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 REPLY IN SUPPORT OF
MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

Plaintiff Margaret Kwoka's eligibility for and entitlement to attorneys' fees and costs in this Freedom of Information Act (FOIA) lawsuit is straightforward: Professor Kwoka, a law professor specializing in agency administration of FOIA, submitted a FOIA request seeking information about FOIA requesters to defendant Internal Revenue Service (IRS), as she has done for several other agencies as part of her widely cited and respected research. In response to her FOIA request, the IRS withheld in full, with scant justification, two categories of information—the names of third-party FOIA requesters and the organizational affiliations of all FOIA requesters. In litigation, the Court rejected the IRS's blanket withholding of these two categories of information and granted Professor Kwoka summary judgment in part. Following the Court's summary judgment decision, the IRS disclosed the requested information, subject only to sparse withholdings. Professor Kwoka has made the records freely available to the public, has begun analyzing the information obtained, and will include her analysis of the information in future scholarly publications, including a forthcoming book.

The IRS's opposition to Professor Kwoka's eligibility and entitlement to a fee award is unpersuasive and ignores binding D.C. Circuit precedent. Moreover, although the IRS argues the Court should apply a modest reduction to the requested hourly rates, it cites only a single district court decision and provides no supporting evidence for its position. The Court should thus grant Professor Kwoka's motion for attorneys' fees and costs in the amount requested: $54,694.80, which includes fees for the time expended on this reply memorandum.

ARGUMENT

I. Professor Kwoka substantially prevailed.

In arguing that Professor Kwoka is not eligible for fees, the IRS claims "she did not win an unalloyed victory in this case." IRS Opp'n 3, Dkt. 27-1. But her victory was all but total; FOIA does not require an "unalloyed victory," and the IRS provides no support for its argument.

FOIA provides that a plaintiff is eligible for fees if she has "substantially prevailed," which includes "obtain[ing] relief through … a judicial order." 5 U.S.C. § 552(a)(4)(E)(ii)(I); *see also Am. Immigration Council v. DHS*, 82 F. Supp. 3d 396, 404 (D.D.C. 2015) ("To be eligible for fees, a complainant must only *substantially*—not completely—prevail."). As Professor Kwoka previously explained, a court order satisfies this standard when it results "in a court-ordered change in the legal relationship between the plaintiff and the defendant." *People for the Ethical Treatment of Animals v. NIH*, 130 F. Supp. 3d 156, 162 (D.D.C. 2015) (quoting *Campaign for Responsible Transp. v. FDA*, 511 F.3d 187, 194 (D.C. Cir. 2007) (internal quotation marks omitted)). And "[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).

Here, as the IRS concedes, the Court granted summary judgment in part to Professor Kwoka. IRS Opp'n 3. As the IRS further concedes, despite the IRS's insistence that it could blanketly withhold two categories of information, "the Court required the Service to review, redact, and release certain records to [Professor Kwoka]." *Id.* The Court's summary judgment order unquestionably provided "relief through … a judicial order" to Professor Kwoka by requiring the IRS to review and produce information it had previously been unwilling to disclose. As a result, the IRS released the vast majority of the previously withheld records: all but 147 third-party requester names and all but 220 organization affiliations—out of more than 12,000 FOIA requests. Pl. Mem. 4 n.1. Thus, the outcome of the litigation was plainly a substantial victory for Professor Kwoka.

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

In considering a plaintiff's motion for attorneys' fees under FOIA, courts in this Circuit look to four factors: the public benefit derived from the case; the commercial benefit to the requester; the nature of the requester's interest in the records sought; and whether the agency's withholding had a reasonable basis in law. *Davy v. CIA*, 550 F.3d 1155, 1159 (D.C. Cir. 2008). "No one factor is dipositive." *Id.*; *see also Am. Immigration Council*, 82 F. Supp. 3d at 408 (holding the requester's "success on the first three factors, combined with some degree of success on the fourth, is more than sufficient to establish its entitlement to fees").

Here, the IRS argues that no factors favor an award of attorney fees. In fact, as discussed at greater length in Professor Kwoka's opening memorandum, all four factors weigh heavily in favor of Professor Kwoka's entitlement to a fee award.

