IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARGARET B. KWOKA,

Plaintiff,

v.

INTERNAL REVENUE SERVICE,

Defendant.

C. A. No. 1:17-cv-01157 (DLF)

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

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), and Federal Rule of Civil Procedure 54(d), Plaintiff Margaret B. Kwoka moves for attorneys' fees and costs in the amount of $48,876, plus reasonable additional fees for future work performed in connection with this motion. Attached with this motion are a memorandum of law in support of the motion; declarations of Margaret B. Kwoka (with attached exhibit), Patrick D. Llewellyn (with attached exhibits) and Adina H. Rosenbaum; and a proposed order.

Dated: September 13, 2019

Respectfully submitted,

/s/ Patrick D. Llewellyn
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MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

Plaintiff Margaret B. Kwoka submitted a request under the Freedom of Information Act (FOIA) to defendant Internal Revenue Service (IRS) in January 2017, requesting a version of the agency's FOIA log reflecting the names of third-party requesters and the organizational affiliations of all requesters. After the IRS withheld this information and persisted in doing so following the filing of this lawsuit, the parties filed cross-motions for summary judgment. The Court subsequently rejected the IRS's blanket withholding of the names and organizational affiliations of FOIA requesters, requiring the IRS to reprocess the records and disclose names of third-party requesters and organizational affiliations of all requesters unless the agency could justify specific withholdings with reasonably specific detail. Following the Court's ruling, the IRS in large part disclosed the requested information. Professor Kwoka is, therefore, eligible for and entitled to attorneys' fees and costs under FOIA, and the Court should award her $48,876 in attorneys' fees and costs, plus reasonable additional fees for future work performed in connection with this motion.

BACKGROUND

Margaret Kwoka is a Professor at the University of Denver Sturm College of Law whose research focuses on government secrecy and agencies' administration of FOIA. Kwoka Decl. ¶¶ 1–2, Ex. A (Prof. Kwoka CV); Mem. Op. 1, Dkt. 18. In the course of her research, Professor Kwoka routinely requests FOIA logs as the identity and organizational affiliation of requesters are crucial to understanding agency FOIA operations. Second Summ. J. Kwoka Decl. ¶ 7, Dkt. 16-1. On January 11, 2017, Professor Kwoka submitted a FOIA request to the IRS for "records reflecting a list or log of FOIA requests received in Fiscal Year 2015." Mem. Op. 1. Specifically, Professor Kwoka requested records reflecting nine categories of information for each FOIA request submitted to the IRS, including "[t]he name of the requester for any third-party request" and "[t]he organizational affiliation of the requester, if there is one." *Id.*

On March 8, 2017, the IRS partially granted and partially denied Professor Kwoka's request, withholding the names of third-party requesters and the organizational affiliations of all requesters in full under FOIA exemptions 3 and 6. *Id.* at 2. On March 27, 2017, Professor Kwoka timely appealed the IRS's withholding of this information. *Id.* On April 11, 2017, the IRS denied Professor Kwoka's appeal, continuing to rely on exemptions 3 and 6 to withhold the names of third-party requesters and the organizational affiliations of all requesters in full. *Id.*

On June 14, 2017, Professor Kwoka filed this lawsuit. *See* Compl., Dkt. 1. The parties subsequently filed cross-motions for summary judgment on the IRS's blanket withholdings of the names of third-party requesters and the organizational affiliations of all requesters in full under exemptions 3 and 6, as well as the IRS's claims that responding to the request would require the creation of new records and would be unreasonably burdensome.

