UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL, **Plaintiff,** **v.** **UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,** **Defendants.**	**Civil Action No.: 1:11-CV-1972 (JEB)**

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF ITS PETITION FOR ATTORNEYS' FEES AND COSTS

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Plaintiff American Immigration Council ("Plaintiff") respectfully submits to this Court the following memorandum of law in support of its motion for attorneys' fees incurred in the above-captioned litigation against Defendants, U.S. Department of Homeland Security ("DHS") and U.S. Customs and Border Protection ("CBP") (collectively, "Defendants").

FACTUAL BACKGROUND

Plaintiff's suit under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., sought records from Defendants, concerning individuals' access to legal counsel during their interactions with CBP. Plaintiff submitted its FOIA request to Defendants on March 14, 2011. Dkt. No. 1, Ex. A. Two months later, Defendants issued a "final response," stating "much of the information… [sought] is already publicly available." *Id.*, Ex. C. Defendants' response did not indicate that the agency had conducted a reasonable search for responsive records, nor did it assert that any responsive records were subject to exemptions under FOIA. *See* Dkt. No. 1.

On May 26, 2011, Plaintiff filed an administrative appeal, asserting that Defendants' search was inadequate. *Id.*, Ex. D. On June 10, 2011, Defendants acknowledged receipt of Plaintiff's appeal but addressed none of the substantive issues raised. *Id.*, Ex. E. More than three months later, Defendants produced two pages of excerpts from agency guidance. *Id.*, Exs. F-G. In an effort to compel Defendants to conduct a search in compliance with the statute, Plaintiff filed suit in November 2011. Dkt. No. 1.

In January 2012, Defendants moved for summary judgment, contending their search was adequate. Dkt. No. 9. After reviewing Plaintiff's opposition, Defendants withdrew their summary judgment motion, voluntarily changed their original position, and agreed to conduct a legally adequate search. *See* Dkt. Nos. 12 & 18. Specifically, Defendants agreed to conduct "a nationwide search of CBP offices… involv[ing] over 300 Ports of Entry, approximately 130 Border Patrol Stations and 20 Border Patrol Sectors, CBP Field Operations Offices as well as the following additional offices at CBP headquarters: Office of Training and Development, Office of Diversity and Civil Rights, Office of Policy and Planning, and Office of Executive Secretariat." Dkt. No. 18 at 2-3.

From October 2012 to July 2013, Defendants made ten productions of responsive records, comprising more than 300 pages of previously unreleased documents.[1] *See* Dkt. Nos. 20-25; 27-29; 31; 36. Some of these records were released in full, some were released in part, and some were withheld in full based on various FOIA exemptions. *See id.* Between October 2012 and September 2013, Plaintiff and Defendants repeatedly met and conferred about the adequacy of Defendants' searches, their asserted FOIA exemptions, and the scope of their redactions; in some cases, these conferences resulted

[1] The records released by Defendants were posted on Plaintiff's website. *See* American Immigration Council – Legal Action Center, Access to Counsel Before DHS, http://www.legalactioncenter.org/litigation/access-counsel-dhs (last visited October 17, 2014); *see also* Legal Action Center – American Immigration Council, CBP Restrictions on Access to Counsel," http://legalactioncenter.org/sites/default/Final%20CBP%20access%20to%20counsel%20FOIA%20factsheet%20%282%29.pdf. (last visited October 17, 2014).

in the production of less redacted versions of Defendants' records. *See* Dkt. Nos. 20-25, 27-29, 31-38.

After ten months, Plaintiff determined that it would no longer challenge the adequacy of Defendants' search. Dkt. No. 36. Plaintiff, however, still had concerns regarding Defendants' reliance on certain exemptions to justify particular redactions. *Id.* Despite continued negotiations the parties could not reach a mutual agreement on seven documents, which were the subject of Defendants' second summary judgment motion.[2]