A. Professor Kwoka has provided substantial explanation for the public benefit derived from the disclosed records.

In challenging the public benefit derived from the disclosed records, the IRS claims that Professor Kwoka has not "identif[ied] a single instance where this litigation or the initial FOIA request was the subject of media coverage" and that she has not "detail[ed] how the records she sought will inform the public." IRS Opp'n 6. The IRS is wrong on both points.

As a preliminary matter, FOIA does not require that a FOIA request or related litigation generate media coverage for the disclosure of the records to have a public benefit. In the D.C. Circuit, courts evaluate the "public benefit" factor by conducting "an *ex ante* assessment of the potential public value of the information requested," and the factor weighs in the requester's favor where it is "plausible *ex ante* that a request has a decent chance of yielding a public benefit." *Morley v. CIA*, 810 F.3d 841, 844 (D.C. Cir. 2016). Professor Kwoka's request easily meets this standard. In her motion for attorneys' fees and costs, Professor Kwoka provided a detailed explanation of the public benefit to be derived from the records disclosed, including that "[k]nowing who is most often using FOIA reveals opportunities for better vehicles for agency information delivery, such as ones [Professor Kwoka] has[s] advanced [her]self." Pl. Mem. 7, Dkt. 25 (quoting First Summ. J. Kwoka Decl. ¶ 4, Dkt. 10-1); *see also id.* at 7–8. The IRS has neither challenged that explanation nor provided any contradictory evidence.

Instead, the IRS relies on a 1978 out-of-circuit decision stating that the public benefit can be evaluated by considering "the degree of dissemination and the likely public impact that might be expected from a particular disclosure." *Blue v. BOP*, 570 F.2d 529, 534 (5th Cir. 1978). Contrary to the IRS's assertion, that decision contains no discussion of "extensive" news coverage or the citation of the records during public debate as the basis for determining a public benefit. *See id.* at 533–34. In any event, although records cited frequently by the press may generate an obvious

public benefit, courts have never required such a showing and such a requirement would be inconsistent with the purpose of FOIA's fees provision. As the D.C. Circuit has explained, the "final and overriding guideline courts should always keep in mind" when evaluating FOIA fee requests is "the basic policy of the FOIA to encourage the maximum feasible public access to government information and the fundamental purpose of [FOIA's fee provision] to facilitate citizen access to the courts to vindicate their statutory rights." *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 715 (D.C. Cir. 1977). "A grudging application of this provision, which would dissuade those who have been denied information from invoking their right to judicial review, would be clearly contrary to congressional intent." *Id.*

Additionally, the IRS is wrong that "the likely degree of dissemination to the public of Plaintiff's findings is low." IRS Opp'n 5. In making this point, the IRS ignores the substantial evidence in the record of Professor Kwoka's expertise in the field of agency administration of FOIA, including that she has published numerous scholarly articles on this topic, her work is regularly cited by both courts and the press, and she has provided related presentations and testimony to federal agencies and Congress. *See* Kwoka Fees Decl. Ex. A, Dkt. 25-1 at 5–17. Moreover, the IRS acknowledges that Professor Kwoka will publish a book containing her findings derived from the records disclosed in this case. IRS Opp'n 6 (citing Kwoka Fees Decl. ¶ 10). Taken together, the evidence in the record shows that Professor Kwoka is well situated to disseminate the findings based on the released records.

B. Professor Kwoka's scholarly interest in the records is neither frivolous nor purely commercial.

With respect to the second and third considerations identified in *Davy*, the IRS challenges Professor Kwoka's entitlement to fees by contending that, because she is a law professor with expertise in this area and intends to publish a book including her findings from the disclosed

records, she has a commercial and personal interest in the records that weighs against awarding her attorneys' fees and costs. IRS Opp'n 7. In so arguing, the IRS wholly ignores contrary D.C. Circuit precedent on this point. *See* Pl. Mem. 8–9. As explained at length in Professor Kwoka's opening memorandum, "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 v. Brown*, 617 F.2d 740, 742 n.4 (D.C. Cir. 1979)). The fact that a professor earns her living in part from her research and writing "cannot be sufficient to preclude an award of attorney's fees under FOIA." *Id.* at 1160; *see id.* at 1161.

