UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PUBLIC RECORD MEDIA, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	Case No. 12-1225- MJD

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR FEES

INTRODUCTION

Defendant Department of Justice ("DOJ") fully complied with its obligations in this matter under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, long before Plaintiff Public Record Media ("PRM") filed suit. DOJ conducted a reasonable search for responsive documents and responded comprehensively and accurately to Plaintiff's original request by indicating that all responsive documents must be withheld in full. In response to the narrowed request pursued on administrative appeal and in this litigation, DOJ confirmed repeatedly that there are no documents responsive to the narrowed request. Plaintiff raised no objection to the search either in its complaint or otherwise, and articulated no relief to which it might be entitled. Despite this clear lack of objection to Defendant's actions, Plaintiff initially refused to dismiss the action and insisted that Defendant move for summary judgment. After Defendant did so, relying on the same facts previously provided to Plaintiff, Plaintiff stipulated to dismissal.

Having gained nothing through the filing and pursuit of this lawsuit, Plaintiff now nonetheless seeks attorney's fees under FOIA, which are only available to a plaintiff that has "substantially prevailed" in its action. For the mere filing of a simple FOIA complaint, and having filed no substantive briefing whatsoever, Plaintiff claims an entitlement to over $14,000 in fees and expenses. But Plaintiff cannot establish that it is eligible for or entitled to fees under FOIA. Moreover, Plaintiff's failure to submit any documentation whatsoever in support of its extraordinary request provides an independent basis for the Court to deny the request for fees.

BACKGROUND

By letter dated October 11, 2011, Matt Ehling submitted a FOIA request to DOJ Office of Legal Counsel ("OLC") on behalf of PRM. PRM sought three categories of documents:

> 1. Any and all legal opinions and/or memoranda produced by [OLC] between January 1, 2007 and October 1, 2011 that deal with the use of lethal force by the United States against United States person "Anwar al-Awlaki" . . . ;
>
> 2. Any and all legal opinions and/or memoranda produced by [OLC] between January 1, 2001 and October 1, 2011 that deal with the use of lethal force . . . by the United States against United States persons physically located outside . . . the United States . . . .
>
> 3. Any and all legal opinions and/or memoranda produced by [OLC] between January 1, 2001 and October 1, 2011 that deal with the use of lethal force by the United States via the use of [unmanned aerial vehicles], against any person physically located within . . . the United States . . . .

See Declaration of John E. Bies, dated September 21, 2012, filed as Docket No. 18-19, ("Bies Decl."), ¶ 2, Ex. A (internal quotations omitted).

OLC responded comprehensively to this request by letter dated November 3, 2011. In its response, OLC treated item one – the request related to Anwar al-Aulaqi – separately from the remainder of the request. With respect to item one, OLC issued what is known as a "Glomar response" and stated that it could neither confirm nor deny the existence of responsive records pursuant to FOIA Exemptions One, Three and Five, *see* 5 U.S.C. § 552(b)(1), (3), (5). *See* Bies Decl. ¶3, Ex. B. This item was treated separately from the remainder of the request because OLC only issues a Glomar response when revealing the existence or non-existence of responsive documents would itself reveal information protected by an exemption.[1] Plaintiff did not administratively challenge that response.

With respect to the remainder of the request, OLC grouped items two and three together, in accordance with its usual practice of treating a request as a whole to the extent possible, rather than identifying individual sub-categories of the request to which documents are responsive. Bies Decl. ¶ 3. OLC indicated that there were documents responsive to the remainder of the request but that all documents were being withheld in full pursuant to FOIA Exemptions 1, 3, and 5 because any responsive documents were

[1] This type of response to a FOIA request is called a "Glomar response" after the CIA's refusal to confirm or deny the existence of records regarding a ship named the Glomar Explorer in *Phillippi v. CIA*, 546 F.2d 1009, 1011 (D.C. Cir. 1976); *see, e.g., Gavin v. SEC*, No. 4-4522, 2007 WL 2454156, *1 (D. Minn. August 23, 2007).

currently and properly classified and protected by the attorney-client and deliberative process privileges. *See id.*, Ex. B. Plaintiff did not challenge this response insofar as it applied to item two.

