 20, 1964" in connection with his duties at Miami station. Both documents, according to Plaintiff, show that "CIA concealed Joannides' presence in New Orleans from the Warren Commission at the time the Commission was launching its investigation there" and "corroborate" that "his

duties ...[at] the Miami station included activities in New Orleans." *See* Fee Motion, Exhibits 135-1 and 2.

Plaintiff is incorrect, and the two documents do not support his speculative theories about Joannides' travel. Indeed, neither document reflects work-related travel by Joannides. Both documents involve the same administrative form – a "residence and dependency report" – and contain fields for residency information (residence when initially appointed, designated permanent residence, last residence, and residence when on "home" leave) and information relating to dependents.[2] New Orleans is clearly listed as Joannides place of residence when on home leave, and the form does not put him in New Orleans on the dates cited by Plaintiff. To the contrary, the form plainly shows that he was elsewhere on those dates. The bottom of the form includes the fields *"signed at"* (emphasis added), "date" and "signature." The place and date that Joannides signed the respective forms clearly show that he was in "Miami, Florida" and at "HQS" (i.e., Washington, D.C.) when he signed them on April 1, 1964 and May 20, 1964, not in New Orleans as alleged by Plaintiff. Thus, this basic review of the documents demonstrate that Plaintiff's assertions are misleading and without merit.

The other two records – a photograph and citation – relate to the fact that Joannides received the Career Intelligence Medal ("CIM") when he retired from the CIA. Plaintiff asserts that "[t]his award is relevant to the JFK assassination story because it shows the CIA honored Joannides for the actions he took in relation to the JFK assassination story in 1963-64 and in 1968." To the contrary, the citation to the medal does not address any specific

[2] As explained at the top of the form, this form is used in "determining travel expenses allowable in connection with leave at government expense, overseas duty, return to residence upon separation of duty and for providing current residence and dependency information required in the event of an employee emergency."

assignment, rather it speaks in terms of 28 years of cumulative service 'in diverse assignments of increasing responsibility at Headquarters, the domestic field and overseas." Plaintiff attempts to bolster this baseless assertion by providing a description of the CIM, which he attributes to the CIA website. However, the description he provides is not that of the CIM, but that of the *Distinguished* Career Intelligence Medal (emphasis added), which is a distinct and more exclusive award (as the name suggests).

Plaintiff then states that Joannides service in 1963 and 1978 was part of a "pattern of increasing responsibility" - by noting that Joannides' "supervisor in 1978 stated that he [Joannides] was the 'perfect man' for the job of Principal Coordinator for the HSCA." This statement is inaccurate and is taken out of context. First, contrary to Plaintiff's claim, Joannides was not the CIA's Principal Coordinator for the HSCA. The Principal Coordinator was Scott Breckinridge, *see* Nelson Decl. dated 21 November 2008, attachment L, and he was the author of the memorandum cited by Plaintiff, which was previously released under the JFK Act. Second, this quote, which is from a memorandum in lieu of fitness report that was released under the JFK Act, is taken out of context and represents yet another instance where plaintiff mischaracterizes the record. After commenting on the need for additional personnel to assist in responding to HSCA requests, a senior officer experienced in operational work was requested. The memorandum states, "While there is no way to outline the qualifications that one should have for this sort of work, it quickly became clear that Mr. Joannides was the perfect man for it. Mr. Joannides was responsible for a new procedure in recording of exchanges with the HSCA. As it developed, the Agency's logs and records on the status of requests by the HSCA and the Agency's responses became the only reliable record…. Beyond

that early contribution to the ordering of the affairs of the office, Mr. Joannides handled day-to-day follow-ups of requirements by telephone with the DDO focal point." Ex. 1. Thus, the memorandum further demonstrates that Joannides was not the "principal coordinator" and instead had more ministerial responsibilities.

Regarding the photograph, Plaintiff contends that it "revealed that the CIA, as an institution" shared this view of Joannides as the "'perfect man' for the job of Principal Coordinator for the HSCA." The photograph reveals nothing more than the fact that Joannides received the CIM. Thus, Plaintiff has not identified any record among the CIA (non-JFK Act records collection) records which reveals "important" new information regarding the Kennedy assassination.[3]

Plaintiff also asserts that "CIA's August 2008 release included operational files" which he attributes to the search of operational files ordered by the D.C. Circuit in December 2007 (one of the two searches on which his eligibility rests and, in turn, his entitlement to fees). However, none of the 293 records released in August 2008 are "operational records" that were located in response to the search ordered by the Court of Appeals. As noted above, these records are largely administrative in nature, relating to the individual's leave, insurance, training, pay, personnel actions, etc. *See* Nelson Decl. 21 November 2008, ¶¶ 27-38 and 52-

[3] The Court of Appeals also called attention to the quote in *Davy* that the standard for entitlement to fees does not "disqualify plaintiffs who obtain information that, while arguably not of immediate public interest, nevertheless enables further research ultimately of great value and interest, such as here the public understanding of a Presidential assassination." 550 F.3d at 1162 n. 3. This statement, included in a footnote, was responding to an argument in the dissent asserting that the lack of public dissemination of the information demonstrated that it was not in the public interest (an issue that was important in that case because, unlike the present case, the CIA did not challenge the plaintiff's assertions about the value of the documents). Here, the CIA's position does not rest on whether the supposedly "new" information has been publicly disseminated. Even if it has been broadly disseminated by the Plaintiff, there has still been no public benefit for the reasons described above. The court in *Davy* also did not suggest that the possibility of enabling further research means that the public benefit requirement will always be met. Again, this statement was simply countering the argument in the dissent. Even if more importance is ascribed to this statement, the possibility of enabling further research must depend on more than pure speculation, particularly where the information at issue bears no relation to the Kennedy assassination.

