
APPEAL NO. 07-5158

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

JUDICIAL WATCH, INC.,

Plaintiff-Appellant

vs.

FEDERAL BUREAU OF INVESTIGATION,

Defendant-Appellee.

BRIEF OF APPELLANT JUDICIAL WATCH, INC.

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), Plaintiff-Appellant Judicial Watch, Inc. (“Judicial Watch”) hereby submits its Certificate as to Parties, Rulings, and Related Cases:

1. **Parties and Amici** - The Parties appearing in the lower court and in this appeal are Plaintiff-Appellant Judicial Watch and Defendant-Appellee the Federal Bureau of Investigation (“FBI”).
2. **Rulings Under Review** - The ruling under review in this appeal is the May 11, 2007 Order of the Honorable Paul L. Friedman. *See* Joint Appendix (“JA”) at 153-54.
3. **Related Case** - To counsel’s knowledge, there are no related cases.

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***Authorities upon which we chiefly rely are marked with asterisks.**

GLOSSARY

Federal Bureau of Investigation	FBI
Freedom of Information Act	FOIA
Joint Appendix	JA
U.S. Department of Defense	DoD

STATEMENT OF JURISDICTION

Jurisdiction in the District Court was based upon 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. JA at 4 (Compl. at ¶ 1). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, because a final judgment disposing of all claims was entered by the District Court. JA at 153-54. This appeal is timely because the District Court entered a final judgment on May 11, 2007, and Judicial Watch filed its notice of appeal on May 15, 2007. JA at 155.

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court erred in finding that Judicial Watch had not “substantially prevailed” for purposes of an award of attorney’s fees and litigation expenses under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*

STATEMENT OF THE CASE

On December 8, 2006, Judicial Watch filed a verified motion seeking an award of \$12,144.68 in attorney’s fees and litigation expenses in this FOIA lawsuit. Judicial Watch had requested that the FBI produce certain videotapes taken on September 11, 2001 at or near the Pentagon. Judicial Watch filed suit when the FBI failed to produce the requested videotapes within the time period required by law. Pursuant to three stipulations and agreed orders subsequently negotiated by the parties and entered by the District Court as enforceable orders,

the FBI was required to produce the requested videotapes by dates certain.

Judicial Watch thus succeeded in its lawsuit by obtaining specific, court-ordered relief, namely, orders compelling the FBI to produce the videotapes at issue.

In order to obtain an award of attorney's fees and litigation expenses in a FOIA lawsuit, a requestor must demonstrate that (1) it has "substantially prevailed" and thus is eligible for an award; and (2) it is entitled to an award under a balancing of relevant factors. *Oil, Chemical and Atomic Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452 (D.C. Cir. 2002) ("OCAW").

In its motion, Judicial Watch argued that it had "substantially prevailed" and thus was eligible for an award of attorney's fees and litigation expenses because it succeeded in obtaining enforceable, court-ordered relief, namely, the three orders that required the FBI to produce the videotapes at issue by dates certain. In support of its argument, Judicial Watch cited this Court's recent ruling in *Davy v. Central Intelligence Agency*, 456 F.3d 162, 165 (D.C. Cir. 2006). JA at 31-33, 138-140 (Plaintiff's Verified Motion for Award of Attorney's Fees and Litigation Expenses at 5-7 ["Pl.'s Fee Mtn"]; Plaintiff's Reply in Support of Motion for Award of Attorney's Fees and Litigation Expenses at 2-6 ["Pl.'s Reply"]).

The District Court denied Plaintiff's motion in an order entered on May 11, 2007. JA at 153-54. In a three-sentence ruling that took no account of this

Court's ruling in *Davy*, the District Court found that Judicial Watch had not "substantially prevailed" within the meaning of FOIA:

Plaintiff relies for its argument that it is such a prevailing party on three Stipulations and Agreed Orders negotiated by the parties and signed by the Court on July 21, August 18 and November 17, 2006, respectively. The Court has carefully reviewed the Stipulations and Agreed Orders and concludes that, post-Buckhannon [Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 603 (2001)], plaintiff cannot be considered a prevailing party by virtue of those Orders. Accordingly, it is hereby ORDERED that plaintiff's Verified Motion [Docket 13] for Award of Attorney's Fees and Litigation Expenses is DENIED.

