UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, ET AL.,	)	
Plaintiffs	)	
v.	)	Civil Action No.: 04-814 (RCL)
CENTRAL INTELLIGENCE AGENCY,	)	
Defendant	)	

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTIONS FOR INTERIM AWARDS OF ATTORNEY'S FEES AND COSTS

Defendant, the Central Intelligence Agency (CIA), respectfully opposes plaintiffs' Motions for Interim Awards of Attorney's Fees and Costs. *See* ECF Nos. 223 (Hall Petition), 224 (AIM Petition). The plaintiffs in this Freedom of Information Act (FOIA) case requested eight staggeringly broad categories of information regarding prisoners of war and soldiers missing in action (POW/MIAs) from the Vietnam era. Rather than working with the CIA to narrow their requests to seek specific records, they have pressed every conceivable argument over ten years of litigation and evidently intend to continue litigating this case indefinitely. Their strategy has yielded some success: The Court ordered the CIA to search for three of the broad categories, and those searches yielded a number of responsive documents.

But the Court need not reward the plaintiffs' strategy by granting them the astronomically high fee award they seek—*$685,000* just in interim fees. Fee awards under FOIA are discretionary. In determining whether a fee award is appropriate, and if so what fee is "reasonable" under the circumstances, the Court must take into account a variety of equitable considerations. Although the CIA accepts some of the responsibility for the unnecessarily protracted nature of this litigation, and therefore agrees that a fee award of up to $75,000 may be

appropriate, a number of factors militate against granting an award any higher than that. First, when viewed in light of the extraordinary breadth of the underlying FOIA requests, the amount that plaintiffs demand is grossly disproportionate to their modest success. Second, the plaintiffs' two attorneys have largely duplicated one another's efforts – effectively leading to a demand for double fees – and have adopted a dilatory approach that has prolonged the case beyond reason. Finally, the plaintiffs have failed to prove that they are entitled to the so-called *Salazar* rates – which represent top dollar in the Washington legal market – rather than the rates they could *actually* charge their clients for this FOIA litigation.

It is ultimately the plaintiffs' burden to establish that a fee award is appropriate and that the amount they seek is reasonable under the circumstances. They have not carried that burden here. Accordingly, their request should be denied insofar as it exceeds $75,000. An award of $75,000 would best serve the goals of FOIA by encouraging requesters to challenge what they perceive to be unreasonable agency actions but also to focus their efforts on the particular documents they believe will serve the public interest. Any higher award would encourage socially unproductive litigation and result in an unwarranted windfall to the attorneys.

Background

The plaintiffs in this Freedom of Information Act lawsuit seek a broad range of documents relating to Vietnam-era POW/MIAs. There has long been speculation and debate about whether American soldiers were left behind at the conclusion of the Vietnam War and, if so, whether those soldiers are still alive.

Before this lawsuit was filed, the government initiated several programs to gather and release information regarding POW/MIAs. The Senate established a special committee on POW/MIA affairs, which issued a lengthy report after conducting an extensive investigation.

See Report of the Select Committee on POW/MIA Affairs, S. Rep. 103-1 (Jan. 13, 1993). In addition, the President ordered all executive branch agencies to review, declassify to the extent possible, and release "all documents, files, and other materials pertaining to American POWs and MIAs lost in Southeast Asia." Exec. Order 12,812 (July 22, 1992); *see also* Presidential Decision Directive NSC 8 (June 10, 1993). The CIA participated in that effort, searching its files for responsive documents and producing most of those documents to the Library of Congress for public release. *See Hall v. CIA* (*Hall I*), No. 93-1319 (ECF No. 54 at 2); Letter from R. James Woolsey, Director of Central Intelligence, to The President (Nov. 9, 1993) (ECF No. 167-2).

Mr. Hall evidently was unsatisfied with these efforts. Beginning in 1994, he submitted a series of FOIA requests to CIA seeking POW/MIA documents. He filed the *Hall I* lawsuit in 1998. As relevant here, the *Hall I* court decided a number of merits issues in an August 2000 opinion. *See Hall I*, ECF No. 54 ("August 2000 Opinion"). But the litigation then stalled over the issue of search, review, and duplication fees. The court denied Mr. Hall's request for a fee waiver (*Hall I*, ECF No. 85) and ultimately dismissed his lawsuit for failure to pay the fees (*Hall I*, ECF No. 95).

In February 2003, while in the midst of the *Hall I* fee dispute, Mr. Hall submitted another FOIA request to the CIA. That request, which is the subject of the present litigation, substantially overlapped with the *Hall I* requests but also sought several new categories of documents. In addition, two organizations joined Mr. Hall in his new FOIA request: plaintiffs Studies Solutions Results, Inc., and Accuracy in Media (AIM). Although the CIA acknowledged receipt of the new request shortly after it was submitted, it did not send Mr. Hall a substantive response within the applicable time limit. Mr. Hall first tried to amend his complaint in *Hall I* to

add claims based on the new request. *See Hall I*, ECF No. 93. When that failed, he filed this lawsuit.

The February 2003 request asked for seven extremely broad categories of documents. The plaintiffs later amended their complaint to include an eighth category, which they had separately requested. The categories are as follows:

Item 1: All records pertaining to Southeast Asia POW/MIAs (civilian or military) and detainees, who have not returned, or whose remains have not been returned, to the United States, regardless of whether they are currently held in prisoner status, and regardless of whether they were sent out of Southeast Asia.

Item 2: All records pertaining to POW/MIAs sent out of Southeast Asia (for example, to China, Cuban, North Korea, Russia).

Item 3: All records prepared by and/or assembled by the CIA between January 1, 1960 and December 31, 2002, relating to the status of any United States POWs or MIAs in Laos, including but not limited to any reports, memoranda, letters, notes, or other documents prepared by Mr. Horgan or any other officer, agent or employee of the CIA for the Joint Chiefs of Staff, the President, or any federal agency.

Item 4: All records of the Senate Select Committee on POW/MIA Affairs which were withdrawn from the collection at the National Archives and returned to the CIA for processing.

Item 5: All records relating to 47 individuals who allegedly are Vietnam era POW/MIAs, and whose next-of-kin have provided privacy waivers to Roger Hall, and those persons who are on the Prisoner of War/Missing Personnel Office's List of persons whose primary next-of-kin (PNOK) have authorized the release of information concerning them.

Item 6: All records on or pertaining to any search conducted for documents responsive to Roger Hall's requests dated January 5, 1994, February 7, 1994, and April 23, 1998, including but not limited to all instructions and descriptions of searches to be undertaken by any component of the CIA and all responses thereto, and all records pertaining to the assessment of fees in connection therewith, including but not limited to any itemizations or other records reflecting the time spent on each search, the rate charged for the search, the date and duration and kind of search performed, etc.

Item 7: All records on or pertaining to any search conducted regarding any other requests for records pertaining to Vietnam War POW/MIAs, including any search for such

records conducted in response to any request by any Congressional Committee or executive branch agency.

