UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PUBLIC RECORD MEDIA, LLC, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil No. 12-1225 (MJD/AJB) **ORDER ON MOTION FOR ATTORNEYS' FEES AND COSTS**

This matter is before the Court, Chief Magistrate Judge Arthur J. Boylan, on a motion for fees and costs by Public Record Media, LLC [Docket No. 22]. The matter has been referred to the magistrate judge under 28 U.S.C. § 636 and Local Rule 72.2(b) for an order on the motion. This matter is decided on the documents and without hearing. Jonathan Haines represents Plaintiff. Amy E. Powell represents Defendant.

Based upon the file, memorandums, and arguments of counsel, **IT IS HEREBY ORDERED THAT** Plaintiff's Motion for Fees and Costs [Docket No. 22] is **GRANTED** as provided herein.

Dated: __January 29, 2013___

__s/Arthur J. Boylan_____
Arthur J. Boylan
United States Chief Magistrate Judge

MEMORANDUM

Plaintiff Public Record Media, LLC, ("Plaintiff") filed a Freedom of Information Act ("FOIA") request with Defendant Department of Justice ("Defendant") on October 11, 2011. The request enumerated three different categories of information sought by Plaintiff.[1] The first category sought information related to lethal force used by the United States against Anwar al-Awlaki. At issue in this matter, however, are the second and third categories, each of which requested information relating to the United States' use of lethal force via "unmanned aerial vehicles" (UAVs). The second category sought information related to lethal UAV force outside of the jurisdiction of the United States, while the third category sought information related to lethal UAV force within the jurisdiction of the United States.[2]

On November 3, 2011, Defendant responded in writing to Plaintiff's request. In its response, Defendant first stated that it could neither confirm nor deny the existence of documents described in the first category of Plaintiff's request. Defendant then addressed the requests of the second and third categories simultaneously as follows: "We have identified several documents that are responsive to the remaining items in your request." Defendant further stated that it was withholding these identified documents pursuant to FOIA Exemptions 1, 3 and 5.[3]

After receiving Defendant's response, Plaintiff filed an administrative appeal with Defendant.[4] In its appeal, Plaintiff narrowed the scope of its initial request to only those documents described in the third category of its request. On May 22, 2012, after not receiving a

[1] Exhibit A, Exhibits in Support of Plaintiff's Fee Motion [Docket No. 24].
[2] *Id*.
[3] *Id.,* Exhibit B.
[4] Plaintiff's appeal was dated December 29, 2011 (*Id*., Exhibit C); however, Defendant states in its opposing memorandum (Page 4, Docket No. 27) that the letter of appeal was not received by the DOJ Office of Information and Policy until April 24, 2012. Regardless, the Defendant failed to make a determination on the appeal within 20 days after receipt of the appeal, as required by 5 U.S.C. § 522(a)(6)(A).

timely determination on its appeal, Plaintiff initiated a lawsuit seeking documents related to its third category of requests, asserting that Defendant "has improperly withheld responsive memoranda and/or legal opinions from Plaintiff under FOIA"[5] Thereafter, during a teleconference in July 2012 and again in a written confirmation letter dated August 3, 2012,[6] Defendant informed Plaintiff that none of the "responsive records" it identified (and withheld) in its initial response related to the third-category request. Instead, it stated that "any responsive records located are responsive to the second category, construed broadly."[7] After learning that no documents relating the third-category request existed, Plaintiff stipulated to a dismissal of its claim.[8] The present issue, discussed below, arises out of Plaintiff's motion for attorney's fees and costs, pursuant to 5 U.S.C. § 522(a)(4)(E).

DISCUSSION

Under FOIA, the Court may award reasonable attorney's fees and costs to a plaintiff whose claim against a governmental agency has "substantially prevailed." *See* 5 U.S.C. § 522(a)(4)(E)(i). A plaintiff is considered to have "substantially prevailed" if relief has been obtained through 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. § 522(a)(4)(E)(ii). The language of this statute naturally divides the attorney-fee inquiry into a two-prong analysis that addresses both fee *eligibility* and fee *entitlement*. *See Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 524 (D.C. Cir. 2011) (citing *Judicial Watch, Inc. v. U.S. Dep't of Commerce,* 470 F.3d 363, 368-69 (D.C. Cir. 2006)). First, the Court must determine whether a plaintiff has "substantially prevailed" and is therefore

[5] Complaint [Docket No. 1].
[6] Exhibit D, Exhibits in Support of Plaintiff's Fee Motion.
[7] *Id.*
[8] Order of Chief U.S. District Court Judge Michael J.Davis [Docket No. 21].

"eligible" to receive fees. *Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Justice*, 820 F.Supp.2d 39, 43 (D.C. Cir. 2011). If the Court determines that a plaintiff is eligible, it must then weigh a variety of factors to determine whether a plaintiff is "entitled" to fees. *Id.* Finally, if it is determined that a plaintiff is both eligible and entitled to fees, the Court will consider whether the fees requested are reasonable under the lodestar standard.

