United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 19, 2018 Decided July 9, 2018

No. 17-5114

JEFFERSON MORLEY,
APPELLANT

v.

CENTRAL INTELLIGENCE AGENCY,
APPELLEE

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

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

Benton G. Peterson, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Jessie K. Liu*, U.S. Attorney, and *R. Craig Lawrence*, Assistant U.S. Attorney.

Before: HENDERSON, KAVANAUGH, and KATSAS, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

Dissenting opinion filed by *Circuit Judge* HENDERSON.

PER CURIAM: This FOIA case has dragged on for a staggering 15 years. The litigation over attorney's fees alone has taken 8 years. It is time to bring the case to an end.

The sole question at this point is whether plaintiff Morley is entitled to attorney's fees under the FOIA attorney's fees statute. In 2003, Morley submitted a FOIA request to the CIA. Morley sought records related to former CIA Officer George Joannides. Morley stated that the records about Joannides would "shed new light on" the assassination of President Kennedy. After several years of litigation, the CIA supplied Morley with some responsive records. In 2010, Morley requested attorney's fees from the Government. Under FOIA, the district court "*may* assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i) (emphasis added).

Because the FOIA attorney's fees statute provides that the district court "may" award fees to a prevailing plaintiff – and not "must" or "shall" award fees – courts have struggled for years to determine when attorney's fees should be awarded to a prevailing FOIA plaintiff. This Court has said that district courts should consider four rather amorphous factors: (i) the public benefit from the case; (ii) the commercial benefit to the plaintiff; (iii) the nature of the plaintiff's interest in the records; and (iv) the reasonableness of the agency's withholding of the requested documents. *See Davy v. CIA*, 550 F.3d 1155, 1159 (D.C. Cir. 2008). We have left the balancing of the factors to the discretion of the district court.

How does the court of appeals review a district court's attorney's fees decision under the FOIA statute and the judicially created four-factor test? Deferentially. We review

the district court's attorney's fees determination only for abuse of discretion. In other words, was the district court's decision on attorney's fees at least within the zone of reasonableness, even if we might disagree with the decision? We apply that deferential standard, we have said, because the district court is "better suited to make the initial determination" about whether a litigant is entitled to attorney's fees, given that the district court closely monitored the litigation. *Davy v. CIA*, 456 F.3d 162, 167 (D.C. Cir. 2006).

It is important to unpack what abuse-of-discretion review means in the context of FOIA attorney's fees litigation. First, we review for abuse of discretion the district court's analysis of each of the four individual factors (to the extent the appellant raises such an argument on appeal). Second, we review for abuse of discretion the district court's balancing of the four factors (to the extent the appellant raises such an argument on appeal). With respect to that latter inquiry, when all four factors point in favor of the plaintiff or in favor of the defendant, the attorney's fees analysis is ordinarily straightforward. But when the four factors point in different directions, the district court has very broad discretion in deciding how to balance those factors and whether to award attorney's fees. Indeed, if the four factors point in different directions, assuming no abuse of discretion in the district court's analysis of the individual factors, it will be the rare case when we can reverse a district court's balancing of the four factors and its ultimate decision to award or deny attorney's fees. *See Tax Analysts v. Department of Justice*, 965 F.2d 1092, 1094, 1096 (D.C. Cir. 1992); *LaSalle Extension University v. FTC*, 627 F.2d 481, 484 (D.C. Cir. 1980).

This is the third time that this Court has considered whether Morley is entitled to attorney's fees. In each of the first two appeals, we remanded the case back to the District

Court for additional analysis. In its most recent decision, the District Court denied fees.

One can debate whether the District Court's decision denying attorney's fees was correct. But the question for us is not whether the District Court's decision was correct, but rather whether the District Court's decision was at least reasonable. Applying the deferential abuse-of-discretion standard, we conclude that the District Court's decision was reasonable, and we therefore affirm the judgment of the District Court denying attorney's fees.

