

“has not met its burden of establishing the reasonableness of its fee request,” *id.* at 10.

As we show, defendant’s argument lacks merit.

I. CREW has Presented Documentation Adequate to Support its Request

The starting point for defendant’s challenge to CREW’s request is the assertion that CREW has somehow failed to present “supporting documentation [that is] sufficiently detailed to enable the court to determine” the reasonableness of the request. *Id.* at 8. While it is unclear precisely what the agency finds lacking in the supporting declarations CREW has submitted, a review of the relevant caselaw establishes that plaintiff’s request is, in fact, “sufficiently detailed.”

In *National Ass’n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982), the D.C. Circuit made clear that “the fee application need not present ‘the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney,’” quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (*en banc*). Rather, “the application must be sufficiently detailed to permit the District Court to make an independent determination whether or not the hours claimed are justified,” and to that end, “[t]he better practice is to prepare detailed summaries based on contemporaneous time records indicating the work performed by each attorney for whom fees are sought.” 675 F.2d at 1327.² Illustrative of the level of detail required to support a fee request, the court described one of the submissions at issue in *Concerned Veterans*:

² While defendant mistakenly suggests that Mr. Sobel’s time accounting is not “contemporaneous,” Def. Resp. at 9, his declaration clearly provides “detailed summaries based on contemporaneous time records.” See Declaration of David L. Sobel, ¶ 4 (summary based upon “tally of time . . . updated as additional time was devoted to the case”).

With respect to hours claimed, each lawyer for whom fees were sought filed a detailed affidavit listing specific activities (*e.g.*, “Research and drafting of FOIA part of complaint; Court appearance on plaintiffs’ motion for a preliminary injunction”) and the number of hours expended on each. In addition, the affidavit of one counsel indicated that 24 hours claimed for work by a paralegal was spent on researching and assisting in the drafting of a motion for a preliminary injunction. *These submissions were entirely adequate* to permit the District Court to determine whether fees should be awarded for all of the hours claimed

Id. at 1332 (emphasis added; footnotes omitted).

Similarly, in *Jordan v. Dep’t of Justice*, 691 F.2d 514 (D.C. Cir. 1982), the court of appeals held that

[t]o enable opposing counsel adequately to assess the merits of the motion, and the court to fulfill its obligations, no more is necessary than “fairly definite information as to the hours devoted to various general activities, *e.g.*, pretrial discovery, settlement negotiation, and the hours spent by various classes of attorneys, *e.g.*, senior partners, junior partners, [and] associates. . . .”

Id. at 520, quoting *Copeland*, 641 F.2d at 891.³ See also *Bebchick v. Washington Metropolitan Area Transit Comm’n*, 805 F.2d 396, 404 (D.C. Cir. 1986) (“a listing of hours for each significant activity undertaken . . . is in accord with our directive in *Copeland*”). When measured against this Circuit’s requirement of providing “detailed summaries . . . indicating the work performed by each attorney,” *Concerned Veterans*, it is clear that CREW’s supporting documentation is wholly adequate to establish the

³ In *Copeland*, the D.C. Circuit, sitting *en banc*, noted that the Third Circuit’s opinion in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), provided the “framework for use in this circuit.” 641 F.2d at 891. In *Lindy*, the court noted that “the only information furnished to the district judge regarding the time spent by [fee petitioners] was that they had spent ‘in excess of 6,000 hours in connection with this litigation.’ This information was insufficient to support the award of fees” 487 F.2d at 167 (citation omitted). It was this complete lack of specificity that led the Third Circuit to require “some fairly definite information as to the hours devoted to various general activities,” *id.*, a requirement that was adopted by the D.C. Circuit.

reasonableness of its fee request. The declarations of the three attorneys who performed work in the case specify their hours devoted to eleven distinct activities, *e.g.*, drafting the complaint; researching, drafting and preparing memoranda relating to the parties' dispositive motions; reviewing the Court's decision; reviewing the agency records ultimately disclosed to assess compliance with the Court's decision; etc.