Item 8: All records of whatever nature pertaining to the estimates of fees made in response to the February 7, 2003 Freedom of Information Act request of Mr. Roger Hall and Studies Solutions Research, Inc., and how each estimate was made.

The lawsuit has unfolded in several phases. Between May 2004 (when the complaint was filed) and May 2006, the parties litigated preliminary issues. In this period, plaintiffs filed several unsuccessful motions. First, plaintiffs each filed motions requesting fee waivers, which the court denied. *See* ECF Nos. 7, 12, 30. Mr. Hall then filed a motion to compel the production of certain records (ECF No. 11), which the Court denied (ECF No. 30). Finally, he filed a motion for reconsideration and for an accounting of the CIA's search costs. *See* ECF No. 32. The Court denied that motion, too. *See* ECF No. 46. The CIA also filed two preliminary motions: a motion to dismiss or stay the proceedings in order to allow the administrative process to go forward, and a motion to dismiss Accuracy in Media as a defendant. *See* ECF Nos. 5, 17. Both were denied. *See* ECF No. 30. Finally, in this period, plaintiffs filed an amended complaint, and the CIA filed its Answer. *See* ECF Nos. 45, 48.

The next phase of the litigation – from May 2006 to August 2008 – was similarly laden with plaintiffs' unsuccessful motions. Just before the CIA was scheduled to file its first motion for summary judgment, Mr. Hall served the Agency with broad discovery demands. *See* ECF No. 53-1. The CIA then moved the Court for a protective order, which the Court granted. *See* ECF Nos. 53, 68. Meanwhile, the parties had filed cross-motions for summary judgment. *See* ECF Nos. 54, 72, 73. But Mr. Hall attached an unorthodox declaration to his brief in opposition (*see* ECF No. 73-1), which then precipitated litigation over whether Mr. Hall was qualified to testify about historical events he did not witness (ECF Nos. 77, 83). The magistrate judge

ultimately struck substantial portions of Mr. Hall's declaration. *See* ECF No. 88. Mr. Hall filed a motion for reconsideration, but the Court sustained the magistrate judge's decision. *See* ECF Nos. 95, 106. And because the pending summary judgment motions relied on the faulty declaration, the Court denied them all without prejudice and ordered the parties to file new motions. *See* ECF No. 107. None of plaintiffs' efforts in this two-year period materially advanced the resolution of the case.

Finally, after five years substantially dedicated to litigating plaintiffs' largely unsuccessful motions, the litigation entered a more productive phase. The parties filed new cross-motions for summary judgment, and the Court issued an opinion in November 2009 granting partial relief to both sides. *Hall v. CIA*, 668 F. Supp. 2d 172 (D.D.C. 2009) ("November 2009 Opinion"). The CIA searched for, processed, and produced a number of documents in response to the Court's order, and the parties then filed a new round of summary judgment motions. The Court ruled on those motions in August 2012, again granting partial relief to both sides. *Hall v. CIA*, 881 F. Supp. 2d 38 (D.D.C. 2012) ("August 2012 Opinion"). In brief, the plaintiffs ultimately lost on most issues, including practically all of the withholdings they challenged and multiple requests for discovery and in camera inspection. But they prevailed on several issues related to searches and referrals. Three rulings, in particular, led to the production of the vast majority of the documents in this case:

Item 4: The CIA argued, in reliance on the August 2000 decision in Hall I, that the "records of the Senate Select Committee on POW/MIA Affairs" were congressional records not subject to FOIA. The Court agreed but nevertheless ordered the CIA to search for and produce "all documents of [the CIA's] own creation that were included with the Senate Committee documents." *November 2009 Opinion*, 668 F. Supp. 2d at 179. This led to the production of over 1,000 documents.

Item 5: The CIA argued that a search for "all records relating to" more than 1,700 separate individuals would be unduly burdensome. The Court disagreed and ordered the

CIA to perform the search. *August 2012 Opinion*, 881 F. Supp. 2d at 52-54. This led to the production of over 400 documents.

Item 7: The CIA argued that a search for "[a]ll records pertaining to any search conducted regarding any other requests for records pertaining to Vietnam War POW/MIAs" would be unduly burdensome. Based on the CIA's representations about the difficulty of conducting a search for all the requested records, the Court ruled that the CIA had to search only one specific database for a specific category of records likely to be found in that database. *See November 2009 Opinion*, 668 F. Supp. 2d at 181 (quoting Koch Decl., ECF No. 54-1, ¶ 38 n.11). The CIA performed that search and located no responsive documents. But the Court then changed tack and required the CIA to search for a second category of records in "all systems likely to contain responsive records." *August 2012 Opinion*, 881 F. Supp. 2d at 55. This led to the production of over 200 documents.

In addition, the Court ruled that the CIA had not adequately followed up with other agencies after it referred 22 documents to them for processing. Those documents were later produced to the plaintiffs.

Since August 2012, the CIA has searched for, processed, and produced additional documents. The plaintiffs have indicated that they intend to challenge these searches and withholdings, so there will be at least one more round of summary judgment briefing. Before that happens, however, the plaintiffs have asked the court to rule on their applications for an interim award of attorney's fees.

Argument

Unlike some of the civil rights fee-shifting statutes, but like many other statutes,[1] attorney's fees are not automatic under FOIA or awarded as a matter of course. FOIA commits the decision to award fees, and the determination of what fee is reasonable under the circumstances, to the Court's discretion. *See, e.g.*, *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1365 (D.C. Cir. 1977); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 714 (D.C. Cir.

[1] *See, e.g.*, *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).

1977). A FOIA plaintiff seeking fees must clear several hurdles: (1) he must prove that he is eligible for fees because he has "substantially prevailed" on at least one of his claims, (2) he must prove that he is entitled to a discretionary award of fees in light of various equitable considerations, and (3) he must prove that the amount of fees he seeks is "reasonable" under the circumstances. *Morley v. CIA*, __ F. Supp. 2d __, 2014 WL 364079, *2 (D.D.C. 2014). The applicant bears the burden of proof on each of these issues. *See Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995).

The government does not dispute that the plaintiffs have substantially prevailed on several of their claims and are therefore eligible for fees. *See supra* at 6-7 (describing court rulings that led to production of documents). And although the plaintiffs arguably have not demonstrated that an award of fees is appropriate under the circumstances of the case (*cf. Morley*, 2014 WL 3640769), the government accepts some responsibility for the unnecessarily protracted nature of this litigation and therefore agrees that a fee award of up to $75,000 may be appropriate. There is accordingly no need for the Court to consider whether the plaintiffs are entitled to an award.

The only question is what award is reasonable under the circumstances. For the reasons that follow, the plaintiffs' demand for nearly $700,000 in only interim fees is grossly unreasonable on the facts of this case. The Court should award up to $75,000 in interim fees, but no more.

