

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 08-5379**  
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**JUDICIAL WATCH, INC.,**

**Plaintiff-Appellee,**

**v.**

**BUREAU OF LAND MANAGEMENT,**

**Defendant-Appellant.**

—————

**ON APPEAL FROM THE U.S. DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

—————

**BRIEF OF APPELLEE JUDICIAL WATCH, INC.**

—————

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**CERTIFICATE AS TO PARTIES, RULINGS,  
AND RELATED CASES**

Pursuant to Cir. R. 28(a)(1), counsel provides the following information as to parties, rulings, and related cases:

**(A) Parties and Amici**

*The following parties, interveners, and amici curiae appeared, or sought to appear, below:*

Plaintiff: Judicial Watch, Inc.

Defendant: Bureau of Land Management

*The following parties, interveners, and amici curiae are before this Court on appeal:*

Plaintiff-Appellee: Judicial Watch, Inc.

Defendant-Appellant: Bureau of Land Management

**(B) Ruling Under Review**

The ruling under review is the Opinion and Order of the United States District Court for the District of Columbia (Lamberth, J.) decided on June 27, 2008. The ruling can be found at Joint Appendix, page 114, and is published as *Judicial Watch, Inc. v. Bureau of Land Management*, 562. F. Supp. 2d 159 (D.D.C. 2008).

**(C) Related Cases**

Judicial Watch does not believe that there are any related cases within the meaning of Local R. 28(a)(1)(C).

/s/ Michael Bekesha

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## **GLOSSARY OF ABBREVIATIONS**

The 2007 Act	OPEN Government Act of 2007
BLM	Bureau of Land Management
BLM's Brief	Revised Brief for Appellant Bureau of Land Management
The District Court	The United States District Court for the District of Columbia
FOIA	Freedom of Information Act
JA	Joint Appendix
Judicial Watch	Judicial Watch, Inc.
Mem. Op.	Memorandum Opinion
JW's Reply	Plaintiff's Reply in Support of Its Verified Motion for an Award of Attorneys' Fees and Litigation Expenses

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## STATUTES AND REGULATIONS

5 U.S.C. §552(a)(4)(E):

(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has 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.

## STATEMENT OF THE FACTS

On March 8, 2007, Judicial Watch, Inc. (“Judicial Watch”) requested records of the Bureau of Land Management (“BLM”) pursuant to the Freedom of Information Act (“FOIA”). Complaint (Joint Appendix (“JA”) 5). Due to the initial lack of response, Judicial Watch contacted BLM several times. On April 27, 2007, July 10, 2007, July 31, 2007, and August 3, 2007, BLM informed Judicial Watch that a release of records was forthcoming shortly; yet, BLM never produced any documents. Plaintiff’s Reply in Support of Its Verified Motion for an Award of Attorneys’ Fees and Litigation Expenses (“JW’s Reply”) (JA 112).

On September 5, 2007, Judicial Watch filed its Complaint in the United States District Court for the District of Columbia (“the District Court”). *Id.* On September 20, 2007, BLM finally produced responsive documents. *Id.* Between September 20, 2007 and January 7, 2008, Judicial Watch and BLM conferred regarding the sufficiency of BLM’s search and release of relevant records. Memorandum Opinion (“Mem. Op.”) at 3 (JA 116). On December 31, 2007, President George W. Bush signed the OPEN Government Act of 2007 (“the 2007 Act”), which took effect upon signing. *Id.* at 7 (JA 120).

Subsequent to the enactment of the statute, on January 7, 2008, Judicial Watch and BLM reached a settlement agreement and jointly filed a stipulation of

entry of judgment in the District Court. *Id.* at 3 (JA 116). On January 22, 2008, Judicial Watch filed a motion for an award of attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E)(ii)(II), and the District Court awarded such fees on June 27, 2008. *Id.* at 3-4 (JA 116-117); Order (JA 140).

