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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARL OGLESBY, **Plaintiff,** **v.** **DEPARTMENT OF THE ARMY et. al.,** **Defendants.**	**Civil Action No. 87-3349 (NHJ/JMF)**

REPORT AND RECOMMENDATION

This matter is before me on the Motion of Plaintiff Carl Oglesby for an Interim Award of Attorneys' Fees [#138]. Carl Oglesby ("plaintiff"), an independent freelance writer, professional journalist, and lecturer, brought suit against the Department of the Army ("Army"), the Department of State ("State"), the Federal Bureau of Investigation ("FBI"), the Central Intelligence Agency ("CIA"), the National Archives and Records Administration ("NARA"), and the National Security Agency ("NSA") (collectively "the agencies"), to enforce his request for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. 522 et seq.

After careful consideration of the plaintiff's motion, the response thereto, and the entire record herein, I recommend that plaintiff's motion for interim attorneys' fees and costs be granted in the amount of $96,394.59.

PROCEDURAL BACKGROUND

Plaintiff submitted FOIA requests to six agencies, in 1985, requesting information

pertaining to the life of Reinhard Gehlen, a German General during World War II. Plaintiff requested all records on General Gehlen from 1944 through 1956; records on meetings held at Fort Hunt, Virginia, in the summer of 1945; records on the U.S. Army's "Operation Rusty"; records on post-war Nazi German underground organizations; records on "Operation Sunrise" carried out in 1945; records on Gehlen's relationship with certain employees of "Operation Sunrise"; and records on the Nazi underground organization "La Arana."

In response to the plaintiff's requests, the agencies released 384 pages of documents (many with redactions) but refused to disclose any others, claiming that some did not exist and others were exempt under 5 U.S.C. § 552(b)(1), (3) and (7). Plaintiff then brought a FOIA action against all six agencies, charging that the agencies performed inadequate searches and improperly denied his fee waiver requests. He also challenged their exemption claims.

Plaintiff failed to administratively appeal to five of the six agencies before filing suit in the district court but argued that he had constructively exhausted his administrative remedies. The district court agreed and decided the merits of the case. The Court granted summary judgment and found that all six agencies had complied with the FOIA in responding to plaintiff's request. Oglesby v. Department of the Army, Civ. A. No. 87-3349, Memorandum Opinion (D.D.C. May 22, 1989). The Court of Appeals, however, remanded the case with respect to five of the agencies, concluding that plaintiff had, in fact, failed to exhaust his administrative remedies. Oglesby v. Department of the Army, 920 F.2d 57, 59 (D.C. Cir. 1990). With respect to his claim against State, the court of appeals found that plaintiff did constructively exhaust his administrative remedies, but remanded the case to the district court to make further findings concerning the adequacy of State's search. Id. at 60.

After exhausting his administrative remedies for the remaining agencies, plaintiff returned to the district court and filed suit. Shortly thereafter, plaintiff obtained additional documents from Army, CIA, and NSA, and was granted fee waivers by Army and CIA.[1] Subsequently, the district court again ruled in favor of all the administrative agencies in granting summary judgment. Oglesby v. Department of the Army, Civ. A. No. 87-3349, Memorandum Opinion (D.D.C. November 2, 1994). Again, plaintiff appealed his case, this time on the grounds of (1) the refusal of certain agencies to grant him a fee waiver for his search; (2) several agencies' allegedly inadequate searches and Vaughn[2] indices; and (3) their impermissible exemption justifications.

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[1] More specifically, the actions of these three agencies were as follows:

Army

Plaintiff constructively exhausted his appeal on or about June 11, 1991, and filed his amended complaint on December 18, 1991. After the exhaustion of administrative remedies and filing of the lawsuit, the Army granted Oglesby a fee waiver and released the following: twelve new pages of material on Odessa on March 3, 1992; two pages which disclosed materials that had originally been withheld on July 13, 1992; and two pages disclosing some material that had previously been withheld on August 3, 1992. Ultimately, the Army additionally released approximately 9,000 pages of documents in March of 1997.

CIA

On July 3, 1991, the CIA stated that plaintiff's appeal would not be considered and the amended complaint for this defendant was also filed on December 18, 1991. On July 1, 1992, the CIA granted Oglesby a waiver of search fees and copying costs and released 426 pages pertinent to the requested information. On February 9, 1993, the CIA released an additional 124 pages to plaintiff.

NSA

Administrative remedies were also exhausted as to this agency on the date the amended complaint was filed, December 18, 1991. On January 17, 1992, NSA released 18 pages of pertinent information which plaintiff argues resulted from his success at the Court of Appeals in arguing that NSA's Vaughn index was inadequate. Additional documents were released to plaintiff on February 27, 1992.

