UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES LUTCHER NEGLEY	)	
	)	
Plaintiff,	)	
	)	Civil No. 03-2126 (GK)
v.	)	
	)	
FEDERAL BUREAU OF INVESTIGATION,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S SUBMISSION IN RESPONSE TO
THE COURT'S ORDER OF OCTOBER 11, 2011

Defendant, Federal Bureau of Investigation ("FBI"), by and through undersigned counsel, respectfully submits this response to the Court's Order and Memorandum Opinion of October 11, 2011, granting the Motion for An Award of Attorneys' Fees and Costs ("fee motion") filed by Plaintiff, James Lutcher Negley. ECF Nos. 127, 128. In its Memorandum Opinion, the Court observed that it required additional submissions from the parties before it could calculate the proper amount of attorneys' fees to which Plaintiff would be entitled. Mem. Op. at 11-12. As the Court noted, "Plaintiff submitted exhibits of great length to substantiate his claims. Many of the pages in the exhibits are difficult to read and many were difficult to understand. The Court does not intend to attempt to interpret these exhibits without some guidance. For that reason, the Court is requesting the specific information it needs and that information should be presented in the clearest fashion possible." *Id.* at 11 n.5.

The Court thus ordered additional submissions by both parties regarding the appropriate amount of fees. *Id.* at 11-12. Specifically, the Court directed the Government to: (1) explain its statement that the total amount invoiced by the three timekeepers for which Negley seeks fees is $198,854 (citing Def.'s Opp'n at 15); (2) explain its position about the $30,000 reduction, which

it claims results in a total fee award of $175,546 (citing *id.* at 16); (3) explain its position that "a reasonable attorneys' fee would be 30 percent of the aggregate total of $175,546 in fees, as calculated using the United States Attorney's Office Matrix, or $52,663.80" (citing *id.* at 16 n.10); and (4) provide a response, if any, to the paragraph in Plaintiff's reply regarding the costs incurred by having depositions videotaped and deposition transcripts expedited (citing Pl.'s Reply at 12). Mem. Op. at 12.

Before delving into the specifics of Plaintiff's fee request, the FBI briefly outlines the contours of Plaintiff's fee request. In total, Plaintiff has sought $233,401.30 in fees and costs based upon the sum of three numbers: $198,854 in fees for the underlying litigation, *see* Pl.'s Mem. [ECF No. 92-2] at 18; $10,040.80 in costs for the underlying litigation, *see id.* at 20; and $24,506.50 for work related to the fee motion. With regard to the $24,506.50 claimed for the fee motion, the Court has already directed Plaintiff to reduce this number[1] by $6,500 because of the lack of any supporting documentation, deduct the amount of time based upon the applicable *Laffey* rates that was devoted to settlement discussions, and further apply a 20% reduction in the final figure, *see* Mem. Op. at 13.

The FBI hereby respectfully provides the information requested in the Court's Memorandum Opinion to explain why Plaintiff's staggering request for $208,894.80 in fees and costs for the underlying litigation (which does not include his supplemental request of $24,506.50 for preparation of the fee motion) is unreasonable in light of the relief granted in this FOIA litigation and in light of legal practice and, consequently, should be significantly reduced.

[1] Plaintiff should first be directed to apply the applicable *Laffey* rates to the hours expended on the fee motion.

1. Total amount invoiced by the three timekeepers for which Negley seeks fees

The Court first requested that the FBI "explain its statement that the total amount invoiced by the three timekeepers for which Negley seeks fees is $198,854." Mem. Op. at 12 (citing Def.'s Opp'n at 15). In his motion, Negley stated that he had reduced the hours indicated in the billing records attached as Exhibits B and C to the Declaration of Prashant K. Khetan by "the number of hours spent for time not attributable to this lawsuit (or pre-lawsuit) -- approximately $30,000" to arrive at a total of $198,854 in fees for work performed on the underlying litigation. Pl.'s Mem. at 18. But, as the FBI explains below, the total amount of $198,854 that Plaintiff seeks for work performed on the underlying litigation should be reduced once the appropriate *Laffey* rates are applied.