### **SUMMARY OF ARGUMENT**

Under FOIA, a court may assess attorneys' fees if a complainant satisfies both the eligibility and the entitlement requirements. Since the 2007 Act changed the eligibility requirement, BLM's appeal concerns the eligibility component of the attorneys' fees assessment. The District Court granted Judicial Watch's motion for an award of attorneys' fees based on the law in effect when the parties reached a settlement agreement. There was no retroactive application of the 2007 Act, because, on January 7, 2008, when the two parties agreed to settle their FOIA dispute, the 2007 Act was in effect. Since the law in effect when the settlement occurred is the controlling law, Judicial Watch was eligible for an award of attorneys' fees under the plain, unambiguous language of the 2007 Act. As the District Court found, Judicial Watch substantially prevailed because "it obtained its desired relief, the release of various documents, due to a voluntary change in position by" BLM. Mem. Op. at 19 (JA 132).

The plain, unambiguous language of the 2007 Act does not contain a requirement that a complainant's lawsuit act as a "catalyst" to an agency's "voluntary change in position." Although the District Court found that Judicial Watch substantially prevailed under the plain, unambiguous language of the 2007 Act, it also analyzed, in dicta, the 2007 Act as if a "catalyst theory" had been incorporated. In doing so, the District Court stated, "In sharp contrast to the lackadaisical response throughout the previous six months, [BLM] disclosed the requested documents shortly after this action was commenced." Mem. Op. at 21 (JA 134). Under this alternative analysis, the District Court found that Judicial Watch's Complaint was a catalyst behind BLM's voluntary change in position, and, therefore, Judicial Watch was eligible for an award of attorneys' fees.

Moreover, Judicial Watch was entitled to an award of attorneys' fees. As the District Court found, Judicial Watch satisfied the four part test: a public benefit derived from the case; there was no commercial benefit to Judicial Watch; Judicial Watch sought the records to inform the public of corruption; and BLM had no reasonable basis for withholding the requested records. *Id.* at 22-24 (JA 135-137).

Finally, BLM does not appeal the amount of the award; therefore, Judicial Watch is eligible for, and entitled to, an award of \$ 3,237.75 for attorneys' fees and \$ 367.82 for other litigation expenses. Mem. Op. At 25 (JA 138).

## **ARGUMENT**

### **I. The Assessment of an Award of Attorneys' Fees Is a Two-Step Process.**

For a complainant to recover an award of attorneys' fees, a court must determine: 1) whether a complainant is eligible for an award of attorneys' fees and 2) whether a complainant is entitled to an award of attorneys' fees. *Edmonds v. Federal Bureau of Investigation*, 417 F.3d 1319, 1327 (D.C. Cir. 2005). A complainant becomes eligible for an award of attorneys' fees if a complainant "substantially prevails" in the litigation. *Id.* To be entitled to an award of attorneys' fees, the court must assess four factors. *Id.* Although the assessment is a two-step process, the 2007 Act changed the definition of the "substantially prevails" provision and, therefore, only changed the standard for which a complainant is eligible for an award of attorneys' fees.

**II. The 2007 Act Was the Law that Existed When the Settlement Occurred and, Therefore, Was Properly Applied in This Case.**

**A. The 2007 Act authorized prospective relief, and its application was not retroactive.**

BLM asserts that the District Court impermissibly applied the 2007 Act when it awarded Judicial Watch attorneys' fees. BLM contends that such application was retroactive. However, BLM's brief only assumes that the application of the 2007 Act would be retroactive; nowhere does it address why the Court should treat Judicial Watch's motion for an award of attorneys' fees as anything but applying the law that existed when the settlement occurred.

BLM cites *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), without first addressing whether *Landgraf* should even apply. Although *Landgraf* is most recognized for setting the standards for permissible retroactive application of a statute, the Court also stated, "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Landgraf*, 511 U.S. at 273. That is the precise situation in this case.

On December 31, 2007, the 2007 Act took effect and allowed for complainants to seek relief based on a new eligibility standard. On January 7, 2008, the parties settled this case. On January 22, 2008, Judicial Watch requested that the District Court award reasonable attorneys' fees as authorized by law.