Plaint. Rep. at 2-6. Thus, plaintiff obtained documents and fees waivers only after he had exhausted his administrative remedies and again filed suit.

[2] See Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975).

In 1996, the court of appeals remanded the case because (1) Army, CIA, and NSA failed to adequately justify their withholdings, and (2) Army and CIA failed to justify the adequacy of their searches. The court of appeals affirmed the district court's decision granting summary judgment as to FBI, State, and NARA. Oglesby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996). In March of 1997, Army released an additional 9,000 pages of documents to plaintiff. Presently, the remaining three agencies have again moved for summary judgment and this motion is currently pending. Plaintiff now moves this Court for an interim award of attorney's fees and costs.

ANALYSIS

Interim Award of Fees

In order to determine whether a plaintiff in a FOIA case should be awarded fees and costs, the court must engage in a two-step analysis. First, the court must determine whether the plaintiff has "substantially prevailed" and is therefore eligible for fees and costs. Second, if the plaintiff is deemed eligible, the court must make a discretionary determination as to whether the plaintiff is entitled to recover its cost based on a four-criteria analysis. Chesapeake Bay Foundation, Inc. v. Department of Agriculture, 11 F.3d 211, 215 (D.C. Cir. 1993); Tax Analysts v. Department of Justice, 965 F.2d 1092, 1093 (D.C. Cir. 1992). A plaintiff who seeks such fees before final judgment may have to overcome additional obstacles.

Since the decision of the Ninth Circuit in Rosenfield v. United States, 859 F.2d 717, 724-725 (9th Cir. 1988),[3] courts in this Circuit have awarded interim attorney's fees in a FOIA case

[3] The Ninth Circuit stated: "When citizens must litigate against the government to obtain public information, especially when, as here, release of the withheld records appears to be in the public interest rather than for merely private commercial gain, it is entirely appropriate that

before final adjudication on the merits of the case. Allen v. Federal Bureau of Investigation, 749 F. Supp. 21 (D.D.C. 1990); Allen v. Department of Defense, 713 F. Supp. 7, 12-13 (D.D.C. 1989); Wilson v. Department of Justice, Civ. A. No. 87-2415, 1989 WL 298673, at *2 (D.D.C. September 12, 1989); The Washington Post v. Department of Defense, 789 F. Supp. 423, 424 (D.D.C. 1992). In the absence of a dispositive decision by either the Supreme Court or the Court of Appeals for this Circuit, there has been insistence, however, that interim fee awards be limited to unusual instances of protracted litigation and financial hardship. Allen v. Federal Bureau of Investigation, 716 F. Supp. 667, 671 (D.D.C. 1988). Some of these courts have awarded interim fees only if the plaintiff makes a satisfactory showing focusing on four factors: 1) the degree of hardship which delaying a fee would cause to plaintiff or his counsel; 2) whether there is an unreasonable delay on the government's part; 3) the length of time the case has been pending prior to the motion; and 4) the period of time likely to be required before the litigation is concluded. Id. at 672 (citing Powell v. Department of Justice, 569 F. Supp. 1192 (N.D. Cal. 1983)).

The imposition of such requirements is troubling when compared to the clear intent of the provision permitting the award of attorney fees: to prevent access to the FOIA's benefit being a function of one's wealth:

> Too often the barriers presented by court costs and attorneys' fees are insurmountable [sic] for the average person requesting information, allowing the government to escape compliance with the law... [A]s observed by Senator Thurmond:
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> > "We must insure that the average citizen can take advantage of the law to the same extent as the giant corporations with large legal staffs. Often the

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interim fee awards be available to enable meritorious litigation to continue." 859 F.2d at 724-725.

> average citizen has foregone the legal remedies supplied by the Act because he has had neither the financial nor legal resources to pursue litigation when his Administrative remedies have been exhausted."

S. Rep. No. 93-854, 93rd Cong., 2d Sess. at 17-18 (1974)(quoting from 1973 Senate Hearings, vol. 1 at 175).

As I will soon explain, FOIA attorneys must be compensated at historic rather than current rates lest the courts award interest against the United States which Congress has not permitted. FOIA attorneys thus begin the race against their monthly-billing colleagues at a significant disadvantage. The latter bill monthly at current rates and can stop work if the client does not pay. FOIA lawyers can only be compensated at historic rates and have to persist to the bitter end to see any money at all. The pace of FOIA litigation, which can take years, if not decades, may require FOIA lawyers to have the patience of saints and the endurance of marathon runners. To require them to also show additional financial hardship besides what they have to endure in the ordinary course piles Pelion on Ossa and threatens to undercut Congress's purposes, particularly if it leads to counsel either having to abandon the litigation in mid-stream or deterring them from even undertaking the FOIA representation in the first place.

