UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Defendant.	)	Civil Action No. 19-915 (CJN)

PLAINTIFF'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E), and Federal Rule of Civil Procedure 54(d), Plaintiff Public Citizen, Inc., hereby moves for attorneys' fees and costs in the amount of $69,955.90, plus reasonable additional fees for future work performed in connection with this motion. Public Citizen submits the accompanying memorandum of law, declarations of Adam R. Pulver (with supporting exhibits), Allison M. Zieve, and Rebecca Smullin, and a proposed order.

Dated: October 30, 2020

Respectfully submitted,

/s/ Adam R. Pulver

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PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

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INTRODUCTION

In December 2018, following widely reported public confusion on the position of Defendant U.S. Department of Housing and Urban Development (HUD) as to the eligibility of Deferred Action for Childhood Arrivals (DACA) recipients for Federal Housing Administration-insured loans, plaintiff Public Citizen sent HUD a Freedom of Information Act (FOIA) request seeking records that would shed light the agency's position and requesting a fee-waiver. HUD cursorily denied the fee waiver and Public Citizen's appeal of that denial, and, after four months, indicated only that it was searching for documents in an office of HUD that had no connection to the request. Accordingly, in April 2019, Public Citizen commenced this action.

After the litigation commenced, and subject to regular orders of the Court, HUD eventually produced responsive documents—6,655 pages over fourteen rolling productions. In these productions—which were not de-duplicated, Bates-stamped, or text searchable—HUD redacted individual words, lines, and paragraphs within discrete documents, labelling the redactions "Non Responsive Record." Plaintiff objected to this practice repeatedly and filed a motion for partial summary judgment on this issue. While deferring a dispositive ruling as to specific documents, the Court issued guidance for HUD's future productions and noted it was "skeptical" that HUD could justify many of its redactions under D.C. Circuit precedent. ECF 34 at 8.

Despite the Court's guidance, HUD stated that it "stood by" its redactions, refused to remove them, and continued to make similar ones in future productions. The Court then ordered expedited briefing on renewed summary judgment motions. Shortly before Plaintiff's motion was due, HUD removed the majority of redactions in dispute, and the parties then agreed to settle the remaining production disputes.

The history of this case demonstrates that, absent litigation, HUD would not have produced any documents without charging a fee and would not have produced the previously redacted material at all. Thus, Public Citizen is eligible for and entitled to an award of reasonable attorney's fees under FOIA. Accordingly, the Court should award Public Citizen attorneys' fees and costs in the amount of $69,555.90, plus reasonable additional fees for future work performed in connection with this motion. This figure reflects reasonable hours of work incurred in a leanly staffed case, at the prevailing market rate for complex civil litigators like Plaintiff's counsel, who are highly skilled in FOIA and administrative litigation.

BACKGROUND

This litigation, arising out of a FOIA request made nearly two years ago, has a long and complicated history. Throughout, HUD took steps to delay its production and repeatedly refused to remove challenged withholdings, until suddenly reversing course weeks before Plaintiff's deadline to file its second summary judgment motion, pursuant to this Court's order.

I. The Request and Administrative Appeal

On December 19, 2018, Plaintiff submitted a FOIA request to HUD seeking three categories of records from seven HUD offices, related to the eligibility of DACA recipients for Federal Housing Administration loans. Ex. 1.[1] The request followed, and cited, news articles discussing confusion in the consumer finance industry on the topic and the lack of a clear, written policy by HUD. *See id.* at 2 (citing Nidhi Prakash, "The Trump Administration is Quietly Denying Federal Housing Loans to DACA Recipients," BuzzFeed News, Dec. 14, 2018, https://www.buzzfeednews.com/article/nidhiprakash/daca-trump-denied-federal-housing-loans); *see also* Dani Hernandez, "Ask the Underwriter: Why is HUD privately discouraging lenders from

[1] All Exhibits are attached to the concurrently filed Declaration of Adam R. Pulver.

making FHA loans to DACA borrowers?," HousingWire, Sept. 20, 2018, https://www.housingwire.com/articles/46885-ask-the-underwriter-why-is-hud-privately-discouraging-lenders-from-making-fha-loans-to-daca-borrowers/. The request specified that Public Citizen sought "all nonexempt portions of the records" and that HUD should not redact "portions of any record as 'non-responsive,' 'out of scope,' or the like." Ex. 1 at 1. Public Citizen also sought a public-interest fee waiver. *Id.*

Two days after Public Citizen's request, HUD denied the fee waiver via a form letter that did not address any specifics of Public Citizen's request, cited generic legal standards, and concluded that "based on the foregoing, your request for a fee waiver is not in the 'public interest' as required by statute and is therefore denied." Ex. 2 at 2. The denial purported to rely on factors set out in 24 C.F.R. § 15.110(h), a regulatory provision that does not currently exist and appears to be a citation to a former version of HUD's FOIA regulations. *See id.* at 1.

On December 21, 2018, Public Citizen appealed HUD's fee-waiver denial. Ex. 3. Public Citizen's appeal explained that the denial was facially defective because it failed to provide reasons for the denial and purported to rely on factors that are different than those set out in HUD's operative regulations, 24 C.F.R. § 15.106(k)(2), and are contrary to D.C. Circuit precedent. *Id.* at 2–3. Public Citizen also detailed why it was entitled to a fee waiver under the appropriate factors. *Id.* at 3–7.

On March 15, 2019, HUD denied Public Citizen's appeal. Ex. 4. In so doing, HUD stated that Public Citizen had "not adequately shown that public understanding of government operations will be significantly enhanced by release of the requested material." *Id.* at 2. HUD stated that Public Citizen's explanation as to why information about whether DACA recipients are eligible to participate in FHA loan programs would enhance public understanding of the operation of the

FHA loan program was "speculative at best." *Id.* In addition, although the request specified the offices from which Public Citizen was seeking documents, *see* Ex. 1 at 1, HUD's letter stated that a search for responsive records was ongoing in the Office of Public and Indian Housing—an office not within the FOIA request and not the office with primary responsibility for the FHA loan program, Ex. 4 at 2. *See* HUD, Program Offices, https://www.hud.gov/program_offices/ (listing program offices, including Office of Public and Indian Housing and Office of Housing); HUD, Housing, https://www.hud.gov/program_offices/housing (noting Office of Housing operates the FHA).

II. The Litigation

On April 1, 2019, Public Citizen had still not received any records responsive to its December 2018 request. It thus filed this action, challenging both the fee waiver denial and the failure to disclose responsive records. ECF 1.

