**SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA**
**Civil Division**

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| **PRISON LEGAL NEWS,** | ) | |
| | ) | |
| **Plaintiff,** | ) | **Case No. 2008 CA 004598** |
| | ) | **Judge Michael Rankin** |
| **v.** | ) | **Calendar No. 7** |
| | ) | |
| **THE DISTRICT OF COLUMBIA,** | ) | |
| | ) | |
| **Defendant.** | ) | |
| | ) | |

**ORDER GRANTING PLAINTIFF'S MOTION FOR FEES AND COSTS**

Plaintiff, Prison Legal News ("PLN"), initially filed this action on June 25, 2008, seeking an injunction to compel the District of Columbia to "provide full and complete responses" to a document request made pursuant to the District of Columbia Freedom of Information Act ("D.C. FOIA") on January 7, 2008. *Complaint* at 1 (Jun. 25, 2008). PLN also sought a "waiver of any fees associated with the request" and production of the documents "in electronic format where available. . . ." *Id.* at 2. In lieu of an answer, the Office of the Attorney General for the District of Columbia ("OAG") filed a motion to dismiss, or in the alternative, for summary judgment, "because the Defendant has made the requested documents available to Plaintiff." *Defendant's Motion to Dismiss* at 1 (Sept. 2, 2008). Ultimately, the plaintiff "succeeded in obtaining over 600 responsive documents from the District." *Plaintiff's Report* at 2 (Jan. 13, 2011). This matter is now before the court on the plaintiff's motion for fees and costs. Upon consideration of the motion, the opposition thereto, and the entire record herein, the motion for fees and costs is granted.

## I. Plaintiff is Eligible for Fees and Costs

Under the D.C. FOIA, a court may award reasonable attorneys fees and other costs of litigation to "a person seeking the right to inspect or to receive a copy of a public record [who] prevails in whole or in part in such suit." D.C. Code § 2-537(c) (2001). Here, the key determination is whether the plaintiff prevailed "in whole or in part" in the instant litigation. *Id.* A plaintiff "cannot be considered to have prevailed unless [the plaintiff] can show a causal nexus . . . between the action [brought in court] and the agency's surrender of the information." *McReady v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 618 A.2d 609, 616 (D.C. 1992) (citing *Cox v. U.S. Dep't of Justice*, 601 F.2d 1, 6 (D.C. Cir. 1979) (citations and quotations omitted)). For the reasons stated below, the plaintiff has shown the necessary causal nexus and has prevailed within the meaning of the D.C. FOIA.

PLN has shown a causal nexus between bringing this suit and the defendant's search for and production of responsive records. On February 13, 2008, Special Counsel and FOIA officer Thorn Pozen responded to PLN's FOIA request. In his letter, Pozen wrote, "I have engaged District staff in a diligent and thorough search of all relevant records [and] we are prepared to make the underlying documents responsive to your request—that are still in our office and which we have determined to be non-privileged and otherwise releasable under the District's FOIA statute—available to you for your inspection at our office." *Memorandum of Points & Authorities in Support of Defendant's Motion to Dismiss* at Exhibit I (Sept. 2, 2008). The letter also stated that "[d]ue to the overwhelming volume of documents on which the attached report is based . . . we are not in a position to provide [PLN] with copies of all the underlying documents you have requested." *Id.* On March 4, 2008, Pozen stated again that the OAG was prepared at

that time to produce documents in its offices.[1] On March 25, 2008, PLN appealed the OAG's denial of its fee waiver and electronic format requests. PLN did not receive a determination from the Mayor's Correspondence Unit within the time limits provided by section 2-537(a) of the D.C. FOIA.[2] The plaintiff was thereby entitled to initiate this lawsuit.

The defendant leads the court to believe that, as of February 13, 2008, it had conducted a thorough search of all relevant records and identified those that were responsive to PLN's request. The defendant also avers that, at that time, it was prepared to produce these documents at the OAG's offices for inspection and copying by PLN. However, the record makes clear that the defendant had not identified all responsive documents prior to the initiation of this litigation; in fact, the defendant had not located and delivered all responsive documents until, at earliest, September 30, 2010. *Plaintiff's Report* at 2 (Jan. 13, 2011); *Joint Status Report* at 1 (Dec. 8, 2010). The defendant was so excessively dilatory in the performance of its duties under the D.C. FOIA that the court issued multiple orders to compel delivery of responsive documents by specified dates. *See Order* entered July 13, 2009;[3] *Order* entered Aug. 18, 2009;[4] *Order* entered

[1] ("[T]he OAG is prepared to make available to you at our office for inspection and copying all the responsive and non-privileged documents you seek . . . in the past, some requestors have made arrangements to bring with them their own copy machines. If you would like to do that, and make your own copies on your own machine, you would not incur any copying charges."). *Memorandum of Points & Authorities in Support of Defendant's Motion to Dismiss* at Exhibit III (Sept. 2, 2008).