I. A Large Award Is Unreasonable in Light of the Plaintiffs' Limited Degree of Success, the Questionable Public Value of the Documents Released, and the Overall Reasonableness of the CIA's Actions.

A. The Plaintiffs Submitted Enormously Broad FOIA Requests but have Achieved Only Limited Success.

As the Supreme Court has emphasized, the "'most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)); *see also Judicial Watch, Inc. v. Dep't of Commerce*, 470 F.3d 363, 369 (D.C. Cir. 2006) ("A plaintiff's overall success on the merits also must be considered in determining the reasonableness of a fee award."). Here, the plaintiffs sought eight extraordinarily broad categories of records, including "[a]ll records pertaining to" POW/MIAs in Southeast Asia, "[a]ll records" prepared by the CIA over a 42-year period that "relate[] to the status of" POW/MIAs in Southeast Asia, "[a]ll records" contained in a large collection transferred from the National Archives to CIA for declassification, and "[a]ll records relating to" any one of more than 1,700 named individuals. Because the requests were so broad, it was almost inevitable that litigation would ensue. Yet after ten years of litigation, the Court has largely upheld CIA's processing of those requests.

This Court's summary judgment orders did not lead to the production of any documents at all in four of the eight requested categories (Items 1, 2, 6, and 8) and led to the production of only a handful of documents in another of the categories (Item 3). *See* Overview of Summary Judgment Rulings, attached hereto as Exhibit G. The Court has also upheld practically all of the CIA's asserted withholdings over the course of the litigation. *See id.* And the Court has rejected many of the plaintiffs' efforts to litigate ancillary matters. The plaintiffs' only material success so far has been in convincing the Court to order the CIA to search for three broad categories of documents (Items 4, 5, and 7). Although those three searches led to the production of a large

volume of documents, the great majority of the documents produced are either publicly available at the National Archives or of questionable public value. *See infra* at 10. The plaintiffs certainly point to no great new revelations about the government's search for Vietnam-era POW/MIAs.

The plaintiffs' own arguments confirm this point. Their fee motions portray their litigation efforts as having revealed information on POWs allegedly left behind at the close of the Vietnam War and the Korean Conflict. *See* Hall Mot. 13-16; AIM Mot. 10-13. They point in particular to two items. First, the motions state that plaintiffs successfully obtained documents allegedly showing that David Hrdlicka, whose wife had been told that he had died in captivity during the Vietnam War, was alive in 1968. *Id.* The motions also discuss a letter from the CIA to the Chairman of the Senate Select Committee on POW/MIA Affairs, which they claim discloses new information on CIA efforts to locate POWs, as well as certain identifying information relating to those POWs. *Id.*

Even if these two documents had been released for the first time in this litigation, it is doubtful that they would have "add[ed] to the fund of information that citizens may use in making vital political choices." *Cotton v. Heyman*, 63 F. 3d 1115, 1120 (D.C. Cir. 1995). For example, while information about Mr. Hrdlicka's whereabouts in 1968 is undoubtedly of great interest to his wife, it does not materially improve the public's knowledge of the functioning of the government. And it is impossible to tell from plaintiffs' description just how the Senate letter supposedly informs public discussion and debate. In any event, there is a more fundamental problem: Both documents already appear to be publicly available at the National Archives.[2] Indeed, the whole point of plaintiffs' Item 4 request – which led to the production of

[2] These documents were produced in response to plaintiffs' Item 4 request, and the numbers at the bottom of the documents (*e.g.*, "NND 982009") indicate that they were part of a National Archives declassification project.

the vast majority of the documents in this case – was to obtain documents that had already been turned over to the National Archives and temporarily returned to the CIA for declassification. *Cf.* Letter from John H. Moseman, Director of Congressional Affairs, CIA, to Hon. Porter J. Goss, Chairman, House Permanent Select Committee on Intelligence (Oct. 18, 1999) (noting, nearly four years before plaintiffs' FOIA request, that CIA was conducting a "[l]abor intensive" declassification review of "more than 40,000 documents (22 cartons)" from the records of the Senate Select Committee on POW/MIA Affairs).[3] They were released to the plaintiffs only after the declassified versions had been returned to the Archives. Although the plaintiffs may have had the right under FOIA to seek the Senate documents from the CIA, the release of otherwise publicly available documents is not the sort of victory that can justify a large fee award. *See, e.g., Tax Analysts v. DOJ*, 965 F.2d 1092, 1094 (D.C. Cir. 1992); *Morley v. CIA*, __ F.Supp.2d __, 2014 WL 3640769, *3 (D.D.C. 2014).

A number of the other documents released to plaintiffs are of questionable public value. For example, a large number of the Item 5 documents are personnel records for people included on Mr. Hall's list of 1,700 individuals. *See, e.g.*, Exhibit H. The records are responsive because they "relate[] to" the named individuals, but they shed no light on the government's efforts to locate POW/MIAs in Southeast Asia. The Item 6 and Item 8 documents are even more narrowly focused: They relate solely to the processing of FOIA requests submitted by these particular plaintiffs. For example, Item 8 of plaintiffs' request sought "All records of whatever nature pertaining to the estimates of fees made in response to the February 7, 2003 Freedom of Information Act request of Mr. Roger Hall and Studies Solutions Research, Inc., and how each estimate was made." It is not obvious how documents relating to a particular agency's fee

[3] Available at http://fas.org/sgp/othergov/cia_search.html.

estimate for a particular FOIA request from particular plaintiffs contribute to "the fund of information that citizens may use in making vital political choices." *Cotton*, 63 F. 3d at 1120.

There is no question that plaintiffs have enjoyed some degree of success in the most technical sense, and the government is willing to agree to a fee award. The government's modest contention is that, given the breadth of plaintiffs' initial requests, their success has been limited and their fees should be proportionate. Plaintiffs' success has not been commensurate with a 10-year (and counting) litigation campaign, and the public significance of the information they obtained cannot support a fee award approaching $700,000. Indeed, several recent cases illustrate that plaintiffs' demand for two-thirds of a million dollars in fees is out of line with recent awards in this Circuit.

***CREW v. DOJ*, No. 11-374 (D.D.C. 2015)**. A FOIA plaintiff litigated for five years, successfully obtaining DOJ records on an investigation and prosecution of a prominent lobbyist who pled guilty to campaign finance violations. The records were featured in the *Washington Post* and other news outlets. For plaintiff's five years of successful litigation, the court awarded attorney's fees of $35,018, approximately one-twentieth of what plaintiffs seek here.

***EPIC v. FBI*, No. 12-667, __ F.3d __, 2015 WL 737101 (D.D.C. 2015).** A FOIA plaintiff litigated for four years, successfully obtaining from the FBI records regarding cell-site simulator or "StingRay" technology, which the plaintiff asserted is used by the FBI and other federal agencies to track and locate cellular telephones and other wireless devices. For plaintiff's four years of successful litigation on a matter implicating broad privacy concerns, the court awarded $29,635 in attorney's fees, less than one-twentieth of what plaintiffs seek here.