It is undisputed that any award of attorneys' fees should be based upon the applicable *Laffey* Matrix for the given year. *See* Mem. Op. at 12 ("Parties should be aware that the Court will award attorneys' fees based upon the applicable *Laffey* Matrix rates for any given year."). Plaintiff conceded this in his motion, stating that fee awards may be calculated based on the *Laffey*, or "the United States Attorney's Office matrix," because "use of the broad *Laffey* matrix may be by default the most accurate evidence of a reasonable hourly rate." Pl.'s Mem. at 16-17. Despite recognizing the appropriateness of the *Laffey* Matrix, Plaintiff failed to apply the correct rates, but instead sought the different non-*Laffey* rates claimed by his counsel. *See id.* at 17-18. Thus, simply by adding all attorneys' fees billed and applying a $30,000 reduction for work not attributable to this lawsuit (or pre-lawsuit), Plaintiff arrived at a total of $198,854 in attorneys' fees -- meaning that he had calculated $228,854 in total attorneys' fees after applying the non-*Laffey* rates claimed by his counsel. *See id.*

Notwithstanding the lack of clarity or organization in Plaintiff's billing records, the FBI separately performed calculations of the hours shown in the billing records based upon the United States Attorney's Office's *Laffey* matrix in order to determine the historic *Laffey* rates for the three timekeepers for whom Plaintiff sought fees: Prashant Kumar Khetan, Paul C. Vitrano, and Sol Wisenberg. *See* Declaration of Timothy A. Rice ("Rice Decl.") ¶¶ 2-3. Defendant's calculations based upon the *Laffey* matrix showed that Mr. Khetan billed $132,722.00 in fees over the course of this litigation, Mr. Vitrano billed $35,384.00 in fees, and Mr. Wisenberg billed $37,440.00 in fees. *Id.* ¶¶ 4-6.

Applying the correct *Laffey* rates, the sum of the total fees for the three timekeepers for whom Plaintiff seeks fees should be $205,546, *id.* ¶ 7, not the $228,854 that the Plaintiff has calculated based upon the rates claimed by his counsel. As explained below, the $205,546 amount should, as Plaintiff himself has pointed out, be further reduced by $30,000, which Plaintiff has indicated represents "the number of hours spent for time not attributable to this lawsuit (or pre-lawsuit)." *See* Pl.'s Mem. at 18.

2. The $30,000 reduction, which results in a total fee award of $175,546

Second, the Court directed the FBI to explain its position about the $30,000 reduction, which would result in a total fee award of $175,546. Mem. Op. at 12 (citing Def.'s Opp'n at 16). As indicated above, the FBI calculated $205,546 in fees using the appropriate *Laffey* Matrix, and reduced this number by the approximately $30,000 that Plaintiff's counsel concedes is "the number of hours spent for time not attributable to this lawsuit (or pre-lawsuit)" to arrive at a total of $175,546 in attorneys' fees. Plaintiff has made no effort to demonstrate or explain how he reached the "approximately $30,000" figure -- for example, it is unclear whether the $30,000 includes the entries in Exhibits B and C with handwritten "unrelated" notations or entries that

have been excised. In any event, he represented that the $30,000 reflects "the number of hours spent for time not attributable to this lawsuit (or pre-lawsuit)."

As Plaintiff recognized, he is not permitted to recover for any time not attributable to this lawsuit or for time expended prior to the lawsuit. Indeed, courts in this jurisdiction have consistently held that FOIA does not authorize fees for work performed at the administrative stage prior to commencement of the litigation. *See Nw. Coalition for Alternatives to Pesticides v. Browner*, 965 F. Supp. 59, 65 (D.D.C. 1997) (deeming as not compensable under FOIA 56.5 hours performed at least two years prior to the filing of the complaint) (citing *Assoc. Gen. Contractors v. EPA*, 488 F. Supp. 861, 864 (D. Nev. 1980); *Kennedy v. Andrus*, 459 F. Supp. 240 (D.D.C. 1978)). Accordingly, after applying the correct *Laffey* rates and a reduction of $30,000, the fee amount should be discounted to $175,546, not the $198,854 that the Plaintiff has calculated based upon the non-*Laffey* rates claimed by his counsel.

3. A reasonable attorneys' fee would be 30 percent of the aggregate total of $175,546 in fees

Third, the Court directed the FBI to explain its position that "a reasonable attorneys' fee would be 30 percent of the aggregate total of $175,546 in fees, as calculated using the United States Attorney's Office Matrix, or $52,663.80." Mem. Op. at 12 (citing Def.'s Opp'n at 16 n.10). Any fee award under FOIA must take into account the relative degree of success, for a prevailing FOIA plaintiff is not entitled to fees or costs for "nonproductive time nor . . . for time expended on issues on which plaintiff did not ultimately prevail." *See Nat'l Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982). As the Supreme Court has made clear, a reasonable attorney fee is not simply the product of hours expended multiplied by the proper hourly rate, for "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees." *Hensley v. Eckerhart*, 461 U.S. 424, 440

(1983). Thus, courts should proportion fees to the "'significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.'" *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 599 (D.C. Cir. 1996) (citing *Hensley*, 461 U.S. at 435). *See also Waterman S.S. Corp. v. Maritime Subsidy Bd.*, 901 F.2d 1119, 1123 (D.C. Cir. 1990) (proportionality comes in after an adequate victory is found and the court considers what share of the fees is reimbursable).