Id. Because it found against Judicial Watch on the first prong of the two-part test governing awards of attorney's fees and litigation expenses, the District Court did not reach the second prong of the analysis. Judicial Watch timely appealed the District Court's denial. JA at 155.

STATEMENT OF FACTS

This case involves Judicial Watch's efforts to obtain videotapes of the deliberate crash of Flight 77 into the Pentagon on September 11, 2001. On December 15, 2004, Judicial Watch served a FOIA request on the FBI that sought access to the following agency records:

- (1) Video camera recording(s) obtained by federal official(s) and/or law enforcement from the Sheraton National Hotel in Arlington, Virginia, on or about September 11, 2001.

- (2) Video camera recording(s) obtained by any federal official(s) and/or law enforcement from a Nexcomm/Citgo gas station in the vicinity of the Pentagon on or about September 11, 2001.
- (3) Pentagon security video camera recording(s) showing Flight 77 strike and/or hit and/or crash into the Pentagon on September 11, 2001.
- (4) Closed Circuit Television (CCTV) video camera recording(s) obtained by any federal official(s) and/or law enforcement from the Virginia Department of Transportation (“VDOT”) and/or the VDOT “Smart Traffic Center” on or about September 11, 2001.

JA at 27-28 (Pl.’s Fee Mtn). Judicial Watch also sought a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii). *Id.* at 28.

On December 29, 2004, Judicial Watch received a letter from David M. Hardy of the FBI’s Records Management Division acknowledging receipt of Judicial Watch’s December 15, 2004 request. *Id.* Judicial Watch received a second letter from Mr. Hardy on March 22, 2005 stating that no documents responsive to paragraph 1 of Judicial Watch’s FOIA request had been found. *Id.* Mr. Hardy’s letter further stated that documents responsive to paragraphs 2, 3, and 4 had been found, but claimed the tapes were exempt from production pursuant to 5 U.S.C. § 552(b)(7)(A). *Id.*

Judicial Watch filed an administrative appeal of the FBI's claim of exemption on April 4, 2005. *Id.* On April 8, 2005, Judicial Watch received a letter from Priscilla Jones, Chief, Administrative Staff of the U.S. Department of Justice's Office of Information and Privacy, acknowledging receipt of Judicial Watch's administrative appeal. *Id.* Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), the FBI's response to Judicial Watch's administrative appeal was due on or before May 3, 2005. *Id.* The FBI failed to respond. *Id.*

On May 22, 2006, more than one year after the FBI's response to Judicial Watch's administrative appeal was due, Judicial Watch sent a letter to the FBI regarding the status of the appeal. *Id.* at 28-29; *see also* JA at 48-49 (May 22, 2006 Judicial Watch Letter to FBI). The letter noted that, in a similar case, *Judicial Watch, Inc., v. U.S. Dep't of Defense*, C.A. No. 06-0309 (RBW), the U.S. Department of Defense ("DoD") had invoked 5 U.S.C. § 552(b)(7)(A) to withhold another videotape depicting Flight 77 striking the Pentagon, but released the videotape to Judicial Watch on May 16, 2006, shortly after the trial of September 11, 2001 co-conspirator Zacarias Moussaoui had ended. *Id.* at 29, 48-49. Judicial Watch received an acknowledgment to its letter from the FBI, but the FBI failed to provide any substantive response or otherwise issue a determination on Judicial Watch's administrative appeal. *Id.* at 29.

On June 22, 2006, Judicial Watch filed suit. *Id.*; *see also* JA at 4-7 (Complaint for Declaratory and Injunctive Relief). Due to the lengthy delay caused by the FBI's failure to produce the requested videotapes or otherwise respond to Judicial Watch's administrative appeal, as well as the intense public interest in the videotapes in general, Judicial Watch sought to obtain relief from the District Court as expeditiously as possible.¹ *Id.* at 29. Consequently, it simultaneously filed with its complaint an application for a preliminary injunction and a request for a hearing.

