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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 KEVIN POULSEN,

13 Plaintiff,

14 vs.

15 UNITED STATES CUSTOMS AND BORDER
16 PROTECTION,

17 Defendant.
18

Case No. C-06-1743 SI

**PLAINTIFF POULSEN'S MOTION FOR
AWARD OF ATTORNEY'S FEES AND
COSTS**

Hearing Date: January 19, 2007
Time: 9.00 a. m.
Courtroom: 10, 19th Floor

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1 **I. INTRODUCTION**

2 Following his successful Motion for Summary Judgment, plaintiff Kevin Poulsen now moves
3 for an award of attorney’s fees and costs.

4 **II. STATEMENT OF THE CASE**

5 On March 7, 2006, plaintiff Kevin Poulsen, a journalist, filed this complaint under the Freedom
6 of Information Act ("FOIA") seeking to compel defendant United States Customs and Border
7 Protection ("CBP") to immediately process and disclose records and information responsive to an
8 August 22, 2005 FOIA request. Poulsen's FOIA request concerns an incident that occurred on August
9 18, 2005, when government computers that process incoming visitors to the United States
10 unexpectedly shut-down, causing back-ups and delays. (Illston Order Sep. 26, 2006 (hereinafter
11 “Ord.”) 1:22.)

12 On September 23, 2005, Poulsen received a phone call from a CBP official in the CBP's Office
13 of Public Affairs. The official told Poulsen that CBP would prefer if Poulsen voluntarily withdrew his
14 FOIA request, stating that CBP officials did not want to go to the trouble of conducting a records
15 search that, in their view, would produce no information that they would be inclined to release, except
16 for information that had already been released to the public and reported in the news. Poulsen declined
17 to withdraw his request. *Id.* at 2:13.

18 Poulsen called CBP on December 9, 2005 to inquire as to the status of his FOIA request.
19 Poulsen was told that his request had been forwarded to the Office of Information and Technology
20 (OIT.) Poulsen then spoke with CBP official Diane Hundertmark, who told him that the OIT did not
21 have his request. After this conversation, Poulsen wrote a follow-up letter to CBP dated December 9,
22 2005, explaining that he had still not received responses to his request. *Id.* at 2:19.

23 On January 31, 2006, Poulsen received an undated letter from the OIT, signed by Diane
24 Hundertmark. The letter stated that all additional documentation regarding the CBP computer incident
25 was exempt from disclosure in its entirety pursuant to 5 U.S.C. §552(b)(2), “the internal administrative
26 practices of the agency” exemption. Poulsen appealed the decision on February 2, 2006. On March 7,
27 2006, after the twenty day statutory time-limit on a response by the agency had lapsed, Poulsen filed
28 this action. *Id.* at 3:4.

1 On September 26, 2006, this Court handed down a final order settling all the outstanding
2 substantive issues in dispute. Poulsen prevailed on several (but not all) of the claims pressed.
3 Specifically, this Court concluded that CBP had conducted an adequate search (*Id.* at 7:18,) but that it
4 had improperly withheld documents under exemption 5 U.S.C. § 552(b)(7)(E), the “law enforcement
5 exemption” (*Id.* at 9:7,) and under exemption 5 U.S.C. § 552(b)(2), the “internal personnel rules and
6 practices” exemption (*Id.* at 10:9.)

7 Pursuant to these findings, this Court ordered the government to turn over significant portions of
8 many of the documents. After the entry of the order, CBP was reasonably forthcoming in turning over
9 the requested documents.

10 Poulsen and CBP stipulated to an extension of time for the filing of a motion for attorney’s fees
11 so that they could meet and confer and attempt to settle the dispute regarding these fees. The two
12 parties reached an impasse during the settlement discussion. Poulsen now seeks an award of fees from
13 this Court. (Declaration of Lauren Gelman in Support of Plaintiff’s Motion for Award of Attorney’s
14 Fees and Costs (hereinafter Gelman Decl.) ¶5.)

16 III. ARGUMENT

17 A. Summary of the Argument

18 Plaintiff Poulsen has obtained an order compelling the CBP to disclose documents improperly
19 withheld under FOIA exemptions and is entitled to an award of attorney fees. Poulsen is a journalist
20 seeking information on behalf of the public. He is helping FOIA realize its core purpose: open
21 government through the broad public disclosure of information.

22 FOIA was enacted to encourage a policy of open government by empowering citizens with the
23 legal tools necessary to make inquiries of government agencies. Recognizing that the costs of litigation
24 are high, Congress incorporated a fee-shifting provision into the FOIA statute designed to encourage
25 normal citizens to pursue FOIA compliance actions.

26 Congress, mindful that requestors might use the FOIA statute to obtain private benefit
27 developed a two-part test to decide when an award of fees is appropriate. The first test is an eligibility
28 test designed to discourage meritless suits. It inquires as to whether the requestor “substantially

1 prevailed.” The second test is an entitlement test. It is designed to sort out requestors who create public
2 benefit from those who file requests primarily to benefit themselves. The entitlement test also serves to
3 punish the government when it behaves improperly by failing to properly respond to FOIA requests.

