No. _____

In The
Supreme Court of the United States

JEFFERSON MORLEY,

Petitioner,

v.

CENTRAL INTELLIGENCE AGENCY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

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Questions Presented.

1. Where the district judge repeatedly refuses to apply the D.C. Circuit's four-factor test for awarding a FOIA plaintiff his attorney's fees, causing a *third* remand to re-balance those factors once again, an event which will produce 1-2 years of delay and yet another appeal, is the court of appeals bound as a matter of sound federal practice, the integrity of FOIA's enforcement scheme and rudimentary notions of due process to review the undisputed record *de novo* and decide the fee issue itself applying its four-factor test?

2. Should the Circuit's reliance on its four-factor test be repudiated and a new rule established which awards a substantially prevailing FOIA plaintiff his attorney fees unless he acted in bad faith?

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The published opinion of the United States Court of Appeals for the District of Columbia Circuit in *Jefferson Morley v. Central Intelligence Agency*, Docket No. 14-5230, decided and filed on January 21, 2016, and reported at 810 F.3d 841 (D.C. Cir. 2016); vacating the District Court's denial of petitioner's renewed motion for attorney's fees and costs under FOIA and remanding the matter to the District Court, is set forth in the Appendix hereto (App.1-11).

The published Memorandum Opinion of the United States District Court for the District of Columbia in *Jefferson Morley v. Central Intelligence Agency*, Civil Action No. 03-cv-2545 (RJL), decided and filed July 23, 2014, and reported at 59 F. Supp. 3d 151 (D.D.C. 2014) denying petitioner's renewed motion for attorney's fees and costs under FOIA, is set forth in the Appendix hereto (App. 12-25).

The *per curiam* published opinion of the United States Court of Appeals for the District of Columbia Circuit in *Jefferson Morley v. Central Intelligence Agency*, Docket No. 12-5032, decided and filed on June 13, 2013, and reported at 719 F.3d 689 (D.C. Cir. 2013), vacating the District Court's denial of petitioner's motion for attorney's fees and costs under FOIA and remanding the matter to the District Court with directions to apply the Circuit's four-factor test, is set forth in the Appendix hereto (App. 26-37).

The published Memorandum Opinion of the United States District Court for the District of

Columbia in *Jefferson Morley v. Central Intelligence Agency*, Civil Action No. 03-cv-2545 (RJL), decided and filed December 15, 2011, and reported at 828 F. Supp. 2d 257 (D.D.C. 2011), denying petitioner's motion for an award of attorney's fees and costs under FOIA, is set forth in the Appendix hereto (App. 38-53).

The unpublished Order of the United States Court of Appeals for the District of Columbia Circuit in *Jefferson Morley v. Central Intelligence Agency*, Docket No. 14-5230, decided and filed on April 6, 2016, denying petitioner's timely filed petition for rehearing, is set forth in the Appendix hereto (App. 54-55).

Basis for Jurisdiction in this Court.

The decision of the United States Court of Appeals for the District of Columbia Circuit vacating the District Court's denial of petitioner's renewed motion for attorney's fees and costs under FOIA and remanding the matter to the District Court, was entered on January 21, 2016; and its order denying petitioner's timely filed petition for rehearing was filed on April 6, 2016 (App.1-11;54-55).

This petition for writ of certiorari is filed within ninety (90) days of April 6, 2016. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

Constitutional, Statutory and Rule Provisions Implicated by This Petition.

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

5 U.S.C. § 552(a)(4)(E) [Freedom of Information Act (FOIA) as amended by The OPEN Government Act of 2007]:

> (E)
> (i) The court may assess against the United States reasonable attorney's fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
> (ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either----
> (I) a judicial order, or an enforceable written agreement or consent decree; or
> (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

28 U.S.C. § 2106:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse, any judgment, decree, or order of a court lawfully brought before it for review, and may remand the

cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Statement of Facts.

Petitioner Jefferson Morley ("petitioner" or "Morley") is a journalist, author and news editor who has written about President John F. Kennedy's assassination. On July 4, 2003, he submitted a request under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), to respondent Central Intelligence Agency ("respondent" or "the CIA") for "all records pertaining to CIA operations officer George Efythron Joannides" ("Joannides"). Joannides had served as a case officer in charge of the Directorio Revolucionario Estudantl ("the DRE" or "Cuban Student Directorate") during a critical 17-month period from November of 1962 through April of 1964, a interval of time which includes the assassination of President John F. Kennedy.

In the months prior to the assassination, alleged presidential assassin Lee Harvey Oswald ("Oswald") was in contact with officers of the DRE. While the Oswald/DRE relationship raised questions about the investigation of President Kennedy's murder, the CIA withheld Joannides' identity from those official bodies investigating the assassination including the President's Commission on the Assassination of President Kennedy ("Warren Commission"); the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities ("Church Committee"); and the House

Select Committee on Assassinations ("HSCA"). The CIA also initially concealed Joannides' identity and other pertinent information from the Assassination Records Review Board ("Review Board"). However, late in its existence, the Review Board discovered that Joannides had been the DRE's case officer when Oswald was in contact with it.

This discovery of Joannides' identity by the Review Board was the basis for petitioner's FOIA request. As petitioner later alleged, by virtue of his position as a U.S. government employee, Joannides "was uniquely well positioned to observe and report" on the assassination of President John F. Kennedy;" and the materials he sought were of great public interest because they "promise to shed light on the confused investigatory aftermath of the assassination." Specifically, because the DRE had contact with Oswald in the months before the assassination, disclosure of the records he sought under FOIA would help complete the historical record of Kennedy's assassination and the CIA operations that might have created intelligence on Oswald.

The CIA waited four months after petitioner's request before belatedly acknowledging it. But rather than comply, the CIA advised petitioner that "CIA records on the assassination of President Kennedy have been re-reviewed under the classification guidelines for assassination-related records of the President John F. Kennedy Assassination Records Collection Act of 1992 ("JFK Records Act") and that they "have been transferred to the National Archives and Records

Administration ("NARA") in compliance with [the JFK Records Act]." The CIA further advised petitioner that these records had been "re-reviewed" by the Review Board after which they were returned to NARA to be made available to the public. It then dismissed petitioner's FOIA request, telling him that he should instead submit his request to NARA.

Significantly, the CIA did *not* assert that *all* the records responsive to petitioner's request had been transferred to NARA. Nor did it assert that it had not retained copies of the JFK assassination-related records which it told petitioner had been transferred to NARA. In fact, *not* all the records responsive to petitioner's FOIA request had been transferred to NARA; and, in fact, the CIA had retained copies of those assassination-related records which it did transfer to NARA.

Having exhausted his administrative remedies and with no records forthcoming from the CIA, petitioner on December 16, 2003, filed this civil action against respondent under FOIA in the District Court for the District of Columbia seeking injunctive relief in the form of an order directing the CIA to make available all documents responsive to his FOIA request. After the suit was stayed to give the CIA time to process petitioner's request, it responded by letter to petitioner on December 22, 2004, enclosing three documents which could be released in their entirety and 112 documents with redactions pursuant to certain FOIA exemptions. It also located additional responsive material that it was withholding in its entirety consistent with other FOIA exemptions; and it explained that the release

of two other documents required consultation with another agency and that 78 other documents responsive to petitioner's request were already on file with NARA. It would "neither confirm nor deny the existence of records which were responsive" to petitioner's request for documents relating to Joannides' participation in any covert operation or assignment.

In February of 2005, respondent sent petitioner in segregable form the two documents the release of which required it to consult with another federal agency. In May of 2005, respondent supplemented its disclosure with an additional document release in segregable form which it inadvertently failed to include in its earlier disclosure; and it told petitioner that it was withholding additional material which was classified and thus could not be released in their entirety.

After unsuccessfully attempting discovery, the parties filed cross motions for summary judgment, the CIA arguing that it had conducted an adequate search in response to petitioner's FOIA request and petitioner contending that it had not. On September 29, 2006, the district court, Leon, J., granted respondent's summary judgment motion and denied petitioner's motion, finding that respondent had conducted an adequate search and had justified its invocation of the claimed FOIA exemptions. *Morley v. U.S.C.I.A.*, 453 F. Supp. 2d 137, 145-148 (D.D.C. 2006). The court of appeals affirmed in part and reversed in part, ruling that the district judge "did not specifically address the individual contentions that [petitioner] raises regarding the adequacy of

the CIA's search." *Morley v. C.I.A.*, 508 F.3d 1108, 1113; 1116-1117 (D.C. Cir. 2007). It remanded the matter with instructions that the district court "direct the CIA to search its operational files and the records released to NARA and to supplement the description of its search and the explanation for withholding materials pursuant to Exemptions 2, 5, and 6." *Id*. at 1129.

In response to this decision, the CIA conducted additional searches and in April of 2008, it released 113 records (88 in full and 25 in part), totaling 1,040 pages, which were responsive to petitioner's FOIA request. In August of 2008, it also released another 293 responsive documents, 29 in their entirety and 264 in part. It located additional material which was classified and their release was denied. Another 295 operational documents were withheld in their entirety. Finally, it would neither confirm nor deny the existence or nonexistence of records pertaining to Joannides' "participation in any covert project, operation, or assignment."

Claiming it had complied with the court of appeals' ruling, respondent renewed its motion for summary judgment and petitioner filed his own cross-motion claiming that respondent had not complied. On March 30, 2010, the district judge granted respondent's summary judgment motion and denied petitioner's motion, ruling that the CIA had conducted adequate searches and justified any withholdings under applicable FOIA exemptions. *Morley v. United States Cent. Intelligence Agency*, 699 F. Supp. 2d 244, 251-258 (D.D.C. 2010).

Petitioner appealed this ruling and the matter was placed into mediation by the court of appeals. Mediation continued until December 12, 2011, and ultimately proved unsuccessful. In the meantime, petitioner on June 1, 2011, moved in the district court for an award his attorney's fees and costs pursuant to FOIA, 5 U.S.C. § 552(a)(4)(E)(i). On December 14, 2011, the district court, Leon, J., denied the motion. *Morley v. United States Cent. Intelligence Agency*, 828 F. Supp. 2d 257 (D.D.C. 2011) (App. 38-53). While reasoning that petitioner might be *eligible* to receive an award of attorney's fees and costs as the substantially prevailing party in this matter, he concluded that petitioner was not *entitled* to same (App. 42-43).

Employing the four-factor test developed by the D.C. Circuit for determining whether a FOIA litigant who substantially prevails is entitled to fees, Judge Leon first ruled that as for the first factor, i.e., the public benefit derived from the case, "this litigation has yielded little, if any, public *benefit*----certainly an insufficient amount to support an award of attorney's fees" because the public already has the benefit of access to all or most of this information as the documents are identical to those which were previously released under the JFK Records Act and were in the public domain at NARA (App. 44-45) (emphasis in original).

As for the second and third factors----the commercial benefit to petitioner and the nature of petitioner's interest in the records----the district judge ruled that petitioner had a commercial interest in securing these records from the CIA rather from

NARA in order to avoid NARA's exorbitant copying charges and therefore had a sufficient private interest in pursuing these records without attorney's fees (App. 48-50). Finally, as for the last factor, i.e., the reasonableness of the CIA's original withholding of documents, he found that "there is no indication in the record that the CIA has engaged in any recalcitrant or obdurate behavior" (App. 50-51).

Petitioner appealed contending that the lower court abused its discretion in the way it applied the four-factor test to this record. In a *per curiam* opinion, the court of appeals reversed and remanded the case to the district court for reconsideration of the public-benefit factor in light of its prior analysis in *Davy v. CIA*, 550 F.3d 1155 (D.C. Cir. 2008). *Morley v. Cent. Intelligence Agency*, 719 F.3d 689 (D.C. Cir. 2013) (App. 26-37). *Davy* also concerned a request for records related to President Kennedy's assassination and it was there held that records requested about individuals allegedly involved in Kennedy's assassination "serves a public benefit" (App. 28 quoting *Davy*, 550 F.3d at 1159).