On July 19, 2006, the parties entered into a stipulation and agreed order. *Id.*; *see also* JA at 8-10 (July 10, 2006 Stipulation and Agreed Order). In the stipulation, the FBI admitted to possessing a single videotape from the Citgo gas station that was responsive to the second paragraph of the request and two videotapes from Pentagon security cameras that were responsive to the third paragraph of the request. *Id.* at 9, 29. Because, in the interim, Judicial Watch had obtained the Pentagon security camera videotapes directly from DoD, it no longer sought production of these tapes from the FBI. *Id.* at 30 n.2. The stipulation thus

¹ When Judicial Watch obtained the DoD videotape and posted it on its website, the public interest was so great that it overwhelmed the site. JA at 29 n.1. The release of the videotape received national and international media attention and since has been viewed over 2 million times on YouTube.com. *Id.*

required the FBI to produce the Citgo videotape by October 18, 2006.^{2,3} *Id.* at 9, 29-30. It specifically stated, in pertinent part: “Upon completion of the redaction, Defendant **shall produce** the videotape to Plaintiff without any other redactions and without imposing any search or duplication fees on Plaintiff in this case.” *Id.* at 9, para. 5 (emphasis added). On July 21, 2006, U.S. District Court Judge Paul L. Friedman approved and entered the parties’ stipulation and agreed order, creating a legally enforceable court order. *Id.* at 30; *see also* JA at 11 (July 21, 2006 Stipulation and Agreed Order). Pursuant to this court order, Judicial Watch received the Citgo videotape on September 13, 2006. *Id.* at 31.

Judicial Watch also had filed a second FOIA request with the FBI on June 29, 2006 seeking access to yet another videotape from September 11, 2001. *Id.* at 30. Specifically, Judicial Watch requested the FBI produce the following:

- (1) Video camera recording(s) obtained by federal official(s) and/or law enforcement from the Doubletree Hotel in Arlington, Virginia, showing the Pentagon and/or its environs, to include but not limited to, the impact of American Airlines Flight 77 on or about September 11, 2001.

² The FBI requested, and Judicial Watch agreed, that the FBI could obscure the faces of persons who appeared in the Citgo videotape, in order to protect their privacy. JA at 9, 30 n.3.

³ While the FBI previously had asserted that it possessed a videotape responsive to paragraph 4 of the request, it subsequently determined that it did not possess any such tape. JA at 9, 29.

Id. By August 3, 2006, Judicial Watch had not received a response of any kind from the FBI or even an acknowledgment of receipt of the request. *Id.*; *see also* JA at 12-16 (Amended Complaint). Consequently, Judicial Watch amended its complaint to include this additional FOIA violation. *Id.*

On August 14, 2006, the parties entered into a second stipulation and agreed order. *Id.* at 30; *see also* JA at 17-20 (August 14, 2006 Stipulation and Agreed Order). In this second stipulation, the FBI admitted that it possessed a videotape responsive to Judicial Watch's June 29, 2006 FOIA request ("the Doubletree Hotel videotape"). *Id.* at 18, 30. The parties' stipulation and agreed order required the FBI to produce the Doubletree Hotel videotape by November 9, 2006.⁴ *Id.* at 18, 30. It specifically stated, in pertinent part:

Accordingly, Defendant **shall** have until and including November 9, 2006 in which to complete its redaction of the Doubletree Hotel videotape and to **produce** the videotape to Plaintiff without any other redactions and without imposing any search or duplication fees on Plaintiff in this case.

Id. at 19, para. 7 (emphasis added). On August 18, 2006, U.S. District Court Judge Paul L. Friedman approved and entered the parties' second stipulation and

⁴ As with the Citgo videotape, the FBI expressed concern for the privacy of patrons and employees of Doubletree who appeared in the videotape and sought to obscure these individuals' faces. JA at 30 n.3. Judicial Watch did not object. *Id.* Also, the second stipulation and agreed order did not alter the court-ordered due date for the Citgo videotape. *Id.*

agreed order, creating yet another legally enforceable court order. *Id.* at 30-31; *see also* JA at 21 (August 18, 2006 Order).