As Defendant noted in its opposition to Plaintiff's fee motion, the Court's grant of Plaintiff's motion for partial summary judgment did not require the FBI to conduct additional searches of seven of the nine identified sources of information, but rather provided the option of providing more detailed information about the search terms used in its earlier searches of the ELSUR database, the Zy index, the SFFO card index, FBIHQ records, handwritten notes, personal files, and restricted files. If one were to consider File S-1575 and the nine potential sources of information identified in the Court's September 24, 2009 Order to represent ten total potential sources of information, the Court's Order required further searches only on three of ten potential sources of information. Given the scope of the relief obtained, Plaintiff should not be awarded fees for the entirety of the work expended from the commencement of this litigation. Rather, a reasonable award would take into account the degree of success in renewed searches of three of the ten potential sources of information, or 30 percent.

Moreover, the results of the additional searches that Defendant conducted pursuant to the Court's September 24, 2009 Order further draw into question the significance of the overall relief obtained by the Plaintiff. Defendant filed its opposition to Plaintiff's fee motion on December 3, 2009 [ECF No. 98], approximately three weeks prior to the December 23, 2009 deadline for Defendant to produce all responsive documents, *Vaughn* index, and detailed

affidavit resulting from its supplemental searches. These additional searches did not locate any responsive FBI investigatory records that had not been previously released to Plaintiff. *See* Eighth Declaration of David M. Hardy [ECF Nos. 103-3, 116-3] ¶ 16. Indeed, the ***only*** records discovered in the renewed searches that had not previously been released to Plaintiff were "administrative" files created as a result of the FOIA request itself that are typically not processed because most requesters do not want a copy of their own request -- records that the FBI twice asked the Plaintiff if he wanted in processing Plaintiff's 2009 FOIA request, but Plaintiff refused to respond in any fashion. *See* Mar. 1, 2011 Mem. Op. at 13 n.9.

Ultimately, Plaintiff "has the burden of establishing the reasonableness of its fee request" and supporting documentation must be sufficiently detailed to enable the court to determine "with a high degree of certainty that such hours were actually and reasonably expended." *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004) (quoting *In re North (Bush Fee Application)*, 59 F.3d 184, 189 (D.C. Cir. 1995) (per curiam); *In re Olson*, 884 F.2d 1415, 1418 (D.C. Cir. 1989) (per curiam) (quotation omitted)). Plaintiff has failed to justify the reasonableness of the overall fee amount sought in this litigation. Instead, he has merely presented summary block billing records, many of which are redacted in part and which, inexplicably, are not organized in any discernable chronological fashion, unduly complicating the reader's ability to discern how much time was expended on a particular task around a given time. Careful scrutiny of the amount of time claimed is particularly critical in FOIA cases because the normal incentive to exercise billing judgment -- the desire to maintain a continuing relationship with a client -- is absent when fees are being paid by the government. In such cases, the prevailing party's counsel "need fear no future loss of business to the firm if the fees they seek . . . are unreasonable." *Copeland v. Marshall*, 594 F.2d 244, 255 n.59 (D.C. Cir. 1978).

This lack of billing judgment is reflected in a number of the entries in Exhibit B to the Declaration of Prashant K. Khetan, including:

- 6/28/2004: "Telephone conference with J. Negley regarding [REDACTED]." 0.5 hours (p. 7);
- 4/14/2004: "Telephone conferences with client [REDACTED]." 1.5 hours (p. 16);
- 2/6/2004: "Review client materials; review and revise request for hearing; record phone messages of D. Huff; strategy conferences regarding motion to reconsider cancellation of status conference and motion for hearing." 2 hours (p. 16);
- 7/9/2004: "Numerous telephone calls with client [REDACTED]." 4 hours (p. 19);
- 8/30/2004: "Telephone calls to client and public defender." 0.2 hours (p. 19);

Examples of the entries in Exhibit C to the Declaration of Prashant K. Khetan include:

- 5/22/2007: "Telephone conference with J. Negley regarding [REDACTED]; prepare outline for Hardy deposition." 5.1 hours (p. 36);
- 12/8/2008: "Draft and file notice of supplemental authority [REDACTED]." 2 hours (p. 44);
- 11/3/2005: "Prepare for oral argument; conference with P. Vitrano." 6.9 hours (p. 63);
- 11/2/2005: "Prepare for oral argument." 6.6 hours (p. 63);
- 11/1/2005: "Research recent case law in preparation for oral argument; prepare for oral argument." 5 hours (p. 63);
- 9/26/2005: "Telephone conference with J. Negley regarding [REDACTED] draft Reply Brief." 8.10 hours (p. 63);
- 11/7/2005: "Appearance at oral argument before D.C. Circuit; confer with P. Khetan regarding [REDACTED]." 3 hours (p. 77);

In *Role Models*, the court held that an applicant fails to meet its "'heavy obligation to present well-documented claims'" when its time entries consist of identical and repeated one-line entries such as "'research and writing for appellate brief.'" 353 F.3d at 971 (citing *Kennecott Corp. v. EPA*, 804 F.2d 763, 767 (D.C. Cir. 1986)). Here, Plaintiff has merely presented summary block billing records and has not bothered to justify the reasonableness of the fee amounts sought for various tasks in this litigation, the explanation for many of which have been redacted. In view of the relief granted in this FOIA litigation and in light of Plaintiff's failure to present well-documented claims, the FBI respectfully submits that a reasonable attorneys' fee is 30 percent of the total $175,546 in fees, or $52,663.80.

4. Response to Plaintiff's reply regarding costs incurred by having depositions videotaped and deposition transcripts expedited

Finally, the Court directed the FBI to provide a response, if any, to the paragraph in Plaintiff's reply regarding the costs incurred by having depositions videotaped and deposition transcripts expedited. Mem. Op. at 12 (citing Pl.'s Reply at 12). The FBI argued that Plaintiff unnecessarily incurred the costs of having each of the three depositions taken earlier in this case videotaped, as well as ordering expedited transcripts each time, resulting in his claim for $7,475.15 in court reporter and depositions costs for three depositions. *See* Def.'s Opp'n at 17 (citing Pl.'s Ex. D). In its reply, Plaintiff claimed that the Court agreed to the videotaping and that the transcripts were ordered expedited "because of the limited time in which to conduct all of the depositions." Pl.'s Reply at 12.

As to the necessity of the videotapes, Plaintiff claims that the "FBI makes this argument despite knowing that the Court, during a telephonic conference prior to the first deposition taken in this case, agreed to the videotaping due to FBI agents' potential unavailability at trial." *Id.* As Plaintiff well knows, neither undersigned counsel nor agency counsel represented the FBI in 2007, and Plaintiff has not supplied any record of what transpired during the telephonic conference with the Court. Even if the Court did agree to the videotaping of FBI deponents, this does not mean that the Government should bear the cost of the strategic decision made by Plaintiff's counsel to videotape the depositions of FBI witnesses in this FOIA litigation, especially considering that FOIA cases rarely go to trial.

Next, Plaintiff's contention that he required expedited processing of the transcripts because of "limited time in which to conduct all of the depositions" does not withstand scrutiny. Plaintiff seeks recovery for four depositions: Clifford Holly on March 12, 2007, David M. Hardy on May 23, 2007, Jennifer A. Wilson on June 27, 2007, and Sandra Figoni on July 13,

2007. More than two months lapsed between the depositions of Mr. Holly and Mr. Hardy, and yet Plaintiff seeks to have the Government pay for an expedited transcript of Mr. Holly's deposition with overnight/messenger delivery on the claim that he needed the transcript to prepare for a deposition two months later. Similarly, Plaintiff claims it was necessary to expedite the transcript of Mr. Hardy's May 2007 deposition when the next deposition was not taking place until over one month later, and to expedite the transcript of Ms. Wilson when the next deposition was not taking place until over two weeks later. Requiring the Government to cover these unnecessary costs is simply not reasonable.

CONCLUSION

For the foregoing reasons, Defendant respectfully submits that Plaintiff's request for $208,894.80 in fees and costs for the underlying litigation is unreasonable in view of the relief granted in this FOIA litigation and Plaintiff's failure to present well-documented claims. Consequently, the Court should significantly reduce Plaintiff's request for $208,894.80 in fees and costs for the underlying litigation, as well as his request for $24,506.50 for work related to the fee motion.

Date: October 31, 2011

Respectfully submitted,

RONALD C. MACHEN JR., D.C. Bar #447889
United States Attorney
for the District of Columbia

RUDOLPH CONTRERAS, D.C. Bar #434122
Chief, Civil Division

By: /s/ Michelle Lo
MICHELLE LO
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530
Tel: (202) 514-5134 Fax: (202) 514-8780
Michelle.Lo2@usdoj.gov

Of counsel:

Jeannette Wise, Esq.
Assistant General Counsel
Federal Bureau of Investigation