UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Public Record Media, LLC,	)	
Plaintiff,	)	Case No. 12-1225- MJD-AJB
v.	)	**Defendant's Reply to Plaintiff's Response to Magistrate Judge's Order Regarding Attorney's Fees and Costs**
United States Department of Justice,	)	
Defendant.	)	

INTRODUCTION

On February 12, 2013, Defendant Department of Justice objected [Dkt. #33] to the magistrate's order awarding plaintiff Public Record Media ("PRM") $7,850 in fees and costs. The Department explained that it had never "changed" its position; that PRM had not "substantially prevailed;" that PRM had shown no public interest entitling it to fees; and that PRM had completely failed to document its fee request. In its February 25 response [Dkt. #34], PRM seeks to lodge its own objection to the magistrate's reduction of PRM's requested fee award. That objection is untimely, and this Court should not consider it. Moreover, PRM's untimely fee documentation reflects improper timekeeping practices and an excessive fee request. The Court should deny PRM's fee request in this case. But even if it finds that some fee award is appropriate (which it should not), the Court should reduce that award to a small fraction of what the magistrate awarded.

ARGUMENT

I. PRM's Objection To The Magistrate's Order Should Be Denied As Untimely.

In responding to the Department's objections to the magistrate's order, PRM purports to submit its own objection to the magistrate's decision to reduce the fee award because of

inadequate documentation. *See* Dkt. #34 at 7. But that objection comes too late and should be denied for that reason alone. Local Rule 72.2(b) requires that a party file and serve any objections to a magistrate judge's dispositive order within 14 days after being served with that order "unless a different time is prescribed." *See also* 28 U.S.C. § 636(b)(1). Courts thus appropriately dismiss objections submitted outside of this 14-day period. *See, e.g.*, *Hentges v. Minnesota*, No. 10-4081, 2011 WL 290527 (D. Minn. Jan. 27, 2011); *see also Caidor v. Onondoga County*, 517 F.3d 601, 604 (2d Cir. 2008).

The Department timely submitted its objection within 14 days of the magistrate's order. PRM did not attempt to lodge an objection to that order until its February 25 response to the Department's objection—27 days after the magistrate's January 29 order. Because this objection was untimely, the Court should not consider it.

II. PRM's Untimely Documentation Does Not Support Its Requested Fee Award.

For the first time in its response to the Department's objection, PRM attempts to submit documentation of the time its counsel expended to justify a fee award. As the magistrate observed, Dkt. #29 at 9, PRM was required to submit such documentation with its original fee petition, yet failed to do so despite the Department's pointing out the deficiency in its opposition. While this Court "may" consider additional evidence that was not presented to the magistrate, *see* Local Rule 72.2(b), the Court should decline to do so here when such evidence is presented for the first time in response to the Department's objection to the magistrate's order and PRM has provided no good reason for such a tardy submission. *See Kelly v. Aman Collections Servs.*, No. 03-6091, 2007 WL 909547, *1 (D. Minn. Mar. 23, 2007) (noting discretion to receive additional evidence but declining plaintiff's request that the court do so).

A. PRM's documentation is still insufficient to support a fee award.

While in this Circuit there is no "*per se* rule" against reconstructing time records, *see Kline v. Kan. City Fire Dep't*, 245 F.3d 707, 709 (8th Cir. 2001), courts have recognized that "[c]asual after-the-fact estimates of time expended on a case are insufficient to support an award of attorney's fees." *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (per curiam). Like the magistrate did here, courts have imposed substantial reductions on plaintiffs that reconstruct their timekeeping records after the fact rather than maintaining them contemporaneously. *See, e.g.*, *Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1419–20 (D.C.Cir.1995); *Citizens for Ethics & Responsibility in Wash. v. U.S. Dep't of Justice* ("*CREW*"), 825 F. Supp. 2d 226, 230–31 (D.D.C. 2011).