Accordingly, absent evidence that Professor Kwoka'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 weigh in her favor here. *Id.* Yet the IRS has not argued that Professor Kwoka's interest was "frivolous or purely commercial" or that such interests outweighed her scholarly interest in the records. Indeed, in arguing that Professor Kwoka sought these records because they fall within her area of her expertise and because of her desire to conduct and publish research in her area of expertise, the IRS effectively admits that Professor Kwoka principally has a scholarly interest in the requested records. *See* IRS Opp'n 7. Moreover, the IRS's position contradicts its earlier conclusion that Professor Kwoka was entitled to a fee waiver, First Smith Decl. Ex. 2 at 2, Dkt. 9-2 at 21, which requires a finding that "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," 5 U.S.C. § 552(a)(4)(A)(iii). *See Am. Immigration Council*, 82 F. Supp. 3d at 406 ("The Court would be remiss, moreover, if it failed to note that Defendants'

current stance [that the requester has a commercial interest] flatly contradicts the position it took when granting Plaintiff's request for a fee waiver.").

The IRS incorrectly claims that an award of attorneys' fees and costs to Professor Kwoka's counsel would be a "windfall" because they "work for a nonprofit organization that describes itself as a nonprofit consumer advocacy organization that champions the public interest in the halls of power" and "brought this suit in the ordinary course of business." IRS Opp'n 8. This argument is contradicted by longstanding Supreme Court precedent, which firmly rejected the notion that awarding market-rate fees to nonprofit attorneys would result in "windfall profits" to those attorneys. *See Blum v. Stenson*, 465 U.S. 886, 895 (1984). Although *Blum* concerned attorneys' fees and costs under 42 U.S.C. § 1988, there is nothing to suggest Congress intended nonprofit attorneys to be treated less favorably under FOIA's fees provision, and the IRS does not identify any basis to conclude otherwise. Moreover, courts in this Circuit regularly award fees under FOIA to litigants represented by attorneys at nonprofit organizations. *See, e.g.*, *Am. Oversight v. DOJ*, 375 F. Supp. 3d 50 (D.D.C. 2019); *Elec. Privacy Info. Ctr. v. DHS* (*EPIC*), 218 F. Supp. 3d 27 (D.D.C. 2016).

C. The IRS acted unreasonably in blanketly withholding the two categories of information requested.

The IRS claims that its actions in this case were reasonable on two bases: First, the agency contends that its blanket withholding of the names of third-party FOIA requesters and the organization affiliations of all requesters was reasonable to "protect confidential tax return information." IRS Opp'n 8. Second, the agency argues that its concerns about "the administrative burden of producing the requested records" justified its failure to review these two categories of information to produce non-exempt information contained within them. *Id.* at 11. Neither argument is correct.

As an initial matter, the IRS misstates the law in arguing that "[a] plaintiff is not entitled to fees if the agency had a colorable basis in law for withholding the requested records." IRS Opp'n 9–10. Instead, "[i]f the Government's position is correct as a matter of law, that will be dispositive. If the Government's position is founded on a colorable legal basis in law[,] that will be weighed along with other relevant considerations in the entitlement calculus." *EPIC*, 218 F. Supp. 3d at 45 (quoting *Davy*, 550 F.3d at 1162). Here, the IRS's position was *not* correct as a matter of law: The Court rejected the IRS's blanket withholding of the two categories of records. *See* Mem. Op. 6, 8, 10, 11, Dkt. 18. And, as explained below, the IRS's actions did not have a colorable basis in the law.

1. The IRS continues to insist that it acted reasonably in blanketly withholding the names of third-party requesters and the organization affiliations of all requesters for thousands of records because of the existence of "a few exceptions" to the general rule that this information is not exempt. IRS Opp'n 10 (quoting Mem. Op. 5). The thrust of the IRS's argument is that the agency wanted to "avoid improperly disclosing third-party taxpayer return and return information" under 26 U.S.C. § 6103. *Id.* As the Court previously concluded, though, the IRS's argument for blanketly withholding these categories of information suffered from "logical problems" in that disclosure of the vast majority of the requested information would not reveal *any* protected information. *See* Mem. Op. 5–8. As the Court stated, "at any rate, the existence of a few possible exceptions does not justify the IRS's blanket withholding here." *Id.* at 8. The very limited redactions made to third-party requester names and all organization affiliations following summary judgment further illustrates the unreasonableness of the IRS's position. *See* Pl. Mem. 4 n.1. Moreover, FOIA requires agencies to produce "[a]ny reasonably segregable portion of a record …

after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). The IRS's argument, which ignores FOIA's segregability mandate, has no colorable basis in the law.