By letter dated December 29, 2011 and received on April 24, 2012 by the DOJ Office of Information Policy ("OIP"), PRM appealed OLC's determination, narrowing the appeal to pursue only item three of its request. *See* Bies Decl. Ex. C ("For the purposes of this appeal, I wish to set aside matters relating to Item 1 (and also Item 2) of my request, and only pursue review of matters that relate to exemptions claimed for Item 3.").[2]

DOJ had not yet ruled on this appeal at the time this lawsuit was filed. *See* Bies Decl. ¶ 5, Ex. D; *see* 28 C.F.R. § 16.9(a)(3) (automatically terminating appeals when a lawsuit is filed). Like the administrative appeal, the complaint is limited to item three of the original FOIA request. *See generally* Complaint, Dkt No. 1. Thereafter, in light of the narrowed request, DOJ confirmed to PRM both orally and in writing that there are no documents responsive to item three; rather, any responsive documents related to item two, read broadly. *See* Bies Decl. ¶¶ 6-7, Ex. F.

Plaintiff nonetheless refused to dismiss the complaint and instead insisted that Defendant move for summary judgment. Once Defendant did so, asserting the same facts

[2] This letter was not received in the DOJ Office of Information and Policy ("OIP") until April 24, 2012; OIP nonetheless treated it as timely filed.

previously provided to the Plaintiff, Plaintiff accepted the fact that there never had been responsive records to be produced and stipulated to dismissal. *See* Dkt No. 20.

ARGUMENT

FOIA provides for an award of attorney's fees only in those cases where a plaintiff has "substantially prevailed." *See* 5 U.S.C. § 552(a)(4)(E)(i). This fee-shifting provision requires courts to engage in a two-step substantive inquiry, first determining whether plaintiff is eligible to receive fees and costs, and second to determine whether plaintiff is entitled to receive fees. *See, e.g., Ginter v. IRS,* 648 F.2d 469, 470 (8th Cir. 1981); *Tax Analysts v. DOJ*, 965 F.2d 1092, 1093 (D.C. Cir. 1992); *Church of Scientology of Cal. v. USPS*, 70-0 F.2d 486, 489 (9th Cir. 1983). The award of fees is at the court's discretion. *Id.*

I. PLAINTIFF IS NOT ELIGIBLE FOR FEES BECAUSE IT HAS NOT SUBSTANTIALLY PREVAILED ON ITS CLAIMS

PRM has not prevailed on any claim, nor received any documents as a result of the filing of this lawsuit. Although "[a] FOIA claimant ... [need not] have received a favorable judgment in order to have prevailed," *see Miller v. Dep't of State*, 779 F.2d 1378, 1389 (8th Cir. 1985), plaintiff must show "either -- (I) a judicial order, or an enforceable written agreement or consent decree; or (II) 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). Fees are not awarded for unsuccessful claims. *See Summers v. DOJ*, 477 F. Supp. 2d 56 (D.D.C. 2007) ("Nor should fees be granted for hours spent on unsuccessful claims that are distinct in all respects from successful claims").

In the present action, Plaintiff sought documents responsive to item three of its original FOIA request and fees, *see* Compl. ¶¶ 25-29, the only relief to which any FOIA complainant is entitled. Because no such documents were produced, Plaintiff cannot reasonably be said to have prevailed on any claim. *See, e.g., Ameren Mo. v. EPA*, -- F. Supp. 2d --, No. 11-02051, 2012 WL 4372518 (E.D. Mo. September 25, 2012) (finding plaintiff ineligible where no further documents were produced); *Uhuru v. U.S. Parole Comm'n*, 734 F. Supp. 2d 8, 14 (D.D.C. 2010) (finding plaintiff ineligible despite delay in production). In *Uhuru*, the Parole Commission failed to respond to the FOIA request until after the litigation was filed, but the Court nonetheless found plaintiff ineligible for fees. Because courts only have jurisdiction to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld," 5 U.S.C. § 552(a)(4)(B), a party may only obtain fees in so far as it relates to a court order or to the actual processing of documents as a result of litigation. *See Uhuru*, 734 F. Supp. 2d at 14. Defendant is aware of no cases in which the plaintiff was awarded fees under FOIA despite having received no favorable judgment and no documents.