On May 3, 2019, Judge Lamberth ordered HUD to produce a *Vaughn* index and supporting dispositive motion by June 3, 2019. ECF 8. On that date, however, rather than comply, the agency filed a motion to vacate the deadline—without proposing a production schedule or committing to producing a single document. ECF 9. Plaintiff opposed, in part, and requested that the Court enter a production schedule. ECF 10. While Defendant's motion was pending, this action was transferred to this Court. *See* June 24, 2019 Minute Order. On July 11, 2019, the Court granted the motion to vacate the June 3, 2019, deadline, and ordered the parties to meet and confer and file a joint a status report within one week.

In June 2019, HUD began producing documents in response to Plaintiff's request. *See* ECF 13 at ¶ 6. In its second production, transmitted in July 2019, 89 of 416 pages bore redactions with a notation of "Non Responsive Record." *Id.* The redactions included redactions of individual

words, sentences, and paragraphs within a single email, PowerPoint slide, or email attachment. *Id.* at ¶ 12. Plaintiff's counsel contacted Defendant's counsel to object to this approach as inconsistent with FOIA and D.C. Circuit case law. Ex. 5 at 4. In that initial email, and in a follow-up email, Plaintiff specifically objected to the redactions of lines within individual emails, within numerous documents titled "Escalation Review Committee Agenda and Minutes," within notes from "half day roundtables," and within PowerPoint presentations prepared by a nongovernment entity known as Potomac Partners. *Id.* at 2–3, 4. HUD refused to remove any of the redactions, stating, "All records not provided for non-responsiveness are substantively completely unrelated to the subject matter of Plaintiff's FOIA request." *Id.* at 1. *See also* July 18, 2019 Joint Status Report (ECF 13) ¶¶ 12–13, 17 (setting forth parties' respective positions).

Given HUD's refusal to remove the disputed redactions or agree not to make similar redactions in future productions, Plaintiff filed a motion for partial summary judgment. It argued that HUD's redaction practices were inconsistent with the agency's obligation under FOIA, and that awaiting the close of production to address the issue would unnecessarily protract the litigation and production of documents to which Plaintiff was entitled under law. ECF 14. The Court then ordered Defendant to "process potentially responsive records at a rate of 500 pages per month until processing is complete" and to "produce responsive, non-exempt records at the end of each month." Aug. 13, 2019 Minute Order. HUD moved to hold Plaintiff's motion in abeyance, which Plaintiff opposed. ECF 16; ECF 17. The Court denied HUD's motion via minute order, and HUD, after two extensions of time, filed a cross-motion for partial summary judgment. *See* Aug. 20, 2019 Minute Order; Sept. 24, 2019 Minute Order; Oct. 8, 2019 Minute Order; ECF 22.

Meanwhile, on the same day that Plaintiff filed its motion for partial summary judgment, HUD made a third production, in which it redacted individual words, phrases, and sentences on

approximately 321 of 552 pages as either "Non Responsive Record" or "Withheld pursuant to exemption Non Responsive Record of the Freedom of Information Act." *See* Aug. 16, 2019 Joint Status Report (ECF 15) at ¶ 2. While the cross-motions for partial summary judgment were pending, HUD made additional monthly productions, in each of which HUD withheld parts of discrete documents, marking them as "Non Responsive Record." *See* Sept. 27, 2019 Joint Status Report (ECF 23) ¶ 2 (noting 55 of 498 pages so redacted); Dec. 12, 2019 Joint Status Report (ECF 29) (43 of 501 pages and 62 of 506 pages); Jan. 15, 2020 Joint Status Report (ECF 30) (69 of 506 pages); Feb. 14, 2020 Joint Status Report (ECF 31) (106 of 500 pages); Mar. 13, 2020 Joint Status Report (ECF 32) (124 of 526 pages). The parties continued to file joint status reports, in accordance with the Court's orders. *See* Sept. 5, 2019 Minute Order; Oct. 25, 2019 Minute Order; Dec. 16, 2019 Minute Order; Jan. 16, 2020 Minute Order; Feb. 18, 2020 Minute Order; Mar. 16, 2020 Minute Order.

On March 26, 2020, the Court issued an order denying both parties' partial summary judgment motions, without prejudice, as premature. ECF 33. At the same time, the Court issued a memorandum opinion in which it "endeavor[ed] to provide general guidance to the Parties for future document productions." ECF 34 at 2. In that opinion, the Court surveyed case law in this district applying the D.C. Circuit's decision in *American Immigration Lawyers Ass'n v. Executive Office for Immigration Review* (*AILA*), 830 F.3d 667 (D.C. Cir. 2016), to determine what constitutes a discrete responsive record. As the Court explained, "At least one trend has emerged: it is usually improper to identify individual words, sentences, or paragraphs in discrete documents or emails and to label them as separate, non-responsive 'records.'" ECF 34 at 6 (collecting cases). The Court declined to rule on the propriety of specific redactions, given that there was "no comprehensive list of challenged redactions, and no government affidavits explaining the rationale

for considering all of HUD's specific redactions as records separate and distinct from the produced materials," and that it "anticipate[d] that there will be additional disputed redactions for which the government will need to articulate its basis for treating them as separate records." *Id.* at 7. But the Court provided a "final note" addressing HUD's "characteriz[ation] as mere 'dicta' *AILA*'s skepticism to the characterizing of individual emails in a chain (or paragraphs or sentences thereof) as separate records." *Id.* at 8. The Court explained:

> While the Court can theoretically imagine a situation in which a single bullet point from a PowerPoint slide or a single email in a chain (or subdivision thereof) might be considered a separate record, it is skeptical that the government will be able to justify that step outside extraordinary circumstances. A contrary approach would be "unduly literal and stingy."

Id. (quoting *Am. Oversight v. U.S. Dep't of Health & Human Servs.* (*Am. Oversight II*), 380 F. Supp. 3d 45, 51 (D.D.C. 2019)).

The day after the Court issued its opinion, HUD made its next release of documents to Public Citizen. Of the 514 pages in the March 2020 production, HUD redacted individual lines, phrases, and paragraphs on 92 pages with the notation "Non Responsive Record." Apr. 21, 2020 Joint Status Report (ECF 36) at ¶ 2. Despite the Court's opinion, there was no discernible change in the agency's redaction practices, so Plaintiff's counsel requested that HUD revisit its redactions in that production and prior productions in light of the Court's opinion. *See* Exs. 6, 7. HUD's new counsel was unfamiliar with the previous discussions, and Plaintiff's counsel was required to forward previous communications on the subject. *Id.* at 6. HUD did not agree to address all ten of its productions through that point, but the parties agreed that HUD would revisit, as exemplars, some of the "non responsive redactions" of PowerPoints, emails, agendas, and notes that Plaintiff's counsel had raised in a July 15, 2019, email in an attempt to narrow the parties' dispute. *See* Apr. 21, 2020, Joint Status Report (ECF 36) at ¶ 4.