55. The documents which Plaintiff refers to as "operational records" were actually located by the Directorate of Support, which handles administrative support for the CIA, including personnel matters. As Ms. Nelson explained in her declaration, these records were located because "[i]n or around May 2008, the personnel working on this case discovered that the CIA previously had acknowledged Joannides as a CIA employee from approximately September 1950 to January 1979. This discovery prompted CIA to reevaluate its previous searches and to conduct additional searches, locating the 293 documents released in August 2008.

Plaintiff also contends that "obtaining this ruling [to search operational records] was an exceptional achievement, the only case to that point in which the D.C. Circuit had ordered such a review." However, as the D.C. Circuit previously noted in this case, and as discussed below, this is not the first or only circuit court to address this issue. With respect to the search of operational files, the notion of public benefit may not be grounded solely on legal precedent set by a case. As the court in *Cotton* stated, "[t]he district court's interpretation presupposes that a public benefit exists by sole virtue of the potential release of present and future information as a result of the precedent set in the present case. Such an inherently speculative observation is contrary to our position in *Fenster* and inconsistent with the structure of FOIA itself." 63 F.3d at 1120. Thus, in the context of this case, this factor should not be deemed to favor Plaintiff. Plaintiff also contends that the public benefit conferred by information he received "on Joannides relates to the CIA's violation of the oversight responsibilities of the last official investigation of the assassination of President Kennedy." *See* (Plt. Mtn. at 21 of 43). None of the documents released support Plaintiff's baseless contention. Moreover, it is important to note that "[t]he simple disclosure of government documents does not satisfy the public interest

factor." *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Justice*, 820 F.Supp.2d 39, 46 (D.D.C.2011) *citing Alliance for Responsible CFC Policy*, 631 F. Supp. 1469 (D.D.C.1986).

Finally, the court in *Davy* also found that "the district court's consideration of the value of the information sought necessarily entailed consideration of the value of the litigation that led to the disclosure of that information. 550 F.3d at 1157-58. In other words, the court considered the circumstances that necessitated the initiation of litigation. *Id.* ("Suffice it to say, ... six years after Davy, acting pro se, filed his first FOIA request, the agency responded by refusing disclosure, stating that it could neither confirm nor deny the existence of responsive records due to national security reasons.... Davy obtained a lawyer but no relief by administrative appeal and filed suit against the agency. The district court dismissed his complaint with leave to amend on the ground that the FOIA request made in 1993 was untimely." Davy then filed a second FOIA request and when no response was received from the agency, amended his complaint.)

Here, Plaintiff filed his FOIA requested in July 2003 seeking "all records" pertaining to CIA operations officer George Joannides, which he asserted will "shed new light on the assassination of President Kennedy." Based on the focus of Plaintiff's request, CIA responded in November 2003, informing Plaintiff that "CIA records on the assassination of President Kennedy have been reviewed under the guidelines for assassination-related records of the President John F. Kennedy Assassination Records Collection Act of 1992" and that "such records, along with those of other government agencies, were available to the public through the National Archives, as required by the Act." "No other correspondence was received from

Mr. Morley (until the filing of the instant complaint with the Court.)" (Declaration of Robert Herman, 25 March 2004, ¶¶ 28-30.) In this regard, the *Morley* case is not remotely comparable to the situation in *Davy*.

In sum, the significant differences between *Davy* and this case plainly demonstrate that Plaintiff has not met the public benefit requirement for entitlement to fees. It cannot be the rule that a FOIA requestor can simply mouth the words "JFK assassination" in a FOIA request and automatically be entitled to fees if records are produced in the resulting litigation. If this were the case, then a FOIA litigant could be entitled to fees in any case where it obtained information about the career of a figure purported to have some connection (based in fact or not) to the assassination, even if the "new" information about that individual has no relation to that historical event. Instead this Circuit's precedent requires a more careful review, and here that review demonstrates that Plaintiff has not met the public benefit requirement.

2. Personal and Commercial Interest

The next two factors - (1) the commercial benefit to Plaintiff and 2) the nature of the Plaintiff's interest in the records- are closely related and often considered together. *See Tax Analysts*, 965 F.2d at 1095; *Fenster*, 617 F. 2d at 743. They counsel against fees not only where a Plaintiff stands to gain financially, *Kaye v. Burns*, 411 F. Supp 897, 905 (D.D.C. 1976), but also where Plaintiff has personal motives "that would serve as an incentive 'to pursue the release of documents regardless of the availability of fees under FOIA.'" *Tax Analysts*, 759 F. Supp. at 30 (*citing* 587 F. Supp. at 1032). This high threshold ensures that only movants who otherwise would be discouraged from litigating their FOIA dispute are

awarded fees. *Tax Analysts*, 965 F.2d at 1095. As discussed below, such is not the case with Plaintiff or his counsel.