There is also no valid countervailing interest that is advanced by limiting the award of interim fees to cases of extreme financial hardship. One supposes that it could be argued that neither the Court nor the government should be burdened with having to consider a FOIA fee petition until the FOIA litigation is completed. But, that argument has no force when, as is true here, a distinct portion of the litigation is completed and no further appeals are possible as to what has been concluded. See Allen v. Department of Defense, supra, 713 F. Supp. at 13. Once that

portion of the litigation is clearly finished, the government and the court will have to grapple with a fee petition either then, or when the case is entirely completed. Thus, confronting the petition is inevitable; the only question is when. Imposing the additional necessity of showing a financial hardship therefore cannot be justified by the specious claim that consideration of an interim fee award subjects the government and the Court to an additional or unnecessary burden. Indeed, for those who like to attack big tasks by subdividing them into smaller tasks, awarding interim fees may simplify rather than complicate the litigation and consideration of the fee petition.

With that said, I hasten to add that even if, contrary to my view, a plaintiff must show financial hardship by considering the four factors to which some courts have pointed, plaintiff easily meets these requirements. Plaintiff submitted his FOIA request to the agencies in 1985 and it is now 1999. While one can hope that the litigation is coming to a close, the date of its conclusion cannot be predicted with any accuracy. The government made the vast majority of the required disclosures in 1997, 12 years after the FOIA request, and a decade after the commencement of the suit. Plaintiff's counsel has stated that he has medical and other expenses that he needs to pay and also that it is impossible for counsel to maintain meritorious litigation in the public interest without timely compensation for services provided. Motion by Plaintiff for Interim Award of Attorney's Fees at 9. In the eyes of some courts, this hardship may alone be enough to justify an award of interim fees. Powell v. Department of Justice, supra, 569 F. Supp. at 1200.

Plaintiff therefore easily makes the case for interim fees. Indeed, if having to persist for 14 years against strong government opposition and securing the vast majority of the disclosure sought only after 10 years of struggle does not qualify one for interim fees, one wonders when

they would ever be available.

I therefore will recommend an award of interim fees and now turn to plaintiff's eligibility and entitlement.

Eligibility for Attorney's Fees

FOIA permits the award of fees and costs to FOIA plaintiffs who have "substantially prevailed." 5 U.S.C. 552(a)(E). By use of words "substantially prevailed," Congress did not require absolute success. It has therefore been clear from early in the development of FOIA jurisprudence that the award of attorney fees is not a function of a dispositive decision in the requester's favor. National Building Maintenance, Inc. v. Sampson, 559 F.2d 704, 709 (D.C. Cir. 1977). Such a requirement would require a requester to prevail absolutely rather than substantially. It would also provide agencies with no motivation to do any thing but fight until plaintiff's success seemed likely. At that point, the agency could "throw in the towel" and snatch victory from the jaws of defeat by making the documents available prior to judicial resolution of, let us say, the requester's motion for summary judgment. Cf. Goldstein v. Levi, 415 F. Supp. 303, 305 & n. 6 (D.D.C. 1976). Having rendered that motion moot, the agency could deny the requester the fees it spent even though those fees would not have been spent had the agency disclosed the documents. Since such a disposition has nothing to recommend it, the judiciary have given the words "substantially prevailed" a more nuanced meaning, designed to capture and effect Congressional intent in awarding attorney fees. Additionally, courts have focused on the practicalities and pace of FOIA litigation where, unfortunately, cases "progress" as snails fly by.

The first reality is that agencies have never been given sufficient resources to comply with the FOIA and the statutory deadlines in the FOIA are little more than idealistic goals which are

rarely if ever achieved. Additionally, this Circuit in the landmark Open America[4] case indicated that, even after suit has been filed, the agency can secure a stay of the prosecution of the suit until it has a reasonable time to respond to the FOIA request. The practical hope of the district court is that Open America will not be an excuse for more agency delay but that the ultimate response will comply with FOIA and moot the action. Unfortunately, since there are more FOIA requests than resources, the agency must deal with them on a first come, first serve basis. A line of requesters thus develops which can be as long and as frustrating as the one at the Department of Motor Vehicles. If a requester tries to jump in front of the line by filing suit but ultimately secures nothing from the lawsuit, or little more than she would have received had she remained in line, then she will not be found to have substantially prevailed. E.g., Weisberg v. Department of Justice, 745 F.2d 1476, 1496 (D.C. Cir. 1984). While one could say that she got the documents after she filed a lawsuit, to then leap to the conclusion that she therefore substantially prevailed is to come too close to the *post hoc, propter hoc* rationalizing that the courts have condemned. Id. Accord: Public Law Education Institute v. Department of Justice, 744 F.2d 181, 183 (D.C. Cir. 1984); Cox v. Department of Justice, 601 F.2d 1, 5 (D.C. Cir. 1979). She may, after all, have gotten the same documents had she only waited until the agency reached her place in the FOIA line or, when the disclosure was ultimately made, she justifiably secured little of what she originally sought. Ginter v. Internal Revenue Service, 648 F.2d 469, 472 (8th Cir. 1981). See Fund for Constitutional Government v. National Archives and Record Service, 656 F.2d 856, 871 (D.C. Cir. 1981).