* * *

Applying this Circuit's four-factor inquiry, the District Court concluded that the first factor favored Morley because there was at least a small public benefit from the information sought by Morley. The District Court concluded that factors two and three – relating to the plaintiff's possible commercial benefit and commercial interest – did not count against Morley. *See Morley v. CIA*, 245 F. Supp. 3d 74, 78 n.2 (D.D.C. 2017). In short, as Morley's counsel acknowledged at oral argument, the District Court "found that three of the four factors favored Morley." Tr. of Oral Arg. at 4.

But Morley contends that the District Court's analysis of those three factors afforded them insufficient weight and did not square with our prior decision in this case. We disagree.

In our prior decision, we held that factor one favored Morley, but only to the extent that some of the records sought by Morley might have "marginally" supported one of Morley's theories, meaning that there was "at least a modest probability" of generating useful information. *Morley v. CIA*, 810 F.3d 841, 844-45 (D.C. Cir. 2016). Our decision did not precisely

quantify the public benefit. But our use of the word "marginally" suggested that the public benefit might be small. The District Court's assessment on remand that a public benefit existed, but was "small," was entirely consistent with our prior decision. *Morley*, 245 F. Supp. 3d at 77. Moreover, given Morley's disjointed explanations in this case, the District Court did not abuse its discretion in concluding that the public benefit here was small.

On factors two and three, the District Court likewise did not abuse its discretion. In similar cases involving non-commercial requesters, we have upheld a district court's analysis of factors two and three when the district court stated (as the District Court did here) that those factors at least did not count against an award of attorney's fees. *See McKinley v. FHFA*, 739 F.3d 707, 712 (D.C. Cir. 2014); *cf. Davy v. CIA*, 550 F.3d 1155, 1160 (D.C. Cir. 2008).

We therefore turn to the fourth factor, which is the heart of this case. That factor evaluates why the agency initially withheld the records. In particular, the "fourth factor considers whether the agency's opposition to disclosure had a reasonable basis in law and whether" the agency was "recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." *Davy*, 550 F.3d at 1162; *see also Tax Analysts v. Department of Justice*, 965 F.2d 1092, 1097 (D.C. Cir. 1992); *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979); *Nationwide Building Maintenance, Inc. v. Sampson*, 559 F.2d 704, 712 (D.C. Cir. 1977). Under the fourth factor, the question for a district court is not whether the agency's legal and factual positions were correct. The question is whether the

agency's positions were reasonable. *See Davy*, 550 F.3d at 1162.[1]

Here, in applying the fourth factor, the District Court determined that the CIA had "advanced a reasonable legal position and did not engage in any recalcitrant or obdurate behavior." *Morley*, 245 F. Supp. at 78. Morley disagrees.

To reiterate, our standard of review of the District Court's conclusion on the fourth factor is deferential: We ask only whether the District Court's decision was reasonable. And in reviewing the District Court's conclusion on the fourth factor (which in turn asks whether the agency's position was reasonable), we end up applying what is in essence a double dose of deference. The question for us is whether the District Court *reasonably* (even if incorrectly) concluded that the agency *reasonably* (even if incorrectly) withheld documents.

Morley advances five main arguments that the CIA acted unreasonably in response to his FOIA request.

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[1] The first three factors have the effect of eliminating the possibility of attorney's fees for certain prevailing plaintiffs. We doubt that is a proper interpretation of the statute, for reasons that have been detailed elsewhere. *See Morley v. CIA*, 719 F.3d 689, 690-693 (D.C. Cir. 2013) (Kavanaugh, J., concurring); *Davy v. CIA*, 550 F.3d 1155, 1166 (D.C. Cir. 2008) (Randolph, J., dissenting). It is arguable that the fourth factor alone should constitute the test under FOIA for attorney's fees. That approach would, among other things, greatly simplify these unnecessarily complicated FOIA attorney's fees cases and eliminate the unfair discrimination against certain prevailing plaintiffs that results from the first three factors. As a three-judge panel, however, we of course must and do adhere to our circuit precedent.