Plaintiff again asserts that his "favored status" initially as a representative of the news media and the favorable treatment that this category of requesters receives with respect to fee waivers means that he has not received a commercial benefit. ECF No.107 at 13-14. Similarly, Plaintiff asserts that because the nature of his interests fit in "the scholarly-journalistic category," he is entitled to an award of fees. *Id*. at 15. Plaintiff overstates the case. Even if a requester is a member of the media, it does not mean that he cannot or does not derive commercial or private benefit from those records. In the case at hand, the majority of information produced to the Plaintiff in response to the Circuit Court decision were those from the search of the JFK collection which were transferred to and already publicly available at NARA.

Thus, the disclosure of these records was not only of no additional benefit to the general public in this case (as discussed above), but Plaintiff had a residual commercial or private interest in the records. That is, Plaintiff would receive JFK Act related records from the CIA at little or no charge under FOIA, but would have to pay substantially higher copying costs if requested from NARA . Under the circumstances of this case: 1) the limited success which Plaintiff can claim, and 2) Plaintiff's citing the release of this information as part of the justification for his entitlement, these facts become more significant in the context of his claim for attorney’s fees. Consequently, Plaintiff did receive a "commercial" or personal benefit which should be balanced in the overall weighing of these factors. As this court has previously

found, Plaintiff had a sufficient private interest in pursuing the records without attorney's fees. *Morley,* 828 F. Supp. 2d. 265.

The D.C. Circuit has recognized that the purpose for allowing attorneys' fees in FOIA cases is "to remove the incentive for administrative resistance to disclosure requests based not on the merits of exemption claims, but on the knowledge that many FOIA plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation," *Davy v. CIA*, 550 F.3d at 1158. In the instant case, the prospect of an award of attorney's fees was not a required incentive to the Plaintiff or his counsel to pursue his claims in court. Plaintiff has clearly demonstrated that he will pursue his theories and speculations about Joannides by whatever means possible, including multiple FOIA litigations. *See* ECF No. 89, Nelson Decl. Exhibits K and L (inquiries through Public Affairs and the Inspector General).

Moreover, the Plaintiff did not enter litigation reluctantly. Plaintiffs with 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 courts. *See National Security Archive v. DOD,* 530 F. Supp 2d 198 at 203 (*citing LaSalle Extension Univ. v. FTC*, 627 F.2d 481, 484 (D.C. Cir.1980)). While these factors would generally favor a journalist, given the limited claims on which Plaintiff prevailed as well as the cost savings to him in this case, Plaintiff's personal and "commercial" interest in the released records militate against fee entitlement in this case.

The provision for an award of attorney's fees and other costs under the FOIA "'was not enacted to provide a reward for any litigant who successfully forces the government to disclose

information it wished to withhold.'" *Nationwide Bldg. Maint., Inc.*, 559 F.2d 704,711 (D.C. Cir. 1977}. Rather, the provision "had a more limited purpose to remove the incentive for administrative resistance to disclosure requests based not on the merits of exemption claims, but on the knowledge that many FOIA plaintiffs do not have the financial resources to pursue their requests through expensive litigation." *Id. See also Davy v. CIA,* 550 F.3d 1155, 1158 (D.C. Cir. 2008). To effect that limited purpose, the FOIA provides that a "court may assess against the United States reasonable attorney fees and other litigation costs reasonably occurred in any case ... in which complainant has substantially prevailed. " 5 U.S.C. §552(a)(4)(E)(i). That is, the awarding of attorney's fees and costs was to serve as an incentive to plaintiffs who would not otherwise be able to litigate and serve as a "disincentive" to obduracy or bad faith on the part of the government. *See Nationwide,* 559 F. 2d 704, at 716 (resorting to litigation before encountering absolute resistance to disclosure may preclude a fee award.) "[W]ithout evidence of bad faith, the court declines to impose a fee award to sanction sluggish agency response." *Simon v.United States of America*, 587 F. Supp. 1029 (D.D.C. 1984) ; *see also LaSalle Extension University v. FTC,* 627 F.2d. 481, 485-86 (fees denied where agency's alleged obduracy in resisting disclosure for four months was deemed insufficient to outweigh other factors.)

In this case (unlike in *Davy),* plaintiff did not need the additional incentive of recovering fees and costs to pursue its request in court, as is evident from the fact that plaintiff did not communicate with CIA regarding the referral to NARA before filing suit. The same is true of plaintiff's counsel, who as founder of the Assassination Archives and Research Center, has demonstrated a ready willingness to litigate any FOIA request that seeks information the

requester or Lesar alleges is assassination-related. See, for example, case list appended to Lesar's declaration, e.g., *Allen, AARC, Davy, Talbot,* as well as *Morley,* to cite but a few such cases. Nor has plaintiff demonstrated bad faith on the part of the defendant. CIA's initial response to Morley's request of referring him to NARA was both reasonable and responsible given the stated focus of his request, i.e., JFK assassination-related records. The JFK Assassination Records Collection Act "mandated that all assassination-related material be housed in a single collection in the National Archives and Records Administration (NARA)," with the "clear intent of the law" being to open such records for research. *(See* www.archives.gov/research/jfk/background.html).