On March 21, 2014, while acknowledging that "CBP's explanations regarding the applicability of the claimed exemptions [we]re at times thin," this Court granted Defendants' second summary judgment motion. *See Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 2014 WL 1118353 (D.D.C. Mar. 21, 2014). In April, the parties began good faith negotiations—including multiple e-mails and several conference calls—to resolve Plaintiff's request for attorneys' fees in the underlying litigation. *See* Dkt. No. 49-1. For approximately the next five months, the parties sought to resolve the issue of attorneys' fees. *Id.* Then, on August 28, 2014, after Plaintiff sent Defendants a proposed status report, counsel for the Defendants took the position that Defendants had no obligation to pay attorneys' fees because Plaintiff had not filed a motion in accordance with Fed. R. Civ. P. 54. *See id.*, Ex. 8. Plaintiff immediately filed a motion with the

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[2] Plaintiff is not seeking attorneys' fees incurred between Defendants' second summary judgment motion and the entry of judgment in this matter. Plaintiff, however, is seeking the attorneys' fees incurred related to the motion practice that resulted in this Court's September 24, 2014 order. *See* Dkt. Nos. 49, 51 & 52.

Court seeking leave to file a petition for attorneys' fees in this matter. Dkt. Nos. 49 & 51. On September 24, 2014, this Court granted Plaintiff's motion.

ARGUMENT

FOIA ensures "an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (intent of FOIA is to ensure that community members can access government records and be informed about "*what their government is up to.*") (emphasis in original) (internal citation and quotation omitted). To advance this purpose, FOIA provides attorneys' fees and costs to parties entitled to them. *See* 5 U.S.C. § 552(a)(4)(E).

I. Because Plaintiff Substantially Prevailed, It Is Eligible and Entitled to Reasonable Attorneys' Fees and Costs Under FOIA.

FOIA allows courts to "assess against the United States reasonable attorneys' 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)(i); *see Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice* (*"CREW I"*), 820 F. Supp. 2d 39, 43 (D.D.C. 2011). When faced with such a request, the court engages in a two-part inquiry, which "case law has long described as 'fee eligibility' and 'fee entitlement.'" *Id.* (citing *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 524 (D.C. Cir. 2011)). Once a court determines a claimant is both eligible and entitled, the court evaluates an award of attorneys' fees for reasonableness. *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.* (*"EPIC I"*), 811

F. Supp. 2d 216, 237 (D.D.C. 2011). Plaintiff is both eligible and entitled to fees, and has submitted a petition for reasonable attorneys' fees and costs.

A. Plaintiff is Eligible for Fees and Costs Because Defendants Voluntarily and Unilaterally Changed Their Position.

Claimants are eligible for attorneys' fees where they "substantially prevail" in FOIA litigation. 5 U.S.C. § 552(a)(4)(E)(i). One can "substantially prevail" by either "obtaining relief through a judicial order, or an enforceable written agreement or consent decree" or "a voluntary or unilateral change in the position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(i)(I)-(II).

Here, Plaintiff is eligible for fees because its litigation caused Defendants to voluntarily and unilaterally change their position. *See Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.* (*"EPIC II"*), 999 F. Supp. 2d 61, 67 (D.D.C. 2013); *EPIC I*, 811 F. Supp. 2d at 232 ("institution and prosecution of the litigation caused the agency to release the documents obtained during the pendency of the litigation"). Defendants produced nothing (beyond two pages of records) in response to Plaintiff's FOIA request for over ten months, and then sought summary judgment. *See* Dkt. No. 1, Ex. A; Dkt. No. 9. However, once Defendants saw Plaintiff's opposition brief and realized that they would likely not prevail before this Court on the adequacy (or lack thereof) of their search, Defendants withdrew their motion. *See* Dkt. Nos. 12 & 18. Defendants then agreed to conduct a legally adequate search, which encompassed "a nationwide search of CBP offices," and resulted in the release of over 300 pages of responsive documents through ten rolling productions. *See* Dkt. Nos. 18; 20-25; 27-29; 31; 36. Throughout this

process, the parties met and conferred regarding the search's adequacy, the asserted FOIA exemptions, and the production of less redacted versions of documents. *See* Dkt. Nos. 20-25; 27-29; 31-38. The substantial number of documents Plaintiff obtained through this litigation, which are summarized, indexed and posted on its website,[3] show that it substantially prevailed in this matter. *See EPIC II*, 999 F. Supp. 2d at 67 ("These tangible successes further support the common-sense notion that EPIC has 'substantially prevailed' in this matter."); *see also* Footnote 1, *supra*.