Prior to the January 7, 2008 settlement, Judicial Watch's rights to relief operated *in futuro*. *Id.* at 274. Since the parties had reached a settlement agreement on January 7, 2008, after the enactment of the 2007 Act, the application of the statute was not retroactive.

**B. The three cases cited by BLM clearly show that Judicial Watch was eligible for an award of attorneys' fees.**

BLM's argument relies heavily on three recent decisions concerning the retroactive application of the 2007 Act. However, these cases do not support BLM's assertion that the 2007 Act was applied retroactively in this case. In fact, the cases support the exactly opposite conclusion. As the Supreme Court made clear, a court must assess the legal effect of conduct "under the law that existed when the conduct took place." *Landgraf*, 511 U.S. at 265 (citing *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). In all three cases, the courts, in deciding whether the 2007 Act could be applied retroactively, found for the government because the settlements occurred prior to the enactment of the 2007 Act. In other words, the courts assessed the legal effect of the parties' agreement to settle.

The first case that BLM cites is *Summers v. Department of Justice*, 569 F.3d 500 (D.C. Cir. 2009). BLM contends that *Summers* resolves this case beyond

dispute. Revised Brief for Appellant Bureau of Land Management (“BLM’s Brief”) at 23. However, BLM, at no time, addresses why this Court in *Summers* held that the 2007 Act applied retroactively. In May 1998, Anthony Summers sent a FOIA request to the Federal Bureau of Investigation, and, in the same year, filed a complaint in the District Court. After six years of litigation, on April 13, 2004, the District Court granted summary judgment in favor of the Federal Bureau of Investigation. Summers appealed the ruling, and the Federal Bureau of Investigation disclosed the withheld information. *Summers*, 569 F.3d at 502. On December 16, 2005, the parties reached a settlement, and Summers dismissed the appeal. *Id.* Summers subsequently moved for an award of attorneys’ fees. *Summers v. U.S. Dep’t of Justice*, 2007 U.S. Dist. LEXIS 52704 (D.D.C. July 23, 2007). The Magistrate Judge denied the motion, which was upheld by the District Court on July 23, 2007. *Id.* Most significantly, the settlement occurred more than two years before the enactment of the 2007 Act, and the motion for an award of attorneys’ fees was filed and denied more than five months prior to the 2007 Act took effect. Under these specific circumstances, this Court held that Summers was not eligible for an award of attorneys’ fees under the 2007 Act.

In reaching this conclusion, this Court specifically stated that the “[a]pplication of the 2007 Act to facts predating its passage obviously would

expose the Government to increased liability for past conduct by raising the possibility the Government would be liable for attorneys' fees in *a case that was settled* and, therefore, not an occasion for paying attorneys' fees under the pre-amendment rule." *Summers*, 569 F.3d at 503 (emphasis added). This Court reached its determination based on the fact that the *Summers* dispute had been settled before the 2007 Act took effect. Moreover, as BLM asserts:

The Government's calculus in settling *Summers*' case would have been different had it known the ["catalyst theory would] apply; its *decision to settle* reflects a calculation that the cost associated with disclosing the disputed information to *Summers* was less than the cost of further litigation, including the uncertainty concerning both the outcome and whether the district court would award the plaintiff attorneys' fees.

BLM's Brief at 25; *Summers*, 569 F.3d at 503 (emphasis added). When the government agreed to settle the case with *Summers* on December 16, 2005, the 2007 Act was two years from becoming law. In calculating costs, the government only had to concern itself with an award of attorneys' fees if the Court ruled in *Summers*' favor.<sup>1</sup>

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<sup>1</sup> As BLM explained, prior to December 31, 2007, only complainants who were awarded relief by an enforceable judgment or a court-ordered consent decree could recover an award of attorneys' fees. BLM's Brief at 16-17.

In contrast, on January 7, 2008, when BLM and Judicial Watch settled their dispute by filing a joint stipulation in the District Court, BLM did not have to clairvoyantly calculate costs. The 2007 Act had already gone into effect.

