

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

JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	
)	
vs.)	Civil Action No. 01-639 (GK)
)	
UNITED STATES DEPARTMENT OF)	
JUSTICE,)	
)	
Defendant.)	
_____)	

**PLAINTIFF’S MOTION FOR AWARD OF ATTORNEY’S
FEES AND LITIGATION EXPENSES**

Plaintiff Judicial Watch, Inc. (“Judicial Watch”), by counsel and pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 1920, respectfully requests that it be awarded \$ 39,606.75 in attorney’s fees and litigation expenses in the above-captioned action. The motion is supported by a verified itemization of attorney/paralegal time and expenses. As grounds therefor, Judicial Watch states as follows:

MEMORANDUM OF LAW

I. Factual Background.

This case involves Judicial Watch’s efforts to obtain records relating to pardon applications granted by former President William Jefferson Clinton shortly before he left office. On February 22, 2001, Judicial Watch served a Freedom of Information Act (“FOIA”) request on the U.S. Department of Justice (“DOJ”) that sought access to the following agency records:

- a. Any and/or all Pardon Grants for January 2001, to include, but not limited to the Department of Justice Pardon Grants listing, dated January 20, 2001 and found at

<http://www.usdoj.gov/opa/pardonchart1st.htm>.

- b. Any and/or all pardon applications considered by former President Clinton.

Judicial Watch also sought a fee waiver of costs associated with the request and expedited handling of the request.¹

Pursuant to 5 U.S.C. § 552(a)(6)(A)(I), FOIA imposes a statutorily-mandated, 20-day deadline for government agencies to respond to a request. On March 6, 2001, DOJ informed Judicial Watch by letter that it would not be complying with the statutorily mandated deadline. In fact, the letter stated that, not only would DOJ not be complying with the 20-day deadline, but it also would not be complying with the 10-day extension provision in FOIA. No responsive records were produced on or before DOJ's deadline, nor was Judicial Watch notified that responsive records were being withheld under any specific claims of exemption. Having received no substantive response by DOJ, Judicial Watch filed suit on March 23, 2001.

On June 11, 2001 – more than 3 months after its response was due – DOJ produced 103 pages of public source records and advised Judicial Watch that it possessed an additional estimated 435 pages of releasable records. DOJ also informed Judicial Watch that its fee waiver request was denied and assessed a fee to cover copying costs. Judicial Watch paid the fee and received the additional records on July 11, 2001. On August 9, 2001, DOJ released an additional

¹ Judicial Watch served a substantially similar FOIA request on the Office of Pardon Attorney that resulted in the filing of a separate lawsuit. These two lawsuits were consolidated by the Court on June 22, 2001. The focus of the second case, Case No.: 01-cv-720, was the single issue of DOJ's denial of a fee waiver. Judicial Watch did not prevail on that issue, and the case was ultimately withdrawn. This motion for attorney's fees and litigation costs does not seek to recover district court fees and costs associated with 01-cv-720. Therefore, any references to pleadings or orders concern Case No.: 01-cv-639 only.

59 pages of records and informed Judicial Watch that it was withholding approximately 900 pages of responsive records under FOIA Exemptions 6 and 7(c) and 16 boxes of responsive records under FOIA Exemption 5. DOJ asserted that the 16 boxes of responsive records pertained to “certain inter- and intra- agency communications protected by the presidential communications privilege” and also were protected by the deliberative process privilege. Defendant’s Motion For Summary Judgment, Exhibit 1E (Docket No. 33). DOJ later acknowledged that the 16 boxes contained 4,825 pages of responsive records withheld in their entirety – 4,341 of which were withheld under FOIA Exemption 5 and the presidential communications and deliberative process privileges. *Id.*

On August 12, 2002, DOJ moved for summary judgment. DOJ argued that its withholding of thousands of pages of records under Exemption 5 was proper, and that the records withheld under Exemption 6 were proper. Judicial Watch opposed this motion on October 31, 2002. Judicial Watch’s opposition was three-fold: (1) the records withheld under the deliberate process privilege were not described adequately; (2) the presidential communications privilege was overused and improperly extended to records beyond the scope of the privilege; and (3) records withheld under FOIA Exemption 6 were withheld improperly.