4 Poulsen filed a FOIA request to obtain information regarding a CBP computer failure.
5 Intending to author several news articles on the matter, he sought information about the underlying
6 cause of the failure. Poulsen continuously experienced difficulties with the CBP in conjunction with
7 his request. The CBP initially asked that he withdraw his request, then lost his request, then summarily
8 refused to disclose any information whatsoever. Contemporaneous with Poulsen’s attempts to get the
9 requested information, the CBP was disseminating inaccurate information about the true cause of the
10 incident.

11 Poulsen had no choice but to resort to this action to force the CBP to disclose its improperly
12 withheld information. In response, the CBP resorted to a tactic of claiming overly-broad FOIA
13 exemptions to protect its information; information that contradicted the agency’s prior public accounts
14 regarding the incident and information that was internally critical of the agency’s response to the
15 computer failure.

16 Having won an order from this Court compelling production of the most important information
17 improperly withheld by the CBP, Poulsen has “substantially prevailed.” Moreover, Poulsen is entitled
18 to an award of fees. His entitlement is defined by his actions that underscore the core purpose of
19 FOIA: the broad dissemination of government information. Poulsen has already produced and
20 published two news articles containing the obtained information. Poulsen has also overcome claimed
21 FOIA exemptions that were overly-broad and improperly applied. He has stood up to a recalcitrant
22 agency that continuously resorted to stonewalling tactics in an effort to protect its incriminating
23 information. Poulsen has done so without realizing any commercial benefit, nor satisfying any
24 personal interest other than his interest in creating and distributing newsworthy articles. Poulsen is at
25 the center of those whom the FOIA fee-shifting provision is intended to benefit, therefore, we request
26 that the Court grant Poulsen a full and untaxed award of attorney’s fees.

27 ///

28 ///

1
2 **B. FOIA Includes a Fee-Shifting Provision to Encourage Government Agencies to Comply with**
3 **FOIA Requests.**

4 The Freedom Of Information Act (FOIA), codified at 5 U.S.C. §552, provides that:

5 “The court may assess against the United States reasonable attorney fees and other
6 litigation costs reasonably incurred in any case under this section in which the
7 complainant has substantially prevailed.”

8 The policy rationale behind the FOIA’s fee-shifting provision is to encourage individuals to
9 seek judicial relief for the purpose of vindicating national policy. *Northcross v. Bd. Of Educ. Of the*
10 *Memphis City Schs.*, 412 U.S. 427 (1973). Recognizing that the substantial costs of litigation would
11 effectively create an insurmountable barrier for the ordinary citizen seeking to press a FOIA
12 compliance action, Congress incorporated the fee-shifting provision to encourage citizens to bring
13 FOIA requests and to incentivize government agencies to comply with FOIA requests. *See Cuneo v.*
14 *Rumsfeld*, 553 F.2d 1360, 1363-64 (D.C. Cir. 1977). Attorneys who represent clients in FOIA
15 litigation pro bono not barred from recovering fees. *See, e.g, Powell v. United States, Dep't of Justice*,
16 569 F. Supp. 1192 (N.D. Cal. 1983) (Attorney entitled to compensation over lodestar amount to
17 compensate for risk assumed when representing a client *pro bono.*)

18
19 **C. A Plaintiff Seeking to Recover Attorney’s Fees Under FOIA Must Establish Both Eligibility**
20 **for the Award of Attorney’s Fees and Entitlement to the Award.**

21 To recover fees pursuant to this statute, a plaintiff must first demonstrate that he has “substantially
22 prevailed” and is therefore eligible for fees. *Church of Scientology v. United States Postal Serv.*, 700
23 F.2.d 486, 489 (9th Cir. 1983) (“If the facts show that the plaintiff has substantially prevailed on his or
24 her FOIA action, then such party is eligible for an award of attorney's fees.”) Eligibility does not
25 entitle a plaintiff to fees, rather, “entitlement ... is left to the discretion of [the court].” *Id.* To
26 determine whether a plaintiff is entitled to fees, the court will "consider the benefit to the public
27 derived from the case, the commercial benefit to the complainant, the nature of the complainant's
28 interest in the records, and whether the government withholding of the records has a reasonable basis

1 in law." *Polynesian Cultural Center, Inc. v. NLRB*, 600 F.2d 1327, 1330 (9th Cir. 1979), quoting *Long*
2 *v. IRS*, 596 F.2d 362, 370 (9th Cir. 1979).