Plaintiff's claim to eligibility rests on its mistaken beliefs that (1) the agency "changed" its position on the existence of responsive documents; and (2) the agency's alleged "change in position" is somehow a victory for PRM. Both propositions are incorrect. As set forth above and in the Bies Declaration, it has never been OLC's position that it had responsive records to item three, and OLC's position that it has no responsive records to item three has never changed. Nor did OLC's response letter state that there were records responsive to this item. The original response simply responded

to the remainder of the request collectively, grouping items two and three together, consistent with ordinary OLC practice. Responding in this fashion is ordinary practice at OLC and at many other federal agencies. PRM is a repeat FOIA requestor, but it never inquired directly of OLC whether there were any items responsive specifically to subcategory three of the request. Instead, it preferred to pursue appeal and litigation. Bies Decl. ¶ 8. Generally, when asked to identify which documents are responsive to which subcategory of the request, OLC will attempt to comply as long as the determination would not be overly burdensome or reveal protected information. *Id.*[3] Indeed, the only change of position here was Plaintiff's decision to narrow its request to that one item. After Plaintiff narrowed its request on appeal and pursued the narrowed request in this litigation, the Department has repeatedly informed Plaintiff that there were no records responsive to its request. This clarification in response to Plaintiff's decision to narrow the request is in no way a change in position.

[3] Plaintiff claims, without citation or sworn declaration, that "all prior agency letters sent in response to multi-item FOIA requests from Plaintiff have tied specific determinations to specific categories of records." *See* Pl's Motion for Fees at 10, n.2. This is manifestly incorrect. For example, several months prior to the filing of the complaint in this case, OLC responded on February 22, 2012 to a different request from Plaintiff, a 6-part request for OLC memoranda on several topics, and in its response, OLC indicated that there were 14 responsive documents without indicating which subpart of the request to which those documents were responsive or which subparts had no responsive documents. *See* request and response available at http://publicrecordmedia.com/freedom-of-information-act-paperwork-office-of-legal-counsel-ndaa/. OLC, like many federal agencies, routinely receives FOIA requests containing many sub-requests related to the same or similar topics; it is not uncommon for the sub-requests to have multiple parts as well, often overlapping. No statute, regulation or caselaw requires any federal agency to identify which, if any, documents are responsive to which sub-category of a multi-item request. Such a requirement would be an unreasonable administrative burden serving little purpose and might require an agency to make difficult judgments about how to categorize documents among multiple overlapping requests.

To the extent Plaintiff maintains that the original treatment of items two and three as a single unit was for some reason inappropriate, that challenge is ill-founded. There is no requirement that a FOIA response identify which documents are responsive to which sub-categories of a request so long as the requirements of FOIA are met. Accordingly, such identification is not "relief" that a complainant can seek under FOIA. *See Uhuru*, 734 F. Supp. 2d at 14. Plaintiff cites not a single FOIA case from any district in the country in which a "no records" response resulted in a fee award.

Plaintiff's apparent misreading of OLC's response letter does not entitle it to fees. To the extent Plaintiff simply chooses not to believe that the original response was intended to respond to the remainder of the request rather than specifically to item three, the agency's representations and sworn affidavits are entitled to a presumption of good faith that has not been rebutted. *See, e.g., SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (acknowledging presumption of good faith afforded agency affidavits); *see also Averianova v. Holder*, 592 F.3d 931 (8th Cir. 2010) (presumption of regularity in agency action). Plaintiff's unsupported reference to the "common rules of grammar" does not suffice to overcome a declaration submitted in good faith and supported by past agency practice.