Moreover, as the court of appeals observed, the plaintiff in *Davy* was found to be entitled to attorney's fees under FOIA because the standard for entitlement to fees does not "disqualify plaintiffs who obtain information that, while arguably not of immediate public interest, nevertheless enables further research ultimately of great value and interest, such as here the public understanding of a Presidential assassination" (*Id.* quoting *Davy*, 550 F.3d at 1162 n.3).

Circuit Judge Kavanaugh concurred in a separate opinion (App. 29-35). He thought the Circuit "should ditch the four-factor standard" because it is arbitrary, atextual, inconsistent with the structure and purposes of FOIA and "so vague and malleable that [the factors] provide very little guidance to district courts" (App. 29-32). Specifically, he believed the first three factors incentivize and reward only certain kinds of FOIA requests and requesters thereby undermining FOIA's plain text which refers to "any person" and thus treats all requests and requesters the same, i.e., no matter the identity of the requesters, the specific benefit that might be derived from the documents or the requesters' overt or subtle motives (App. 30).

He also believed that the public-benefit factor "is riddled with arbitrariness in addition to contravening the basic equality-of-requester principle in FOIA;" and that the second and third factors were similarly flawed because FOIA does not prioritize certain kinds of requests over others (App. 31-32). As Judge Kavanaugh observed, "[i]n my view, we should stop relying on these atextual factors, and stop discriminating against FOIA requesters' fee requests based on a necessarily ill-informed perception of public benefit and an arbitrary assessment of the nature of the requester's interests" (App. 33). In his opinion, the Circuit should adopt a new rule for awarding FOIA plaintiffs their attorney's fees akin to the one in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) which awards a prevailing party his attorney's fees and costs in the usual run of cases with only a very

narrow exception for "special circumstances" such as bad faith by a prevailing plaintiff (App. 33-34).

Finally, he found that this atextual four-factor test is not only at odds with this Court's decision in *Milner v. Department of the Navy*, ___ U.S. ___; 131 S. Ct. 1259, 1267 (2011), where the majority opinion by Kagan, J., rejected a similarly atextual 30-year-old FOIA precedent developed by the Circuit, but it also it generates unnecessary and wasteful satellite litigation about attorney's fees (App. 29-30; 34-35). He concluded:

> This case, which is now going back for a second round in the District Court, is a good exhibit of wasteful and unnecessary satellite litigation. Under a *Newman* approach, [petitioner] would already have his fees, and this litigation would have long since concluded.

(App. 35).

Upon remand, petitioner renewed his motion for attorney's fees and costs and on July 23, 2014, the district judge issued his memorandum opinion once again denying the motion. *Morley v. C.I.A.*, 59 F. Supp. 3d 151 (D.D.C. 2014) (App. 12-25). Noting that the CIA does not contest the fact that petitioner is *eligible* for such fees because he has "substantially prevailed," the district court addressed the issue of whether petitioner is nonetheless *entitled* to an award (App. 15-16 & n.3). Analyzing the public benefit factor again in light of *Davy*, *supra*, as the court of appeals instructed, however, did not alter its

original conclusion that this litigation has yielded little, if any, public benefit to support an award of attorney's fees (App. 16-17).

The district judge did not read *Davy* as broadly holding that *all* records "about individuals allegedly involved in President Kennedy's assassination" automatically benefit the public, only that in *Davy* it was uncontested that the records requested there, e.g., new information bearing on the controversy about former District Attorney Jim Garrison's charge that the CIA was involved in the assassination plot, served a public benefit (App. 17-18 quoting *Davy*, 550 F.3d at 1159). Yet here the importance of the new information released as the result of petitioner's request was "fiercely contested" (App. 18-19).

Separating the records released into those which were identical to those publicly available at NARA and those that were not, Judge Leon first decided that the release of those already in the public domain at NARA do not further the public benefit (App. 19). As for the four records not previously available or in the public domain (i.e., two travel documents showing Joannides traveled to New Orleans during the time of the Warren Commission investigation; and a photo and CIA citation Joannides received in 1981), he found that "nothing other than pure speculation connects any of it to the Kennedy assassination" (App. 21). Because the public-benefit factor requires more than speculation of an unknown potential future benefit, he found against petitioner on this factor (App. 22-23). His analysis of the remaining three factors

remained the same and he concluded that petitioner was not entitled to attorney's fees (App. 23-24).

On appeal, the court of appeals unanimously vacated the district court's denial of petitioner's motion and remanded the matter once again to the district court because the district judge improperly analyzed the public-benefit factor by assessing the public value of the information *received* rather than "the potential public value of the information sought" (App. 2 quoting *Davy*, 550 F.3d at 1159). While agreeing with the lower court that the value of the released documents is "at best unclear" and appear to reveal little, if anything, about the President's assassination, the court ruled that it was ultimately irrelevant to *Davy's* requirement that a court assess "the potential public value of the information sought," *not* the public value of the information received (App. 3;4-5, quoting *Davy*, *supra*).

As it reasoned, FOIA's fee provision was intended to remove any incentive for administrative resistance to disclosure requests based not on the merits of legitimate exemption claims but on the knowledge that many FOIA plaintiffs lack the financial resources to pursue their requests through expensive litigation (App. 5 quoting *Davy*, 550 F.3d at 1158). Thus shifting to the plaintiff the risk that the disclosures will be unilluminating would defeat this purpose since few plaintiffs would risk their resources on litigation when they know nothing about the documents or their contents prior to their release (*Id.* quoting *Davy*, 550 F.3d at 1162 n.3).

To make this post-*Davy* analysis more clear, the court of appeals held that

> the public-benefit factor requires 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*....[I]f it's plausible *ex ante* that a request has a decent chance of yielding a public benefit, the public-benefit analysis ends there.

(App. 6) (emphasis supplied). Thus a request implicating the public interest "must have at least a modest probability of generating useful new information about a matter of public concern" and where the subject is the Kennedy assassination, showing potential public value is "relatively easy" (App. 6). Moreover, the court of appeals concluded that petitioner's request possessed such potential value because "there was at least a modest probability that [it] would generate information relevant to the assassination or later investigations" (App. 7).

With the public-benefit factor decided in petitioner's favor, the matter was remanded *for the third time* to the district court to consider the remaining three factors and the overall balance of the four factors "afresh," with the proviso that the district court accommodate any fee award with the fact that some of the released documents are available at NARA but that some of those records cannot be electronically located because of missing

record identification forms (App. 7-8). In fact, however, the records at issue here are not available online in digital form; a special search has to be conducted by Archive staff or a personal visit by a researcher in order to find and retrieve them.

Petitioner sought a panel rehearing arguing that once it ruled that the first and most important public-benefit factor weighs in his favor, the court of appeals should have decided the issue of his entitlement to attorney's fees *de novo* as it did in *Davy* rather than remanding the matter *for the third time* where there is no reasonable prospect the district judge's analysis of the Circuit's four-factor test will end this litigation; and where the remand will continue this "major litigation" for1-2 more years and result in yet another appeal, all to the detriment of petitioner.

On April 6, 2016, the court of appeals denied petitioner's petition for rehearing (App. 54-55).

Argument Supporting A Grant of the Writ.

1. When The District Judge Repeatedly Refuses To Apply The Circuit's Four-Factor Test For Awarding A FOIA Plaintiff His Attorney's Fees, Instead Of Remanding The Case For The *Third* Time, The Court Of Appeals Is Bound As A Matter Of Sound Federal Practice, The Integrity Of FOIA's Enforcement Scheme And Rudimentary Notions Of Due Process To Review The Undisputed Record *De Novo* And Decide The Fee Issue Itself Applying Its Four-Factor Test.

In concluding that the public-benefit factor unquestionably favors petitioner, the court of appeals relied heavily on its earlier decision in *Davy v. CIA*, 550 F.3d 1155,1159 (D.C. Cir. 2008). There it was determined that even when the value of released records may be unclear and may reveal little about the assassination or its investigation, that fact is irrelevant because the public-benefit inquiry focuses *not* on the public value of the information ultimately received but instead whether there is potential public value in the information initially *sought* by the requester (App. 3;4-5 quoting *Davy*, *supra*).

The court of appeals decided that petitioner's request for respondent's records having to do with its agent Joannides and his connection to the Kennedy assassination as well as its investigatory aftermath had at least a modest probability, i.e., a decent

chance, that it would generate information relevant to the assassination or later investigations, both subjects of continuing public concern and public interest (App. 6-7). Having made this plausible assessment of petitioner's request *ex ante*, the court concluded "relatively eas[ily]" that the public-benefit factor weighed in petitioner's favor (App. 6-7).

Despite finding unequivocally that the first and most important pubic-benefit factor weighed decisively in petitioner's favor, the court of appeals refused to go further and analyze the remaining three factors even though the district judge had made it unquestionably clear in his prior rulings that were he to reassess these factors again, he would come to the same conclusion, i.e., that despite the public-benefit factor now favoring petitioner, he would weigh the remaining factors against him so that petitioner would not be entitled to an award of fees under § 552(a)(4)(E)(i).

However, the undisputed record before the court of appeals would have allowed it to find that respondent did *not* contest below petitioner's eligibility for a fee award on the grounds that he had not substantially prevailed (App. 16 n.3). Instead, it argued that petitioner was not entitled to a fee award under the four-factor test. Yet the court of appeals easily determined that the first factor favored petitioner; and the undisputed record showed that the remaining three factors weigh heavily in his favor as well. That is, petitioner, a journalist and news editor who has written about the President's assassination, was seeking documents for public informational purposes rather than for

private advantage, like the plaintiff in *Davy*. See *Davy*, 550 F.3d at 1161-1162. Moreover, it was unquestioned on this record that the CIA, as in *Davy*, failed to offer any reasonable explanation why it refused to respond to petitioner's FOIA requests until after he had brought suit. See *id.* at 1162-1163. By any analysis, then, *each of the four factors* weigh decisively in petitioner's favor and entitle him to an award of attorney's fees under § 552(a)(4)(E)(i).

The court of appeals' robust reaffirmation of *Davy's* coherent public-benefit factor analysis left unaddressed *Davy's* well reasoned treatment of the three remaining factors of the four-factor test employed by the Circuit since *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1365 (D.C. Cir. 1977). The *Davy* Court persuasively analyzed each remaining factor to conclude that the plaintiff, another Kennedy assassination scholar/researcher, was "the quintessential requestor of government information envisioned by FOIA" and that the agency had no excuse for waiting until the plaintiff brought suit before disclosing the requested documents. 550 F.3d at 1157; 1161-1162;1163. *Id.* As the *Davy* Court explained, this kind of delay "is exactly the kind of behavior the fee provision was enacted to combat." *Id.* at 1163.That each of the four factors decisively favored the plaintiff "only support[s] the conclusion that [the plaintiff] is entitled to an award of attorney's fees." *Id.*

The very same determination could have—and should have—been made on this undisputed record before the court of appeals. It contains *no* factual questions left for resolution, only questions of law,

about petitioner's entitlement to attorney's fees under FOIA. With matters in this posture, instead of remanding the case for the third time to Judge Leon, the court of appeals was obligated as a matter sound federal practice, the integrity of FOIA's enforcement scheme which Congress envisioned, and rudimentary notions of due process, to review the undisputed record *de novo* and decide the fee issue itself applying its four-factor test.

In the face of the district judge's repeated refusal to analyze correctly the four-factor test under FOIA, a refusal which has now caused *three* separate remands and the promise of another 1-2 years of delay and yet another appeal, the court of appeals' failure to exercise its inherent authority to review this completed record *de novo* and to make an award based on its own application of its four-factor test is at odds with the Circuit's own precedent, Supreme Court precedent, federal norms which avoid wasteful and unnecessary satellite litigation and Congress's intent in enacting FOIA in the first place.