3. Reasonableness

In examining the reasonableness of the government's withholding, the government must show only that it had a "reasonable or colorable basis for the withholding" and that it was not engaged in "recalcitrant or obdurate behavior." *See Tax Analysts v. Department of Justice,* 965 F.2d 1092, 1097 (D.C. Cir. 1992). Plaintiff focuses his claim for attorney fees on assertions that "CIA's actions in this case were designed to frustrate the requester," initially by referring him to NARA and not giving him appeal rights. ECF No. 107 at 18. To the contrary, because the focus of requester's letter was clearly on Joannides in connection with the assassination of President Kennedy and subsequent investigations thereof, CIA responded by explaining that these records, along with those of other Executive Branch agencies, relevant Congressional committees, and those donated by private entities, were transferred to NARA. The CIA provided the appropriate address at NARA to which such requests should be directed and noted that the collection was searchable through the NARA website. ECF No. 88 at 3. The CIA took

these steps to enable the requester to receive these records as expeditiously and efficiently as possible, not to frustrate as Plaintiff claims. Plaintiff alleges that CIA continued to engage in delaying tactics after the suit was filed. The CIA filed for and the Court granted an Open America stay in order to allow the CIA to orderly process Plaintiff's request.

Plaintiff alleges that CIA "continued to obstruct Morley's access to records by...refusing to acknowledge the existence of operational records that had been officially disclosed when it released records under the JFK Act." Plaintiff misunderstands the CIA's response. The CIA did not refuse to acknowledge the existence of operational records. The CIA issued a *Glomar* response which stated: "With respect to that portion of your request seeking records regarding Mr. Joannides' participation in any covert project, operation or assignment, unless of course previously acknowledged, the CIA can neither confirm nor deny the existence of records responsive to your request." (Joannides's assignments at JMWAVE during 1962-64 and as liaison officer supporting the House Select Committee on Assassinations inquiry, were previously acknowledged and those records were released.) ECF No. 88 at 4. While the appellate decision directed the CIA to further explain or justify its assertion of the *Glomar*, such a request is procedural and does not change the relationship of the parties. [3] *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir 2007); *see Waterman S.S. Corp. v. Maritime Subsidy Bd.*, 901 F.2d 1119, 1122 (D.C. Cir. 1990).[4]

[3] An order to file a revised Vaughn index is procedural and does not change the legal relationship between parties. *Summers v. Dept. of Justice*, 477 F.Supp.2d 56 at 66 (D.D.C. 2007) (*discussing Campaign For Responsible Transplantation v. U.S. F.D.A.*,448 F.Supp.2d 146, 147 (D.D.C.,2006.); nor does an "order directing Defendant to file an affidavit indicating its efforts to locate a missing file." *Id*. at 66. (Does this footnote belong here? Statement regarding filing revised Vaughn appears at end of next paragraph.)

[4] Although *Waterman* involved a request for EAJA fees, the rationale applies with equal force to the "prevailing party" analysis under other fee-shifting statutes. *See Bd. of Trustees of the Hotel & Restaurant Employees Local*

Thus, "interim victories [such as remands] on the way to ultimate defeat" are not enough. *Id*. at 1123. On remand, the CIA explained its assertion of the *Glomar* and prevailed.

Plaintiff also asserts that "CIA further obstructed Morley's access to operational records by litigating whether operational records had to be searched in this case. As the D.C. Circuit stated, "CIA relie[d] on the only opinion by a circuit court of appeals to address §431(c)(3) (*Sullivan v. CIA*)," (emphasis added), the section providing that certain investigations constitute an exception to the CIA Information Act, which, under certain circumstances, exempts operational files of the CIA from the provisions of FOIA*Morley v. CIA*, 508 F.3d 1108 at 1118 (D.C. Cir. 2007).

In *Sullivan v. CIA*, 992 F.2d 1249 (1st Cir.1993), the First Circuit Court of Appeals found that "the [Church] Committee's inquiry was not a direct investigation into CIA wrongdoing and...appellant's request for information… bears no claimed or readily discernible relationship to the investigation's purposes" and thus, did not constitute an exception to the operational files exemption. *Id*. at 1255. Thus, the CIA had a colorable basis in law for initially declining to search designated operational files. "Where an agency erroneously interprets the law, its withholdings will be reasonable if the interpretation has a colorable basis in law." *Barnard v. Department of Homeland Security*, 656 F. Supp.2d 91, 100 (D.D.C. 2009) (*quoting Burka v. United States Department of Health and Human Services*, 142 F.3d 12 86, 1288 (D.C. Cir.1998)). As the D.C. Circuit has emphasized, the government's position "need not be correct to qualify as reasonable." *See Fenster*, 617 F.2d at 744; *see also Piper v. Dep't. of Justice*, 339 F. Supp. 2d 13, 22 (D.D.C. 2004).

---

25 v. JPR, Inc., 136 F.3d 794, 808 (D.C. Cir. 1998); *Environmental Defense Fund v. Reilly*, 1 F.3d 1254, 1256 (D.C. Cir. 1993).

