UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES LUTCHER NEGLEY Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, Defendant.	)	Civil No. 03-2126 (GK)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

Defendant Federal Bureau of Investigation ("FBI" or "Defendant"), by and through undersigned counsel, respectfully submits this opposition to Plaintiff James Lutcher Negley's Motion for An Award of Attorneys' Fees and Costs. Plaintiff, a private citizen, brought suit under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *as amended*, in connection with a FOIA request he submitted to the FBI for "any records about [him] maintained at and by the FBI in [the San Francisco] field office." First, Plaintiff's motion is premature and judicially inefficient at this juncture in the proceedings. Second, even if Plaintiff's motion is not deemed premature, Plaintiff has failed to show that he is "entitled" to an award of fees and costs. The records sought by Plaintiff's FOIA request do not confer any public benefit, and Plaintiff undeniably falls into the latter category in the distinction that the D.C. Circuit has drawn between "requesters who seek documents for public informational purposes and those who seek documents for private advantage." *See Davy v. CIA*, 550 F.3d 1155, 1160 (D.C. Cir. 2008). As a result, this Court should follow the D.C. Circuit's guidance that "the latter cannot deserve a subsidy as they benefit only themselves and typically need no incentive to litigate," *id.*, and deny

Plaintiff's motion for attorneys' fees and costs in its entirety. Finally, even if this Court were to find that Plaintiff's motion is not premature and Plaintiff is entitled to an award of fees and costs, the requested award of $208,894.80 is unreasonable and should be reduced significantly.

BACKGROUND

As the Court is well-acquainted with the facts of this case, Defendant will not recount the factual background but will provide a brief summary of the relevant procedural background.

In August 2007, Defendant filed its second motion for summary judgment on all the claims raised by Plaintiff. At the same time, Plaintiff cross-moved for partial summary judgment challenging the sufficiency of the FBI's searches, seeking the production of File Number 149A-SF-106204-S-1575, and seeking the production of a *Vaughn* index. *See* Docket No. [71]. On September 24, 2009, the Court issued an Order granting Plaintiff's Motion for Partial Summary Judgment and denying Defendant's Second Motion for Summary Judgment. *See* Docket No. [90]. The Order required Defendant to:

- produce File Number 149A-SF-106204-S-1575 ("File S-1575"), along with a *Vaughn* index for any redactions and/or withholdings and a detailed affidavit explaining the bases for any redactions and/or withholdings;
- conduct an additional search of (1) the ICM database using relevant file numbers and dates; and (2) the ECF database that "captures at least the 'six-way phonetic breakdown' of Negley's name";
- conduct a reasonable search, or specify with sufficient detail the search terms used in its earlier searches of (1) the ELSUR database; (2) the Zy database; (3) the SFFO card index; (4) FBIHQ; (5) handwritten notes; (6) personal files; and (7) restricted files;

- produce all responsive non-exempt documents resulting from the searches, along with a detailed affidavit explaining the searches; and
- make FBI affiants available for depositions, including one deposition of David M. Hardy, at Defendant's cost, limited to the topics discussed in the Fifth Declaration of David M. Hardy submitted concurrently with Defendant's Second Motion for Summary Judgment.

Following the Court's issuance of its Order on September 24, 2009, Plaintiff filed his motion for attorneys' fees and costs, seeking a total award of $208,894.80. Recognizing that there remains additional discovery in this case and, quite possibly, further briefing before any final judgment is rendered on the merits of Plaintiff's FOIA claim, Plaintiff "reserve[d] his right to file a subsequent motion for attorneys' fees and costs, if appropriate, after any remaining discovery and if he obtains judgment on any remaining claims (or if the case is appealed)." *See* Pl.'s Mem. at 1 n.1.

LEGAL STANDARD

Pursuant to the FOIA's fee-shifting provision, a court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case . . . in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E). Under this provision, courts have employed a two-step inquiry to determine whether an award of attorneys' fees is proper. First, a court must determine whether the complainant has shown that he is "eligible" for an award by demonstrating that he has "substantially prevailed." Second, and equally important, a court must determine whether the complainant has shown that he is "entitled" to an award. *See Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1495 (D.C. Cir. 1984). This second inquiry entails a balancing of four factors: (1) the benefit of the

release to the public; (2) the commercial benefit of the release to the plaintiff; (3) the nature of the plaintiff's interest; and (4) the reasonableness of the agency's withholding. *Id.* at 1498. Once it is determined that a complainant is entitled to attorneys' fees, the court then calculates a reasonable fee award. *Id.* at 1495.