***EPIC v. DHS*, 999 F.Supp.2d 61 (D.D.C. 2013).** A FOIA plaintiff litigated for three years, successfully obtaining records concerning DHS's monitoring of social media networks so

that the public could assess the privacy risks at stake. For plaintiff's three years of successful litigation on a matter of broad public concern, the court awarded $29,841 in attorney's fees, less than one-twentieth of what plaintiffs seek here.

To be sure, these cases are only a sample of recent attorney's fee awards in FOIA cases in this Circuit. There have been isolated cases with higher awards. *See, e.g., CREW v. FEC*, __ F.Supp.2d __, 2014 WL 4380292 (D.D.C. 2014) (awarding $153,258 in attorney's fees under the USAO *Laffey* Matrix for an intensely-litigated case in which plaintiff sought Federal Election Commission records relevant to the public's ability to make "vital political choices"). But even in that outlying case, the fee awarded was less than one-fourth of the *interim* fee that plaintiffs seek here, the FOIA request was far more tailored, and the records produced had more obvious public value. Plaintiffs' motions fail to explain why they should be awarded fees many times higher than any awarded in recent years in cases where plaintiffs achieved far greater degrees of success.

Plaintiffs' victory has been largely pyrrhic. They "asked for a bundle and got a pittance." *Farrar*, 506 U.S. at 120 (O'Connor, J., concurring). The amount of this Court's fee award should be dramatically reduced to reflect that limited success. *See, e.g.*, *EPIC v. DHS*, 982 F. Supp. 2d 56, 63 (D.D.C. 2013) (Lamberth, J.) (reducing fees by 86% for limited success); *Judicial Watch, Inc. v. DOJ*, 878 F. Supp. 2d 225, 239 (D.D.C. 2012) (reducing fee award by nearly 95% on basis of FOIA plaintiff's "minimal success in this case"). In the government's view, a reasonable interim fee award would be no more than $75,000, which would reflect an annualized rate commensurate with the awards described above in *CREW v. DOJ, EPIC v. FBI,* and *EPIC v. DHS*.

B. The CIA Acted Reasonably in this Case

Attorney's fees under FOIA are not intended to create a windfall for attorneys. Rather, they are intended to deter the government from unreasonably denying documents with the knowledge that few plaintiffs will have the resources to sue under FOIA. *See Citizens for Responsibility and Ethics in Washington v. DOJ*, 820 F. Supp. 2d 39, 45 (D.D.C. 2011) (citing S. REP. NO. 93-854 at 17 (1974)). Because of this, one of the most important factors undergirding an award of attorney's fees is whether the government acted unreasonably. *See Negley v. FBI*, 818 F. Supp. 2d 69, 76-77 (D.D.C. 2011). Courts consider whether "the agency's opposition to disclosure had a reasonable basis in law" and whether "the agency had been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." *McKinley v. FHA*, 739 F.3d 707, 712 (D.C. Cir. 2014) (citation omitted); *see also Chesapeake Bay Found., Inc. v. Dep't of Agric.*, 11 F.3d 211, 216 (D.C. Cir. 1993) (holding that the government need only have "a colorable basis in law" for its decision to withhold documents).

The government concedes that at least two aspects of its handling of this case may not meet that test of reasonableness in hindsight. First, the CIA did not send the plaintiffs a substantive response to their FOIA request for more than a year. The CIA withheld its response on the ground that the February 2003 FOIA request was already the subject of ongoing litigation in *Hall I*. This Court held, however, that the CIA should have issued a response. ECF No. 30. Second, the Court criticized the CIA's failure to adequately follow up on documents referred to other agencies for processing. *See November 2009 Opinion*, 668 F. Supp. 2d at 182; *August 2012 Opinion*, 881 F. Supp. 2d at 55-57. The government does not defend either of those actions here and agrees that a reasonable award may be appropriate in recognition of those shortcomings.

In all other important respects, however, the CIA acted reasonably. The three requests that led to the production of most documents – Items 4, 5, and 7 – were extremely broad. Because of the breadth of those requests and the burden they imposed, the CIA arguably was not obligated to process them at all. Courts have noted that "the FOIA does not provide individuals with the right to demand an all-encompassing fishing expedition of files in every office at taxpayer expense." *Bloeser v. DOJ*, 811 F. Supp. 2d 316, 321 (D.D.C. 2011) (quoting *Dale v. IRS*, 238 F. Supp. 2d 99, 105 (D.D.C. 2002); *Pinson v. DOJ*, __ F.Supp.3d __, 2015 WL 739805 (D.D.C. 2015) (endorsing agency's refusal to conduct an unreasonably burdensome search). Indeed, the case law is clear that agencies need not process requests seeking all documents "relating to" even a single individual, much less the 1,700 individuals named in Item 5. *See Dale v. IRS*, 238 F. Supp. 2d 99, 104 (D.D.C. 2002) (courts have found that FOIA requests for *all* documents concerning a requester are too broad.").

The Court ultimately disagreed with these arguments, and the CIA conducted three burdensome searches at no cost to the plaintiffs. (Although the court had ruled that the plaintiffs were not entitled to a fee waiver, *see* ECF No. 30, the CIA exercised its discretion to waive fees anyway, in an effort to move the litigation along. *See* DeMaio Decl. ¶ 10, ECF No. 109-1.). But the government submits that it is perfectly reasonable – indeed, consistent with the goals of FOIA and the sensible allocation of government resources – for an agency to decline to process these types of extremely broad requests. Even though the CIA ultimately lost on these issues, its behavior was not "recalcitrant in its opposition to a valid claim" and did not "engage[] in obdurate behavior." *McKinley*, 739 F.3d at 712 (citation omitted). The fee award should reflect this aspect of the case.

II. Plaintiffs' Efforts Have Been Duplicative and Dilatory

Although the government will not undertake a line-by-line disputation of plaintiffs' billing records, it is worth noting several broad considerations that suggest that the plaintiffs' lodestar calculation is greatly inflated.

First, there is no justification for awarding double fees for the work of two separate attorneys in this case. Although it is impossible to be certain, it appears that AIM was added as a party in order to strengthen the plaintiffs' argument for a waiver of fees. *See, e.g.*, Mot. for Waiver, ECF No. 12. That was their right; but the taxpayers should not have to bear the cost of that strategic choice. Indeed, it is hard to see what benefit was gained by having two attorneys litigate the same issues. It appears that plaintiffs and their respective counsel have duplicated each other's efforts throughout this case. *See, e.g.*, plaintiffs' motions for partial summary judgment (ECF Nos. 114 and 117); plaintiffs' replies in support of motions for partial summary judgment (ECF Nos. 135 and 136); plaintiffs' responses to the CIA's response to the November 2009 Opinion (ECF Nos. 163 and 166); plaintiffs' responses to the CIA's supplemental memorandum (ECF Nos. 181 and 182); plaintiffs' motions for interim attorney's fees (ECF Nos. 223 and 224). Many of these paired filings are substantively identical – *e.g.*, plaintiffs' motions for attorney's fees are largely word-for-word copies apart from the declarations. Not surprisingly, the billing records disclosed with those fee motions reveal, throughout the case, plaintiffs' counsel have dedicated many hours to conversing with one another by email and telephone. Yet these overlapping and duplicative efforts have not resulted in any greater degree of success or public benefit: in this FOIA case, one diligent plaintiff and counsel likely would have achieved precisely the same outcome and public benefit as multiple plaintiffs and counsels filing identical requests and making similar arguments.