II. PLAINTIFF IS NOT ENTITLED TO FEES

Even if PRM were able to demonstrate that it "substantially prevailed" and therefore is eligible for fees, it is not entitled to fees. Eligibility for fees does not necessarily mean that a party is entitled to attorney's fees under FOIA. *See Miller*, 779 F.2d at 1389. Rather, the Court must consider several factors to determine whether the

prevailing party is entitled to fees: "(1) the benefit to the public to be derived from the case; (2) commercial benefit to the complainant; (3) the nature of the complainant's interest in the records which [it] seeks; and (4) whether the government's withholding of the records had a reasonable basis in law." *Id.*

Plaintiff cannot satisfy the public benefit factor where no records have been produced. *See, e.g., Nw. Coal. for Alts. to Pesticides v. EPA*, 421 F. Supp. 2d 123, 128 (D.D.C. 2006) (concluding that plaintiff "could not satisfy" the public benefit factor of the Court's entitlement analysis because it had "received no documents.").[4] Generally the "public-benefit prong 'speaks for an award of [attorney's fees] whether the complainant's victory is likely to add to the fund of information that citizens may use in making vital political choices.'" *Barnard v. DHS,* 656 F. Supp. 2d 91, 96 (D.D.C. 2009) (quoting *Blue v. Bureau of Prisons*, 570 F.2d 529, 534 (5th Cir. 1978)); *see also Cotton v. Heyman,* 63 F.3d 1115, 1120 (D.C. Cir. 1995) (declining to review remaining factors after finding no public benefit from release and recognizing reasonableness of agency's position); *Read v. FAA*, 252 F. Supp. 2d 1108, 1110-11 (W.D. Wash. 2003) (finding no public benefit from merely forcing compliance with FOIA where there was no public benefit related to the actual production of documents). Because no documents were produced in response to PRM's FOIA request, there was no victory; PRM possesses no documents as a result of its FOIA request that would assist it in helping the public make "vital political choices." *See also Klamath Water Users Protective Ass'n v. Dep't of the*

[4] Although the Court eventually awarded fees in that case, it found entitlement based on the agency's inadequate initial defense of its withholdings. No such considerations apply here where there has been no judicial order and the government's position is reasonable.

Interior, 18 F. App'x 473, 475 (9th Cir. 2001) (declining to award attorney fees for the release of documents "having marginal public interest and little relevance to the making of political choices by citizens"); *Bangor Hydro-Elec. Co. v. Dep't of the Interior*, 903 F. Supp. 169, 171 (D. Me. 1995) ("[A] successful FOIA plaintiff always confers some degree of benefit on the public by bringing the government into compliance with FOIA and securing for society the benefits assumed to flow from the disclosure of government information; [t]hat general benefit alone, however, does not necessarily support an award of litigation costs and attorney fees.")

Plaintiff argues that it has "provided information about whether the government is contemplating the use of [UAVs] in US jurisdictions," "provided information about how Defendant maintains its records" and conducts searches, and has "challenged an agency in an instance where it failed to adequately respond to a FOIA request."[5] The first point is inaccurate; Plaintiff received no information about the use of UAVs. The only additional piece of information Plaintiff might claim to have gleaned concerns whether OLC authored an opinion about the domestic use of UAVs, and Plaintiff has described no public benefit that flows from knowing that such an opinion does not exist. It is certainly not information that helps the public make "vital political choices."

[5] With respect to the second and third factors to be considered (complainant's interest and financial benefit to the complainant), Plaintiff claims not to have received any individual benefit from the no-records response. *See* Pl's Mem. at 12. Although Plaintiff makes a living as a journalist and thus generally could expect to benefit personally from the release of information in response to FOIA request, given the no-records response, it seems unlikely that anyone received any benefit from this litigation.

