

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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)	
ELECTRONIC PRIVACY INFORMATION CENTER)	
)	
Plaintiff,)	
)	
v.)	No. 1:12-cv-00667-CKK-AK
)	
FEDERAL BUREAU OF INVESTIGATION)	
)	
Defendant.)	
)	

**PLAINTIFF ELECTRONIC PRIVACY INFORMATION CENTER’S
OBJECTIONS TO THE MAGISTRATE JUDGE’S PROPOSED FINDINGS AND
RECOMMENDATIONS**

Pursuant to Rule 72 of the Federal Rules of Civil Procedure and Local Civil Rule 72.3, the Electronic Privacy Information Center (“EPIC”) hereby objects to the Magistrate Findings and Recommendations issued in this case on September 19, 2014. Specifically, EPIC objects to three of the Magistrate’s recommendations: (1) the reduction of time EPIC spent preparing and filing the Complaint, (2) the reduction of time EPIC spent reviewing the documents at issue in this case, and (3) the reduction of time EPIC spent litigating the fee matter. All three recommendations were based on errors of fact and are contrary to law. EPIC further objects to several errors made by the Magistrate in the final recommendation regarding the calculation (and reduction) of the requested fees, costs, and fees-on-fees. EPIC also requests that this court award an additional \$5,254 in fees-on-fees for time spent on this Objection to the Recommendations.

In his Report, the Magistrate recommended finding that EPIC is both eligible and entitled to recover fees and costs under the FOIA in this case. (Report and

Recommendation [“Report”], ECF No. 38, at 4). Specifically, the Magistrate’s recommendation was based on his determination that EPIC had “substantially prevailed,” that three of the four entitlement factors favor EPIC, and that the fourth factor was neutral. (Report at 7-8). However, the Magistrate also recommended that EPIC’s fee award be reduced by \$13,003.50.¹ EPIC has identified several significant factual errors and recommendations that are contrary to law in the Magistrate’s Report, which are described in detail below. If this Court sustains EPIC’s objections and adopts an amended version of the Magistrate’s recommendations, it should award EPIC a total of \$37,622 in fees, costs, and fees-on-fees plus an additional \$5,254 in fees-on-fees for its time spent preparing these objections.²

Standard of Review

Local Rule 72.3(c) provides that “[a] district judge shall make a *de novo* determination of those portions of a magistrate judge’s findings and recommendations to which objection is made as provided in paragraph (b).” LCvR 72.3(c) (emphasis added). Courts in this Circuit have conducted *de novo* review of previous Magistrate Reports and

¹ The Magistrate’s reasonableness analysis contains several significant factual and legal errors, as discussed below, but on Page 14 he recommends four specific reductions: (1) “reduction of \$2,878.50 in preparing the Complaint,” (2) “reduction of \$2,774.50 in preparing the Joint Proposed Schedule,” (3) “reduction of \$3,763 for work reviewing documents received pursuant to the FOIA request,” and (4) “reduction of \$3,578.50, because the request for fees-on-fees is premature.” (Report at 14). The total of these four reductions was \$13,003.50.

² EPIC also notes that if the Defendant FBI files a response to these objections, then EPIC will likely spend additional billable hours preparing a reply to the FBI’s response. *See* LCvR 72.3(b) (“The filing of oppositions and replied [sic] shall be governed by LCvR 7(b) and (d)”); LCvR 7(b) (“Within 14 days of the date of service or at such other time as the Court may direct, an opposing party shall serve and file a memorandum of points and authorities in opposition to the motion”); LCvR 7(d) (“Within seven days after service of the memorandum in opposition the moving party may serve and file a reply memorandum.”)

Recommendations on similar fee motions. *See, e.g., Robinson v. D.C.*, ___ F. Supp. 2d ___, No. 13-1006, 2014 LEXIS 102115, 2014 WL 3702853, at *2 (D.D.C. July 28, 2014); *Hunter v. D.C.*, 905 F. Supp. 2d 364, 370-71 (D.D.C. 2012); *Heard v. D.C.*, No. 02-296 CKK, 2006 LEXIS 62912, 2006 WL 2568013, at * 5 (D.D.C. Sept. 5, 2006). The judge “may accept, reject, or modify, in whole or in part, the findings and recommendations of the magistrate judge, or may recommit the matter to the magistrate judge with instructions.” LCvR 72.3(c).

Argument

I. EPIC is Entitled to Full Attorneys Fees for Time Spent Drafting and Filing the Complaint, Reviewing Documents, and Litigating the Fees Issue

a. The Magistrate’s Recommendation Regarding the Fee Reduction for the Complaint is Logically Impossible; EPIC Spent a Reasonable Amount of Time Drafting the Complaint

EPIC objects to the Magistrate’s recommendations that its fees be reduced for time that its attorneys spent initiating the lawsuit. The Magistrate’s recommendation is not consistent with the decisions of other courts in this Circuit. The Magistrate’s recommendations are also logically impossible because it would exclude entirely time spent by Ms. McCall, who is director of FOIA litigation at EPIC, who was the attorney of record and the person who filed the complaint. Furthermore, EPIC’s attorneys spent a reasonable amount of time preparing documents for this lawsuit under the circumstances.