[2] DC Code § 2-537(a)(1) provides, "If the Mayor denies the petition or does not make a determination within the time limits provided in this subsection, or if a person is deemed to have exhausted his or her administrative remedies pursuant to subsection (e) of § 2-532, the person seeking disclosure may institute proceedings for injunctive or declaratory relief in the Superior Court for the District of Columbia."

[3] The July 13, 2009 order mandated the following: "By August 11, 2009: identified those cases that are in the Office of Attorney General; For those that are not in the OAG, start ordering the files from Suitland; Produced those documents from files in OAG by making them available for inspection and copying; By September 11, 2009: completed the request of all Suitland files and begun production for inspection and copying of those documents in files that have been delivered from Suitland."

[4] The August 18, 2009 order stated, *inter alia*, "This is the LAST extension. As to those documents already identified, they must be housed in a spot for plaintiff to review after all the materials are collected and identified. Of course, if defendant only gives two days on dates specific for inspection and has not yet produced all records, it results in multiple trips for plaintiff and added expense. This is not acceptable or authorized under FOIA. The materials are long overdue."

Sept. 3, 2009.[5] The defendant's delay in performing an effective search, producing responsive documents, and complying with court imposed deadlines cannot be characterized as an "unavoidable delay accompanied by due diligence." *Defendant's Opposition* at 9 (July 25, 2011). Because these facts demonstrate a "causal nexus . . . between the action [brought in court] and the agency's surrender of the information," the plaintiff has prevailed within the meaning of the D.C. FOIA. *McReady*, 618 A.2d at 616 (citations omitted).

## II. Plaintiff Should be Awarded Fees and Costs

Having determined that the plaintiff prevailed in the underlying litigation, the court now considers whether fees and costs should be awarded to the plaintiff. It is well-settled in this jurisdiction that "courts must follow the plain and ordinary meaning of the statute because that is the meaning the legislature intended." *Donahue v. Thomas*, 618 A.2d 601, 607 (D.C. 1992) (citing *Guerra v. District of Columbia Rental Hous. Comm'n*, 501 A.2d 786, 789 (D.C. 1985)). Section 2-537(c) of the D.C. FOIA provides, "if a person seeking the right to inspect or to receive a copy of a public record prevails in whole or in part in such suit, he or she *may* be awarded reasonable attorney fees and other costs of litigation." (emphasis added). The plain language of the D.C. FOIA's fee provision does not require the court to analyze any particular factors or criteria before making an award. Rather, the use of "*may*" indicates that the Council's intent was to empower the court to award attorneys fees and costs at its discretion.

[5] The September 3, 2009 order required, *inter alia*, that "[b]y September 18, 2009, Defendant shall deliver to Plaintiff's counsel's office in Washington, D.C., the redacted documents thus far identified in those cases that are in the Office of Attorney General that are responsive to the amended FOIA request for plaintiff to inspect and copy; Defendant shall continue to search and redact the remaining documents in OAG that are responsive as well as those delivered from Suitland and shall continue to order those from Suitland that are in need of ordering; By October 23, 2009, Plaintiff shall return to the OAG the original documents delivered to them on September 18, 2009, and Plaintiff shall have thirty days to review and copy any subsequent submissions delivered to Plaintiff's counsel's office."

The court also finds it appropriate to consider the appropriate weight to give to interpretations of the parallel federal FOIA statute. This jurisdiction follows the rule that "when a local law is borrowed from a federal statute, it is presumed that judicial construction of the federal statute is borrowed as well." *McReady*, 618 A.2d at 615 (citing *Hughes v. District of Columbia Dep't of Employment Sec.*, 498 A.2d 567, 571 n.8 (D.C. 1985)). Further, where the provisions of a statute enacted by the Council of the District of Columbia ("Council") are "substantially adopted" from a federal statute, only the "known and settled judicial interpretations of that statute" are presumed to have been adopted. *McReady*, 618 A.2d at 615 (citing *Hartford Accident & Indem. Co. v. Hoage*, 85 F.2d 411, 413 (D.C. 1936); *Hughes*, 498 A.2d at 571 n.8). However, the Council will not be held to have borrowed the federal interpretation unless there is "some degree of likelihood that the Council was, in fact, aware of the judicial interpretation in question." *McReady*, 618 A.2d at 615 (citing *Office of People's Counsel v. Pub. Service Comm'n*, 477 A.2d 1079, 1091 (D.C. 1984)).

