ORAL ARGUMENT NOT YET SCHEDULED

No. 04-5177

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

S.D. EDMONDS,

Plaintiff/Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant/Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF APPELLANT

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Date: December 6, 2004

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CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS AND RELATED CASES UNDER LOCAL RULE 28(a)(1) (INCLUDING F.R.A.P. 26.1 STATEMENT)

Pursuant to Rule 28(a)(1) of this Court (and Federal Rule of Appellate Procedure 26.1), counsel for amicus curiae Public Citizen, Inc., certify as follows:

A. Parties

Except for amicus curiae Public Citizen, Inc., all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellant S.D. Edmonds.

Pursuant to Fed. R. App. P. 26.1, counsel state that amicus curiae Public Citizen, Inc., is a non-profit corporation engaged in advocacy efforts on a range of issues including openness in government. Public Citizen, Inc., has no corporate

parents or subsidiaries, and no publicly held company has an ownership interest in it of any kind or degree.

B. Ruling Under Review

References to the rulings at issue appear in the Brief for Appellant S.D. Edmonds.

C. Related Cases

References to related cases appear in the Brief for Appellant S.D. Edmonds.

Respectfully submitted,

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GLOSSARY

FBI	The Federal Bureau of Investigation
FOIA	The Freedom of Information Act, codified as amended at 5 U.S.C. § 552
APA	The Administrative Procedure Act
OCAW	This Court's decision in *Oil, Chemical & Atomic Workers International Union v. Department of Energy*, 288 F.3d 452 (D.C. Cir. 2002)

INTEREST OF AMICUS CURIAE AND INTRODUCTION

Amicus curiae Public Citizen, Inc., is a non-profit advocacy group with approximately 160,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues. Among the foremost of Public Citizen's concerns is open access to information about the workings of our federal government. As a result, Public Citizen takes a keen interest in the Freedom of Information Act, or FOIA.

Public Citizen makes constant use of FOIA to obtain information that is important to its work on substantive issues. Much of that work centers on matters involving federal regulatory agencies — for example, issues involving FDA regulation of drugs and medical devices, OSHA regulation of workplace health and safety, and the Transportation Department's regulation of cars and trucks. Timely access to information through FOIA is critical to Public Citizen's efforts to monitor the regulators' adherence to statutory mandates and the requirements of their own regulations. When agencies delay or deny release of information as required by FOIA, Public Citizen often has to resort to litigation to obtain the information it seeks.

In addition, because of the importance Public Citizen places on the values of open government that FOIA reflects, Public Citizen attorneys frequently bring FOIA actions on behalf of other organizations or individuals whose requests have

been denied or who have faced prolonged or indefinite delays in obtaining information to which they are entitled. As a result, Public Citizen attorneys have litigated hundreds of FOIA cases on behalf of Public Citizen or other plaintiffs.

Public Citizen's commitment of substantial resources, including hundreds of thousands of dollars worth of attorney time, to FOIA litigation over many years has made it acutely aware of the importance of FOIA's attorney fee provision in making enforcement of FOIA rights economically feasible. The possibility of attorney fee recovery not only helps make it possible for non-profit organizations such as Public Citizen to represent themselves and others in FOIA litigation, but also has enabled litigants of modest means to obtain the assistance of members of the private bar in cases such as this one. Limitations on the availability of attorney fees to prevailing parties in FOIA litigation will have the effect both of eliminating the incentive of private attorneys to bring such litigation except on behalf of persons or corporations wealthy enough to pay the substantial hourly fees that FOIA litigation often entails, and of reducing the resources available to non-profit organizations such as Public Citizen that try to provide representation to FOIA requesters in cases that the private bar is unable or unwilling to take on.

Unfortunately, the doctrine of *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), made applicable to FOIA cases by this Court's decision in *Oil Chemical & Atomic*

Workers International Union v. Department of Energy ("*OCAW*"), 288 F.3d 452 (D.C. Cir. 2002), has already substantially impaired the effectiveness of FOIA's attorney fee provision. In FOIA cases where the only disputed issue is which documents the requester will receive, the government nearly always has the ready option of releasing documents as the litigation progresses in order to avoid an enforceable court order to produce them. The common experience of FOIA litigators is that the government typically dribbles out its documents only when faced with the obligation to respond to summary judgment motions or the need to appear in court to argue its position. Although those documents likely either would not have been released at all or would only have been released after months or years of further delay but for the filing of an action and the expenditure of substantial resources in prosecuting the case, *Buckhannon*, as applied to FOIA by *OCAW*, enables the government to assert that the plaintiff has not "prevailed" in such cases because the release of documents was not the result of an enforceable court order.