For these same reasons, the IRS's argument that agency officials face criminal and civil penalties for unlawful disclosure of tax return information is inapposite. *See* IRS Opp'n 10. In making this argument, the IRS relies on *Chesapeake Bay Foundation, Inc. v. USDA*, in which the requester sought data submitted to USDA by Maryland state agencies. 11 F.3d 211, 212–13 (D.C. Cir. 1993). USDA determined the information was exempt under a statute barring disclosure of the information but offered to obtain waivers of the bar from the state agencies that supplied the information. *Id.* at 213. After all of the state agencies provided waivers to USDA, USDA released the information. *Id.* In reviewing the reasonableness of the agency's actions after the requester sought fees, the court concluded, in light of the statute barring release, "USDA officials might have been subject to criminal penalties if they had wrongfully disclosed the documents at issue." *Id.* at 217. Moreover, because the requester "concede[d] that USDA's legal argument [was] reasonable," "the issue of the *reasonableness* of the Government's position is not open to question." *Id.* By contrast, here, the Court determined that that the statutory provision relied upon by the IRS to blanketly withhold this information did *not* apply to the vast majority of the information withheld. As demonstrated by the Court's opinion and the IRS's ultimate disclosure of the vast majority of the requested information, this case did not present a risk of criminal or civil penalties for wrongful disclosure.

2. The IRS also argues that it acted reasonably in refusing to review and redact the requested records because of the "many man-hours" that would be required to do so. IRS Opp'n 11–12. This Court flatly rejected this argument at summary judgment, finding that "courts in this Circuit have required production of records much more voluminous than the records requested

here." Mem. Op. 11 (citing *Pub. Citizen v. Dep't of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003)) Further, the Court emphasized that the cases cited by the IRS concerned whether a request required an "unreasonably burdensome search," yet time spent reviewing records "is not a *search* at all." *Id.* at 10.

Moreover, the IRS incorrectly states that its "concerns were borne out." IRS Opp'n 12. The IRS's declarant now states that IRS personnel spent 802.6 hours on this case after the filing of the complaint.[1] Black Am. Decl. ¶ 5, Dkt. 27-2. The declarant fails, however, to distinguish between time spent on the case prior to summary judgment and after summary judgment—that is, to identify the amount of time spent processing Professor Kwoka's FOIA request to produce the information required by the Court's summary judgment order. And even if every hour was spent processing Professor Kwoka's FOIA request post-summary judgment—which is unlikely given that IRS personnel submitted supporting declarations for both of the IRS's summary judgment briefs—that time represents well under *half* of the amount of time the IRS represented to the Court would be required to process the request. *See* IRS Mem. in Supp. of Summ. J. 10, Dkt. 9 (stating that "segregation of the requested records would require approximately 2,196 hours of IRS work"). The gulf between these numbers undermines any claim of reasonableness: Given that the Court found approximately 2,200 hours to be an unremarkable burden on the IRS to process the request, *see* Mem. Op. 11, well under half of that amount of time is even less so. The burden does not reasonably justify the IRS's outright refusal to process and produce the requested categories of information.

[1] The IRS's declarant originally stated that the IRS had spent 718.35 hours on this case after the filing of the complaint. Black Decl. ¶ 5, Dkt. 26-2. The IRS filed a Notice of Errata on October 4, 2019—the due date for Professor Kwoka's reply—amending the declaration and opposition to increase this number but providing no explanation for the error. *See* IRS Notice of Errata, Dkt. 27.

For this entitlement factor, "the burden is on the agency to show that it acted reasonably," *Davy*, 550 F.3d at 1162, and the agency has not carried its burden.

III. The Court should award the full lodestar requested.

The IRS's challenge to the reasonableness of the attorneys' fees and costs sought by Professor Kwoka's counsel is a limited one. The IRS raises no challenge to the hours requested by Professor Kwoka's counsel and "does not dispute the use of the LSI-*Laffey* Matrix in this case." IRS Opp'n 14.