First, Morley contends that the CIA unreasonably missed the initial 20-day statutory deadline for responding to the FOIA request. Morley is correct that the CIA failed to properly respond to the request within 20 days, as required by statute. *See* 5 U.S.C. § 552(a)(6)(A)(i). But that is true of a vast number of FOIA requests. The statute itself imposes consequences on the agency for delay past the 20-day mark. *See Citizens for Responsibility and Ethics in Washington v. FEC*, 711 F.3d 180, 189 (D.C. Cir. 2013). But the statute does not suggest that an award of attorney's fees should be automatic in those situations. And some delay past the 20-day mark is not necessarily so unreasonable in and of itself as to *require* an award of attorney's fees to an ultimately prevailing plaintiff. We are aware of no court of appeals case that has suggested otherwise.

This case is a fine example of why that is so. According to the responsible CIA official, when the CIA processed Morley's FOIA request, "the Agency had 1,675 FOIA and" Privacy Act "requests in queue in various stages of processing." Herman Declaration ¶ 31. Of those outstanding requests, "approximately 940 in the same queue as" Morley's request were still in process. *Id.* To be sure, agencies should strive to meet relevant statutory deadlines. But here, the CIA faced a large backlog of requests. Therefore, based on the record, the District Court reasonably concluded that the agency had a reasonable basis for missing the 20-day deadline.

Second, Morley asserts that the CIA acted unreasonably when it initially referred Morley to the National Archives and Records Administration to obtain records. In its initial response to Morley, the CIA explained that it had gathered CIA records related to the Kennedy assassination, as required by the President John F. Kennedy Assassination Records Collection Act of 1992, which we will refer to as the JFK Act. Pursuant

to the Act, the CIA then transferred the records to the National Archives. The Archives in turn made the records available to the public. The CIA also explained to Morley that the collection at the National Archives contained the records of numerous other agencies and entities, and that the records were searchable on the Internet.

In an earlier round of the underlying FOIA litigation in Morley's case, this Court concluded that the JFK Act did not relieve the CIA of its duty to search for and produce Kennedy assassination records in response to a FOIA request – even when the exact same records were publicly available at the Archives. This Court ruled that the CIA therefore acted *incorrectly* when it initially referred Morley to the National Archives. *See Morley v. CIA*, 508 F.3d 1108, 1119-20 (D.C. Cir. 2007).

Of course, the purpose of the fourth factor of the attorney's fees inquiry is to determine not whether the agency acted correctly, but rather "whether the agency has shown that it had any colorable or reasonable basis for not disclosing" the relevant material. *Davy*, 550 F.3d at 1163. Here, the CIA initially directed Morley to the Archives because the collection at the Archives would include the relevant CIA records that were responsive to Morley's FOIA request, as well as other potentially relevant documents from other government agencies. In doing so, the CIA relied on the JFK Act, which had been enacted by Congress to centralize all of the Federal Government's Kennedy assassination records in one place: the National Archives. And the CIA believed that Congress's decision to maintain all the records at the Archives relieved individual agencies of the unnecessary burden of producing duplicate copies of those same records in response to FOIA requests. As a general matter, an agency cannot avoid a FOIA request by simply saying that the documents are already

publicly available. *See Department of Justice v. Tax Analysts*, 492 U.S. 136, 150-55 (1989). But the CIA analogized the situation here to a principle articulated by this Court in *Tax Analysts*: "an agency need not respond to a FOIA request for copies of documents where the agency itself has provided an alternative form of access." *Tax Analysts v. Department of Justice*, 845 F.2d 1060, 1065 (D.C. Cir. 1988); *see also Tax Analysts*, 492 U.S. at 152 (stating "an agency need not disclose materials that it has previously released"). With respect to Kennedy assassination records, Congress itself had provided an "alternative form of access," or so the CIA reasoned.