The decision below threatens to compound the problem by imposing a new restriction on fees in FOIA litigation that follows neither from *Buckhannon* nor from its plain-language construction of the meaning of the term "prevail." In this case, there is no question that the plaintiff *did* receive an enforceable court order when she prevailed on her motion for summary judgment requiring expedited

handling of her FOIA request (and on the government's counter-motion for an "*Open America*" stay of the deadlines for responding to the request). But the district court concluded that prevailing on such matters does not constitute prevailing on the "*merits*" in FOIA litigation, and it announced a broad and unbending rule that "a court order requiring expedited processing does not rise to the level of a '"material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." 310 F. Supp. 2d at 58 (quoting *Buckhannon*, 532 U.S. at 604). Rather, according to the district court, only a judgment "regarding the legality of the government's withholding of documents" can constitute a "decision on the merits as required by *Buckhannon.*" *Id.*

The key flaw in the district court's ruling is its reliance on a conception of the "merits" of FOIA litigation that follows neither from FOIA itself nor from *Buckhannon* or *OCAW*. FOIA — and FOIA litigation — is as much about *when* information must be produced as it is about *what* information is to be produced. Researchers, journalists, and citizens typically need *timely* access to government information because that information is relevant to issues of current public concern or to other needs that cannot wait forever to be fulfilled. Litigation is often necessary to enforce the public's entitlement under FOIA to prompt access to information. A holding that a FOIA requester who prevails in litigation on a substantial issue controlling the timing of the government's release of information

can never qualify as having "substantially prevailed" for purposes of fee eligibility under FOIA will further impair the ability of members of the public and organizations such as Public Citizen to enforce FOIA rights — and this time, the impairment will come about without even a semblance of support in the plain language of the statute.

Public Citizen has accordingly sought leave to file this brief in support of the appellant in this case.

SUMMARY OF ARGUMENT

FOIA confers rights not only to have access to government information, but also to have *prompt* access. FOIA litigation is often concerned more with compelling the government to respond in a timely fashion than it is with compelling the production of specific pieces of information. When a requester brings an action in whole or in part to enforce her right to prompt release of documents, and when litigation over a significant issue relating to the timing of release leads to an enforceable court order that compels the government to respond faster than it otherwise would have, the requester has *won* on an issue that goes to the merits of her claim and that may be much more important than the issue of which particular documents responsive to her request are or are not exempt from release. Under *Buckhannon*'s plain-meaning construction, the requester has "prevailed" because she has been "awarded some relief by the court," resulting in a

"judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 603, 605 (citations and internal quotation marks omitted).

Contrary to the district court's view, *OCAW* does not mandate denial of fees to a party who litigates and wins on an issue of timing. In *OCAW*, the court held that what it referred to as a stipulated "scheduling orde[r]" (288 F.3d at 459) was not enough to make the requester a prevailing party. But a stipulated scheduling order is a far cry from a litigated ruling that a plaintiff has a substantive entitlement under the statute to an expedited response. Nothing in *OCAW* says that a plaintiff who wins such a ruling has not prevailed.

ARGUMENT

I.
FOIA Confers Substantive Rights to Prompt Release of Documents.

FOIA provides that when a person requests records from an agency, the agency "shall make the records *promptly* available." 5 U.S.C. § 552(a)(3)(A) (emphasis added). That the word "promptly" is not merely aspirational is made clear by the specific requirements the statute imposes on the agency. Thus, when an agency receives a request, the statute requires that it "determine within 20 [working] days … whether to comply with such request" and that it "immediately notify the person making such request of such determination and the reasons therefore." *Id.* § 552(a)(6)(A)(i). Similarly, the agency must "make a determination with respect to any appeal within twenty [working] days … after the

receipt of such appeal." *Id.* § 552(a)(6)(A)(ii). The statute states that these time limits may be extended only under "unusual circumstances." *Id.* § 552(a)(6)(B)(i).