The *Davy* Court's decision in 2008 was not the first time it had encountered this particular district judge's refusal to award the plaintiff fees under FOIA despite his clear entitlement to same. In 2005, this same district judge denied the plaintiff's fee request, finding him ineligible for an award because it was found that he had not substantially prevailed within the meaning of the statute. *Davy v. C.I.A.*, C.A. No. 00-2134 (2/5/2005). *Id*. at 1157. The court of appeals reversed this ruling and held that he was eligible as a prevailing party, remanding the case to the district court to determine whether he was

entitled to fees under the Circuit's four-factor test. *Davy v. C.I.A.*, 456 F.3d 162 (D.C. Cir. 2006). *Id.* However, the district court again denied the plaintiff's fee request, finding against him on the last three factors. *Davy v. C.I.A.*, 496 F. Supp. 2d 36, 38 (D.D.C. 2007). Plaintiff again appealed, leading to the *Davy* Court's decision in 2008 which determined that he was unquestionably entitled to fees and costs under FOIA.

In view of these repeated failures by this particular district judge to analyze the Circuit's four-factor test in a manner required by its decisional law, the *Davy* Court refused to simply vacate the order and remand the case to the district court so that it could reassess yet again plaintiff's fee request. Instead, it reviewed the matter *de novo*, exercised its own discretion to determine upon a completed factual record that the plaintiff was entitled to fees and costs under all four factors and reversed the lower court's order denying fees. *Id.* at 1157; 1163. It then remanded the case but "*only* for the district court to enter an appropriate order awarding fees and costs as to all matters on which [the plaintiff] prevailed." *Id.* at 1163 (emphasis supplied).

This inherent power of the court of appeals to forgo a remand and decide for itself a FOIA plaintiff's right to attorney's fees and costs under the four-factor test in the aftermath of error by the district court was adverted to but not exercised in *Nationwide Building Maintenance, Inc. v Sampson*, 559 F.2d 704, 716 (D.C. Cir. 1977). There both parties urged the court of appeals to decide the

question of attorney's fees itself in the wake of the district court's erroneous failure to do so. *Id*. It responded that

> *[w]e may well have the authority to make our own discretionary decision under section 552(a)(4)(E)*, but in this area where, as we have emphasized, Congress has relied on the broad discretion of the courts, it is better to have that discretion exercised by the court which has been the most intimately associated with the case. A remand here does not necessarily require any further delay for additional proceedings.

Id. at 716 & n.44 citing *Reed v. Arlington Hotel Co.*, 476 F.2d 721, 726 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973) (court reversed dismissal of plaintiffs' class action under Title VII; found plaintiff entitled to attorney's fees); *Malone v. North American Rockwell Corp.*, 457 F.2d 779, 881 (9th Cir. 1972) (court of appeals reversed district court ruling of no jurisdiction; awarded attorney's fees) (footnote omitted) (emphasis supplied).

After *Davy* and *Sampson*, then, a court of appeals in the D.C. Circuit is authorized to forgo a remand to the district court and decide for itself *de novo* a FOIA plaintiff's fee request if, as in *Davy*, the district judge repeatedly refuses to apply correctly the Circuit's four-factor test for awarding fees under FOIA; or if, as was explicit in *Davy* and implied in *Sampson*, the lower court demonstrates that it is

unwilling or unable to exercise its proper discretion in making this assessment. Petitioner submits that these considerations converge in this record to invoke the court of appeals' unquestioned authority to forgo remanding this case to the district court and instead review this completed record *de novo* and award him his attorney's fees and costs under § 552(a)(4)(E)(i) based on its own application of its four-factor test.

Compounding the impropriety of the remand here is the fact that the district judge in *Davy* who caused the successive remands there is the same district judge who has caused the three remands here; the undersigned counsel here was the same counsel for the plaintiff in *Davy*; respondent here is the same defendant in both cases; and the upshot of the court of appeals' decision here to remand the case to the district court rather than reverse the ruling below based on its own application of its four-factor test means the same legal issues resting on the same operative facts will now be before the same district judge for the *fifth* time in the past decade.

This untenable procedure runs counter to the good sense of *Davy's* disposition; it imposes further delay with additional proceedings such that it becomes wasteful and unnecessary satellite litigation which acts as a powerful disincentive for attorneys to engage in FOIA litigation or for FOIA requesters to pursue their legitimate requests for government records and documents; and it undermines the expectation created by Congress that all FOIA litigants will have meaningful access

to discoverable government documents and records upon request.

Besides the Circuit precedent of *Davy* and *Sampson* which authorize *de novo* review when a remand to the district court is inappropriate, unwise or futile, there is precedent from this Court authorizing an appellate court to exercise *de novo* review and then reverse a judgment rather than vacate and remand where a remand is unnecessary because the completed factual record before the appellate court "permits only one resolution of the factual issue." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). Accord, *Highmark, Inc. v. Allcare Health Management System, Inc.*, ___U.S.___, 134 S. Ct. 1744, 1748 (2014) ("Traditionally, decisions on 'questions of law' are 'reviewable *de novo*'..."); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (if the facts are unassailable but the proper rule of law was misapplied to those facts, the appellate court "could have reversed the District Court's judgment."). See *Pierce v. Underwood*, 487 U.S. 552, 560-561; 584-585 (1988) (White, J., concurring and dissenting in part) (*de novo* review of attorney's fees issue is a question of law when a Circuit's decisions are clear about whether or not a particular legal position was substantially justified).

Here the completed factual record was before the court of appeals in the form of a two-volume appendix consisting of more than 800 pages. There are no new factual disputes to resolve, only the question of law whether petitioner is entitled to fees under the four-factor test. The court of appeals already has determined that the first factor weighs

decisively in his favor and it could as well decide the remaining three factors on this completed record without a wasteful, inefficient and time-consuming remand. Its refusal to do so presents a severe disincentive to attorneys specializing in FOIA litigation who spend more time addressing fee issues than substantive FOIA claims. The Supreme Court has emphatically stated that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Yet by deciding to remand this case back to the district court once again, the court of appeals has guaranteed another 1-2 years of delay and further litigation about issues it can and should decide now on this completed record.

Its refusal to review *de novo* and then reverse outright the district judge also undermines the will of Congress in enacting the fee provisions of § 552(a)(4)(E). The touchstone of a court's discretionary decision under this statute must be whether an award of attorney's fees is necessary to implement FOIA. "A grudging application of this provision, which would dissuade those who have been denied information from invoking their right to judicial review [when that information is wrongfully withheld], would be clearly contrary to congressional intent." *Davy*, 550 F.3d at 1158 quoting *Sampson*, 559 F.2d at 715.

Finally, remanding this case back to the same district judge who has repeatedly refused to apply the Circuit's four-factor test consistent with its precedents does not comport with fundamental fairness. Petitioner's right to have its claim for

attorney's fees and costs heard and decided by the federal courts in this action----to have his day in court---- is a valuable property right entitled to due process protection. *Los Angeles v. David*, 538 U.S. 715, 117 (2003). *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972). *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933). See *Boddie v. Connecticut*, 401 U.S. 371, 374-375 (1971). Nor can it be doubted that the actions of the federal court including its judicial officers acting in their official capacities are encompassed by the fifth amendment's Due Process Clause. *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984).

Due process requires a neutral and detached judge in the first instance. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972). *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). *In re Murchison*, 349 U.S. 133, 136 (1955). While the District Judge is more than a mere umpire, he cannot become an advocate or otherwise use his judicial powers to advantage or disadvantage a party unfairly. *Quercia v. United States*, 289 U.S. 466, 470 (1933). Nor "should [he] give vent to personal spleen or respond to a personal grievance." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

For reasons unknown to the undersigned counsel, the otherwise competent district judge has consistently failed to apply the four-factor test required by controlling precedent such as *Davy* and the result has been protracted delay, unnecessary expense and the prospect of unending litigation in order for petitioner to realize his rights under § 552(a)(4)(E). In the event the court of appeals is

not ordered to conduct a *de novo* review of this undisputed record, at the very least, either this Court or the court of appeals should exercise its statutory powers under 28 U.S.C. § 2106, to effect a remand of this matter to a different district court judge for consideration of petitioner's renewed motion for fees and costs under § 552(a)(4)(E).

2. The Circuit's Reliance On Its Four-Factor Test Should Be Repudiated And A New Rule Established Which Awards A Substantially Prevailing FOIA Plaintiff His Attorney Fees Unless He Acted In Bad Faith.

For the reasons identified by Circuit Judge Kavanaugh in his concurrence in *Morley v. Cent. Intelligence Agency*, 719 F.3d 689 (D.C. Cir. 2013) (App. 26-37), the Circuit's four-factor test for determining whether petitioner is entitled to his fees under § 552(a)(4)(E) is arbitrary, unsupported by FOIA's text, inconsistent with the structure and purposes of FOIA and "so vague and malleable that [the factors] provide very little guidance to district courts" (App. 29-32). It incentivizes and rewards only certain kinds of FOIA requests and requesters, undermining FOIA's plain text which refers to "any person" and thus treats all requests and requesters the same, i.e., no matter the identity of the requesters, the specific benefit that might be derived from the documents or the requesters' overt or subtle motives (App. 30).

In addition, the Circuit Judge found that this atextual four-factor test is not only at odds with this

Court's decision in *Milner v. Department of the Navy*, ___ U.S. ___, ___; 131 S. Ct. 1259, 1267 (2011), where a majority of eight Justices rejected a similarly atextual 30-year-old FOIA precedent developed by the Circuit, but it also it generates unnecessary and wasteful satellite litigation about attorney's fees (App. 29-30;34-35). He concluded that the approach in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968) is preferable, i.e., an award of attorney's fees to a prevailing party is presumed warranted unless he acted in bad faith (App. 33). This new rule would provide for predictable fee awards, would treat FOIA requests and requesters equally, and would incentivize putative FOIA plaintiffs with meritorious claims (*Id.*). Moreover, under such an approach, petitioner "would already have his fees, and this litigation would have long since concluded" (App. 35).

Conclusion.

For all of these reasons identified herein, petitioner respectfully requests that this Court grant his petition for writ of certiorari and review the judgment and decision of the United States Court of Appeals for the District of Columbia Circuit, remand the matter to that court for its *de novo* review of this undisputed record and its own application of the Circuit's four-factor test to determine his entitlement to attorney's fees and costs under FOIA; or replace the Circuit's four-factor test in favor of a new rule akin to the one in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968) which awards a substantially prevailing FOIA plaintiff his attorney fees unless he acted in bad faith; or provide

him with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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APPENDIX

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[ENTERED JANUARY 21, 2016]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 6, 2015 Decided January 21, 2016

No. 14-5230

JEFFERSON MORLEY,
APPELLANT

v.

CENTRAL INTELLIGENCE AGENCY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:03-cv-02545)

James H. Lesar argued the cause and filed the briefs for appellant.

Benton Peterson, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Vincent H. Cohen, Jr.*, Acting U.S. Attorney, and *R. Craig Lawrence*, Assistant U.S. Attorney.

Before: SRINIVASAN, *Circuit Judge*, and WILLIAMS and GINSBURG, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

WILLIAMS, *Senior Circuit Judge*: Jefferson Morley appeals for the second time from the district court's denial of his request for attorney's fees and costs under the Freedom of Information Act ("FOIA"). Morley argues that he is entitled to a fee award under the familiar four-factor standard that looks to "(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." *Davy v. CIA*, 550 F.3d 1155, 1159 (D.C. Cir. 2008) (citations omitted). Because the district court improperly analyzed the public-benefit factor by assessing the public value of the information *received* rather than "the potential public value of the information sought," *id.* (citations omitted), we must vacate and remand again.