When the FBI determined that it required more time to complete its privacy redaction of the Doubletree Hotel videotape, the parties entered into a third stipulation and agreed order. JA at 22-25 (November 8, 2006 Stipulation and Agreed Order). On November 16, 2006, U.S. District Court Judge Paul L. Friedman signed and approved the third stipulation and agreed order, creating another legally enforceable court order. *Id.* at 26 (November 16, 2006 Order). Pursuant to this court order, Judicial Watch received the Doubletree videotape on November 28, 2006. *Id.* at 31.

SUMMARY OF THE ARGUMENT

This appeal requires nothing more than a straightforward application of the Court's clear holding in *Davy* to the very simple set of facts presented by Judicial Watch's substantially similar appeal. In *Davy*, the parties had stipulated that the defendant agency would produce records requested under FOIA by a date certain, and the trial court had approved the parties' joint stipulation. 456 F.3d at 164. On appeal, this Court found that the trial court's memorialization of the parties' joint stipulation created a judicially enforceable order. *Id.* at 166. This Court noted that, had the agency not complied with the order, it could have been held in

contempt. *Id.* The Court found that the requestor had received the records he requested within a particular time frame and that his lawsuit had changed the “legal relationship between” the parties. As a result, the requestor had succeeded in obtaining “relief on the merits.”

Like the requestor in *Davy*, Judicial Watch also succeeded in obtaining significant, court-ordered relief that changed the legal relationship between the parties, namely, enforceable court orders that required the FBI to produce the requested videotapes by dates certain. Had the FBI failed to produce either videotape by the court-ordered date, the FBI likewise could have faced contempt sanctions. Clearly, by bringing this action and obtaining enforceable court orders requiring the production of the requested videotapes by dates certain, Judicial Watch “substantially prevailed” in its FOIA lawsuit, just as the requestor in *Davy* had substantially prevailed in his lawsuit.

ARGUMENT

I. Standard of Review

This Court reviews whether a plaintiff “is eligible for attorney fees – that is, whether he “substantially prevailed” – de novo because it rests on ‘an interpretation of the statutory terms that define eligibility for an award.’” *Davy*,

456 F.3d at 164 (quoting *Edmonds v. FBI*, 417 F.3d 1319, 1322 (D.C. Cir. 2005) and *Nat'l Ass'n of Mfrs. v. Dep't of Labor*, 159 F.3d 597, 599 (D.C. Cir. 1998)).

II. Standard Governing an Award of Attorney's Fees and Litigation Expenses under FOIA

FOIA allows awards of attorney's fees and litigation expenses 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* *OCAW*, 288 F.3d 452; *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)).

III. The District Court Erred in Finding That Judicial Watch Had Not "Substantially Prevailed" for Purposes of an Award of Attorney's Fees and Litigation Expenses under FOIA.

A party has "substantially prevailed" if it has "been awarded some relief by [a] court, either in a judgment on the merits or in a court-ordered consent decree."

OCAW, 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 a three-sentence ruling, the District Court found that Judicial Watch had not “substantially prevailed” within the meaning of FOIA:

Plaintiff relies for its argument that it is such a prevailing party on three Stipulations and Agreed Orders negotiated by the parties and signed by the Court on July 21, August 18 and November 17, 2006, respectively. The Court has carefully reviewed the Stipulations and Agreed Orders and concludes that, post-Buckhannon [Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 603 (2001)], plaintiff cannot be considered a prevailing party by virtue of those Orders. Accordingly, it is hereby ORDERED that plaintiff's Verified Motion [Docket 13] for Award of Attorney's Fees and Litigation Expenses is DENIED.

JA at 153-54. The District Court is clearly wrong.