B. Plaintiff is Entitled to Fees Because It Meets All Four Factors for Entitlement.

After a court determines that a claimant is eligible to receive attorneys' fees, it must then analyze whether the claimant is also "entitled" to such fees. *EPIC I*, 811 F. Supp. 2d at 232. The D.C. Circuit has a four-factor test to determine if a claimant is entitled to fees: "(1) public benefit derived from the case, (2) the commercial benefit to the requester, (3) the nature of the requester's interest in the information, and (4) the reasonableness of the agency's conduct." *EPIC II*, 999 F. Supp. 2d at 67-68 (quoting *Morley v. CIA*, 719 F.3d 689, 690 (D.C. Cir. 2013)). No single factor is dispositive, and the court has discretion to weigh the four factors according to the case's facts. *CREW I*, 820 F. Supp. 2d at 45. Here, all four factors weigh in favor of finding that Plaintiff is entitled to attorneys' fees.

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[3] American Immigration Council – Legal Action Center, Access to Counsel Before DHS, http://www.legalactioncenter.org/litigation/access-counsel-dhs (last visited October 17, 2014).

1. The Public Benefits from Plaintiff's Request.

Analyzing the first factor "requires consideration of both the effect of the litigation for which fees are requested and the potential public value of the information sought." *Davy v. CIA*, 550 F.3d 1155, 1159 (D.C. Cir. 2008). Plaintiff sought records concerning the operations and activities of DHS and CBP related to "CBP's policies regarding a noncitizen's access to counsel in interactions with the agency." Dkt. No. 1, Ex. D at 4. The records released by Defendants provide critical information regarding access to counsel during primary, secondary and deferred inspection, as well as at CBP's detention facilities. They also include CBP's policy guidance related to advisals of rights and the treatment of children. These records will be of particular value to attorneys who represent noncitizens, U.S. citizens and noncitizens who engage in cross-border travel, and other members of the public who are concerned with immigration agency proceedings and policies. *See id.* at 3-5. Plaintiff summarized, indexed, and posted these documents on its website. *See* Footnote 1, *supra*. Plaintiff's website receives an average of more than 112,000 monthly page views. *See* Declaration of Melissa Crow ("Crow Decl."), ¶ 7. The number of page views to Plaintiff's website indicates that the information has been widely disseminated to the public. *See EPIC II*, 999 F. Supp. 2d at 68 (citing discussions on various websites and news sources as indicia of public benefit from FOIA litigation); *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.* ("*EPIC III*"), 892 F. Supp. 2d 28, 50-51 (D.D.C. 2012) (holding that public benefit factor weighed in favor of FOIA plaintiff when records were posted to plaintiff's website and in its newsletter that over 8,000 people received); *CREW I*, 820 F. Supp. 2d at 46-47 (noting

that availability of requested documents on plaintiff's various websites weighed in favor of "public benefit" factor); *EPIC I*, 811 F. Supp. 2d at 234 (finding that public benefit factor weighed in favor of FOIA plaintiff when released records were extensively covered in online news sources during public debate); *Nw. Coal. for Alts. to Pesticides v. Browner*, 965 F. Supp. 59, 64 (D.D.C. 1997) (listing "degree of dissemination" and "likely public impact" as "pertinent considerations" in the public benefit analysis). Under the first factor, Plaintiff is entitled to fees.

2. Plaintiff Derives No Commercial Benefit from Its Request.

The second factor requires the court to determine what, if any, commercial benefit a claimant derived from its request. *See Davy*, 550 F.3d at 1160 (assessing whether one has "sufficient private incentive to seek disclosure without attorney's fees") (internal quotation marks omitted). If one seeks records for a commercial benefit, fees are inappropriate. *EPIC I*, 811 F. Supp. 2d at 235. However, recovery of fees "is often appropriate… when the plaintiff is a nonprofit public interest group." *Id.*

Here, Plaintiff satisfies the second factor. In fact, Defendants themselves determined that Plaintiff did not have a commercial interest in its FOIA request. The Chief of CBP's FOIA Appeals, Policy and Litigation Branch, Ms. Suzuki, stated in correspondence with Plaintiff that "AIC [did] not have a commercial interest that would be furthered by release of the information requested" during the administrative appeals process. Dkt. No. 1, Ex. F at 8.