* * *

Morley is a journalist and news editor who has written about the assassination of President John F. Kennedy. In 2003 he submitted a FOIA request to the Central Intelligence Agency for all records related to CIA officer George E. Joannides. Morley believed that information on Joannides could shed new light on President Kennedy's assassination because Joannides had served as the CIA case officer for *Directorio Revolucionario Estudantil* ("DRE"), one of the Cuba-focused organizations with which Lee Harvey Oswald was in contact in the months before the assassination. Receiving only a

communication from the CIA that records on President Kennedy's assassination had been sent to the National Archives and Records Administration, Morley filed suit. The ensuing litigation spanned over a decade and led to the production of several hundred documents, a subset of which are in fact publicly available in the Archives. Morley contends that some of the documents turned over—a couple of travel records and a photograph and citation relating to a career medal once received by Joannides—shed some light on President Kennedy's assassination, but the value of these documents is at best unclear.

In 2010 Morley sought attorney's fees as a substantially prevailing party. See 5 U.S.C. § 552(a)(4)(E)(i). The district court denied the fee request. *Morley v. CIA*, 828 F. Supp. 2d 257, 265-66 (D.D.C. 2011). While acknowledging that "the Kennedy assassination is surely a matter of public interest," *id.* at 262 (citation omitted), the district court concluded that the public-benefit factor weighed strongly against a fee award because the actual documents produced by the CIA provided little if any public benefit, see *id.* at 262-64. After analyzing the remaining three factors, the district court concluded that Morley was not entitled to fees. *Id.* at 264-66.

This court vacated and remanded because the district court had failed to consider the analysis of the public-benefit factor in *Davy*, a decision that also concerned a FOIA request for documents related to President Kennedy's assassination. *Morley v. CIA*, 719 F.3d 689, 690 (D.C. Cir. 2013).

On remand, the district court again denied fees, explaining that *Davy* "d[id] not alter [its] original conclusion that 'this litigation has yielded little, if any, public *benefit*—certainly an insufficient amount to support an award of attorney's fees.'" *Morley v. CIA*, 59 F. Supp. 3d 151, 155 (D.D.C. 2014) (emphasis in original) (quoting *Morley*, 828 F. Supp. 2d at 262). While noting the *Davy* court's conclusion that the requested information served a public benefit because of its alleged nexus to the Kennedy assassination, the district court rejected the idea that *Davy* had "create[d] a category of records that automatically satisfy the [public-benefit] factor based on a plaintiff's claims of a relationship to [President Kennedy's] assassination." *Id.* (As developed below, we agree with the point that a plaintiff's "claims" of a relationship to the assassination aren't enough to establish a public benefit.) Analyzing the particular documents that Morley received, the court concluded that "this litigation has benefited the public only slightly, if at all." *Id.* at 158. The released documents either were previously publicly available, *id.* at 156, or "shed very little, if any, light on Joannides's involvement in the events surrounding the Kennedy assassination," *id.* at 158.

* * *

The district court erred in concluding that the merits case had not yielded a public benefit. We agree that the released documents appear to reveal little, if anything, about President Kennedy's assassination. Morley contends that the released travel records indicate that Joannides may have

been in New Orleans at the time that Warren Commission investigators were interviewing DRE members about their contacts with Oswald, and that the career medal reflects the CIA's approval of Joannides's conduct as its case officer for the DRE and as liaison between the CIA and the House Select Committee on Assassinations. The plausibility and value of these inferences are at best questionable, but are ultimately of little relevance as *Davy* required the court to assess "the potential public value of the information sought," *Davy*, 550 F.3d at 1159 (citations omitted), not the public value of the information received. The purpose of the fee provision is "to remove the incentive for administrative resistance to disclosure requests based not on the merits of exemption claims, but on the knowledge that many FOIA plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation." *Id.* at 1158 (quoting *Nationwide Bldg. Maint., Inc. v. Sampson*, 559 F.2d 704, 711 (D.C. Cir. 1977)). "[S]hifting to the plaintiff the risk that the disclosures will be unilluminating" would defeat this purpose because "[f]ew people . . . would stake their financial resources on litigation when they can know nothing about the documents or their contents prior to their release." *Id.* at 1162 n.3; see also *id.* at 1164-65 (Tatel, J., concurring).

To be sure, *Davy* notes that assessing the public benefit also requires considering "the effect of the litigation," and while the court's analysis focuses on "[t]he information Davy requested," there is some discussion of the actual documents released. *Id.* at 1159 (majority opinion). But "the effect of the

litigation" inquiry is properly understood as asking simply whether the litigation has caused the release of requested documents, without which the requester cannot be said to have substantially prevailed. See *id*. (suggesting that assessing "the value of the litigation" "presents a variation on" the question whether the plaintiff has "substantially prevail[ed]"). Lest there be any uncertainty, we clarify that the public-benefit factor requires 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. We can imagine a rare case where the research harvest seemed to vindicate an otherwise quite implausible request. But if it's plausible *ex ante* that a request has a decent chance of yielding a public benefit, the public-benefit analysis ends there.

Of course a bare allegation that a request bears a nexus to a matter of public concern does not automatically mean that a public benefit is present. To have "potential public value," *Davy*, 550 F.3d at 1159, the request must have at least a modest probability of generating useful new information about a matter of public concern. The higher this probability and the more valuable the new information that could be generated, the more potential public value a request has. The nature of the subject that the request seeks to illuminate is obviously important. Where that subject is the Kennedy assassination—an event with few rivals in national trauma and in the array of passionately held conflicting explanations—showing potential public value is relatively easy. This of course does not mean that a requester's mere *claim* of a

relationship to the assassination *ipso facto* satisfies the public interest criterion. Cf. *Morley*, 59 F. Supp. 3d at 155.

Morley's request had potential public value. He has proffered—and the CIA has not disputed—that Joannides served as the CIA case officer for a Cuban group, the DRE, with whose officers Oswald was in contact prior to the assassination. Travel records showing a very close match between Joannides's and Oswald's times in New Orleans might, for example, have (marginally) supported one of the hypotheses swirling around the assassination. In addition, this court has previously determined that Morley's request sought information "central" to an intelligence committee's inquiry into the performance of the CIA and other federal agencies in investigating the assassination. *Morley v. CIA*, 508 F.3d 1108, 1118 (D.C. Cir. 2007). Under these circumstances, there was at least a modest probability that Morley's request would generate information relevant to the assassination or later investigations.

The district court suggested that Morley is not entitled to fees incurred in connection with documents that were available to him (and the public generally) in the Archives. *Morley*, 59 F. Supp. 3d at 156. The district court's basic point was correct: whether documents are already in the public domain is significant because it undermines any claim that the requester's use of FOIA had provided public access to the documents. See *Tax Analysts v. U.S. Dep't of Justice*, 965 F.2d 1092, 1094-95 (D.C. Cir. 1992). But, unlike the requester in *Tax Analysts*,

who sought publicly available tax decisions, Morley had no reason to believe that all records pertaining to Joannides would be available. Moreover, at oral argument Morley's counsel claimed that extracting documents of this sort from the Archives is a laborious and unreliable process—and that some documents in the Archives cannot be electronically located because of missing record identification forms, which record information about each document for input into an electronic database. The Archives website does not clearly confirm or contradict this claim, but does indicate that "[n]ot all the material found in the Collection is indexed in the database." JFK Assassination Records Collection Reference System, https://www.archives.gov/research/jfk/search.html#reference (last visited Jan. 4, 2016).

Before denying any fees on the ground that some of the documents were available in the Archives, the district court should consider (1) whether fees incurred in connection with such documents are segregable and, if so, (2) whether the difficulties recited above nonetheless militate against denial of fees for such documents.

Following the prior remand on the fees issue, the district court declined to reevaluate any factors other than public benefit, or to rebalance the factors, despite this court's suggestion in *Davy* that the first three factors are all addressed to the distinction "between requesters who seek documents for public informational purposes and those who seek documents for private advantage." *Davy*, 550 F.3d at

1160. On remand, the district court should consider the remaining factors and the overall balance afresh.

* * *

The judgment of the district court is vacated and the case is

Remanded.

[ENTERED JANUARY 21, 2016]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5230 **September Term, 2015**
FILED ON: JANUARY 21, 2016

JEFFERSON MORLEY,

APPELLANT

v.

CENTRAL INTELLIGENCE AGENCY,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:03-cv-02545)

Before: SRINIVASAN, *Circuit Judge*, and WILLIAMS and GINSBURG, *Senior Circuit Judges*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby vacated and the case is remanded, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: January 21, 2016

Opinion for the court filed by Senior Circuit Judge Williams.

[ENTERED JULY 23, 2014]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFERSON MORLEY	)
	)
Plaintiff,	)
	)
v.	)
	)
CENTRAL INTELLIGENCE AGENCY,	)
	)
Defendant.	)

Case No. 03-cv-2545 (RJL)

MEMORANDUM OPINION
(July 23, 2014) [Dkt. #135]

Plaintiff Jefferson Morley brings this action to recover attorney's fees and costs from the Central Intelligence Agency ("CIA") under the Freedom of Information Act ("FOIA"). *See* Pl.'s Renewed Mot. for Att'y's Fees and Costs [Dkt. #135] ("Pl.'s Mot."). The CIA opposes. Def.'s Opp'n to Pl.'s Renewed Mot. for Att'y's Fees and Costs ("Def.'s Opp'n") [Dkt. #139]. After review of the motion, the applicable law, and the record herein, plaintiff's motion is DENIED.

BACKGROUND

This case has been ongoing since 2003. This Court and our Circuit have outlined the facts and procedural history of plaintiff's FOIA request in

numerous prior opinions. *See generally Morley v. CIA*, 699 F. Supp. 2d 244 (D.D.C. 2010) (*"Morley III"*); *Morley v. CIA*, 453 F. Supp. 2d 137 (D.D.C. 2006) (*"Morley* I"), *aff'd in part*, *rev'd in part*, 508 F.3d 1108 (D.C. Cir. 2007) (*"Morley II"*). Indeed, this is plaintiffs second request for attomey's fees, and the specific facts relevant to his fee request are detailed in *Morley v. CIA*, 828 F. Supp. 2d 257 (D.D.C. 2011) (*"Morley IV"), vacated*, 719 F.3d 689 (D.C. Cir. 2013) (*"Morley V"*). Accordingly, a brief summary will suffice here.

Morley is a journalist and news editor. *Morley II*, 508 F.3d at 1113. On July 4, 2003, Morley submitted a request under FOIA to the CIA for "all records pertaining to CIA operations officer George Efythron Joannides." Pl.'s Mot., Exh. 1 [Dkt. #135-3]. The letter makes clear that Morley sought information connected to President John F. Kennedy's assassination. *See id.* (explaining that the documents sought would "shed new light on the assassination of President Kennedy on November 22, 1963"). The CIA responded in the beginning of November, 2003, with a letter explaining that the National Archives and Records Administration ("NARA") had a public collection of CIA records related to the JFK assassination, which was searchable online. PI.'s Mot., Exh. 2 [Dkt. #135-4]. The CIA directed him to submit his request to NARA and did not release any records directly to Morley at that time. *Id.*

Morley subsequently filed suit in this Court on December 16, 2003, to enforce his FOIA request. *Morley II*, 508 F.3d at 1113. After further processing

of the request, along with an appeal up to our Circuit, the CIA ultimately provided Morley with a total of 524 responsive records (some of which were segmented and/or redacted). *Morley IV*, 828 F. Supp. 2d at 260. Of those records, 113 were from the files the CIA previously had transferred to NARA. *Id.*

Morley then moved this Court for attorney's fees. *Id.* at 261. Applying the four-factor standard courts in this Circuit use to determine whether a FOIA plaintiff is entitled to an award of attorney's fees, *see Tax Analysts v. U.S. Dep't of Justice*, 965 F.2d 1092, 1093 (D.C. Cir. 1992), *superseded by statute on other grounds*, OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, I concluded that Morley was not so entitled, *Morley IV*, 828 F. Supp. 2d at 265-66.[1]

Morley appealed. The Circuit vacated and remanded with instructions to "apply the four-factor standard in a manner consistent with *Davy [v. CIA,* 550 F.3d 1155 (D.C. Cir. 2008)]," a case in which our Circuit "recently elaborated on one of the four factors, the public-benefit factor." *Morley V*, 719 F.3d at 690. The opinion did not mention this Court's analysis of any of the other three factors. Morley has

[1] In its original opposition to Morley's fee request, the CIA did not contest whether Morley is *eligible* to receive attorney's fees, the other requirement a plaintiff must fulfill to receive an award. *See Morley IV*, 828 F. Supp. 2d at 261 (citing *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1495 (D.C. Cir. 1984)).

now filed a Renewed Motion for an Award of Attorney's Fees and Costs.[2] Pl.'s Mot.