As noted above, Plaintiff also claims that he is entitled to fees based on this fourth factor because Defendant engaged in "dilatory tactics" beginning with the four month time period between the date of his letter and the date of CIA's response referring him to NARA. However, Plaintiff has failed to submit any evidence that any administrative delay in sending a response was done "merely to avoid embarrassment or to frustrate the requester." *Id*., *see also Tax Analysts v. U.S. Dept. of Justice*, 965 F.2d 1092, 1097, (D.C. Cir. 1992) ("reasonable-basis-in-law factor is intended to weed out those cases in which the government was 'recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior."), *Maydak v. U.S. Dept. of Justice*, 579 F. Supp.2d 105, 108 -109 (D.D.C. 2008) (" Although none of the foregoing four factors is solely dispositive, the 'failure to satisfy the fourth element [of an unreasonable withholding] may foreclose a claim for attorney fees' or costs.") (*citing Summers v. U.S. Dep't of Justice*, 477 F. Supp. 2d 56, 63 (D.D.C.2007) (*citing Chesapeake Bay Found*., 11 F.3d 211, 216-17(D.C. Cir.1993)).[5] This court has previously noted that "[t]he CIA has not only relied on reasonable interpretations but has also acted reasonably throughout this case." *Morley* at 265.

For reasons above, this factor also weighs in the favor of Defendant. Consequently, given the reasonableness of the government's action and the fact that little, if any, public benefit may be attributed to this litigation, Plaintiff is not entitled to a fee award in this case.

[5] Even when the delay in releasing records is challenged, that delay does not favor a fee award so long as the agency has not engaged in "obdurate behavior or bad faith." *See Republic of New Afrika v. FBI*, 645 F. Supp. 117, 122 (D.D.C. 1986) (finding no agency bad faith notwithstanding a three and one half year delay in producing documents).

As noted above, the provision for an award of attorney fees and other costs under the FOIA "'was not enacted to provide a reward for any litigant who successfully forces the government to disclose information it wished to withhold.'" *Davy* II, 550 F.3d at 1158 (*quoting Nationwide Bldg. Maint., Inc. v. Sampson*, 559 F.2d 704, 711 (D.C. Cir. 1977) (citing S. REP. NO. 93-854, at 17 (1974))). The factors which led to the award of fees in *Davy* are not present in this case. Plaintiff's motion for attorneys' fees and costs should be denied. Moreover, even if a plaintiff is found to be both eligible and entitled, the awarding of fees is still a decision within the discretion of the court considering the circumstances of the individual case.

C. **Plaintiff's Request Attorneys' Fees and Costs is Unreasonable and Excessive.**

Even if the Court concludes that Plaintiff is entitled to attorneys' fees, which it is not, Plaintiff clearly is not entitled to the $295,928.30 in requested fees. An award of attorneys' fees must be reasonable in light of the relief granted in the FOIA litigation and reasonable in light of legal practice. *See* 5 U.S.C. § 552(a)(4)(E). Plaintiff "has the burden of establishing the reasonableness of its fee request" and supporting documentation must be sufficiently detailed to enable the court to determine "'with a high degree of certainty that such hours were actually and reasonably expended.'" *Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 975 (D.C. Cir. 2004). Plaintiff is eligible for and entitled to attorney's fees and costs, he can only recover the fees and costs reasonably incurred in litigation. *Playboy Enters. v. United States Customs Serv*., 959 F. Supp. 11, 18 (D.D.C. 1997). Fees and costs should not be awarded for excessive, redundant, or otherwise unnecessary work. *Hensley v. Eckerhart*, 461 U.S. 424, 434-440 (1983).

This Court has the discretion to deny or adjust any request for attorneys' fees that is unreasonable on its face. *Weisberg v. U.S. Dep't of Justice*, 848 F.2d 1265, 1271-72 (D.C. Cir. 1988) (Weisberg III); *Oklahoma Aerotronics, Inc. v. United States*, 943 F.2d 1344, 1347 (D.C. Cir. 1991) ("[T]here is a point at which thorough and diligent litigation efforts become overkill. The district court must disallow claims for 'excessive, redundant, or otherwise unnecessary charges, . . . and the determination of how much to trim from a claim for fees is committed to the court's discretion."); *see American Petroleum Institute v. EPA*, 72 F.3d 907, 912-15 (D.C. Cir. 1996). Courts also have a particular duty to scrutinize bills for attorney's fees which the government is being called upon to pay. *Copeland v. Marshall*, 641 F.2d 880, 888 (D.C. Cir. 1980).

Only "the number of hours reasonably expended on the litigation," are recoverable. *Hensley*, 461 U.S. at 433 (emphasis added); *see also Blum v. Stenson*, 465 U.S. 886, 888 (1984); *Anthony v. Sullivan*, 982 F.2d 586 (D.C. Cir. 1993) (*relying on Hensley*). This formula contemplates that "the amount of time actually expended" is not necessarily the equivalent of "the amount of time reasonably expended." *Copeland*, 641 F.2d at 891. Importantly, there is no presumption that plaintiffs should be compensated for work merely because they provided a list of hours billed. To the contrary, the Court of Appeals has observed:

> Compiling raw totals of hours spent, however, does not complete the inquiry. It does not follow that the amount of time actually expended is the amount of time reasonably expended. . . . Thus, no compensation is due for nonproductive time. For example, where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time. Similarly, no compensation should be paid for time spent litigating claims upon which the party seeking the fee did not ultimately prevail.

Id. (emphasis in original).