Furthermore, Plaintiff "is a 501(c)(3), tax-exempt, not-for-profit educational and charitable organization." Dkt. No. 1, Ex. D; *see EPIC I*, 811 F. Supp. 2d at 235 ("[EPIC]

is a '501(c)(3) non-profit interest research center [that] derived no commercial benefit from its FOIA request or lawsuit'"). Plaintiff's mission is to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, and protect the legal rights of noncitizens. *See* Declaration of Melissa Crow ("Crow Decl."), ¶ 3. Relevant to this FOIA request, Plaintiff has historically focused on access to counsel issues. Specifically, Plaintiff educates the public about the law surrounding access to counsel for immigrants in removal proceedings, advocates for fair standards and procedures to remedy the effects of ineffective assistance of counsel, and encourages better access to counsel in proceedings before the Department of Homeland Security and its components. *See id*. In furtherance of these goals, Plaintiff summarized, indexed, and posted Defendants' documents on its website, allowing the public to access and examine these documents free of charge. *See* Footnote 1, *supra*.

Taken together, these facts support the conclusion that Plaintiff derived no commercial benefit from its request. *See CREW I*, 820 F. Supp. 2d at 45 (noting that claimant who "derived no commercial benefit from its requests favored grant of fee award").

3. The Nature of Plaintiff's Interest in the Information Supports an Award of Fees.

The third factor considers a claimant's interest in the records. *See Davy*, 550 F.3d at 1160. When FOIA litigation is "motivated by scholarly, journalistic, or public interest concerns," those requestors "are the proper recipients of fee awards." *EPIC I*, 811 F.

Supp. 2d at 235 (internal quotation marks omitted); *see CREW I*, 820 F. Supp. 2d at 45 (noting that records sought by claimant acting in "public-interest capacity" favored grant of fee award).

Plaintiff sought records from Defendants to better educate the public, policymakers, and the media on Defendants' immigration policies and practices. *See* Dkt. No. 1, Ex. D. It intended (and in fact did) distribute Defendants' documents "to immigration attorneys, noncitizens and other interested members of the public free of charge." *Id.* Plaintiff's goal was to assist the public in understanding the scope of noncitizens' access to counsel in interactions with CBP. Dkt. No. 1, Ex. A at 3; *see EPIC II*, 999 F. Supp. 2d at 69 ("As the D.C. Circuit has explained, those 'requesters who seek documents for public information purposes' are favored by FOIA, and they 'engage in the kind of endeavor for which a public subsidy makes some sense.'"); *EPIC I*, 811 F. Supp. 2d at 235 ("[EPIC's] aims, which include dissemination of information regarding privacy issues to the public… fall within the scholarly and public-interest oriented goals promoted by FOIA…. Thus, the 'commercial benefit'… element[] weigh[s] in favor of granting" a motion for fees). Accordingly, Plaintiff meets the third factor in support of its entitlement to fees.

4. Defendants' Conduct Was Not Reasonable.

The fourth factor "requires consideration of 'whether the agency's opposition to disclosure had a reasonable basis in law,' and whether the agency 'had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior.'" *CREW I*, 820 F. Supp. 2d at 47 (quoting *Davy*, 550 F.3d at 1162). The government

agency must prove its "opposition to disclosure has a reasonable basis in law." *Id.* (internal quotation marks omitted) (citations omitted). "The question is not whether [the claimant] has affirmatively shown that the agency was unreasonable, but rather whether the agency has shown that it had any colorable or reasonable basis for not disclosing the material until after [the claimant] filed suit." *Davy*, 550 F.3d at 1163.