ANALYSIS

FOIA permits a court to "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." 5 U.S.C. § 552(a)(4)(E)(i). The FOIA attorney fee provision was *not* designed as a "reward for any litigant who successfully forces the government to disclose information it wished to withhold." *Nationwide Bldg. Maint., Inc. v. Sampson*, 559 F.2d 704, 711 (D.C.Cir. 1977). Instead, it has "a more limited purpose-to remove the incentive for administrative resistance to disclosure requests based not on the merits of exemption claims, but on the knowledge that many FOIA plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation." *Id.* With this limited purpose in mind, a plaintiff seeking fees must satisfy a two-part inquiry. *See Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1495 (D.C. Cir. 1984). The plaintiff must be both "eligible" for an award, in that

[2] Plaintiff's Unopposed Motion for Leave to File Renewed Motion for Award of Attorney's Fees Out of Time [Dkt. # 134] is granted, as is Plaintiff's Motion for Leave to File Supplemental Memorandum [Dkt. #141].

he has "substantially prevailed,"[3] and "entitled" to an award. *Id.*

A court in this Circuit analyzing whether a plaintiff is "entitled" to a fee award must consider at least the following four factors: "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) whether the government has a reasonable basis for withholding the requested information." *Cotton v. Heyman*, 63 F.3d 1115, 1117 (D.C. Cir. 1995). No single factor is given dispositive weight,[4] and legislative history demonstrates that Congress intended courts to retain "broad discretion when considering a request for attorney fees." *Nationwide Bldg. Maint.*, 559 F.2d at 714.

When it remanded this case to me for reconsideration, our Circuit Court noted its elaboration on the public benefit factor in *Davy v. CIA*, 550 F.3d 1155 (D.C. Cir. 2008), and instructed me "to apply the four-factor standard in a manner consistent with *Davy*." *Morley V*, 719 F.3d at 690. Accordingly, I have reviewed the facts, new briefing, and relevant law in this case, including *Davy*. Further consideration of our Circuit's elaboration on

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[3] In response to plaintiff's renewed motion for fees, the CIA does contest whether plaintiff is eligible. Def. Opp'n at 6-7. For the reasons described herein, I conclude that plaintiff is not entitled to fees, and do not consider the eligibility question.

[4] Of course, "where the government can show that information disclosed after initial resistance was nonetheless exempt from the FOIA a plaintiff should not be awarded attorney fees under section 552(a)(4)(E)." *Nationwide Bldg. Maint.*, 559 F.2d at 712 n.34.

the public benefit factor in *Davy,* however, does not alter my original conclusion that "this litigation has yielded little, if any, public *benefit*-certainly an insufficient amount to support an award of attorney's fees." *Morley IV*, 828 F. Supp. 2d at 262.

A. Public Benefit Factor

Evaluation of the public benefit factor "requires consideration of both the effect of the litigation for which fees are requested and the potential public value of the information sought." *Davy*, 550 F.3d at 1159. Although "[t]he release of any government document benefits the public by increasing citizens' knowledge of their government," Congress did not intend for this vague benefit to entitle a plaintiff to fees. *Fenster v. Brown,* 617 F.2d 740, 744 (D.C. Cir. 1979). Instead, the public benefit factor weighs in plaintiff's favor "where the complainant's victory is likely to add to the fund of information that citizens may use in making vital political choices." *Id.* (internal quotation marks omitted).

When it remanded this case, the Circuit noted that *Davy* "concerned a request for records related to President Kennedy's assassination" and had stated "that records 'about individuals allegedly involved in President Kennedy's assassination[] serve[] a public benefit.'" *Morley V*, 719 F.3d at 690 (quoting *Davy*, 550 F.3d at 1159) (alteration in original). However, the *Davy* court did not make a broad statement that *all* records "about individuals allegedly involved in President Kennedy's assassination" benefit the public. 550 F.3d at 1159. Instead, its conclusion was

a much more limited, case-specific one that *"[t]he information Davy requested-about* individuals allegedly involved in President Kennedy's assassination-serves a public benefit." *Davy*, 550 F.3d at 1159 (emphasis added). The *Davy* Court's description of the documents at issue does not create a category of records that automatically satisfy the first factor based on a plaintiff's claims of a relationship to the assassination. The Court must look deeper.

Indeed, analysis of the public benefit factor is a fact-based and document-specific inquiry that must be undertaken on a case-by-case basis. *See Cotton,* 63 F.3d at 1120 ("The only way to comport with this directive is to evaluate the specific documents at issue in the case at hand."). Although Morley and Davy are similar plaintiffs in that they both sought documents regarding individuals they claimed were related to the Kennedy assassination, the factual circumstances are sufficiently distinct so as to support different conclusions on the public benefit in their respective cases.

In *Davy,* everyone[5] agreed with–or at least did not contest–the fact the released documents provided "important new information bearing on the controversy over former [District Attorney Jim] Garrison's contention that the CIA was involved in the [Kennedy] assassination plot." *Id.* at 1159 (internal quotation marks omitted) (first alteration in original). Here, however, the importance of the

[5] This includes this Court, which had concluded below that "this factor favors the plaintiff." *Davy v. CIA*, 496 F. Supp. 2d 36, 38 (O.D.C. 2007).

new information released as a result of Morley's FOIA request is fiercely contested. *See* Def.'s Opp'n at 8-19.

The information that the CIA released pursuant to Morley's FOIA request can be placed into two broad categories: documents that the CIA previously had transferred to NARA and documents it had not. The CIA agrees that the released records identical to the ones transferred to NARA are "unquestionably assassination-related" and "ordinarily would give rise to public benefit." *Id.* at 10-11. But these documents already were in the public domain and available for consumption at the National Archives. Whether documents are already in the public domain may be irrelevant on the merits of a FOIA request, but that fact can be taken into consideration when evaluating entitlement to attorney's fees. *See Tax Analysts*, 965 F.2d at 1094; *Davy,* 550 F.3d at 1159 (noting that "[a]t least one of the requested documents was not previously available to the public" when finding that the public benefit factor favored plaintiff). Here, the CIA's release to Morley of records identical to those publicly available at the National Archives (with a searchable index online) does not further the public benefit.

Accordingly, Morley emphasizes four records *not* previously publicly available to support his claim that the public benefit factor weighs in his favor. PI.'s Mot. at 24-27. The first two are "travel" documents Morley originally claimed demonstrate that Joannides traveled to New Orleans on two specific dates-April 1, 1964, and May 20, 1964. *Id.* at

24-25; *see* Pl.'s Mot., Attachments 1-2 [Dkt. #135-1; 135-2]; Pl.'s Mot., Morley Decl. ¶¶8-9 [Dkt. 135-9]. This, Morley argued, demonstrates Joannides was performing CIA activities in some way related to the Warren Commission's investigation of the assassination. Pl.'s Mot. at 24-25. In response, the government pointed out, correctly, that although the documents were *signed* on the dates in question, they indicate only that New Orleans was Joannides's "home leave residence" and shed no light on where Joannides was on any particular date. Def. Opp'n at 14; *see* Pl.'s Mot., Attachments 1-2. Morley now argues that the mere fact that Joannides may have been in New Orleans at some point between 1962 and 1964 is new information related to the Kennedy assassination because Lee Harvey Oswald was also in New Orleans during that period. Reply to Def.'s Opp'n at 10-11.

Morley also relies on a photograph and citation relating to the Career Intelligence Medal Joannides received in 1981 after he had retired from the CIA.[6] Pl.'s Mot., Morley Decl. ¶¶10-13; Eighth Decl. of J. Morley, Attachment 2 [Dkt. #119-1]. The citation declares the medal was awarded "in recognition of [Joannides's] exceptional achievement with the Central Intelligence Agency for more than twenty-eight years." Eighth Decl. of J. Morley, Attachment 2. Morley argues that by awarding Joannides a medal for his service over the totality of his career, the CIA is reflecting its "'approval of his

[6] My review of the record does not reveal any filing of the photograph with this Court, only the citation and a record of the ceremony that notes a photographer was present. *See* Eighth Decl. of J. Morley, Attachment 2 [Dkt. #119-1].

conduct as it related to the JFK assassination issues he dealt with'" at particular points during his career. Pl.'s Reply to Def.'s Opp'n at 7 (quoting Eighth Decl. of J. Morley ¶4). Unfortunately for plaintiff, recognition of "overall career performance," Eighth Decl. of J. Morley, Attachment 2, upon retirement does not reflect institutional approval of any specific action an employee undertook during that career.

The CIA does not dispute that these four records convey newly-released information not already in the public domain. But nothing other than pure speculation connects any of it to the Kennedy assassination. What do the new documents Morley points to tell us? Joannides had a home leave residence in the same city where Kennedy's assassin conducted some activities, and the two may-or may not-have been in that city at the same time. Joannides was recognized for a long career of service in the CIA, and the CIA did not condemn him for any particular Kennedy-assassination-related activities in a way that prevented positive recognition for his overall career. That is about it. This information is not "likely to add to the fund of information that citizens may use in making vital political choices." *Fenster*, 617 F.2d at 744 (internal quotation marks omitted).

My evaluation of the significance of this information to the public also takes into consideration the language the *Morley V* Court highlighted from a footnote in *Davy:* "'[P]laintiff's who obtain information that, while arguably not of immediate public interest, nevertheless enables further research ultimately of great value and

interest, such as here the public understanding of a Presidential assassination'" should not be foreclosed from fees. *Morley V*, 719 F.3d at 690 (quoting *Davy*, 550 F.3d at 1162 n.3). I do not interpret the *Davy* Court's footnote as holding that *every* new piece of information released pursuant to a FOIA request benefits the public because it may, someday, in some way, contribute to research on a matter of public import. The public benefit factor requires more than speculation of an unknown potential future benefit. Again, plaintiff here has pointed to nothing in the newly-released information demonstrating an actual relationship to the Kennedy assassination or any other topic of "great value and interest."[7]

In concluding that this litigation has benefited the public only slightly, if at all, I do not pass any judgment on the importance of information regarding Joannides's relationship with Oswald, the Kennedy assassination, or the Warren Commission.

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[7] Morley raises a number of additional arguments as to why the public benefits here, none of which are persuasive. First, he argues that the news media has shown interest in covering the disclosed records. Pl.'s Mot. at 28-30. But he fails to tie that coverage to any of the newly-released documents rather than those that were already available to the public. He also contends that the public learned about documents the CIA continues to withhold. Pl.'s Reply at 12-13. As I stated previously, these documents were withheld properly under FOIA. *See Morley III*, 699 F. Supp. 2d at 252-59. Finally, he argues that this case sets an important precedent by requiring the CIA to search and produce operational records. PI.'s Reply at 13-14. However, "the establishment of a legal right to information [is not] a public benefit for the purpose of awarding attorneys' fees." *Chesapeake Bay Found., Inc. v. Dep't of Agric.*, 108 F.3d 375, 377 (D.C. Cir. 1997) (citing *Cotton*, 63 F.3d at 1120).

I am focused on the particular documents at issue in this case. *See Cotton*, 63 F.3d at 1120. Here, the new documents released to the public shed very little, if any, light on Joannides' s involvement in the events surrounding the Kennedy assassination. Plaintiff has not provided the Court with anything beyond conjecture in arguing their relevance and importance.