On September 28, 2018, the Court granted in part and denied in part the parties' cross-motions. Order, Dkt. 17. In doing so, the Court rejected the IRS's blanket withholding of the names of third-party requesters and the organizational affiliations of all requesters under exemptions 3 and 6. Mem. Op. 3–8. Specifically, the Court held that, in the usual case, disclosing the name of a third-party requester or the organizational affiliation of any requester would not disclose the identity of a taxpayer or information regarding a particular person's tax liabilities or tax examination status because, contrary to the IRS's repeated assertions, the "*target* of a FOIA request—i.e., the person whose tax records the requester is seeking"—would not be revealed. *Id.* at 4–6. Although "there may be some exceptions" to this general rule, the Court explained that the IRS would need to justify withholding in such instances "'with reasonably specific detail'" and that "the existence of a few possible exceptions does not justify the IRS's blanket withholding here." *Id.* at 6, 7–8 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). Additionally, the Court held that responding to Professor Kwoka's FOIA request would neither require the creation of new records nor be unreasonably burdensome. *Id.* at 8–11. Indeed, the Court explained that decades-old D.C. Circuit precedent foreclosed the IRS's argument that the redaction of information involves the creation of a new record, *id.* at 9 (quoting *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982)), and that the amount of time the IRS estimated would be required to process the request fell far short of establishing an unreasonable burden, *id.* at 10–11.

In response to the Court's opinion and order, the IRS reprocessed the requested records. Consistent with the Court's opinion, the IRS produced the vast majority of third-party requester names and organizational affiliations of all requesters, withholding such information only in

unique circumstances.[1] Professor Kwoka has already begun analyzing the information produced, and she plans to include her analysis of this information as part of her forthcoming book, "Saving the Freedom of Information Act," which is under contract with Cambridge University Press to be published next year. Kwoka Decl. ¶ 10. Following the completion of the IRS's production, the parties agreed that the only outstanding issue in this case was Professor Kwoka's attorneys' fees and costs. June 28, 2019 Joint Status Report, Dkt. 23. Professor Kwoka attempted to settle the issue, but the IRS responded that briefing would be necessary to resolve attorneys' fees and costs. Llewellyn Decl. ¶ 10.

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 under FOIA is divided into two prongs: "eligibility" and "entitlement." *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 524 (D.C. Cir. 2011). A plaintiff is eligible for fees and costs if she has "substantially prevailed," *id.*, and the Court applies a "judicially created four-factor test" to determine whether a plaintiff is "entitled" to fees and costs, *Morley v. CIA* (*Morley III*), 894 F.3d 389, 391 (D.C. Cir. 2018) (per curiam). "Upon determining that a plaintiff is both eligible for and entitled to a FOIA fee award, the Court must then determine whether the requested award is reasonable." *People for the Ethical Treatment of Animals v. NIH* (*PETA*), 130 F. Supp. 3d 156, 166 (D.D.C. 2015).

[1] The final redaction log produced by the IRS indicates that out of more than 12,000 FOIA requests, the IRS is withholding third-party requester names from only 147 requests and organization affiliations of requesters from only 220 requests. Llewellyn Decl. ¶¶ 12–13, Ex. E.

ARGUMENT

I. Professor Kwoka is both eligible for and entitled to fees and costs.

A. Professor Kwoka substantially prevailed by obtaining a Court order requiring the production of information withheld by the IRS.

A plaintiff has "substantially prevailed" where she "has obtained relief through … a judicial order[.]" 5 U.S.C. § 552(a)(4)(E)(ii)(I). A court order satisfies this standard if it "constitutes judicial relief on the merits resulting in a court-ordered change in the legal relationship between the plaintiff and the defendant." *PETA*, 130 F. Supp. 3d at 162 (quoting *Campaign for Responsible Transp. v. FDA*, 511 F.3d 187, 194 (D.C. Cir. 2007) (internal quotation marks omitted)). "A court order that changes the legal relationship between the parties is one that requires a party 'to do what the law required—something it had theretofore been unwilling to do.'" *Id.* (quoting *Campaign for Responsible Transp.*, 511 F.3d at 196); *see also Nw. Coalition for Alternatives to Pesticides v. EPA*, 421 F. Supp. 2d 123, 127 (D.D.C. 2006) (holding order remanding FOIA request to agency and requiring agency to "explain the reasons for its withholdings" was sufficient to make plaintiff eligible for fees because the order "'required some action by the defendant'" (internal ellipsis omitted) (quoting *Edmonds v. FBI*, 417 F.3d 1319, 1324 (D.C. Cir. 2005)).