HUD's next production consisted of 600 pages, 116 pages of which again bore redactions to individual phrases, lines, or paragraphs (on 116 pages) with the marking "Non Responsive Record." June 30, 2020 Joint Status Report (ECF 37) ¶ 5. Plaintiff requested HUD reassess these redactions in light of the March 26, 2020 opinion, as well. *Id.* at ¶ 6. On May 28, 2020, HUD informed Plaintiff that it "stand[s] by [its] approach and redactions" and did not make any changes to the redactions in the April 2020 production. Ex. 8 at 1. As to the exemplar pages, HUD made a few alterations to its redactions, but largely continued to withhold information on each page with the notation "non responsive record." *Id.*; June 30, 2020 Joint Status Report (ECF 37) at ¶ 9.

Pursuant to the Court's production orders, HUD made three more productions, and, pursuant to the Court's July 1, 2020 minute order, production was completed on July 31, 2020. *See* June 30, 2020 Joint Status Report (ECF 37) at ¶ 10 (May 30, 2020 production of 605 pages, no "non responsive record" redactions); *id.* at ¶ 11 (June 30, 2020 production of 501 pages, fifteen with "non responsive record" redactions); Aug. 6, 2020 Joint Status Report (ECF 38) ¶ 2 (July 31, 2020, production of 342 pages, portions of 86 with "non responsive record" redactions).

Throughout the spring and summer of 2020, Plaintiff was clear that it intended to renew its motion for summary judgment as to the agency's withholdings of portions of responsive records as "non responsive." *See, e.g.*, Apr. 21, 2020 Joint Status Report (ECF 36) at ¶ 5 (noting that Plaintiff intended to move for summary judgment on these grounds after close of production); June 30, 2020 Joint Status Report (ECF 37) at ¶¶ 17–18 (same). On July 1, 2020, the Court ordered the parties to submit an "expedited" briefing schedule for this motion by August 6, 2020. *See* July 1, 2020 Minute Order. To determine an appropriate schedule, Plaintiff de-duplicated the production and determined that HUD's "non responsive record" redactions appeared in 62 unique discrete documents. *See* Aug. 6, 2020 Joint Status Report (ECF 38); Pulver Decl. ¶ 12, Ex. 9 (chart listing

documents). The parties agreed on an expedited briefing schedule, which the Court adopted, ordering Plaintiff to file its renewed motion for summary judgment by September 4, 2020. *See* Aug. 6, 2020 Minute Order.

After the Court entered its order, on August 13, 2020, HUD made a "discretionary release" via e-mail. *See* Ex. 10. After review, Plaintiff's counsel determined that HUD had provided 32 of the 62 documents without any redactions on the grounds of "non responsive records," and had removed some, but not all, of its "non responsive record" redactions as to another 13 documents. *See* Pulver Decl. ¶ 13, Ex. 9. Among the documents in the discretionary release were Escalation Review Committee Agendas and Minutes, Potomac Partners' PowerPoint presentations, and notes—documents that had been specifically addressed in Plaintiff's August 2019 motion for partial summary judgment. *See* Pulver Decl. ¶ 14.

Given that HUD had removed the challenged redactions on 45 of the 62 documents, Plaintiff agreed not to pursue HUD's remaining withholdings. *See* Sept. 30, 2020 Joint Status Report (ECF 40) at ¶¶ 2–3. The parties' attempt to resolve the issue of attorney's fees was unsuccessful. *See* Joint Motion to Vacate Briefing Schedule (ECF 39) at ¶ 6; Sept. 30, 2020 Joint Status Report (ECF 40) at ¶ 4.

LEGAL STANDARD

Courts in FOIA cases have authority to award "reasonable attorney fees and other litigation costs reasonably incurred" to a plaintiff who "has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i). Under D.C. Circuit precedent, "the attorney-fee inquiry is divided into two prongs, the fee 'eligibility' and the fee 'entitlement' prongs." *Reyes v. U.S. Nat'l Archives & Records Admin.*, 356 F. Supp. 3d 155, 161 (D.D.C. 2018) (citing *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 524 (D.C. Cir. 2011)). If the plaintiff meets both these prongs, "the

Court considers the reasonableness of the fees requested." *Id.*

ARGUMENT

I. Public Citizen is both eligible for and entitled to fees and costs.

A. By prompting HUD to produce 6,655 pages of records without charge, and to remove redactions on dozens of documents, Public Citizen substantially prevailed.

"The eligibility prong asks whether a plaintiff has 'substantially prevailed' and thus 'may' receive fees." *Brayton*, 641 F.3d at 524 (citation omitted). A plaintiff can substantially prevail "by obtaining relief either through a judicial order, enforceable written agreement, consent decree or, alternatively, through a voluntary or unilateral change in position by the agency, if the plaintiff's claim is not insubstantial." *Reyes*, 356 F. Supp. 3d at 161 (citing 5 U.S.C. § 552(a)(4)(E)(ii)(I-II)). Courts have referred to these two alternatives as the "judicial order" and "catalyst" theories. *See, e.g.*, *Am. Oversight v. U.S. Dep't of Justice* (*Am. Oversight I*), 375 F. Supp. 3d 50, 61 (D.D.C. 2019); *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.* (*EPIC V*), 218 F. Supp. 3d 27, 39 (D.D.C. 2016). HUD's productions of 6,655 pages of documents, and its removal of challenged redactions on 47 documents after fourteen months of litigation, entitle Plaintiff to relief under either theory.

First, "voluntary" production of responsive records over the course of litigation, without motion practice, is sufficient for a plaintiff to be eligible for fees under the "judicial order" theory where "the Court issued numerous orders supervising the search, review, and production of responsive documents." *Poulsen v. Dep't of Homeland Sec*., No. CV 13-498 (CKK), 2016 WL 1091060, at *3 (D.D.C. Mar. 21, 2016). That is exactly what occurred here: Public Citizen obtained production of responsive documents as a result of this Court's August 13, 2019 Minute Order, requiring processing of "potentially responsive records at a rate of 500 pages per month until processing is complete," with productions at the end of each calendar month. Notably, this

schedule was *not* the one that HUD proposed to the Court. Rather, HUD sought to make monthly productions with a "day-for-day adjustment to the production schedule for scheduled leave of counsel, federal holidays, and government shut down." July 18, 2019 Joint Status Report (ECF 13) at ¶ 16. The Court later ordered HUD to "complete its production of responsive records by July 31, 2020." July 1, 2020 Minute Order. These orders constituted a "judicially sanctioned change in the legal relationship between the parties." *Am. Oversight I*, 375 F. Supp. 3d at 62 (quoting *Davy v. CIA* ("*Davy I*"), 456 F.3d 162, 166 (D.C. Cir. 2006)); *see also Judicial Watch, Inc. v. FBI*, 522 F.3d 364, 368–69 (D.C. Cir. 2008) (plaintiff eligible for fees where agency produced records pursuant to joint stipulation and order).