Although Judicial Watch recognizes that the law was relatively new, BLM cannot argue that it did not know the law existed or that the law would apply. Moreover, the joint stipulation expressly stated, “Plaintiff reserves the right to seek an award of attorneys’ fees.” Stipulation of Entry of Judgment (JA 11). When BLM agreed to settle on January 7, 2008, any calculation of costs would have included attorneys’ fees pursuant to the 2007 Act.

BLM argues that the *Summers* decision settles the general issue of whether the 2007 Act may be applied retroactively. Judicial Watch is not rearguing the *Summers* decision. Judicial Watch asserts that the District Court’s application of the 2007 Act in this case was not a retroactive application. It did nothing more than apply the “law that existed when the conduct took place.” Under *Summers*, because of the finality of an agreement to settle, the only significant conduct was the filing of the joint stipulation on January 7, 2008, after the enactment of the 2007 Act.

The second case that BLM cites is *Zarcon v. National Labor Relations Bd.*, 578 F.3d 892 (8th Cir. 2009). On October 19, 2007, the parties in *Zarcon* filed a

joint stipulation in which they informed the court that they had reached a settlement. *Zarcon v. Nat'l Labor Relations Bd.*, 2008 U.S. Dist. LEXIS 52722, \*2 (Mar. 25, 2008). On November 29, 2007, the plaintiff in *Zarcon* filed a motion for an award of attorneys' fees. *Id.* The parties in *Zarcon* settled the case more than two months before the 2007 Act was enacted, and the plaintiff moved for an award of attorneys' fees more than one month prior to its enactment. Although the settlement in *Zarcon* occurred close in time to the enactment, it still occurred before the 2007 Act was enacted.

In *Zarcon*, as BLM states in its brief, the court generally held “that the [2007] Act did not apply retroactively to [a] *pending* FOIA fee request.” BLM’s Brief at 25 (emphasis added). Specifically, the U.S. Court of Appeals for the Eighth Circuit held:

At the time the NLRB *settled* this case, our cases clearly demonstrated that the “catalyst theory” would not be an available means of recovering costs under FOIA. Applying the [2007] Act to this case would, therefore, increase the NLRB’s “liability for past conduct, [and] impose new duties with respect to transactions already completed.” *Landgraf*, 511 U.S. at 280.

*Zarcon*, 578 F.3d at 896 (emphasis added). In *Zarcon*, as in *Summers*, the court found the critical conduct to be the settlement of the case. No other conduct by

the government mattered to the court when it determined that the 2007 Act could not be permissibly applied as taking retroactive effect.

In contrast, Judicial Watch's motion for an award of attorneys' fees was not pending at the time the 2007 Act took effect. Nor was the case even settled at that time. In other words, under the court's analysis, the application of the 2007 Act to Judicial Watch's motion was not retroactive because BLM and Judicial Watch settled their dispute on January 7, 2008, after the enactment of the 2007 Act.

The third case that BLM cites is *Oregon Natural Desert Association v. Locke*, 572 F.3d 610 (9th Cir. 2009). Like in the prior two cases, the settlement took place before the 2007 Act took effect. In fact, the court in *Locke* had already reached a decision on the plaintiff's motion for an award of attorneys' fees: "The district court entered its attorney[s'] fees order on April 24, 2006." *Id.* at 616. In other words, in *Locke*, the district court's proceedings were complete almost two years before the 2007 Act took effect. The 2007 Act was enacted only "while th[e] appeal was pending." *Id.* Once again, the specific circumstances in *Locke* vastly differ from those currently before the Court. BLM and Judicial Watch settled their dispute *after* the enactment of the 2007 Act; the District Court proceedings were ongoing and not complete on December 31, 2007.

