IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

PUBLIC RECORD MEDIA, LLC, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant	)	CASE 0:12-cv-01225-MJD-AJB

REPLY MEMORANDUM IN SUPPORT OF FEES MOTION

When a good faith requester reasonably understands an agency to be withholding records, and such requester has exhausted his administrative remedies, his statutory recourse is litigation, and when appropriate, fee recoupment. Defendant's theory of the case appears to be that a "no records" declaration during litigation is a total bar to Defendant agency fee responsibility under 5 U.S.C. § 552(a)(4)(E), irrespective of its prior representations and actions. Plaintiff's theory of the case is: if a Defendant agency causes a requester to reasonably believe the agency is withholding responsive records, and, having failed to respond to an administrative appeal in the time periods proscribed by the FOIA, it provides a "no records" response after the initiation of litigation, the agency should be responsible for Plaintiff's expenses. Section 552(a)(4)(E) provides a basis for such a reward. Given the language of the statute, the case law interpreting it, and the purposes of the FOIA, Plaintiff respectfully renews its request that the Court find in favor of Plaintiff's motion for fees.

ARGUMENT

The crux of Plaintiff's argument is that if a Defendant agency is reasonably understood to be withholding responsive records after administrative remedies have been exhausted, and Defendant changes its position in litigation -- either by declaring that no such records exist or by producing withheld records -- the effect of such change for the purposes of § 552(a)(4)(E) is essentially the same. As discussed in Plaintiff's initial memorandum in support of this motion (Docket No. 23, "Plaintiff's Memo"), the "catalyst" rule was codified in § 552(a)(4)(E) because, in situations such as this one, an agency's responses and an observer's reasonable understanding thereof are primarily in such agency's control, giving it the ability to use such control and disparity in resources to frustrate (whether or not intentionally) good faith requesters and therefore the purposes of the FOIA. *See, e.g., Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 525 (U.S.App.D.C 2011) ("Agencies could force FOIA plaintiffs to incur litigation costs while simultaneously ensuring that they could never obtain the merits judgment they needed to become eligible for attorneys fees. To address this problem, Congress passed the Open Government Act of 2007…which revived the possibility of a fee award in the absence of a court decree" and "redefined 'substantially prevailing' to include obtaining relief through … a voluntary or unilateral change in position by the agency." 5. U.S.C. § 552(a)(4)(E)(ii)); *and Negley v FBI*, 818 F.Supp.2d 69, 75 (D.C.Cir. 2011) ("the touchstone of a court's discretionary decision under section 552(a)(4)(E) must be whether an award of attorneys fees is necessary to implement the FOIA. A grudging application of this provision, which would dissuade those who have been denied information from

invoking their right to judicial review, would be clearly contrary to congressional intent.")

None of Defendant's arguments in its response memorandum (Docket No. 27, "Response Memo") alter the fundamental facts at issue: (1) Defendant agency responded to Plaintiff's multiple-category FOIA request with a letter that responded to two categories together; (2) Defendant agency stated that responsive records exist, invoking FOIA exemptions to withhold such records ("We have identified several documents that are responsive to the remaining items in your request. We are withholding these documents pursuant to FOIA Exemptions (1, 3 and 5)."); (3) Defendant did not make representations that specific records did not exist, (4) Plaintiff timely filed an administrative appeal narrowing its request to only one of the categories; and (5) Defendant agency failed to timely respond to the administrative appeal under FOIA thereby exhausting Plaintiff's administrative remedies. Plaintiff's recourse at that juncture was this suit. Two months after Plaintiff filed suit, Defendant agency declared that there are no records responsive to Plaintiff's narrowed request thereby changing its representation of its position. In such a scenario, Defendant should bear responsibility for the costs of the suit.

I. A "No Records" Declaration During Litigation is Not a Bar to Fee Liability.

As detailed in Plaintiff's Memo, a fee award is an appropriate part of a suit's resolution when a Defendant agency comes forward with dispositive information only following the initiation of a lawsuit, whether or not there is court-ordered relief on

the underlying merits, and whether or not physical records (as opposed to dispositive information, as here) have been produced.