Here, Defendants had no reasonable legal basis for opposition to disclosure. Defendants took approximately five months to produce a mere two pages of records in response to Plaintiff's FOIA request. *See* Dkt. No. 1, Ex. A; *id.*, Ex. F. Plaintiff was forced to file suit to enforce its right to a legally adequate search and the release of responsive documents. *See* Dkt. No. 1. Failing to take action until after a claimant files suit "is exactly the kind of behavior the fee provision was enacted to combat." *Davy*, 550 F.3d at 1163; *see EPIC I*, 811 F. Supp. 2d at 236 ("As the Circuit has explained, FOIA's fee provision is intended to incentivize the government to promptly turn over—before litigation is required—any documents that it ought not withhold. That purpose will be ill-served if the government can prevail on [the reasonable basis] factor by saying nothing and forcing the requester to sue, only then to offer no resistance." (quoting *Davy*, 550 F.3d at 1165 (internal quotation marks omitted) (alteration in original)).

Then, Defendants obdurately filed a meritless summary judgment motion. Dkt. No. 9. After reviewing Plaintiff's opposition, Defendants voluntarily withdrew their summary judgment motion and agreed to engage in a search for responsive documents. Dkt. Nos. 12, 18. Had Defendants believed that they had performed a reasonable, adequate search for documents responsive to Plaintiff's FOIA request, they would have

proceeded with their motion. Instead, after withdrawing their motion, they chose to engage in numerous conference calls and extensive correspondence with Plaintiff regarding search terms, office locations, redactions, and exemptions. Defendants would not have taken such steps if they had concluded their original actions were up to snuff. *See Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.* ("*Judicial Watch I*"), 2009 WL 1743757, at *6, *8 (D.D.C. June 15, 2009) (recommending partial grant of fee award because agency failed to respond to claimant for three months before litigation and later released documents one day before it was to submit responsive pleading). Furthermore, they would not have made ten rolling productions, which resulted in the release of over 300 pages of documents, or filed numerous status reports in this matter regarding the adequacy of their search. Dkt. Nos. 20-25; 27-29; 31; 36; *see EPIC I*, 811 F. Supp. 2d at 236 (concluding that defendant failed to show that it acted according to law "when it initially withheld the hundreds of pages of documents that were ultimately produced to [EPIC] in the course of this litigation"). In this litigation, Defendants never even attempted to justify their refusal to produce documents until after Plaintiff opposed their first summary judgment motion, which supports a finding that Defendants lacked a reasonable basis in law for their actions. *See Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice* ("*CREW II*"), 2014 WL 4380292, at *5-*7 (D.D.C. Sept. 5, 2014) (adopting report and recommendation that defendant's withholding was not reasonable when it provided no justification for refusal to release documents between filing of action and settlement negotiations). Because Defendants had no reasonable

basis in law for resisting Plaintiff's FOIA request, Defendants cannot meet their burden under the fourth factor, which supports an award of fees in this matter.

C. Plaintiff is Entitled to Seek "Fees on Fees."

Plaintiff is also entitled to seek attorneys' fees from its recent work related to its motion for fees. Such a request is allowed in this circuit. *See EPIC II*, 999 F. Supp. 2d at 69-70 ("[I]t is settled in this circuit that hours reasonably devoted to a request for fees are compensable.") (internal quotation marks omitted). Furthermore, such a request has been granted in other FOIA cases in this district. *Id.*; *see Judicial Watch, Inc. v. Dep't of Justice* ("*Judicial Watch II*"), 878 F. Supp. 2d 225, 240 (D.D.C. 2012); *EPIC I*, 811 F. Supp. 2d at 240 ("[H]ours 'reasonably expended' in preparing a fee petition are compensable.").

After this Court issued its opinion on March 21, 2014, granting Defendants' second summary judgment motion, *American Immigration Council*, 2014 WL 1118353, Plaintiff sought to resolve the issue of attorneys' fees without further litigation. Dkt. No. 49-1. These negotiations proceeded for approximately five months. *Id.* at 2. Then, on August 28, 2014, Defendants abruptly (and without warning) changed their position, asserting that they had no obligation to pay attorneys' fees because Plaintiff had not filed a motion in accordance with Fed. R. Civ. P. 54. Dkt. No. 49-1, Ex. 8. Plaintiffs immediately moved for a briefing schedule regarding attorneys' fees, which Defendants opposed. Dkt. Nos. 49 & 51. This Court granted Plaintiff's motion on September 24, 2014. Dkt. No. 52.