The adequacy of CREW's submission is apparent when the ultimate objective of this Circuit's documentation requirement is considered. The court of appeals has explained that a fee applicant must provide "sufficiently detailed information about the hours logged and the work done" because such information is "essential not only to permit the District Court to make an accurate and equitable award but *to place government counsel in a position to make an informed determination as to the merits of the application.*" *Concerned Veterans*, 675 F.2d at 1327 (emphasis added). Here, the agency's opposition amply demonstrates that opposing counsel possesses enough detailed information to assess the merits of CREW's request; indeed, defendant devotes three full pages of its brief to an analysis of the hours plaintiff's counsel devoted to every specific task performed in the case. Def. Resp. at 11-13. As we discuss below, defendant's critique of CREW's detailed summaries amounts to nothing more than a subjective and unsubstantiated attack on an eminently reasonable and clearly justified request for fair compensation.

II. CREW's Fee Request is Reasonable

After dissecting the details of the summaries of hours that it complains are not "sufficiently detailed," defendant baldly asserts that CREW's request is unreasonable and "invit[es] [the Court] to 'conduct a minute evaluation of each phase or category of

counsel's work.” *Alfonso v. District of Columbia*, 464 F. Supp. 2d 1, 5 (D.D.C. 2006), quoting *Copeland*, 641 F.2d at 903. Ultimately, the agency's complaints illustrate why “[a] district court should avoid countenancing criticisms of fee claims that amount to ‘nit-picking.’” *Goldring v. District of Columbia*, 2004 U.S. Dist. LEXIS 28300 at *11 (D.D.C. May 26, 2004), citing *Concerned Veterans*, 675 F.2d at 1338 (Tamm, J., concurring). *See, e.g.*, Def. Resp. at 13 (“It is unreasonable for Plaintiff to seek \$1,367.50 to review the Court's decision, \$3,255 to oppose the stay request, \$930 to review disclosed documents, and \$5,087.50 to file a fee petition.”).⁴

In *American Petroleum Inst. v. Environmental Protection Agency*, 72 F.3d 907, 916 (D.C. Cir. 1996), the D.C. Circuit noted that “[d]eciding what is a reasonable amount of time to spend on motions is an imprecise undertaking . . . and [a court's] calculations will necessarily be rough.” But “[b]ased on the motions filed and [the court's] familiarity with the issues of the case,” the reasonableness of time devoted to particular tasks can be assessed. In that case, the fee petitioners sought compensation for approximately 550 hours of time devoted to the preparation of three motions, two of which were twenty pages long and the third “was somewhat shorter.” *Id.* at 915. The court of appeals concluded that compensation was appropriate for “seventy-five percent of the hours spent on [the] motions” (or approximately seven hours of work for each page of the briefing at issue). *Id.* at 916.

Here, defendant complains, *inter alia*, that CREW seeks compensation for 34.5 hours of time devoted to the preparation of a “14½-page memorandum of law.” Def.

⁴ The agency's reference to the dollar amounts at issue suggests that its real grievance is with the applicable *hourly rates*, as opposed to the amounts of time expended on particular tasks. Those rates, of course, are established by the Office of the U.S. Attorney, which is representing the agency.

Resp. at 12.⁵ As Judge Tamm observed in *Concerned Veterans*, a fee applicant meets its burden once it submits “sufficiently detailed supporting documentation” of the kind that CREW has submitted here.

The burden of proceeding then shifts to the party opposing the fee award, who *must submit facts and detailed affidavits to show why the applicant’s request should be reduced or denied*. Just as the applicant cannot submit a conclusory application, an opposing party does not meet his burden merely by asserting broad challenges to the application. *It is not enough for an opposing party simply to state, for example, that the hours claimed are excessive . . .*

675 F.2d at 1337-1338 (Tamm, J., concurring) (emphasis added). Here, defendant has submitted no “facts [or] detailed affidavits” to support its naked assertion that the attorney hours detailed by CREW are “excessive” and “unreasonable.” The agency has not, for instance, submitted declarations detailing the number of hours that government counsel devoted to the eleven specific tasks identified by CREW. *See, e.g., Sierra Club v. Environmental Protection Agency*, 769 F.2d 796, 807 (D.C. Cir. 1985) (“The government notes that it spent a total of about 400 hours on the merits of the case. The petitioners, in contrast, request compensation for 800 hours.”); *Lake Pilots Ass’n v. United States Coast Guard*, 310 F. Supp. 2d 333, 341 (D.D.C. 2004) (agency argued that

