

D.C. Circuit Prescribes a “Double Dose of Deference” for Reviewing Decisions on FOIA Attorney’s Fees

By Max Mishkin

On July 9, 2018, a divided D.C. Circuit panel issued the latest ruling in a fifteen-year odyssey of FOIA litigation, affirming the district court’s decision not to award attorney’s fees to a journalist who sought records from the CIA related to the assassination of President Kennedy. [Morley v. CIA \(Morley XI\)](#), 2018 WL 3351383 (D.C. Cir. July 9, 2018) (per curiam).

Background

In July 2003, author and editor Jefferson Morley submitted a FOIA request to the CIA seeking records related to George Joannides, a former CIA officer who served as the agency’s liaison to the House Select Committee on Assassinations. The CIA referred Morley to the records that it had transferred to the National Archives pursuant to the President John F. Kennedy Assassination Records Collection Act of 1992 (“JFK Act”). Morley filed suit in response, after which the CIA produced documents that had not been transferred, issued a *Glomar* response as to certain records, and withheld other material as classified. Morley filed a new complaint challenging those withholdings and the adequacy of the agency’s search.

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The district court granted summary judgment for the CIA, *Morley v. CIA (Morley I)*, 453 F. Supp. 2d 137 (D.D.C. 2006), and the D.C. Circuit affirmed in part and reversed in part, *Morley v. CIA (Morley II)*, 508 F.3d 1108 (D.C. Cir. 2007). The CIA then released hundreds of additional records to Morley, and the district court thereafter granted the CIA’s renewed summary judgment motion. *Morley v. CIA (Morley III)*, 699 F. Supp. 2d 244 (D.D.C. 2010). Following that decision, Morley sought an award of attorney’s fees and costs, which the district court denied. *Morley v. CIA (Morley IV)*, 828 F. Supp. 2d 257 (D.D.C. 2011). The D.C. Circuit affirmed the district court’s summary judgment decision in part and reversed in part, *Morley v. CIA (Morley V)*, 466 F. App’x 1 (D.C. Cir. 2012), and the district court subsequently dismissed the case as moot. *Morley v. CIA (Morley VI)*, 2013 WL 140245 (D.D.C. Jan. 9, 2013).

The D.C. Circuit vacated the district court’s fees decision, *Morley v. CIA (Morley VII)*, 719 F.3d 689 (D.C. Cir. 2013) (per curiam), and on remand the district court once more denied fees, *Morley v. CIA (Morley VIII)*, 59 F. Supp. 3d 151, 153-54 (D.D.C. 2014). That, too, was vacated. *Morley v. CIA (Morley IX)*, 810 F.3d 841, 842 (D.C. Cir. 2016). On remand, the

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district court yet again denied Morley’s request for fees, which by then amounted to more than \$700,000. *Morley v. CIA (Morley X)*, 245 F. Supp. 3d 74 (D.D.C. 2017). Morley appealed.

The D.C. Circuit’s Decision

The majority opinion – issued *per curiam* by Judges Kavanaugh and Katsas – explained that the “sole question” after fifteen years of litigation was whether Morley was entitled to an award of attorney’s fees and costs. (Eagle-eyed court watchers spotted that while the D.C. Circuit typically releases published opinions on Tuesdays and Fridays, *Morley XI* was issued on the afternoon of Monday, July 9, 2018, hours before Judge Kavanaugh was nominated to the Supreme Court.)

FOIA provides that 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)(i). In the D.C. Circuit, this discretionary award turns on four factors: “(i) the public benefit from the case; (ii) the commercial benefit to the plaintiff; (iii) the nature of the plaintiff’s interest in the records; and (iv) the reasonableness of the agency’s withholding of the requested documents.”

The court noted that it will review for abuse of discretion both the district court’s analysis of each factor and the district court’s balancing of those factors, writing that “when the four factors point in different directions, the district court has very broad discretion in deciding how to balance those factors and whether to award attorney’s fees,” and thus “if the four factors point in different directions, assuming no abuse of discretion in the district court’s analysis of the individual factors, it will be the rare case when we can reverse a district court’s balancing of the four factors and its ultimate decision to award or deny attorney’s fees.”

The district court found in *Morley X* that factors one, two, and three favored Morley, but that factor four favored the CIA. The D.C. Circuit noted that, on appeal, factor four analyses should receive “a double dose of deference,” or “[d]eference piled on deference,” because the appellate court must decide “whether the District Court *reasonably* (even if incorrectly) concluded that the agency *reasonably* (even if incorrectly) withheld documents.”

The court then addressed Morley’s arguments for why the CIA acted unreasonably in responding to his request. Of particular note, the court held that while the CIA failed to respond to the request within 20 days as required by statute, “that is true of a vast number of FOIA requests,” and “some delay past the 20-day mark is not necessarily so unreasonable in and of itself as to *require* an award of attorney’s fees to an ultimately prevailing plaintiff.” Moreover, although *Morley II* rejected the CIA’s interpretation of the statute exempting from disclosure

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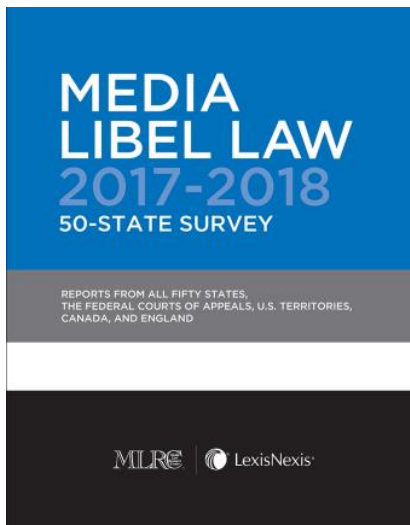
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“operational files,” the D.C. Circuit held that the CIA had reasonably relied on “the only opinion by a circuit court of appeals to address the relevant provision.”

Next, the D.C. Circuit affirmed the district court’s weighing of the four factors in deciding not to award fees. The court advised that “[t]here are many reasonable approaches a district court might take in balancing the factors, and it is difficult for an appellate court—with our deferential standard of review—to second-guess that balancing.” The D.C. Circuit opined that, under its deferential standard, it would have affirmed even if the district court had decided that a fee award *was* justified.

In dissent, Judge Henderson observed that “[b]ut for the district court’s repeated misapplication of FOIA precedent, this case could have ended as early as 2006,” and wrote that her “colleagues pile their deference far too high.” Judge Henderson argued that “the CIA’s decision to refer Morley to [the National Archives] instead of producing any documents” was “entirely unreasonable” in the face of the Supreme Court’s decision in *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), as well as a “common-sense interpretation of the JFK Act.” Judge Henderson concluded that the district court “erred in evaluating each of the four factors individually and abused its discretion in weighing them against one another.”

Max Mishkin is an associate at Ballard Spahr in Washington, D.C. Plaintiff/Appellant Morley was represented by James H. Lesar of Silver Spring, Maryland.



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