3 **1. Poulsen is Eligible for an Award of Attorney's Fees Under FOIA Because He Has**
4 **'Substantially Prevailed' in this Action.**

5 To 'substantially prevail', a plaintiff must demonstrate that: (1) the filing of the action could
6 reasonably have been regarded as necessary to obtain the information; and (2) the filing of the action
7 had a substantial causative effect on the delivery of the information. *Church of Scientology.*, 700 F.2d
8 486 (9th Cir. 1983). A judicial order compelling disclosure of documents improperly withheld under
9 FOIA exemptions establishes both the necessity and causation elements. *See Manos v. United States*
10 *Dep't of the Air Force*, 829 F. Supp. 1191, 1193 (N.D. Cal. 1993)(After conducting an *in camera*
11 review of documents withheld pursuant to the FOIA privacy exemption, the court let stand only one
12 exemption and held that plaintiff 'substantially prevailed.');

13 *See also Read v. F.A.A.*, 252 F.Supp.2d
14 1108, 1110 (W.D.Wash., 2003)(Plaintiff substantially prevailed in this litigation because it was
15 'abundantly clear that litigation was necessary' to cause the FAA to produce the records, the delay in
16 the records production was unusual, and most of the records were produced pursuant to the order
17 compelling response.); *Matlack, Inc. v. United States EPA*, 868 F. Supp. 627, 631 (D. Del.
18 1994)(Noting that the two threshold conditions only need to be substantively addressed when
19 documents are subsequently disclosed without plaintiff obtaining a court order.) A plaintiff need not
20 win complete relief to have substantially prevailed. An action that results in only partial relief is
21 sufficient to establish eligibility to an award of fees. *See, e.g., Buckhannon Bd. & Care Home v. W.*
22 *Va. Dep't of Health & Human Res.*, 532 U.S. 598 (U.S. 2001)("A 'prevailing party' is one who has
23 been awarded some relief by a court."); *Exner v. FBI*, 443 F. Supp. 1349 (S.D. Cal. 1978)(Plaintiff
24 substantially prevailed even though she did not overcome all government exemptions.); *Cook v. Watt*,
25 597 F.Supp. 552, 555 (D.Alaska 1984); *Katz v. DOJ*, 498 F. Supp. 177, 185 (S.D.N.Y. 1979).

26 Poulsen substantially prevailed.

27 First, the filing of this action was necessary to compel CBP to turn over documents. Poulsen
28 made numerous attempts to obtain the documents directly from CBP before initiating this lawsuit. The
Customs Border Patrol notified Poulsen that it had uncovered 15 documents comprising 666 pages of
material pursuant to his FOIA request on January 10th 2006 but it was unwilling to release any

1 documents. After Poulsen commenced this litigation, a mere 6 pages were turned over ‘voluntarily’.
2 The 6 surrendered pages, representing brief portions of only 4 of the 15 documents, contained heavy
3 redactions. (Ord. 3:15.) CBP was unwilling to cooperate with Poulsen’s request for information before
4 commencement of this action.

5 Second, the filing of this action had a substantial causative effect on the delivery of the
6 information. Only after the Plaintiff secured this Court’s September 26, 2006 order did CBP produced
7 portions of six of the eleven withheld documents. The documents surrendered under the Order contain
8 a multitude of qualitatively significant information (in excess of that which was initially released after
9 this action was brought.) This recently obtained information indicates that:

- 10
- 11 • The Zotob virus infected the CBP computers through their connections to that
12 Immigration and Customs Enforcement (ICE) network. (Document 14, Incident
13 Timeline.)
- 14 • The CBP initially patched over 40,0000 Desktops, but intentionally delayed the
15 patching of 1300 US Visit machines. Documents indicate that this decision was due to
16 concerns over whether the patch would interfere with the US Visit computer peripherals.
17 (Document 15, Executive Summary Narrative.)
- 18 • The call logs obtained show the overall breadth of the problem and highlight the
19 frustrations that CBP end-user clients were having at the peak of the virus attack,
20 including continuous computer reboots. (Document 1, Help-Desk Response Records.)
- 21 • A specific help-desk call on October 12th, 2005 by a concerned CBP user who
22 did not have administrative access to his laptop and was therefore unable to install a
23 *newer* patch released by Microsoft. The user noted his laptop was a
24 remote code execution and denial-of-service threat. (Document 1, Help-Desk Response
25 Records, pg. 13.)
- 26 • An admission by the CBP that it was mistaken in not applying the patch to the
27 US Visit machines early on when the virus was detected. (Document 15, Executive
28 Summary Narrative.)

1
2 As a result of this Court’s Order, Poulsen obtained information that provides valuable insight
3 into both the breadth of the problem and CBP’s response; information that is qualitatively significant.
4 Therefore, Poulsen has ‘substantially prevailed’ in this action and is eligible for an award of
5 reasonable attorney’s fees and costs.