What teeth these requirements have are provided largely by FOIA's provisions allowing a requester to treat the agency's failure to comply with the time limit either for an initial response or for the resolution of an appeal as a denial, and to seek judicial review without further exhaustion of administrative remedies. *Id.* § 552(a)(6)(C)(i). The agency must respond promptly to a complaint initiating a FOIA case (*id.* § 552(a)(4)(C)), and the statute directs that a court entertaining such a case may grant a stay to provide the agency "additional time to complete its review of records" *only* "[i]f the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request." *Id.* § 552(a)(6)(C)(i). The statute further cautions that "the term 'exceptional circumstances' does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests." *Id.* § 552(a)(6)(C)(ii). [1]

[1] A stay based on "exceptional circumstances" is commonly referred to as an "*Open America*" stay because this Court first construed the statutory provision allowing such stays in *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976). The current statutory standard for granting such a stay is a tightened version of the standard applied in *Open America.*

The effect of these provisions is to provide FOIA requesters, even in the ordinary case, with an enforceable substantive entitlement to have their requests acted upon as promptly as possible (even if the reality is that that entitlement if typically honored in the breach, whether because of agency indifference or the heavy volume of FOIA requests). But the statute goes still further: It requires agencies to "promulgate regulations … providing for expedited processing of requests for records" in cases of "compelling need" or in "other cases determined by the agency." *Id.* § 552(a)(6)(E)(i). Under the statute, agencies must determine whether to grant or deny expedited processing in no more than ten days and must "process as soon as practicable any request for records to which the agency has granted expedited processing." *Id.* § 552(a)(6)(E)(ii) & (iii). That the right to expedited processing in appropriate cases is a substantive entitlement separate from any ultimate right to obtain access to particular documents is underscored by the statute's express provision that "[a]gency action to deny or affirm denial of a request for expedited processing … and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review." *Id.* § 552(a)(6)(E)(iii).

FOIA's legislative history only confirms what is already apparent from the statute's clear terms: Speeding the release of government information is one of the law's fundamental purposes. In particular, the 1974 amendments to FOIA were

designed to "expedite the handling of requests for information from Federal agencies in order to contribute to the fuller and faster release of information, which is the basic objective of the Act." H.R. Rep. No. 93-876, 1974 U.S.S.C.A.N. 6267, 6267. Both the House and Senate Reports on the 1974 legislation evinced a strong concern with remedying the consequences of agency delay in responding to requests for information. As the House Report put it:

> [I]nformation is often useful only if it is timely. Thus excessive delay by the agency in its response is often tantamount to denial. It is the intent of this bill that the affected agencies be required to respond to inquiries and administrative appeals within specific time limits.

Id. at 6271. The Senate Report likewise stressed that "an agency with records in hand should not be able to use interminable delay to avoid embarrassment, to delay the impact of disclosure, or to wear down and discourage the requester." S. Rep. No. 93-854 at 26 (1974).

Similarly, the 1996 amendments to FOIA, which added the provisions for expedited processing and tightened the standards for granting "*Open America*" stays, were intended (among other things) to help "ensure agency compliance with statutory time limits." Electronic Freedom of Information Act Amendments of 1996, P.L. 104-231, § 2(b)(3), 110 Stat. 3048. The House Report on the 1996 legislation lamented that "[a]t some agencies failure to allocate sufficient staff to comply with the Act has resulted in lengthy backlogs measured in years." H.R. Rep. No. 104-795, 1996 U.S.C.C.A.N. 3448, 3449. The Report went on to say that

"many agencies have failed to process FOIA requests within the deadlines required by the law. These delays in responding to FOIA requests continue as one of the most significant FOIA problems." *Id.* at 3456. The 1996 legislation addressed the problem in two ways: first, by providing that exceptional circumstances justifying an "*Open America*" stay do not include routine backlogs, thus "strengthen[ing] the requirement that agencies respond to requests on time," *id*. at 3462; and second, by requiring the "development of agency administrative processes to respond to specific types of requests on an expedited basis." *Id.* at 3457.