As the D.C. Circuit made clear in *Environmental Defense Fund, Inc. v. Reilly*, 1 F.3d 1254 (D.C. Cir. 1993), when determining "the reasonableness of the hours reported, [courts] properly disallow 'time spent in duplicative, unorganized or otherwise unproductive effort.' " *Id.* at 1258, *quoting Jordan v. Dep't of Justice*, 691 F.2d 514, 518 (D.C. Cir. 1982). The inadequacy of the documentation of the fees claimed allows the Court to reduce the fee awarded accordingly. *Hensley*, 461 U.S. at 433.

The D.C. Circuit has also instructed that district courts exercising their discretion over applications for attorney's fees are:

> …duty bound to recall that Congress required [courts] to exercise [their] independent judgment on the reasonableness of all fees requested before taxing them against the United States.

In re North (Bush Fee Application), 59 F.3d 184, 189 (D.C. Cir. 1995).

In this case, Plaintiff's fee application is replete with excessive, redundant, and unnecessary charges. It presents a thousand small cuts which together amount to a large hemorrhage. Additionally Plaintiff's low degree of success does not warrant an award of fees in the amount claimed, if at all. It was the Defendant rather than the Plaintiff that prevailed in this case. The appellate court affirmed the district court in part and reversed in part - only the direction to conduct the two searches changed the legal relationship between the parties in this case; the other five items cited in the appellate decision merely sought further explanation or justification. On remand, the CIA prevailed on all of these. This Court determined that CIA record searches were adequate and all information withheld was properly exempt and granted CIA's renewed motion for summary judgment.

However, prior to examining Plaintiff's claim for fees, as a threshold matter, Plaintiff's attempts to use the alternative matrix applied in *Salazar v. District of Columbia*, 123 F. Supp. 2d 8 (D.D.C. 2000), to determine attorney's fees in this garden-variety FOIA case is inappropriate should be rejected. Fee Mot. at 41. *Salazar* was a protracted class action litigation filed by Medicaid applicants and recipients involving complex issues such as "medical necessity" determinations, contempt sanctions, etc. and has no application to this FOIA matter. *Id.*

Specifically, Plaintiff contends, without authority, that "the Court should adjust the baseline rate set by the U.S. Attorney's Office Matrix towards the Salazar rates, given "the eroding dollar value of the services rendered, the obduracy of the CIA, and the substantial and unique success achieved." Fee Mot. at 41. This case not only was a straightforward, noncomplex FOIA case in which Plaintiff had limited success (unlike *Salazar*), any enhancement of fees in this case is clearly unwarranted. Plaintiff has failed to demonstrate obduracy, let alone bad faith, on the part of CIA. Furthermore, Plaintiff's assertion that that his claim for attorneys' fees should be adjusted upward because of "the eroding dollar value of the services" is nothing but a poorly disguised claim for interest on any fees to which he may be entitled which is generally impermissable.[4]

[4] "In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986), See also United States v. Louisiana, 446 U.S. 253, 264- 65 (1980). The Supreme Court also observed that the "no-interest rule provides an added gloss of strictness" upon the equally well-settled rules that waivers of sovereign immunity are to be strictly construed in favor of the sovereign and that such waivers are not be enlarged beyond what the language requires. *Library of Congress*, 478 U.S. at 318. As courts have recognized, the payment of attorney's fees at current rates amounts to an award of interest. See, e.g., *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992).

However, even properly applying the appropriate U.S. Attorney's Laffey matrix to this case, Plaintiff has failed to satisfy its burden of demonstrating that he is entitled to $288,040 in fees.[5] Plaintiff bears the "burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." As the Supreme Court cautioned in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (civil rights case), its "generous" definition of prevailing party "brings the Plaintiffs only across the statutory threshold" that allows the trial court to consider what fee would be reasonable. Once past that threshold, the critical factor is the degree of success obtained. *Id*. at 435; *see also Farrar v. Hobby*, 506 U.S. 103, 105-107 (1992); *Goos v. National Ass'n of Realtors*, 997 F.2d 1565, 1568. Thus, courts should proportion fees to the 'significance of the overall relief obtained by the Plaintiff in relation to the hours reasonably expended on the litigation'" *F.J. Vollmer v. Magaw*, 102 F.3d 591,599 (D.C. Cir. 1996) (*citing Hensley*, 461 U.S. at 435).

Here, Plaintiff's fee submission is insufficient and unreasonable under established legal precedent in this jurisdiction, and thus, any fee award should be denied or substantially reduced. For example, in 2006 Plaintiff's counsel devoted approximately 75 hours totaling $31,900 to a cross motion for summary judgment phase of this litigation. The tasks involved included the drafting of a 45-page memorandum in support of his motion, with over 20 pages devoted to a discussion of the statutory and regulatory framework of FOIA, editorial back ground and legal discussion that Plaintiff ultimately did not prevail upon (i.e. the need for discovery, CIA's use of the proper standard for a FOIA request; the adequacy of CIA's Vaughn Index; and CIA's proper assertion of FOIA exemptions (b)(1), (b)(3), and (b)(7)(E)). *See* ECF.

[5] Although it does not appear that Plaintiff made an affirmative argument for "costs" the same arguments apply against the award of costs in this matter.