Second, the litigation plainly served as a catalyst for HUD's production—both of the documents in general, and of the material that HUD withheld. Under the catalyst theory, a requester is entitled to fees where "the lawsuit was reasonably necessary and the litigation substantially caused the requested records to be released." *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 878 F. Supp. 2d 225, 231 (D.D.C. 2012) (quoting *Burka v. U.S. Dep't of Health & Hum. Servs.*, 142 F.3d 1286, 1288 (D.C. Cir. 1998)). "Although the mere filing of the complaint and the subsequent release of the documents is insufficient to establish causation, it is nonetheless a salient factor in the analysis." *Id.* (citations and marks omitted).

Here, HUD "did not produce any documents until Plaintiff filed [it]s Complaint," *Poulsen*, 2016 WL 1091060, at *3, or for two months thereafter. The last pre-litigation correspondence from HUD included no estimated production time, and stated that the agency was searching "in the Office of Public and Indian Housing (PIH) specifically." Ex. 2 at 2. Plaintiff's FOIA request had not asked for search of that office, and Plaintiff did not believe that the office was the custodian of the records sought. Indeed that belief was correct, as the documents produced nearly all came from

custodians in the Office of Housing, an entirely different division of HUD, headed by a different Assistant Secretary. *See* HUD, Strategic Plan 2018–2022 (May 2019) at 5, https://www.hud.gov/sites/dfiles/SPM/documents/HUDSTRATEGICPLAN2018-2022.pdf (organizational chart). Moreover, HUD denied Plaintiff's request for a public interest fee waiver and denied Plaintiff's appeal on the fee-waiver issue. Without litigation, that denial would have been final.

Public Citizen thus reasonably concluded that litigation was necessary to obtain production. *See Chesapeake Bay Found., Inc. v. U.S. Dep't of Agric.*, 11 F.3d 211, 216 (D.C. Cir. 1993) (noting that "reasonable necessity [is] determined from the perspective of a reasonable person in the position of the requester"), *abrogated on other grounds by Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 601–02 (2001). Even if HUD would have eventually produced responsive records, "the productions would have been, at a minimum, less prompt and potentially less inclusive had they not occurred under the supervision of this Court during the pendency of this litigation." *Poulsen*, 2016 WL 1091060, at *3; *see also Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.* (*EPIC I*), 811 F. Supp. 2d 216, 233 (D.D.C. 2011) (holding that the plaintiff was entitled to attorneys' fees given agency's "long record of noncompliance to the plaintiff's FOIA requests, followed by [its] disclosure of a substantial quantity of non-exempt records in response to this suit"). And HUD would have charged Plaintiff for them. Moreover, HUD removed redactions of partial records as "non responsive" only after repeated requests by Plaintiff, motion practice resulting in guidance from the Court, and on the eve of renewed summary judgment briefing. This litigation was indisputably the catalyst for the production of the additional material produced on May 28, 2020, and on August 13, 2020.

Because the record reflects that "Plaintiff's lawsuit served as a necessary catalyst for the agency's release of [a] significant body of responsive material," *EPIC V*, 218 F. Supp. 3d at 50, Public Citizen is eligible for fees.

B. Public Citizen is entitled to an award of attorneys' fees and costs.

Public Citizen also meets the requirements of the entitlement prong under D.C. Circuit case law. This precedent requires the balancing of four factors, no one of which is dispositive: "(1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) the reasonableness of the agency's withholding of the requested documents." *McKinley v. Fed. Hous. Fin. Agency*, 739 F.3d 707, 711 (D.C. Cir. 2014) (internal quotation marks omitted). The second and third factors typically merge into the single question "whether a plaintiff has sufficient private incentive to seek disclosure of the documents without expecting to be compensated for it." *Id.* (citations and internal quotation marks omitted). Taken together, the first three factors help distinguish "between requesters who seek documents for public informational purposes," on the one hand, and "those who seek documents for private advantage," on the other. *Davy v. CIA* (*Davy II*), 550 F. 3d 1155, 1160 (D.C. Cir. 2008). The former "typically need the fee incentive to pursue litigation," whereas the latter "benefit only themselves and typically need no incentive to litigate." *Id.* All four factors weigh in favor of a fee award here.

1. Public Citizen's request was calculated to obtain documents with significant benefit to the public.

In evaluating the first factor, the "public benefit," courts conduct "an *ex ante* assessment of the potential public value of the information requested, with little or no regard to whether any documents supplied prove to advance the public interest." *Morley v. CIA* (*Morley II*), 810 F.3d 841, 844 (D.C. Cir. 2016). Where it is "plausible *ex ante* that a request has a decent chance of

yielding a public benefit, the public-benefit analysis ends there." *Id.*

Plaintiff's request easily meets this standard. The request sought information about eligibility for a public program, in the face of confusion among regulated entities, consumers, and government officials. *See, e.g.*, Prakash, *supra*; Hernandez, *supra*; Ben Lane, "Confusion reigns over whether government is backing mortgages for DACA dreamers," HousingWire, Mar. 8, 2019, https://www.housingwire.com/articles/48390-confusion-reigns-over-whether-government-is-backing-mortgages-for-daca-dreamers/. Only after Public Citizen's request and after this action was filed did HUD make a clear, public statement about the eligibility of DACA recipients for FHA loans. *See* Ben Lane, "HUD declares FHA is no longer backing DACA mortgages," HousingWire, June 13, 2019, https://www.housingwire.com/articles/49326-hud-declares-fha-is-no-longer-backing-daca-mortgages/ ("After months and months of uncertainty about whether the Federal Housing Administration is backing mortgages for Deferred Action for Childhood Arrivals recipients or not, the Department of Housing and Urban Development has finally given an official answer. And that answer is no."); Katy O'Donnell, "HUD: DACA recipients ineligible for U.S.-backed mortgages," Politico, June 13, 2019 https://www.politico.com/story/2019/06/13/daca-dreamers-ineligible-mortgages-1529643 (noting letter from HUD Assistant Secretary "end[ed] months of confusion").