Without question, Professor Kwoka substantially prevailed in this case. From the outset, this case concerned two categories of information that had been withheld in full by the IRS: the names of third-party requesters and the organizational affiliations of all requesters. *See* Compl. at 2–4. The Court granted Professor Kwoka's cross-motion for summary judgment in part, holding that "neither exemption 3 nor exemption 6 justifies a blanket withholding of Kwoka's request for FOIA requesters' names and organizational affiliations" and that "production of the information would [not] require the IRS to create a new record or be unreasonably burdensome." Mem. Op. 11;

see also Sept. 28, 2018 Order. As a result, the IRS was required to reprocess its FOIA logs and produced previously withheld information. Accordingly, Professor Kwoka is eligible for fees and costs under FOIA.

B. Professor Kwoka is entitled to attorneys' fees and costs.

To determine whether a plaintiff is entitled to fees and costs, courts in this Circuit consider four factors: "(i) the public benefit from the case; (ii) the commercial benefit to the plaintiff; (iii) the nature of the plaintiff's interest in the records; and (iv) the reasonableness of the agency's withholding of the requested records." *Morley III*, 894 F.3d at 391. "No one factor is dispositive, although the court will not assess fees when the agency has demonstrated that it had a lawful right to withhold disclosure." *Davy v. CIA*, 550 F.3d 1155, 1159 (D.C. Cir. 2008). 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." *McKinley v. Fed. Hous. Fin. Agency*, 793 F.3d 707, 711 (D.C. Cir. 2014) (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*, 550 F. 3d at 1160.

The balancing of the factors is left to this Court's discretion, though "when all four factors point in favor of the plaintiff or in favor of the defendant, the attorney's fees analysis is ordinarily straightforward." *Morley III*, 894 F.3d at 391. This case is a "straightforward" one because all four factors weigh in Professor Kwoka's favor.

(1) Factor One: Public Benefit

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.*

Professor Kwoka's request meets this standard. As she explained in her summary judgment declaration:

> Knowing who is most often using FOIA reveals opportunities for better vehicles for agency information delivery, including proposed reforms at the congressional and executive level, such as ones that I have advanced myself. Moreover, the responsive records will inform the public as to how federal tax dollars are spent and whether such expenditures with regard to the FOIA obligations of agencies are being utilized in the best way to meet the public's needs.

First Summ. J. Kwoka Decl. ¶ 4, Dkt. 10-1. As an expert in this field, *see id.* ¶¶ 1, 3; Kwoka Decl. ¶¶ 1–2, Ex. A, Professor Kwoka further explained how knowing the identities and organizational affiliations of FOIA requesters supports policy recommendations and changes that make the administration of FOIA better for the public. For example, at agencies where commercial requesters pursuing particular commercial uses are the most prevalent FOIA requesters, providing for greater proactive or affirmative disclosures of these categories of records could reduce agency expenditures responding to these FOIA requests and free up resources for other members of the public. Second Summ. J. Kwoka Decl. ¶¶ 8–9. Similarly, at agencies where first-party FOIA requests predominate because of administrative adjudications—such as the Department of Homeland Security and its subagencies—increasing the availability of administrative discovery would decrease agency FOIA expenditures. *Id.* ¶¶ 10–12.

