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FEATURE

Getting Laffey Out of Court: Rethinking the Calculation of Reasonable Attorney Fees in FOIA Cases

By Margaret N. Strouse

When it works as intended, the Freedom of Information Act's (FOIA) fee-shifting provision both deters federal agencies from unlawfully withholding records and helps financially challenged requestors contest withholdings in court.[1] But in federal courts in the District of Columbia, where any FOIA lawsuit may be brought and where a large portion of such suits are litigated, courts frequently undermine that goal by awarding fees, *not* based on the hourly rates plaintiffs' attorneys charged their clients, but by relying instead on outdated and insufficient benchmarks published by the U.S. Attorney's Office—the very office charged with defending federal agencies in these cases. This table of purportedly reasonable hourly rates, called the "USAO Matrix" or "*Laffey* Matrix," and its slightly more reasonable but still problematic cousin the "LSI *Laffey* Matrix," should be retired in favor of fee awards based on rates that willing plaintiffs agree to pay their lawyers. Until the D.C. Circuit does so, however, there are a number of strategies FOIA plaintiffs' counsel can pursue to obtain more equitable fee awards.

I. Hourly Fee Matrices Fail FOIA's Fee-Shifting Policy

> "What defendant neglects to acknowledge, however, is that plaintiffs' fees reached this sum because of defendant's unyielding opposition at each and every stage of this case—including plaintiffs' request for fees. Recognizing that it may be forced to pick up the check at the end of the day, defendant may want to rethink its fight-to-the-death litigation strategy in the future—for the public benefit."[2]

All too often, the government fails to suffer any consequences from its combative litigation style in FOIA cases by evading the true costs of litigation under FOIA's fee-shifting provision. After plaintiffs prevail on the merits, litigation frequently becomes even more protracted over how much the government should be required to pay.

If the FOIA case is litigated in D.C., courts frequently hold that attorneys are not entitled to their ordinary hourly billable rate. Instead, the courts adhere to hourly rates determined by a matrix produced by the U.S. Attorney's Office for the District of Columbia (USAO) that are presumptively "reasonable." FOIA plaintiffs' attorneys have recently advocated for use of another benchmark, the Legal Services Index (LSI) Matrix, because it offers higher billable rates under a formula approved by some courts. Even still, the LSI fails to accurately reflect market value of a FOIA attorney's billable rate in complex federal litigation, or sensibly calculate the going rate for such fees (the LSI rates are still below market rates).

These competing matrices complicate fee determinations by requiring plaintiffs to litigate which to use instead of having the court determine an actual reasonable hourly rate. Indeed, the USAO Matrix and LSI Matrix *both* woefully undervalue attorneys' time. More than five years ago, the court in *Salazar v. District of Columbia* acknowledged the USAO Matrix rates were 38 percent lower than the average national law firm rates and the LSI Matrix rates were 14 percent lower.[3] The use of these precalculated matrices fails plaintiffs seeking official documents in the pursuit of a transparent government because they do not in fact reimburse the requestor's full litigation costs. The FOIA fee-shifting provision is designed to encourage plaintiffs to pursue litigation against the federal government when the government unlawfully withholds public records. Plaintiffs with fewer resources thus will not pursue FOIA litigation knowing that, if they win, they may be on the hook for 38 percent or more of their attorney's bill.

A. Dissuading FOIA Actions

Fees are always on a plaintiff's mind. FOIA requestors are faced with a frustrating choice once their request is denied: pay for litigation that could take years and cost hundreds of thousands of dollars, with no guarantee of recovering attorney fees at the end, or abandon their investigation entirely. Because many FOIA attorneys bill clients monthly, clients must continue to pay until the litigation is resolved. Successful FOIA plaintiffs frequently won't recoup that money until years after paying their legal fees and in an entirely different budget cycle. That means even financially hardy plaintiffs have to plan to book significant expense during much of the life of the litigation—an expensive and cost-prohibitive undertaking for many newsrooms and citizens. Upon a denial of a records request under New York's state public records law, a ProPublica reporter wrote, "short of suing the agency—an expensive proposition that could take years if the agency actively resists and appeals when it loses—I can't find out."[4] Requestors have the same dilemma under the federal FOIA.