Whether or not HUD considered DACA recipients eligible for FHA loans was plainly of public importance. Independently, how HUD came to its position as to the eligibility of DACA recipients, in light of the months of confusion, is a matter of public interest. "An understanding of how [a federal agency] makes policy decisions, including the influence of any outside groups on this process, is also important to the public's understanding of the [government]." *Natural Res.*

Def. Council v. EPA, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008) (quoting *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1179 (10th Cir. 2005)).

Plaintiff's request for information was thus reasonably calculated "to add to the fund of information that citizens may use in making vital political choices." *Cotton v. Heyman*, 63 F.3d 1115, 1120 (D.C. Cir. 1995) (quoting *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979)). Accordingly, the first factor is met.

2. Public Citizen had no significant private incentive to seek disclosure.

The second and third entitlement factors, examining the commercial benefit to the plaintiff and the plaintiff's interest in the records sought, also weigh in favor of entitlement. Public Citizen is a non-profit organization that sought the requested records to further its mission of promoting openness and democratic accountability in government. *See* Ex. 1 at 2–4. It had no commercial interest in the records sought, and it intended to disseminate the records free of charge and to utilize them in its ongoing work informing members of the public about government transparency, consumer finance, and regulatory issues. *Id.* Courts in this district have regularly found organizations with similar interests to be entitled to fees. *See, e.g.*, *Am. Oversight I*, 375 F. Supp. 3d at 67; *EPIC I*, 811 F. Supp. 2d at 235; *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 820 F. Supp. 2d 39, 45 (D.D.C. 2011).

3. HUD unreasonably withheld the requested records and initially made unreasonable redactions.

The final entitlement factor, the reasonableness of HUD's withholding of the requested documents, also weighs in favor of a fee award. Notably, on this factor, HUD bears the burden of showing its positions were reasonable. *Davy II*, 550 F.3d at 1163. HUD cannot do so, neither as to its refusal to grant the fee waiver, its failure to produce any documents in the first four months

after the request was submitted, nor its initial withholding of fragments of documents as "non responsive records."

a. HUD had no basis to deny Plaintiff's fee waiver request.

Along with its FOIA request, Plaintiff requested that HUD waive fees in accordance with 5 U.S.C. § 552(a)(4)(A)(iii), which provides for a waiver of search and copying fees for the processing of requests "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." In support of this request, Plaintiff cited to news coverage of the confusion around HUD's policy, discussed above, as well as evidence of Public Citizen's demonstrated capacity to disseminate materials received via FOIA to the public, including citations to reports based on records obtained via FOIA. *See* Ex. 1 at 2–3. HUD summarily rejected the request for a fee waiver two days after Plaintiff submitted the request in a template document titled "ACKNOWLEDGMENT LETTER DENYING FEE WAIVER [name of requester]," which said nothing specific to Plaintiff's fee request. Ex. 2. A form-letter denial in response to a detailed fee-waiver request is unreasonable.

Plaintiff then submitted a six-page, single-spaced appeal letter. Ex. 3. First, the appeal argued that the form denial failed to comply with FOIA's requirement that an agency's determination include "the reasons therefor." *Id.* at 2 (citing 5 U.S.C. § 552(a)(6)(A)(i)(I) and *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Second, it argued that the four-factors HUD cited in the letter, which came from a 2000 judicial opinion, were *not* the four factors to be considered under HUD's operative regulations and under more recent D.C. Circuit precedent. *Id.* at 2–3 (citing 24 C.F.R. § 15.106(k)(2) and *Cause of Action v. FTC*, 799 F.3d 1108, 1115–16 (D.C.

Cir. 2015)). Then, citing additional evidence, Plaintiff explained that, under the correct test, it was plainly eligible for a fee waiver. *Id.* at 3–7.

In denying the appeal, HUD continued to cite the 2000 district court decision and did not address Public Citizen's legal arguments. Ex. 4. Rather, it stated that Public Citizen had "not adequately shown that public understanding of government operation will be significantly enhanced by release of the requested material" because the argument that clarification of HUD's position would enhance public understanding was "speculative at best," suggesting Plaintiff had a burden to show the documents it sought existed. *Id.* at 2.

This decision denying the administrative appeal was unreasonable. "[T]he FOIA fee waiver provision 'is to be liberally construed in favor of waivers for noncommercial requesters.'" *Schoenman v. FBI*, 604 F. Supp. 2d 174, 188 (D.D.C. 2009) (quoting *McClellan Ecological Seepage Situation v. Carlucci,* 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. 27, 90 (1986) (Sen. Leahy))). The information provided by Public Citizen in both its initial request and appeal easily cleared the "minimal bar" required to show the information sought has public value. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 602 F. Supp. 2d 121, 128 (D.D.C. 2009). "[A] requester satisfies its burden by describing with reasonable specificity the link between the request and the enhancement of public awareness and understanding of governmental activities." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 2d 261, 270 (D.D.C. 2009). Here, the request reflected the proposition that documents about HUD's policy would contribute to public understanding of HUD's policy, particularly given widely reported confusion about that policy. "Previous media focus" and "recently received public attention," such as the multiple news articles cited by Public Citizen, have been held to substantiate a requester's view that the requested documents will reveal

information about agency conduct and "that the public will gain meaningful information" through a request. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Health & Hum. Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006). Public Citizen could not possibly have known exactly what the requested records would show—nor was it required to. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (requester was not required to show government official had conflict of interest to establish documents relevant to question of whether conflict existed would contribute to public understanding of agency operations). Other than the fact that members of the public were confused by existing public information provided by HUD as to the eligibility of a particular class of persons to participate in a specific HUD program, it is unclear "what else [Public Citizen] could have said to satisfy the government's appetite for specificity." *Id.* at 1313.

HUD's initial boilerplate denial, complete with legal inaccuracies, and the illogical appeal decision "amounted to just the sort of 'roadblock and technicality' that led Congress to liberalize the fee waiver provision." *Id.* at 1315 (quoting 132 Cong. Rec. 31,415 (1986) (Sen. Leahy)). And since Public Citizen would not have received *any* documents without charge absent litigation, this unreasonable position entitles it to its attorneys' fees and costs.

b. HUD had no basis not to produce documents prior to being sued.