The D.C. FOIA was adopted and signed into law in 1976, before the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") decided *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977), the first case interpreting the federal FOIA's fee provision.[6] In *Cuneo*, the court held that "Congress did not intend the award of attorney fees to be automatic. Instead, the trial court must weigh the facts of each case against the criteria of the existing body of law on the award of attorney fees and then exercise its discretion in determining whether an award is appropriate." *Id.* at 1367. In its analysis, the D.C. Circuit recognized that the Senate version of the federal FOIA's fee provision had contained four factors for a court to consider

[6] "[T]he Council adopted the D.C. FOIA after first and second readings in September and October of 1976, and the provision was signed into law on November 19, 1976." *McReady*, 618 A.2d at 615 (citing D.C. Code § 1-1521 (1992 Repl.) (legislative history of Law 1-96)). The D.C. FOIA ultimately became effective on March 29, 1977. *Id.* The *Cuneo* decision was in March 24, 1977. *Cuneo*, 553 F.2d 1360.

when determining entitlement to a fee award. These criteria were eliminated from the final version of the federal FOIA because "the existing body of law . . . [already] recognized such factors" and they would be "too delimiting and . . . unnecessary." *Id.* at 1364. Because the *Cuneo* analysis regarding awards of fees and costs under the federal FOIA was not a "known and settled judicial interpretation" when the Council enacted the D.C. FOIA, it cannot be considered to have been adopted by the Council. *McReady*, 618 A.2d at 615.

While interpretations of the federal FOIA's fee provisions are not binding on this court, "case law interpreting federal FOIA is instructive authority in this jurisdiction." *Donahue*, 618 A.2d at 606 (citing *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521 n.5 (D.C. 1989)). In light of the absence of D.C. Court of Appeals decisions interpreting the D.C. FOIA's fee provision, and the similarities between the federal and local fee provisions, the court finds useful guidance in federal FOIA caselaw. The four factors recognized by the existing body of federal law are: (1) the public benefit derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding had a reasonable basis in law. *Tax Analysts v. U.S. Dep't of Justice*, 965 F.2d 1092, 1093 (D.C. Cir. 1992); *Cuneo*, 553 F.2d at 1364–66*Id.* Therefore, in the present matter, the court has determined that a fee award is appropriate after weighing these four factors.

**1. Public Benefit Derived from the Case**

The first factor weighs in favor of an award of attorneys fees and costs to the plaintiff because the production of the records will result in a public benefit for the residents of the District of Columbia. This 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 v. Central Intelligence Agency*, 550 F.3d 1155, 1159 (D.C. Cir. 2008) (citations omitted). A fee award is favored under this factor when "the complainant's victory is likely to add to the fund of information that citizens may use in making vital political choices." *Davy*, 550 F.3d at 1167 (Randolph, J., dissenting) (citing *Cotton v. Heyman*, 63 F.3d 1115, 1120 (D.C. Cir. 1995)).

The effect of this litigation was the defendant's production of "over 600 responsive documents." *Plaintiff's Report* at 2 (Jan. 13, 2011). These documents included, "the initial claim or complaint and the verdict sheet, settlement and/or general release filed in each case where the Department of Corrections paid more than $1,000.00 in damages, attorney fees or sanctions from January 1, 2000 to December 31, 2007." *Plaintiff's Statement of Material Facts* at ¶ 8. These records present a potentially significant public value because they contain information that details expenditures of public monies by the District of Columbia Department of Corrections ("DoC") for "damages, attorney fees or sanctions." *Id.* PLN avers that it will be able to use its editorial skills, as "a representative of the news media,"[7] to synthesize and analyze these documents, and then publish articles in both printed format and online. Dissemination of this information in a medium that is accessible by and comprehensible to District residents will "add to the fund of information that citizens may use in making vital political choices." *Davy*, 550 F.3d at 1167. By increasing public awareness of conditions and promoting transparency in the DoC's operation, the public will be better equipped to determine whether the DoC is effectively carrying out its stated mission and may hold this public agency

[7] "A representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *Tax Analysts*, 965 F.2d at 1095 (citing *National Security Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989)).

accountable through the political process if it is not.[8] Accordingly, this factor weighs in favor of granting the plaintiff attorneys fees and costs under the D.C. FOIA.

**2. Commercial Benefit to the Complainant**

The second factor also weighs in plaintiff's favor because PLN is a § 501(c)(3) non-profit organization. The plaintiff is organized under the laws of the state of Washington as a news journal, for the purpose of reporting on litigation involving detention facilities. There are no foreseeable profits forthcoming from the receipt of the documents in this case, beyond those which may be necessary for the continued operation of PLN's organization. The structure and nature of plaintiff's organization, as well as the content of its request, makes clear that this litigation was not driven by a motive to obtain a commercial advantage. Accordingly, this factor weighs in favor of granting the plaintiff attorneys fees and costs under the D.C. FOIA.