The courts have instead inquired whether the FOIA requester reasonably believed that

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[4] Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).

bringing the FOIA lawsuit was necessary because there was no realistic hope that the agency would produce what it was obliged to produce and therefore justifiably saw no good reason to wait in line. Id.; Church of Scientology v. Harris, 653 F.2d 584, 588 (D.C. Cir. 1981). If there has been additional progress such that by the time the suit is brought, the agency has gotten to this requester's place in line and indicated its legal position as to the request, then whether it was reasonably necessary to bring the lawsuit becomes an absolute function of the validity of the government's position. If the agency denies the request and its doing so ultimately withstands judicial review, then the requester has not substantially prevailed. E.g., Duffin v. Carlson, 636 F.2d 709, 713 (D.C. Cir. 1988). If the converse is true, the requester unquestionably gets attorney fees; she prevailed absolutely.

But, judges get paid because cases rarely appear in such black and white terms. A more common progression of a FOIA case is that once administrative remedies have been exhausted, and the Open America extension of time has expired, the government moves for summary judgment accompanying its motion with the so called Vaughn declaration. The latter is supposed to be a detailed explanation of why the agency has declined to provide the documents in whole or in part.

Ironically, the process of the preparation of the Vaughn declaration, designed to justify not producing the documents, can instead yield greater disclosures than the agency originally made. Required to justify in detail its refusal, and aided by its counsel's guidance, the agency may reconsider its original position and disclose what it initially refused to give. Thus, the Vaughn process often becomes more of a disclosure than a withholding process. When it is completed, the requester may well have achieved substantially all the disclosure she could have realistically hoped

for. A court will then conclude that the requester substantially prevailed even though it ultimately awards summary judgment to the agency. E.g. Nationwide Building Maintenance Inc. v. Sampson, supra, 559 F.2d at 704; Cox v. Department of Justice, supra, 601 F.2d at 5.

It is in this context that causation--the cognate of reasonable necessity--comes to the fore. While a judicial declaration granting the requester judgment for the documents it sought unquestionably causes the disclosure of those documents, courts have never limited fee recovery to such complete victories. To the contrary, they review the entire history and may determine that a requester has substantially prevailed despite the ultimate award of judgment to the agency. Instead of ultimate victory, they look to see if the disclosure ultimately made was caused by the lawsuit. That showing is easily made when the agency ultimately resists disclosure, relying on exemptions from FOIA, but in the process of the lawsuit produces documents it once claimed were exempt. In such a situation, it is unlikely to the point of inconceivability that the agency would have changed its original decision without the necessity of having to justify its position in court. When the agency then decides to make the disclosure, rather than hazard the rejection of its legal position, its doing so is unquestionably caused by the lawsuit and justifies the award of fees.[5] FOIA fee litigation is one place where it can be truly said that a fee petitioner may lose

[5] Miller v. Department of State, 779 F.2d 1378, 1388 (8th Cir. 1985); Seagull Manufacturing Co. v. National Labor Relations Board, 741 F.2d 882, 884 (6th Cir. 1984); Cazalas v. Department of Justice, 660 F.2d 612 (5th Cir. 1981); Exner v. Federal Bureau of Investigation, 612 F.2d 1202, 1206 (9th Cir. 1980); Church of Scientology v. Harris, 653 F.2d 584 (D.C. Cir. 1981); Fund for Constitutional Government v. National Archives and Records Service, 656 F.2d 856, 871-872 (D.C. Cir. 1981); Cox v. Department of Justice, 601 F.2d 1, 5-7 (D.C. Cir. 1979); Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704 (D.C. Cir. 1977); Ralph Hoar & Associates v. National Highway Traffic Safety Administration, 985 F. Supp. 1(D.D.C. 1997) Jaffe v. Central Intelligence Agency, 573 F. Supp. 377 (D.D.C. 1983); Founding Church of Scientology v. Marshall, 439 F. Supp. 1267 (D.D.C. 1977); Goldstein v. Levi, 415 F. Supp. 303 (D.D.C. 1976). In each of these cases the FOIA requester ultimately had judgment entered against

several battles but still win the war.