Public Citizen is also entitled to fees as HUD had no "colorable or reasonable basis for not disclosing the [requested] material until after [Plaintiff] filed suit." *Davy II*, 550 F.3d at 1163. HUD did not offer any lawful justification for its delay in responding to the request. *See EPIC I*, 811 F. Supp. 2d at 235–36 (finding that agency unreasonably withheld records where it neither provided plaintiff with any information about its FOIA request prior to suit nor made use of "statutory mechanisms by which it could extend its time to respond to the FOIA request"). In its

answer, HUD did not assert that any extraordinary circumstances justified its failure to respond to the request in a timely fashion. ECF 7.

Moreover, HUD cannot properly claim that a FOIA backlog justified its refusal to provide responsive records (or even an estimated date of completion). "[T]he purposes behind the fourth factor of the test for entitlement to attorneys' fees … would not be served if it were reasonable for agencies to withhold documents for indeterminant periods of time because they have too many FOIA requests and too few FOIA staff members." *Reyes*, 356 F. Supp. 3d at 168. Thus, in *Reyes*, the court held that a failure to respond to the plaintiff's FOIA request for over 120 days, and responding only after the filing of suit, was unreasonable. This case involves a delay of a similar length of time. HUD's unjustified failure to produce any documents over four months triggered the litigation and entitles Public Citizen to its fees and costs reasonably incurred in obtaining production.

c. HUD had no reasonable basis for the subsequently removed redactions.

Finally, in addition to an unreasonable denial of fees, and an unreasonable delay releasing responsive records, HUD's redactions of individual words, lines, and paragraphs within responsive documents, were unreasonable—both from the get-go and certainly *after* the Court issued its March 26, 2020, opinion.

As the Court explained in its March opinion, a range of case law in this circuit reflects the proposition that "it is usually improper to identify individual words, sentences, or paragraphs in discrete documents or emails and to label them as separate, non-responsive 'records.'" ECF 34 at 6 (citing *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Rev.*, 830 F.3d 667, 679 (D.C. Cir. 2016); *Am. Oversight II*, 380 F. Supp. 3d at 50–51; *Inst. for Policy Studies v. CIA*, 388 F. Supp. 3d 51, 53–54 (D.D.C. 2019)). Thus, the Court explained it was "skeptical that the government w[ould] be able to justify" its steps of withholding "a single bullet point from a

PowerPoint slide or a single email in a chain (or subdivision thereof)" outside extraordinary circumstances." *Id.* at 8.

Nonetheless, despite numerous requests that the agency remove its "non responsive record" redactions of portions of PowerPoint slides and single emails within chains, HUD refused to do so for nearly five months, until just before Plaintiff's renewed summary judgment motion was due. Cognizant of the tenet that "[t]he determination of fees 'should not result in a second major litigation,'" *Fox v. Vice*, 563 U.S. 826, 838 (2011) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)), and the fact that the parties already briefed the issue in their cross-motions for partial summary judgment, Plaintiff has provided in support of this motion only a few examples of such documents showing the initial documents produced by HUD and those produced in August 2020. These exhibits show that HUD did not remove redactions of individual bullet points from single PowerPoint slides, and redactions of lines within discrete emails and email chains until nearly five months after the Court's opinion. *Compare, e.g.*, Ex. 11 at AUG07-134, *with* Ex. 12 at 5 (PowerPoint slide with and without redactions); Ex. 11 at SEP23-043 with Ex. 12 at 16 (Email with and without redactions).

Given that the Court had already stated that, absent extraordinary circumstances, the partial redactions were likely improper, and HUD's failure to identify any such circumstances, HUD's refusal to remove these redactions, and continued practice of making similar redactions through the remainder of its production and until shortly before Plaintiff's deadline to file a second motion for summary judgment on that issue, was unreasonable. Plaintiff is thus entitled to recover fees through its preparation of briefing to compel HUD to remove the redactions.

4. Eligibility should be the sole criterion.

Members of the D.C. Circuit have questioned whether that court's entitlement prong is

properly part of the standard for assessing an award of attorneys' fees under FOIA. *See Morley v. CIA* (*Morley III*), 894 F.3d 389, 392 n.1 (D.C. Cir. 2018) (per curiam); *Morley v. CIA* (*Morley I*), 719 F.3d 689, 690 (D.C. Cir. 2013) (Kavanaugh, J., concurring); *Davy II*, 550 F.3d 1155, 1166 (D.C. Cir. 2008) (Randolph, J., dissenting). Although, as discussed above, Public Citizen is both eligible and entitled to fees under the Circuit's case law, Plaintiff agrees with the position expressed in then-Judge Kavanaugh's concurring opinion in *Morley I* that the entitlement prong is not supported by the statute and that the inquiry should focus solely on eligibility. *See* 719 F.3d at 690. Plaintiff raises this point to preserve the issue in case of an appeal.

II. The fees and costs Public Citizen seeks are reasonable.

Public Citizen seeks an award of $69,555.90 in attorneys' fees and $400.00 in costs.[2] Given the hours worked and the applicable billing rates, this total is reasonable and should be awarded by the Court. In calculating reasonable attorneys' fees in FOIA cases, courts "calculate[e] the 'lodestar'—the number of hours reasonably expended multiplied by a reasonable hourly rate." *EPIC V*, 218 F. Supp. 3d at 47 (citing *Bd. of Trs. of the Hotel & Rest. Emps. Local 25 v. JPR, Inc*., 136 F.3d 794, 801 (D.C. Cir. 1998)).

A. The hours billed were reasonable.

This case was leanly staffed. While Public Citizen seeks to recover for hours worked by three attorneys, the vast majority of time was spent by one attorney. As demonstrated by contemporaneous, detailed time records, Ex. 13, these attorneys put in a total of 90.6 hours over an eighteen-month period, to prepare the complaint, communicate with opposing counsel (including negotiations over production schedules, redactions, and the content of eight separate

[2] The sole costs sought are the filing fee of $400. *See* ECF 1.

joint status reports), review each of HUD's thirteen separate productions, respond to several (frequently, last-minute) extension motions filed by HUD, and brief the issue of the propriety of HUD's redaction practices. On the last of these, Plaintiff's counsel spent time briefing the parties' initial cross-motions for partial summary judgment, but also HUD's motion to hold that briefing in abeyance (ECF 16) and a renewed motion for summary judgment that became unnecessary when HUD made a "discretionary release" shortly before the filing deadline. These are all compensable tasks, and the modest amount of time spent on each is reasonable.