Although her work is still ongoing, Professor Kwoka has begun reviewing and analyzing the records produced by the IRS in this case. Her preliminary analysis of the information reveals several patterns among IRS FOIA requesters, including a high proportion of first-party requesters, tax attorney requesters, and consultant requesters. Kwoka Decl. ¶¶ 6–7. From these trends, she

will be able to examine whether the IRS is administering its FOIA obligations in a manner that is efficient and effective given the nature of frequent requesters, as well as develop policy recommendations for the IRS and other agencies. *Id.* ¶¶ 8–9. Professor Kwoka will share her insights with the public through her upcoming book, as well as through other scholarly presentations and publications. *Id.* ¶ 10. Additionally, Professor Kwoka has made the records produced by the IRS in this case available online. *Id.* ¶ 4.

As the Supreme Court has repeatedly observed, FOIA was enacted to help "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "[I]n FOIA, after all, a new conception of Government conduct was enacted into law, a general philosophy of full agency disclosure." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 (2001) (internal quotation marks omitted). Obtaining records through FOIA that shed light on how the agency is fulfilling its statutory mandate under FOIA to disclose agency records is important, given FOIA's central role in a democratic society. Because of Professor Kwoka's expertise in FOIA administration, she is also well-suited to analyze and interpret the requested information from the IRS so as to provide it to the public in a meaningful way that will "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 from *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979)).

(2) Factors Two and Three: Professor Kwoka's Interest in the Records

The D.C. Circuit has made clear that "a court [will] generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented, unless [her] interest was of a frivolous or purely commercial nature." *Davy*, 550 F.3d at

1160–61 (quoting *Fenster*, 617 F.2d at 742, n.4). As it relates to the second and third factors of the entitlement test, "[s]urely every journalist or scholar may hope to earn a living plying his or her trade, but that alone cannot be sufficient to preclude an award of attorney's fees under FOIA." *Id.* at 1160; *see also id.* at 1161 ("Congress did not intend for scholars (or journalists and public interest groups) to forego compensation when acting within the scope of their professional roles."). Concluding otherwise would mean "very few, if any, [such requesters] would ever prevail" in obtaining attorneys' fees and costs, "[y]et their activities often aim to ferret out and make public worthwhile, previously unknown government information—precisely the activity that FOIA's fees provision seeks to promote." *Id.* Accordingly, absent special circumstances establishing that such a requester's "private commercial interest outweighs [her] scholarly interest [or] the public value in providing [her] an incentive to ferret out and publish this information," the second and third factors will weigh in favor of requesters with a scholarly interest in the requested records. *Id.*

There can be no dispute that Professor Kwoka has a scholarly interest in the requested records and that she sought them for public informational purposes. As illustrated by her CV, Professor Kwoka has been a professor of law since 2011, and her research focuses on government secrecy generally and agencies' administration of FOIA specifically. *See* Kwoka Decl. Ex. A. Her work been cited by federal courts, *see, e.g.*, *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 204 n.77 (D.D.C. 2013) (quoting Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 Am. U. L. Rev. 217, 268 (2011)); *Moffat v. DOJ*, 716 F.3d 244, 254 n.10 (1st Cir. 2013) (citing Kwoka, *The Freedom of Information Act Trial*, *supra*, at 249–56), and numerous media outlets, and she has made numerous presentations to federal agencies regarding FOIA, First Summ. J. Kwoka Decl. ¶ 3; Kwoka Decl. Ex. A at 1–7. Further, as explained above, Professor Kwoka has already begun utilizing her expertise to analyze the information produced by the IRS in this case,

and she will include the insights gained from her analysis in her forthcoming book, "Saving the Freedom of Information Act," which is under contract with Cambridge University Press to be published next year. Kwoka Decl. ¶ 10.