**C. The factual time line supports Judicial Watch's position that the application of the 2007 Act was not retroactive.**

As evident above, the factual time line in this case is very different from those in the three cases cited by BLM. In an attempt to argue away the distinguishing facts, BLM incorrectly asserts that the relevant conduct occurred in September when BLM released responsive records to Judicial Watch. However, the release of responsive records did not end the dispute. Between September 20, 2007 and January 7, 2008, the complete time line unfolded. Mem. Op. at 3 (JA 116). On October 16, 2007, the two parties met "in an effort to resolve the impasse without further litigation." *Id.* At such time, Judicial Watch expressed its concern about the sufficiency of BLM's search and production. Subsequently, BLM performed a supplemental search and provided Judicial Watch with the results along with two affidavits on or about December 19, 2007. BLM's Brief at 8-9. With a summary judgment deadline looming, Judicial Watch reviewed the affidavits to determine whether it was satisfied with BLM's actions. *Id.* After determining that the supplemental search was adequate, Judicial Watch and BLM settled the case on January 7, 2008, when the parties filed a joint stipulation in the District Court. *Id.*

The conduct of both parties, including that of BLM, did not end on September 20, 2007, or October 16, 2007, or even December 18, 2007. When the 2007 Act took effect on December 31, 2007, the dispute was ongoing. It was only on January 7, 2008, after the enactment of the 2007 Act, that the dispute was resolved and finality existed. The settlement of the case and the filing of the joint stipulation occurred after the enactment of the 2007 Act. BLM's argument that the 2007 Act was applied retroactively in this case based on the September 20, 2007 date is nothing more than smoke and mirrors. Therefore, the 2007 Act was properly applied as the law that existed when the relevant conduct took place.

**III. The District Court Correctly Concluded That Judicial Watch Was Eligible for an Award of Attorneys' Fees under the 2007 Act.**

Since this Court in *Summers* held that the 2007 Act did not apply to the specific facts of that particular case, it did not have to, nor did it, interpret the meaning of the 2007 Act. *Summers*, 569 F.3d 505. Therefore, whether the 2007 Act created a new standard or incorporated a "catalyst theory" is one of first impression. Judicial Watch asserts that the District Court's plain language interpretation of the 2007 Act is the only proper interpretation and that there is no need to look beyond the plain, unambiguous language of the 2007 Act to apply it. Mem. Op. at 19 (JA 132).

**A. The language of the 2007 Act is plain and unambiguous.**

The 2007 Act amended the eligibility standard to plainly state: “[A] complainant has substantially prevailed if the complainant has obtained relief through ... a voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial.” 5 U.S.C. § 552(a)(4)(E)(ii)(II).

Although the language is clear, BLM wants to look beyond the plain, unambiguous language of the 2007 Act. Although BLM does not assert that the 2007 Act is ambiguous, BLM argues that the Court should interpret the 2007 Act as if it incorporated a “catalyst theory.” BLM’s Brief at 34. However, there is no reason to ignore the plain, unambiguous language of the 2007 Act. As this Court has stated:

[W]e must not overlook the general rule of statutory construction that such intent is to be found in the language employed. When the words are plain ... it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.

*De Ruiz v. De Ruiz*, 88 F.2d 752, 753-754 (D.C. Cir. 1936).

Even if the Court were to look beyond the plain, unambiguous language of the 2007 Act, BLM fails to support its argument in any way. BLM’s Brief at 34-35. BLM does not even provide the Court with legislative history to support its

assertion.<sup>2</sup> Nowhere in the text of the 2007 Act do the words “catalyst” or “caused” appear. As the U.S. Supreme Court has explained:

The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. ... No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.

*United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897). If Congress sought to incorporate a “catalyst theory,” it could have done so; it knew of, and understood, the varying case law. If it wanted to, Congress could have easily incorporated a “catalyst theory” by inserting language similar to: “[A complainant] establish[es] eligibility by showing that the lawsuit was reasonably necessary and the litigation substantially caused the requested records to be released.” Mem. Op. at 20 (JA 133) (*citing Burka v. United States Dep’t of Health and Human Serv.*, 142 F.3d

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<sup>2</sup> In fact, the legislative history does not suggest that the 2007 Act incorporated a “catalyst theory.” It only shows that Congress sought to abolish the *Buckhannon* standard. Mem. Op. at 8 (JA 121) (*citing* 153 Cong. Rec. S15701-04 (daily ed. Dec. 14, 2007) (“*The bill clarifies that Buckhannon does not apply to FOIA cases. Under the bill, a FOIA requester can obtain attorneys’ fees when he or she files a lawsuit to obtain records from the Government and the Government releases those records before the court orders them to do so.*” (emphasis added by the District Court))).