Specifically, this case is factually indistinguishable from *Davy*, 456 F.3d 162, in which this Court found that the plaintiff had “substantially prevailed” for purposes of a fee award where the parties had stipulated that the defendant agency would produce the requested records by a date certain and the trial court approved the parties' joint stipulation. This Court found in *Davy* that the trial court's memorialization of the parties' joint stipulation created a judicially enforceable order – one that 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 *Davy* received

the responsive records he had requested within a particular time frame, which the Court defined as changing the “legal relationship between” the parties and awarding the plaintiff “some relief on the merits.” *Id.* at 166.

In the instant matter, like the plaintiff in *Davy*, Judicial Watch succeeded in obtaining significant, court-ordered relief. Through three, legally enforceable orders, Judicial Watch obtained both the Citgo and Doubletree videotapes. The orders required the FBI to produce the requested records by a date certain. The July 19, 2006 stipulation and agreed order stated, in pertinent part: “Upon completion of the redaction, Defendant **shall produce** the videotape to Plaintiff without any other redactions and without imposing any search or duplication fees on Plaintiff in this case.” JA at 9, para. 5 (emphasis added). Likewise, the August 14, 2006 stipulation and agreed order stated, in pertinent part:

Accordingly, Defendant **shall** have until and including November 9, 2006 in which to complete its redaction of the Doubletree Hotel videotape and to **produce** the videotape to Plaintiff without any other redactions and without imposing any search or duplication fees on Plaintiff in this case.

Id. at 19, para. 7 (emphasis added). The November 8, 2006 stipulation and agreed order merely extended the date by which the FBI was required to produce the Doubletree Hotel videotape. *Id.* at 24.

Had the FBI failed to produce either videotape by the court-ordered date, the FBI would have faced contempt sanctions. Clearly, by bringing this action and obtaining court orders requiring the production of the requested videotapes, Judicial Watch has “substantially prevailed,” just as the requestor in *Davy* “substantially prevailed.” *See also Edmonds*, 417 F.3d at 1321-23 (FOIA requestor who obtained a court order granting expedited processing of her request and requiring production of responsive records by a date certain had “substantially prevailed” for purposes of an attorney’s fee award.).

Below, the FBI argued that this Court’s ruling in *OCAW*, 288 F.3d 452, not this Court’s ruling in *Davy* or *Edmonds*, applies to this case. In *OCAW*, the parties filed a status report requesting that the case be dismissed after the defendant agency provided most of the records the plaintiff sought. *Id.* at 457. The trial court, by order, subsequently dismissed the case. *Id.* This Court found the trial court’s order insufficient to justify an award of fees. In this regard, the Court declared that the order granted no relief on the merits and was a mere formality, dismissing the case as the records had already been produced:

On December 10, 1999, the court approved the parties’ final status report as a “Stipulation and Order” stating in its entirety:

Subject to the approval of the Court, it is hereby stipulated and agreed as follows by and between the undersigned:

1. In light of defendant's production of substantial amounts of material responsive to plaintiff's claim for relief in this action, the action is hereby dismissed with prejudice and, except as provided in P 2, without fees or costs.

2. The dismissal of this action shall be without prejudice to the right of plaintiff to obtain in [this case], an award of attorney's fees and litigation costs covering work performed in this action.

This order did not constitute a decision on the merits; the court had no contested issues before it. The "Stipulation and Order" approved the parties' terms of dismissal, but this was merely a formality. An "action may be dismissed ... without order of the court ... by filing a stipulation of dismissal signed by" all of the parties. *See Fed. R. Civ. P. 41(a)(1)*.

OCAW, 288 F.3d at 457.

Judicial Watch agrees with the FBI that *OCAW* is instructive here, but only because it is so readily distinguishable from the facts of this case. *OCAW* is readily distinguishable for at least three reasons. First, the order at issue in *OCAW* did not require the agency to produce any responsive documents to the requestor. 288 F.3d at 457. In fact, production had already taken place. The order merely confirmed the parties' agreement to the dismissal of the action. The Court found:

The December 10 Stipulation and Order of Dismissal did not meaningfully alter the legal relationship of the parties. Its only effect was to dismiss the union's lawsuit with a court order when no court order was needed. That cannot represent "judicial relief" for the

union. Aside from the union's attorney fee request, there was nothing left for the district court to oversee.