In light of the detailed statutory scheme and the analogous FOIA case law, the CIA's decision to direct Morley to the central Archives repository of records related to the Kennedy assassination was hardly unreasonable. Indeed, the CIA's initial letter responding to Morley sought to be helpful by informing Morley that other agencies' records were also available at the Archives. To be sure, the CIA turned out to be incorrect legally (or so this Court later ruled) in thinking that the public availability of documents at the Archives entirely relieved the agency of its duty to search for its own copies of those same documents. But the CIA's ultimately incorrect legal view was not unreasonable, at least in the unique context of the statute governing the Kennedy assassination records. Indeed, it would seem inefficient (to put it mildly) to require an agency such as the CIA to expend scarce agency resources repeatedly gathering anew copies of documents that the agency had already gathered and made available to the public at the Archives. In short, given the statute and given the language of *Tax Analysts*, the CIA had a strong legal argument that referring Morley to the Archives was legally permissible and appropriate.

It is true that the JFK Act itself provided that members of the public still had a right to "file" FOIA requests with an executive agency. President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, § 11(b). But that statutory language – "file" – said nothing to suggest that an agency had a duty to collect and produce copies of the exact same documents that the agency had already collected and transferred to the Archives and that would be available to the public there. In other words, it was at least arguable that the JFK Act did not require agencies to conduct entirely redundant searches for *copies* of those documents that the agency had already transferred to the Archives. As noted, such a scheme would seem highly inefficient to the point of absurdity. So it was at least reasonable – even if not ultimately correct – for the CIA to read the JFK Act's provision referencing FOIA to speak only to those records that might be responsive to a FOIA request and that the CIA had *not* transferred to the Archives.

In that vein, Morley is on somewhat stronger ground in saying that the CIA should have realized that his FOIA request – even though it expressly referenced the Kennedy assassination – asked the CIA for some categories of CIA documents that may not have been transferred to the Archives. We agree with Morley that the CIA's initial response to him was not entirely sufficient, as was revealed when the CIA ultimately produced some responsive documents that had not been transferred to the Archives. But was the CIA's initial response at least reasonable? In light of the unique nature of the JFK Act and the CIA's extraordinarily extensive efforts to gather records under that Act for transfer to the Archives (as detailed in the various CIA declarations in this case), it was at least reasonable for the CIA to believe that Morley's request as phrased would lead only to records that the agency had already gathered and produced to the Archives.

In any event, the District Court's conclusion – namely, that the CIA's response was reasonable – was at least within the zone of reasonableness. This is where the double dose of deference in reviewing the District Court's analysis of factor four may matter. Recall that the very narrow question for us is simply whether the District Court *reasonably* concluded that the CIA acted *reasonably* in initially directing Morley to the Archives. Deference piled on deference. We answer the question in the affirmative.

Third, Morley argues that the CIA unreasonably delayed the release of responsive operational files. Operational files describe certain foreign intelligence or counterintelligence activities. *See* 50 U.S.C. § 431(b). Typically, operational files are exempt from FOIA requests. *See* 50 U.S.C. § 431(a). But the statute exempting those files also contains several exceptions. *See* 50 U.S.C. § 431(c). The CIA argued that the relevant operational files did not fall into any of those statutory exceptions and thus were exempt. This Court later rejected the CIA's interpretation of that statute, but we noted that the CIA had relied "on the only opinion by a circuit court of appeals to address" the relevant provision. *Morley*, 508 F.3d at 1118. For our purposes here, what matters is that it was entirely reasonable for the CIA to rely on the only available court of appeals precedent when the agency withheld operational records. In short, the District Court reasonably concluded that the agency acted reasonably in withholding the operational records.