Plaintiff's Fee Eligibility

A plaintiff no longer needs to win court-ordered relief on the merits of his FOIA claim in order to be eligible for a fee award. *See Brayton*, 641 F.3d 521 at 525. Instead, following amendments to the attorney's fees provisions of FOIA under the OPEN Government Act of 2007, a plaintiff is considered to have "substantially prevailed" and is thereby eligible for fees if his claim causes a voluntary or unilateral change in the position of the agency involved. *See id.; see also Davis v. U.S. Dep't of Justice,* 610 F.3d 750, 752 (D.C. Cir. 2010) (describing this change as a "catalyst theory" approach).

In the present case, the Court finds that Plaintiff's claim did in fact cause Defendant to change its position regarding the third-category request, and therefore Plaintiff "substantially prevailed," making it eligible for an award of attorney's fees. In its initial response to Plaintiff's request, Defendant did not address the second and third category requests individually, but instead addressed them simultaneously in one vague sentence: "We have identified several documents that are responsive to the remaining items in your request."[9] Based on the construction of this sentence alone (i.e., the documents are described as responsive to the remaining "items" – the plural word "items" suggests both the second and third categories, not just one category), as well as the sentence's natural meaning in the context of Defendant's letter as a whole, it was reasonable for Plaintiff to conclude that responsive documents were identified

[9] Exhibit B, Exhibits in Support of Plaintiff's Fee Motion.

to match the descriptions of both the second and third category requests. Yet, after Plaintiff's legal claim was initiated, Defendant notified Plaintiff that no documents were identified as responsive to the third-category request.

The change from an initial, (seemingly) positive identification of documents relating to the government's lethal use of UAVs within its jurisdiction to the final conclusion that no such documents exist is a substantial change in position. Despite the fact that no documents were ever produced, the Plaintiff and the public at large can still glean important information from this change – namely, the government does not possess any documents related to the lethal use of UAVs within U.S. jurisdiction. This information was only made available after Plaintiff initiated its claim, and therefore Plaintiff is determined to have "substantially prevailed" in its claim.

Plaintiff's Fee Entitlement

Having determined that Plaintiff is eligible for fees, the Court must next consider whether Plaintiff is entitled to fees. The goal of this analysis is to ensure that fees are awarded in a manner consistent with the purpose of FOIA's amended fee provision. *Citizens for Responsibility,* 820 F.Supp.2d 39 at 45. The amended fee provision aimed "to remove the incentive for administrative resistance to disclosure requests based not on the merits of exemption claims, but on the knowledge that many FOIA plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation." *Davy v. C.I.A.*, 550 F.3d 1155, 1158 (D.C. Cir. 2008) (citing *Nationwide Bldg. Maint., Inc. v. Sampson*, 559 5.2d 704, 711 (D.C. Cir. 1977)).

With this purpose in mind, the Court must consider at least four factors when making a determination as to attorney fee entitlement: (1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4)

the reasonableness of the agency's withholding of the requested documents. *Citizens for Responsibility,* 820 F.Supp.2d 39 at 45 (citations omitted). None of these factors is in and of itself dispositive, and "[t]he sifting of those criteria over the facts of a case is a matter of district court discretion." *Id.* (citing *Davy*, 550 F.3d 1155 at 1159 and *Tax Analysts v. U.S. Dep't of Justice*, 965 F.2d 1092, 1094 (D.C. Cir. 1992)).

The first "public benefit" factor tests whether "the disclosure will assist the citizenry generally in making an informed judgment as to governmental operations." *Aviation Data Service v. F.A.A.*, 687 F.2d 1319, 1323 (10th. Cir. 1982). As previously discussed, despite the fact that Plaintiff's suit did not uncover any documents, it did nevertheless provide the public with the benefit of important information that was not available to the public prior to the suit. Namely, Plaintiff's suit led to the government's statement that there is no documentation related to the lethal use of UAVs within the jurisdiction of the United States; however, the government was able to identify documentation to such use outside of U.S. jurisdiction. This information, which reveals the general scope of the United States' lethal use of UAVs, is in and of itself valuable information that benefits the public, even if the public does not gain access to any relevant documents. Furthermore, the public can easily gain access to this information through the Plaintiff's website, which invokes the second and third factors for consideration.

The second and third factors inquire into the nature of Plaintiff's interest in the information it is seeking, including any commercial benefit the Plaintiff might obtain with such information. *See Citizens for Responsibility*, 820 F.Supp.2d 39 at 45 (noting that as a threshold matter, these factors are closely related and often considered together). A public interest, rather than a private commercial interest, will weigh in favor of an award of fees. *See id.* In its motion, Plaintiff identifies itself as a Minnesota media organization that seeks and publishes government

documents on its website at no charge "for the benefit of policy makers, the press, and the public." (Docket No. 23, p. 3). There is no evidence that Plaintiff's attempt to obtain information from the Defendant, including the lawsuit it initiated in furtherance of this attempt, provided any commercial benefit to Plaintiff. Instead, Plaintiff asserts that one of its goals in obtaining such information is to provide to the public "government documents related to national security matters that are frequently discussed in the national and international press."[10] Defendant does not challenge these assertions.