6 **2. Poulsen is entitled to an award of attorney’s fees because his action benefits the public,**
7 **his interest in the information is not commercial in nature, and the CBP acted**
8 **‘capriciously and arbitrarily’ in failing to properly address his FOIA request.**

9 Once it has been determined that a plaintiff is eligible for fees, the Court must determine in its
10 discretion whether the plaintiff is entitled to fees. *Church of Scientology*, 700 F.2.d at 489. In
11 evaluating entitlement, courts are to primarily consider four factors: “(1) the benefit to the public, if
12 any, deriving from the case; (2) the commercial benefit to the complainant; (3) the nature of the
13 complainant's interest in the records sought; and (4) whether the government's withholding of the
14 records sought had a reasonable basis in law.” *Id.* No one factor is dispositive of the entitlement
15 analysis; rather, the factors are to be balanced. *Id.* A court may also expand the list of factors and
16 consider “[whatever the court] deems relevant in determining whether an award of attorney’s fees is
17 appropriate.” *Id.*

18 Because the balance of each of the four factors favors Poulsen, he is entitled to an award of
19 reasonable attorney’s fees.

20 **a) Poulsen’s Action Creates Public Benefit Because He Disseminates the**
21 **Information Broadly Through Journalistic Activities and Because He Has**
22 **Further Defined the Substantive Breadth of the Defeated FOIA Exemptions.**

23 The public benefit factor primarily directs courts to ascertain whether the value created by the
24 plaintiff’s actions benefits the public or merely “subsidizes a private concern.” *Church of Scientology*,
25 700 F.2.d at 493. To evaluate this factor, a district court should take into account the degree of
26 dissemination and the likely public impact that might result from disclosure of the information. *Id.*

27 Information sought by a professional to be disseminated through a television program or a
28 newspaper benefits the public. S. REP. No. 93-854, 93d Cong., 2d Sess. (1974) (Conf. Rep.) (“Under
the first criterion a court would ordinarily award fees, for example, where a newsman was seeking

1 information to be used in a publication.”); *see also Goldstein v. Levi*, 415 F. Supp. 303 (D.D.C. 1976)
2 (Television producer who sought information for book and television production entitled to attorney's
3 fees because he pushed information into the public fund.)

4 Poulsen is a Senior Editor with Wired News. His occupation is at the core of the public interest
5 alluded to in the legislative history. Plaintiff Poulsen, like Goldstein, disseminates the information
6 broadly, information which is of interest to the general public. *Goldstein*, 415 F. Supp. at 305. The
7 information initially received after commencement of this suit was incorporated into an article and is
8 now published. Kevin Poulsen, *Border Security System Left Open*, Wired News, at
9 <http://www.wired.com/news/technology/0,70642-2.html> (Apr. 12, 2006). Information that this Court
10 ordered produced under the September 26, 2006 order has also been incorporated into an article and
11 published. Kevin Poulsen, *The Virus That Ate DHS*, at
12 <http://www.wired.com/news/technology/0,72051-0.html> (Nov. 2, 2006). Thus, the public has already
13 realized a substantial benefit from Poulsen’s action.

14 Moreover, Poulsen expanded the categories of information available to the public under the
15 FOIA. This Court rejected several CBP claimed exemptions. A ruling “which establishes that the
16 government may not withhold certain information pursuant to a particular FOIA exemption ... benefits
17 the public.” *Church of Scientology*, 700 F.2d at 493. The CBP’s attempt to apply exemption 7,
18 protecting “information [that is] compiled for law enforcement purposes” (5 U.S.C. § 552(b)(7)(E)),
19 was defeated because Poulsen established that documents generated as a “matter of course” in
20 response to a computer problem of a law enforcement agency are not created *for the purpose* of law
21 enforcement. The CBP’s attempt to apply Exemption 2, protecting: “information related solely to the
22 internal personnel rules and practices of an agency” (5. U.S.C. §552(b)(2)) was defeated in part,
23 because Poulsen established that certain information concerning the “scope of the incident,” general
24 accounts of the situation, and the relevant responses, are not protected by FOIA exemptions as they do
25 not compromise the agency’s security and are of public interest.

26 Plaintiff Poulsen’s has already broadly disseminated the FOIA-obtained information to the
27 public *and* has obtained a holding that the CBP improperly applied FOIA exemptions, therefore, this
28 factor weighs heavily in favor of finding an entitlement to reasonable attorney’s fees.

1 **b) The Second and Third Factors, the Commercial Benefit Accrued to Poulsen and**
2 **the Nature of Poulsen’s Interest in the Information Weighs in Favor of Finding**
3 **an Entitlement to Fees as Poulsen’s Interest in the Information is Neither**
4 **Commercial nor Personal.**

5 The second factor, the commercial benefit to the plaintiff, and the third factor, the nature of the
6 plaintiff’s interest in the records, are considered together. *See Church of Scientology*, 700 F.2d 486, at
7 494. In weighing the two factors, a court will try to ascertain whether the plaintiff’s interest in the
8 information would sufficiently motivate him to pursue the action were the fee-shifting provision not
9 incorporated in the statute. *See Read*, 252 F.Supp.2d at 1108 (Factor[s] weighed against a finding of
10 entitlement because plaintiff admitted interest in information was “personal in nature” and motivation
11 independent of the ability to recoup fees.); *Tax Analysts v. United States Dep’t of Justice*, 965 F.2d
12 1092 (D.C. Cir. 1992)(“A motive to bring its FOIA lawsuit independent of the attorney’s fees incentive
13 [makes the second and third factor militate] against an award of fees.”)