The Court granted DOJ’s motion for summary judgment on March 28, 2003. *See Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 259 F. Supp. 2d 86 (D.D.C. 2003). The Court held that DOJ properly applied the privileges and exemptions to all of the withheld records.

On April 3, 2003, Judicial Watch appealed the order granting DOJ summary judgment

ruling.² In its opening brief, Judicial Watch argued that the presidential communications privilege was not invoked properly by DOJ and did not apply to many documents outside the scope of the privilege. Judicial Watch also argued that DOJ had improperly withheld records under Exemption 6.³ On May 7, 2004, after a full briefing of these issues and an oral argument, the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) affirmed in part, reversed in part, and remanded with instructions.

In its opinion, the D.C. Circuit affirmed DOJ’s use of Exemption 6, but held that DOJ “erred in extending the presidential communications privilege to internal Department documents.” 365 F.3d 1108, 1110. The D.C. Circuit reversed the grant of summary judgment with regard to DOJ’s improper extension of the presidential communications privilege to internal DOJ documents and remanded the matter to this Court for further proceedings. *Id.* at 1124.

On September 14, 2004, the parties attended a status conference after which the Court issued an order requiring DOJ to reprocess Judicial Watch’s FOIA request in light of the D.C. Circuit’s opinion and requiring Judicial Watch to pay a \$500 processing fee for copying. The order also set the dates for the new briefing schedule. *See* September 14, 2004 Order (Docket No. 52). Pursuant to the Court’s order, DOJ reprocessed Judicial Watch’s FOIA request, and, on December 15, 2004, produced 1,015 pages of previously withheld records in full and 930 pages

² The two cases were consolidated on appeal as well: Appeal Nos. 03-5093, 03-5094. All references to the appeal in this motion are only in regard to the appeal of Civil Case No. 01-cv-639.

³ Judicial Watch also argued that it should have been granted a blanket fee waiver. On appeal, DOJ acknowledged that some of the records sought by Judicial Watch qualified for a fee waiver and committed to granting a fee waiver for those particular records. *See Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1127 (D.C. Cir. 2004) As such, Judicial Watch’s request for a blanket fee waiver became a non-issue.

of previously withheld records with redactions. *See* July 19, 2006 Memorandum Opinion at 3. (Docket No. 60). DOJ continued to withhold 3,642 pages of records in full under the presidential communications privilege, the deliberative process privilege and Exemption 6.⁴

On February 25, 2005, DOJ moved for summary judgment. After a full briefing of the motion, the Court granted summary judgment in DOJ's favor on July 19, 2006.

II. Argument.

A. Judicial Watch is Entitled to an Award of Attorney's Fees.

FOIA allows awards of attorney's fees to prevailing plaintiffs for two purposes: (1) "to encourage Freedom of Information Act suits that benefit the public interest" and (2) to serve "as compensation for enduring an agency's unreasonable obduracy in refusing to comply with the Freedom of Information Act's requirements." *LaSalle Extension Univ. v. Federal Trade Comm'n*, 627 F.2d 481, 484 (D.C. Cir. 1980). To obtain an award, the requestor must demonstrate that (1) it has "substantially prevailed" and is thus eligible for an award; and (2) it is entitled to an award under a balancing of relevant factors. *See Oil, Chemical and Atomic Workers Int'l Union v. Department of Energy*, 288 F.3d 452 (D.C. Cir. 2002); *Bricker v. FBI*, 54 F. Supp. 2d 1, 5 (D.D.C. 1999); *Northwest Coalition for Alternatives to Pesticides v. Browner*, 965 F. Supp. 59, 63 (D.D.C. 1997) (citing *Weisberg v. DOJ*, 848 F.2d 1265, 1268 (D.C. Cir. 1988)).

1. Judicial Watch Has "Substantially Prevailed".

A party has "substantially prevailed" if it has "been awarded some relief by [a] court,

⁴ Judicial Watch only challenged DOJ's use of the deliberative process privilege. The presidential communications privilege and Exemption 6 were no longer at issue.

either in a judgment on the merits or in a court-ordered consent decree.” *Oil, Chemical, and Atomic Workers Int’l Union*, 288 F.3d at 456-57 (citing *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 603 (2001) (internal quotations omitted)).