Plaintiff's counsel also spent time reviewing the nearly 7,000 pages produced in this case. Courts in this district have repeatedly found time spent reviewing productions compensable, where, as here, "to the extent that the released documents are being reviewed to evaluate the sufficiency of the release or the propriety of a specific withholding so that the attorney can then challenge the release or withholding, such document review time is properly included in a FOIA attorney's fees award." *Elec. Privacy Info. Ctr. v. FBI* (*EPIC IV*), 80 F. Supp. 3d 149, 159 (D.D.C. 2015); *see also Reyes*, 356 F. Supp. at 172; *Elec. Privacy Info. Ctr. v. Fed. Bureau of Investigation* (*EPIC III*), 72 F. Supp. 3d 338, 351 (D.D.C. 2014); *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Security* (*EPIC II*), 999 F. Supp. 2d 61, 75 (D.D.C. 2013). As one court explained, "it would seem critical to the prosecution of a FOIA lawsuit for a plaintiff to review an agency's disclosure for sufficiency and proper withholding during the course of its FOIA litigation." *EPIC I*, 811 F. Supp. 2d at 239–40.

Here, Plaintiff's counsel was required to conduct a detailed review of HUD's production as a direct result of HUD's redaction practices. In making its productions, HUD did not provide any indication of which of the nearly 1,100 pages that it was partially redacting as "non responsive records." Because HUD's productions included duplicates of documents, with no indication of

which were duplicates, Public Citizen counsel had to review each page. When HUD *did* remove redactions, both in May 2020 and in August 2020, it provided no explanation or indication of which redactions it altered, requiring Plaintiff's counsel to do line-by-line comparisons. Plaintiff's counsel enlisted support staff to conduct document processing tasks that did not require an attorney, for example, identifying which pages bore "non responsive record" redactions. Pulver Decl. ¶ 10. In an exercise of billing judgment, Plaintiff is not seeking recovery for the time of support staff. But counsel necessarily had to review the agency's line-by-line, word-by-word redactions to consider whether they were justifiable under FOIA. As in *EPIC IV*, Plaintiff's counsel's review of the produced documents led to challenges of some of HUD's withholdings, and that review directly led to "the release of additional responsive documents." 80 F. Supp. 3d at 160. The time is thus compensable.

Although Plaintiff never filed its renewed motion for summary judgment due to HUD's last-minute production of the majority of material at issue, the hours spent beginning to prepare it are compensable. HUD's counsel did not even mention the possibility that it would make a "discretionary release" until the parties' August 6, 2020 Joint Status Report. ECF 38 at ¶ 6. Plaintiff reasonably had begun work on the renewed summary judgment motion given the Court's order that such motion should be "expedited" before then, and does not seek compensation for any time spent on that motion on or after that date. *See* Ex. 13. As courts have repeatedly held, time spent preparing a motion that was not filed is compensable so long as a "reasonable attorney with his client's interests in mind" would have spent the time preparing the motion. *Roberts v. City of Honolulu*, 938 F.3d 1020, 1026 (9th Cir. 2019); *see Zargarian v. BMW of N. Am., LLC*, 442 F. Supp. 3d 1216, 1229 (C.D. Cal. 2020) (finding "billing items for motions that were ultimately not filed are reasonable, under the circumstances" as "it was not unreasonable for

Plaintiff's counsel to work on a motion that was ... eventually rendered moot."); *Sierra Club v. McCarthy*, 235 F. Supp. 3d 63, 69 (D.D.C. 2017) (stating that "it may be reasonable and necessary to draft a motion where a deadline is pressing, even if settlement negotiations ultimately render the motion unnecessary"); *Nong v. Reno*, 28 F. Supp. 2d 27, 32 (D.D.C. 1998) (finding fees for motion prepared and not filed due to last-minute agency action were reasonable).

Here, not only had the Court requested expedited briefing and there were no ongoing settlement negotiations, but Defendant repeatedly had refused to remove any of the challenged redactions, saying it "stood by" them, Ex. 8 at 1, even after the Court's opinion. *See Gray Panthers Project Fund v. Thompson*, 304 F. Supp. 2d 36, 42 (D.D.C. 2004) (finding time spent on motion not filed reasonable "given defendant's previous adherence" to position); *Charlebois v. Angels Baseball LP*, 993 F. Supp. 2d 1109, 1125 (C.D. Cal. 2012) ("Defendants neglect to recognize that Defendants chose to negotiate a settlement days before the deadline for filing summary judgment motions; if Defendants had wished to not pay [attorneys'] fees, Defendants could have settled earlier."). Given the large production that had to be analyzed, it was reasonable for counsel to begin the task of "review[ing] the documents and form[ing] objections to specific redactions (or categories thereof)," as contemplated by this Court's March 26 Opinion. *See* ECF 34 at 8.

B. The rates sought are reasonable.

"'[R]easonable fees' are those grounded in rates 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" *DL v. Dist. of Columbia*, 924 F.3d 585, 588 (D.C. Cir. 2019) (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)). To establish the prevailing market rate, "[n]o particular type of evidence can be considered gospel; 'evidence of the prevailing market rate can take many forms.'" *Id.* at 589 (quoting *Eley v. Dist. of Columbia*, 793 F.3d 97, 104 n.5 (D.C. Cir. 2015)).

In *DL,* the D.C. Circuit held that the rates set forth in the so-called "LSI *Laffey* matrix" are presumptively reasonable rates for complex federal litigation and suffice to meet a plaintiff's initial burden. *Id.* at 591. *See also Salazar v. Dist. of Columbia*, 809 F.3d 58, 64 (D.C. Cir. 2015). Here, Plaintiff seeks to recover those LSI *Laffey* rates here: $759 per hour for Adam Pulver and Rebecca Smullin, and $914 per hour for Allison Zieve. *See* Ex. 14 (current LSI *Laffey* matrix). These LSI *Laffey* rates are appropriate given counsel's experience in complex federal litigation, with significant experience in regulatory and FOIA matters, as is relevant to this case and as set out in detail in their accompanying declarations. *See* Pulver Decl. ¶¶ 18–22; Zieve Decl. ¶¶ 2–6; Smullin Decl. ¶¶ 2–5. Applying these rates to the hours set out in Exhibit 13, Plaintiff seeks $62,389.80 for Mr. Pulver's time (82.2 x 759), $2,504.70 for Ms. Smullin's time (3.3 x 759), and $4,661.40 for Ms. Zieve's time (5.1 x 914).