⁵ The agency asserts, without elaboration or substantiation, that “[i]t is unreasonable for Plaintiff to seek \$15,932.50 to draft a straightforward (and largely boilerplate) opposition and cross-motion,” *id.* CREW is unsure how best to respond to the characterization of its brief as “boilerplate,” other than to concede that it was the sort of submission that FOIA requesters are typically required to prepare in order to demonstrate that, as the Court found here, an agency’s “*Vaughn* submission is vague, conclusory and inadequate to justify the grant of summary judgment in the agency’s favor;” that the deliberative process privilege has been invoked despite the fact that “there is not even a hint of deliberation to be found” in the redacted material; that “the redacted material is almost entirely factual and therefore is not properly withheld under Exemption 5;” and that there is “cause for concern with regard to [the agency’s] duty to release ‘(a)ny reasonably segregable portion of these documents.’” *Citizens for Responsibility & Ethics in Washington v. Dep’t of Homeland Sec.*, 648 F. Supp. 2d 152, 157-162 (D.D.C. 2009).

the pleadings could “easily have been completed in 50 hours – an amount in excess of the time the Coast Guard’s attorneys spent on the motion practice”).

In addition to its generic, unfocused criticism of *all* hours for which CREW seeks compensation, the agency asserts that there is not “any basis for Defendant or the Court to determine how much time was spent on the issues upon which Plaintiff did not prevail.” Def. Resp. at 14 (citation omitted). It is unclear which “issues” the agency has in mind, as CREW, in an exercise of discretion early in the litigation, elected not to challenge the adequacy of the agency’s search for responsive records nor its invocation of FOIA Exemptions 6 or 7(E), leaving only Exemption 5 to be litigated. Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment in Part, and in Support of Plaintiff’s Cross-Motion for Summary Judgment in Part (“Pl. Opp. Mem.”) at 4, n.2. While the Court ruled in the agency’s favor with respect to several portions of documents withheld under Exemption 5, the agency has failed to articulate any basis for disallowing or reducing compensation for time reasonably expended in advancing the arguments that resulted in CREW “substantially prevailing” in this case. *See* Pl. Opp. Mem., *passim*. In any event, as this Court has recognized, “entitlement to a fee award is not tempered by the fact that [fee petitioners] may not have technically prevailed on all aspects of their claims.” *Cobell v. Norton*, 407 F. Supp. 2d 140, 149-150 (D.D.C. 2005); *see also Action on Smoking & Health v. Civil Aeronautics Bd.*, 724 F.2d 211, 215 (D.C. Cir. 1984) (only where “the claims asserted ‘are truly fractionable’” should counsel be compensated only for work on those distinct claims that prevailed) (footnote and internal quotation marks omitted).

Conclusion

Defendant's subjective, unfocused challenge to CREW's fee petition clearly lacks merit and should be rejected. As the D.C. Circuit recognized in *Concerned Veterans*, "contests over fees should not be permitted to evolve into exhaustive trial-type proceedings," as "attorneys would be deterred from undertaking FOIA . . . actions if each victory on the merits were inevitably but the prelude to an exhausting and uncertain battle over fees . . . [which] would frustrate the purposes of FOIA" 675 F.2d at 1324 (footnote omitted). *See also Judicial Watch, Inc. v. Bureau of Land Mgt.*, 562 F. Supp. 2d 159, 175 (D.D.C. 2008) ("the current FOIA statute's legislative history evinces a strong desire for courts to be aggressive in awarding attorney's fees to prevailing parties").

For the foregoing reasons, and those set forth in CREW's opening memorandum, CREW's motion for an award of attorneys' fees and costs should be granted, and defendant DHS should be ordered to pay CREW \$49,916 in fees⁶ and \$350 in costs.

Respectfully submitted,

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⁶ CREW seeks additional compensation for time expended by counsel preparing this reply memorandum; specifically, \$3,255 for Mr. Sobel's time and \$697 for Ms. Weismann's time. Supplemental Declaration of David L. Sobel; Supplemental Declaration of Anne L. Weismann.

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