Consistent with the statute and its legislative history, this Court, too, has recognized that the statute imposes substantive obligations on agencies to comply with requests in a timely manner. While recognizing the impossibility and unfairness of enforcing strict compliance with the statutory deadlines in all cases, this Court long ago held in *Open America* that FOIA requires "good faith effort and due diligence of the agency to comply with all lawful demands under the Freedom of Information Act in as short a time as is possible." *Open America*, 547 F2d. at 616. Moreover, *Open America* acknowledged Congress' intent that judicial remedies be available "when the agency was not showing due diligence in processing plaintiff's individual request or was lax overall in meeting its obligations under the Act with all available resources, and … when plaintiff can show a genuine need and reason for urgency in gaining access to Government

records ahead of prior applicants for information." *Id.* at 615-16 (footnote omitted).

Accordingly, the Court has recognized that "prolonged delay in making information available" may "require judicial intervention," *Payne Enterprises v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988) (citation omitted), and that an agency practice constitutes "withholding" of information in violation of FOIA if "its net effect is significantly to impair the requester's ability to obtain the records or significantly to increase the amount of time he must wait to obtain them." *McGehee v. CIA*, 697 F.2d 1095, 1110 (D.C. Cir.), *vacated in part*, 711 F.2d 1076 (D.C. Cir. 1983). Thus, this Court has stated its agreement with the proposition that "unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses." *Payne*, 837 F.2d at 495 (quoting *Long v. IRS*, 693 F.2d 907, 910 (9th Cir. 1982)).

Or, as another court has put it more succinctly, under FOIA, "*[w]hen* the information is delivered may be as important as *what* information is delivered." *Exner v. FBI*, 443 F. Supp. 1349, 1352 (S.D. Cal. 1978) (emphasis added), *aff'd*, 612 F.2d 1202 (9th Cir. 1980).

II.
A Plaintiff Who Obtains an Enforceable Court Order Granting Expedited Processing or Denying an Agency's Request for an *Open America* Stay Has Prevailed on the Merits of a Claim Under FOIA.

In *Buckhannon*, the Supreme Court held that the phrase "prevailing party," as used in federal statutes limiting eligibility for attorney fees, is "a legal term of art" denoting "one who has been awarded some relief by the court." 532 U.S. at 603. Based on what the Court considered the clear meaning of the statutory language, the Court stated that a plaintiff must "receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* (citation omitted). Moreover, the court specified that the necessary relief on the merits must be "*judicial* relief," *id.* at 606 (citation omitted; emphasis by *Buckhannon* Court) — that is, it generally must take the form of an enforceable court order (whether a consent decree or a litigated judgment on the merits) that "create[s] the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Id.* at 604 (citation omitted). Accordingly, the Court rejected application of the "catalyst theory," under which a plaintiff was deemed a "prevailing party" if by bringing litigation she obtained her sought-after goals "without obtaining any judicial relief." 532 U.S. at 606.

Although FOIA does not use the specific term "prevailing party" that was construed in *Buckhannon*, this Court held in *OCAW* that "*Buckhannon* controls" in FOIA cases, and thus that "in order for plaintiffs in FOIA actions to become

eligible for an award of attorney's 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." 288 F.3d at 456-57.

Regardless of the correctness of *OCAW* (or, for that matter, *Buckhannon*), a plaintiff who obtains an enforceable court order that affirms her entitlement to expedited processing of a FOIA request and/or denies the government's request for an *Open America* stay to allow additional time to respond, and that accordingly compels the government to respond to her request on an accelerated basis, satisfies the *Buckhannon*/*OCAW* standard for recognition as a prevailing party. Such a plaintiff does not assert merely that her action was a "catalyst" that prompted the government to act without judicial compulsion. Rather, she has obtained a court order that alters her legal relationship with the defendant by enforcing her important substantive right to the *timely* release if non-exempt records under FOIA and requiring the government to act accordingly. In *Buckhannon*'s terms, she has received "some relief" (532 U.S. at 603); she has received "*judicial* relief" (*id*. at 606); and the relief she has received is "on the merits" (*id.* at 603) in that it enforces the very statutory entitlements that her lawsuit was brought to vindicate.