Plaintiff relies heavily on *Negley v. FBI*, 818 F. Supp. 2d 69, 75 (D.D.C. 2011), for the proposition that its lawsuit provided a public benefit despite the lack of documents produced. In that case, the FBI produced a large volume of documents that had only minimal public value beyond the plaintiff's interest, but the litigation also brought to light new information about how FBI conducts searches, which the district court believed was adequate demonstration of a public benefit. Even assuming that the D.C. district court was correct in treating the opinions describing FBI declarations as a "public benefit" procured by plaintiff, the case is readily distinguishable. In addition to the large volume of documents produced only after extensive litigation in that case, the "recalcitrant behavior" of the FBI, and the favorable opinions published by the court about the litigation, the plaintiff learned new information, not previously available, about how the agency conducts searches. Here, on the other hand, there have been no documents produced, and no opinions written; the Defendant has actively attempted to accommodate Plaintiff's questions during the course of the litigation; and no new information about OLC databases or search methodology was gained by anyone.[6] The kind of information regarding OLC search methodology, as provided in the Bies Declaration, is routinely provided by OLC in FOIA litigation, and Plaintiff has not identified anything new learned by the public. *Cf. Tax Analysts*, 965 F.2d at 1094 (affirming finding that more prompt release of public tax decisions was less than overwhelming contribution to public

[6] Plaintiff's interpretation of *Negley* would assign a meaningful public benefit to any litigation in which a search declaration is filed, regardless of whether or not the information in those declarations was previously available, thus creating perverse incentives to pursue litigation at least up to the filing of declarations, regardless of whether or not any benefit was obtained.

knowledge).[7] Indeed, much of the information contained in the Bies Declaration regarding OLC's general search practices as well as regarding the particular searches at issue in this case is contained almost verbatim in publicly available declarations previously filed in other litigation.

With respect to the last factor, OLC's position has a reasonable basis in law. Indeed, Plaintiff does not seem to maintain that OLC acted unreasonably in its initial response, *see* Pl's Mem. at 13, and does not cite a single statute, regulation or case that purports to require that an agency identify which documents, if any, are responsive to which subcomponents of a request. Plaintiff's bare allegation that OLC "failed to adequately respond" is not a substantial legal argument, in light of the widespread acceptance of treating FOIA requests as a whole.

Finally, Plaintiff urges the Court to consider "other factors," such as Plaintiff's good faith and whether litigation was a necessary option. It is unclear how Plaintiff believes these new factors should be weighed. Defendant notes, however, that even assuming that Plaintiff's misinterpretation of the initial FOIA response was a reasonable and good faith error, that miscommunication could have been resolved by other means. OLC responds to even informal requests for clarification where appropriate. *See* Bies Decl. ¶ 8. The appeal could have been allowed to proceed and could have resulted in a

[7] Plaintiff also cites *Dixie Fuel Co. v. Callahan*, 136 F. Supp. 2d 659 (E.D. Ky. 2001), in which a district court in Kentucky found a public benefit where the plaintiff succeeded in forcing the release of documents. In that case, however, there was a substantial release of documents, a published judicial opinion on the merits, and judicial findings regarding a lack of reasonable basis for withholding documents. No such circumstances or concerns exist here.

response to the narrowed request, thus resolving the alleged lack of clarity. Finally, Plaintiff unnecessarily prolonged the litigation after being informed both orally and in writing that no responsive documents existed.[8]

III. THE COURT SHOULD DENY THE MOTION FOR FEES AND COSTS FOR LACK OF ADEQUATE DOCUMENTATION

The Court can and should independently deny the request for fees because Plaintiff has not met its burden to show that any fees were reasonably expended. *See Blazy v. Tenet*, 194 F.3d 90, 92 (D.C. Cir. 1999) (rejecting otherwise valid claim for fees "for want of substantiation); *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (per curiam) ("Attorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney.").[9] Generally, the burden is on the party seeking fees to establish the "lodestar" amount of reasonable hours expended at a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1993). "Where the documentation of hours is