Fourth, Morley contends that the CIA unreasonably asserted a *Glomar* response to a certain category of requested covert activities records. When an agency is not willing to confirm or deny the existence of certain documents, it may submit a *Glomar* response. Here, the CIA believed that confirming or denying certain of Joannides's covert activities

could damage national security. This Court ultimately concluded that the *Glomar* response, once it was sufficiently detailed, was lawful. *See Morley v. CIA*, 466 Fed. App'x 1 (D.C. Cir. 2012). It follows that the District Court reasonably concluded that the CIA's *Glomar* response was reasonable.

Fifth, Morley argues that the CIA unreasonably asserted Exemption 2 (the FOIA exemption for internal personnel rules and practices) as to records concerning internal procedures and clerical information. The agency's position was correct under this Court's law at the time. To be sure, during the pendency of this multi-decade litigation, the Supreme Court decided a case that disagreed with this Circuit's longstanding interpretation of Exemption 2. *See Milner v. Department of the Navy*, 562 U.S. 562 (2011). Afterwards, the CIA withdrew its Exemption 2 assertion in this case. *See Morley*, 466 Fed. App'x at 1. Given the state of the law at the time that the CIA initially asserted Exemption 2, the District Court reasonably concluded that the CIA reasonably asserted Exemption 2.

In sum, each of the positions that the CIA advanced to initially withhold records was reasonable – or at least the District Court could reasonably conclude as much. Therefore, the District Court did not abuse its discretion in concluding that the fourth factor weighed in favor of the Government.

The remaining question is whether the District Court reasonably balanced the four factors. To review, factors one through three favored Morley, albeit only slightly. Because the first three factors favored Morley, Morley argues that the District Court should have awarded him attorney's fees. But the District Court reasonably concluded that the fourth factor heavily favored the CIA. And as explained above, when the four factors point in different directions, the district court has very broad discretion how to balance the factors and whether

to award or deny fees. There are many reasonable approaches a district court might take in balancing the factors, and it is difficult for an appellate court – with our deferential standard of review – to second-guess that balancing. And in this case, especially with factor four heavily favoring the agency and the other three factors only slightly favoring Morley, we cannot say that the District Court abused its discretion in concluding that the fourth factor tilted the balance in favor of denying attorney's fees.

* * *

In closing, we note a few respectful points in response to the dissent.

First, the dissent says that the District Court did not heed this Court's prior remand. We disagree. The dissent appears to be conflating our prior decision in Morley's case and our prior decision in *Davy*. In *Davy*, our decision *required* the District Court to award attorney's fees. By contrast, in Morley's case, our prior decision simply remanded for the District Court to "consider the remaining factors and the overall balance afresh." *Morley v. CIA*, 810 F.3d 841, 845 (D.C. Cir. 2016). On remand here, the District Court did just that. We can disagree about whether the District Court correctly evaluated and balanced the four factors. But in our view, it is inaccurate to say that the District Court in any way flouted or disregarded our prior decision.

Second, the dissent contends that we have disregarded circuit precedent and replaced this Court's four-factor test with an inquiry that looks only to the fourth factor: whether the CIA acted reasonably in withholding documents. The dissent is incorrect. In this opinion, we have considered both the District Court's analysis of each individual factor and the District

Court's balancing of the four factors. We first concluded that the District Court did not abuse its discretion in its analysis of the individual factors. We then concluded that the District Court acted within its discretion when it concluded that the fourth factor outweighed the other three. And to prove that we have not ditched the four-factor test, we will be crystal clear: If the District Court had *awarded* attorney's fees in this case, we would have affirmed. In other words, when the first three factors favor the plaintiff, but the fourth does not, a district court retains very broad discretion under the four-factor test about how to balance the factors and whether to award attorney's fees. We have faithfully and carefully applied the four-factor test set forth by our precedents.

In light of the statutory text of the FOIA attorney's fees provision – in particular, the word "may" – and our deferential standard of review, we affirm the judgment of the District Court denying attorney's fees.

So ordered.