14 A journalist who obtains no commercial benefit other than that indirectly earned under his
15 employment is not a commercial requestor under the second factor. *See Nationwide Bldg.*
16 *Maintenance, Inc. v. Sampson*, 182 U.S. App. D.C. 83 (D.C. Cir. 1977), *quoting* S. REP. No. 93-854,
17 93d Cong., 2d Sess. (1974) (Conf. Rep.) (“For the purposes of applying [the second] criterion, news
18 interests should not be considered commercial interests.”) A journalist seeking to disseminate the
19 information also fosters no personal interest in the information. S. REP. No. 93-854, 93d Cong., 2d
20 Sess. (1974) (Conf. Rep.) (“Under the third criterion a court would generally award fees if the
21 complainant’s interest in the information sought was scholarly or journalistic or public interest
22 oriented.”)

23 Poulsen’s FOIA request is not motivated by either a personal interest or a commercial interest.
24 Poulsen is a journalist. Therefore, his interest in procuring information for Wired News is not a
25 commercial interest as contemplated by the statute. Nor does Poulsen harbor a personal interest in the
26 requested information. Unlike the plaintiff in *Read*, who had a personal motivation to pursue the FOIA
27 request, Poulsen did not request the information to satisfy a personal curiosity. The extent of Poulsen’s
28 interest in the information is congruent with its newsworthiness (and correspondingly, the magnitude
 of the information’s benefit to the public.) *Read*, 252 F.Supp.2d at 1108.

1 Plaintiff Poulsen is a journalist and holds no personal interest in the requested material,
2 therefore, both the ‘nature of interest’ factor and the ‘commercial interest factor’ favor a finding of an
3 entitlement to an award of reasonable attorney’s fees.

4 **c) The Fourth Factor, the ‘Reasonableness of the Government’s Withholding’**
5 **Weighs in Favor of Finding an Entitlement to Fees as a Significant Portion of**
6 **the CBP Claimed Exemptions Were Invalidated By This Court, and Because**
7 **the CBP Acted Improperly in Response to Poulsen’s FOIA Request.**

8 The fourth factor, whether the government’s decision to withhold documents has a reasonable
9 basis in law is “intended to weed out those cases in which the government was ‘recalcitrant in its
10 opposition to a valid claim or otherwise engaged in obdurate behavior.’” *Tax Analysts*, 965 F.2d at
11 1097, quoting *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977). A plaintiff can tip this factor
12 in his favor by showing either i) an unreasonable basis for withholding the materials, or ii) recalcitrant
13 behavior. *Wishart v. C.I.R.*, 1998 WL 667638 (N.D.Cal.1998). Similarly, to prevail on this factor the
14 government must demonstrate that it had a colorable basis to withhold the documents and also that it
15 behaved properly in addressing the FOIA request. *Id.*

16 **(1.) The Fourth Factor Weighs in Favor of an Entitlement to Fees Because**
17 **the CBP Did Not Have a Reasonable Basis for Withholding the**
18 **Requested Information.**

19 The Ninth Circuit has few opinions clarifying how the government can demonstrate a
20 reasonable basis for withholding to dispose of an entitlement to attorney’s fees. In *Church of*
21 *Scientology*, the court noted that the Southern District of New York concluded that the government has
22 a reasonable basis in law, notwithstanding an improper application of an exemption, when the
23 requested (but improperly withheld) document is sufficiently related to a properly excluded document.
24 *Church of Scientology of California*, 700 F.2d 486 at 494, addressing *Kaye v. Burns*, 411 F. Supp.
25 897 (S.D.N.Y. 1976). The Eastern District of Washington held that a reasonable basis could be
26 established by the fact that “two of the four federal judges to have reviewed the merits of the plaintiff’s
27 claim found that the government could not be compelled to release the letter.” *Weatherhead v. United*
28 *States*, 112 F. Supp. 2d 1058, 1070 (D. Wash. 2000).

This is not a case where the government improperly withheld documents that were strongly
related to properly withheld documents under the same exemption (*Kaye*), nor a case where judges

1 have reached opposing conclusions on the applicability of exemptions. In this case, plaintiff Poulsen
2 convincingly demonstrated that two exemptions were improperly applied (*Weatherhead*.)