No 59. Six years later, after Summary Affirmance briefing, full briefing before the Court of Appeals, oral argument and full briefing of the first motion for fees, Plaintiff devoted another 38.8 hours on "Brief for Appellants" (9/15/12- 9/21/12) and 41.6 hours on "Reply brief" (12/7/12-12/16/12). In effect, Plaintiff's counsel devoted approximately an additional eight full business days to drafting a appellant's brief and another approximately eight full business days on the reply brief concerning essentially the same well-worn issues that the parties briefed years earlier. *See Nat'l Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (even a prevailing FOIA plaintiff is not entitled to fees or costs for "nonproductive time nor . . . for time expended on issues on which plaintiff did not ultimately prevail"). When the relative degree of success is considered, and other appropriate deductions made, a substantial deduction is warranted. As the Supreme Court has made clear, a reasonable attorney fee is not simply the product of hours expended multiplied by the proper hourly rate, and "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees." *Hensley*, 461 U.S. at 440.

Thus, courts should proportion fees to the "'significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.'" *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 599 (D.C. Cir. 1996) (*citing Hensley*, 461 U.S. at 435). *See also Waterman S.S. Corp. v. Maritime Subsidy Bd.*, 901 F.2d 1119, 1123 (D.C. Cir. 1990) (proportionality comes in after an adequate victory is found and the court considers what share of the fees is reimbursable).

Plaintiff contends that in view of his "repeated successes and the significance of what he obtained as a result, a substantial amount of the fees should be awarded." Fee Mot. at 40.

While Plaintiff's counsel states that he has "eliminated many hours which devoted to fruitless attempts to discovery[sic]" and accordingly reduces his claim by 30% to more than $295,928.30 and upwards of $494,652.41 (under Salazar rate). This is clearly insufficient in that it does not accurately reflect reductions for his other unsuccessful claims in this case.

For example, Plaintiff petition does not reflect any disallowances for unsuccessful cross motions for summary judgment nor the success of defendant's successful motions and renewed motions for summary judgment. It also inaccurately portrays the success of appellate rulings in this case and ignores the Circuit Court's upholding of the adequacy of CIA's records search and the exemptions claimed by the CIA.[6] *See*, e.g., *Anthony v. Sullivan*, 982 F. 2d 586, 589 (D.C. Cir. 1993); *Martin v. Lauer*, 740 F.2d 36, 47 (D.C. Cir. 1984) (Plaintiff not entitled to fees for time spent on unsuccessful claims that are distinct from successful claims); *National Security Archive*, 530 F. Supp. 2d at 209 (inability to segregate time spent on FOIA claim it won from time spent on claim lost militates against award of fees sought.) The issues on which Plaintiff can claim success are segregable from those on which Defendant prevailed and thus, the award of any fees should be substantially reduced. Even if the issues are deemed inter-related because they "shared a common core of facts," they should still be substantially reduced because in assessing the fees for related claims, "a court should simply compute the

[6] The February 1, 2008 appellate decision, Court upheld this Court's determination concerning Defendant's withholding based on FOIA exemptions (b)(1), (b)(3) and b(7)(E). Fee Motion, Ex. 10 Lesar att. 3 at 8-9. Moreover, the Court of Appeals' decision only required the CIA to conduct two records searches. *Morley v. CIA*, 508 F.3d 1108, 1116-19 (D.C. Cir. 2007)**.** The remainder of the decision merely required CIA to provide additional explanation regarding CIA's search for records, assertion of *Glomar* response, or assertions of FOIA exemptions (b)(2), (b)(5) and (b)(6), i.e., all procedural matters, which did not change the relationship of the parties. *see, e.g., Barnard v. Dep't of Homeland Security,* 656 F. Supp 2d 91, 99 (D.D.C. 2009)(holding that court order directing the parties to indicate whether there were any production issues concerning certain records was procedural in nature and did not change the relationship between the parties) Moreover, they are issues on which the CIA ultimately prevailed.

appropriate fee as a function of degree of success." *George Hyman Const. Co. v. Brooks*, 963 F.2d 1532, 1537 (D.C. Cir. 1992). *See Goos*, 997 F.2d at 1569(the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation); *Pigford v. Vilsack* 613 F.Supp.2d 78, 83-85 (D.D.C., 2009).

Defendant also notes that Plaintiff reinserted many of the charges from his initial filing which he previously acknowledged were improper (ex. Failure to exclude non-productive time (6/9/2004 "Open America Stay") and failed to accurately apportion success within specific pleadings. *See* ECFNo. 111, Plaintiff's Reply to Defendant's Opposition to the (first) Motion for Fees, at 20-21. Nothing in the appeals impacted these particular charges that would justify their inclusion at this time (either on the merits or where insufficient documentation has been provided.) .

In addition Plaintiff's inclusion of time spent on "mediation " is not reasonable given that the purpose of the settlement discussions was an attempt to reach agreement on reasonable fees and costs without the need for judicial intervention. See Fee Motion, Ex. 10 Lesar Declaration, Att. 2. Plaintiff's claim of 42 hours of compensable time related to mediation is also excessive. *Id*. at 16-21. In the event of unsuccessful mediation--both parties should bear their own costs. That the settlement discussions were ultimately unsuccessful has no bearing on whether Plaintiff is entitled to an award of attorneys' fees and costs here. *See Role Models Am*., 353 F.3d at 970 (noting that courts should review fee applications carefully to ensure that taxpayers only reimburse prevailing parties for reasonable fees and expenses that contributed to the results achieved).