Since the Court's order, Plaintiff has again reached out to Defendants to see if they were interested in trying to resolve this issue out of court. To date, Plaintiff has received no definitive indication that Defendants wish to pursue such a resolution. Because of Defendants' actions, Plaintiff had no choice but to seek relief from this Court on the issue of attorneys' fees and to proceed with briefing. The law in this circuit allows Plaintiff to seek fees on fees, and Plaintiff requests that all such fees be awarded.

D. Plaintiff's Fees and Costs are Reasonable.

Upon determining that a claimant is both eligible and entitled to fees, the court must still "analyze whether the amount of the fee request is reasonable." *EPIC I*, 811 F. Supp. 2d at 237. To achieve a reasonable attorneys' fee amount, one usually multiplies "the hours reasonably expended in the litigation by a reasonable hourly fee, producing a lodestar amount." *Judicial Watch, Inc. v. U.S. Dep't of Justice* ("*Judicial Watch III*"), 774 F. Supp. 2d 225, 232 (D.D.C. 2011) (quoting *Bd. of Trs. of Hotel & Rest. Emps. Local 25 v. JPR, Inc.*, 136 F.3d 794, 801 (D.C. Cir. 1998) (internal quotation marks omitted)); *see Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.").

When calculating the hours "reasonably expended in litigation," "hours that are excessive, redundant, or otherwise unnecessary," must be excluded. *Hensley*, 461 U.S. at 433-34. When considering a reasonable hourly fee, "the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel" must be examined. *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see Nw. Coal.*

for Alts. to Pesticides, 965 F. Supp. at 65 ("The appropriate hourly rate for public interest legal services organizations and for-profit firms engaged in public interest work is the 'prevailing market rate.'" (citing *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988)).

In this Circuit, the *Laffey* Matrix[4] is often used if counsel lacks a "customary billing rate[]," which is "a schedule of fees based on years of attorney experience." *Judicial Watch III*, 774 F. Supp. 2d at 232; *see Covington v. Dist. of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995) (approving of use of *Laffey* matrix and affirming fee award calculated using it); *Nw. Coal. for Alts. to Pesticides v. E.P.A.*, 421 F. Supp. 2d 123, 129 (D.D.C. 2006) ("In this Circuit, fee awards may be calculated based on the *Laffey* Matrix because, in the absence of a specific sub-market analysis of attorney fees, 'use of the broad Laffey matrix may be by default the most accurate evidence of a reasonable hourly rate.'") (quoting *Covington*, 57 F.3d at 1114 n.5). Furthermore, beyond using the *Laffey* Matrix as the prevailing market rates, courts have used the *Laffey* Matrix to assess whether billed rates are reasonable. *See Dist. of Columbia v. R.R.*, 390 F. Supp. 2d 38, 41

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[4] Courts in this district have approved use of the updated *Laffey* Matrix, which factors in monthly data from the legal services index ("LSI") of the Bureau of Labor Statistics' Nationwide Consumer Price Index. *Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, No. 11-754, slip op. at 9-10 (D.D.C. Aug. 4, 2014) ("[T]his Court has, for many years, accepted the appropriateness of and greater accuracy of rates based on the LSI Index [of the *Laffey* matrix]."); *Salazar v. Dist. of Columbia*, 2014 WL 342084, at *2 (D.D.C. Jan. 30, 2014) ("[T]he LSI-adjusted matrix… appears to be a more accurate reflection of the cost of legal services both in this community and nationwide."); *Eley v. Dist. of Columbia*, 2013 WL 6092502, at *7-12 (D.D.C. Nov. 20, 2013). Accordingly, this motion applies figures from the "updated" *Laffey* Matrix.

(D.D.C. 2005); *see also Cobell v. Norton*, 407 F. Supp. 2d 140, 170 (D.D.C. 2005). *See generally Nw. Coal. for Alts. to Pesticides*, 965 F. Supp. at 65 n.4 ("The *Laffey* Matrix may be used to represent the prevailing market rate in a fee analysis for work performed by lawyers at a for-profit firm engaged in public interest work.").