Prior to 2001, courts employed the "catalyst theory" to determine whether a plaintiff had "substantially prevailed" and was therefore eligible for attorneys' fees under FOIA. Under the catalyst theory, "[s]o long as the litigation substantially caused the requested records to be released, the FOIA plaintiff could recover attorneys' fees even though the district court had not rendered a judgment in the plaintiff's favor." *See Oil Chemical & Atomic Workers v. Dep't of Energy*, 288 F.3d 452, 454 (D.C. Cir. 2002) ("*OCAW*") (discussing the history of the catalyst theory). In 2001, the Supreme Court in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), expressly rejected the application of the catalyst theory to an award of attorneys' fees under the fee-shifting provisions of the Fair Housing Amendments and the Americans with Disabilities Act. Rather, the Court held that a plaintiff was a prevailing party only if he "received a judgment[] on the merits" or secured "a settlement[] agreement enforced through a consent decree." *Id.* at 605. Thus, a defendant's "voluntary change in conduct, although perhaps accomplishing what the plaintiffs sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.*

In *OCAW*, the D.C. Circuit found that the "'substantially prevail' language in FOIA [is] the functional equivalent of the 'prevailing party' language" found in the statutes *Buckhannon* interpreted. *OCAW*, 288 F.3d at 455-56. Accordingly, the Court held that "in order for plaintiffs in FOIA actions to become eligible for an award of attorneys' fees, they must have 'been awarded some relief by [a] court,' either in a judgment on the merits or in a court-ordered

consent decree." *Id.* at 456-57 (quoting *Buckhannon*, 532 U.S. at 603); *see Davis v. CIA*, 460 F.3d 92, 106 (D.C. Cir. 2006).[1]

ARGUMENT

In exercising its statutory discretion under the FOIA regarding attorneys' fees, the Court must engage in a two-step substantive inquiry: (1) whether the plaintiff is eligible for an award of fees and/or costs; and, if so, (2) whether the plaintiff is entitled to the award. *See Cotton v. Heyman*, 63 F.3d 1115, 1123 (D.C. Cir. 1995); *Tax Analysts v. U.S. Dep't of Justice*, 965 F.2d 1092, 1093 (D.C. Cir. 1992). It is well-established that "the 'legislative history of section 552(a)(4)(E) evinces a clear congressional intent to leave the courts broad discretion when considering a request for attorney fees,' such that there is no 'presumption in favor of awarding attorney fees' to prevailing FOIA litigants." *See Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Protection*, No. 04-0377 (JDB), 2006 WL 3060012, at *2 (D.D.C. Oct. 26, 2006) (quoting *Nationwide Bldg. Maint., Inc. v. Sampson*, 559 F.2d 704, 713-14 (D.C. Cir. 1977) and citing *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1367 (D.C. Cir. 1977) ("It is clear from the legislative history that Congress did not intend the award of attorney fees to be automatic.")).

[1] The OPEN Government Act of 2007 went into effect on December 31, 2007, but does not, as Plaintiff concedes, Pl.'s Mem. at 8 n.4, apply retroactively to cases pending at the time of its passage. *See Summers v. Dep't of Justice*, 569 F.3d 500, 504 (D.C. Cir. 2009). Among other things, the statute amends 5 U.S.C. § 552(a)(4)(E) to provide that a complainant has "substantially prevailed if the complainant has obtained relief," either through (i) a judicial order, or an enforceable written agreement or consent decree; or (ii) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial. *Id.* § 4(a)(2). The Act was designed to incorporate the "catalyst theory" for FOIA cases that had been rejected by *Buckhannon*. *See Summers*, 569 F.3d at 503.