With respect to the fee petition in general, Plaintiff's counsel admits that he has had substantial experience in litigating fees under the FOIA and Defendant notes that he was the attorney of record in the *Davy* case. *See also* Fee Mot. Lesar Declaration, Att. 3. Regardless, as described above, the time submitted for preparation of briefs, motions, and mediation are illustrative examples of excessive and inappropriate claims for reimbursement. Particularly, it is unreasonable for experienced counsel -- particularly one who touts "extensive practice litigating Freedom of Information Act (FOIA) cases... with 43 years of experience in [the FOIA] field" to claim the amount of compensable time in Plaintiff's fee motions themselves. *See*, Fee Mot., Ex. 10, Lesar Decl. ¶ 3. Plaintiff claims it required approximately 87 hours to prepare Plaintiff's first fee motion in 2010, and now claims an additional 45 hours to draft the latest fee motion, despite the evidence that many of the arguments and claims in the fee motions remained unchanged from the first submission. *Id*. at Att. 2 at 14-16; 25-27. Indeed, the excessive number of hours expended on preparing the fee motions further reflect the failure to exercise any billing judgment whatsoever.

In addition to the issue of reimbursement for unsuccessful or inappropriate claims, in several instances Plaintiff's claims are insufficiently documented. For example, some charges are so cryptic as to be meaningless: "research" (ex. March 26, 2005, December 15, 2005, December16, 2005, June 10, 2006, June 21, 2006, and June 24, 2006, totaling 9.5 hours). *See Poulsen v. United States Customs and Border Protection*, 2007 WL 160945 (N.D.Cal), deducting "research" as too general to provide any meaningful indication as to how time was spent. A fee petitioner must submit documentation supporting fee requests, and the documentation must be sufficiently detailed to permit the Court to make a determination of

whether the claimed hours are justified. *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982). Block Billing is defined as time entries which make "it impossible for the court to meet its responsibility of determining with a high degree of certainty that the hours billed were reasonable" which presents a problem when a party only prevails on part of a claim and the court cannot discern what hours were spent on that portion of the case where the Plaintiff prevailed. *DL v. District of Columbia*, 256 F.R.D. 239 (D.D.C. 2009). Plaintiff's use of block billing here is ubiquitous and as such, in the event attorney's fees are awarded the Court should reduce those fees. (ex. Fee Mot. Lesar Decl., Att. 3 at 14(7/7/07); 20 (7/19/10); 23(2/7/11); 27 (2/6/12) .

With regard to other billing entries, Plaintiff fails to explain or clarify why the charges are necessary or appropriate, references to communications between Plaintiff's Counsel and individuals whose identities are a mystery: February 17, 2005 Dustin Park; March 23, 2005 Megan Rose; June 17, 2005 P. Wolf; May 6 2007 N. Stanley; (none of these individuals are parties or declarants according to Defendant's records). Fee Motion Ex. 10 Lesar att. 3. at 3-5. In *Role Models*, the court held that an applicant fails to meet its "'heavy obligation to present well-documented claims'" when its time entries consist of identical and repeated one-line entries such as "'research and writing for appellate brief.'" 353 F.3d at 971 (*citing Kennecott*, 804 F.2d at 767). Here, Plaintiff has merely presented summary block billing records and has not bothered to justify the reasonableness of the fee amounts sought for various tasks in this litigation. *See* Fee. Mot., Lesar Decl. Att. 2.

However, even if the Court were to decide that fees are appropriate, the amount of the award should be adjusted downward from Plaintiff's request to reflect the unreasonableness of

the number and type of hours claimed for preparation of the fee motions. Specifically, Plaintiff's requested fees should be reduced on the basis that a certain number of the hours expended on the litigation were not reasonable in light of counsel's experience and the nature of the work produced as explained above. Should the Court determine that attorney's fees and costs are warranted here, which Defendant contends the Court should not, the request of $295,928.30, should be reduced by half of the alleged fees concerning the limited areas of appellate success or $147, 964. This amount should be further reduced by a similar percentage proportion as in *Role Models America, Inc.,* to no more than one quarter of the fees requested, or an amount of $36,579. *See Judicial Watch, Inc. v. U.S. Dept. of Homeland Sec*., No. 08-2133 EGS/DAR, 2009 WL 1743757, at *9 (D.D.C. June 15, 2009) (finding plaintiff's fee request, which included a total of 26 hours expended on litigation of the dispute with respect to attorney's fees and expenses, to be excessive and reducing the total award by 20 percent).

V. CONCLUSION

For the above reasons, the Defendant respectfully requests that Plaintiff's Motion for Attorney's Fees and Costs be denied. A proposed order is attached.

Respectfully submitted,

RONALD C. MACHEN JR, Bar # 447889
United States Attorney
for the District of Columbia

DANIEL VAN HORN ,Bar # 924092
Chief, Civil Division

By: _____/s_____
BENTON PETERSON ,Bar #1029849
Assistant U.S. Attorney
555 4th Street, N.W.
Washington, D.C. 20530
(202) 514-7238
Benton. Peterson@usdoj.gov