In this case, Plaintiff is seeking a total amount of $130,631.15 in attorneys' fees. *See* Declaration of Michelle S. Grant ("Grant Decl."), ¶¶ 11-13; *id.*, Exs. A-B; Crow Decl., ¶¶ 14-16; *id.*, Exs. A-B. This breaks down into $106,499.90 for the start of the case to the second summary judgment motion and $24,131.25 for its "fees on fees" efforts. *See* Grant Decl., ¶¶ 11-13; *id.*, Exs. A-B; Crow Decl., ¶¶ 14-16; *id.*, Exs. A-B.

1. The Hours Expended by Plaintiff Were Reasonable.

Plaintiff expended a total of 266.35 hours before Defendants sought summary judgment a second time in this matter, and those hours were reasonable. *See* Grant Decl., ¶ 11; *id.*, Ex. A; Crow Decl., ¶ 14; *id.*, Ex. A. Plaintiff is not seeking attorneys' fees for all of the hours expended in this litigation. In fact, Plaintiff has excluded the hours related to Defendants' second summary judgment motion. Plaintiff excluded these hours because this Court granted summary judgment to Defendants, and Plaintiff would not be considered "eligible" for fees related to that motion under FOIA. 5 U.S.C. § 552(a)(4)(E)(i)(I).

A substantial percentage of the hours expended on this matter went toward the first summary judgment motion. The hours expended by Plaintiff's counsel were reasonable because Defendants filed a potentially dispositive motion seeking to end Plaintiff's effort to seek responsive records. *See* Grant Decl., ¶ 5; *id.*, Ex. A; Crow Decl.,

¶ 11; *id.*, Ex. A. Plaintiff's work was necessarily extensive, and resulted in Defendants' withdrawal of their motion in order to undertake a reasonable search for documents.

The remaining hours were expended when the parties conferred about search parameters, produced documents, and asserted exemptions in an effort to narrow the issues to be litigated. *See* Grant Decl., ¶ 5; *id.*, Ex. A; Crow Decl., ¶ 11; *id.*, Ex. A. If Defendants had performed an adequate search and produced redacted documents in the first instance, then Plaintiff's involvement in this process would have been significantly less time-consuming.

Furthermore, Plaintiff expended 60.1 hours related to fees on fees. *See* Grant Decl., ¶ 12; *id.*, Ex. B; Crow Decl., ¶ 15; *id.*, Ex. B. Again, Defendants' actions required Plaintiff to expend additional, necessary hours in this matter. Defendants took a new asserted position regarding attorneys' fees in August 2014, after months of negotiation to avoid further litigation. *See* Dkt. No. 49-1, Ex. 8. With Defendants' abrupt position change, Plaintiff had no choice but to seek relief from this Court via a motion to set a briefing schedule regarding attorneys' fees. Dkt. Nos. 49, 51. Had Defendants chosen to continue to negotiate with Plaintiff, there would have been no hours expended nor fees incurred.

Plaintiff has endeavored to limit the number of hours it expended in this matter. Had Defendants not filed (and withdrawn) their first summary judgment motion and had Defendants chosen to negotiate the issue of attorneys' fees, Plaintiff would have expended fewer hours. Given the circumstances of this case, Plaintiff's hours were reasonable.