FOIA litigation is a time-consuming and expensive undertaking. Even with the fee-shifting provision for a prevailing plaintiff, FOIA "fee awards are by no means routine because of the degree of the discretion granted to the district court judge."[5] A journalist for a small news outlet, a nonprofit organization, or an average citizen cannot easily afford the thousands of dollars (sometimes tens or hundreds of thousands of dollars) in attorney fees in FOIA litigation.[6] Solo practitioners such as Chris Sproul in California say they could not take FOIA cases for nonprofits and activists without the statute's fee-shifting provision.[7]

II. FOIA Fee-Shifting Structure

The American rule for attorney fees traditionally requires each party to pay its own legal fees. In certain situations, however, Congress has approved a statutory scheme to shift attorney fees of the prevailing party to the losing party. The American Bar Association explains such fee-shifting provisions allow attorneys to take "public interest cases that would otherwise not seem worth the investment."[8] The U.S. Supreme Court indicated a preference toward plaintiffs hiring an attorney to litigate such cases rather than filing them pro se in refusing an attorney fee award to an attorney representing himself in a civil rights action.[9]

FOIA's fee-shifting provision gives courts discretion to allow the prevailing plaintiff to collect attorney fees from the government. Under FOIA, "[t]he 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."[10]

A. Entitlement and Eligibility: How to Win FOIA Fees

To determine if a FOIA plaintiff has "substantially prevailed," a court uses a two-prong inquiry: "eligibility" and "entitlement."[11] The "eligibility" inquiry asks whether the plaintiff did in fact "substantially prevail" on their FOIA requests, which would make the plaintiff "eligible" for attorney fees.[12] Substantially prevailing does not require a court order for relief on the merits; it also includes an enforceable agreement or "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial."[13] Plaintiffs who receive their requested documents after filing suit, but without a court ruling on the merits, may be entitled to attorney fees if they are able to satisfy the summary judgment standard to establish that their position was correct as a matter of law.[14]

If a plaintiff is "eligible" for attorney fees, the court moves on to the "entitlement" inquiry. A plaintiff is only "entitled" to fees if the government acted unreasonably in withholding the documents. This inquiry requires the court to consider whether the government had a legal basis for its withholdings. To determine whether a FOIA plaintiff is "entitled" to attorney fees, the D.C. Circuit balances four nonexclusive 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) the reasonableness of the agency's withholding' of the requested documents."[15] If the fourth factor weighs in favor of nondisclosure, it can be dispositive. Essentially, the plaintiff "is not entitled to fees if the Government's legal basis for withholding requested records is correct."[16] So if the government was "'correct as a matter of law' to refuse a FOIA request, 'that will be dispositive.'"[17] Further, courts have discretion to grant fee awards to plaintiffs whose claims fall short on the merits when the government fails to provide a legal basis for withholding the records.[18] "Even though FOIA provides fee awards to plaintiffs that substantially prevail, fee awards are by no means routine because of the degree of discretion granted to the district court judge."[19]

B. Fee Awards

Once a court determines a FOIA plaintiff is entitled to some award of fees, it must determine what constitutes a reasonable fee request in that particular case. Courts in the D.C. Circuit use a three-part analysis to assess the amount of attorney fee awards in complex federal litigation cases: "(1) determine the number of hours reasonably expended in litigation; (2) set the reasonable hourly rate; and (3) use multipliers as warranted."[20] Some judges have questioned whether straightforward FOIA litigation should be considered "complex federal litigation" when lowering a plaintiff's fee award, such as by denying use of the LSI Matrix in favor of the lower USAO Matrix rates.[21]

For part one, the hours reasonably expended, courts adjust the number of hours billed for duplicative or unnecessary work.[22] Additionally, in FOIA cases, hours can be cut for time spent litigating issues on which the plaintiff did not ultimately prevail.[23] As for multipliers, part three of the three-factor analysis, this may be somewhat of a misnomer. Multipliers more often operate instead as a divisor in fee award calculations.[24]

Part two, the hourly rates determination, can be contentious because of its overall impact on the ultimate award and comparative flexibility. The court is required to determine a reasonable, or "lodestar," hourly rate, and then multiply that rate by the number of hours the attorney reasonably expended on the case.[25] Not surprisingly, therefore, an attorney's billable hourly rate is a crucial part of attorney fee calculations and subject to a good deal of litigation. The Supreme Court "recognize[s] that determining an appropriate 'market rate' for the services of a lawyer is inherently difficult[.]"[26]

Since adopting the *Laffey* Matrix in 1988, the government has effectively undercut attorneys' actual billable rates with a chart that indicates purportedly "reasonable" rates for attorneys at different levels of experience, measured solely by years since graduating from law school.