When this fee petition is measured by these standards, it becomes clear that finding that the plaintiff did not substantially prevail would be an utterly incorrect conclusion. First, since the court of appeals gave him no choice, plaintiff exhausted his administrative remedies before he filed his amended complaint. He cannot be accused of attempting to jump over those who were ahead of him in line and then securing little or nothing from the lawsuit he filed. Second, the initial agency responses gave him only 384 of the approximately 10,000 pages of documents he would ultimately secure and were otherwise combative refusaling to grant him what he sought and claiming that everything else was exempt or did not exist. Indeed, the agencies' initially and (in all but one instance) correctly claimed that he had failed to exhaust his administrative remedies. Plaintiff persisted and exhausted them. But, that exhaustion yielded nothing more than what plaintiff had prior to exhaustion since none of the agencies gave plaintiff a single additional document until he had filed suit. Given their intransigent refusal to part with any more of the documents which plaintiff sought during the agency process, it was, to put it mildly, a reasonable conclusion that a lawsuit was necessary to achieve the disclosure plaintiff sought. When the agencies ,over a six year period of time, made the disclosures they did, culminating in a release of 9,000 pages by the Army in 1997, their doing so was the direct result of plaintiff's filing the lawsuit and persisting with it. The agencies cannot seriously be suggesting that they would have ultimately given him every thing he wanted had he not filed suit. To the contrary, they initially gave him a pittance, compared to what he ultimately received. They gave him the rest only after he filed suit and beat back their efforts to throw him out of court for failing to exhaust his

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her or voluntarily dismissed her suit, but was found to have substantially prevailed.

administrative remedies. Even after forcing him to exhaust his administrative remedies, they gave him nothing more. Given their adamant opposition to what he was trying to accomplish, followed by their producing and disclosing thousands more pages of documents than they ever gave him during the agency process, any claim by the government that there was no casual connection between the lawsuit and the agencies' ultimate disclosure borders on the irrational.

Finally, a determination of whether a requester has substantially prevailed requires a comparison of what the plaintiff had when the agency process was exhausted and what it had when the lawsuit was completed or, in this case, nearing completion. When the agency process ended, plaintiff had only 384 pages of documents. Now, plaintiff has over 10,000 pages of documents, fee waivers, and detailed Vaughn indices justifying the documents not given. His abundant success compels the conclusion that he substantial prevailed and fits this case easily within the controlling precedents.

The agencies nevertheless challenge the conclusion that plaintiff substantially prevailed. They reason that plaintiff could not have substantially prevailed because "he lost a large majority of the issues he presented for review." Defendant's Opposition to Plaintiff's Motion for an Interim Award of Attorneys' Fees (" Def. Opp.") at 1-2. They point to the court of appeals' ruling against plaintiff regarding five of the six agencies in its first decision and three of the six agencies in its second. In a similar vein, defendant argues that plaintiff should not have filed suit because he had not exhausted his administrative remedies. Specifically, defendant argues that plaintiff should not be awarded fees for the years 1987-1990 when plaintiff "should not even have been in Court against the Army, the CIA, the NSA, the FBI, and NARA." Def. Opp. at 2. But, speaking generically, and as I have taken pains to explain, whether plaintiff prevailed on all or most of the

issues before the Court is not the crucial inquiry. A requester may substantially prevail even if it loses on every legal issue and has judgment entered against it, if its lawsuit was reasonable, necessary to, and a cause of the ultimate disclosure made. Indeed, whether a FOIA plaintiff substantially prevailed is not related to whether the Court has even resolved any legal issues at all, let alone in his favor. Chesapeake Bay Foundation, Inc. v. Department of Agriculture, 785 F. Supp. 1030, 1033 (D.D.C. 1992), reversed on other grounds, 108 F.3d 375 (D.C. Cir. 1997) (affirmed the district court determination that the Foundation substantially prevailed and was "eligible" for fees and costs). In that case, the court of appeals stated that, even though the district court did not resolve any issues in the case, plaintiff substantially prevailed because the suit was necessary and responsible for obtaining the information requested. Id.

Additionally, as to the 1987 failure to exhaust, it must be remembered that the first court of appeals' decision in this case was a landmark one, setting forth the meaning of what is required to exhaust administrative remedies in a FOIA case. See United States Department of Justice, Freedom of Information Act Guide & Privacy Act Overview, 430-31 (September 1996 ed). Plaintiff had a reasonable argument that it had constructively exhausted its administrative appeals because the defendants did not respond to the request within the ten day period as required by the FOIA, 5 U.S.C. § 552 (a)(6)(A)(i). The district court agreed with plaintiff's analysis and decided the merits of the case. The court of appeals clarified, however, that exhaustion is not necessary if the agency does not answer the FOIA request before a lawsuit is filed but it is when the agencies responded after the ten day limitation period but before plaintiff filed suit. Oglesby v. Department of the Army, supra, 920 F. 2d at 63. There was not a clear, controlling precedent that plaintiff's counsel ignored in bad faith. In fact, the court of appeals allowed plaintiff to then file his

administrative appeals even though the requisite sixty days had already passed. The court of appeals stated that: "[w]e acknowledge that the precise requirements of FOIA exhaustion have heretofore not been sufficiently certain that appellant should not be penalized for not having discerned that an administrative appeal was mandatory." Id. at 65. The determination of whether a FOIA plaintiff substantially prevailed must be based on the entire lawsuit and plaintiff's ultimate success in forcing agency disclosure of the documents it seeks. It certainly is not a function of whether plaintiff won or lost on an admittedly novel issue in the court of appeals.