3 The CBP claimed the “law enforcement” exemption as to all the withheld documents. The CBP
4 is an agency with a clear law enforcement mandate, accordingly, it only needed to “establish a rational
5 nexus” between enforcement of a federal law and the documents [withheld under the exemption.]”
6 (Ord. 8:18.) The burden for such a demonstration is light. However, in the words of this Court, “The
7 connection between the documents and CBP’s law enforcement mandate is so attenuated, that,
8 according to defendant, virtually any document created by the CBP would be [exempt under the
9 CBP’s construction of the exemption.]” *Id.* 9:1. Because the CBP’s claimed exemption could not even
10 satisfy the light burden established by the rational nexus test (and must therefore be *irrational*), the
11 CBP’s use of 5 U.S.C. §552(b)(7)(E) did not have a “reasonable basis in law.”

12 The CBP’s attempt to withhold information under 5 U.S.C. §552(b)(2), the “internal personal
13 rules and practices” exemption, was also improper. The CBP used a blanket application of the
14 exemption to withhold documents that contained information on the geographic scope of the virus, as
15 well as the depth of the internal attack. *Id.* 10:19. This Court found the CBP’s application of the
16 exemption to be improper because the CBP failed to “articulate how this general information would
17 [render the CBP computer system vulnerable.]” *Id.* 10:22. The failure of the CBP to articulate how
18 release of withheld information would permit circumvention of agency regulations evinces a failure by
19 the CBP to thoroughly review and evaluate the data it claimed exempt. By applying the exemption
20 broadly to cover information such as the geographic effect of the virus, CBP flouted the presumption
21 toward disclosure the FOIA promotes; challenging such overbroad applications of an exemption is
22 central to the spirit of the FOIA fee-shifting provision. *See O’Neill, Lysaght & Sun v. DEA*, 951 F.
23 Supp. 1413, 1425 (C.D. Cal. 1996). Therefore, the CBP did not have a “reasonable basis in law” for a
24 significant portion of the 5 U.S.C. §552(b)(2) exemption applications.

25 **(2.) The Fourth Factor Weighs in Favor of Entitlement to Fees Because the**
26 **CBP Has Behaved Improperly, as Demonstrated By Its Failure to**
27 **Comply with FOIA Statutory Limits, Its Efforts to Dissuade Poulsen**
28 **from Pursuing His Valid FOIA Request, Its Arbitrary Attempts to**
Increase the Time and Expense of Litigation, and Its Efforts to
Withhold Information for Fear of Potential Embarrassment.

1 When determining whether the government’s conduct was reasonable, the court should
2 consider the behavior of the government as far back as the filing of the initial FOIA request. *See Guam*
3 *Contractors Asso. v. United States DOL*, 570 F. Supp. 163, 169 (N.D. Cal. 1983). The District Court
4 need not address the merits of the government’s claimed exemptions, rather the “spirit within which
5 the Government addressed the request.” *Id.* at 170; *see also Cuneo*, 553 F.2d at 1366 (“What is
6 required [to meet this fourth factor] is a showing that the government had a reasonable basis in law for
7 concluding that the information in issue was exempt and that it had not been recalcitrant in its
8 opposition to a valid claim or otherwise engaged in obdurate behavior.”) The judgment should assess
9 the government’s actions *in toto* as not focus too greatly on any single action. *Id.* To the extent that the
10 government’s refusal was focused on avoiding embarrassment or thwarting the requestor, attorney’s
11 fees should be awarded as a “punitive measure against the government [as it] unreasonably refused to
12 release its information.” *Id.*

13 Attempts to dissuade plaintiff from pursuing his FOIA request demonstrates government
14 recalcitrance. When the government fails to make “even a cursory effort to comply” with a FOIA
15 request upon receipt, the government has been unreasonable. *See O’Neill, Lysaght & Sun v. DEA*, 951
16 F. Supp. 1413, 1418-25 (C.D. Cal. 1996). In *Read v. FAA*, plaintiff Read filed his FOIA request to
17 obtain information from the F.A.A. Ultimately, Read turned to the court to compel compliance with the
18 request after the statutory period had lapsed. “Bureaucratic ineptitude” *alone* was insufficient to tilt this
19 factor in favor on an entitlement, but an extreme showing of ineptitude demonstrates “recalcitrance and
20 obduracy.” *See Read*, 252 F.Supp.2d at 1112. Since the F.A.A. had charged Read a substantial sum for
21 the costs of his request, and then subsequently failed to produce the documents in a timely manner, the
22 court held that the government’s behavior was sufficiently recalcitrant to warrant an entitlement to fees.
23 *Id.*

24
25 The Central District of California has created a rule that a blanket policy of refusal is *per se*
26 unreasonable. In *O’Neill, Lysaght & Sun v. DEA*, Plaintiff OL & S sought to obtain DEA records that
27 it believed would undermine the credibility of a witness who had testified against its client. Rather
28 than search for documents in response to OL & S’s FOIA request, the DEA contacted OL & S and

1 claimed a “blanket policy” of refusing to release such records without certain consents. *See O’Neill,*
2 *Lysaght & Sun*, 951 F. Supp. at 1419. The court noted that the DEA failed to make “even a cursory
3 effort to comply with [the FOIA] request and the mandate of FOIA.” *Id.* at 1418. Such an action was
4 held to be counter to the FOIA obligation that government agencies should make a “good faith”
5 attempt to comply with FOIA requests. *Id.*

6 Plaintiff Poulsen was also the victim of government recalcitrance. He filed his FOIA request on
7 August 22, 2005. CBP was thereafter required to respond to his request within 20 days by either
8 producing the requested documents or detailing why such documents were exempt. 5 U.S.C. §552
9 (a)(6)(A)(i). (Ord. 1:25.)