1286, 1288 (D.C. Cir. 1998)). Instead, Congress passed and the President signed a law which allows complainants – who obtain their desired relief due to a voluntary change in position by an agency, if their claim is not insubstantial – to be eligible for an award of attorneys’ fees.

**B. The District Court properly applied the plain, unambiguous language of the 2007 Act.**

In interpreting the 2007 Act, the District Court used the plain language method of analysis. Mem. Op. at 19 (JA 132) (“The Supreme Court has held that, ‘[w]hen the statute’s language is plain, the sole function of the courts ... is to enforce it according to its terms.’” *Id.* (citing *Dodd v. United States*, 545 U.S. 353, 359 (2005)). Based on the plain, unambiguous language of the 2007 Act, the District Court held:

[Judicial Watch] has clearly “substantially prevailed” pursuant to FOIA: it obtained its desired relief, the release of various documents, due to a voluntary change in position by [BLM], and its claim was substantial. Since this is the sole criterion that must be met in order to have “substantially prevailed” under the statute, [Judicial Watch] is [eligible for] attorney[s’] fees.

Mem. Op. At 19 (JA 132).

The District Court applied the law to the facts and found for Judicial Watch. BLM received Judicial Watch’s FOIA request on March 9, 2007. JW’s Reply at 5

(JA 111). BLM was required to produce responsive documents by April 6, 2007.

*Id.* Subsequently, in response to Judicial Watch's inquiries, BLM repeatedly claimed it was processing the FOIA request and was close to producing documents, but no documents were ever produced. *Id.* at 5-6 (JA 111-112).

Instead, Judicial Watch received the following E-mails from BLM regarding the status of its FOIA request:

- April 27, 2007: BLM promises to "complete processing by May 11, 2007," or that it will contact Judicial Watch by May 4, 2007, if additional time for processing is needed.
- July 10, 2007: BLM claims "that within the next 2 days, the package will go to the Solicitor's office for review/approval before release. We anticipate completion of the process with the next 10 days."
- July 31, 2007: BLM again claims "[y]our FOIA request is near completion and I hope to have it to the Solicitor's office by Friday August 3rd."
- August 3, 2007: BLM yet again claims "[w]e are very near completion of review on your FOIA request . . . Your package should be in the Solicitor's Office no later than Tuesday, August 7th."

*Id.* at 6 (JA 112). Judicial Watch received no further communication from BLM, much less any responsive documents, until after it filed the Complaint on September 5, 2007. Mem. Op. at 3 (JA 116). On September 20, 2007, after the Complaint was filed, BLM produced responsive documents. *Id.*

In other words, prior to the Complaint, BLM repeatedly promised Judicial Watch that it would release documents, but it repeatedly failed to produce responsive records by the dates on which BLM claimed that it would. It was only after Judicial Watch filed the Complaint that BLM released the responsive documents. Under the plain, unambiguous language of the 2007 Act, this constitutes a voluntary change in position by BLM. Accordingly and because Judicial Watch's claim was not insubstantial, Judicial Watch "substantially prevailed" and is, therefore, eligible for an award of attorneys' fees.

**C. Even under a "catalyst theory," Judicial Watch was eligible for an award of attorneys' fees.**

Although the District Court also analyzed Judicial Watch's motion for an award of attorneys' fees as if it incorporated a "catalyst theory," the District Court did not have to do so. The District Court explained, "Though conclusions drawn from [the plain language] analysis alone afford [Judicial Watch] a right to collect attorney's fees, [Judicial Watch] is *also* [eligible for attorneys'] fees" under a "catalyst theory." Mem. Op. at 20 (JA 133) (emphasis added).

