

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**GOVERNMENT ACCOUNTABILITY
PROJECT,**

Plaintiff,

v.

**U.S. DEPARTMENT OF HOMELAND
SECURITY,**

Defendant.

Case No. 17-cv-2518 (CRC)

ORDER

Plaintiff Government Accountability Project (“GAP”) filed a Freedom of Information Act (“FOIA”) request with the U.S. Department of Homeland Security (“DHS”) seeking records exposing the Department’s purported administration of “ideological tests” to screen migrants entering the United States along the Southwest border. After an initial search revealed no responsive documents, GAP sued. A confirmatory search came up dry as well, and the parties proceeded to summary judgment. Siding with Plaintiff, the Court found that DHS had applied an overly cramped interpretation of GAP’s FOIA request in conducting its searches and ordered the Department to search again using a broader set of agreed search terms. See Gov’t Accountability Project v. DHS (“GAP I”), 335 F. Supp. 3d 7, 11–13 (D.D.C. 2018) (Cooper, J.). This third search also failed to uncover any responsive records.

GAP now moves for attorney’s fees and costs under FOIA’s fees provision, which provides that “[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E)(i). FOIA plaintiffs must make two showings to recover reasonable attorney’s fees: (1) that they are “eligible” for fees because of having

“substantially prevailed” in the litigation, and (2) that they are “entitled” to recovery given the particular circumstances of the case. Brayton v. Office of the U.S. Trade Representative, 641 F.3d 521, 525–26 (D.C. Cir. 2011). Here, consideration of the first requirement presents an issue that no court appears to have addressed: whether a FOIA plaintiff is eligible for fees where it prevailed on summary judgment yet ultimately received no responsive records in response to its request. The Court need not decide that novel question, however, because even if GAP could be said to have substantially prevailed in the litigation, the Court finds that it is not entitled to a fee award. See, e.g., Maydak v. DOJ, 579 F. Supp. 2d 105, 108 (D.D.C. 2008) (adopting the same approach).

Determining whether a prevailing FOIA plaintiff is entitled to attorney’s fees lies within the sound discretion of the Court. Morley v. CIA, 894 F.3d 389, 391 (D.C. Cir. 2018), cert. denied, 139 S. Ct. 2756 (2019) (per curiam). Four factors are to be considered in making the determination: (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. Davy v. CIA, 550 F.3d 1155, 1159 (D.C. Cir. 2008). Non-commercial requesters such as GAP typically get the nod on factors two and three. Morley, 894 F.3d at 392.

As for the first factor—public benefit—the Government maintains that the public could not have gained since no records were ultimately obtained. But, while the absence of records certainly lessens any public benefit, it does not eliminate the potential for public good altogether. The question is whether the public benefited “from the case,” Davy, 550 F.3d at 1159, not just from disclosures that resulted from the case. Here, the Court concluded that DHS had erroneously confined its search to the exact words that GAP included in its FOIA request—akin

to plotting the precise coordinates called out by an opponent in a game of “Battleship.” GAP I, 335 F. Supp. 3d at 12. A ruling rejecting that practice at DHS and other agencies arguably contributed, even if only marginally, to greater public disclosure in future cases, notwithstanding the ultimate futility of the search in this one. As a result, the Court cannot say that this case resulted in absolutely no public benefit.

Unlike the third factor, however, the fourth one—whether the “withholding had a reasonable basis in law”—explicitly presupposes a “withholding.” The only withholding by the agency here was of non-responsive records, and GAP does not contest DHS’s non-responsiveness determination. This factor thus weighs in the Government’s favor. Because there was no improper withholding, the Court need not decide whether the agency had a “colorable or reasonable basis,” Davy, 550 F.3d at 1163, for crafting its initial searches as it did.

“[W]hen the four [entitlement] factors point in different directions,” as they do here, “the district court has very broad discretion in deciding how to balance those factors and whether to award attorney’s fees.” Morley, 894 F.3d at 391. And, “[a]lthough none of the foregoing four factors is solely dispositive, the ‘failure to satisfy the fourth element [of an unreasonable withholding] may foreclose a claim for attorney fees’ or costs.” Maydak, 579 F. Supp. 2d at 109 (quoting Summers v. DOJ, 477 F. Supp. 2d 56, 63 (D.D.C. 2007)) (alteration in original); see also Morley v. CIA, 245 F. Supp. 3d 74, 78 (D.D.C. 2017), aff’d, 894 F.3d 389 (D.C. Cir. 2018) (“Thankfully, the final factor breaks the tie—it weighs heavily against Morley and is ultimately dispositive.”). Given that DHS did not improperly withhold documents and its renewed search failed to uncover any responsive records, thus limiting any public benefit from the litigation to greater disclosure in future cases, the Court finds in the exercise of its discretion that GAP is not entitled to a fee award under FOIA.

It is, therefore, hereby

ORDERED that [26] GAP's Motion for Attorney Fees is **DENIED**. It is further

ORDERED that this case is **DISMISSED**.

SO ORDERED.

Date: June 2, 2020

CHRISTOPHER R. COOPER
United States District Judge