I acknowledge that there are some situations where plaintiff did not prevail on separate and distinct issues and courts have denied fees for time expended on those issues. Allen v. Federal Bureau of Investigation, 749 F. Supp. 21, 25 (D.D.C. 1990); National Association of Concerned Veterans v. Secretary of Defense, 675 F. 2d 1319, 1327 (D.D.C. 1982). In Hensley v. Eckhart, 461 U.S. 424, 435 (1983), however, the Supreme Court stated:

> [P]laintiff's claim for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the case as a whole, making it difficult to divide the hours expended on a claim by claim basis. Such a lawsuit cannot be viewed as a series of discrete claims.

Id. at 435. In the same case, the Supreme Court has also stated that "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." Id. Similarly, this circuit's opinions reflect the same analysis and have held that a plaintiff's failure to prevail on one count is not itself a sufficient ground for reducing fees. It is the plaintiff's overall success and not the number of counts "won" that matters. See Goos v. National Association of Realtors, 68 F.3d 1380, 1386 (D.C. Cir. 1995) ("[K]ey question is whether the work was reasonably done in pursuit of the ultimate result.")

Dickerson v. HBO & Company, Civ. A. No. 92-2758, 1995 WL 767179 (D.D.C. Dec. 21, 1995). By that standard, it is plaintiff's ultimate victory, not the losses it suffered along the way, that determine whether plaintiff substantially prevailed.

Finally, in a remarkable footnote, the Army seems to be suggesting that plaintiff should not be awarded fees because it was the Army's use of a new indexing system which yielded the 9,000 pages of documents it disclosed to plaintiff in 1997. That the Army makes that argument with a straight face is remarkable. In 1992, the Army assured Chief Judge Johnson that she need not have any concern that the few documents it released to the plaintiff were all that were available.[6] It urged her, therefore, to find that its search had been adequate. Five years later, the same Army released *9,000* pages of documents which its supposedly exhaustive 1991-92 search did not reveal. Had plaintiff not persisted in insisting that the Army's search was inadequate, those 9,000 pages of documents would have never seen the light of day. That plaintiff persisted after the Army made the reckless assertion about the adequacy of its search, which was then proven demonstrably incorrect, is additional grounds to award him fees rather than deny them.

Entitlement to Fees and Costs

FOIA places the burden on the fee applicant to establish entitlement to an award and to document the costs and fees incurred. Anderson v. Secretary of Health and Human Services, 80 F. 3d 1500, 1504 (10th Cir. 1996); Tax Analysts v. Department of Justice, 965 F.2d 1092 (D.C. Cir. 1992).

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[6] Defendant Army stated that "[t]his search was checked personally by the Chief of the FOIPA office, INSCOM and it was determined that each inquiry resulted in a valid response and reflected the best and most reasonable search that could be made on plaintiff's request." Defendant's Motion to Dismiss the Department of Army, or in the Alternative, for Summary Judgment, filed August 17, 1992 at 3.

In determining whether an eligible plaintiff is entitled to fees, the court of appeals has directed district courts to consider: 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) the reasonableness of the agency's withholding. Tax Analysts v. Department of Justice, supra, 965 F.2d at 1094. The subject of the FOIA request was Reinhard Gehlen, former Nazi General in charge of the Nazi intelligence apparatus in Eastern Europe and the Soviet Union. The focus of the request was on how the United States dealt with him, torn as it was between President Roosevelt's de-Nazification order and the need to meet the challenge of our erstwhile ally, the Soviet Union which was rapidly becoming our Cold War enemy at the end of the Second World and the falling of the Iron Curtain. Historians, particularly of the revisionist school, have published articles and books which claim that the post-war hunt for Nazi war criminals was compromised by American intelligence officials who believed that certain Nazis could be of great use to the United States in meeting the Soviet menace. Whatever the validity of their theses, adding to the information available to historians in these vital government documents served an obvious public benefit; the public is unquestionably benefitted when a FOIA request leads to important additions to the country's intellectual patrimony, particularly now that Americans are so often horrified by their children's abominable ignorance of their country's history.[7]

Additionally, there is no showing whatsoever that plaintiff sought the documents for a commercial benefit. I believe his interest in the records was intellectual and, in that sense, disinterested. Finally, one need only compare, as I have, what the agencies initially gave plaintiff

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[7] Americans recently learned to their horror that 60% of high school students scored "below basic" (the lowest possible rating) on a test of their knowledge of history. Diane Ravitch, *Put Teachers to the Test*, Washington Post, February 25, 1998 at A-17.

and what they ultimately disclosed in assessing how reasonable their initial position was. It took 10 years of diligent effort before plaintiff to "hit the mother lode" and when he did, he caused the disclosure to the public of an immense number of documents relating to an important historical topic. The case for awarding him fees under the four required criteria is therefore easily made.