The evidence before the D.C. Circuit in *DL*, some of which is submitted here as Exhibits 15 and 16, sets forth how the LSI *Laffey* matrix has been calculated and updated, and explains why that method is a reasonable means to calculate the prevailing market rate for complex federal litigation in the District of Columbia, and superior to the rate typically advocated by the United States Attorneys' Office for the District of Columbia (the USAO Rate). As the *DL* court held, the USAO rate does not accurately reflect D.C. market rates for complex federal litigation. 924 F.3d at 592–93. Although *DL* involved IDEA litigation, the opinion explicitly disapproved of several FOIA decisions in which courts awarded less than the LSI *Laffey* rates and concluded that adoption of the USAO rate in those cases reflected "fundamental errors." 924 F.3d at 593 (citing *Gatore v. U.S. Dep't of Homeland Sec.*, 286 F. Supp. 3d 25, 42–43 (D.D.C. 2017); *Elec. Privacy Info. Ctr. v. U.S. Drug Enforcement Admin.* (*EPIC VI*), 266 F. Supp. 3d 162, 170–71 (D.D.C. 2017); and *Clemente v. FBI*, No. 1:08-cv-1252-BJR, 2017 WL 3669617, at *5 (D.D.C. Mar. 24, 2017)).

Post-*DL*, courts in this district have thus held that the LSI *Laffey* Matrix provides the presumptively applicable rate in all complex federal litigation. *See, e.g.*, *U.F. v. District of Columbia*, No. CV 19-2164 (BAH), 2020 WL 4673418, at *6 (D.D.C. Aug. 12, 2020); *Feld v. Fireman's Fund Ins. Co.*, No. CV 12-1789 (JDB), 2020 WL 1140673, at *6 (D.D.C. Mar. 9, 2020). Courts in this district have also recognized that FOIA litigation is complex federal litigation. *See, e.g.*, *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 80 F. Supp. 3d 1, 5 (D.D.C. 2015). Although some courts have previously suggested certain tasks involved in FOIA litigation are not "complex," *Poulsen*, 2016 WL 1091060, at *6, an expert explained in the *DL* case that firms handling complex federal litigation do not typically charge different rates for different tasks that are necessary in a case involving a substantively complex area of federal law:

> Rather, in such litigation, firms customarily bill a client one rate for a particular attorney irrespective of the type of legal activity performed by the attorney in the matter. The complexity of tasks is accounted for in two ways other than switching rates: the reasonableness of number of hours necessary to accomplish the task and the appropriateness of the experience level or seniority of the individual assigned to undertake the task.

Ex. 16 at ¶ 18. For this reason, as Judge Tatel explained in his concurrence in *Reed v. District of Columbia*, whether rates for complex federal litigation are appropriate is not to be based on the specifics of the tasks that were eventually performed, "but rather on an assessment of the nature of [the] litigation generally." 843 F.3d 517, 528 (D.C. Cir. 2016). Even so, here, a large number of hours sought entailed complex tasks that benefited from counsel's expertise in FOIA and in litigation more generally.

Beyond the matrix itself, there is additional evidence that the rates sought reflect the prevailing market rate for services such as those provided by Plaintiff's counsel. First, both before and after the D.C. Circuit's decision in *DL*, several courts in this district have awarded LSI *Laffey* rates in FOIA cases. *See, e.g.*, *Mattachine Soc'y of Wash., DC v. U.S. Dep't of Justice*, 406 F.

Supp. 3d 64, 71 (D.D.C. 2019); *Am. Oversight I*, 375 F. Supp. 3d at 70; *EPIC IV*, 218 F. Supp. 3d at 49. Second, Plaintiffs have submitted declarations submitted recently in other cases in this district, which shows that the rates Plaintiff's counsel seek are comparable to or less than those charged by similarly qualified lawyers in FOIA and administrative law. In the *Mattachine Society* case, the plaintiffs' lawyers provided a declaration setting out the fees they typically "charged and received from [their] clients" in 2016. Exh. 17 at ¶ 35. Even at 2016 rates, those rates were comparable to those Plaintiffs seek here. *Id.* at ¶ 33. For a lawyer with 13 years of experience, the cited market rate was $740—comparable to the $759 sought for Mr. Pulver and Ms. Smullin, with 12 and 14 years of experience, respectively. For a partner with 32 years of experience, the market rate cited was $895 per hour—comparable to the $914 sought for Ms. Zieve, with 31 years of experience. In another recent case, plaintiffs' lawyers who primarily practice in administrative law, appellate, and Supreme Court litigation—similar to Public Citizen's lawyers—noted standard billing rates of $990 per hour for 2007 and 2009 law school graduates, $875 for a 2013 graduate, and $750 for 2014 through 2016 graduates. Ex. 18 at ¶¶ 2–8. These rates far exceed the LSI-*Laffey* rates sought here, and thus indicate the rates sought are reasonable.

Finally, recent decisions in this district reflect that lawyers in this district regularly charge LSI-*Laffey* rates or higher for work of comparable difficulty. In *True the Vote, Inc. v. IRS*, Civ. No. 13-734 (RBW), 2020 WL 5656694, at *7 (D.D.C. Sept. 23, 2020), the court summarized a variety of declarations stating that LSI-*Laffey* rates are "in line" with rates D.C. lawyers would charge in administrative law cases, and thus awarded fees at that rate under the Equal Access to Justice Act. While that case was not a FOIA case, it involved a similar level of complexity and skill-level. And in *U.S. Equal Employment Opportunity Commission v. George Washington University*, No. 17-cv-1978 (CKK/GMH), 2020 WL 3489478, at *3, *12 (D.D.C. June 26, 2020),

the court noted that the rates charged by a D.C. law firm to conduct document review that *exceeded* the hourly rates in the LSI-*Laffey* Matrix were "within the realm of reasonableness." Again, while that case was not a FOIA case, there is no reason to believe that document review requires less skill than this litigation—particularly given that this case itself involved line-by-line review of redactions of documents.

Together, the LSI-*Laffey* Matrix, declarations, and judicial decisions establish that the rates sought are reasonable.

C. The Court should award "fees on fees."

In addition to the time spent obtaining productions from HUD, Public Citizen seeks compensation for time spent seeking attorneys' fees. *See* Ex. 13.[3]

"It is settled in this circuit that hours reasonably devoted to a request for fees are compensable." *Reyes*, 356 F. Supp. 3d at 173 (quoting *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest.*, 771 F.2d 521, 528 (D.C. Cir. 1985) (marks omitted)). Plaintiff diligently attempted to settle the matter of fees without the need for briefing, and the number of hours counsel spent preparing this motion, which necessarily addressed the litigation's history and the multiple factors required by circuit precedent, is reasonable.

CONCLUSION

For all foregoing reasons, Plaintiff asks this court to award a total of $69,955.90 in attorneys' fees and costs, plus reasonable attorneys' fees for future work performed in connection with this motion.

[3] Plaintiff will submit updated information with its reply memorandum in support of this motion.

Dated: October 30, 2020

Respectfully submitted,

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