I. WHILE PLAINTIFF HAS PREVAILED WITH RESPECT TO FILE S-1575 AND ADDITIONAL SEARCHES, ANY FEE DETERMINATION AT THIS STAGE IN THIS LITIGATION IS PREMATURE AND INEFFICIENT

Defendant recognizes that the Court's September 24, 2009 Order required the FBI to produce File S-1575, conduct additional searches of the ICM database and the ECF database, and produce all responsive non-exempt documents resulting from the searches.[2] The Order also required the FBI to ***either*** conduct a reasonable search ***or*** provide additional details as to the search terms used in its earlier searches of the ELSUR database, the Zy index, the SFFO card index, FBIHQ, handwritten notes, personal files, and restricted files.[3] In addition, the Court permitted Plaintiff to take three additional depositions of FBI representatives limited to: (1) the topics discussed in the Fifth Declaration of David M. Hardy submitted concurrently with Defendant's Second Motion for Summary Judgment; (2) the affiant who attests to the bases for any redactions and/or withholdings with respect to File S-1575; and (3) the affiant who attests to the additional searches conducted in response to Plaintiff's FOIA request.[4]

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[2] Pursuant to the Court's September 24, 2009 Order, the FBI produced File S-1575 on October 26, 2009, *see* Exhibit A attached hereto, and completed its searches of the ICM database and the ECF database by November 23, 2009.

[3] Plaintiff claims in his opening brief that the Court's September 24, 2009 Order required the FBI to "conduct within 60 days reasonable searches of nine different sources of information," Pl.'s Mem. at 1, acknowledging only in passing that "for some sources" the Order actually required that the FBI either conduct a reasonable search or "explain in sufficient detail its manner of previously conducting a reasonable search," *id.* at 6. In fact, the Court's September 24, 2009 Order sought more specificity from the FBI as to the search terms used in its earlier searches of seven of the nine sources of information -- specifically, (1) the ELSUR database; (2) the Zy index; (3) the SFFO card index; (4) FBIHQ; (5) handwritten notes; (6) personal files; and (7) restricted files.

[4] Oddly, Plaintiff again fails to accurately characterize the Court's Order, claiming that the Court "authorized additional discovery (including additional depositions of FBI representatives, *some* of which would be at the FBI's cost)." Pl.'s Mem. at 8 (emphasis added). The Court's September 24, 2009 Order provided that only one of the depositions would be at the FBI's cost.

Although Defendant does not dispute that Plaintiff has "prevailed" with respect to the disclosure of File S-1575 and the additional searches of the ICM database and the ECF database, there remains, as Plaintiff acknowledges, additional discovery in this case and, quite possibly, further briefing should Plaintiff decide to challenge any withholdings and/or exemptions asserted with respect to any disclosures. Because final judgment has not been rendered on the merits of Plaintiff's FOIA claim, with the exception of File S-1575 and the additional searches of two of the nine potential sources of information, it is not possible at this time to determine whether Plaintiff will have "substantially prevailed" with respect to the other seven potential sources of information, for which the Court has ordered that the FBI either provide additional details on its prior searches or conduct a reasonable search. *See Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 470 F.3d 363, 368 (D.C. Cir. 2006) ("[I]n order to 'substantially prevail,' a party must obtain court-ordered relief on the merits of its FOIA claim.").

Therefore, Defendant respectfully submits that a motion for attorneys' fees is premature at this time. *See Wheeler v. Executive Office of U.S. Attorneys*, No. 05-1133 (CKK), 2008 WL 178451, at *7 (D.D.C. Jan. 17, 2008) (finding the issue of whether plaintiff was entitled to costs and attorneys' fees to be "premature" given that there remained outstanding issues yet to be resolved). Moreover, courts have found the need for piecemeal litigation over attorneys' fees to be "inefficient" and permitted only "in limited circumstances" that are not present in this case. *See Biberman v. FBI*, 496 F. Supp. 263, 265 (S.D.N.Y. 1980) (noting "inefficiency" of interim fee award); *see also Allen v. FBI*, 716 F. Supp. 667, 669-72 (D.D.C. 1989) (recognizing that although court may order payment of interim fees, it should be done only "in limited circumstances").

Even if Plaintiff has substantially prevailed, "[e]ligibility for fees does not necessarily mean that a party is entitled to attorney fees under FOIA." *See Judicial Watch*, 470 F.3d at 369. Here, Plaintiff, a requester seeking documents for his personal benefit, cannot satisfy the entitlement portion of the Court's two-step analysis. As detailed below, Plaintiff fails to demonstrate that he is entitled to attorneys' fees under the criteria employed by this Court, and thus this Court should deny Plaintiff's motion for attorneys' fees and costs in its entirety.