[8] Plaintiff claims that a denial of fees would create "an incentive for agencies to issue incomplete and unclear responses" to FOIA requests and a "disincentive" for requesters to pursue litigation. Pl's Mem. at 14. To begin, Defendant maintains that its initial response was both complete and clear, and it was certainly permissible under FOIA. Second, a denial of Plaintiff's motion creates no incentive for Defendant to issue unclear responses; Plaintiff has succeeded in wasting a large amount of taxpayer resources on meritless litigation even without getting a fee award. Finally, Plaintiff's proposed award – particularly in light of the extraordinary amount sought – is vastly out of proportion of any alleged public benefit gained from a simple "no records" response.

[9] The local rules also contemplate that such documentation will be submitted at the time of a motion for fees. *See* L. Rule 54-3(b) (noting that the Court will set a schedule in fee motions "for the submission and consideration of the motion for attorney's fees and all supporting documentation.").

inadequate, the district court may reduce the award accordingly." *Hensley*, 461 U.S. at 433; *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991); *Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, 1275 (8th Cir. 1980) ("uncertainties should be resolved against the plaintiff, if arising because of imprecise recordkeeping without adequate justification."). Here, Plaintiff has submitted no documentation whatsoever.

For filing and serving a simple FOIA complaint, Plaintiff claims to have spent $14,362.50 (95.75 hours at $150/hour). The amount alone is extraordinary in light of the simple nature of the complaint and the lack of any other substantive work on the litigation. For example, in a recent matter reflecting reasonable rates in Washington, D.C., the District Court for the District of Columbia awarded a public interest organization $1,040.00 "for the hours it reasonably expended between May 21, 2010, and June 14, 2010, on drafting and filing the complaint and effecting service of process on the DOJ" plus a small fraction of its request for attorney fees and costs. *See Judicial Watch, Inc. v. DOJ*, No. 10-851, 2012 WL 2989945 at *11-12 (D.D.C. July 23, 2012). Following the principle that "'the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees[,]'" *id*. at *10 (quoting *Hensley v. Eckhart*, 461 U.S. 424, 440 (1983)), the Court determined that Judicial Watch was not entitled to its full fee request because the organization had not been successful in litigating the merits of its claims, despite the fact that DOJ released documents during the course of the litigation. *Id*. at *2, *11. Given that Plaintiff PRM received no documents whatsoever for its efforts and completed no substantive briefing, its request for an award nearly 15 times that of Judicial Watch for doing similar work is manifestly unreasonable.

Without knowing how Plaintiff's counsel calculated his fees, it is difficult to know how Plaintiff came to such an extraordinary figure or what Defendant's exact objections would be. As a sampling however, there are many potential problems. First, FOIA does not provide reimbursement for fees incurred at the administrative level, *see Nw. Coal. For Alts. to Pesticides v. Browner*, 965 F. Supp. 59, 65 (D.D.C. 1997), and it is unclear whether Plaintiff's request includes such hours. Second, a fee award generally should be reduced to reflect when a plaintiff has achieved only limited success, *Hensley*, 461 U.S. at 440; *Nat'l Farmers' Org., Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1312 (8th Cir. 1988), and it is not clear whether Plaintiff has exercised such judgment here. Third, Plaintiff has not provided documentation adequate to establish that the hourly rate sought is a reasonable rate in the community. *See Blum v. Stenson*, 465 U.S. 886, 895–96 (1984). Finally, precedent requires that the district court exclude from its lodestar calculation hours that were not "reasonably expended," and a party seeking attorneys' fees is required to exclude from counsel's fee request hours that are "excessive, redundant, or otherwise unnecessary." *Id*. *Hensley*, 461 U.S. at 434. Without any supporting documentation, neither the Defendant nor the Court has any way to evaluate the reasonableness of Plaintiff's claims for fees or costs. Accordingly, Plaintiff's claims for fees and costs should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's motion for fees and costs.

Dated: November 30, 2012 Respectfully Submitted,

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