Even if the 2007 Act incorporated a "catalyst theory," Judicial Watch would be eligible for an award of attorneys' fees. BLM asserts, "[W]hen the release of documents occurred, the parties' expectations were that the 'catalyst theory' was

not a basis on which Judicial Watch could ‘substantially prevail.’” BLM’s Brief at 26. When BLM released documents, it did so with the Complaint in mind. If the Complaint was not a catalyst for the decision to release the documents, BLM would not have even considered the implications of the Complaint.

Moreover, under this alternative analysis, the District Court found Judicial Watch to be eligible for an award of attorneys’ fees. Mem. Op. At 20 (JA 133).

Based on the same facts recited above, the District Court found:

[T]he record here indicates that [Judicial Watch] may not have received an appropriate response to its FOIA request absent the filing of the lawsuit. Indeed, [BLM] had committed to releasing information four separate times, and it had each time reneged without any meaningful explanation. In sharp contrast to its lackadaisical response throughout the previous six months, [BLM] disclosed the requested documents shortly after this action was commenced by [Judicial Watch]. Such a finding certainly establishes a causal connection between the filing of the complaint and the release of documents.

Mem. Op. at 21 (JA 134). The District Court had no hesitation in determining that, without Judicial Watch’s filing of the Complaint, BLM may never have released responsive documents.

#### **IV. The District Court Correctly Concluded That Judicial Watch Was Entitled to an Award of Attorneys' Fees.**

The District Court also found that Judicial Watch was entitled to an award of attorneys' fees. Mem. Op. at 22 (JA 135). In weighing the four factors -- (1) the benefit to the public; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) whether the Government had a reasonable basis for withholding requested information -- the District Court found "[e]ach factor contributes to the conclusion that [Judicial Watch] is entitled to an award of attorney[s'] fees." *Id.* The District Court had no doubts that Judicial Watch's FOIA request satisfied the requirements, and BLM does not even attempt to argue that the District Court was incorrect in its analysis. BLM only asserts that it "never 'withheld' any documents at all." BLM's Brief at 40.

BLM made the same unpersuasive argument in the District Court. Mem. Op. at 23 (JA 136). Contrary to BLM's argument, the District Court found that "[c]ourts have generally required that [government agencies], at a minimum, provide meaningful justification for inactivity" and, in this instance, that BLM's "justifications for its inaction fall short of meaningful." *Id.* Moreover, the District

Court explained:

[BLM] continually assured [Judicial Watch] that its request would soon be released, only to subsequently renege on these commitments, citing as justification sweeping assertions that it was “short-staffed” and saddled with other FOIA requests demanding immediate attention.

*Id.* The District Court correctly found BLM’s pre-litigation response to be unacceptable and, therefore, found its withholding of responsive records to be unreasonable. Therefore, Judicial Watch is entitled to an award of attorneys’ fees.

**V. Judicial Watch Is Eligible for, and Entitled to, the Full Amount Awarded by the District Court.**

The District Court awarded Judicial Watch \$ 3,237.75 for attorneys’ fees and \$ 367.82 for other litigation expenses. Mem. Op. At 25 (JA 138). BLM does not challenge the validity of Judicial Watch’s calculation and the amount of the award. *Id.* Therefore, Judicial Watch is eligible for, and entitled to, an award of \$ 3,605.57.

## CONCLUSION

For the foregoing reasons, the District Court's award of attorneys' fees and other litigation expenses should be affirmed, and Judicial Watch should be awarded additional attorneys' fees and costs for its time and expenses in defending this appeal.

Dated: February 4, 2010

Respectfully submitted,

JUDICIAL WATCH, INC.

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### **CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 4,742 words (using WordPerfect 11), and has been prepared in a proportional Times New Roman, 14-point font.

/s/ Michael Bekesha

## CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February 2010, I filed via the CM/ECF system and by hand (the original and eight copies of) the foregoing **BRIEF OF APPELLEE JUDICIAL WATCH, INC.** with the Court and served via the CM/ECF system and by First-Class U.S. Mail (two copies of) the foregoing **BRIEF OF APPELLEE JUDICIAL WATCH, INC.** to:

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