The district court's contrary view that only an order regarding the legality of the government's withholding of particular documents constitutes relief on the merits of a FOIA claim (310 F. Supp. 2d at 58), would have the effect of denying

fees in situations where plaintiffs obtained enforceable court orders granting other forms of relief under FOIA — relief that may be of far greater substantive significance than the resolution of exemption claims concerning particular documents. A few examples help illustrate the point:

- In *Piper v. United States Department of Justice*, 339 F. Supp. 2d 13 (D.D.C. 2004), the plaintiff filed suit after receiving an unsatisfactory response to a request for Justice Department records concerning the kidnapping of his mother. The government sought a *four-year* stay under *Open America*. The district court (Lamberth, J.), held that the stay sought by the government was excessive and ordered the government to respond within two years. The order resulted in the production of 80,000 pages of records. Further disputes between the parties also resulted in an order granting the plaintiff summary judgment with respect to his entitlement to 25 specific documents, and denying access to others.

On the plaintiff's motion for attorney fees, Judge Lamberth found that the plaintiff had substantially prevailed not only with respect to the 25 documents, but, more significantly, by obtaining an order requiring the government to release documents two years before it otherwise would have. Judge Lamberth held that his order constituted "at least some relief on the merits" because it imposed an binding obligation on the government to produce any non-exempt documents within two years. 339 F. Supp. 2d at 19. As Judge Lamberth explained:

> [W]hether plaintiff received the requested documents within four years or two years, in real world terms, substantially changed the parties' legal status because a two year stay reduction determines when and, to a large extent, how long the litigation will proceed. The stay reduction had the effect of making the Government confront plaintiff's challenges to the various FOIA disclosure exceptions the FBI invoked two years earlier than it thought it should be required to do.
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> * * *
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> By requiring the FBI to produce the requested documents within two years rather than four years, the plaintiff obtained a "change [in the FBI's] primary conduct in … real world [terms] …." … Therefore, when this Court reduced the stay by two years, it was indeed granting plaintiff "some relief."

Id. (citations omitted).[2]

- In *Ettlinger v. FBI*, 596 F. Supp. 867 (D. Mass. 1984), the plaintiff sought FBI files on her grandmother in order to prepare a scholarly biography. The FBI denied her request for a fee waiver and delayed processing her appeal of the denial; the agency also produced some documents but delayed processing of others. The plaintiff brought an action not to challenge the withholding of particular items, but to require the FBI to waive fees and to produce any additional documents (plus a *Vaughn* index of withheld documents) by a date certain. The district court ruled in her favor on the fee waiver issue, and also found that the FBI had violated the statute by delaying its production of documents. Accordingly, the

[2] The government has not appealed the attorney fee award in *Piper*.

court ordered the FBI to produce all non-exempt documents (as well as its *Vaughn* index) by a particular date.

As in *Piper*, the court found the plaintiff entitled to fees, even though she had not compelled production of specific documents, because she had substantially prevailed in vindicating her right to a timely response (and to a fee waiver) under FOIA. The court explained (*id.* at 879-80):

> Without this lawsuit, the plaintiff would have been denied her legal rights under the FOIA. Upon the determination of this court that the actions of the defendants in denying her a fee waiver and in failing to produce the requested documents were arbitrary and capricious, based on an improper application of the law, the plaintiff has prevailed on both counts of her complaint.

- In *Exner v. FBI*, 443 F. Supp. 1349 (S.D. Cal. 1978), *aff'd*, 612 F.2d 1202 (9th Cir. 1980), the plaintiff (the then-notorious Judith Exner) had sought files maintained on her by the FBI. The FBI informed her that its response would be delayed because of its heavy backlog of requests, and it refused to grant expedited treatment of her request. In light of Ms. Exner's particular need for the files in order to respond to leaks of possibly inaccurate information about her, the district court ordered the FBI to expedite processing of her request. The government then responded to the request as ordered, withholding certain documents on claims of exemption. The district court found the claims of exemption well-founded (and the Ninth Circuit affirmed), but both courts nonetheless held that Ms. Exner had substantially prevailed by obtaining an order

requiring expedited processing of her request. As the district court put it, she "convinced this court and the Ninth Circuit Court of Appeals that she was entitled to have her request for information moved 'up the line,'" and thus "completely succeeded in her effort to force the government to give her information request priority." *Id*. at 1353, 1354. In words that are particularly apt here, the court rejected the notion that prevailing on an issue of timing cannot qualify a plaintiff for a fee award:

> [T]he purpose of this lawsuit was to compel immediate production of documents in the government's possession. The government seems to suggest in its argument that an action affecting only the timing of production does not meet the test for an award of attorney fees. Section 552(a)(4)(E) contains no such limitation, nor does the legislative history suggest one.