2. The Hourly Rates of Plaintiff's Counsel Were Reasonable.

In adjudicating a motion for attorneys' fees, the Court must consider "the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Blum*, 465 U.S. at 895. Besides having its own non-profit counsel assist in this matter, Plaintiff was represented *pro bono* by Dorsey and Whitney LLP's Minneapolis and D.C. offices.[5] *See* Grant Decl., ¶ 6. Dorsey's hourly rates are the normal, undiscounted rates that would be charged for any similar services performed for any other client. *Id.*, ¶ 8. Courts have repeatedly held that Dorsey's rates are in line with the prevailing rates in the community for similar services provided by lawyers of reasonably comparable experience, skill, and reputation. *See Kennedy Bldg. Assoc. v. Viacom, Inc.*, Civil No. 99-1833 (JMR/FLN), Order Approving Magistrate's Recommendation & Report and Recommendation & Report at 9 (D. Minn. Feb. 4, 2003, and Dec. 10, 2002) (awarding attorneys' fees and costs after determining that Dorsey's "requested rates [were] in line with community rates and [were] reasonable"); *Macke v. Purechoice, Inc.*, 2009 WL 6327273, at *5 (Hennepin Cnty. Dist. Ct. Nov. 19, 2009) (concluding that "the hourly rates set forth in Dorsey's affidavits are in line with those prevailing in the community for similar services by lawyers of reasonable comparable skill, experience, and reputation"), *aff'd* 2011 WL 69022 (Minn. Ct. App. Jan. 11, 2011); *Olson v. Supervalu, Inc.*, Case No. 02-C9-07-1834, Mem. & Order, at iv (Anoka Cnty. Dist. Ct. July 22, 2009) (finding Dorsey's rates reasonable and

[5] All counsel from Dorsey and Whitney LLP listed in the tables are located in Minneapolis except Creighton Magid, who is in the D.C. office. *See* Grant Decl., ¶ 6.

stating that "the fees charged by Dorsey are in keeping with current market rates for a law firm of its representation and skill"); *TestQuest, Inc. v. LaFrance*, Case No. CT-02-1347, Mem. & Order at 1 (Hennepin Cnty. Dist. Ct. Apr. 9, 2003) (finding Dorsey & Whitney's hourly rates were reasonable and awarding a Dorsey plaintiff attorneys' fees and costs); *see also Welk v. GMAC Mortg., LLC*, 2012 WL 3260355, *4 n.5 (D. Minn. Aug. 8, 2012) (determining that attorneys' fees requested by Dorsey & Whitney were reasonable after reviewing the attorneys' submissions and noting that opposing counsel did not object to the amount requested).[6]

The *Laffey* Matrix confirms that Dorsey's hourly rates are reasonable. *See* Grant Decl., ¶ 9. The Grant Declaration details the experience and skill level for each of the Dorsey attorneys who participated in this case; the rates of a majority of those attorneys are lower than the rates listed in the *Laffey* Matrix. *Id.* ¶¶ 7, 9, 10; *see Nw. Coal. for Alts. to Pesticides*, 965 F. Supp. at 66 (noting that *Laffey* Matrix "imposes the 'upper limits' of the prevailing market rates").

Plaintiff's in-house counsel requests that its fees be awarded based on the *Laffey* Matrix measured by the LSI Index of the CPI. *See* Crow Decl., ¶ 13. Moreover, declarations from an outside expert confirms that the LSI indexed version of the *Laffey* Matrix rates are in line with the prevailing market rates in the relevant community for similar services provided by lawyers of reasonably comparable experience, skill, and

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[6] Copies of the *Olson*, *TestQuest*, and *Kennedy* have been provided for the Court's convenience. *See* Grant Decl., Exs. C-F.

reputation. *See* Declaration of David L. Sobel ("Sobel Decl."), ¶ 6. To successfully demonstrate the inadequacy of Defendants' initial document production and motion for summary judgment, Plaintiff required the diligent services of attorneys familiar with the immigration process and FOIA requests. *See* Declaration of Andres C. Benach ("Benach Decl."), ¶¶ 6-10.

E. Plaintiff is Entitled to Costs.

Pursuant to 5 U.S.C. § 552(a)(4)(E)(i), courts may award "reasonable attorney fees and other litigation costs reasonably incurred." Plaintiff is seeking $469.06 in litigation costs in this matter, which include filing fees and process server fees. These fees were reasonably incurred, being necessary to this litigation, and such fees are typically awarded in this jurisdiction. *See, e.g.*, *Judicial Watch III*, 774 F. Supp. 2d at 234 (awarding litigation costs); *Judicial Watch I*, 2009 WL 1743757, at *9 (awarding litigation expenses).

II. Conclusion

Plaintiff substantially prevailed in this litigation and is therefore entitled to reasonable attorneys' fees and litigation costs under 5 U.S.C. § 552(a)(4)(E). Based on the above, Plaintiff respectfully requests that this Court award attorneys' fees and costs in the total amount of $131,100.21.

Respectfully submitted,

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