B. Four Factor Standard

Our Circuit Court directed me to reevaluate the four factor standard in light of *Davy's* elaboration on the public benefit factor. *Morley V*, 719 F.3d at 690. My analysis of the other factors remains the same.[8] In short, without repeating the analysis here, Morley had "a sufficient private interest in pursuing these records without attorney's fees" (second and third factors) and the "CIA has advanced reasonable legal positions" (fourth factor). *Morley IV*, 828 F. Supp. 2d at 265. When considering all four factors together, any public benefit that may exist from this litigation is insufficient to support an award of attorney's fees, particularly because the fourth factor "weighs strongly in favor of the CIA." *Id*. Plaintiff, therefore, is not entitled to attorney's fees.

CONCLUSION

Thus, for all the foregoing reasons, plaintiff's Renewed Motion for Attorney's Fees and Costs [Dkt.

[8] Indeed, my previous analysis of the second and third factors already directly cites *Davy*. *Morley IV*, 828 F. Supp. 2d at 264.

#135] is DENIED. An appropriate order shall accompany this Memorandum Opinion.

/s/
RICHARD J. LEON
United States District Judge

[ENTERED JULY 23, 2014]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFERSON MORLEY	)
	)
Plaintiff,	)
	)
v.	)
	)
CENTRAL INTELLIGENCE AGENCY,	)
	)
Defendant.	)

Case No. 03-cv-2545 (RJL)

ORDER

For the reasons set forth in the Memorandum Opinion entered this date, it is this 23rd day of July, 2014, hereby

ORDERED that the plaintiff's Renewed Motion for Attorney's Fees and Costs [Dkt. #135] is **DENIED**.

/s/
RICHARD J. LEON
United States District Judge

[ENTERED JUNE 18, 2013]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 25, 2013 Decided June 18, 2013

No. 12-5032

JEFFERSON MORLEY,
APPELLANT

v.

CENTRAL INTELLIGENCE AGENCY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:03-cv-02545)

James H. Lesar argued the cause and filed the briefs for appellant.

Benton Peterson, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Ronald C. Machen Jr.*, U.S. Attorney, and *R. Craig Lawrence*, Assistant U.S. Attorney.

Before: KAVANAUGH, *Circuit Judge*, and EDWARDS and WILLIAMS, *Senior Circuit Judges*.

Opinion for the Court filed PER CURIAM.

Concurring opinion filed by *Circuit Judge* KAVANAUGH.

PER CURIAM: Jefferson Morley submitted a Freedom of Information Act request to the CIA for records related to CIA officer George E. Joannides. Morley believed the records might shed light on the assassination of President John F. Kennedy because Joannides had served as the CIA case officer "in charge of" a Cuban group whose officers had contact with Lee Harvey Oswald in the months before the assassination. After not obtaining documents from the CIA, Morley filed a FOIA suit and as a result subsequently received some documents from the CIA. Morley then sought attorney's fees as a substantially prevailing party. *See* 5 U.S.C. § 552(a)(4)(E)(i). The District Court applied the four-factor standard that this Circuit has set forth for considering a substantially prevailing party's entitlement to attorney's fees in FOIA cases. *See Morley v. CIA*, 828 F. Supp. 2d 257, 261 (D.D.C. 2011). Those four factors are: (1) the public benefit derived from the case, (2) the commercial benefit to the requester, (3) the nature of the requester's interest in the information, and (4) the reasonableness of the agency's conduct. Applying those four factors, the District Court determined that Morley should not receive attorney's fees. *Id.*

This Court recently elaborated on one of those four factors, the public-benefit factor, which looks to the public benefit derived from the plaintiff's FOIA suit. *See Davy v. CIA*, 550 F.3d 1155 (D.C. Cir.

2008). *Davy*, like this case, concerned a request for records related to President Kennedy's assassination. In *Davy*, this Court said that records "about individuals allegedly involved in President Kennedy's assassination[] serve[] a public benefit." *Id.* at 1159. We also noted that the standard for entitlement to attorney's fees does not "disqualify plaintiffs who obtain information that, while arguably not of immediate public interest, nevertheless enables further research ultimately of great value and interest, such as here the public understanding of a Presidential assassination." *Id.* at 1162 n.3. We concluded, moreover, that "a balancing of the factors can only support the conclusion that Davy is entitled to an award of attorney's fees." *Id.* at 1163.

In this case, the District Court did not consider the *Davy* Court's analysis of the public-benefit factor. *See Morley*, 828 F. Supp. 2d at 262-64. We therefore vacate and remand for the District Court to apply the four-factor standard in a manner consistent with *Davy*. We take no position here on whether the District Court should award fees.

So ordered.

KAVANAUGH, *Circuit Judge*, concurring: The Freedom of Information Act provides: "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case . . . in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i). In determining whether a substantially prevailing FOIA plaintiff is entitled to attorney's fees, this Court has long applied a four-factor standard that looks to (1) the public benefit derived from the case, (2) the commercial benefit to the requester, (3) the nature of the requester's interest in the information, and (4) the reasonableness of the agency's conduct. *See Cuneo v. Rumsfeld*, 553 F.2d 1360, 1365 (D.C. Cir. 1977); *see also Nationwide Building Maintenance, Inc. v. Sampson*, 559 F.2d 704, 714 (D.C. Cir. 1977).

We should ditch the four-factor standard. As Judge Randolph has cogently explained, the four factors have no basis in the statutory text. *See Davy v. CIA*, 550 F.3d 1155, 1166 (D.C. Cir. 2008) (Randolph, J., dissenting); *Burka v. HHS*, 142 F.3d 1286, 1293-94 (D.C. Cir. 1998) (Randolph, J., concurring). And Congress's decision not to include the four factors in the statutory text appears to have been deliberate: The four factors were in the original Senate bill addressing FOIA attorney's fees, but the final bill did not include them. To be sure, the factors were mentioned in a Senate committee report, but the Supreme Court recently reiterated – in an eight-Justice opinion by Justice Kagan in a FOIA case – that we should heed the statutory text of FOIA, not committee reports. *See Milner v. Department of the*

Navy, 131 S. Ct. 1259, 1267 (2011). In short, the text of FOIA does not require this four-factor standard.

Rather than mandating a four-factor standard, FOIA grants courts discretion to determine when attorney's fees should be awarded. It is not inappropriate for courts to flesh out that discretion with specific rules or standards that are rational and consistent with the structure and purposes of FOIA. But the four-factor standard adopted by this Court is arbitrary and inconsistent with the structure and purposes of FOIA.

FOIA is an equal-opportunity disclosure statute. For disclosure purposes, FOIA treats all requests and requesters the same – no matter the identity of the requesters, the specific benefit that might be derived from the documents, or the requesters' overt or subtle motives. *See* 5 U.S.C. § 552(a)(3)(A) ("each agency . . . shall make the [requested] records promptly available to *any person*") (emphasis added). With that backdrop, three of the four factors in the four-factor standard for attorney's fee awards make little sense in the FOIA context – namely, the three factors that require evaluation of the public benefit derived from the case, the commercial benefit to the requester, and the nature of the requester's interest. Those three factors incentivize and reward only certain kinds of FOIA requests and requesters, notwithstanding that FOIA deliberately renders the nature of the request and the identity of the requester irrelevant to whether a request should be granted. Those three factors are therefore in tension with the basic structure and purposes of FOIA.

Apart from the three factors' basic incompatibility with FOIA's structure and purposes, the three factors in application generate additional problems. With respect to the first factor, the public benefit from the case, how can courts know whether some disclosures of government documents benefit the public more than others? How does a judge evaluate "public benefit" in a principled way? Doesn't this factor inevitably devolve into what *the judge* subjectively thinks is important, rather than an objective determination? And what about cases where the degree of public benefit may become apparent only years later, after the litigation has ended? After all, information sometimes becomes meaningful only when later pieced together with other information. And more broadly, even if the information is of value only to a small group or segment of the public, why treat those citizens as second class in determining who gets attorney's fees? Put simply, the public-benefit factor is riddled with arbitrariness in addition to contravening the basic equality-of-requester principle embodied in FOIA. *See Burka*, 142 F.3d at 1293-94 (Randolph, J., concurring).

The second and third factors – the commercial benefit to the requester and the nature of the requester's interest – are similarly flawed. Courts have stated that the requester's potential commercial benefit from the information counsels against a fee award. But no business is a bottomless well, and that is especially true of small businesses and individual proprietors. And if attorney's fees are not available, some businesses presumably will not litigate some FOIA disputes that they might

otherwise have litigated. Yet FOIA doesn't prioritize certain kinds of requests or requesters over others. Moreover, the case law has drawn an odd distinction between an ordinary business's commercial interests (which count against an award of fees) and a news organization's commercial interests (which do not count against an award of fees). But one of the broad purposes of FOIA was to enable all citizens to directly access government information without having to rely on filters. So why penalize non-media businesses that directly seek more information about how the government is carrying out its responsibilities? And to add a further complication, who qualifies and doesn't qualify as a news organization today? In short, the second and third factors also rest on arbitrary and ill-considered distinctions. *See Burka*, 142 F.3d at 1293-94 (Randolph, J., concurring).

When taken together, these factors cause even more problems for FOIA plaintiffs and for the courts. The factors are so vague and malleable that they provide very little guidance to district courts. That leads to unpredictable and inconsistent fees results from case to case and judge to judge. And that unpredictability undermines whatever incentive the four-factor standard is supposed to create in the first place for plaintiffs with meritorious FOIA claims. In light of the uncertainty, how can would-be FOIA plaintiffs count on fees even if they have a meritorious claim?

To reiterate, if FOIA *required* courts to consider these four factors, we would have to make the best of it. But FOIA does not so require. The

courts have adopted the factors on our own. In my view, we should stop relying on these atextual factors and stop discriminating against FOIA requesters' fee requests based on a necessarily ill-informed perception of public benefit and an arbitrary assessment of the nature of the requester's interests. *Cf. Sebelius v. Cloer*, No. 12-236, slip op. at 10 (U.S. 2013) (an interpretation of an attorney's fees provision should not be "inconsistent with the goals of the fees provision"); *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139-40 (2005) ("When applying fee-shifting statutes, we have found limits in the large objectives of the relevant Act . . . .") (internal quotation marks omitted).

We can do better. In an appropriate case, I think the Court should jettison the four-factor standard and adopt the rule from *Newman*, where the Supreme Court construed a similarly worded civil rights fees statute and held that prevailing plaintiffs should receive attorney's fees – with only a very narrow exception for "special circumstances" such as bad faith by a prevailing plaintiff. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).[1] A *Newman*-style rule for FOIA fee awards would be clear and predictable, would treat FOIA requests and requesters equally, and would incentivize would-be FOIA plaintiffs with meritorious claims. As a narrower alternative, albeit

[1] Notably, a Senate committee report cited the statute construed in *Newman* as the model for FOIA attorney's fee awards. *See* S. REP. NO. 93-854, at 17-18 (1974). Of course, the same Senate committee report elsewhere listed the four factors. *Cf.* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 36 (1997) (using legislative history can be like picking out your friends at a party).

one not as favorable to FOIA plaintiffs as the *Newman* rule, we could simply continue to use the one factor from the current four-factor standard that makes some sense in the FOIA context: the reasonableness of the agency's conduct. That factor makes some sense because it discourages a federal agency from using its superior administrative and litigation resources to unfairly wear down meritorious FOIA plaintiffs. Under that approach, if the district court were to find that the agency acted unreasonably in withholding documents or otherwise acted unreasonably during the litigation, the district court would award attorney's fees to a substantially prevailing plaintiff. Otherwise, the district court would not award fees.[2]

Either of those two alternatives would be clear, simple, predictable, efficient, and consistent with the overarching structure and purposes of the statute – characteristics that courts should strive for when deciding cases and that are sorely lacking in the current four-factor standard.

It's tempting to think that we should leave well enough alone given that we have applied the four-factor standard since our 1977 decision in *Cuneo*. Two points together convince me that inertia is not the right answer. First, Justice Kagan's majority opinion for the Supreme Court in *Milner* recently rejected a similarly atextual 30-year-old FOIA precedent from this Court. *See* 131 S. Ct. at

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[2] That factor is substantially the same as the standard for attorney's fees under the Equal Access to Justice Act. *See* 28 U.S.C. § 2412(d)(1)(A); *Burka*, 142 F.3d at 1293-94 (Randolph, J., concurring).