Finally, in cases where the government initially refused to disclose records, the Court must consider the reasonableness of Defendant's initial withholding of the documents requested. The parties seem to agree that this factor is not relevant to the case at hand, because no documents related to the third-category request were actually in existence, and therefore, no documents related to the third category were actually withheld.

In sum, because Plaintiff was seeking information to benefit the public without any commercial benefits to itself, and because the public can derive a benefit from the information discerned after the initiation of Plaintiff's lawsuit, the Court finds that Plaintiff is entitled to fees pursuant to FOIA.

Reasonableness of Fees

Having determined that Plaintiff is both eligible and entitled to fees, the Court must now decide whether $14, 712.50 is reasonable compensation for Plaintiff's legal fees and costs. Plaintiff claims that its lodestar calculation includes 95.75 hours of work at a rate of $150 per hour (for a total of $14,362.50), plus a $350 filing fee expense. To date, Plaintiff has not provided the Court with any documentation to support this claim. Even when Defendant's opposing memorandum alerted the Court (and Plaintiff) that sufficient documentation of the fees

[10] Plaintiff's Memorandum in Support of Motion for Fees and Costs, Page 4 [Docket No. 23].

requested was absent from the record,[11] Plaintiff still failed to submit any documentation regarding its fees with its reply memorandum. Instead, Plaintiff stated that if would provide whatever additional documentation is required only "[w]hen and if directed by the Court."[12] Plaintiff's failure to substantiate its claim with relevant documentation, [13] despite having several opportunities to do so, is grounds for this Court to dismiss its claim. *See Blazy v. Tenet*, 194 F.3d 90, 98 (D.C. Cir. 1999) (dismissing a claim for fees and litigation costs because the plaintiff failed to provide documentary evidence to support his claim for fees, "[e]ven after the Government's opposition brief put him on notice that the necessary documentation was missing").

Even if the Court does not entirely dismiss the claim for fees, it may still reduce the award accordingly "[w]here the documentation of hours is inadequate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (holding that the party seeking an award of fees should submit evidence supporting the hours worked and rates claimed). Defendant notes that Plaintiff failed to meet its burden of providing documentation adequate to establish that the hourly rate charged by Plaintiff is a reasonable rate in the community. Still, Defendant does not suggest, nor does this Court believe, that a rate of $150 per hour is an unreasonable rate within the local legal community. Instead, Defendant takes issue with the claim that 95.75 hours is a reasonable amount of time to spend on this case.

---

[11] Defendant's Memorandum in Opposition to Plaintiff's Motion for Fees, Pages 13-14 [Docket No. 27].
[12] Plaintiff's Reply Memorandum in Support of Fees Motion, Page 14 [Docket No. 28].
[13] Instead of offering documentation to the Court in support of its claim for attorney fees, Plaintiff argues that the information it provided in its motion papers regarding its fee amount was sufficient under Federal Rule of Civil Procedure 54(d)(2)(c), which provides that "[t]he court *may* decide issues of liability for fees before receiving submissions on the value of services" (emphasis added). Note that the court is not required to decide issues of liability for fees and value of services separately. Therefore, Plaintiff's seemingly unnecessary withholding of documents in support of it its own claim tends to suggest that Plaintiff may not have in its possession sufficient documentation regarding its attorney's fees.

Defendant correctly points out that FOIA does not provide reimbursement for fees incurred at the administrative stage. *See Nw. Coal. for Alts. to Pesticides v. Browner*, 965 F.Supp. 59, 65 (D.C. Cir. 1997). In response, Plaintiff contends that the 95.75 hours includes only time spent on litigation, not time spent on administrative appeal.[14] Plaintiff also states that "at the outset of this suit and for two months thereafter" it was under the understanding that the parties would be litigating Defendant's use of FOIA exemptions to withhold documents, and it was preparing for litigation related to the use of these exemptions.[15] In the absence of adequate documentation or support for Plaintiff's lodestar calculation, the Court is compelled to exercise its discretion to determine the reasonableness of the hours Plaintiff claims to have worked while completing its initial complaint against Defendant and preparing for litigation over a two-month period before a dismissal was stipulated. The Court finds 50 hours to be a reasonable amount of time to spend on legal work of this nature, at the reasonable rate of $150 per hour, and thereby grants Plaintiff's motion for fees in the reduced amount of $7,500 plus its $350 filing fee. The remaining 45.75 undocumented hours of work claimed by Plaintiff are hereby excluded as unreasonable.

CONCLUSION

For the foregoing reasons, Plaintiff is found to be both eligible and entitled to an award of attorney's fees. However, because Plaintiff provided no documentation to support the hours it claimed to have expended on this case, the Court determines that Plaintiff's work reasonably required 50 hours of work at its rate of $150 per hour. Therefore, Plaintiff is granted an award of attorney's fees in the amount $7,500, plus its $350 filing fee, for a total award of $7,850.

[14] Plaintiff's Reply Memorandum in Support of Fees Motion, Page 14 [Docket No. 28].
[15] *Id*.