10 Rather than respond to Poulsen’s FOIA request, as it was required do so by statute, CBP
11 allowed the 20 day window to lapse and then improperly contacted Poulsen and asked him to
12 withdraw his request, stating that “CBP officials did not want to go to the trouble of conducting a
13 records search that, in their view, would produce no information.” The contention that no new
14 information would be produced has been shown to be wholly inaccurate when comparing the
15 information obtained in the documents with the December 15th CNET news publication. (Ord. 2:26.)

16 The plain language of the FOIA statute does not allow an agency to ignore a request or attempt
17 to dissuade a requestor. Thus, the CBP request that Poulsen voluntarily withdraw his FOIA request is
18 directly at odds with the CBP’s statutory mandate. “[E]ach agency, upon any request for records which
19 (i) reasonably describes such records and (ii) is made in accordance with published rules stating the
20 time, place, fees (if any), and procedures to be followed, shall make the records promptly available to
21 any person.” 5 U.S.C. §552 (a)(3)(A).

22 The CBP’s failure to conduct the search and its subsequent attempt to dissuade Poulsen from
23 pursuing his request is remarkably similar to the situation in *O’Neill, Lysaght & Sun*, in which the
24 DEA failed to meet its obligation to even conduct a search after receipt of its FOIA request. In both
25 instances, rather than comply with the FOIA mandate, the government took a firm stance against the
26 production of information. The failure to disclose in the instant case and the subsequent attempt to
27 dissuade Poulsen from pursuing his FOIA request is especially irresponsible because of the CBP’s
28

1 contention (maintained as late as December 15th 2005) that the computer failure was not caused by a
2 virus. (Ord. 2:25.)

3 In failing to comply with Poulsen’s request, and attempting to thwart his interest in the matter
4 by allowing the requisite time periods to lapse and by personally requesting that he voluntarily
5 withdraw his request, the CBP acted arbitrarily, capriciously, and unreasonably.

6 After repeated phone-calls and letters, Poulsen finally received a response on January 31, 2006
7 summarily declaring that all information found pursuant to the request, in its entirety, was exempt
8 under the “administrative practices exemption,” 5 U.S.C. §552 (b)(2). (Ord. 3:4.) Poulsen promptly
9 filed an appeal, and the agency was required to respond within 20 days. 5 U.S.C. §552 (a)(6)(A)(ii).
10 The CBP again ignored the statutory window, requiring Poulsen to turn to this court to enforce his
11 rights. In failing to comply with its obligation to process Poulsen’s appeal within 20 days of its filing,
12 and in claiming an exemption *in toto* of all documents found, the CBP again acted arbitrarily,
13 capriciously, and unreasonably.

14 Prior to the summary judgment order that ultimately disposed of merits of this case, the CBP
15 moved to depose Poulsen. The court noted that it was apparent from plaintiff’s opposition that “little
16 [would be] gained by deposing [Poulsen] prior to briefing or hearing on this [summary judgment]
17 motion,” additionally noting that “[Poulsen’s] deposition would add nothing material to these
18 assertions.” (Ord. 2:16.) As stated in the deposition of David Sobel, General Counsel for Electronic
19 Privacy Information Center and internationally recognized expert in United States FOIA law, in 24
20 years of handling FOIA litigation, Sobel has never once heard of the government moving to depose the
21 plaintiff. Sobel further noted that allowing the government to ratchet up the costs of litigation by
22 pursuing depositions of marginal value would have a “chilling effect on requestors” and runs counter
23 to the underlying policy of FOIA: “to bring to public light records of government agencies.” (Sobel
24 Decl. ¶¶ 7-11.)

25 The CBP’s attempt to depose Poulsen, which this court noted would add nothing material to
26 the case, is illustrative of the CBP’s attempt to stonewall Poulsen’s request at every stage of litigation
27 and is unreasonable.