1267. The Supreme Court emphatically concluded that it did not matter that this Court had applied a contrary interpretation for three decades. *Id.* at 1268. The obvious lesson to be drawn from *Milner* is that we should not reflexively cling to FOIA decisions that were decided on the basis of legislative history during an era when statutory text was less central to statutory interpretation. Second, and just as important, the four-factor standard causes continuing real-world problems – among other things, drawing arbitrary and unfair distinctions among FOIA requesters and requests, and generating satellite litigation that is wasteful and unnecessary. This case, which is now going back for a second round in the District Court, is a good exhibit of wasteful and unnecessary satellite litigation. Under a *Newman* approach, Morley would already have his fees, and this litigation would have long since concluded.

As a three-judge panel, we of course have to adhere to the four-factor standard set forth in our precedents. Applying that four-factor standard, I accept the Court's decision today to vacate and remand in light of our prior decision in *Davy*. But the en banc Court has the authority to correct mistaken or outdated precedents of three-judge panels. I hope that, at some point, the en banc Court will adopt a more coherent approach, whether it be the *Newman* rule or a rule focused on the reasonableness of the agency's conduct. As stated above, I prefer the *Newman* rule, but either of those two alternatives would be a significant improvement over the current four-factor standard.

[ENTERED JUNE 18, 2013]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5032 **September Term, 2012**
FILED ON: JUNE 18, 2013

JEFFERSON MORLEY,
APPELLANT

v.

CENTRAL INTELLIGENCE AGENCY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:03-cv-02545)

Before: KAVANAUGH, *Circuit Judge*, and EDWARDS and WILLIAMS, *Senior Circuit Judges*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is **ORDERED** and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby vacated and the case is remanded for the District Court to

apply the four-factor standard in a manner consistent with *Davy*, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
/s/
Jennifer M. Clark
Deputy Clerk

Date: June 18, 2013

Opinion Per Curiam
Concurring opinion filed by Circuit Judge Kavanaugh.

[ENTERED DECEMBER 15, 2011]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFERSON MORLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Case No.
	)	03-2545 (RJL)
UNITED STATES CENTRAL	)	
INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION
(December 14th 2011) [#107]

Plaintiff, Jefferson Morley, moves for an award of attorney's fees and costs against the Central Intelligence Agency ("CIA" or "Agency") under 5 U.S.C. § 552(a)(4)(E) of the Freedom of Information Act ("FOIA"). After careful review of this motion, the applicable law, and the entire record herein, plaintiff's motion is DENIED.

BACKGROUND

The facts of Morley's case are detailed in prior opinions of this Court and our Court of Appeals. *See generally Morley v. CIA*, 699 F. Supp. 2d 244 (D.D.C. 2010) ("*Morley II*"); *Morley* v. *CIA*, 453 F. Supp. 2d 137 (D.D.C. 2006) ("*Morley I*"), *aff'd in part*, *rev'd in*

part, 508 F.3d 1108 (D.C. Cir. 2007) ("*Morley*"). Accordingly, I will summarize only those facts that directly bear on Morley's motion for attorney's fees.

Plaintiff is a journalist, author, and news editor who has written about President John F. Kennedy's assassination. *See Morley*, 508 F.3d at 1113. On July 4, 2003, he requested from the CIA, through FOIA, "all records pertaining to CIA operations officer George Efythron Joannides ... including, but not limited to" seventeen specific categories of records. Compi. Ex. 1 ("Morley Letter") 1-3 [Dkt. # 1-1]. Morley's interest in Joannides stems from his belief that the former CIA officer was "uniquely well-positioned to observe and report" on the Kennedy assassination. Morley Letter 3.

The CIA initially responded to Morley's request by directing him to records relating to the Kennedy assassination that the CIA had transferred to the National Archives and Records Administration ("NARA"). *See Morley*, 508 F.3d at 1113. After further review, the CIA reconsidered its position and, in several productions in 2004 and 2005, sent Morley 3 complete documents, 2 documents in segregable form, and 113 redacted documents. *See id.* at 1114.[1]

Based on these document searches and productions, this Court granted summary judgment

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[1] The CIA justified these redactions and its withholding of other material under various FOIA Exemptions including Exemptions 1, 2, 3, 5, 6, 7(C), 7(D), and 7(E). *Id.* It also issued a *Glomar* response, whereby it declined to confirm or deny the existence of certain records requested by Morley. *See id.*

in the Agency's favor. *See Morley I*, 453 F. Supp. 2d at 144-57. On review, our Circuit Court affirmed in part and reversed in part. *See Morley*, 508 F.3d at 1113, 1129. Specifically, the Court of Appeals remanded the case for the CIA to: (1) search its operational files, which it had not done previously, *id.* at 1116-19; (2) search the records it transferred to NARA, *id.* at 1119-20; (3) supplement its explanation regarding certain monthly reports, which Morley believes should have been filed by Joannides, *id.* at 1120-21; (4) provide additional details describing the scope of its search, *id.* at 1121-22; (5) explain to this Court's satisfaction why the withheld information was not segregable, *id.* at 1123; (6) substantiate its *Glomar* response, *id.* at 1126; and (7) provide additional justification for withholding documents under FOIA exemptions 2, 5, and 6, *id.* at 1124-28. Simultaneously, our Circuit affirmed this Court's decision concerning the CIA's use of FOIA to respond to Morley's document request, the adequacy of the CIA's *Vaughn* index, and the CIA's withholding of material under FOIA Exemptions 1,3, and 7(3). *Id.* at 1129.

In response to our Circuit's decision, the CIA in 2008 conducted additional searches and produced additional material to Morley. In particular, on April 28, 2008, the CIA released 113 responsive records from the files it previously transferred to NARA, and on August 6, 2008, another 293 responsive records from the CIA's files. Pl.'s Mem. P&A Supp. Pl.'s Mot. Award Att'y's Fees & Costs ("Pl.'s Mem.") 6 [Dkt. # 107]. The CIA then filed a renewed motion for summary judgment. Def.'s Renewed Mot. Summ. J. [Dkt. #88]. Finding that the CIA conducted adequate

searches and properly justified its withholdings under applicable FOIA exemptions, this Court granted the CIA's motion. *Morley II*, 699 F. Supp. 2d at 258. Morley now moves this Court for an award of attorney's fees and costs. Pl.'s Mot. Award Att'y's Fees & Costs ("Pl.'s Mot.") 1 [Dkt. #107]. The CIA opposes this motion. Def.'s Opp'n Pl.'s Mot. Att'y's Fees & Costs ("Opp'n") [Dkt. #109].

ANALYSIS

A. Legal Standard

Under FOIA, a 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." 5 U.S.C. § 552(a)(4)(E). To obtain this award, a plaintiff must make two separate showings: (1) he is *eligible* for an award of attorney's fees and (2) he is *entitled* to that award. *Weisberg* v. *Us. Dep 't of Justice*, 745 F.2d 1476,1495 (D.C. Cir. 1984).

First, to be eligible for attorney's fees, a plaintiff must have "substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i). Next, and equally necessary, the plaintiff must also show the court that he is entitled to such an award. *Tax Analysts v. U.S. Dep't of Justice*, 965 F.2d 1092, 1093 (D.C. Cir. 1992), *superseded by statute on other grounds*, OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524. In determining whether a FOIA litigant is entitled to fees, a court must consider the following four, nonexhaustive factors: "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) whether the government has a reasonable basis for withholding the requested information." *Cotton v. Heyman*, 63 F.3d 1115, 1117 (D.C. Cir. 1995) (internal citation omitted). But, there is no "presumption in favor of awarding attorney fees" to prevailing FOIA litigants," and "the legislative history of section 552(a)(4)(E) evinces a clear congressional intent to leave the courts' broad discretion when considering a request for attorney fees." *Nationwide Bldg. Maintenance*, *Inc. v. Sampson*, 559 F.2d 704, 713-14 (D.C. Cir. 1977); *see also Tax Analysts*, 965 F.2d at 1094 ("The sifting of those criteria over the facts of a case is a matter of district court discretion .... ") (internal citation omitted).

B. Plaintiff Is Not Entitled to an Award of Attorney's Fees and Costs.

Morley contends that he is both eligible and entitled to an award of attorney's fees under FOIA. PI.'s Mem. 8, 10. The CIA does not contest whether Morley is eligible to receive attorney's fees; instead, the Agency argues that Morley has failed to show that he is *entitled* to attorney's fees under any of the four factors. Opp'n 2. For the following reasons, I agree with the CIA and conclude that Morley is not *entitled* to an award of attorney's fees in this case.[2]

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[2] Because I agree with the CIA that Morley is not entitled to attorney's fees, I need not, and will not, analyze whether Morley is also eligible for an award. Although the CIA does not directly contest Morley's eligibility, the parties are not in agreement on the governing standard for whether a plaintiff has substantially prevailed. Plaintiff contends that, because

1. Public Benefit

The public benefit factor "speaks for an award of attorney's fees when the complainant's victory is likely to add to the fund of information that citizens may use in making vital political choices." *Cotton*, 63 F.3d at 1120 (quoting *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979). Relevant considerations for this factor include the disclosure's "likely degree of dissemination and the public impact that can be expected," *Peter* S. *Herrick's Customs* & *Int'l Trade Newsletter v. U.S. Customs* & *Border Protection*, No. 04-377, 2006 WL 3060012 at *4 (D.D.C. Oct. 26, 2006) (internal citation and quotations omitted), and the extent to which the information is already publically available, *Tax Analysts*, 965 F.2d at 1094. As such, the public benefit should be measured by

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this Court's final ruling followed the enactment of the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, amending 5 U.S.c. § 552(a)(4)(E), that statute applies to this case. PI.'s Mem. 8-10. Under that statute's language, a plaintiff substantially prevails "if the complainant has obtained relief through either-(I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." §552(a)(4)(E)(ii). Defendant states that because Morley filed his case prior to this statute's enactment, this Court may not apply the statute retroactively and is bound to apply *Buckhannon Bd.* & *Care Home*, *Inc. v. W Va. Dep't o/Health* & *Human Res.*, 532 U.S. 598 (2001). Opp'n 7-9. Prior to the OPEN Government Act's enactment, *Buckhannon* controlled attorney's fee eligibility. *Buckhannon* held that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." 532 U.S. at 604 (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)).

the "the specific documents at issue in the case at hand." *Cotton*, 63 F.3d at 1120.

Morley contends that "[a]s an author and journalist, [he] is in the favored class of requesters who 'ordinarily' would be awarded attorney's fees." Pl.'s Mem. 11. And, indeed, Morley requested documents regarding Joannides to gain information about the Kennedy assassination. *Id.* at 11-12; *see also* Morley Letter 3. While the Kennedy assassination is surely a matter of public interest, *see Weisberg*, 543 F.2d at 311, this litigation has yielded little, if any, public *benefit*-certainly an insufficient amount to support an award of attorney's fees.

Here, in response to our Circuit's decision, the CIA in 2008 conducted additional searches and produced to Morley 113 documents from the set of documents previously transferred to NARA ("Kennedy-assassination documents") and 293 documents from the CIA's operational files related to Joannides's personnel records. Pl. 's Mem. 5-6; Opp'n 5-6. Morley appears to claim that the public benefit primarily derives from the Kennedy-assassination documents. *See* Pl.'s Reply Def.'s Opp'n ("Reply") 4-6,8-9 [Dkt. #112-1]; Pl.'s Resp. Def.'s Surreply ("Pl.'s Resp.") 2-5 [Dkt. #119].[3] This litigation did not,

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[3] In his initial motion, Morley did not attempt to show that the specific documents disclosed through this litigation conferred a public benefit. *See* Pl.'s Mem. 11-12. Instead, Morley initially relied only on his own unsupported assertion that "[t]here is no reason why he should be removed from the class of requesters who are ordinarily awarded fees" and the general fact that information related to the Kennedy assassination concerns the public interest. *Id.*

however, lead to the publication of the Kennedy-assassination documents.