The Supreme Court's recent fee-shifting jurisprudence has made it clear that "a 'reasonable' fee is a fee that is sufficient to induce *a capable attorney* to undertake the representation" in question. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010) (emphasis added). This goal of ensuring that "a capable attorney" will undertake a FOIA case is not advanced by compensating multiple plaintiffs and their attorneys for undertaking the same case simultaneously. For that reason, plaintiffs' combined fee award should be substantially reduced to account for duplication of effort. To the extent plaintiffs shared the burden of prosecuting this case successfully, they are entitled to a *single* reasonable award of attorney's fees. The Court may award fees to the three plaintiffs jointly and severally, and they may determine how best to divide the fees among themselves.[4]

Second, in material respects, this case's unusually long duration has been the result of plaintiffs' litigation choices, and plaintiffs should not be permitted to leverage that lack of diligence into a justification for higher fees. As noted above, the first several years of this litigation largely were consumed with litigating a series of plaintiffs' unsuccessful motions. *See, e.g.*, plaintiffs' motions for fee waivers (ECF Nos. 7, 12); Court's denial of motions (ECF No. 30); plaintiffs' motion to compel production of records (ECF No. 11); Court's denial of motion (ECF No. 30); plaintiffs' motion for reconsideration and for an accounting of the CIA's search costs (ECF No. 32); Court's denial of motion (ECF No. 46); plaintiffs' discovery requests (ECF No. 53-1); CIA's motion for protective order (ECF No. 50); Court's grant of protective order

[4] The government does not mean to suggest that FOIA precludes any possibility of attorneys cooperating on a representation, as commonly occurs with attorneys at the same firm. Instead, the government objects to multiple plaintiffs, represented by multiple firms, litigating identical FOIA requests by filing virtually identical motions throughout a case and then independently seeking attorney's fees. Notably, AIM's fee request – which is only 1/3 the size of Hall's – would itself represent one of the highest FOIA fee awards ever ordered in this Circuit, and would still be just an award of interim fees.

(ECF No. 68); *see also* Order (ECF No. 205) (concluding that litigation over the format of documents was "much ado about nothing" because the U.S. Attorney's Office had already agreed to scan the documents for the plaintiffs).

Although progress on the merits has been made since then, plaintiffs have frequently availed themselves of the Court's willingness to grant extensions. Consider, for example, plaintiffs' response to the CIA's August 23, 2010 supplemental memorandum (ECF No. 148). Under the schedule the Court set forth, plaintiffs were to respond to the CIA's filing within 30 days, *i.e.*, by September 22, 2010. Plaintiffs, however, petitioned to extend their deadline no fewer than eight times, pushing their due date back by seven months. *See* ECF No. 152 (Sept. 21, 2010); ECF No. 153 (Oct. 26, 2010); ECF No. 156 (Dec. 13, 2010); ECF No. 158 (March 3, 2011); ECF No. 159 (March 24, 2011); ECF No. 160 (March 31, 2011); ECF No. 161 (April 7, 2011); ECF No. 162 (April 11, 2011). Even after seven months of extensions, plaintiffs filed their responses several days out of time. *See* ECF No. 164. To be sure, the government consented to each of plaintiffs' extension requests, and the government sought its own share of extensions over the course of the litigation; but plaintiffs should not be heard to cite "Unreasonable Delay on the Government's Part" and "Case Length" (Hall Mot. at 20; AIM Mot. at 20) as justifications for their exorbitant fee demand.

It also bears noting that this is not the only long-running case involving Mr. Hall's attorney, James Lesar. Of the eighty-three cases listed in PACER under Mr. Lesar's name, twenty-six were (or have been) pending in the district court for than five years and thirteen were (or have been) pending in the district court for more than ten years. Mr. Lesar is counsel of record in the only two FOIA cases pending in this district for more than ten years that are listed

in the most recent Civil Justice Reform Act report.[5] And one of Mr. Lesar's cases has been pending for more than twenty-five years, *see DiBacco v. Dep't of the Army*, 983 F.Supp.2d 44 (D.D.C. 2013), while another was pending for almost twenty years, *see Davis v. Dep't of Justice*, 606 F. Supp. 2d 1 (D.D.C. 2009). Although these facts are by no means dispositive, they do suggest a pattern.

Finally, the plaintiffs have entirely failed to meet their burden of proof in several important respects:

- The plaintiffs have made no effort to segregate the time they spent litigating the claims on which they prevailed from time spent on other issues. *See National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327-28 (D.C. Cir. 1982) ("Fees are not recoverable . . . for time expended on issues on which plaintiff did not ultimately prevail."). Only three arguments—all at the summary judgment stage—led to the production of documents. *See supra* at 9. The great majority of plaintiffs' arguments and litigation led nowhere. They should claim fees only for the time spent litigating the three successful arguments (plus other necessary time, such as time spent defending against the government's two motions to dismiss).

- The plaintiffs have apparently charged for non-legal services at their full billing rate. *See, e.g.*, 2/9/15 entry re: "proofed motion"; 4/2/14 entry re: "attempts to upload CD Rom"; 4/17/14 entry re: "work on time sheets." That is not appropriate. *See Missouri v. Jenkins*, 491 U.S. 274, 288 n.10 (1989) ("It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it.").

- Mr. Hall's attorney has not submitted any contemporaneous documentation to support, and only the barest descriptions of, how he spent his time. Although he says he kept contemporaneous records in spiral notebooks, he has not produced those records. This makes it extremely difficult for the government and the Court to evaluate the reasonableness of the claimed fee. A substantial reduction is warranted. *See, e.g., Kennecott Corp. v. EPA*, 804 F.2d 763, 767 (D.C. Cir. 1986); *cf. Action on Smoking and Health v. CAB*, 724 F.2d 211, 220 (D.C. Cir. 1984) ("Outright denial may be justified when the party seeking fees declines to

[5] Available at http://www.uscourts.gov/uscourts/statistics/cjra/2014-03/CJRATable7.pdf.

> proffer any substantiation in the form of affidavits, timesheets or the like, or when the application is grossly or intolerably exaggerated, or manifestly filed in bad faith.").

