



UNITED STATES DEPARTMENT *of* JUSTICE

Attorney Fees & Litigation Costs



5 U.S.C. § 552(a)(4)(E)(i):

“The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.”



Threshold Considerations:

- Timing: Normally reserved for the conclusion of a FOIA case
- “Attorney” fees: Who qualifies?
 - Courts look to a representational relationship
 - But also available to self-represented organizations
- Costs: Limited to costs incurred “litigating” the FOIA claims



Two-Step Inquiry:

- Courts employ a two-step inquiry to assess attorney fees
 - “Eligibility”
 - “Entitlement”
- Assessing attorney fees is a matter of the court’s discretion



Knowledge Check

- **True or False:** A successful FOIA requester/litigant who is also an attorney can seek attorney fees against the government for the time they spent litigating their claim

- **True or False:** A successful FOIA requester/litigant who is also an attorney can seek litigation costs against the government they incurred litigating their claim



Eligibility:

- Plaintiff must “substantially prevail”
- Relief through:
 - A judicial order, or an enforceable written agreement or consent decree or
 - A voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial (a.k.a. “catalyst theory”)



Entitlement:

- Courts review four factors:
 - Public benefit derived from case
 - Commercial benefit to complainant
 - Nature of complainant's interest in information
 - Whether withholding had reasonable basis in law
- Factors are balanced together and no single factor is dispositive



Agency Backlog & Delay and the Availability of Attorney Fees:

- Delay is relevant to both eligibility & entitlement analyses
- Eligibility:
 - Processing & Production Orders
 - Catalyst Theory
- Entitlement:
 - “Reasonableness of agency’s withholding”



Knowledge Check

- **True or False:** A FOIA plaintiff who establishes that an agency accelerated the processing of their FOIA request after the complaint was filed, may be found to be eligible for attorney fees
- **True or False:** A FOIA plaintiff who has a commercial interest in the records sought will never be found to be entitled to attorney fees



Calculating Reasonable Attorney Fees:

- Plaintiff has initial burden to establish the reasonableness of amount of fees
 - Amounts should be supported by well-documented, contemporaneous billing records
 - Lodestar: hourly rate x reasonable amount of hours
- Burden then shifts to defendants to rebut with specific evidence



Reasonable Hourly Rates:

- A reasonable hourly rate is the prevailing rate in the community where the case was filed, for similar work
- In the D.D.C., two fee matrices are frequently litigated:
 - USAO Matrix (Updated in 2021 to the “Fitzpatrick Matrix”)
 - “LSI” Matrix



A Reasonable Amount of Hours, Reasonably Incurred:

- Specific fee amounts can be reduced for:
 - Time spent on unsuccessful claims
 - Excessive or duplicative billing
 - Block billing, or lack of specificity
 - Overstaffing
- General reductions for when there is no principled basis to subtract specific hours



Final Considerations:

- Fees on Fees
- On appeal, legal conclusions underpinning an attorney fees award are reviewed *de novo*, and the award of fees is reviewed for abuse of discretion



Questions?