II. AS PLAINTIFF'S FOIA REQUEST DOES NOT SERVE ANY PUBLIC INTEREST AND PLAINTIFF WAS CLEARLY MOTIVATED BY PRIVATE INTERESTS, PLAINTIFF CANNOT SHOW THAT HE IS ENTITLED TO ATTORNEYS' FEES

It is well-settled that eligibility for attorneys' fees does not establish that a prevailing party is entitled to such fees. *See Judicial Watch*, 470 F.3d at 369. Here, the equitable factors simply do not support an award. To begin, while the D.C. Circuit has recognized that the purpose for allowing attorneys' fees in FOIA cases is "to remove the incentive for administrative resistance to disclosure requests based not on the merits of exemption claims, but on the knowledge that many FOIA plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation," the D.C. Circuit has also repeatedly "embraced the view that a distinction is to be drawn between the plaintiff who seeks to advance his private commercial interests and thus needs no incentive to file suit, and a newsman who seeks information to be used in a publication or the public interest group seeking information to further a project benefitting the general public." *Davy*, 550 F.3d at 1158 (citing *Nationwide Bldg. Maint., Inc.*, 559 F.2d at 711).

In determining whether a prevailing party is entitled to attorneys' fees in FOIA cases, courts consider the following four factors: (1) the public benefit derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the plaintiff's interest in the records

sought; and (4) whether the government's withholding had a reasonable basis in law. *See Cotton v. Heyman*, 63 F.3d 1115, 1117 (D.C. Cir. 1995); *Tax Analysts v. Dep't of Justice*, 965 F.2d at 1093. Failure to satisfy even one of these criteria can be grounds for finding that a prevailing party is not entitled to fees. *See, e.g.*, *Chesapeake Bay Fdn., Inc. v. U.S. Dep't of Agriculture*, 11 F.3d 211, 216 (D.C. Cir. 1993), *abrogated on other grounds*, *OCAW*, 288 F.3d at 454. Although Plaintiff purports to be entitled to an award of attorneys' fees upon a weighing of these four factors, Plaintiff's analysis of each of the four factors conveniently ignores the relevant case law, sidesteps the fact that he brought suit to advance his own private interest, and relies upon an overstatement of the import of his case.

A. Information Sought by Plaintiff Pertaining to Himself Does Not Confer Any Public Benefit And Weighs Against An Award of Fees

The "public benefit" factor "speaks for an award [of attorney fees] when the complainant's victory is likely to add to the fund of information that citizens may use in making vital political choices." *Cotton*, 63 F.3d at 1120 (quoting *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979)). Such a determination necessarily entails an evaluation of the nature of the specific information disclosed. *See id.* (finding, in case where employee of Smithsonian Institution sought documents from the Office of the Inspector General for purposes of furthering her employment discrimination claim, that "no evidence exists that the release of the two non-exempt documents will contribute to the public's ability to make vital political choices"). This inquiry also benefits from a consideration of the "likely degree of dissemination and the public impact that can be expected from a particular disclosure." *Horsehead Indus. v. U.S. Envtl. Prot. Agency*, 999 F. Supp. 59, 68 (D.D.C. 1998). Therefore, as an initial step, the Court must identify and evaluate the "specific documents at issue" in this case. *Cotton*, 63 F.3d at 1120 (observing the directive of the public-benefit prong that that the complainant's victory should add to the

fund of information that citizens may use in making vital political choices and noting that "[t]he only way to comport with this directive is to evaluate the specific documents at issue in the case at hand"); *Herricks*, 2006 WL 3060012, at *4.

Plaintiff here has not demonstrated how the release of File S-1575 and "any records about [him] maintained at and by the FBI in [the San Francisco] field office" in any way "add to the fund of information that citizens may use in making vital political choices." In fact, Plaintiff does not even address the nature of the documents that he has sought, claiming instead that the public benefit here is his purported discovery of "extraordinary information regarding how the FBI maintains its records and the baseline method by which it will search for and respond to FOIA requests, unless a FOIA requester has information to demand otherwise." *See* Pl.'s Mem. at 10-11. Plaintiff makes the outsized and extraordinary claim that "[i]t is difficult to conceive of a FOIA case that could more clearly provide a 'public benefit,'" premised upon his apparent belief that the Court's Order extends far beyond the specific facts of his case. *Id.* Plaintiff cannot make any showing that the *information derived from the documents disclosed in this case* -- which the D.C. Circuit has found to be the relevant inquiry, *see Cotton*, 63 F.3d at 1120 -- is of any interest to anyone other than himself. *See Herricks*, 2006 WL 3060012, at *6 (rejecting plaintiff's contention that the release of a Customs handbook "will greatly assist the public in knowing Customs' procedures for seized assets" and thus served a public interest); *Simon v. United States*, 587 F. Supp. 1029, 1032 (D. D.C. 1984) ("Plaintiffs cannot inflate the importance of their FOIA claims by association with the other claims in this action pertaining to waste, fraud, mismanagement, and personnel violations at the PTO."). As the D.C. Circuit has stated, while "[t]he release of any government document benefits the public by increasing citizens' knowledge of their government . . . Congress did not have this sort of broadly defined benefit in

mind." *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979). The asserted public benefit that Plaintiff claims here is precisely the sort of "broadly defined benefit" that the D.C. Circuit has rejected as not contemplated by the FOIA fees provision.