III. USAO *Laffey* Rates Better Meet the Goal of Fee Shifting Statutes

For whatever fees the Court does decide to award, the Court should calculate those fees by reference to the *Laffey* Matrix maintained by the U.S. Attorney's Office ("USAO *Laffey* Matrix"), attached hereto as Exhibit A, and not the *Salazar* Matrix, attached hereto as Exhibit B. In this case, this would result in a reduction of 32% in the lodestar fees requested by plaintiffs. The USAO *Laffey* Matrix is superior because it more effectively advances the goal of the fee-shifting statutes, which is to ensure the availability of an adequate supply of competent counsel, not to ensure that attorneys receive the same fees as the most highly compensated attorneys in the relevant market, here the Washington, D.C. area. In particular, the USAO *Laffey* Matrix tracks the target market more accurately than the *Salazar* Matrix, which results in overly generous rates, comparable to or exceeding the very top rates in the D.C. market.

As explained below, this Court has recently rejected *Salazar* Matrix rates in favor of USAO *Laffey* Matrix rates, and this case provides no reason to change course. Indeed, in post-*Salazar* cases in this Circuit, James Lesar, Hall's counsel, has filed fee petitions requesting USAO *Laffey* Matrix rates. The Court should adhere to its prior decision and compute fees using, at most, the USAO *Laffey* Matrix rate.

A. Adequate Supply of Competent Counsel

The Supreme Court's jurisprudence on fees-shifting statutes in the last few decades has clearly converged on the use of the lodestar method as the preferred method for calculating a reasonable attorney fee, and in that body of case law, the Supreme Court has been consistent in explaining that the purpose of the fee-shifting statute is not to provide a windfall to the prevailing

counsel, nor to punish the other party or its counsel, but instead to aim somewhat lower: to ensure an adequate supply of counsel who are competent to handle the types of claims brought under the particular statute:

> [A] "reasonable" fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case. *See Delaware Valley I*, 478 U.S., at 565, ("[I]f plaintiffs ... find it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied"); *Blum, supra*, at 897, ("[A] reasonable attorney's fee is one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys" (ellipsis, brackets, and internal quotation marks omitted)). Section 1988's aim is to enforce the covered civil rights statutes, not to provide "a form of economic relief to improve the financial lot of attorneys." *Delaware Valley I, supra*, at 565.

Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 552 (2010). It is important to note that the inducement described above does not necessarily imply even awarding an average rate for the given market, but only a rate high enough to attract an adequate supply of competent counsel to ensure that meritorious claims do not want for effective legal representation.

B. Average Rates in the DC Legal Market

The use of market rates to establish a "reasonable rate" has been accepted by the D.C. Circuit in *Covington v. Dist. of Columbia*, 57 F.3d 1101, 1114 n. 5 (D.C. Cir. 1995). As explained in *Covington*, the requester bears the initial burden of establishing the market rate: "In order to demonstrate this third element, plaintiffs may point to such evidence as an updated version of the *Laffey* matrix or the U.S. Attorney's Office matrix, or their own survey of prevailing market rates in the community." *Id.* at 1109. The Circuit opined that "use of the broad [USAO] *Laffey* matrix may be by default the most accurate evidence of a reasonable hourly rate." *Id.* at 1114 n.5. The Circuit also expressed approval of other evidence of the market rate:

> To supplement any matrix that has been offered, plaintiffs may also provide surveys to update the matrix; affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases; and evidence of recent fees awarded by the courts or through settlement to attorneys with comparable qualifications handling similar cases.

Id. Thereafter the opposing party may "rebut the case for a requested rate ...by equally specific countervailing evidence." *Id*. (quoting *Nat'l Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1326 (D.C. Cir. 1982)).

The dispute about the competing matrices should not obscure the ultimate issue. The lodestar method is intended to produce an award that "*roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Perdue*, 559 U.S. at 551. The correct rate is therefore the one that the attorney has actually charged his client for the services performed in the case or, if the attorney does not charge his clients, the market rate in the community for "similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). Charts like the *Laffey* matrix are easily administrable tools for estimating the overall market rate in a jurisdiction for legal services; and the government is willing to accept the USAO *Laffey* rate in this case and others because it saves time and decreases uncertainty, even though it may overstate a particular attorney's actual billing rate in some cases. But a plaintiff who seeks more than the USAO Laffey rate must be willing to prove through specific evidence that he does, or would, charge the claimed rate to paying clients in similar cases.

The debate about the USAO *Laffey* Matrix versus the *Salazar* Matrix centers on which one better tracks the actual inflation of the legal market for federal litigation in D.C. The USAO *Laffey* Matrix relies on an average within the government's Consumer Price Index for all urban

consumers ("CPI-U"), specifically, the CPI-U for the Washington-Baltimore, DC-MD-VA-WV, which aims to capture the inflation for consumer spending in the Baltimore-Washington metropolitan area.

This Court has previously followed the USAO *Laffey* Matrix and rejected the *Salazar* Matrix. *See Fisher v. Friendship Public Charter School*, 880 F. Supp. 2d 149, 155 (D.D.C. 2012) (Lamberth, J.) (rejecting *Salazar* rates in a case of unexceptional complexity). It should apply the same reasoning here: Although long in the tooth, this case has been a straightforward FOIA matter. What is more, James Lesar, Hall's counsel, has previously sought fees according to the USAO *Laffey* Matrix in this Circuit in the years following the *Salazar* decision. *See* Lesar Decl. at 11-12, filed in *Summers v. DOJ*, No. 98-1837 (Jan. 1, 2006), attached hereto as Exhibit C (requesting USAO *Laffey* rates); Lesar Decl. at 7, filed in *Davy v. CIA*, No. 00-2134 (Jan. 29, 2007), attached hereto as Exhibit D (requesting USAO *Laffey* rates). In fact, *Summers* and *Davy* covered several of the same years as this case, but Mr. Lesar now seeks higher rates than he did in those cases, even for the years in common. *Compare* Lesar *Davy* Decl. at 7 (Ex. D) (seeking $410/hr for hours billed in 2006-2007) *with* Hall Motion, ECF No. 223-1 at 36 (seeking $614/hr for hours billed in 2006-2007). Mr. Lesar should be held to his prior position that USAO *Laffey* rates are appropriate. To the extent the Court might seek to revisit this issue, or to bolster the Court's previous findings on it, defendant offers the additional argumentation below.