Id. at 1353.

These examples illustrate that success under FOIA is not, or not always, merely a matter of showing entitlement to particular documents. The same is true here. The plaintiff, Ms. Edmonds, brought her action in part to force expedited processing of her claim. In its December 2002 order, the district court not only rejected the government's contention that it should receive an *Open America* stay granting additional time for processing, but also expressly granted Ms. Edmonds summary judgment on her claim to expedited processing, holding that she was entitled under the Justice Department's own regulations to expedited consideration of her request. Thereafter, the court issued an order based on its partial summary

judgment ruling that required the FBI to respond to Ms. Edmonds' request by a date certain. Ms. Edmonds was "awarded some relief by [a] court," and she received it in "a judgment on the merits." *OCAW*, 288 F.3d at 457. Under *Buckhannon* as applied to FOIA by *OCAW*, she "prevailed" and is thus potentially eligible for fees.

III.
OCAW Does Not Hold That Orders Relating to Issues of Timing Can Never Constitute Relief on the Merits for Fee Purposes.

The court below held that *OCAW* precluded an award of fees based on any "procedural ruling regarding the timing of production," including a "court order requiring expedited processing." 310 F. Supp. 2d at 58. The court based this conclusion on a passage in *OCAW* that rejected the argument (not made by the appellees in the case, but only by the dissenting judge) that the plaintiffs should be deemed to have prevailed because there was a stipulated order specifying the date by which the defendant was to complete its review of records. *See OCAW*, 288 F.3d at 458-59. But this Court's ruling that particular timing order in *OCAW* was "not judicial relief on the *merits* of the … complaint," *id.*, was not a holding that orders affecting the timing of a FOIA response can *never* constitute relief on the merits.

As described in the Court's opinion in *OCAW*, the stipulated order was merely a "procedural ruling" — one in a series of "scheduling orders." *Id.*

Nothing in the opinion suggests that the order resolved any disputed issue as to either the plaintiffs' entitlement to an expedited or timely response or the existence of "exceptional circumstances" justifying a stay to allow the government additional time to respond. Moreover, the Court's statement that the order granted the plaintiffs no relief on the merits of their complaint suggests either that the complaint did not seek expedited consideration or, if it did, that the scheduling order did not require it.

As Sigmund Freud famously said, "Sometimes a cigar is just a cigar." By the same token, sometimes a scheduling order is just a scheduling order. That seems, from this Court's opinion, to have been the case in *OCAW*. But that does not mean, as the district court held, that *all* orders that involve the timing of the government's response to a FOIA claim are similarly mere scheduling orders.[3]

[3] We note that Public Citizen Litigation Group represented the requesters in *OCAW* in their petition for rehearing en banc. We there argued that the majority's rejection of the argument that the order specifying a date for the completion of the defendant's review of records made the plaintiffs prevailing parties was inconsistent with this Court's prior recognition that FOIA confers enforceable, substantive rights with respect to the timing of agency action. *See* Appellees' Petition for Rehearing En Banc, *OCAW*, No. 01-5163 (D.C. Cir. filed June 20, 2002). The Court's rejection of the petition for rehearing en banc suggests that it saw no such inconsistency — that is, that it viewed the scheduling order as just a scheduling order, not an order adjudicating the requesters' right to timely action on their request. Unfortunately, it appears that the district court here read *OCAW* in the way we feared it would be read.

Here, the district court's order was not just a scheduling order or an interim procedural decision. Rather, it reflected the court's decision that Ms. Edmonds was entitled to judgment as a matter of law on one of her claims — namely, that the FBI was required by Department of Justice regulations to give her request expedited treatment. It also reflected rejection of the government's argument that circumstances justified additional time to respond to her request, and in that way, too, the order vindicated Ms. Edmonds' substantive rights under the statute to a prompt resolution of her claim of access to information. Nothing in *OCAW* justifies the district courts' conclusion that such an order *cannot* be viewed as a basis for finding that a plaintiff prevailed on the merits.[4]

The district court's view that a plaintiff does not "prevail" when she succeeds in litigation about the timing of agency action without determining the ultimate outcome of that action would have consequences that potentially could reach far beyond FOIA. For example, could it be said that a plaintiff who litigated