"[M]uch like a journalist," Professor Kwoka "gathers information of potential interest to a segment of the public, uses [her] editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *Davy*, 550 F.3d at 1161–62 (quoting *Tax Analysts v. DOJ*, 965 F.2d 1092, 1095 (D.C. Cir. 1992)). Moreover, she is "at least the quintessential 'average person,' requesting information under FOIA about what the government was up to that [she] intends to share with the public as part of [her] scholarship … rather than merely to promote [her] private commercial interests." *Id.* at 1162 (internal citations omitted) (quoting *Cuneo v. Rumsfeld*, 553 F.3d 1360, 1363–64 (D.C. Cir. 1977), *abrogated on other grounds by Kay v. Ehrler*, 499 U.S. 432, 438 (1991)). Factors two and three thus weigh heavily in Professor Kwoka's favor.

(3) Factor Four: Reasonableness of the IRS's Actions

The final entitlement factor concerns "whether the agency's opposition to disclosure had a reasonable basis in law and whether the agency had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." *Davy*, 550 F.3d at 1162 (internal citations and quotation marks omitted). A requester need not "affirmatively show[] that the agency was unreasonable" for this factor to weigh in her favor, but rather the burden is on the agency to show that it acted reasonably. *Id.* at 1163; *see also Elec. Privacy Info. Ctr. v. DHS*, 892 F. Supp. 2d 28, 52 n.15 (D.D.C. 2012) ("[A]n agency must show that its withholding of requested records had a reasonable basis in the law, not merely that it did not withhold in bad faith.").

Here, the IRS cannot show it acted reasonably in blanketly withholding the names of third-party requesters and the organizational affiliations of all requesters. As the Court's memorandum

opinion makes clear, the agency lacked a reasonable basis in law to withhold this information in full. From the administrative process through summary judgment briefing, the IRS's position was that *all* third-party requester names and *all* organizational affiliations were categorically exempt under exemptions 3 and 6 because disclosure could purportedly "be used to reverse engineer and reveal information protected by 26 U.S.C. § 6103(a)," namely the identity of the taxpayer that is the subject of the FOIA request and related details about the subject taxpayer, such as his "tax liabilities" or "tax examination status." Def. Mot. for Summ. J. 11–12, 14, Dkt. 9; *see also* First Smith Decl. Ex. 2 (IRS FOIA Response), Dkt. 9-2; *id.* Ex. 4 (IRS FOIA Administrative Appeal Response), Dkt. 9-2. But as the Court held—and Professor Kwoka repeatedly argued—the IRS's position suffered from basic "logical problems": "Neither the [publicly accessible FOIA] log nor the information Kwoka requests generally reveals the *target* of a FOIA request—i.e., the person whose tax records the requester is seeking." Mem. Op. 4, 6; *see id.* at 6–7 (same); Pl. Mem. in Supp. of Cross-Mot. for Summ. J. 7, 9, 14, Dkt. 10 (same); First Smith Decl. Ex. 3 (Kwoka FOIA Administrative Appeal), Dkt. 9-2 (same). In light of this obvious fact, none of the harms asserted by the IRS—disclosure of return information or information that would cause "harassment stigma, retaliation or embarrassment"—would occur, as a general matter. Mem. Op. 4–8. The Court therefore held that the IRS had "failed to justify its blanket invocation[s]" of exemptions 3 and 6. *Id.* at 6, 8.

Moreover, the IRS cannot establish that it acted reasonably by pointing to "a few exceptions" to the general rule that the requested information is not exempt. *Id.* at 5, 8. Both the Court and Professor Kwoka noted that some unique circumstances might permit the IRS to withhold certain third-party requester names or requester organizational affiliations. *Id.* 5–6, 7–8; Pl. Cross-Mot. 9. But "the existence of a few possible exceptions does not justify the IRS's blanket

withholding here." Mem. Op. 8.[2] FOIA itself is clear that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). And the IRS's productions following summary judgment with sparse withholdings of the requested information, *see* Llewellyn Decl. Ex. E, demonstrates that the IRS "has not been forthcoming with the information and analysis that FOIA requires." *EPIC v. DHS*, 892 F. Supp. 2d at 53.