Id. In this case, by contrast, Judicial Watch obtained court orders expressly requiring the FBI to produce the videotapes at issue by dates certain, without redactions other than for privacy reasons and without charging Judicial Watch for search or duplication costs.

Second, the Court in *OCAW* found that there had been no change in the legal relationship between the parties. 288 F.3d at 458. The Court noted that private settlements are different from court-ordered consent decrees and that the parties' agreement amounted to a private settlement agreement. In this case, by contrast, the parties' stipulations and agreed orders were approved and entered by the Court and, once so memorialized by the Court, became enforceable orders. Prior to the entry of the court-ordered stipulations, Judicial Watch had been at the mercy of the FBI's alleged good intentions to produce the videotapes. Once the stipulations were approved, entered, and memorialized by the Court, however, Judicial Watch had legal remedies available to it if the FBI failed to produce the videotapes as required. The stipulations and agreed orders in this case clearly changed the legal relationship between the parties.

Third, in *OCAW*, the Court found that, because the order at issue did nothing more than approve the parties' terms of dismissal – which the Court deemed unnecessary in any event – the requestor had not obtained any relief on the merits. *Id.* at 457-58. In this case, the stipulations and agreed orders entered by this Court were much more than a formality. They required the FBI to produce the videotapes by dates certain and constituted a substantial portion of the relief sought by Judicial Watch when it initiated this litigation.

Although not advanced by the plaintiff in *OCAW*, the dissent argued that another order issued earlier in the case by the trial court justified an award of attorney's fees to the Plaintiff. *Id.* at 458. The order relied upon by the dissent required the defendant agency to conduct a search for the records requested. *Id.* The Court found this interim order also insufficient as a basis to justify an award of attorney's fees. *Id.* The Court reasoned that the order did not grant the plaintiff the relief that it has requested, *i.e.*, production of records, but instead merely ordered that a search be conducted. *Id.* In *Davy*, this Court again elucidated its rationale:

In [*Oil, Chemical and Atomic Workers*] . . . [w]e held that the order requiring the agency to search the records did not constitute court-ordered relief on the merits. We highlighted the order's interim nature, which was procedural – conduct a search – as opposed to substantive” produce documents. (sic) We stated, “Before August

23, the court had not ordered the Energy Department to turn over any documents; after August 23, the Energy department still had no obligation to do so. Accordingly, OCAW did not obtain relief on the merits because it sought documents, not merely a search therefor.

456 F.3d at 165 (internal citations omitted).

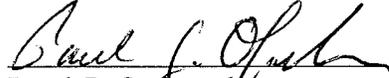
In this case, by contrast, Judicial Watch obtained court orders expressly requiring the FBI *to produce* the videotapes at issue by dates certain, without redactions other than for privacy reasons, and without charging Judicial Watch for search or duplication costs.” *Id.* at 9, para. 5 and 15, para. 15. Pursuant to these court orders, the videotapes were produced to Judicial Watch. This relief is precisely the relief sought by Judicial Watch in filing its lawsuit. As a result, Judicial Watch has “substantially prevailed” for purposes of an award of attorney’s fees and litigation expenses under FOIA.

CONCLUSION

For the foregoing reasons, Judicial Watch respectfully requests that the Court reverse the District Court’s May 11, 2007 determination that Judicial Watch had not “substantially prevailed” and remand this case for consideration of the second prong of the two-part analysis required under *OCAW*.

Dated: December 4, 2007

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE PURSUANT TO
F.R.A.P. 32(a)(7)(c) AND CIRCUIT RULE 32(a)(2)**

I certify that pursuant to F.R.App.P. 32(a)(7)(c) and District of Columbia Circuit Rule 32(a)(2), the attached principal brief is proportionally spaced, has a typeface of 14 points or more and contains 4,251 words.

Dated: December 4, 2007


Paul J. Orfanedes

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2007, two true and correct copies of the foregoing BRIEF OF APPELLANT JUDICIAL WATCH, INC. were served by first-class mail, postage prepaid, on the following:

Michael E. Robinson
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