In this case, DOJ not only failed to satisfy the statutory procedural requirements of FOIA, but it also improperly withheld over one thousand pages of responsive records from Judicial Watch, thereby forcing Judicial Watch to litigate this matter for years in order to compel production of the obtain the records it requested. Initially, DOJ failed to respond substantively to Judicial Watch’s FOIA request. In fact, in its acknowledgment letter, DOJ admitted it would not comply with the statutorily-mandated 20-day deadline or the 10-day extension provision. The only recourse available to Judicial Watch was to file a lawsuit.

In addition to the procedural violations of FOIA, DOJ improperly withheld over one thousand pages of responsive records. Prior to the lawsuit, DOJ failed to produce any responsive documents or claim any such records were subject to FOIA’s exemptions. Only after Judicial Watch filed its lawsuit did DOJ produce 597 pages of responsive records. However, DOJ continued to withhold in full more than 4,500 pages of responsive records. Of those records withheld in their entirety, 4,341 pages were withheld pursuant to the presidential communications privilege. However, DOJ’s application of the presidential communications privilege was flawed. *See Judicial Watch, Inc.*, 365 F.3d at 1124. As a result of DOJ’s improper application of the privilege, it was necessary for Judicial Watch to continue to litigate this matter, including bringing an appeal. It was only after the D.C. Circuit rejected DOJ’s assertion of the presidential communications privilege and remanded the matter to this Court, and after this Court

ordered DOJ to reprocess the responsive records, that the overwhelming majority of responsive documents were produced to Judicial Watch.

Recently, in *Davy v. Central Intelligence Agency*, 2006 U.S. App. LEXIS 17247, *9 (D.D.C. July 11, 1006), the D.C. Circuit held that a requestor substantially prevailed when the district court issued an order that “awarded some relief on the merits of his claim.” The D.C. Circuit found that the trial court’s memorialization of the parties’ joint stipulation created a judicially enforceable deadline – one which could have resulted in a finding of contempt if the agency failed to comply with the order. As a result of the order, the plaintiff in *Daly* received the responsive records he had requested, which the D.C. Circuit defined as “some relief on the merits.” *Id.*

Like the plaintiff in *Davy*, Judicial Watch successfully obtained significant court-ordered relief. The D.C. Circuit rejected DOJ’s improper application of the presidential communications privilege to internal DOJ documents, holding:

[T]he presidential communications privilege applies to pardon documents ‘solicited and received’ by the President or his immediate advisers in the Office of the President, and ... the deliberative process applies to internal agency documents that never make their way to the Office of the President.

Judicial Watch, Inc., 365 F3d at 1123. This Court then ordered DOJ to reprocess Judicial Watch’s request in light of the D.C. Circuit’s opinion. As a result, DOJ produced an additional 1,015 pages of previously withheld, responsive documents to Judicial Watch on or about December 15, 2004.⁵ It also provided an updated *Vaughn* index to try to support its claims of exemption. Clearly, by overcoming many of DOJ’s claims of exemption under the presidential

⁵ DOJ also produced 930 redacted pages of responsive records.

communications privilege and securing the release of additional, responsive documents, Judicial Watch has “substantially prevailed.”

2. Balancing the Relevant Factors Warrants an Award.

In addition, before granting an award of attorney’s fees and litigation expenses to a requestor who has “substantially prevailed,” a Court also must consider the following four factors: “(1) the public benefit derived from the case; (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.” *Burka v. U.S. Dep’t of Health & Human Servs.*, 142 F.3d 1286, 1288 (D.C. Cir. 1998) (internal citations and quotations omitted). The second and third factors are “closely related and often considered together.” *Cotton v. Heyman*, 63 F.3d 1115, 1120 (D.C. Cir. 1995) (quoting *Tax Analysts v. United States Dep’t of Justice*, 965 F.2d 1092, 1095 (D.C. Cir. 1992)). In determining a requestor’s entitlement to an award of attorney’s fees, the Court must balance all four factors. *Ralph Hoar & Assocs. v. Nat’l Hwy Traffic Safety Admin.*, 985 F. Supp. 1, 9 (D.D.C. 1997). The balancing of these factors in this case clearly supports awarding attorney’s fees to Judicial Watch.

a. Public Benefit.