As one court in this Circuit recently noted, "[a]lmost all members of this Court have consistently declined to approve as reasonable the inflated rates that comprise the Adjusted *Laffey* [*Salazar*] Matrix . . . electing instead to use the U.S. Attorney's Office's *Laffey* Matrix as the presumptive highest hourly rate . . . ." *Salmeron v. District of Columbia*, __ F.Supp.3d __,

2015 WL 129079 *5 (D.D.C. Jan. 9, 2015) (Walton, J.).[6] *Compare McAllister v. District of Columbia*, --- F. Supp. 2d ---, 2014 WL 901512 (D.D.C. Mar. 6, 2014) (Contreras, J.) (using USAO *Laffey* rates); *Embassy of Fed. Republic of Nigeria v. Ugwuonye*, 297 F.R.D. 4, 15 (D.D.C. 2013) (Rothstein, J.); *Berke v. Bureau of Prisons*, 942 F. Supp. 2d 71 (D.D.C. 2013) (Huvelle, J.) ("the USAO Laffey matrix is far more widely accepted," citing cases)*; Fisher*, 880 F. Supp. 2d at155 (Lamberth, J.) (rejecting *Salazar* rates); *Sykes v. District of Columbia*, 870 F. Supp. 2d 86, (D.D.C. 2012) (Kay, M.J.) (rejecting *Salazar* rates in favor of USAO *Laffey* rates)*; Heller v. Dist. of Columbia*, 832 F. Supp. 2d 32, 48 (D.D.C.2011) (Sullivan, J.) (rejecting *Salazar* rates and crediting expert opinion of Dr. Malowane over that of Dr. Kavanaugh); *Hayes v. D.C. Public Schools*, 815 F. Supp. 2d 134, 143 (D.D.C. 2011) (Urbina, J.); *Queen Anne's Conservation Ass'n v. U.S. Dept. of State*, 800 F. Supp. 2d 195 (D.D.C. 2011) (Robinson, M.J.); *Woodland v. Viacom, Inc*., 255 F.R.D. 278 (D.D.C. 2008) (Facciola, M.J.); *American Lands Alliance v. Norton*, 525 F. Supp. 2d 135, 150 (D.D.C. 2007) (Walton, J.) ***with*** *CREW v. DOJ*, No. 11-374 (D.D.C. Feb. 11, 2015) (Cooper, J.) (applying *Salazar* rates, but decreasing them by 15% to reflect firms' difficulty in collecting all billable amounts); *CREW v. DOJ*, No. 11-1021 (D.D.C. Oct. 24, 2014) (Boasberg, J.); (*Eley v. District of Columbia*, 999 F. Supp. 2d 137 (D.D.C. 2013) (Howell, J.) (applying *Salazar* rates and rejecting USAO *Laffey* rates); *Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 15 (D.D.C. 2000) (Kessler, J.) ("Salazar I") (accepting an "enhanced" *Laffey* Matrix for the first time).[7]

[6] Although *Salmeron* was an IDEA case, the same is true of FOIA matters.

[7] *Cf. Thomas v. District of Columbia*, 908 F. Supp. 2d 233, 243-44 (D.D.C. 2012) (Howell, J.) (using USAO *Laffey* Matrix where requester relied on it); *Cox v. District of Columbia*, 754 F. Supp. 2d 66, 76-77 (D.D.C. 2010) (Kessler, J.) (awarding requested rates,

1. As explained in the attached Declaration of Dr. Laura Malowane (Exhibit E), the CPI-Washington produces a matrix that more closely tracks the average hourly rates charged by firms in the DC area, as reflected by the results of survey data collected by ALM Legal Intelligence, in its annual Survey of Law Firm Economics. (Malowane Decl. ¶ 28.)[8] This closer tracking is seen in two ways. First, the survey data show that the average rates for attorneys at private firms saw actual inflation in hourly rates ranging from 6% up to 1.6% down, depending on experience level of the attorneys. By contrast, the *Salazar* Matrix showed a nearly 10% increase across all levels of experience. (Malowane Decl. ¶ 28 and Table 1.) Second, for 2011, the hourly rates provided by the USAO *Laffey* rates much more closely resemble the average rates reflected in the survey data for D.C.[9] The Malowane Declaration summarizes these average rates from the survey data, and compares them to the rates suggested by the USAO *Laffey* Matrix and the *Salazar* Matrix:

2011 Rates			
Years' Experience since law school	**Salazar Matrix**	**USAO Laffey Matrix**	**Average Rates DC**
20+	$709	$475	$459
11-19	$589	$420	$418
8-10	$522	$335	$338

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which were below USAO *Laffey* rates); *Friends of Animals v. Salazar*, 696 F. Supp. 2d 16, 21 (D.D.C. 2010) (Collyer, J.) (parties agreed on USAO *Laffey* rates).

[8] The Malowane Declaration was drafted for, and was submitted recently in, *Citizens for Responsibility and Ethics in Washington v. Dep't of Veterans Affairs*, No. 08-1481 (PLF) (D.D.C.). *See* Defendant's Opposition to Motion for Attorney's Fees (ECF No. 85) (filed December 5, 2014).

[9] 2011 rates are the most recent commercially available. (Malowane Decl. ¶ 28 n.20.)

4-7	$361	$275	$295
1-3	$294	$230	$270

(Malowane Decl. ¶ 32 & Table 2.) These numbers speak for themselves: the average rates charged by D.C. firms, as reflected in the survey data, closely track the rates estimated by the USAO *Laffey* Matrix, whereas the corresponding rates in the *Salazar* Matrix are much higher, in some cases more than 50% higher. (*Id*. ¶ 33 & Table 3. *See also* Exhibit B, the *Salazar* Matrix.) This stark difference suffices to show the inaccuracy of the *Salazar* Matrix and, per *Covington*, the Court should reject it in favor of the USAO *Laffey* Matrix.

This evidence also suffices to show that the *Salazar* Matrix is far more generous than any reasonable estimate of what would be necessary to ensure an adequate supply of competent counsel. For surely that statutory goal would be met by something less than the average rates charged, and yet here the evidence shows that the *Salazar* rates are far above even the average.

Indeed, the survey data go even further than this when comparing the *Salazar* rates to those charged by the largest surveyed firms in D.C. Table 4 of the Malowane Declaration shows that the top *Salazar* rate of $789/hour exceeds that of the average of the twelve largest firms headquartered in D.C. (*Id*. ¶ 40.) The survey data illustrate that the *Salazar* Matrix misses the average D.C. market by a wide margin, so much so that it even exceeds the average rates at the largest twelve firms in town. The *Salazar* Matrix thus represents even more than top dollar. This is a far cry from a "reasonable" rate that would fulfill the statutory goal of ensuring an adequate supply of competent counsel. *Accord Berke*, 942 F. Supp. 2d at 77 ("This Court agrees that the USAO matrix more accurately reflects the prevailing market rates in the Washington, D.C. legal market. This is particularly true here, where the hourly rates sought by the WLCCR attorneys under the updated *Laffey* matrix [i.e. *Salazar*] far exceed even the rates sought by the

private attorneys at Ballard Spahr."), *id*. at 78 ("The rates charged by the five Ballard Spahr attorneys who worked on this case, though not identical to the [USAO] *Laffey* rates, are very much 'in line' with them.").[10]

2. In addition to the survey data from ALM Legal Intelligence, *Covington* contemplates evidence of what other attorneys have received in awards from the courts. A review of decisions by this Court, reported in Westlaw, from January 1, 2009, to December 2, 2014, shows two important themes that further undercut the reliability of the *Salazar* Matrix.[11] First, of the 138 reported decisions in which it could be determined whether the requester sought USAO *Laffey* rates, or more, or less, in fewer than one third did the requester ask for more than the USAO *Laffey* Matrix rates. (Exhibit F, spreadsheet listing cases.) And of those cases with requests for higher rates, more than half were made by a single attorney (Douglas Tykra).