1. Calculations

Washington, D.C., is the only jurisdiction that employs a prepackaged attorney fees matrix to calculate "reasonable" attorney fees for FOIA cases. The USAO Matrix itself explains, "[t]he matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, or by other Department of Justice components, or in other kinds of cases" other than FOIA, Title VII, and Equal Access to Justice Act cases.[27]

Other courts field FOIA fee requests without relying on the USAO matrix.[28] The Ninth Circuit finds attorney affidavits stating an attorney's hourly billing rate presumptively reasonable.[29] The Ninth Circuit also weighs 12 factors:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the

> "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.[30]

The USAO Matrix's predecessor, the original *Laffey* Matrix, was developed in 1983 based on an exhibit submitted in *Laffey v. Northwest Airlines*, where attorneys asked for over five million dollars in attorney fees for a thirteen-year litigation.[31] In *Laffey*, the plaintiffs represented flight attendants in a Title VII Equal Pay Act lawsuit at a modest public interest rate, and during the fee-shifting litigation argued the court should look beyond the firm's regular public interest hourly rates and construct a market value for their services based on the prevailing market rate.[32] This argument was rejected in *Laffey*, but a later case, *Save Our Cumberland Mountains v. Hodel*, adopted it and stated, "Congress did not intend the private but public-spirited rate-cutting attorney to be penalized for his public spiritedness by being paid on a lower scale than either his higher priced fellow barrister from a more established firm or his salaried neighbor at a legal services clinic."[33]

The name "*Laffey* Matrix" stuck. The *Laffey* Matrix was employed from 1988, when *Save Our Cumberland Mountains v. Hodel* was decided, to 2015, when the Department of Justice (DOJ) introduced the "USAO Matrix." The *Laffey* Matrix is a chart that describes "reasonable" hourly rates based on number of years out of law school. The hourly rates themselves were taken from the *Laffey* Affidavit and multiplied by the Consumer Price Index each year, which captured general inflation rates in a broad definition of the greater Washington area (including the District of Columbia, Maryland, Virginia, and West Virginia) but did not specifically measure the increase in price for legal services.[34]

DOJ must have heard the complaints surrounding the *Laffey* Matrix's failure to account for legal market inflation when formulating the USAO Matrix. In 2015, the USAO Matrix used the average D.C. hourly rates from ALM Legal Intelligence's 2010 and 2011 Survey of Law Firm Economics, which tracks legal prices throughout the country.[35] The ALM Survey measures billing rates by geographic region of firms from those with a single practitioner to those with 150 lawyers, and warns that comparing billing rates outside the geographic area or law firm size is unhelpful.[36] The ALM report is released yearly, although the USAO Matrix does not account for annual changes in the ALM figures.

The starting data for the USAO Matrix is already flawed for failing to control for the size of firms undertaking complex federal litigation matters. Compounding the problem, DOJ updates the USAO Matrix by multiplying the 2010–2011 ALM data by the Producer Price Index–Office of Lawyers Index (PPI-OL) to account for inflation. This inflation estimate measures the price of all legal services nationally, and is not specifically tied to the types of cases for which the USAO Matrix is intended to be used.

Another flaw is that DOJ chose a particularly low starting point. In 2010 and 2011, law firms had not entirely recovered to their performance prior to the 2008 recession. DOJ chose to base its initial statistics for attorney "reasonable" hourly rates for its new USAO Matrix not only on a rate outdated by five years, but on rates not yet fully recovered from the recession that caused many law firms (and their clients) to tighten their budgets.[37]

Though DOJ focused on the D.C. area, there is no consideration in the USAO Matrix of law firm size or complexity of litigation. The USAO Matrix applies only to fee-shifting in FOIA, Title VII Civil Rights, and Equal Access to Justice litigations, all of which are considered complex federal litigation. These cases all require the skills of an experienced attorney.

After the *Laffey* Matrix was released, plaintiffs' attorneys put their support behind an alternative, economist-developed matrix: the Legal Services Index (LSI) Matrix.[38] The LSI Matrix was developed using rates from 1988–89 and uses the national Producer Price Legal Services Index, maintained by the U.S. Department of Labor, Bureau of Labor Statistics, based on the U.S. Department of Commerce, Census Bureau, as part of its annual surveys and census. The LSI Matrix's creator, Michael Kavanaugh, argues a national index is reasonable because "the market for legal services in federal litigation in the Baltimore-Washington, D.C., area is not a local market."[39] It produces rates higher than the original *Laffey* and USAO matrices but still does not reflect the actual billing rates of attorneys on FOIA

Determining reasonable attorney fees is uncomfortably qualitative, as it requires courts to make a value judgment concerning how much a litigator's time is worth. It is also uncomfortably quantitative. Comparing the USAO Matrix and its competitor, the LSI Matrix, involves economic concepts that may be unfamiliar to many attorneys and judges. Discomfort with these topics, however, should not stop clients from being rightfully awarded legal fees in a FOIA action. Judges' refusal to adhere to actual market rates could also put downward pressure on fee awards:

> The Court agrees with Defendant that fees of nearly $300,000 for an action in which only two depositions were taken and one summary judgment motion was opposed, seem excessive. That, however, is due in part to the hourly rates charged by law firms everywhere (which always seem excessively high to those working in government, such as counsel for the Defendant—and the Court).[40]

This difficult comparison would not be necessary if courts accepted an attorney's actual billing rate as a "reasonable market rate." Because clients do pay an attorney their hourly rate, it is necessarily a reasonable market rate.

2. Criticism of Laffey

Rejection of the USAO Matrix is gaining momentum with judges and DOJ. In 2019, the court in *Mattachine Society of Washington v. DOJ* granted the requestor's motion for $178,448.91 in fees based on the LSI Matrix.[41] Despite this win for FOIA requestors, the opinion commends the requestor for voluntarily removing hours worked by "non-core" associates, partners, and summer associates and for not seeking a fees-on-fees award.[42] "As *Mattachine* correctly points out there is no better indication of what the market will bear than what the lawyer in fact charges for his or her services and what the clients are willing to pay."[43]

District courts in the District of Columbia also have begun adopting the slightly more generous LSI Matrix outside the FOIA context. For example, in *Salazar*, the court rejected the USAO Matrix in favor of the LSI Matrix.[44] The judge indicated that the LSI Matrix provided rates that remained significantly below market rates for an attorney at a national law firm, rates that the attorneys actually charged their clients.[45] Similarly, the *Eley* court recognized a preference for the LSI Matrix.[46] The court in *DL v. District of Columbia* went even farther. The *DL* court critiqued the LSI Matrix and the USAO Matrix for broad geographic surveying and for failure to control for attorney's hourly billing rates in complex federal litigation cases.[47] The *DL* court suggests use of these matrices to determine attorneys' reasonable billable hour may be on the way out.[48]

Justice Brett Kavanaugh, at the time a judge on the U.S. Court of Appeals for the D.C. Circuit, has also criticized the FOIA fee award system, taking issue with the four-factor balancing test to determine a fee award in *Morely v. CIA*.[49] In a concurrence, he advocated that the rule for awarding fees in FOIA cases should be simplified to reflect the rule in civil rights cases, where prevailing plaintiffs receive attorney fees unless there are special circumstances, such as the plaintiff acted in bad faith.[50] In the alternative, he suggests the first three factors of the balancing test should be eliminated, leaving the reasonability of the government's withholding documents and litigation conduct as the sole determining factor in awarding fees.[51]

DOJ may have indicated a willingness to accept LSI Matrix fees as reasonable. In *American Oversight v. U.S. DOJ*[52] and *Judicial Watch, Inc. v. U.S. DOJ*,[53] DOJ did not challenge the requestors' rate calculations. While it was unclear whether the LSI Matrix was used in *Judicial Watch* because the court stated it would apply the "*Laffey* Matrix" without distinguishing which version, it is possible that Judicial Watch asked for the higher-priced LSI Matrix.[54] Regardless, such examples of DOJ accepting a plaintiff's fee calculations raise hopes that the practice may spread to other government agencies.

In an economic sense, the USAO Matrix is inherently flawed because it uses outdated hourly rates multiplied by an inflation estimate that is not specific to the District of Columbia. The USAO Matrix is based on average Washington hourly rates from the year 2010–2011, without taking into account the size of firm, type of law, or complexity of litigation. This includes hourly rates from lawyers performing tasks ranging from drafting wills to litigating in front of the Supreme Court. Then, each year an inflation estimate, PPI-OL, is used to adjust the decade-old, recovering-from-the-Recession fixed rates to determine the "reasonable rates" of the current year. The PPI-OL [illegible]on estimate uses data about the price of legal services nationally and is not specifically related to the types of cases the USAO

Matrix is used for. Further, the PPI-OL estimate does not account for law firm size or difficulty of litigation, which vastly impacts an attorney's hourly rate. The average Washington, D.C., attorney hourly rates from 2010, multiplied by the inflation estimate for legal services nationwide, will never be an accurate estimate of the actual market rates of FOIA attorneys, particularly those at big firms. The overall economy for legal services varies from the Washington, D.C., economy because nationwide issues may impact the market for D.C.-area legal services differently.

In fact, DOJ admits that the USAO Matrix is not the ideal estimator of actual billable rates by attorneys. In a footnote to the USAO Matrix, DOJ explains that it is "presently working to develop a revised rate schedule, based upon current, realized rates paid to attorneys."[55] DOJ in that footnote acknowledges that in *DL v. District of Columbia*, the D.C. Circuit observed that the USAO Matrix has not kept up with legitimate hourly rates for legal services. While the revised rate schedule DOJ has under development may help make the USAO Matrix more reasonable, it certainly will not bring the matrix in line with market rates. The only way to exactly match the Washington legal market and attorneys' hourly rates is to accept an attorney's actual hourly rates. Indeed, one federal judge in Washington recently recognized in a non-FOIA case that "[i]t is well established that the USAO *Laffey* rates have failed to keep pace with the true rate of inflation, which is why when the two are pitted against each other, courts frequently find the LSI *Laffey* matrix more persuasive."[56] If a client is willing to pay the attorney that price, it is inherently reasonable.

3. Government's Role in Driving Up Plaintiffs' Fees

The courts should recognize the driver of high FOIA litigation costs: the government itself. After the final bill is disclosed in a request for attorney fees, the government may balk at the number, but the government fails to take accountability for why the number is so high. The government's refusal to comply with disclosure mandated by FOIA drives so much of the litigation. Then, once the litigation begins, the government often uses delay tactics and over-briefing to ensure that the requestor's attorneys will incur substantial fees.[57] A California federal court reminded the government that the requested fee award was significantly higher because of the government's aggressive litigation strategy.[58] The bold headline of a 2018 Congressional Report stated "FOIA is broken" based on the culture within the government to improperly withhold relevant documents and fight FOIA appeals and litigation.[59] The purpose of FOIA is disclosure, so why are plaintiffs punished for pursuing it?

Moreover, it is fundamentally unfair for the party responsible for the unlawful activity that justifies a fee award to be responsible for determining what a "reasonable" hourly rate should be. The government has every incentive to lowball the rates to lessen the consequences for its own improper actions—both the original withholding decision and the litigation tactics that ran up the bill. Courts should not allow the offender to choose its own consequences in this fashion.

The U.S. District Court for the District of Columbia has recognized the financial impact of the government's foot-dragging. In *Urban Air Initiative v. EPA*, the Environmental Protection Agency (EPA) protested the requestor's bill based on the attorneys' actual hourly rates for $47,095.80 for 90.9 hours in fees-on-fees, and the court recognized that the EPA had objected to every element of the requestor's eligibility, entitlement, reasonableness of rates, and time expended in the fee calculation.[60] Even so, the court reduced the requestor's fee award to $10,000, less than a quarter of the actual cost of the fee briefing, even after acknowledging the fee award without reductions should be $35,574.10 using the USAO Matrix. The court stated the time spent on fees motions was unreasonable and would "constitute an unsupportable windfall" to the requestor.[61]

To state the obvious, if the government pays a private attorney based on their billable rate, or even the USAO Matrix, as the result of a *fee-shifting* provision, then there is no windfall. The attorney is merely being compensated fully for their time because the government improperly withheld documents that the public has a right to access. That is the purpose of fee-shifting in FOIA: to provide incentive for public interest plaintiffs that would otherwise not be able to afford litigation.[62] If the government had a culture of free and fair disclosure, the metric by which FOIA fees are determined would not be a contentious debate.

III. Recommendations

In addition to the typical attorney affidavits affirming their standard fee, courts have begun asking for more information to justify that their rates are reasonable within the market. Courts have questioned affidavits for not mentioning names and rates of other attorneys practicing in the FOIA area.[63] One case cited to the *National Law Journal*'s 2016 Annual Billing Survey by ALM Intelligence,[64] which measures large law firms and their average hourly rates, as a good measurement of reasonable legal hourly rates.[65] Other sources that compile data on attorney hourly rates are BRASS Plus by PWC,[66] Law Catalog,[67] LexisNexis Counsel Benchmarking,[68] Clio,[69] NALFA,[70] Valeo,[71] ALM Intelligence,[72] and Above the Law.[73]

To overcome the presumption of the USAO Matrix, or in some cases the LSI Matrix, FOIA plaintiffs should highlight cracks identified in the case law in the presumptive reasonableness of fees under both the USAO and LSI matrices. For instance, FOIA plaintiffs should consider:

- Arguing that there is no better measure of reasonable rates than what clients are willing to pay.[74]
- Submitting market data or colleagues' billable rates to justify the claimed hourly rates, not just your firm's own rates, to overcome *Barton v. United States Geological Survey*.[75]
- Highlighting foot-dragging or over-pleading by the government that drove attorney fees higher.[76]
- Explaining any hours that the government challenges as "unreasonable," for example, that extra time drafting the complaint saved time in drafting the motion for summary judgment.
- Removing superfluous billable hours voluntarily so the court sees the plaintiff's position as more reasonable.[77]
- Explaining whether your client will pay for any nonreimbursed attorney fees.
- Highlighting the ideological importance of the FOIA fee-shifting provision.[78]
- Suggesting doing away with the four-factor FOIA fee-balancing test as then-Judge Kavanaugh recommended in *Morely*.
- Citing to criticism of the USAO and LSI Matrices, such as:
- *Mattachine Society*[79] and *Salazar*.[80]
- *Hartman*[81] and *DL*.[82]
- *Eley*.[83]
- Suggesting balancing of factors similar to the Ninth Circuit attorney fees factors.[84]
- In the alternative, explaining that the FOIA case should be considered complex federal litigation to receive LSI Matrix fees.[85]

The outdated USAO and LSI matrices are insufficient to provide FOIA plaintiffs with true compensation for their attorney fees. The FOIA fee-shifting provision was designed to allow requestors free access to documents that the government incorrectly withholds. Until the government embraces the presumption of disclosure, FOIA plaintiffs will be disadvantaged by the economic burdens of these cases. Convincing D.C. courts to abandon the inflexible limits of the matrix calculations and recognize an attorney's actual billable rate as per se reasonable better serves FOIA requestors, FOIA attorneys, and the purpose of FOIA.

Endnotes

1. Kwoka v. IRS, 989 F.3d 1058, 1063 (D.C. Cir. 2021) (fee-shifting "remove[s] the incentive for administrative resistance to disclosure ests based not on the merits of exemption claims, but on the knowledge that many FOIA plaintiffs do not have the financial rces or economic incentives to pursue their requests through expensive litigation").

2. Assembly of State of Cal. v. U.S. Dep't of Com., 1993 WL 188328, at *17 (E.D. Cal. May 28, 1993).

3. 809 F.3d 58, 65 (D.C. Cir. 2015) (awarding attorney fees under the LSI Matrix).

4. Cezary Podkul, *Delayed, Denied, Dismissed: Failures on the FOIA Front*, ProPublica (July 21, 2016, 8:01 AM), https://www.propublica.org/article/delayed-denied-dismissed-failures-on-the-foia-front.

5. FOIA Project Staff, *Scrutinizing Attorney Fee Awards in FOIA Litigation*, The FOIA Project: Freeing Info. Through Pub. Accountability (Dec. 19, 2018), http://foiaproject.org/2018/12/19/attorney-fee-awards-foia-litigation.

6. *Id.*

7. *Id.*

8. *Fee-Shifting*, Am. Bar Ass'n (June 11, 2015), https://www.americanbar.org/groups/delivery_legal_services/reinventing_the_practice_of_law/topics/fee_shifting.

9. *See generally* Kay v. Ehrler, 499 U.S. 432 (1991).

10. 5 U.S.C. § 552(a)(4)(E) (2019).

11. *See* Brayton v. Off. of the U.S. Trade Representative, 641 F.3d 521, 524 (D.C. Cir. 2011).

12. *Id.*

13. 5 U.S.C. § 552(a)(4)(E).

14. *See Brayton*, 641 F.3d at 527–28.

15. Elec. Privacy Info. Ctr. v. NSA, 87 F. Supp. 3d 223, 228 (D.D.C. 2015) (quoting McKinley v. Fed. Hous. Fin. Agency, 739 F.3d 707, 711 (D.C. Cir. 2014)).

16. Chesapeake Bay Found. v. USDA, 11 F.3d 211, 216 (D.C. Cir. 1993).

17. *Brayton*, 641 F.3d at 525 (quoting Davis v. U.S. Dep't of Just., 610 F.3d 750, 1162 (D.C. Cir. 2010)).

18. *Id.* at 526 ("leav[ing] room for fee awards in some cases whether a plaintiff has a 'not insubstantial' claim that falls short on the merits").

19. FOIA Project Staff, *supra* note 5. *See Brayton*, 641 F.3d at 526.

20. Salazar v. Dist. of Columbia, 809 F.3d 58, 65 (D.C. Cir. 2015).

21. Barton v. U.S. Geological Surv., Civ. Action No. 17-1188 (ABJ), 2019 U.S. Dist. LEXIS 167501, at *19–20 (D.D.C. Sept. 29, 2019) ("Plaintiffs' evidence is insufficient to establish that FOIA practitioners in Washington, D.C., receive rates in line with the LSI Matrix for complex federal litigation. Notably, nowhere in their pleadings do plaintiffs invoke the term 'complex federal litigation' much less explain how this case would qualify.").

e generally Hensley v. Eckerhart, 461 U.S. 424 (1983).

23. *See* Queen Anne's Conservation Ass'n v. U.S. Dep't of State, 800 F. Supp. 2d 195 (D.D.C. 2011).

24. *See* Bywaters v. United States, 670 F.3d 1221, 1228–29 (Fed. Cir. 2012).

25. *See Hensley*, 461 U.S. 424; Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542 (2010).

26. Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984).

27. *USAO Attorney's Fees Matrix—2015–2019*, Dep't of Just., https://www.justice.gov/usao-dc/file/796471/download.

28. *E.g.*, Grissom v. Mills Corp., 549 F.3d 313, 323 (4th Cir. 2008); Rosenfeld v. U.S. Dep't of Just., 904 F. Supp. 2d 988, 1003 (N.D. Cal. 2012) (citing Prison Legal News v. Schwarzenegger, 608 F.3d 446, 454 (9th Cir. 2010)).

29. *See* Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 980 (9th Cir. 2008).

30. Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975).

31. First Aff. of Daniel A. Rezneck, Plantiff's Exh. 30, at 8, Laffey v. Nw. Airlines, Inc., Civ. No. 05-1437 (RCL) (D.D.C. 1983), https://static1.squarespace.com/static/5a2af8a0f14aa1cbbcf14079/t/5a6fb30b08522915a3f608ef/1517269801357/Original+Laffey+Matrix.PDF. *See* Laffey v. Nw. Airlines, Inc., 572 F. Supp. 354, 359 (D.D.C. 1983).

32. *Laffey*, 572 F. Supp. at 372.

33. 857 F.2d 1516, 1525 (D.C. Cir. 1988) (*en banc*).

34. *Laffey Matrix—2014–15*, Dep't of Just., https://www.justice.gov/sites/default/files/usao-dc/legacy/2014/07/14/Laffey%20Matrix_2014-2015.pdf (see explanatory note 3).

35. *See USAO Attorney's Fees Matrix—2015–2019*, *supra* note 27.

36. *See* David Brown & Jennifer Tonti, *Survey of Law Firm Economics, 2012 Edition Executive Summary* at 5 (ALM Legal Intel. 2012) ("[W]ith the economic collapse of 2008, corporations needed to cut expenses and nothing was left off the table, including outside legal costs.").

37. *See id.* at 8 ("[W]ith the economic collapse of 2008, corporations needed to cut expenses and nothing was left off the table, including outside legal costs.").

38. The LSI Matrix also is referred to as the "*Salazar* Matrix," "LSI *Laffey* Matrix," or the "Updated *Laffey* Matrix." *See, e.g.*, Nat'l Sec. Counselors v. CIA, Civ. Action No. 11-444 (BAH), 2017 U.S. Dist. LEXIS 192545, at *43 n.12 (D.D.C. Nov. 21, 2017).

39. *See Expert Opinions*, Laffey Matrix, http://www.laffeymatrix.com/expert.html.

40. L.A. Gay & Lesbian Cmty. Servs. Ctr. v. IRS, 559 F. Supp. 2d 1055, 1061 (C.D. Cal. 2008).

41. 406 F. Supp. 3d 64, 68, 71 (D.D.C. 2019) (selecting LSI *Laffey* rates over USAO Matrix rates and stating that "[t]his choice is largely based upon [D.L.] which rejected the USAO Matrix for its failure to survey the relevant population and canvass the relevant type of lawyer before imposing a specific hourly rate").

at 70.

43. *Id.* (internal quotations removed) (citing Cobell v. Jewell, 234 F. Supp. 3d 126, 167 (D.D.C. 2017)).

44. Salazar v. Dist. of Columbia, 809 F.3d 58, 65 (D.C. Cir. 2015).

45. *Id.*

46. *See* Eley v. Dist. of Columbia, 793 F.3d 97, 101 (D.C. Cir. 2015).

47. 924 F.3d 585, 589–90 (D.C. Cir. 2019).

48. *Id.* at 587–88 ("[T]he new [USAO] matrix departs from the statutory requirement that reasonable fees be tethered to 'rates prevailing in the community' for the 'kind and quality of services furnished. [Individuals with Disabilities Education Act,] 20 U.S.C. § 1415(i)(3)(C). We therefore vacate the award and remand for the district court to recalculate the hourly rate based on evidence that focuses on fees for attorneys practicing complex federal litigation in the District of Columbia.").

49. 719 F.3d 689 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

50. *Id.* at 690–91.

51. *Id.* at 692–93 ("As a narrower alternative, . . . 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.").

52. 375 F. Supp. 3d 50, 70 (D.D.C. 2019) (noting that defendants "do not challenge the use of the LSI-Laffey Matrix" and offering no further analysis on this point).

53. 774 F. Supp. 2d 225, 232 (D.D.C. 2011) (stating that "[b]ecause [defendant] does not dispute [plaintiff's] rate calculations, the Court will accept them").

54. *Id.*

55. *USAO Attorney's Fees Matrix—2015–2021*, at n.7, Dep't of Just., https://www.justice.gov/usao-dc/page/file/1305941/download.

56. Hartman v. Pompeo, 2020 U.S. Dist. LEXIS 204894, at *41 (D.D.C. Nov. 3, 2020) (internal quotation omitted) (quoting DL v. Dist. of Columbia, 924 F.3d 585, 589 (D.C. Cir. 2019)).

57. Urban Air Initiative v. EPA, 442 F. Supp. 3d 301, 327 (D.D.C. 2020) ("Defendant's objection to [the fees-on-fees] portion of the fees in its entirety, though, is not well-taken given that it briefed an objection to every single aspect of plaintiffs' eligibility for and entitlement to fees, as well as the reasonableness of the rates and the time expended.").

58. Assembly of State of Cal. v. U.S. Dep't of Com., 1993 WL 188328, at *17 (E.D. Cal. 1993).

59. FOIA Project Staff, *supra* note 5.

60. 442 F. Supp. 3d 301, 321, 327 (D.D.C. 2020).

61. *Id.* at 327.

62. Kwoka v. IRS, 989 F.3d 1058, 1063 (D.C. Cir. Mar. 9, 2021).

63. Barton v. U.S. Geological Survey, 2019 U.S. Dist. LEXIS 167501, at *17 (D.D.C. Sept. 29, 2019) (calling an attorney's affidavit "deficient" for not receiving the "precise fees that attorneys with similar qualifications have received") (citing DL v. Dist. of Columbia, 924 F.3d 585, 589 (D.C. Cir. 2019)).

64. *See 2020 NLJ 500 Report*, ALM Intel., https://www.alm.com/intelligence/solutions-we-provide/business-of-law-solutions/surveys-rankings-and-reports/2020-nlj-500-report/ ($1,400 for 2020 data about the nation's largest law firms).

65. Mattachine Soc'y of Wash. v. DOJ, 406 F. Supp. 3d 64, 70 (D.D.C. 2019).

66. *Billing Rate & Associate Salary Survey Plus (BRASS Plus)*, PWC, https://www.pwc.com/us/en/industries/law-firms/surveys/brass-survey.html (complimentary results distributed to firms that participate in data collection with additional reports available for purchase).

67. *Legal Survey*, Law Catalog, https://www.lawcatalog.com/shop-by-product-type/survey.html (collecting legal surveys for purchase).

68. *LexisNexis Counsel Benchmarking*, LexisNexis, https://www.lexisnexis.com/en-us/products/counsel-benchmarking.page (providing for purchase a product that can compare hourly rate by role, company size, and geography).

69. *Legal Trends 2020*, Clio, https://www.clio.com/resources/legal-trends/2020-report/read-online (free source: Appendices A and B provide average hourly rates over time and details on data collection).

70. *Custom Hourly Rate Surveys*, Nat'l Ass'n of Legal Fee Analysis: Specializing in Att'y Fees & Legal Billing, http://www.thenalfa.org/custom-hourly-rate-surveys (designs custom surveys that can be used in court proceedings or for internal purposes and provides general hourly rate data for purchase).

71. *Valeo 2020 Attorney Hourly Rate Report, Research and Markets*, Clio, https://www.clio.com/resources/legal-trends/2020-report/read-online ($25,000 for a single-use PDF of the 2,525-page 2020 report).

72. *Survey of Law Firm Economics*, ALM Intel., https://www.alm.com/intelligence/solutions-we-provide/business-of-law-solutions/surveys-rankings-and-reports/surveys-rankings-and-reports-list/survey-of-law-firm-economics (priced at $2,995 for each yearly report).

73. *Billing Rates*, Above the Law, https://abovethelaw.com/tag/billing-rates (assorted articles).

74. Mattachine Soc'y of Wash. v. Dep't of Justice, 406 F. Supp. 3d 64, 70 (D.D.C. 2019).

75. 2019 U.S. Dist. LEXIS 167501, at *17 (D.D.C. Sept. 29, 2019) (suggesting attorney affidavit must contain "precise fees that attorneys with similar qualifications have received") (citing DL v. Dist. of Columbia, 924 F.3d 585, 589 (D.C. Cir. 2019)).

76. Urban Air Initiative v. EPA, 442 F. Supp. 3d 301, 321, 327 (D.D.C. 2020) (recognizing defendant government challenged every possible factor in a fee award, requiring plaintiff to research and plead every element).

77. *See, e.g.*, Mattachine Soc'y, 406 F. Supp. 3d at 68.

78. *See, e.g.*, Kwoka v. IRS, 989 F.3d 1058, 1063 (D.C. Cir. 2021) (fee-shifting "remove[s] 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").

79. 406 F. Supp. 3d at 70.

80. Salazar v. Dist. of Columbia, 809 F.3d 58, 65 (D.C. Cir. 2015).

81. Hartman v. Pompeo, 2020 U.S. Dist. LEXIS 204894, at *41 (D.D.C. Nov. 3, 2020)

82. DL v. Dist. of Columbia, 924 F.3d 585, 589 (D.C. Cir. 2019).

83. Eley v. Dist. of Columbia, 793 F.3d 97, 101 (D.C. Cir. 2015).

84. Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975).

85. *See* Barton v. U.S. Geological Survey, 2019 U.S. Dist. LEXIS 167501, at *19–20 (D.D.C. Sept. 29, 2019) ("[N]owhere in their pleadings do plaintiffs invoke the term 'complex federal litigation' much less explain how this case would qualify.").

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