Indeed, to credit Plaintiff's assertion would mean that the FBI's disclosures of File S-1575 (which pertains to an individual not connected in any way to Plaintiff, *see* Ex. A) and "any records about [Plaintiff] maintained at and by the FBI in [the San Francisco] field office" confer a greater public benefit than, for example, the information sought in *Davy v. CIA* regarding individuals allegedly involved in President Kennedy's assassination. *See Davy*, 550 F.3d at 1159. In short, Plaintiff has failed to make any showing that the release of the information sought here adds to the fund of information that citizens may use in making vital political choices, the public interest factor weighs against a finding of entitlement to attorneys' fees.

B. The Clearly Personal Benefit to Plaintiff and Plaintiff's Private Interest in the Information Weigh Against An Award of Fees

The second and third criteria, commercial benefit to the plaintiff and the plaintiff's interest in the information, are usually considered together. *Piper v. Dep't. of Justice*, 339 F. Supp. 2d 13, 21 (D.D.C. 2004). "When a litigant seeks disclosure for a commercial benefit or other personal reasons, an award of fees is usually inappropriate." *Cotton*, 63 F.3d at 1120 (citing *Tax Analysts*, 965 F.2d at 1095). To cut against an award of attorneys' fees, the requester's "motive need not be strictly commercial; any private interest will do." *Tax Analysts*, 965 F.2d at 1095. Thus, if the plaintiff has a personal or commercial interest in the information released, and particularly if there is a commercial gain to plaintiff, this weighs against an award of attorneys' fees. *See, e.g.*, *Cotton*, 63 F.3d at 1120; *Short v. U.S. Army Corps of Engineers*, 613 F. Supp. 2d 103, 107 (D.D.C. 2009) (Collyer, J.) (finding that plaintiff was not entitled to fees on the ground that his FOIA request was motivated by an interest in the Army Corps of

Engineers' progress on his petition for a revised jurisdictional determination and was thus pursued for his own commercial benefit); *Simon*, 587 F. Supp. at 1032 (finding that although plaintiffs' interests in records to support their employment discrimination claim were not commercial, they were personal and "would have prompted plaintiffs to pursue the release of documents regardless of the availability of fees under FOIA").

Here, Plaintiff's counsel claims that "the documents sought by Negley . . . relate to its investigation of Negley and his company" and further contends, imaginatively and without any support whatsoever, that he "anticipates that the documents . . . will show the Government's interest in his research in photovoltaic cells, which research has the potential of commercial benefit to him, but also has enormous environmental and other benefit to the public."[5] Pl.'s Mem. at 13. Plaintiff's counsel further claims that the purpose of Plaintiff's lawsuit "became to uncover the FBI's inadequate records system and systematic failings in responding to FOIA requests" and that he selflessly "incurred substantial money to obtain those benefits for others."[6] *Id.*

Counsel's inventive claims of commercial benefit derived from this litigation cannot overcome the simple, indisputable fact that Plaintiff brought this FOIA request to uncover "any records about [him] maintained at and by the FBI in [the San Francisco] field office," not about his company. While Plaintiff may not have sought the records for a commercial purpose, he did

[5] Plaintiff does not, because he cannot, point to any single document disclosed by the FBI in response to his FOIA request, including File S-1575 that he has had since October 26, 2009, that supports his theory that "the documents . . . will show the Government's interest in his research in photovoltaic cells."