FEES AND COSTS

There is a three part analysis in determining the appropriate award in a FOIA fees case: 1) determination of a reasonable hourly rate, 2) determination of the number of hours reasonably expended in litigation, and 3) the determination of the use of multipliers, but only if merited. Blum v. Stenson, 465 U.S. 886 (1984).

Rate of Compensation

Defendants and plaintiff are in agreement[8] that the Laffey matrix[9] should be used in determining any fees payable in this case. The disagreement is regarding what years' rates the plaintiff may be awarded fees. Plaintiff requests payment for all work done since 1987 at the 1996-97 Laffey rate of $325/hour, insisting that it is simply unreasonable to be paid in 1997, for work done in 1987, at 1987 rates. Unfortunately for plaintiff, the Court of Appeals has held that to accept such an argument is to award interest against the United States which is impermissible without an express waiver of sovereign immunity and FOIA contains no such waiver:

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[8] Plaintiff's counsel are experienced counsel who have handled many FOIA cases; plaintiff's lead counsel, James H. Lesar, Esq., has, for example, litigated over 100 FOIA cases since 1970. Declaration of James H. Lesar at 1.

[9] The Laffey matrix sets forth a fee schedule based upon prevailing market rates and years of experience, adjusted upward on an annual basis in accordance with the rise in the Consumer Price Index. Laffey v. Northwest Airlines Inc., 572 F. Supp, 354 (D.D.C. 1983), aff'd, 746 F.2d 4 (D.C. Cir. 1984). See Save Our Cumberland Mountains, Inc. v. Hodel, 857 F. 2d 1516 (D.C. Cir. 1988).

> Next, Weisberg contends that the court erred in not granting a fee enhancement to compensate counsel for the delay in receiving his fees. This claim, however, is foreclosed by the Supreme Court's decision in Library of Congress v. Shaw, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986). *Shaw* held that, in the absence of explicit statutory authorization, principles of sovereign immunity prevent awards of interest (which are legally and economically indistinguishable from compensation for delay) against the United States. Because FOIA's fee-shifting provision does not authorize compensation for delay, see 5 U.S.C. S 552(a)(4)(E), *Shaw* disposes of Weisberg's claim in this particular.

Weisberg v. Department of Justice, 848 F.2d 1265, 1272 (1988), overruled on other grounds, King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991). Accord: Save Our Cumberland Mountains v. Hodel, 826 F.2d 43, 50 (D.C. Cir. 1987) ("Use of a current hourly rate to pay for work done at a time when rates were lower is simply a forbidden award of interest under another name."), opinion vacated in part on rehearing on other grounds, 857 F.2d 1516 (D.C. Cir. 1988); Northwest Coalition for Alternatives to Pesticides v. Browner, 965 F. Supp. 59, 65 (D.D.C. 1997).

Nor do I see any justification for any other enhancement of the lodestar, such as the risk of undertaking this kind of litigation. Such an enhancement is no longer permissible in this Circuit. King v. Palmer, supra, 950 F.2d at 775.

While the results achieved and the quality of the representation were both excellent, this is already reflected in the lodestar, according to Blum v. Stenson, supra, 465 U.S. at 899-900 (quality of representation generally reflected in reasonable hourly rate); (results obtained normally should not provide an independent basis for increasing the fee award). I do not see how plaintiff can enter through the extraordinarily narrow crack for lodestar enhancements that Blum v.

Stenson, supra, left open.[10]

Thus, I am recommending that plaintiff's counsel be awarded their fees based on their years of experience in the year in which the work was completed and at the rate in which the Laffey matrix suggests is the "prevailing market rate" for that particular year.

I will not, however, award fees for plaintiff's preparation of its opposition to the pending summary judgment motion.[11] It could be argued that, even if defendants win the motion for summary judgment, all that would mean is that, fourteen years after the initial FOIA request was made, defendants have now complied and have no more documents to release. While that argument may make some sense, I think it is foolhardy to grant fees for work on a motion yet to be decided. Fees related to that work are a relatively small part of the fees sought and, in my discretion, I think that resolution of that portion of the fee petition should await Chief Judge Johnson's final disposition of the defendants' motion. I cannot find any case in which a court has anticipated the results of a motion and granted fees while it is still pending.