PRM does not state that its documentation reflects *contemporaneously* maintained records. Indeed, it appears that the time records were reconstructed and prepared solely for submission with PRM's response, *see* Dkt. #34-2 at 4 (February 23 entry for "[p]repar[ing] documentation filing"), which gives significant reason to question the veracity of those records. For example, with very limited exceptions, PRM's record entries are all recorded in one-hour or half-hour increments. This is contrary to standard timekeeping practices, which record in one-tenth hour increments, and it suggests significant overestimation of the time actually spent on many tasks. *See, e.g.*, Dkt. #34-2 at 4 (October 30, 2012 entry of 1.0 hour to "File Motion" after recording 5 hours already spent to "Finalize motion papers").[1] Courts have properly found such timekeeping practices inappropriate and insufficient to support a requested fee award. *See, e.g.*, *CREW*, 825 F. Supp. 2d at 231; *Blackman v. Dist. of Columbia*, 59 F. Supp. 2d 37, 44 & n.5 (D.D.C. 1999) (criticizing counsel for billing "a full quarter hour for certain *de minimis* tasks" because "[c]ounsel

[1] As just one other example, PRM dubiously represents that each and every "conference" with the "client" lasted at least a full half-hour.

clearly would have billed substantially less time had he kept his time in tenth-hour segments," inviting defendants to respond to the reasonableness of such billing entries, and stating that "the Court will not award fees where plaintiffs' counsel has not calculated his time in tenth-hour increments"). If PRM is entitled to any fee award at all, a substantial reduction for insufficient timekeeping practices is certainly warranted.

B. PRM's requested fee award is excessive.

PRM's requested award is excessive in several ways. First, and fundamentally, the vast majority of PRM's documented hours are for work performed after it was informed in July 2012 that OLC possessed no responsive records to category 3 of its request. *See* Dkt. #23 at 5. Given that PRM's fee request rests upon its claim that it "substantially prevailed" by getting the Department to provide a no-records response, no work performed after this date could possibly have led to that purported "change" in position. Consequently, PRM did not prevail as a result of, and thus should not be permitted to recover any fees for, work performed after that date. Thus, even if the Court were to find that the Department did change its position, PRM should be permitted to recover only for work performed through July 26, 2012—allegedly 35 hours. *See* Dkt. #34-2 at 2.

Second, PRM's documentation also reveals the excessiveness of the amount of time PRM claims to have spent on various activities. For example, PRM requests fees for an alleged 30 *hours* to research and prepare a boilerplate seven-page complaint (more than four hours per page). Certain entries on PRM's invoice demonstrate the excessiveness of that number; for example, an alleged 3.0 hours spent preparing the summons, complaint, and cover sheet for filing on May 17, followed by another 4.0 hours spent "[f]inaliz[ing]" the summons and complaint on May 22, all following 23 hours previously spent researching and preparing the complaint. In other, more complicated FOIA cases, plaintiffs have

claimed substantially less time for the preparation of the complaint. *E.g.*, *CREW*, 825 F. Supp. 2d at 232 (seven hours). Similarly, although the Department's summary judgment motion merely reiterated facts PRM already knew—that the Department had no responsive records—and led directly to a voluntary joint stipulation of dismissal, PRM claims fees for *6.5 hours* in connection with the preparation of filing of the two-page joint stipulation, *see* Dkt. #20, and another *9 hours* reviewing the summary judgment filing and drafting a never-filed "response memo" between September 25 and October 18.[2] *See* Dkt. #34-2 at 2–3.

Finally, although PRM did not expressly request compensation for the preparation of its fee motion before the magistrate, from PRM's invoice it is now clear that PRM did intend to seek compensation for 25 hours of work to research and prepare its motion for fees in this case,[3] not including an additional 18 hours to prepare its reply brief. These time estimates, evidently reconstructed after the fact, are clearly excessive, particularly in light of the facts and outcome of this case. To the extent the Court rejects any of PRM's contentions regarding its attorney's fees request but still grants some award, these hours on the fees motion should be substantially reduced. *See Comm'r, INS v. Jean*, 496 U.S. 154, 163 n.10 (1990) ("[F]ees for fee litigation should be excluded to the extent that the applicant ultimately fails to prevail in such litigation.").

CONCLUSION

For the foregoing reasons, the Court should decline to consider PRM's untimely objection to the magistrate order and should reject PRM's requested fee award.

Respectfully submitted.

[2] The time entries for October 4 and 5 also include time researching fee issues, but the entries are block billed and the portion of the time spent on the fee issue cannot be disaggregated.

[3] This total amount of time spent on fees does not include any time from the seven hours block billed for October 4 and 5, which, as explained above in note 3, cannot be disaggregated from other activities.

Dated: March 18, 2013

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