[6] Plaintiff makes no assertion that he was in any way motivated to pursue the release of documents by the availability of fees under FOIA. To the contrary, the record amply reflects the fact that Plaintiff would have pursued the release of documents regardless of the availability of fees.

so for a personal, rather than scholarly, journalistic, or public interest-oriented, purpose. Plaintiff's claims here are similar to those raised by the plaintiff in *Herrick's*, in which plaintiff claimed that release of a Customs handbook that purportedly shed light on Customs' practices with respect to seized assets did not yield a commercial or private interest by virtue of plaintiff's status as a newsletter. *Herricks*, 2006 WL 3060012, at *7. In that case, the court found that the news organization's commercial and professional interests weighed against an award of fees where the newsletter was produced by plaintiff's counsel and the "most readily identifiable beneficiaries" of the released portions of a Customs handbook were plaintiff's counsel's law firm and clients. *Id.* at *8. In this case, contrary to Plaintiff's wholly speculative assertions about documents that allegedly "will show the Government's interest in his research in photovoltaic cells," the only readily identifiable beneficiary of "any records about [Plaintiff]" is Plaintiff.

Plaintiff's interests in the requested documents clearly render solely a personal benefit and Plaintiff, and Plaintiff alone, has a private interest in their disclosure. Thus, the second and third factors also weigh against a finding of entitlement to attorneys' fees.

C. The FBI's Withholding of File S-1575 and Scope of Search Was Based Upon Its Interpretation of the Law, Which Had A Colorable Basis in Law

The final factor in the entitlement inquiry is "whether the government's withholding of the records had a reasonable basis in law." *Herricks*, 2006 WL 3060012 (quoting *Nationwide Bldg. Maint., Inc.*, 559 F.2d at 712 n.34 ("[I]f the government only establishes that it had a reasonable basis in law for resisting disclosure it may be proper to deny a FOIA plaintiff's motion for attorney fees unless other factors affirmatively justify such an award."). This factor "is intended to weed out those cases in which the government was 'recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior.'" *Tax Analysts*, 965 F.2d at 1097.

On this factor, Defendant fully recognizes that this Court has found the FBI's position on the disclosure of File S-1575 and the sufficiency of its search to be incorrect as a matter of law. As the D.C. Circuit has emphasized, however, the government's position "need not be correct to qualify as reasonable." *See Fenster*, 617 F.2d at 744; *see also Piper*, 339 F. Supp. 2d at 22 ("Where the agency erroneously interprets the law, its withholdings will be considered reasonable if the interpretation has a colorable basis in law."). Although the Court had expressed its unhappiness with the "[t]he FBI's stubborn refusal" to turn over File S-1575, Defendant respectfully submits that the FBI's refusal was predicated upon its reasonable belief that File S-1575 was not responsive to Plaintiff's FOIA request and its release would be a clearly unwarranted invasion of the personal privacy of third parties. *See* Ex. A. Moreover, while the Court found there to be insufficient detail regarding the scope and nature of searches conducted of the nine potential sources of information identified in the Court's September 24, 2009 Order, the FBI believes that its forthcoming declaration on the scope of the searches of these nine potential sources of information will evidence that the FBI's interpretation had a colorable basis in law.[7]

Therefore, based upon the reasons set forth above, none of the four factors in the entitlement analysis cut in favor of Plaintiff. Accordingly, Plaintiff is not entitled to an award of attorneys' fees here.

III. EVEN IF PLAINTIFF WERE ENTITLED TO FEES, THE REQUESTED FEES ARE UNREASONABLE

Even if this Court were to find that Plaintiff has established eligibility and entitlement, and that his fee motion is not premature, an award of attorneys' fees must be reasonable in light

[7] As stated above, given the outstanding discovery, the FBI respectfully submits that any award of fees would be premature at this time.

of the relief granted in the FOIA litigation and reasonable in light of legal practice. *See* 5 U.S.C. § 552(a)(4)(E). Although where fees are payable counsel are typically entitled to compensation for their efforts, "[i]t does not follow that the amount of time actually expended is the amount of time reasonably expended." *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (*en banc*). This Court has the discretion to deny or adjust any request for attorneys' fees that is unreasonable on its face. *Weisberg v. U.S. Dep't of Justice*, 848 F.2d at 1271-72.

Here, the requested total award of $208,894.80 is entirely unreasonable. Plaintiff concedes that fee awards may be calculated based on the *Laffey*, or "the United States Attorney's Office matrix" because "use of the broad *Laffey* matrix may be by default the most accurate evidence of a reasonable hourly rate." Pl.'s Mem. at 16-17. Plaintiff thus claims that because his counsel's rates have allegedly "fluctuated between being slightly lower, the same as or slightly higher than those permitted under the *Laffey* matrix," he was thus seeking the rates actually charged by his counsel at all times. Plaintiff then claims that he has reduced "the number of hours spent for time not attributable to this lawsuit (or pre-lawsuit) – approximately $30,000," to result in a total of $198,854 in attorneys' fees. *Id.* at 17-18. Plaintiff then buries in a footnote a statement that he is "willing to simply not seek, at the present (but without waiving his rights in the future), fees for the approximately 50 hours spent by the other timekeepers."[8] Pl.'s Mem. at 17 n.8.