1 In sum, through Poulsen's efforts, he was able to obtain irrefutable evidence that the CBP
2 computer failures on August 18, 2005 were not the result of "glitches" as maintained by the CBP as
3 late as December, 2005, rather, they were the direct result of the Zotob virus. The disparity in the
4 various reports issued by CBP spokespersons and the actual cause as proven by the now obtained
5 documents provides substantial evidentiary support for an allegation that the CBP may have attempted
6 to thwart Poulsen's efforts to shield itself from potential embarrassment that would arise if the public
7 were aware that the CBP computers were vulnerable to the Zotob virus. This contention is
8 strengthened by the statement released pursuant to this Court's Order claiming that the failure to patch
9 the US Visit computers in a timely manner was a mistake. (Document 15, Executive Summary
10 Narrative.) The government is unreasonable when it withholds information in an attempt to protect
11 itself from embarrassment. *See Guam Contractors Asso.*, 570 F. Supp. at 170.

12 Because the CBP failed to comply with the statutory time limits allowed for both the
13 processing of the FOIA request and the administrative appeal, attempted to thwart Poulsen's discovery
14 of the true cause of the failure by improperly contacting him and requesting a voluntary withdrawal of
15 the FOIA request, resorted to tactics to increase the length and costs of litigation by, *inter alia*, seeking
16 a deposition that would marginal value to its case, and improperly withheld information to avoid
17 public embarrassment, the CBP has behaved unreasonably in this action and therefore the fourth factor
18 favors an entitlement to an award of attorney's fees.

19 **D. The Fees Sought By Poulsen's Counsel Are Reasonable.**

20 To obtain fees, the plaintiff should submit a lodestar figure: the product of the hours of work
21 performed and the corresponding billable rate, which the court then has the discretion to adjust. The
22 lodestar is presumed reasonable if the hours and rates are both reasonable. *Long v. United States IRS*,
23 932 F.2d 1309, 1314 (9th Cir. 1991).

24 The hourly rate to be applied is the "rate prevailing in the community for similar work
25 performed by attorneys of comparable skill, experience, and reputation." *Barjon v. Dalton*, 132 F.3d
26 496, 502 (9th Cir.1997), *quoting Chalmers v. Los Angeles*, 796 F.2d 1205, 1210-11 (9th Cir. 1986).

27 The lodestar may be modified in the court's discretion based upon factors including "time
28 spent by attorney; novelty and complexity of the issues presented; level of skill required; customary

1 fee charged by attorney or firm; experience, reputation, and ability of attorney; and awards in similar
2 cases." *Exner*, 443 F. Supp. at 1354. The court should be mindful that the costs of litigating FOIA
3 requests scale when the government exhibits "recalcitrance and resistance" to the request. *See, e.g.*,
4 *O'Neill, Lysaght & Sun*, 951 F. Supp. at 1413 (DEA's resistance to the request directly responsible for
5 the fact that litigation took longer than it should have resulting in a higher-than-normal award of
6 attorney's fees.)

7 Poulsen is entitled to a full and untaxed award of attorney's fees because he prevailed on both
8 of the government's claimed exemptions, the core of his FOIA request. *See Mayock v. INS*, 736 F.
9 Supp. 1561, 1564 (N.D. Cal. 1990) (Attorney's fees appropriate for FOIA requestor whose central
10 claims prevailed on summary judgment.); *See Read v. FAA*, 252 F. Supp. 2d 1108 (D. Wash. 2003).
11 The hourly rates and total hours are reasonable. (Gelman Decl.; Exhibit A.) As in *O'Neill, Lysaght &*
12 *Sun*, wherein the DEA stubbornly refused to comply with FOIA mandates, the CBP has continuously
13 failed to comply with the FOIA statute and has needlessly ratcheted up the costs of this action by, *inter*
14 *alia*, threatening to depose the plaintiff. *See O'Neill, Lysaght & Sun*, 951 F. Supp. at 1413.

15 The declarations filed with this motion attest to the skill and expertise of the attorney's who
16 worked on this matter. (Gelman Decl.; Olson Decl.; Granick Decl.) Moreover, the declarations assert
17 the reasonableness of the fees requested. *Id.*

18 19 **IV. CONCLUSION**

20 Plaintiff Kevin Poulsen has demonstrated that he is eligible for an award of attorney's fees
21 because he substantially prevailed in this case by winning legally sanctioned relief requiring the CBP
22 to turn over a qualitatively significant portion of the documents withheld.

23 Moreover, Poulsen is entitled to an award of attorney's fees because he has demonstrated that
24 each factor under the entitlement analysis favors such an award. Poulsen's actions benefit the public
25 because the information he received from the request is disseminated broadly through his journalistic
26 activities, and because he overcame claimed FOIA exemptions (an important public interest in this
27 circuit.) Poulsen's interest in the requested material is neither personal nor commercial. Finally, the
28 CBP behaved unreasonably by attempting to persuade Poulsen to remove his request, by failing to

1 comply with statutory FOIA time-limits, and by withholding the information to protect itself from
2 embarrassment.

3 Accordingly, the District Court should grant Poulsen’s request for reasonable attorney’s fees
4 and costs.

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Dated: November 3, 2006

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By: _____/S/_____
Lauren Gelman
Attorney for Plaintiff