The IRS does not fare any better with respect to its claims that responding to Professor Kwoka's request would require the creation of new records and be unreasonably burdensome. *See* Def. Mem. 6–10. As to the former, the Court held "[t]his argument fails because the IRS has admitted that it has the information Kwoka seeks," Mem. Op. 9 (citing First Smith Decl. ¶ 9b), and reiterated that "[t]he argument that a document with some information deleted is a 'new document,' and therefore not subject to disclosure, has been flatly rejected," *id.* (quoting *Yeager*, 678 F.2d at 321). In other words, the IRS's claim contradicted its own declarant and ignored decades-old binding precedent, neither of which is reasonable. As to the latter, as the Court pointed out, the authority on which the IRS relied largely concerned whether a FOIA request required an "unreasonably burdensome search," but time spent reviewing responsive records "is not a *search* at all," as Professor Kwoka had correctly argued. *Id.* at 10 (citing Pl. Cross-Mot. 20). Moreover, the Court explained that "courts in this Circuit have required production of records much more voluminous than the records requested here." *Id.* at 11 (citing *Pub. Citizen v. Dep't of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003)). Accordingly, the Court held that it would "not allow [the IRS] to withhold the documents wholesale simply because it will (potentially) take 2,200 hours to review

[2] Professor Kwoka pointed out that many of the specific examples provided by the IRS in its summary judgment papers concerned, at most, a few dozen requests among approximately 10,000 FOIA requests. *See* Pl. Cross-Mot. 15; Pl. Reply 5, 7–8, Dkt. 16.

them for redactions." *Id.* As the Court's discussion on this point makes plain, the IRS did not put forward a reasoned, supported argument about the burden involved in light of the existing case law.

Because the IRS cannot show that it acted reasonably in this case, the fourth factor also weighs in Professor Kwoka's favor.

(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 III*, 894 F.3d at 392 n.1; *Morley v. CIA* (*Morley I*), 719 F.3d 689, 690 (D.C. Cir. 2013) (Kavanaugh, J., concurring); *Davy*, 550 F.3d at 1166 (Randolph, J., dissenting). Although, as discussed above, Professor Kwoka is both eligible for and entitled to fees under the Circuit's case law, she 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. Professor Kwoka raises this point to preserve the issue in case of an appeal.

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In sum, a widely-cited professor sought records from the IRS falling directly within her field of scholarship in order to analyze the data and provide the public with previously unavailable information about the IRS's administration of a statutory obligation and its expenditure of taxpayer resources in doing so. The IRS withheld the information based on illogical arguments and only produced the information following the Court's summary judgment opinion rejecting the IRS's arguments. Professor Kwoka is plainly "the type of requester Congress contemplated when it sought 'to lower the often insurmountable barriers presented by court costs and attorney fees to

the average person requesting information under the FOIA,'" *Davy*, 550 F.3d at 1163 (quoting *Tax Analysts*, 965 F.2d at 1095), and the IRS acted unreasonably in blanketly withholding the requested information. Accordingly, Professor Kwoka is entitled to attorneys' fees and costs under FOIA.

II. The fees and costs Professor Kwoka seeks are reasonable.

In calculating reasonable attorneys' fees in FOIA cases, courts "multiply the hours reasonably expended by a reasonable hourly fee, producing the 'lodestar' amount." *Am. Oversight v. DOJ*, 375 F. Supp. 3d 50, 69 (D.D.C. 2019) (quoting *Bd. of Trs. of Hotel & Rest. Emps. Local 25 v. JPR, Inc.*, 136 F.3d 794, 801 (D.C. Cir. 1998)). Professor Kwoka seeks an award of $48,476 in attorneys' fees and $400 in costs.[3] Given the hours worked and the applicable billing rates, this total is reasonable.