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[10] According the Ballard Spahr website, the firm has more than 500 attorneys in 14 offices and its "litigators are fully experienced in taking the largest and most complex cases to trial, as plaintiff or defense counsel." http://www.ballardspahr.com/practiceareas/practices/litigation.aspx (last visited Dec. 5, 2014).

[11] This Office compiled the list by searching the Westlaw database ("dctdc") for U.S. District Court decisions by this Court, issued from 1/1/09 to 1/27/15, that used the term "attorney fee" (which includes the plural), and included any of the following additional terms: lodestar, hourly, Laffey, Matrix, Salazar, or enhanced. This yielded 287 hits. From those, 138 decisions were identified for inclusion on the attached list where each included decision (1) involved a request for attorney's fees, and (2) described whether the requester was seeking rates above or below the USAO *Laffey* Matrix rates. Generally, the 149 cases not included on the list fell into 5 categories: (1) the decision did not involve a fee request or, if it did, it was decided on preliminary grounds (e.g., eligibility or entitlement) and/or did not provide enough information about the hourly rate requested to compare to USAO *Laffey* Matrix rates, (2) the requested fee was based on a contingency fee percentage, not on a lodestar hourly rate calculation, (3) the fees were requested under the Equal Access to Justice Act, which has a hard cap on fees, (4) fees awarded based on something other than a fee-shifting statute, e.g., by contract, and (5) fees based on a different legal market outside of DC. In each of the instances in (2)-(5), there was not enough information in the decision about what the requester thought was a reasonable market hourly rate in D.C. Of course, the Westlaw sample does not include all potentially relevant decisions, e.g., decisions unpublished by Westlaw, but there is no apparent reason to question that it is representative of all relevant decisions by this Court in the same time period.

Second, fewer than 10% of the decisions resulted in awarded rates higher than USAO *Laffey* Matrix rates. (Exhibit F.) These low incidences of higher requests and higher awards are both inconsistent with a legal market in which the USAO *Laffey* Matrix might be failing to ensure an adequate supply of competent legal counsel. Were that the case, one would certainly expect upward pressure in the legal rates to be reflected in far more attorneys asking for higher rates. (*Accord* Malowane Decl. ¶ 35.) Indeed, given how infrequently this Court has awarded rates above the USAO *Laffey* Matrix rates in the past five years, if it were the case that the USAO *Laffey* Matrix rates were in fact too low, one would expect that the supply of available competent counsel to have been pinched or reduced. But there is no evidence of this – nor even a suggestion of it – either in plaintiffs' motions for fees or indeed in the recent decisions of this Court. This is a classic dog that did not bark. And it is further confirmation that the USAO *Laffey* Matrix rates adequately fulfill the statutory purpose of ensuring an adequate supply of competent counsel.

3. Further evidence supporting the use of the CPI-Washington comes from the use of that inflation index in the jurisprudence for attorney's fees awarded under the Equal Access to Justice Act ("EAJA"), which awards reasonable fees capped at $125/hour, where that cap is subject to an inflation adjustment. *See* 28 U.S.C. § 2412(d)(2)(A) ("not ... in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys ... justifies a higher fee."). In *Porter v. Astrue*, 999 F. Supp. 2d 35, 39 (D.D.C. 2013) (Boasberg, J.), the Court reviewed the case law on point and concluded that "most of the courts in the circuit use the regional CPI" as the inflation adjuster. Because the baseline rate of EAJA fees – $125 per hour – is well below all of the USAO *Laffey* Matrix rates, this means that the selection of the correct inflation adjuster is critical in ensuring

that EAJA awards achieve EAJA's stated goal. And that goal explicitly requires accounting for the possibility of "the limited availability of qualified attorneys," which is equivalent to the goal of the other fee-shifting statutes as reflected in the *Perdue* line of Supreme Court cases – to ensure an adequate supply of competent counsel. *See* 28 U.S.C. § 2412(d)(2)(A)(ii). Therefore, if the "regional CPI" is sufficient for EAJA's purposes, it stands to reason that the CPI-Washington should work for the other fee-shifting statutes, and indeed, it may well be generous in light of the higher starting point for the USAO *Laffey* Matrix rates compared to EAJA's $125 per hour.

4. Much ink has been spilled in this Circuit on the conceptual differences between the CPI-Washington used by the USAO *Laffey* Matrix and the Legal Services Index used by proponents of the *Salazar* Matrix. The most important point in the debate may well be that neither matrix's inflation index directly represents – or even overlaps with – the ideal target market, which is the legal market for attorney services within this Court for complex federal litigation. The Legal Services Index captures only those legal services that the Bureau of Labor Statistics considers part of the bundle of goods and services purchased by a typical *consumer*, such that the LSI can function as a component of *consumer* spending. Therefore, it necessarily heavily favors the simplest of legal services, specifically uncontested work on wills, powers-of-attorney, divorces, and administrative immigration matters. There is little reason to expect much overlap in (a) the attorneys who provide those kinds of legal services for uncontested actions, largely on a flat-fee basis, and (b) the attorneys who represent clients in complex federal litigation. (Malowane Decl. ¶ 17.)

The bottom line on the use of matrices should be which one better approximates the overall market, rather than the high end of the market. The data overwhelmingly favors the

USAO *Laffey* Matrix as a reasonable, and probably generous, guide for the rates necessary to ensure an adequate supply of competent counsel for FOIA litigation in Washington, D.C. Moreover, neither Hall's attorney nor AIM's attorney has demonstrated that he has, or could, charge higher rates to paying clients in similar cases. The USAO *Laffey* Matrix rates therefore represents the best available estimate of the market rate for the services those attorneys performed in this case.

CONCLUSION

For the foregoing reasons, the CIA respectfully asks the Court to compute plaintiff's interim fee award using the USAO *Laffey* Matrix, and to reduce that award to an amount commensurate with (i) their moderate degree of success, (ii) recent fee awards in FOIA cases in this Circuit and (iii) the fact that plaintiffs' efforts were substantially duplicative. In the CIA's view, such a calculation leads to a reasonable interim fee award of approximately $75,000.

Dated: February 27, 2015

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, ET AL.,	)	
Plaintiffs	)	
v.	)	Civil Action No.: 04-814 (RCL)
CENTRAL INTELLIGENCE AGENCY,	)	
Defendant	)	

Order

UPON CONSIDERATION of plaintiffs' motions for an interim award of attorney's fees, it is hereby

ORDERED that the motion is GRANTED; and it is

ORDERED that defendant shall pay to plaintiffs $75,000 in interim attorney's fees and costs.

SO ORDERED.

_____ _____

Date United States District Judge