According to the U.S. Court of Appeals for the District of Columbia Circuit, a FOIA action results in a public benefit if a plaintiff’s victory is “likely to add to the fund of information that citizens may use in making vital political choices.” *Cotton*, 63 F.3d at 1120 (quoting *Blue v. Bureau of Prisons*, 570 F.2d 529, 534 (5th Cir. 1978)). In making this inquiry, it is important to note that the “central purpose” of FOIA is “to assist our citizenry in making the informed choices so vital to the maintenance of a popular form of government.” *Blue*, 570 F.2d at 533.

The subject matter of presidential pardons is clearly one of public importance. In fact, this Court stated in an earlier memorandum opinion that it was “well aware that the subject matter of Plaintiff’s FOIA request – pardon applications considered or granted by former President Clinton – is of great public interest.” *See* March 28, 2003 Memorandum Opinion (Docket No. 45).

The records obtained by Judicial Watch in this case, and indeed, the case itself, clearly added to “the fund of information that citizens may use in making vital political choices” about this matter of great public interest. In fact, throughout the course of this litigation, Judicial Watch disseminated the information it obtained from DOJ in various forms, including press releases and newsletter reports, and national talk shows and radio programs. *See* Exhibit 1. Judicial Watch’s FOIA request also became the subject of newspaper articles across the country. *See* Exhibit 2. Judicial Watch’s efforts to obtain and disseminate this information – not only the actual records it successfully obtained through a court order, but also the actual process of the litigation – conferred a substantial educational benefit on the public

b. Commercial Benefit/Nature of Plaintiff’s Interest.

The second and third factors -- whether a plaintiff will derive commercial benefit from disclosure and the nature of the plaintiff’s interests in the records -- are closely related and typically considered together. *Cotton*, 63 F.3d at 1120. Judicial Watch is a non-profit, tax-exempt, educational organization. It has no commercial interest in this case. Instead, Judicial Watch’s only interest is in bringing information about the operations of government to the public’s attention, which significantly, is identical to the purpose behind FOIA. S. Rep. No. 93-854, 93 Cong., 2d Sess. at 19 (1974). Accordingly, Judicial Watch’s entirely non-commercial

motive and its interest in obtaining and disseminating the records at issue here clearly entitle it to an award of attorney's fees and expenses.

c. Reasonableness of Government's Basis for Withholding.

This final criterion provides, in part, that where the government has unreasonably withheld records, a fee award is appropriate if the agency was "recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." *See Tax Analysts v. United States Dep't of Justice*, 965 F.2d 1092, 1097 (D.C. Cir. 1992) (citations omitted); *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1054 (5th Cir. 1983); *Matlack, Inc. v. United States Environmental Protection Agency*, 868 F. Supp. 627, 632 (D. Del. 1994).

DOJ's conduct clearly justifies a fee award. First, DOJ blatantly failed to comply with FOIA's statutorily-mandated deadlines, leaving Judicial Watch with no alternative but to file a lawsuit if it were to obtain the records at issue. When DOJ improperly asserted claims of presidential communication privilege for thousands of pages of responsive documents, Judicial Watch successfully challenged those claims of exemption on appeal. Ultimately, the D.C. Circuit rejected DOJ's improper application of the presidential communications privilege and remanded this matter for further proceedings. This Court then ordered DOJ to reprocess the request in accordance with the D.C. Circuit's ruling, which ultimately resulted in DOJ producing thousands of pages of responsive documents it had withheld previously. *See* September 14, 2004 Memorandum Opinion and Order (Docket No. 52). DOJ offered no legitimate basis for failing to produce these thousands of pages of responsive documents before being ordered to do so by both the D.C. Circuit and this Court. Under the circumstances, an award of attorney's fees and expenses clearly is justified.