A. The hours billed were reasonable.

This case was leanly staffed. The fee request seeks to recover for hours worked by only two attorneys, with the vast majority of time spent by one attorney. As demonstrated by counsel's contemporaneous, detailed time records, *see* Llewellyn Decl. Ex. A, these attorneys put in a total of 81.1 hours drafting the complaint, researching legal issues, conferring with opposing counsel and their client, drafting joint status reports, and briefing summary judgment. They spent an additional 25 hours on preparing this motion and related work.[4] These tasks are all compensable, and the hours spent are reasonable.

The 13.6 hours spent working on the complaint, research, conferring with opposing counsel and Professor Kwoka, and preparing joint status reports is a modest amount of time for that set of tasks. The largest portion of time—67.5 hours—represents the work of one attorney on summary

[3] The sole cost sought is the filing fee of $400. *See* ECF No. 1 Dkt. Entry.

[4] Updated hours will be submitted with the reply memorandum in support of this motion.

judgment briefing. Although the billing entries reflect that other attorneys provided substantive edits and feedback throughout the summary judgment briefing process, only the time spent by lead counsel on summary judgment is included in the lodestar. Given that the IRS raised four claims for withholding all of the requested information in full, this time is a reasonable amount for summary judgment briefing.

Likewise, the 25 hours of fees-on-fees time is a reasonable amount to research and prepare this substantive motion and complete related tasks. It is a "settled rule in this circuit that hours reasonably devoted to a request for fees are compensable." *Am. Oversight*, 375 F. Supp. 3d at 72 (quotation marks & brackets omitted) (quoting *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest.*, 771 F.2d 521, 528 (D.C. Cir. 1985)). Here, the requested "fees on fees" are a modest proportion of the time spent litigating this matter. Moreover, work on this motion was needed because, in response to an offer to settle attorneys' fees, the IRS responded that briefing would be necessary. Llewellyn Decl. ¶ 10. And the number of hours spent on this motion and related work is reasonable.

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. District 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. District 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. District of Columbia*, 809 F.3d 58, 64 (D.C. Cir. 2015). Here, those LSI *Laffey* rates are as follows:

- For work performed between June 1, 2017, and May 31, 2018: $440 per hour for Patrick Llewellyn and $718 per hour for Adina Rosenbaum.
- For work performed between June 1, 2018, and May 31, 2019: $456 per hour for Mr. Llewellyn.
- For work performed between June 1, 2019, and the present: $458 per hour for Mr. Llewellyn and $747 per hour for Ms. Rosenbaum.

See Llewellyn Decl. Ex. B (current LSI *Laffey* matrix). These LSI *Laffey* rates are appropriate given Mr. Llewellyn's and Ms. Rosenbaum's experience in complex federal litigation, with significant expertise in FOIA matters, as set out in their accompanying declarations. *See* Llewellyn Decl. ¶¶ 2–5; Rosenbaum Decl. ¶¶ 2–3.

The evidence before the D.C. Circuit in *DL*, some of which is attached as Exhibits C and D to Mr. Llewellyn's declaration, 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 D.C. Circuit held in *DL*, 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 error." 924 F.3d at 593 (citing *Gatore v. DHS*, 286 F. Supp. 3d 25, 42–43 (D.D.C. 2017); *Elec. Privacy*

Info. Ctr. v. U.S. Drug Enforcement Admin., 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)).

Like the IDEA litigation in *DL*, *id.* at 592, FOIA litigation is complex federal litigation. *See, e.g.*, *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 80 F. Supp. 3d 1, 5 (D.D.C. 2015). Reflecting this point, several courts in this district have awarded LSI *Laffey* rates in FOIA cases. *See, e.g.*, *Am. Oversight*, 375 F. Supp. 3d at 69–70; *Elec. Privacy Info. Ctr. v. DHS*, 218 F. Supp. 3d 27, 49 (D.D.C. 2016).

CONCLUSION

For the above stated reasons, the Court should award plaintiff $48,476 in attorneys' fees and $400 in costs, plus reasonable attorneys' fees for future work performed in connection with this motion.

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Respectfully submitted,

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