Nothing in the case law or the plain language of the statute prevents an award of fees under this theory. As Defendant concedes, "[a] FOIA claimant ... [need not] have received a favorable judgment in order to have prevailed" for purposes of considering an award of fees." *See* Response Memo at Page 5, ¶3 (*citing Miller v. Dep't of State*, 779 F.2d 1378, 1389 (8th Cir. 1985)). Rather, Plaintiff need only show "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).

Defendant cites *Uhuru v. U.S. Parole Comm'n* for the proposition that "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* Response Memo, Page 6, ¶1 (*citing Uhuru v. U.S. Parole Comm'n*, 734 F. Supp. 2d 8, 14 (D.D.C. 2010)). The *Uhuru* case does not say this. In stating that federal courts have jurisdiction only to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld," the *Uhuru* court was actually rejecting the availability of a sanctions claim under 5 U.S.C. § 552(a)(4)(B) on jurisdictional grounds, not ruling as to the fees provision in 5 U.S.C. § 552(a)(4)(E). *See Uhuru*, 734 F. Supp. 2d at 14 ("moreover, to the extent that plaintiff demands an award of costs as a sanction for the USPC's delay in responding to this FOIA request, the FOIA does not recognize such a claim"). Section 552(a)(4)(B) provides the court jurisdiction to enjoin the withholding of records and to order production of records improperly withheld. Plaintiff's motion here is

not a motion for "sanctions" under 5 U.S.C. § 552(a)(4)(B). The rejection of sanctions as an available remedy under the jurisdictional element of 552(a)(4)(B) in *Uhuru* does not invalidate Plaintiff's motion for fees under 552(a)(4)(E).

When addressing 552(a)(4)(E) specifically, the *Uhuru* court found that a "voluntary or unilateral change in position by the agency" does not alone justify an award of costs if plaintiff's claim is "insubstantial," finding plaintiff ineligible for fees under that section because it found plaintiff's claims "insubstantial" as the documents it sought were for "his personal benefit." *See Uhuru*, 734 F. Supp. 2d at 14. Neither party disputes that a claim must not be insubstantial in order to be eligible for fees under 552(a)(4)(E), and Plaintiff references its initial memorandum for its discussion of the substantiality of its claim. *See, generally,* Plaintiff's Memo at 7, 8, 11-13.

Defendant cites *Ameren Mo. v. EPA,* for the proposition that "because no such documents were produced, Plaintiff cannot reasonably be said to have prevailed on any claim." *See* Response Memo, Page 6, ¶1 (*citing Ameren Mo. v. EPA*, -- F. Supp. 2d -- No. 11-02051, 2012 WL 4372518 (E.D. Mo. September 25, 2012)). The discussion in *Ameren* was primarily regarding the court's rejection of Plaintiff's summary judgment motion and was cursory with regard to fee motions, but nonetheless, Plaintiff does not dispute that there are cases in which the non-production of records has been relevant to the consideration of fee motions. In cases where responsive records exist, it is a relevant factor to be sure. It does not follow however that production of records is therefore required in all cases for fee award eligibility under the statute.

This case is distinguishable from cases that consider the production of

records. Here, we are informed after the initiation of litigation, there are no records to produce. The language of the statute itself does not require the physical production of records to prevail on a fee motion thereunder, only a change in position by Defendant. 5. U.S.C. § 552(a)(4)(E). And as discussed previously, Congress intended for the Court's discretion to be wide in considering such motions. *See* Plaintiff's Memo, Page 7, ¶4.

Defendant also argues that, even if Plaintiff is found to be eligible for fees, Defendant's "no records" declaration in litigation renders Plaintiff not entitled for fees. *See* Response Memo, Page 9, ¶2 ("Plaintiff cannot satisfy the public benefit factor where no records have been produced") (*citing Nw. Coal. for Alts. to Pesticides v. EPA*, 421 F. Supp. 2d 123, 128 (D.D.C. 2006)). Defendant asserts that "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.'" *See id.* (*citing Barnard v. DHS,* 656 F. Supp. 2d 91, 96 (D.D.C. 2009)). Defendant concludes therefore that "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 id*.