Reasonableness of Hours

As to the issue of the reasonableness of the attorneys hours, the agencies do not argue

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[10] Since the decision in Blum v. Stenson, supra, only one court has enhanced the lodestar for the quality of representation. Powell v. Department of Justice, Civ. A No C-82-326 Slip. Op. at 22-23.

[11] In reviewing plaintiff's counsel's declaration of fees, I do not find any fees allocated to the work done opposing the pending motion for summary judgment. In fact, during the time period when plaintiff was drafting his opposition, from late 1997 to early 1998, he only lists hours designated to his work on obtaining attorneys fees. If I am incorrect in this determination and plaintiff has included hours for his work on the summary judgment motion, plaintiff shall immediately notify me and the fees shall be adjusted accordingly.

that plaintiff's counsel spent too much time on any one issue[12] or that plaintiff's two attorneys did duplicative work.[13] I have evaluated the hours submitted in their declarations and find the hours to be reasonable. With no objections stated from defendants as to the reasonableness of any particular entries, and with my approval of the affidavits, I recommend that plaintiff be awarded fees for the hours claimed in all litigation work in this case, except the preparation of the opposition to the summary judgment motion. The only fees for which I do not recommend an award are the fees for non-litigation portions of the case for which plaintiff may not recover.[14] Thus, plaintiff is not entitled to collect any fees for the initial filing of any information requests or appeals which equals the 11.1 hours spend on appeal letters to the agencies. See Lesar Aff. at 3. Finally, I recommend awarding fees plaintiff has requested for the preparation of this motion for the award of interim fees ("fees-on-fees"). Finding no specific objection by defendant to the award of fees claimed in preparing this motion and noting that the FOIA case law allows compensation for hours expended pursuing the fee award,[15] I will recommend that the fees-on-fees requested be granted.

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[12] The affidavits are detailed enough to determine what work was done for each entry and the amount of time is not excessive and appears reasonable.

[13] As an example of their efficient delegation of duties, Daniel Acorn does the predominant amount of work in 1997 on the fee petition and James Lesar only billed 4.5 hours in that same year.

[14] See Northwest Coalition for Alternatives to Pesticides v. Browner, supra, 965 F. Supp at 65.

[15] See Copeland v. Marshall, 641 F.2d 880, 896 & n.29 (D.C. Cir. 1980); Assembly of the State of California v. United States Department of Commerce, Civ. A. No. S-91-990, 1993 WL 188328, at *16 (E.D. Cal. May 28, 1993).

Calculation of Fees

Pursuant to this Report and Recommendation, I recommend that plaintiff's counsel be awarded fees for the hours of work they stated in their affidavits, at the rate the Laffey matrix suggests for the year of completion of those hours. The amount of fees awarded shall be $96,394.59 as calculated in the following tables:

James Lesar

YEAR	NUMBER OF HOURS	RATE	TOTAL
87-88	17.6	$200	3,520.00
88-89	65.8	$210	13,818.00
89-90	81.3	$260	21,138.00
90-91	10.9	$275	2,997.50
91-92	9.3	$285	2,650.50
92-93	30.2	$300	9,060.00
93-94	4.5	$305	1,372.50
94-95	27.3	$310	8,463.00
95-96	68.6	$315	21,609.00
96-97	1.6	$325	520.00
97-98	4.5	$330	1,485.00
	321.6		**$ 86,633.50**

Daniel Acorn

YEAR	NUMBER OF HOURS	RATE	TOTAL
97-98	32.6	$285	**$9,291**

Costs

Plaintiff requests costs in the amount of $ 470.09. FOIA permits an award against the government of "reasonable attorney's fees and other litigation costs reasonably incurred." 5 U.S.C. § 552(a)(4)(E). Plaintiff's requests regarding costs are reasonable[16] and have not been specifcally contested by defendant. Thus, costs in the amount of $ 470.09 shall be included in the award of fees which includes costs from the commencement of the case through the present.

CONCLUSION

In conclusion, I find that plaintiff's counsel are eligible and entitled to an interim award of attorneys fees and costs. I recommend that plaintiff's counsel be awarded these fees and costs in the amount of $ 96,394.59 for the FOIA litigation engaged in from 1987 to the present.

The parties should note that failure to file timely objections to the findings and recommendations set forth in this report in accordance with Rule 504(b) for the United States District Court for the District of Columbia may waive their right of appeal from an order of the District Court adopting such findings and recommendations. See Thomas v. Arn, 474 U.S. 140 (1985).

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

March 24, 1999

[16] See Save Our Cumberland Mountains, Inc. v. Hodel, supra, 826 F.2d at 53.