Nonetheless, while stating that it does not challenge use of the LSI *Laffey* matrix rates, the IRS also asks the Court to reduce the rates by 15 percent, *id.* at 14, on the theory that Professor Kwoka's motion "does not take into account the actual billing practices of large firms, *i.e.*, that firms generally discount their standard rates, write off portions of their billed hours, and do not collect 100 percent of the fees they bill," *id.* at 13. The Court should reject the IRS's request.

As the D.C. Circuit recently explained, the initial burden is on the fee applicant to show that the requested rates sought are reasonable. *DL v. District of Columbia*, 924 F.3d 585, 591 (D.C. Cir. 2019). Here, the IRS acknowledges that the LSI *Laffey* matrix sets forth reasonable rates. Indeed, the IRS acknowledges the D.C. Circuit's recent finding that the matrix provides a presumptively reasonable representation of the cost of legal services in the District of Columbia. *Id.* at 588, *cited in* IRS Opp'n 13. Because Professor Kwoka has met the initial burden of putting forth reasonable rates, the burden shifts to the IRS to "offer 'equally specific countervailing evidence' supporting another rate." *Id.* (quoting *Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995)). Yet the IRS offers no evidence to support its position.

Instead, the IRS relies solely on *Citizens for Ethics & Responsibility in Wash. v. DOJ* (*CREW*), 80 F. Supp. 3d 1 (D.D.C. 2015). In that case, which pre-dates the D.C. Circuit's decision

in *DL*, the district court discounted the requested LSI *Laffey* rates by 15 percent "to account for the differences between reported [law firm billing] rates and actual law firm billing actualization." *Id.* at 5. Respectfully, the *CREW* decision misinterpreted the basis of the LSI *Laffey* matrix, and the concerns underlying the court's application of a discounted rate—such as "writing off a portion of their billed hours to reflect attorney inefficiency and other considerations," *id.*—are not properly accounted for in determining the reasonable hourly rate.

First, in *DL*, the D.C. Circuit reaffirmed its prior holding that the LSI *Laffey* matrix is "probably a *conservative* estimate of the actual cost of legal services in this area." 924 F.3d at 591 (quoting *Salazar v. District of Columbia*, 809 F.3d 58, 65 (D.C. Cir. 2015)). Second, as attorneys' fees expert Michael Downey explained in his declaration in the *DL* case, law firms generally do *not* charge varying rates in complex federal litigation. Llewellyn Decl. Ex. D (Downey Decl.) ¶ 18, Dkt. 25-2 at 34. "Rather, in such litigation, firms customarily bill a client one rate for [each] particular attorney" and account for the ultimate fee charged in "in two ways other than switching rates: the reasonableness of the number of hours necessary to accomplish the task and the appropriateness of the experience level or seniority of the individual assigned to undertake the ask." *Id.* Here, the time records reflect a reasonable number of hours to accomplish the tasks performed, and the IRS has not challenged any of the hours sought. Additionally, the vast majority of the work was performed by a single attorney, avoiding duplication of work. *See* Llewellyn Decl. Ex. A; Llewellyn Suppl. Decl. Ex. A. Accordingly, no discount to the LSI *Laffey* rates are warranted.

IV. Counsel's updated fees-on-fees time.

In her initial motion, Professor Kwoka noted that her counsel would submit updated hours with her reply memorandum. Professor Kwoka's counsel are filing with this memorandum

supplemental declarations and updated time records reflecting the hours spent working on this matter subsequent to the filing of the motion. *See* Llewellyn Suppl. Decl. ¶ 1; Rosenbaum Suppl. Decl. ¶ 1; Llewellyn Suppl. Decl. Ex. A. Mr. Llewellyn has spent an additional 11.4 hours and Ms. Rosenbaum has spent an additional 0.8 hours preparing this reply and related work. At their respective LSI *Laffey* rates of $458 per hour and $747 per hour, Professor Kwoka thus seeks an additional $5,818.80 for time spent by her counsel on this matter subsequent to the filing of her initial motion for attorneys' fees and costs. Accordingly, combined with the $48,476 in attorneys' fees and $400 in costs Professor Kwoka sought in her motion, Professor Kwoka requests that the Court award a total award of $54,694.80 in attorneys' fees and costs.

CONCLUSION

For the above stated reasons and those in Professor Kwoka's initial motion, the Court should award plaintiff $54,294.80 in attorneys' fees and $400 in costs.

Dated: October 4, 2019

Respectfully submitted,

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