Again, the production of records may indeed be relevant in certain cases for the evaluation of the benefit to the public of a plaintiff's claim. However, it does not follow that the production of records is therefore required in all cases for fee award entitlement. As a result of the litigation here, in addition to the information about Defendant's FOIA search and response methods, a sworn declaration stating that Defendant's Office of Legal Counsel does not posses opinions regarding the use of lethal

force by UAVs in the United States -- a matter of significant public interest -- is now in the public record. As detailed in its initial memorandum (Plaintiff's Memo, Page 9, ¶2), there is a clear benefit to the public as a result of Plaintiff's good faith efforts and Plaintiff should be found to be entitled to fees as well as eligible.

II. Defendant Has Changed Position During Litigation, And Providing The Necessary Information In Advance of Litigation Would Not Have Been an Undue Burden.

Defendant asserts that by filing a declaration during litigation explaining its pre-litigation statements, it can therefore declare that what it *meant* by its pre-litigation statements is identical to its post-litigation statements, and as such does not constitute a change in position. Even affording Defendant's declaration its good faith presumption, this argument should be rejected. Defendant claims that:

> "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." (Response Memo, Page 6, ¶2, *citing* Declaration of John E. Bies, September 21, 2012 (Docket No. 18-19)).

and:

> "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." (Response Memo, Page 8, ¶2.)

While Plaintiff continues to find Defendant's post-facto interpretations of its November, 2011, statements grammatically tortured, Defendant may indeed have meant what it now claims to have meant more than a year ago. Plaintiff's argument, however, concerns what Defendant's course of responses should have reasonably been

understood by the recipient to mean, and whether such reasonable understanding, if altered in litigation, constitutes a change in position for purposes of 552(a)(4)(E).

Certainly, whatever Defendant now declares it meant by its statements prior to litigation, what it actually *said* is clear: "We have identified several documents that are responsive to the remaining items in your request. We are withholding these documents pursuant to FOIA Exemptions (1, 3 and 5)." *See* Plaintiff's FOIA Request, attached as Exhibit A to Plaintiff's Memo (Docket No. 24-1).

Based on this statement and Defendant's failure to respond to Plaintiff's narrowed appeal challenging Defendant's withholding of Category 3 records, Plaintiff understood Defendant to be representing that it was withholding responsive records. Plaintiff submits that this understanding was reasonable, and if it was indeed reasonable, then it is also reasonable to conclude that a "no records" declaration in litigation is a change in position. To conclude otherwise would require future FOIA requesters to interpret what Defendant agencies mean, not what they say, which is of course possible only to a limited degree.

Whether or not it is the case that "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" (Response Memo, fn. 3), it is also the case that no statute, regulation or case suggests that an agency may imply that responsive records exist if they in fact do not. Presumably Defendant does not mean to suggest that it can do so indiscriminately or in a misleading fashion.

Through Plaintiff's administrative appeal, it sought records responsive to

only one category of Plaintiff's initial request (Category 3). Declaring "no records" in response to this appeal would not have been an undue burden for Defendant.[1] To adopt Defendant's theory of post-litigation "no records" representations as a bar to fee responsibility would provide a disincentive for agencies to provide clear and complete information on a timely basis in contravention of the purposes of the FOIA – a result cautioned against in *Nationwide Bldg. v. Sampson,* 559 F.2d 704, 705 (D.C. Cir. 1977). *See* Plaintiff's Memo, Page 7, ¶2.

The necessary information here was evidently available months prior to the commencement of litigation, according to Defendant's Bies Declaration. *See generally* Declaration of John E. Bies, dated September 21, 2012 (Docket No. 18-19). Rather than providing the information in response to Plaintiff's initial FOIA request or in response to Plaintiff's narrowed administrative appeal, Defendant provided it only after the initiation of this suit. If an agency's representations cause a requester to reasonably believe the agency possesses responsive records, and the agency then provides materially different representations after forcing costly litigation, it should bear responsibility for such costs. Defendant should be found to have changed its position here and therefore be liable under 5 U.S.C. Section 552(a)(4)(E) for the resulting expenses.