[4] Even if this Court were to hold that whether a plaintiff who succeeds in forcing expedited processing and opposing an *Open America* stay has "substantially prevailed" depends on the circumstances, that would require reversal and remand here for consideration of the relevant circumstances, since the district court held that prevailing on such issues is *always* insufficient. In particular, the district court did not suggest that the degree of expedition granted was somehow trivial (a conclusion that would in any event be inconsistent with her view that the delay proposed by the government was enough to violate Ms. Edmonds' right to expedited processing).

and won on a claim that an agency had unreasonably delayed a rulemaking in violation of the APA — and who obtained an order requiring the agency to act by a date certain — had not prevailed (for purposes of fees under the Equal Access to Justice Act or some other federal statute) unless she also won on a claim relating to the substance of the rule that finally resulted?[5] The answer must be no. *See Environmental Defense Fund v. Reilly*, 1 F.3d 1254 (D.C. Cir. 1993) (litigant prevailed when it obtained ruling vacating agency rule for lack of notice-and-comment rulemaking even though agency went on to repromulgate same rule). The reasoning of the district court, however, would suggest otherwise.

The fact of the matter is that just as does the APA, FOIA creates enforceable substantive rights with respect to the timing of agency action, and where a plaintiff carries the difficult burden of establishing a violation of those rights and obtaining judicial relief, nothing in *OCAW*, *Buckhannon*, or, more importantly, the terms of the statute suggests that she has not "substantially prevailed."

[5] *Cf. Public Citizen Health Research Group v. Chao*, 314 F.3d 143 (3d Cir. 2002) (finding that OSHA had unreasonably delayed rulemaking proceeding in violation of 5 U.S.C. § 706 and ordering it to proceed with rulemaking on a schedule to be determined through court-sponsored mediation).

IV.
This Court Need Not Reconsider *OCAW* to Rule in Ms. Edmonds' Favor.

Ms. Edmonds concludes her brief with several pages of argument that *OCAW* was incorrectly decided, though she makes clear that she is preserving the issue "for purposes of further review" (Edmonds Br. 18) given that this panel is bound by *OCAW*. We make no bones about our disagreement with *OCAW*, for the reasons stated in Ms. Edmonds' brief as well as in the petition for rehearing en banc in *OCAW* itself.[6] Nonetheless, we submit this brief in large measure to urge the Court not to throw the baby out with the bath water — that is, not to rule against Ms. Edmonds simply because it is powerless to overturn *OCAW* without en banc review.

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[6] In particular, we find it curious that the *OCAW* court equated "prevailing party," which the Supreme Court referred to as a "legal term of art," with "substantially prevailed," without recognizing that the latter term employs another "legal term of art" — "substantial" — which denotes instances in which someone comes close to but does not quite reach some status (e.g., "substantial compliance" or "substantial performance"). Thus, *OCAW*'s assertion that one cannot "substantially prevail" without "prevailing" (288 F.3d at 455) is, we submit, incorrect. At the very least, "substantially prevail" has an ambiguity that the Supreme Court found lacking in "prevailing party," rendering resort to the clear legislative history favoring the catalyst theory under FOIA appropriate. Other arguments against the application of *Buckhannon* to FOIA are comprehensively presented in David Arkush, *Preserving "Catalyst" Attorneys' Fees Under the Freedom of Information Act in the Wake of* Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources, 37 Harv. C.R.-C.L. L. Rev. 131 (2002).

Notwithstanding Ms. Edmonds' (and our own) disagreement with *OCAW*, the primary question here is not whether *OCAW* is right or wrong. It is whether the result below is commanded by, or even consistent with, *OCAW*. The answer is no. A plaintiff who obtains a court order adjudicating the merits of a claim to expedited processing under FOIA and requiring specific agency action as a result has prevailed within the meaning of *OCAW* and *Buckhannon*. The district court's contrary ruling cannot be sustained.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded for consideration of whether fees should be awarded and, if so, in what amount.

Respectfully submitted,

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RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing Brief for Appellant complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The Brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (Microsoft Word 2002) the Brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the local rules of this Court) contains 5,618 words.

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2004, I caused two copies of the foregoing Brief of Amicus Curiae Public Citizen, Inc., in Support of Appellant to be served by first-class mail, postage prepaid, and be electronic mail, on:

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