Instead, the Kennedy-assassination documents obtained by Morley through this FOIA litigation are *identical* to the documents which were previously released under the President John F. Kennedy Assassination Records Act of 1992 ("JFK Act") to NARA and were already in the public domain. Decl. of D. Nelson ("Nelson Decl.") ¶ 42, Nov. 21, 2008 [Dkt. #89]; PI.'s Reply 9 ("The copies of the CIA records regarding Joannides referred to NARA were released to Morley as official JFK Act Releases with this status and the date of the release noted on the face of the document."). As such, Morley cannot claim that any of this information "add[s] to the fund of information that citizens may use in making vital political choices." *Cotton*, 63 F.3d at 1120.[4] Indeed, Morley admits as much in this case when, referencing a document marked "JFK Act Release," Pl. Ex. 1 [Dkt. # 112-2], he states: "Through Morley's use of this and other CIA materials *he obtained from NARA*, he enriched public understanding of such matters." PI.' s Reply 9 (emphasis added).[5]

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[4] In a declaration filed with his reply brief, Morley claims that "this case has yielded a trove of revelations that have intrigued news editors, JFK scholar [sic], and the reading public." Morley Decl. ¶ 4, July 19,2010 [Dkt. #112-4]. Morley then describes news coverage concerning this litigation, including some articles he authored. *Id.* at 2-4; Pl.'s Reply 4-5. But, he fails to explain how any of this information is distinguishable from that already available at NARA.

[5] Morley cites to several, non-binding cases related to FOIA fee-waivers for the proposition that prior disclosure does not necessarily preclude documents' providing a public benefit.

Morley tries to circumvent this problem by arguing that "NARA normally requires the requester to do the search and imposes exorbitant copying charges." Pl.'s Reply 8. But, Morley's using FOIA to sidestep these copying costs and to compel the CIA to search these records did not exactly further the public benefit. *See Chesapeake Bay Found.*, *Inc. v. Dep't of Agric.*, 108 F.3d 375, 377 (D.C. Cir. 1997) ("[T]hat the Foundation did not have to pay for postage under the [court's order] is hardly a significant public benefit. Nor is the establishment of a legal right to information a public benefit .... "). Indeed, prior to filing this case, "the public had the benefit of access to all or most of this information .... " *Tax Analysts*, 965 F.2d at 1094 (internal citation and quotation omitted). Accordingly, considering that Morley has already himself benefitted by avoiding the copying costs, this Court does not view a further award of attorney's fees as appropriate in this case.

Pl.'s Reply 10-11. Those cases, however, involved disclosures to other FOIA requesters, *see Carney v. U.S. Dep't of Justice*, 19 F.3d 807,815 (2d Cir. 1994); *Schrecker v. Dep't of Justice*, 970 F. Supp. 49, 51 (D.D.C. 1997), and publications in agency's reading rooms, *see Friends of the Coast Fork v. Us. Dep't of Interior*, 110 F.3d 53,55 (9th Cir. 1997); *Fitzgibbon* v. *Agencyfor Int'l Dev.*, 724 F. Supp. 1048, 1051 (D.D.C. 1989). Those limited disclosures are materially distinguishable from the situation here where documents were transferred to a designated place for public review-NARA. *See* President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No.1 02-526, § 4, 106 Stat. 3443-58 ("All assassination records transmitted to the National Archives for disclosure to the public shall be included in the Collection and shall be available to the public for inspection and copying at the National Archives .... ").

Even if the majority of documents Morley received had not been previously public, Morley's claims about the supposed public benefit of the documents produced in this litigation are unconvincing as based on nothing more than his own conclusory opinions and factually inaccurate statements. For instance, Morley claims that his "suit prompted the CIA to acknowledge for the first time that Joannides was acting in an official and deceptive capacity" in his role with the House of Representatives Select Committee on Assassinations. PI.'s Reply 6 (quoting Morley Decl. ¶ 4(b), July 19, 2010). But, the CIA had previously acknowledged this fact when it released records under the JFK Act. Nelson Decl. ¶¶ 16, 59-60. Morley also argues that his lawsuit forced the CIA to disclose that Joannides received a "medal for his work in 1963 and 1978," Pl.'s Reply 7; Pl.'s Resp. 5-6; Morley Decl. ¶ 4(c), July 19, 2010. But, Morley overstates this medal's importance to his case as in fact this was a "Career Intelligence Medal" awarded for Joannides's 28 years of service from *1950 to* 1978. Morley Decl., Oct. 24, 2010, Attach. 2 [Dkt. # 119-1].[6] Finally, Morley makes one more argument, which actually undermines his claim that this case has conferred a public benefit.

Morley claims that this Court should award attorney's fees based on documents *withheld* by the

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[6] Morley makes a similarly unfounded claim that Joannides's traveling to New Orleans twice during the same period that Warren Commission investigators were conducting interviews in New Orleans is "unquestionably new information of interest to scholars of the assassination and to the general public." Pl.'s Resp. 4 (quoting Morley Decl. ¶ 2, Oct. 24, 2010 [Dkt. # 119-1]).

CIA. *See* Pl.'s Reply 7 ("[T]he lawsuit has made it clear that the CIA retains a significant body of JFK assassination-related records that it has not reviewed and released as mandated by the JFK Records Act."); Pl.'s Resp. 4-5. But those documents were properly withheld under FOIA, *see Morley IL* 699 F. Supp. 2d at 252-59, and therefore, his argument must fail. Even so, the CIA has stated that most of these records are completely unrelated to the Kennedy assassination. *See* Nelson Decl. ¶ 55.[7] Accordingly, the public benefit factor weighs strongly in the CIA's favor.

2. Plaintiff's Commercial Benefit and the Nature of Plaintiff's Interest

The second and third factors, the plaintiff's commercial benefit and the nature of plaintiff's interest, "are closely related and often considered together." *Tax Analysts*, 965 F.2d at 1095. As our Circuit Court instructed in *Davy v. CIA*, 550 F.3d. 1155 (D.C. Cir. 2008), these factors are intended to assess whether a plaintiff has "sufficient private

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[7] Morley, nevertheless, maintains that these records are related to the Kennedy assassination and should have been released under the JFK Act. In his Response to the Defendant's Surreply, Morley, referencing the 295 documents withheld by the CIA under FOIA, states: "according to Judge John Tunheim, they meet the *legal criteria* of JFK-assassination-related records." Pl.'s Resp. 5 (emphasis added). Morley apparently bases this statement on a quote in a newspaper article, from Judge Tunheim, the former chairman of the Assassination Records Review Board, in which Judge Tunheim states: "This material should be released." *See* Scott Shane, *C.I.A. Is Still Cagey About Oswald Mystery*, N.Y. Times, Oct. 17,2009. This Court finds Morley's argument to be not only unpersuasive, but also misguided.

incentive to seek disclosure" recognizing that "many FOIA plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation." *Id.* at 1158, 1160 (internal citations and quotations omitted). But, "when a litigant seeks disclosure for a commercial benefit or out of personal motives, an award of attorney's fees is generally inappropriate." *Tax Analysts*, 965 F.2d at 1095. (internal citations and quotations omitted).

Morley asserts that these factors favor a fee award because (1) any commercial benefit he received should not disquality him from an award because he "belongs to the category of requesters favored to receive both fee waivers and attorney's fees" and (2) his interest "fits in the scholarly-journalistic category." Pl.'s Mem. 13-17. Morley admits that he received "minimal" compensation for writing news articles about this matter but has "no book contract." Morley Decl. ¶ 6, July 19, 2010. But, Morley claims that he is "interested in historical truth." *Id.* ¶ 7. Although Morley is correct, to the extent that these points by themselves would not preclude him from receiving attorney's fees, it certainly cannot be said that Morley's whole purpose was "to increase the public fund of knowledge about a matter of public concern." *Davy*, 550 F.3d at 1162.

Rather, as the CIA correctly points out, Morley had an interest in obtaining the NARA records "from the CIA at little or no charge under FOIA" to avoid expending his own time and money to obtain the documents from NARA. Opp'n 16; *cf* Pl.'s Reply 8 ("NARA normally requires the

requester to do the search and imposes exorbitant copying charges."). I find, therefore, that these two factors indicate that Morley has a sufficient private interest in pursuing these records without attorney's fees. *See* 550 F.3d at 1160.

3. Reasonableness of CIA's Original Withholding

Because the CIA has advanced reasonable legal positions, this Court concludes that the fourth factor also weighs against an award of attorney's fees. The final factor considers whether the government had a reasonable or colorable basis for withholding documents and whether the government was recalcitrant or obdurate in opposing a valid claim. *Id.* at 1162. Although none of the factors is solely dispositive, the "failure to satisfy the fourth element ... may foreclose a claim for attorney's fees or costs." *Mayadak v. U.S. Dep't of Justice*, 579 F. Supp. 2d 105, 108-09 (D.D.C. 2008) (internal citations and quotations omitted).

Morley contends that the CIA engaged in "dilatory tactics" in its initial response to Morley's FOIA request and then continued with "delaying tactics" by asserting its *Glomar* response and litigating whether its operational records were exempt from FOIA. Pl.'s Mem. 16-17; Pl.'s Reply 15-18. I disagree.

The CIA has not only relied on reasonable legal interpretations but also acted reasonably throughout this case. First, in response to Morley's FOIA request letter seeking materials to "shed new

light on the assassination of President Kennedy," Morley Letter 3, the CIA directed Morley to the logical repository of such records-NARA. Second, the CIA was certainly reasonable in its assertion of a *Glomar* response concerning Joannides's participation in covert operations: after the CIA expanded its explanation for making the *Glomar* response at our Circuit Court's instruction, this Court found that explanation adequate. *Morley II*, 699 F. Supp. 2d at 257-58. Further, the CIA had a reasonable legal basis for initially contesting Morley's request to search its operational files. Although our Circuit eventually ruled against the CIA on this point, the court noted that the CIA relied on the "only opinion by a circuit court of appeals" to address the relevant FOIA exemption under the CIA Act, 50 U.S.C. § 431. *Morley*, 508 F.3d at 1118. Finally, there is no indication in the record that the CIA has engaged in any recalcitrant or obdurate behavior. *Cf Davy*, 550 F.3d at 1163 (holding that fourth factor weighed against agency where agency took more than one year to process documents and provided no legal basis in response to a second FOIA request). In sum, this factor also weighs strongly in favor of the CIA.

CONCLUSION

For all these reasons, the Court concludes that the plaintiff is not entitled to attorney's fees.[8] Thus, plaintiff's motion must, and will be, DENIED. An

[8] Because Morley is not entitled to fees, there is no need for this Court to assess whether Morley's attorney's fee request is reasonable.

appropriate Order will issue with this Memorandum herewith.

/s/
RICHARD J. LEON
United States District Judge

[ENTERED DECEMBER 15, 2011]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFERSON MORLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Case No.**
	)	**03-2545 (RJL)**
UNITED STATES CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	

ORDER

For the reasons set forth in the Memorandum Opinion entered this 14th day of December, 2011, it is hereby

ORDERED that plaintiff's Motion for an Award of Attorney's Fees and Costs [Dkt. # 107] is **DENIED.**

SO ORDERED.

/s/
RICHARD J. LEON
United States District Judge

[ENTERED APRIL 6, 2016]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5230 **September Term, 2015**

1:03-cv-02545-RJL
Filed On: April 6, 2016

Jefferson Morley,

Appellant

v.

Central Intelligence Agency,

Appellee

BEFORE: Srinivasan, Circuit Judge; Williams and Ginsburg, Senior Circuit Judges

O R D E R

Upon consideration of appellant's petition for panel rehearing filed on March 28, 2016, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk