UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, **v.** **UNITED STATES DEPARTMENT OF JUSTICE,** **Defendant.**	**Case No. 15-cv-1955 (TSC)**

OPPOSITION TO MOTION FOR ATTORNEYS' FEES AND COSTS

EPIC's motion for attorneys' fees is deficient on numerous levels but perhaps most notably in its omission of a critical fact that bears directly on EPIC's claimed entitlement to fees in this action under the Freedom of Information Act ("FOIA"), which sought a single document, the "EU-US Umbrella Agreement on data protection." EPIC fails to advise the Court that EPIC *already* had obtained a copy of that document from the EU Commission before this lawsuit was filed, and that, therefore, all this lawsuit sought (and has accomplished) is the release to EPIC of the same document from the federal government. Thus, EPIC's motion for attorneys' fees – seeking a recovery of over $21,000 – does not seek reimbursement for fees incurred to advance public knowledge, but rather reflects an attempt by EPIC to profit at the expense of the public by claiming reimbursement from the government for attorneys' fees that were incurred to obtain a document that it already had obtained and publicized on its website.

Because the document at issue already was in EPIC's possession and publicly available, EPIC cannot establish that this lawsuit advanced the public interest as would be necessary to establish entitlement to a fee award. For that reason, and the other reasons discussed below, EPIC's motion should be denied. Alternatively, in the event the Court determines that some fee award is appropriate, the amount should be substantially reduced to a fraction of the amount requested.

FACTUAL BACKGROUND

I. EPIC Obtained The Document At Issue Prior To Filing This Lawsuit.

EPIC has acknowledged that the sole document at issue in this case is the EU-US Umbrella agreement on data protection. (Compl. ¶ 2, 6, 22; ECF No. 18 at ¶ 1; ECF No. 20, Joint Status Report at ¶ 2) According to EPIC's website, on September 8, 2015, "European and U.S. officials announced that they have concluded an agreement on data protection for transatlantic criminal investigations" but, "[d]espite the announcement[], neither U.S. officials nor their European counterparts made the text of the Agreement public." (Ex. 4 to Jones Decl. at 2; *see also* Compl. ¶ 6)

Although the EU Parliament released the document within one week of that announcement and EPIC posted the document on its website, EPIC characterized that document as the "unofficial version" and stated that it still "pursues the public release of the document by US and EU agencies." (Ex. 4 to Jones Decl. at 2). EPIC thus submitted freedom of information requests to several federal government agencies and to the EU Commission, the "European counterpart[]" to the agreement. One request – the one at issue here – was dated September 10, 2015 to the Department of Justice (Compl. ¶ 2) and another was a request to the EU Commission dated September 14, 2015. (Ex. 5 to Jones Decl. at 2 (EU Commission Release Letter)).

In October 2015, EPIC obtained the document at issue from the EU Commission.[1] (Jones Decl. ¶ 16 and Ex. 5 thereto). The document, an initialized draft of the Umbrella Agreement, was the same document that was released by the EU Parliament a month earlier which EPIC had characterized as an "unofficial version." (Ex. 4 and 5 to Jones Decl.) As explained in the EU Commission's release letter, the Umbrella Agreement was at an intermediate stage of the approval process (the stage at which the draft was initialed to mark the end of negotiations) and required further action (including by the United States Congress) to become final. (Ex. 5 to Jones Decl. at 2; *see also* Compl. ¶¶ 7-8, alleging that the action by Congress is required to effectuate the Agreement).

Notably, EPIC's October 23, 2015 press release announcing the EU Commission's disclosure no longer referred to the document as an "unofficial version." EPIC instead reported that "[t]he EU Commission, in response to a freedom of information request, has released to EPIC the text of the EU-US data transfer agreement." (Ex. 5 to Jones Decl. at 1) EPIC posted on its website the EU Commission's release letter, which provided a link to the document. (*Id.* at 2) In the same press release, EPIC stated that "EPIC continues to pursue the public release of the Agreement from US federal agencies." (*Id.* a 1) Thus, prior to the filing of this lawsuit on November 4, 2015, EPIC acknowledged that it had obtained the document at issue from the EU Commission and was seeking a copy of the same document from the federal government.

1 At all times relevant to Plaintiff's fee motion, the document at issue was not final. The document bears the header "Draft for initialling." References in this opposition to the document as an "agreement" are thus made with this qualification. In February 2016, Congress passed the legislation (the Judicial Redress Act of 2015) required to effectuate the EU-US Umbrella Agreement and the President signed that legislation later that month.

II. EPIC Unnecessarily Filed This Lawsuit And Moved For A Default Judgment.

EPIC filed the instant lawsuit against the Department of Justice – seeking a copy of a document that it already had – on November 4, 2015. EPIC, however, failed to acknowledge in the Complaint that it already had obtained the document from the EU Commission. EPIC instead alleged only that "the text of the Agreement has not been made available to the public by any federal agency." (Compl. ¶ 7) (EPIC uses similar language in its fee motion – *see, e.g.*, page 3 of motion).

The United States Attorney's Office received the Complaint on November 16, 2015, making Defendant's deadline to answer December 16, 2015. However, due to an apparent administrative oversight, the Complaint failed to go through the applicable assignment process within the United States Attorney's Office. Specifically, although the case name appeared on a written list of materials received at the front desk of the office, it was not entered into the database that logs newly served cases, and also appeared not to have been routed to a supervisor for assignment to an AUSA. As a result, the government failed to appear and respond to the Complaint within the applicable 30-day period under FOIA.[2]

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2 The failure to appear in a timely fashion was not intentional. *See generally Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 61 (D.D.C. 2013) ("A default judgment is appropriate when a defendant is a totally unresponsive party and its default [is] plainly willful, reflected by its failure to respond to the summons and complaint, the entry of default, or the motion for default judgment."), *aff'd*, 782 F.3d 9 (D.C. Cir. 2015); *Payne v. Barnhart*, 725 F. Supp. 2d 113, 115 (D.D.C. 2010) ("[f]ederal law favors the disposition of cases on the merits, and, as a result, 'a default judgment is a drastic sanction that should be employed only in an extreme situation'"); *see also* Fed. R. Civ. P. 55(d) (courts shall not enter a default judgment against the United States or any agency thereof unless claimant establishes a right to relief upon evidence satisfactory to the court).

Nevertheless, because EPIC litigates with the government over FOIA matters before this Court frequently, EPIC easily could have contacted the United States Attorney's Office to confirm that it received the Complaint and inquire as to the status.[3] EPIC instead chose to incur the unnecessary expense (approximately $4,000 in attorneys' fees according to EPIC's billing statements) of filing a motion for entry of default against the United States (ECF No. 12, 14) in a case in which EPIC already had obtained from the other signatory to the agreement a copy of the document it was seeking.

Moreover, at the time of that motion, the same attorney who signed the declaration in support of the motion (Mr. Tran) was counsel of record in a FOIA matter brought by EPIC against the United States Coast Guard and the Department of Homeland Security in which the United States Attorney's Office appeared on behalf of the defendants. *See, e.g., EPIC v. United States Coast Guard, et al.,* Case No. 15-1527 (RDM). Not only was that matter pending at the time of EPIC's motion for default, but counsel for EPIC appeared at a status conference in that case on November 24, 2015, and easily could have contacted the AUSA handling that case to bring the government's lack of response in this case to the attention of government. (*Id.*, minute entry dated Nov. 24, 2015) However, Mr. Tran's declaration accompanying the motion for default did not indicate that any attempt was made to contact the United States Attorney's office. (ECF No. 14-1) Continuing a pattern repeated throughout this litigation, that motion for default also failed

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3 A search on the docket of this Court reveals approximately 60 cases filed by EPIC against the federal government since 2000. In many of these cases, the government was represented by the United States Attorney's Office. At least two such cases, moreover, were pending at the time EPIC filed for default and reflect contemporaneous communications between counsel for EPIC and attorneys from the United States Attorney's Office. *See, e.g., EPIC v. FBI,* Case No. 14-1311 (Joint Status Report filed November 17, 2015) and *EPIC v. United States Coast Guard, et al.,* Case No. 15-1527 (Status Conference held on November 24, 2015).

to acknowledge that EPIC already had obtained a copy of the document at issue from the EU Commission and instead repeated the technically accurate yet misleadingly incomplete assertion that "no federal agency has released a copy of the Umbrella Agreement to the public." (ECF No. 14 at 6)

After EPIC filed its motion for default on January 6, 2016, the United States Attorney's Office was notified by the Court that a motion for default had been filed and undersigned counsel was promptly assigned to the case and entered an appearance. (ECF No. 16) Thereafter, the Court ordered Defendant to respond to the motion for default judgment by January 25, 2016. On January 21, 2016, with a major snow event imminent, Defendant took the precaution of moving for a two week extension of that deadline, explaining:

> Defendant has identified a document that it believes to be responsive to this request and is currently evaluating the document under FOIA and expects to make a determination as to whether or not it will be released shortly (and, if not, the basis for any withholdings). That process, however, involves consultation within the applicable Department of Justice offices, as well as with the Department of State and the Department of Homeland Security. Accordingly, that process may not be completed before the January 25, 2016 filing deadline. That process, moreover, will be further complicated by the anticipated weather event that is expected to impact this area beginning on Friday, January 22, 2016.

(ECF No. 17 at ¶ 6) EPIC opposed that motion, implying in its argument to the Court that time was of the essence for obtaining the document but again omitting that EPIC *already* had a copy of the document at issue. (ECF No. 18 at ¶ 11, arguing that "delay will prejudice Plaintiff's interest in disclosure of the requested record" and citing to the motion for default in which Plaintiff claimed to have "shown an urgent need to obtain this record and provide it to the public to inform the ongoing U.S.-EU privacy debate"). The Court granted the extension motion in part.

According to EPIC's billing statements, EPIC incurred approximately $2,000 in attorneys' fees opposing this extension motion.

Despite a major snow event, the Criminal Division completed the necessary consultations and released the document to EPIC on January 25, 2016, the original deadline. The release letter stated in relevant part: "After carefully reviewing the record responsive to your request, I have determined that, as a matter of discretion, this document may be released in full. While this record is likely subject to Exemption 5, . . . given the fact that the European Commission has provided you with a copy of the record and is making the file publicly available on its website, I have determined to release the record as a matter of discretion." (ECF No. 19-2; Ex. 3 to Jones Decl.)

EPIC's website contains links to the document released by the EU Parliament on September 14, 2015, the EU Commission's release letter from October 2015 (itself containing a link to the document on the EU Commission website), and the document released by the Criminal Division. A comparison of all three documents reveals them to be the same.[4] (Ex. 4, 5, and 6 to Jones Decl.)

On January 28, 2016, the parties jointly moved to vacate the default (which the Court granted by minute order dated January 29, 2016) and undertook to negotiate over the issue of attorneys' fees. The parties were not able to reach agreement and, on April 4, 2016, EPIC moved

4 The only apparent difference between the documents concerns the location of the initials in the bottom right hand corner of each page of the document. The location of the initials is the same in the documents produced by the EU Parliament and EU Commission. The initials are in a slightly different location on the document produced by the Criminal Division, suggesting that two counterpart originals may have been created. The three documents otherwise appear to be identical.

for a fee award of $21,408.15 and an award of $400 in costs to obtain a copy of a document that it already had obtained.

ARGUMENT

I. Standard of Review

A plaintiff must satisfy a two-step inquiry to receive fees and costs in a FOIA action. First, the plaintiff must show that it is eligible for an award. To meet this standard, the plaintiff must show that it has "substantially prevailed," which means it obtained relief through either (1) "a judicial order, or an enforceable written agreement or consent decree;" or (2) "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii). The second of these two options "essentially codifies the 'catalyst theory'" of recovery, under which a plaintiff is eligible for fees if the "litigation substantially caused the requested records to be released." *N.Y.C. Apparel F.Z.E. v. U.S. Customs& Border Prot. Bureau*, 563 F. Supp. 2d 217, 221 (D.D.C.2008) (internal citation omitted). To recover attorneys' fees under this theory, "a litigant must . . . show[] that the lawsuit was reasonably necessary and the litigation substantially caused the requested records to be released." *Burka v. HHS*, 142 F.3d 1286, 1288 (D.C. Cir. 1998). However, "the mere filing of the complaint and the subsequent release of the documents is insufficient to establish causation." *Weisberg v. DOJ*, 745 F.2d 1476, 1496 (D.C. Cir. 1984); *Pub. Law Educ. Inst. v. DOJ*, 744 F.2d 181, 184 n.5 (D.C. Cir. 1984) ("While the temporal relation between an FOIA action and the release of documents may be taken into account in determining the existence vel non of a causal nexus, timing, in itself or in conjunction with any other particular factor, does not establish causation as a matter of law."); *Pub. Law. Educ. Inst. v. Dep't of Justice*, 744 F.2d 181, n.5 (D.C. Cir. 1984) ("[T]iming in itself or in conjunction with any other particular factor does not establish causation as a matter of law."); *see also Maynard v. CIA*, 986 F.2d 547, 568 (1st Cir. 1993) (holding that the fact that agencies produced documents after plaintiff filed suit is not determinative of whether plaintiff substantially prevailed).[5]

In addition to establishing eligibility for a fee award, a FOIA plaintiff seeking fees also must show that it is entitled to them. *Church of Scientology of Cal. v. Harris*, 653 F.2d 584, 590 (D.C. Cir. 1981). The entitlement inquiry examines (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. *See Davy v. CIA*, 550 F. 3d 1155, 1159 (D.C. Cir. 2008). Ultimately, the decision on whether a plaintiff is entitled to attorneys' fees "rests in the sound discretion of the district court." *Church of Scientology*, 653 F.2d at 590.

If the Court finds that EPIC is eligible for, and entitled to, attorneys' fees, it must determine a reasonable amount of fees. An appropriate starting point is typically the lodestar, a reasonable number of hours multiplied by a reasonable hourly rate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1982). Fees for unsuccessful claims, however, are not awarded. *See Nat'l Sec. Archive v. U.S.*

[5] In *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001), the Supreme Court rejected the so-called "catalyst theory" for determining whether a FOIA litigant substantially prevailed and held instead that in order for plaintiffs in FOIA actions to become eligible for an award of attorney's fees, they must have been "awarded some relief by [a] court" either in a judgment on the merits or in a court-ordered consent decree. In the OPEN Government Act of 2007 ("OGA"), Congress established the catalyst theory as an alternative basis for finding that a FOIA requester has "substantially prevailed" if he "obtained relief through . . ., a 'voluntary or unilateral change in position by the agency, [and] if the complainant's claim is not insubstantial.'" *See* Section 4 of the Act, amending 5 U.S.C. § 552(a)(4)(E). The case law interpreting the catalyst theory that was in effect prior to *Buckhannon*, and which is cited above, therefore has been revived by the OGA and remains relevant to the analysis.

Dep't of Defense, 530 F. Supp. 2d 198, 204-205 (D.D.C. 2008) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983)). Moreover, as a decision to award fees is discretionary, a court "may deny in its entirety a request for an 'outrageously unreasonable' amount, lest claimants feel free to make 'unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place.'" *Envtl. Defense Fund, Inc. v. Reilly*, 1 F.3d 1254, 1258 (D.C. Cir. 1993) (quoting *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir.1980)). If overbilling is less egregious but still unreasonable, the Court "may impose a lesser sanction, such as awarding a fee below what a 'reasonable' fee would have been in order to discourage fee petitioners from submitting an excessive request." *Id.* (citing *Farris v. Cox*, 508 F. Supp. 222, 227 (N.D. Cal. 1981)).

II. EPIC Is Neither Eligible Nor Entitled To A Fee Award

A. EPIC Is Not Entitled To A Fee Award

Although it is common in fee litigation to address a movant's eligibility for a fee award before addressing the entitlement prong, the unique circumstances of this case (where EPIC already had obtained the document before filing this lawsuit) make it more efficient to begin with the question of entitlement. Even if EPIC could be considered eligible to obtain a fee award in this action, which DOJ disputes as discussed below, EPIC is not entitled to any award because this lawsuit did not result in any benefit to the public. Instead, all that EPIC could possibly claim about this lawsuit is that it resulted in the release of a document that already was in EPIC's possession and publicly available before the lawsuit was filed. Although the "public benefit" derived from the case is one of four factors in assessing entitlement, "[w]here, as here, there was no public benefit to the litigation, an award of attorneys' fees and costs is unwarranted."

Chesapeake Bay Found. v. Dep't of Agric., 108 F.3d 375, 378 (D.C. Cir. 1997); *see also Bryant v. CIA,* 818 F. Supp. 2d 153, 157-58 (D.D.C. 2011) (same).

In determining whether a FOIA action resulted in a "public benefit," the Court asks whether any disclosure resulting from the lawsuit is "likely to add to the fund of information that citizens may use in making vital political choices." *Cotton v. Heyman,* 63 F.3d 1115, 1120 (D.C. Cir. 1995). "Minimal, incidental, and speculative benefit will not suffice." *Aviation Data Serv. v. FAA*, 687 F.2d 1319, 1323 (10^{th} Cir. 1982). Where the information requested already is publicly available, the required public interest is lacking. *Tax Analysts v. United States Dep't of Justice,* 965 F.2d 1092, 1094-95 (D.C. Cir. 1992) (upholding denial of fees based on District Court's determination that "the information obtained was previously available publicly"); *Cf. Davy,* 550 F.3d at 1159-60 (distinguishing *Tax Analysts* because "[a]t least one of the requested documents was not previously available to the public" and indisputably provided new information).

Because EPIC already was in possession of the document sought in this lawsuit before this lawsuit was filed, and that document was publicly available on the EU Commission's website (and publicized by EPIC on its own website), the public interest that EPIC identifies in its motion is misguided. EPIC asserts that "[t]he Umbrella Agreement, successfully obtained by EPIC in this case, has contributed materially to [the] debate" over transatlantic data transfers, and refers to the document as a "previously secret document concerning transatlantic data transfers that is now subject to public scrutiny." (EPIC Motion at 8-9) In fact, however, EPIC already had obtained the same document from the EU Commission before this lawsuit was filed. Moreover, before EPIC had posted the document obtained in this lawsuit on its website or even filed suit in this lawsuit, it apparently already had posted the same document on its website (or provided a link to it) that had been obtained from the EU Parliament and the EU Commission. In emphasizing the popularity of its website (Opp. at 9 n. 4), EPIC implicitly acknowledges that the public had access to the document well before this lawsuit was even filed and that public knowledge therefore was not advanced by the filing of this lawsuit.

Because EPIC fails in its motion to acknowledge its prior receipt of the "EU-US Umbrella Agreement", EPIC's motion lacks any explanation of how this lawsuit advanced public knowledge when the document already had been released by the EU Commission. EPIC, for instance, has not questioned the authenticity or accuracy of the document that it obtained from the EU Commission. To the contrary, a headline on its website dated October 25, 2015, stated that "After FOI Request, EPIC Obtains Secret 'Umbrella Agreement' from the EU Commission." (Ex. 5 to Jones Decl.) The EU is, of course, a distinct entity from the United States and cannot bind the United States through its actions. But this is not a situation involving an unauthorized release by an entity without rights to the document. The EU Commission was a party to the agreement and released the copy of the document that it lawfully maintained. EPIC has failed to establish how, in such a situation, the later release of the same document by the other party to the agreement (the federal government) adds in any material way to "the fund of information that citizens may use in making vital political choices." For this reason alone, EPIC's fee motion should be denied.

The remaining factors that courts consider in assessing entitlement include the commercial benefit to the plaintiff, the nature of the plaintiff's interest in the records, and the reasonableness of the agency's withholding. *McKinley v. Federal Housing Finance Agency*, 739 F.3d 707, 711 (D.C. Cir. 2014). However, because no public benefit was obtained by this lawsuit, the Court need not consider these other factors. *Chesapeake Bay Found.*, 108 F.3d at 378 ("[w]here, as here, there was no public benefit to the litigation, an award of attorneys' fees and costs is unwarranted").

Nevertheless, on balance, those factors also weigh against any fee award. The second and third factors are generally considered together, and where the plaintiff is a public interest group (like EPIC), courts routinely weigh these factors in plaintiff's favor. However, the final factor is dispositive where the agency has a "colorable basis" for initially withholding a document before making a discretionary release. *Dorsen v. U.S. Securities and Exchange Commission*, 15 F. Supp. 3d 112, 123-125 (D.D.C. 2015). "[T]he rule applied in this Circuit avoids penalizing agencies that 'choose to relent for the sake of transparency and release requested documents without exposing themselves to monetary penalties: the fact that their initial nondisclosure decision rested on a solid legal basis creates a safe harbor against the assessment of attorney fees.' Otherwise, 'agencies with legal authority to withhold requested documents would have no such safe harbor' and 'might hesitate to release the documents, since doing so would risk creating a 'substantially prevail[ing]' plaintiff who might be entitled to fees.'" *Id.* at 124-25 (quoting *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 524 (D.C. Cir. 2011)).

Here, the agency did not issue a decision to EPIC withholding any records and did not require a court-ordered judgment to process or release any record. Instead, as in *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521 (D.C. Cir. 2011), the Criminal Division, of its own volition, made a discretionary release of the document after carefully considering factors relevant to that determination (Jones Decl. ¶¶ 14-15). *See Brayton,* 641 F.3d at 523, 528 (agency decision to de-classify trade agreement with European counterparties and release the document to FOIA plaintiff after the Europeans agreed to release the agreement does not subject the agency to fees under FOIA; noting that the agency "could have delayed the process and withheld the documents much longer" and "the irony that awarding to plaintiffs in Brayton's situation might prod government agencies to be less rather than more transparent"). Thus, EPIC cannot establish that DOJ "withheld" the document or acted unreasonably as would be required to satisfy the fourth factor. *Id.* at 528; *Dorsen*, 15 F. Supp. 3d at 125.

Indeed, EPIC's assertions here are similar to those rejected by the Court in *Mobley v. DHS,* 908 F. Supp. 2d 42 (D.D.C. 2012). There, the Court held that, even assuming that the lawsuit was the catalyst for the release of records, fees were not warranted because "the government did not engage in the sort of dilatory litigation tactics that [the "voluntary or unilateral change in position"] provision was aimed to prevent." *Id.* at 48. The government instead "voluntarily processed the plaintiffs' request only three weeks after the complaint was filed" and, while "it would have been ideal for the defendant to process the plaintiffs' request from the very beginning," the Court held that "the government's compliance with the plaintiffs' request so early in the litigation is not the sort of agency behavior that Congress intended to prevent by awarding attorney's fees." *Id.*

Here, it cannot be said that the Criminal Division's conduct was unreasonable, recalcitrant or obdurate in any way. *See McKinley*, 739 F.3d at 712-713. As set forth in the accompanying Jones Declaration, the agency diligently undertook an administrative review process from the time the request was received by the Department of Justice and routed to the appropriate component for processing to the date of the document's release in late January 2016. (Jones Decl. ¶¶ 8-15) That process required input from numerous components within the federal government as well as consideration of various issues, including the potential applicability of Exemption 5 due to the draft nature of the document. *See, e.g., In re Sealed Case,* 121 F.3d 729, 741 (D.C. Cir. 1997) (citing *Russell v. Dep't of Air Force,* 682 F.2d 1045 (D.C. Cir. 1982), as holding that "deliberative process privilege applies to early drafts of Air Force report on use of herbicides in Vietnam despite public release of the final report"); *Competitive Enter. Instit. v. Office of Science & Tech.*, 2016 U.S. Dist. LEXIS 15893, at *16 (D.D.C. Feb. 10, 2016) (discussing the application of Exemption 5 to drafts). Ultimately, after considering these issues and the EU Commission's public release of the document, the Criminal Division decided to make a discretionary release of the document. (ECF No. 19-2; Jones Decl. ¶¶14-15 and Ex. 3) Thus, the record reflects that the Criminal Division never issued a decision to EPIC withholding the document and acted diligently in considering issues bearing on the ultimate release determination.

B. EPIC Is Not Eligible To Obtain A Fee Award

EPIC never obtained a judgment from the Court or an order directing the release of the document at issue. For EPIC to claim eligibility for a fee award, it must do so, if at all, under a "catalyst" theory, namely, that the fees it incurred in this lawsuit caused "a voluntary or unilateral change in position by the agency" provided EPIC's lawsuit was "not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii).

To recover attorneys' fees under a catalyst theory, "a litigant must . . . show[] that the lawsuit was reasonably necessary and the litigation substantially caused the requested records to be released." *Burka v. HHS*, 142 F.3d 1286, 1288 (D.C. Cir. 1998). "A FOIA case must be viewed in its totality in determining whether a plaintiff has 'substantially prevailed..'" *Mobley,* 908 F. Supp. 2d at 48. Under the totality of circumstances, EPIC cannot establish that the lawsuit was "reasonably necessary," nor can EPIC establish that the litigation "substantially caused" the requested record to be released. Moreover, for reasons already addressed above, because the requested record already was publicly available, EPIC is unable to establish that the outcome was "not insubstantial." *Bryant v. CIA,* 818 F. Supp. 2d 153, 158 (D.D.C. 2011) ("'FOIA's fees provision seeks to promote' activity that would 'ferret out and make public worthwhile, previously unknown government information[.]' Plaintiff . . . fails to persuade the Court that his victory was 'not insubstantial.'").

1. EPIC Filed The Lawsuit Prematurely

Under this "circuit's long-established rule," fees should not be awarded to plaintiffs "who bring FOIA lawsuits that cannot survive summary judgment." *Brayton,* 641 F.3d at 526, 528. Even when, as here, a discretionary release has been made mooting the lawsuit, the Court should consider whether the plaintiff would have prevailed at the dispositive motion stage. *Id.* In this case, EPIC would not have prevailed at the dispositive motion stage because EPIC failed to exhaust its administrative remedies before filing suit.[6] Its failure to do so, moreover, renders the

6 EPIC's failure to exhaust administrative remedies before filing suit would have been a ground for dismissal of this lawsuit had it not been rendered moot by the Criminal Division's discretionary release of the document at issue. In this Circuit, however, the court can consider how a claim may have fared at the dispositive motion stage in ruling on a fee motion even if that stage was not reached. *Brayton,* 641 F.3d at 527-528 (fee award not available where government establishes it would have prevailed on summary judgment). The agency's discretionary release, moreover, does not preclude the Criminal Division from raising the failure to exhaust in the context of EPIC's fee motion. *Dorsen,* 15 F. Supp. 3d at 124; *see also Greenberg v. Dep't of Treasury,* 10 F. Supp. 2d 3, 23 (D.D.C. 1998) ("Plaintiffs also fail to explain how the FBIHQ's decision to release some documents . . . waived its exhaustion defense. . . . Penalizing agencies by holding that they waive their exhaustion defense if they make a discretionary document release after the time for an administrative appeal had expired would not advance the underlying purpose of the FOIA -- the broadest possible responsible disclosure of government documents.").

litigation (and all fees incurred in the litigation) unnecessary and thus not recoverable for that additional reason.

Under FOIA, an agency receiving a request for the release of information is afforded 20 days after receipt (excepting Saturdays, Sundays, and legal holidays) to make a determination as to whether to comply with the request. *See* 5 U.S.C. § 552(a)(6)(A)(i). Moreover, an agency can extend by ten working days the 20-day time limit for processing a request by written notice setting forth unusual circumstances, 5 U.S.C. § 552(a)(6)(B)(i)-(iii), which the agency did here. (ECF No. 14-5, Ex. D to Motion for Default). Although the exhaustion of administrative remedies is not jurisdictional, exhaustion is a "condition precedent" to filing a lawsuit and the failure to exhaust "precludes judicial review." *Hidalgo v. Federal Bureau of Investigation,* 344 F.3d 1256, 1259 (D.C. Cir. 2003); *Bonner v. SSA,* 574 F. Supp. 2d 136, 138-39 (D.D.C. 2008) (observing that administrative exhaustion is a "condition precedent" to filing suit and dismissing prematurely filed lawsuit); *Judicial Watch v. FBI,* 2002 U.S. Dist. LEXIS 28168, at *14 (D.D.C. July 26, 2002) (dismissal appropriate for prematurely filed lawsuit even if "the defendant subsequently failed to timely respond to the plaintiff's substantive request for the documents" because "the Court will only consider those facts and circumstances that existed at the time of the filing of the complaint, and not subsequent events, in deciding whether this case must be dismissed").

Under the DOJ FOIA regulations, requests must be sent "directly to the FOIA office of the component that maintains the records being sought," 28 C.F.R. § 16.3(a)(1), and if a requester is uncertain about the location of the records, the requester can send the request to DOJ's "catch-all 'FOIA/PA Mail Referral Unit,'" *id.* § 16.3(a)(2), which is what EPIC did here (ECF No. 14-2, Ex. A to Motion for Default). *See generally Gordon v. Courter,* 118 F. Supp. 3d 276, 285-86 (D.D.C.

2015). When as here a requester sends a request to DOJ's "catch-all" address and that request is not directed in the first instance to the proper component, the response time does not begin to run until the request is received by the "proper component's office that is designated to receive requests, but in any event not later than 10 working days after the request is first received by any component's office that is designated by these regulations to receive requests." *See* 28 C.F.R. § 16.5(a); *see also* 5 U.S.C. § 552(a)(6)(A).

The applicable component here was the DOJ Criminal Division, which received the request on October 7, 2015. (ECF No. 14-5, Ex. D to Motion for Default and Ex. 2 to Jones Decl.). However, because the DOJ Mail Referral Unit (an agency component designated by regulation to receive requests) received the request on September 10, 2015, the Criminal Division's response period began to run 10 working days after receipt by the DOJ Mail Referral Unit, that is, on September 24, 2015, even though the request was first directed to the Office of Information Policy and not received by the Criminal Division until October 7, 2015. *See* 28 C.F.R. § 16.4(c) and 16.5(a). The Criminal Division was the "proper component's office" that ultimately was designated to receive and respond to the request. (Jones Decl. ¶ 7 and Ex. 2 to Jones Decl.)

Moreover, because the FOIA requester was timely notified of unusual circumstances for processing the request (Ex. 2 to Jones Decl.), the agency had at least 30 working days from September 24, 2015 (instead of 20 working days) to process the request. *See* 28 C.F.R. § 16.5(c). Accordingly, excluding weekends and holidays, the agency's response period did not expire until November 6, 2015. *See* 5 U.S.C. § 552(a)(6)(B)(i-iii); 28 C.F.R. § 16.5(c).[7]

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7 The Criminal Division's letter of October 8, 2015 did not set a specific date by which the

EPIC filed this lawsuit prematurely on November 4, 2015. EPIC, therefore, cannot establish that the lawsuit was "reasonably necessary" as is required to be eligible for a fee award. *See Schoenman v. FBI,* 2006 U.S. Dist. LEXIS 14905, at *61 (D.D.C. Mar. 31, 2006) ("Here, Plaintiff is left with an unperfected request upon the CIA that was not administratively exhausted. If Plaintiff's argument to the contrary were to prevail (i.e., Plaintiff could just ignore the agency's helping hand, refuse to respond, fail to exhaust his administrative remedies, and bring suit), it would discourage agencies from pursuing a course that tries to aid the requester and reduce fees - a position in accordance with the 1996 Amendments to the FOIA."). All fees incurred in this lawsuit were voluntarily incurred by EPIC (rather than necessarily incurred) and thus EPIC is not eligible for a fee award for this reason. Moreover, because EPIC failed to exhaust administrative remedies before filing suit, its claim would not have survived a dispositive motion, *Hidalgo,* 344 F.3d at 1259, thus disqualifying EPIC from any fee award. *Brayton,* 641 F.3d at 526, 528.

2. EPIC Has Failed To Establish That The Litigation Substantially Caused The Release Of The Record.

EPIC's basis for contending that the litigation substantially caused the release of the record rests entirely on the timing of the release relative to the date when the Criminal Division learned of the lawsuit. However, a plaintiff is not entitled to attorney's fees based on the bare assertion that the agency released documents after plaintiff filed a lawsuit. *Conservation Force v. Jewell,* 2016

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processing of the request could be expected to be completed, but instead, as permitted by 28 C.F.R. § 16.5(c), stated that the time limit was being extended "beyond the ten additional days provided by the statute." (Ex. 2 to Jones Decl.). Accordingly, pursuant to 28 C.F.R. § 16.5(c), the Criminal Division afforded EPIC the opportunity to narrow the scope of the request or propose an alternative timeframe for processing. (*Id.*) EPIC did not respond to that aspect of the October 8, 2015 letter. (ECF No. 14-6, Ex. E). EPIC instead appealed only the Criminal Division's denial of its request for expedited processing. (*Id.*) *See Judicial Watch v. FBI,* 2002 U.S. Dist. LEXIS 28168, at *13 (D.D.C. July 26, 2002) (alleged exhaustion of expedited processing claim does not constitute exhaustion of distinct claim for release of documents).

U.S. Dist. LEXIS 14275, at *13 (D.D.C. Feb. 5, 2016) ("Ultimately, it is the plaintiff's burden to show that the catalyst pathway applies . . . ; if nothing else, this at least means that equipoise on the question of causation will not do"); *Touarsi v. U.S. Dep't of Justice,* 78 F. Supp. 3d 332, 350 (D.D.C. 2015) ("A plaintiff may not recover attorney's fees in a FOIA action merely because the agency released additional documents after the plaintiff filed a complaint in federal court.").

Indeed, it is well settled that such timing alone is "insufficient to establish causation." *Weisberg v. DOJ*, 745 F.2d 1476, 1496 (D.C. Cir. 1984); *Pub. Law Educ. Inst. v. DOJ*, 744 F.2d 181, 184 n.5 (D.C. Cir. 1984) ("While the temporal relation between an FOIA action and the release of documents may be taken into account in determining the existence vel non of a causal nexus, timing, in itself or in conjunction with any other particular factor, does not establish causation as a matter of law."); *Pub. Law. Educ. Inst. v. Dep't of Justice*, 744 F.2d 181, n.5 (D.C. Cir. 1984) ("[T]iming in itself or in conjunction with any other particular factor does not establish causation as a matter of law."); *see also Maynard v. CIA*, 986 F.2d 547, 568 (1st Cir. 1993) (holding that the fact that agencies produced documents after plaintiff filed suit is not determinative of whether plaintiff substantially prevailed).

In addition, because the record establishes that the Criminal Division was engaged in a diligent process to locate and evaluate the requested record before the lawsuit was filed through the date the document was released in late January 2016 (Jones Decl. ¶¶ 8-15), EPIC is not eligible to recover attorney's fees. *Calypso Cargo, Ltd. v. U.S. Coast Guard,* 850 F. Sup. 2d 1, 5-6 (D.D.C. 2012) (plaintiff not eligible for fees where agency's "declarations make clear that the delay in the

Coast Guard's release was not due to intransigence, but rather was the result of a diligent, ongoing process that began before the initiation of the instant lawsuit").[8]

III. Any FeeAward Should Be Substantially Reduced From The Claimed Amount.

In addition, even if EPIC could establish entitlement and eligibility, EPIC should not be awarded fees that were unnecessarily incurred, excessive, unrelated to obtaining the document at issue, or that pertain to matters that were ruled on by the Court adversely to EPIC.[9] *See, e.g., EPIC v. DHS,* 982 F. Supp. 2d 56, 60 (D.D.C. 2013) ("[T]his Court expects fee applicants to exercise billing judgment. Where applicants fail to do this, the Court will exclude 'hours that are excessive, redundant, or otherwise unnecessary' after considering the record."); *Envtl. Defense Fund, Inc. v. Reilly,* 1 F.3d 1254, 1258 (D.C. Cir. 1993) ("In deciding the reasonableness of the

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8 The accompanying Jones declaration is being submitted to establish facts that demonstrate that the Criminal Division was engaged in a diligent, ongoing process that began before the initiation of the instant lawsuit. Unlike the factual timeline established in the declaration, additional details regarding the deliberations of the Criminal Division and various proposals regarding how to respond to the request are not included because they add nothing to this demonstration and are protected by the deliberative process privilege. As reflected in the declaration, the agency did not make a final, official determination regarding whether to release the document until January 25, 2016. Accordingly, there was only one final, official decision, and EPIC cannot demonstrate that the lawsuit caused "a voluntary or unilateral change in position" within the meaning of 5 U.S.C. § 552(a)(4)(E)(ii).

9 The Criminal Division made a discretionary release of the document on January 25, 2016. Any time spent by EPIC after January 25, 2016, therefore, cannot be characterized as necessary for obtaining release of the document. Moreover, although EPIC prepared its motion for default judgment prior to that release, EPIC cannot be considered the prevailing party with respect to that motion because the parties jointly moved on January 28, 2016 to deny that motion as moot (ECF No. 19) and the Court granted that motion and vacated the clerk's entry of default. Similarly, EPIC was not the prevailing party regarding the Criminal Division's motion for extension, filed on January 22, 2016, because that motion was granted in part. Thus, even if EPIC were found to be eligible and entitled to fees, that eligibility and entitlement would not include time incurred on matters that were ruled on by the Court in which EPIC did not prevail, as well as matters that post-date the release of the record at issue.

hours reported, we properly disallow 'time spent in duplicative, unorganized or otherwise unproductive effort.'"); *Conservation Force,* 2016 U.S. Dist. LEXIS 14275, at *15 ("it is important to note that, even after finding eligibility and entitlement, district courts retain the discretion to modify a fee award based on the reasonableness of the request and the particular facts of the case")

Here, Plaintiff seeks to recover for unnecessary time expended prosecuting an ultimately unsuccessful motion for default (when it could have avoided those expenses by reaching out to existing contacts at the United States Attorney's Office), opposing a partially successful motion for extension on the ground that time was of the essence (when EPIC already had the document at issue in its possession), participating in unnecessary conferences with multiple attorneys, and performing other miscellaneous tasks after the Criminal Division's January 25, 2016 release of the document. This case cannot be characterized as complex litigation warranting extensive staffing (EPIC seeks to recover fees for the attorney time of four lawyers (albeit one at a paralegal rate)[10]). It was a straightforward FOIA action seeking the release of a single document (already in EPIC's possession) by an entity already knowledgeable about FOIA and with experience litigating FOIA

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10 One of the individuals listed in the billing statements, Marc Rotenberg, identifies himself in his declaration as holding only the title of President of EPIC. (ECF No. 21-9, Rotenberg Decl. ¶ 3). In contrast, the other individuals listed in the billing records identify themselves as holding the following legal positions with EPIC: Senior Counsel (Alan Jay Butler), FOIA Counsel (T. John Tran), and Appellate Advocacy Counsel (Aimee D. Thomson). (ECF No. 21-10, Butler Decl. ¶ 4; ECF No. 21-11, Tran Decl. ¶ 5; ECF No. 21-12, Thomson Decl. ¶ 4). Although licensed to practice law, Mr. Rotenberg has failed to establish that he served in the capacity as an attorney at EPIC (as opposed to the role of client) in connection with the tasks he performed as referenced in the billing records with respect to this matter. Accordingly, his time should be excluded in full for this alternative reason. The billing rate for which he seeks reimbursement ($796 per hour), moreover, is $266 more per hour than provided in the USAO Laffey Matrix for an attorney with 21-30 years of experience ($530 per hour). (Ex. A hereto)

actions.[11] Thus, for all of these reasons, were the Court to find EPIC eligible and entitled to fees in this case (which Defendant disputes), the Court should at most award EPIC its court filing fee and the attorney hours reasonably incurred in the preparation of the Complaint.

Moreover, once the Court identifies a reasonable amount of hours incurred, it must identify the applicable hourly rate. Plaintiffs claim that they are entitled to the higher rates set forth in the LSI *Laffey* Matrix as opposed to the United States Attorney's Office ("USAO") *Laffey* Matrix. (Opp. at 12-13) Although the D.C. Circuit recently held that a lower court did not abuse its discretion in applying LSI *Laffey* Matrix under the circumstances of that case, *Salazar v. District of Columbia,* 809 F.3d 58, 64-65 (D.C. Cir. 2016), this litigation presents a unique set of circumstances in which the higher LSI *Laffey* Matrix would not be appropriate.

Among other things, the document that EPIC sought to obtain (the EU-US Umbrella Agreement) already was in its possession before the lawsuit was filed. This litigation, moreover, did not require the briefing of dispositive motions or other tasks that could be characterized as complex. EPIC also did not retain the services of a law firm to prosecute this case, but litigated the action entirely through in-house counsel. Under these circumstances, and given the absence of any public benefit to this litigation, awarding EPIC fees at the LSI *Laffey* Matrix would enable EPIC to profit at the public expense and is not warranted. *Poulsen v. DHS,* 2016 U.S. Dist. LEXIS 35984, at *19 (D.D.C. Mar. 21, 2016) ("This case did not involve creation of a *Vaughn* index or briefing of dispositive motions. . . ., Plaintiff's counsel's role was more focused on coordination with opposing counsel, preparation and submission of Joint Status Reports to the

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11 For instance, attorney Marc Rotenberg, the President of EPIC, refers to himself in his declaration as the "coeditor of . . . a leading practice manual on the Freedom of Information Act" and an adjunct professor who teaches about FOIA matters. (ECF No. 21-9, Rotenberg Decl. ¶ 6).

Court, monitoring of ongoing production, and negotiations regarding the applicability of certain exemptions that the agency applied. . . . [T]he Court cannot conclude based on the record submitted that the tasks required of Plaintiff's counsel, as a whole, are the types of tasks that merit rates enhanced beyond the *Laffey* rate scheme produced by the U.S. Attorney's office."); *Citizens for Responsibility and Ethics in Washington v. Dep't of Justice,* 2015 U.S. Dist. LEXIS 145942, at *38 (D.D.C. Oct. 27, 2015) (finding that evidence similar to that offered here by EPIC "does not speak to the prevailing rate in Washington, D.C. for similar services by lawyers of reasonably comparable skill, experience and reputation. Most notably, the bulk of the evidence reflects rates charged by lawyers at some of the nation's largest law firms.")

According to EPIC's billing statements, EPIC's FOIA Counsel, T. John Tran, spent 4.6 hours drafting the complaint, conferring with a senior attorney (Mr. Butler) and EPIC's President (Mr. Rotenberg) about the complaint and filing the complaint. (ECF No. 21-8, at Page 3 of 13). Under the USAO *Laffey* Matrix applicable to that time period (Ex. A hereto), and given that Mr. Tran had been practicing law since only July 2015,[12] his time may be compensated at the rate of $284 per hour, for a total of $1,306.40. Moreover, EPIC's Senior Counsel, Alan Butler, spent 0.7 hours conferring with Mr. Tran and EPIC's President about the complaint and editing the complaint. (*Id.*) Under the USAO *Laffey* Matrix, Mr. Butler's time may be compensated at $315 per hour based on his 2013 admission to the D.C. Bar,[13] for a total of $220.50.

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12 Although Mr. Tran states in his declaration that he graduated law school in 2014, he was not admitted to practice by the DC Bar (the only bar membership identified in his declaration) until July 10, 2015, according the member search result for his name on the DC Bar website. *See* https://www.dcbar.org/membership/find-a-member-results (using search term Thailam John Tran).

13 Although Mr. Butler states in his declaration that he graduated law school in 2011, he was

Accordingly, in the event the Court determines that EPIC is eligible and entitled to fees, the Court should award no more than $1,526.90 for attorney time and $400 for the filing fee, for a total of $1,926.90.

IV. EPIC's Claim for "Fees on Fees"

In addition to claiming fees incurred in bringing this action, EPIC also seeks "fees on fees" for time spent either negotiating fees with Defendant or preparing its filing for attorneys' fees. Of the $21,408 in attorneys' fees sought by EPIC in its motion, $7,417.30 are attributable to the issue of attorneys' fees. (ECF No. 21-1, Tran Decl. ¶ 12). If the Court chooses to grant EPIC "fees on fees", such an award should be reduced significantly to the same extent that the Court reduces any award to EPIC on its underlying claim for fees. *See Judicial Watch, Inc. v. DOJ,* 878 F. Supp. 2d 225, 241 (D.D.C. 2012) (after finding that plaintiff was entitled to only 5.3% of fees sought for litigating the merits, awarding plaintiff the same percentage of the "fees on fees" plaintiff sought).

Moreover, an additional condition applies to any fees awarded to EPIC as a result of Defendant's service of an Offer of Judgment on EPIC on February 25, 2016. (Ex. B hereto) (redacted Offer of Judgment) Even though EPIC already had obtained a copy of the EU-US

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not admitted to practice by the DC Bar until January 11, 2013, according the member search result for his name on the DC Bar website. *See* https://www.dcbar.org/membership/find-a-member-results (using search term Alan Butler). Mr. Butler states in his declaration (dated April 4, 2016) that he also is a member of the State of California Bar. However, according to the California State Bar website (http://members.calbar.ca.gov/fal/Member/Detail/281291), Mr. Butler's status was inactive as of February 6, 2015 and only again became active on February 29, 2016. Thus, although Mr. Butler was admitted to the State Bar of California in December 2011, the Court should use his D.C. Bar admission date to assess his relevant hourly rate under the *Laffey* matrix. *See Dickens v. Friendship-Edison P.C.S.,* 724 F. Supp. 2d 113, 119-20 (D.D.C. 2010) ("Though they were admitted to the bars of other states, neither RR nor CB were licensed to practice law in the District of Columbia during the time they worked on these cases . . . . Accordingly, this Court accepts Defendant's suggestion that attorneys RR and CB are reasonably billed at the hourly rate for paralegals.").

Umbrella Agreement before filing this lawsuit, EPIC did not accept this offer within 14 days of service, choosing instead to litigate the issue.

Under Rule 68, if EPIC prevails on its fee motion but recovers less than the amount offered, EPIC cannot recover any costs incurred after the offer, which here would be fees incurred after February 25, 2016. *EPIC v. DHS,* 982 F. Supp. 2d 56, 62, 65 (D.D.C. 2013). At this time, unless requested to do so by the Court, Defendant is not disclosing the amount of its Offer of Judgment out of concern that it could influence improperly the Court's consideration of the fee motion or be construed as a concession by Defendant that the amount specified in the Offer represents a reasonable award. Instead, Defendant respectfully requests that if the Court finds EPIC eligible and entitled to attorneys' fees, the Court divide the fees that it finds recoverable into two categories: those incurred until February 25, 2016, and those incurred after that date, and that the Court initially refrain from entering final judgment for any amount of attorneys' fees. After reviewing the Court's preliminary ruling on the fee issue, Defendant will determine whether the Offer of Judgment is greater or lesser than any pre-Offer fees and costs awarded to EPIC, and will promptly file either (a) in the former case, the Offer (and a request to deny any fees subsequent to the Offer), or (b) in the latter case, a Notice that the Offer did not exceed the pre-Offer fees and costs awarded.

CONCLUSION

For the foregoing reasons, EPIC's motion for attorneys' fees should be denied or, in the alternative, any fees awarded should be substantially reduced to a fraction of what EPIC has requested.

Respectfully submitted,

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