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[1] When an agency has made a "no records" determination, Plaintiff reasonably expects to receive such information, as it did, *e.g*., from the Department of Homeland Security here: http://www.publicrecordmedia.com/wp-content/uploads/2010/documents/FOIADHS2011_pd_002.pdf ("no records" in response to 3 of 5 categories), from the Department of the Interior here: http://www.publicrecordmedia.com/wpcontent/uploads/2010/documents/FOIAUSFWS2010_pd_003.pdf ("no records"), and from Defendant's Office of Legal Counsel here: http://www.publicrecord media.com/wp-content/uploads/2010/documents/FOIAOLC2010_pd_005.pdf ("no records" in response to narrowed FOIA request).

III. Certain of Defendant's Arguments Misconstrue Facts or Are Irrelevant.

Various of Defendant's assertions misconstrue facts or are irrelevant.

(a) Plaintiff Did Inquire as to Category 3 Records, and Defendant Did Not Reply to Plaintiff's Administrative Appeal.

Defendant's argument that it did not change position relies heavily on a repeated conflation by Defendant between Defendant's responses in this lawsuit with its non-response to Plaintiff's administrative appeal. Defendant has conflated these separately relevant facts throughout this suit including in its summary judgment motion and at least four times in its recent response memorandum, despite very clear facts in the record, certainly reducing the parties' ability to come to an amicable resolution.

Defendant *insists*:

1. "In response to the narrowed request pursued on administrative appeal and in this litigation, DOJ has confirmed repeatedly that there are no documents responsive to the narrowed request." See Defendant's Summary Judgment Memorandum, Page 1, ¶1.

2. Later in its Response Memo, the verbatim assertion: "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." *See* Response Memo, Page 1, ¶1.

3. "DOJ had not yet ruled on this appeal at the time this lawsuit was filed. Like the administrative appeal, the complaint is limited to item three of the original FOIA request. 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." Response Memo at Page 4, ¶3.

4. "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." Response Memo at Page 7 ¶1.

5. 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." Response Memo at Page 7 ¶1.

These repeated claims are misleading, at best. Plaintiff clearly "inquired directly of OLC whether there were any items responsive specifically to subcategory three of the request." It did so quite specifically in its initial FOIA request. *See* Plaintiff's FOIA Request, attached as Exhibit A to Plaintiff's Memo (Docket No. 24-1). And perhaps more to the point it did so again in its administrative appeal, which was, as Defendant concedes, *narrowed specifically to only category 3 records*. In fact, Plaintiff's administrative appeal, delivered December 29, 2011, serves *precisely* the function Defendant claims Plaintiff never pursued – i.e., it narrowed the scope of its request to one category of records, and sought further information regarding those Category 3 records by challenging Defendant's apparent withholding of those records. *See* Plaintiff's Administrative Appeal, attached as Exhibit C to Plaintiff's Memo (Docket No. 24-1).

By continually conflating its non-response to Plaintiff's administrative appeal with its response to this lawsuit Defendant blurs a distinction that is obviously relevant. Notwithstanding Defendant's claims, two essential facts remain clear in the record: (1) Plaintiff did inquire specifically as to, and challenged the withholding of, Category 3 records prior to litigation through its administrative appeal,[2] and (2) Defendant did not substantively respond to Plaintiff's appeal within the time periods set

[2] Regarding Defendant's repeated and baseless accusations that Plaintiff somehow "preferred" litigation, this is patently false, as is clearly borne out by the fact that Plaintiff filed an administrative appeal rather than a lawsuit at that juncture. The flaws here were in Defendant's course of responses to Plaintiff's good faith submissions.

forth in 5 U.S.C. §552(a)(6)(A) thereby exhausting Plaintiff's administrative remedies.[3]

Defendant did not declare the non-existence of the requested records until two months after the initiation of litigation. By not responding to the narrowed appeal, Defendant left Plaintiff with a reasonable belief that Defendant was withholding responsive records under FOIA exemptions, and that litigation was its primary recourse.

(b) Defendant's Search Is Not At Issue.