**3. Nature of the Complainant's Interest in the Records Sought**

The third factor also weighs in plaintiff's favor because PLN's interest in the records stems purely from its status as a "representative of the news media." "'[N]ews interests should not be considered commercial interests,' [and] 'a court would generally award fees if the complainant's interest in the information was . . . journalistic.'" *Tax Analysts*, 965 F.2d at 1096 (citations omitted). However, this does not "render[] irrelevant the news organization's other interests in the information." *Id.* Here, the defendant has provided no plausible reason for the court to suspect that the plaintiff has anything but a journalistic interest in the records. By all accounts, plaintiff's only interest in the documents is goes toward providing information to its

[8] "The mission of the Department of Corrections (DOC) is to provide a safe, secure, orderly, and humane environment for the confinement of pretrial detainees and sentenced inmates, while affording those in custody meaningful rehabilitative opportunities that will assist them to constructively re-integrate into the community." Department of Corrections About DOC, http://www.doc.dc.gov (last visited Nov. 18, 2011).

about litigation involving the DoC. Accordingly, this factor weighs in favor of granting the plaintiff attorneys fees and costs under the D.C. FOIA.

**4. Whether the Government's Withholding had a Reasonable Basis in Law**

The final factor also weighs in favor of an award of attorneys fees and costs in this matter because the defendant did not have a reasonable basis in law for its delayed compliance. The defendant argues that the *Chesapeake Bay Foundation v. United States Department of Agriculture*, 11 F.3d 211 (D.C. Cir. 1993), standard applies. In *Chesapeake*, the D.C. Circuit held that the defendant needs only "a colorable basis in law" for this factor to be considered, and "[i]f the Government's position is correct as a matter of law, that will be dispositive." *Chesapeake*, 11 F.3d at 216. The defendant fails on this factor even if the court were to apply this test because the defendant is in clear violation of D.C. FOIA sections 2-532(c)[9] and (d).[10] Further, the defendant also fails under the *Cuneo* explanation of this factor, which states, "the reasonableness of the government's opposition does not preclude a recovery of costs and attorney fees. It is but one aspect of the decision left to the discretion of the trial court." *Cuneo*, 553 F.2d at 1365. The defendant did not assert a right to withhold the documents pursuant to a D.C. FOIA exemption. Instead, the defendant asserts that it was willing to make the documents available to the plaintiff at all times, and only objected to producing the documents in electronic format and waiving copying charges. However, the defendant functionally withheld the documents from PLN by its ineffectual and protracted searches for and production of responsive records. The defendant's delayed responses to the plaintiff's lawful request had no reasonable

[9] "A public body, upon request reasonably describing any public record, shall within 15 days . . . make the requested public record accessible or notify the person making such request of its determination not to make the requested public record or nay part thereof accessible and the reasons therefor." D.C. Code § 2-532(c) (2001).
[10] D.C. Code § 2-532(d) states in pertinent part, "In unusual circumstances, the time limit prescribed in subsection (c) of this section may be extended by written notice to the person making such request setting forth the reasons for extension and expected date for determination. Such extension will not exceed 10 days . . . ."

basis in law. Accordingly, the final factor also weighs in favor of granting the plaintiff attorneys fees and costs under the D.C. FOIA.

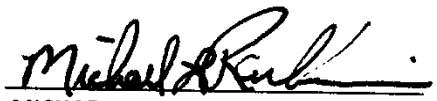
## III. Conclusion

The plaintiff is eligible for an award of attorneys fees and costs because it has prevailed within the meaning of D.C. Code section 2-537(c). Further, the court finds that the plaintiff should receive an award of fees and costs because the four factor analysis weighs in its favor. In determining the amount of the fees and costs award, the court opted against applying the Laffey Matrix. Having considered the arguments of both sides, the court has exercised its discretion and determined that a reasonable fee for the legal services provided is $75,000 (seventy-five thousand dollars). In addition, the court awards the plaintiff an additional $290 (two-hundred and ninety dollars) for costs incurred. Accordingly, it is on this 1st day of December, 2011, by the Superior Court of the District of Columbia, hereby

**ORDERED,** that plaintiff's motion for fees and costs is **GRANTED**; and it is further

**ORDERED,** that defendant pay plaintiff's fees and costs in the amount of $75,290.00 (seventy-five thousand two hundred and ninety dollars).

**SO ORDERED.**



MICHAEL L. RANKIN, Associate Judge

December 1, 2011

Copies to:
Carl Messineo
Mara Verheyden-Hilliard
Radhika Miller
617 Florida Avenue, NW
Washington, DC 20001

Juliane T. DeMarco
Erica McKinley
441 Fourth Street, NW, Suite 650
Washington, DC 20001