[8] It is unclear to Defendant what Plaintiff hopes to achieve by this reservation of rights. Plaintiff has brought a fee motion based upon work leading up to the Court's grant of his partial motion for summary judgment. Plaintiff's "willing[ness] to simply not seek . . . fees for the approximately 50 hours spent by the other timekeepers" waives his right to these fees. Plaintiff does not get the opportunity to come back before this Court at a later time to litigate the issue of fees for the approximately 50 hours, simply by stating "without waiving his rights in the future."

First, Defendant has calculated the hours represented in Exhibits B and C to Plaintiff's motion based upon the United States Attorney's Office matrix,[9] which Plaintiff's counsel has acknowledged is "the most accurate evidence of a reasonable hourly rate," and accordingly reduced this number by the approximately $30,000 that Plaintiff's counsel states is "the number of hours spent for time not attributable to this lawsuit (or pre-lawsuit)," to result in an aggregate total of $175,546 in attorneys' fees (as opposed to the $198,854 Plaintiff claims in attorneys' fees).

Second, as stated above, *see* supra n.3, while the Court granted Plaintiff's partial motion for summary judgment, it did not require the FBI to conduct additional searches of seven of the nine identified sources of information, but rather gave the FBI the option of providing more detailed information about the search terms used in its earlier searches of seven of the nine sources of information -- specifically, (1) the ELSUR database; (2) the Zy index; (3) the SFFO card index; (4) FBIHQ records; (5) handwritten notes; (6) personal files; and (7) restricted files. Given the scope of the relief ordered by the Court, plaintiff should not be awarded fees for the entirety of the work expended from the commencement of this litigation.[10]

Third, not only did Plaintiff have two senior attorneys present for the deposition of David M. Hardy on May 23, 2007 (one of whom did not ask any questions), but Plaintiff's counsel expanded what was ostensibly a deposition about a FOIA request into an inquiry about such

[9] Defendant's calculations based upon the United States Attorney's Office matrix reflect that Mr. Khetan has billed $132,722.00 in fees; Mr. Vitrano has billed $35,384.00 in fees; and Mr. Wisenberg has billed $37,440.00 in fees.

[10] If one were to consider File S-1575 and the nine potential sources of information identified in the Court's September 24, 2009 Order to represent ten total potential sources of information, the Court's Order required further action on three of the ten potential sources of information and required further details as to the remaining seven. It would stand to reason, then, that a reasonable attorneys' fee would be 30 percent of the aggregate total of $175,546 in fees, as calculated using the United States Attorney's Office matrix, or $52,663.80.

clearly irrelevant subjects such as Karl Rove, former FBI Director Louis Freeh, the Office of the Secretary of the Navy, including former Commandant of the Navy John Dalton and made inquiry concerning Mr. Hardy personally, specifically his career in the Navy. *See* Ex. B at pp. 81-90. Plaintiff should not be rewarded for engaging in a fishing expedition and should, if at all, be entitled to no more than half of the fees associated with this deposition for the one counsel who deposed Mr. Hardy. Plaintiff also unnecessarily incurred the costs of having each of the three depositions taken earlier in this case videotaped, as well as ordering expedited transcripts each time, and now seeks to have the Government pay for $7,475.15 in court reporter and depositions costs for three depositions. *See* Pl.'s Ex. D. It is unreasonable to require the Government to pay for clearly wasteful expenses that need not have been incurred.

Defendant respectfully submits that Plaintiff's requested total award of $208,894.80 in attorneys' fees and costs is not reasonable and should be significantly reduced for the reasons set forth above.

CONCLUSION

Accordingly, because Plaintiff's request for "any records about [him] maintained at and by the FBI in [the San Francisco] field office" fails to confer any public benefit, and Plaintiff was motivated by a personal benefit and private interest, Plaintiff cannot show that he is entitled to an award of fees. Defendant therefore respectfully requests that Plaintiff's motion for an award of attorneys' fees be denied in full.

Date: December 3, 2009

Respectfully submitted,

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