3. The Requested Award is Reasonable.

Fee awards are calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate, resulting in a lodestar amount. *See Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980). As public interest lawyers, Judicial Watch's attorneys do not have customary billing rates, as most private practice attorneys do. Nevertheless, public interest attorneys may be awarded reasonable attorney's fees calculated "according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 896 (1984) (fees awarded based on prevailing rate whether plaintiff is represented by private or nonprofit counsel); *Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995); *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1524 (D.C. Cir. 1988).

In the District of Columbia Circuit, awards of attorney's fee may be calculated based on the *Laffey* matrix, because, in the absence of a specific sub-market analysis of attorney's fees, "use of the broad *Laffey* matrix may be by default the most accurate evidence of a reasonable hourly rate." *Covington*, 57 F.3d at 1114 n.5.⁶ A copy of the *Laffey* matrix is attached as Exhibit 3. Judicial Watch requests that its fee award be calculated under the *Laffey* matrix.

A verified itemization of attorney/paralegal time spent by Judicial Watch in this matter is attached as Exhibit 4. Unless otherwise indicated, the itemization was generated from the

⁶ This matrix, commonly referred to as the "*Laffey* Matrix" or the "United States Attorney's Office Matrix," is based on hourly rates allowed by the District Court in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983). Use of an updated *Laffey* Matrix was implicitly endorsed by the U.S. Court of Appeals for the District of Columbia Circuit in *Save Our Cumberland Mountains*, 57 F.2d at 1525. The Court subsequently declared that parties may rely on the updated *Laffey* Matrix prepared by the United States Attorney's Office as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. *See Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n.14 (D.C. Cir. 1995).

contemporaneously-kept time records of the individuals who worked on the case, Paul J. Orfanedes, Jason B. Aldrich, Meredith L. Di Liberto, and David F. Rothstein. The rates applied to the time recorded in Exhibit 5 are adopted from the *Laffey* Matrix.

Mr. Orfanedes is an attorney who graduated from The American University's Washington College of Law in 1990. He has been practicing law continuously since that time and is an experienced litigator was admitted to practice before numerous state and federal courts, including the Bar of this Court.

Mr. Aldrich is an attorney who graduated from William and Mary School of Law in 1997. He joined Judicial Watch in 1997 and was admitted to the New York Bar in 2001. He was subsequently admitted to the District of Columbia Bar and this Court.

Ms. Di Liberto is an attorney who graduated from Regent University School of Law in 2000. After graduating from law school, Ms. Di Liberto worked as a law clerk in Connecticut from approximately September 2000 to December 2001. She has been practicing law continuously since April 2002 and is admitted to the New Jersey Bar as well as the Bar of this Court.

Mr. Rothstein is a senior litigation assistant/paralegal who graduated from The Catholic University of America's Columbus School of Law in 1994. He has been working as a paralegal at Judicial Watch since 2003.

B. Judicial Watch is Entitled to Reimbursement for Its Litigation Expenses.

Judicial Watch incurred litigation expenses (other than fees of counsel) of \$150.00. This consists of the \$150.00 filing fee to initiate this action. *See* Exhibit 5. As provided under FOIA

and 28 U.S.C. § 1920, this expense should be awarded to Judicial Watch. Judicial Watch does not seek costs for photocopying and other litigations expenses.⁷

III. Conclusion.

For the foregoing reasons, Judicial Watch respectfully requests that it be awarded \$39,456.75 in attorney's fees and \$150.00 in litigation expenses pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 1920, for a total award of \$39,606.75.

Respectfully submitted,

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⁷ Judicial Watch is not seeking attorney's fees associated with any motions for extension of time, status reports filed prior to the appeal, or DOJ's final motion for summary judgment.

LOCAL RULE 7.1(M) CERTIFICATE

On August 2, 2006, I contacted Susan Ullman, counsel for the U.S. Department of Justice, to discuss the relief requested in this motion. Ms. Ullman and I agreed that, after she had an opportunity to review the motion and verified itemization, we would confer again to determine whether the motion could be resolved by agreement of the parties or if it needed to be litigated. We also agreed that, because it may take additional time in which to make this determination, with the Court's consent, Defendant could have until and including September 14, 2006 in which to submit any opposition, if necessary.

/s/ Paul J. Orfanedes