Defendant's focus on Plaintiff's lack of objection to Defendant's search is misplaced and irrelevant. *See, e.g.,* Response Memo, at Introduction, ¶1 ("Plaintiff raised no objection to the search either in its complaint or otherwise"). Plaintiff filed this lawsuit in order to challenge what it reasonably understood to be Defendant's withholding of responsive records, not the propriety of Defendant's search. Because Plaintiff chose to dismiss the suit based on Defendant's later "no records" representations, rather than change the nature of the lawsuit mid-course and consider the search itself does not mean that Plaintiff therefore endorses Defendant's search. Defendant's search, and whether Plaintiff has objected to it, has not at any point been at issue in this litigation.

(c) The Timing of Dismissal by the Parties was Appropriate, and is Irrelevant to Defendant's Liability for Fees.

Defendant suggests that Plaintiff should have dismissed the case before reviewing Defendant's motion filings. *See* Response Memo, Page 1, ¶2 ("Plaintiff initially refused to dismiss the action and insisted that Defendant move for summary

[3] Notably, Defendant has not challenged that Plaintiff's appeal was proper and timely. If Defendant had inter-agency circulation issues, this does not somehow negate the fact that it failed to timely respond to Plaintiff's submissions or make such failures less its responsibility.

judgment.") It is understandable that Defendant prefers to limit its filings whenever possible. However, the fact that Plaintiff chose to review Defendant's under-oath declarations prior to making a dismissal decision is of course entirely reasonable. The nature of Defendant's representations changed following the initiation of this suit. Plaintiff learned of the change around the time of the status conference in August, 2012, and then, receiving no offers or counter-offers from Defendant as to who should bear responsibility for resulting expenses, deemed it necessary to review Defendant's motion papers, attached declarations, and new representations made therein before making its own decision as to whether to proceed. This was entirely reasonable, if not advisable.

In any event, Defendant's protestations about the timing of the parties' joint dismissal in this suit would only be relevant, if at all, to the reasonability of the amount of fees requested, not to Defendant's liability therefor.

IV. Fee Documentation.

Plaintiff understood that the information it provided in its motion papers – a fair estimate of total amount requested, counsel's rate, a deducible number of hours spent, and Plaintiff's itemized costs (in this case, the filing fee) – was sufficient under Federal Rule of Civil Procedure 54(d) and Local Rule 54.3, as well as under Federal Rule 54(d)(2)(C) which provides that "the court may decide issues of liability for fees before receiving submissions on the value of services." *See also, Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, 820 F.Supp.2d 39, 43 (D.C.Cir. 2011) (upon finding defendant liable for fees, court afforded the parties an opportunity to resolve the issue of fee amount prior to making its own determination), *and Negley v FBI*,

818 F.Supp.2d 69, 75 (D.C.Cir. 2011) (directing the parties to submit additional information on fee amounts after granting plaintiff's motion).

Regarding Defendant's protestations about Plaintiff's estimate, perhaps it is useful to also briefly recall here that, at the outset of this suit and for two months thereafter, Plaintiff was under the reasonable understanding that the parties would be litigating the propriety of Defendant's use of FOIA exemptions to withhold documents. Plaintiff's preparation at that juncture was therefore in large part regarding exemptions 1, 3 and 5, as would be typical in a FOIA case.

The estimate provided is accurate, and includes only litigation (not administrative appeal) expenses. When and if directed by the Court, Plaintiff will provide whatever additional documentation is required.

CONCLUSION

If an agency possesses no records responsive to a FOIA request, the agency is obligated to at some point inform the requester of the fact. If the agency waits until after a requester's administrative remedies are exhausted to do so, the agency should be responsible for resulting litigation expenses under 522(a)(4)(E). A finding to this effect by the Court here would reflect a narrowly construed and reasonable requirement in FOIA cases: If there are no records in response to a narrowly tailored request, a responding agency must be reasonably understood to so inform requester before such requester's administrative remedies are exhausted, or be liable for resulting litigation expenses. Such a requirement does not constitute an undue burden. Agencies do not avoid liability for fees by simply rendering a case moot by producing documents after the

initiation of litigation, nor should they by waiting until litigation to declare no documents exist.

For the reasons discussed in this memorandum and Plaintiff's initial memorandum, Plaintiff respectfully requests that this Court find Defendant liable for Plaintiff's reasonable fees and costs, and if necessary direct the parties to make additional submissions regarding the fee estimate provided.

Dated: December 14, 2012

Respectfully submitted,

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