EPIC’s attorneys spent 18.4 hours researching, drafting, editing, and finalizing the complaint and filing associated documents. (See Pls. Mot. for Att’y Fees and Costs, ECF No. 28, Ex. 8 at 1-2 [hereinafter Fee Motion Bill]).³ The Complaint consisted of nine pages with fifty-four paragraphs, including a discussion of the specific facts underlying

³ Mr. Butler spent 0.5 hours completing service of process and 0.5 hours on the affidavit of mailing, which were both necessary steps in the litigation after the complaint was filed.

the case, a summary of EPIC's FOIA request, the procedural history, as well as five counts against the Defendant FBI. (See Compl., ECF No. 1). The subject matter concerned the use of a complex surveillance tool, known as a "cell site simulator." This was not merely a "boilerplate complaint," and the agency has not argued that EPIC's bills are inaccurate or otherwise misstate the amount of time spent by EPIC attorneys.

In order to prepare and file this complaint, EPIC attorneys had to first make a considered judgment whether to file this lawsuit, taking into account the significance of the EPIC FOIA Request, the agency's response, other litigation obligations, the availability of attorneys to pursue the matter, and the likelihood of success. Mr. Butler then had to compile and review the administrative record, review the statute and precedents related to the claims asserted, and carefully draft each paragraph in the complaint. Mr. Butler also had to ensure compliance with the rules for electronic case filing in this Circuit and create the necessary filing documents: a civil cover sheet, electronic summons, and the corporate disclosure statement. (See Docket). While drafting these documents, Mr. Butler worked closely with Ms. McCall, the Director of EPIC's Open Government Program, who was lead counsel on the case at the time of the filing. All the documents were subsequently reviewed and edited by both Ms. McCall and Mr. Rotenberg, EPIC's Executive Director. (See Fee Motion Bill at 1-2). On this basis, EPIC sought fees for hours it spent on the initial filing: 1 hour researching the complaint, 10.4 hours drafting and editing the complaint and initiating documents, 4.2 hours of internal

discussions about the complaint, 1.8 hours finalizing and filing the lawsuit, and 1 hour completing service of process.⁴

The Magistrate recommended that EPIC’s fee award be reduced by \$2,878.50, adopting the FBI’s arbitrary fee determination that EPIC “should be entitled to 8 hours – six at Mr. Butler’s rate and two at Mr. Rotenberg’s” (Report at 9). The Magistrate only offers one statement in support of his conclusion, “The undersigned is inclined to agree with the FBI, because 18.4 hours spread across three people is an excessive amount of time to draft this Complaint.” (Report at 9). The Magistrate’s recommendation is based on both factual and legal errors. Neither the FBI nor the Magistrate can cite a single case that supports the conclusion that this is an unreasonable amount to bill for preparing and filing a complaint, and courts in this Circuit have previously rejected such minute objections to fees for work done of a specific element of a FOIA case. *See, e.g., EPIC v. DHS*, 999 F. Supp. 2d 61, 74-75 (D.D.C. 2013).

Courts in this Circuit have routinely declined “to engage in the kind of ‘nitpicking’ invited by DOJ’s smaller-scale objections” to the number of hours billed on particular tasks. *CREW v. DOJ*, 825 F. Supp. 2d 226, 229-30 (D.D.C. 2011) (citing *Baker v. D.C. Public Schools*, 815 F. Supp. 2d 102, 109 (D.D.C. 2011)); *see also Alfonso v. D.C.*, 464 F. Supp. 2d 1, 5-6 (D.D.C. 2011) (rejecting “defendants’ invitation to ‘conduct a minute evaluation of each phase or category of counsel’s work.’”) In *CREW*, the Courts

⁴ The total amount of time spent researching, drafting, editing, and reviewing the complaint and initiating documents was: 9.4 hours by Mr. Butler, 5.5 hours by Ms. McCall, and 3.5 hours by Mr. Rotenberg. Based on the applicable *Laffey* Matrix rates (\$240, \$240, and \$495 respectively), the total amount billed for time spent on the initiating documents was $(240 \times 9.4) + (240 \times 5.5) + (495 \times 3.5) = \$5,308.50$. The Magistrate recommended that the Court reduce that number by \$2,878.50, which is 54% of the total amount.

rejected the same argument that the FBI is making now, with respect to a similar fee claim. *CREW*, 825 F. Supp. 2d at 232 (finding that seven hours spent by a senior attorney with a billing rate of \$465 per hour was reasonable for a FOIA complaint).

The Magistrate cites no legal or factual basis for his recommendation that EPIC's fees for work on the complaint and initiating documents is unreasonable and should be reduced by fifty-four percent. In fact, the Magistrate's recommendation is itself unreasonable and logically impossible because it would allocate 0.0 hours for the time Ms. McCall spent (1) filing the complaint, (2) completing service of process, and (3) filing the affidavit of mailing. (*See Fee Motion Bill at 1-2*). These actions are all recorded in the Court's docket. (*See Docket*). This is a clear error, and precisely the type of mistake that courts in this Circuit seek to avoid when they refuse to conduct a "minute evaluation of each phase or category of counsel's work." *Alfonso*, 464 F. Supp. at 5-6.

It would be inappropriate to write off hours that EPIC spent preparing the initial filing documents in this case, which is the type of "nitpicking" that other courts have disfavored. The time that EPIC spent preparing these documents was reasonable based on the expertise at the time of the primary attorney assigned to the matter. And although EPIC does have a "breadth of experience in filing FOIA actions" as the FBI and Magistrate acknowledge, Mr. Butler was a first-year attorney at the time this filing was initiated and this was his first FOIA case. The time he spent working on the complaint should be evaluated based on his own experience.⁵ This is the basis of fees determinations that rely on the *Laffey Matrix*. *CREW v. FEC*, ___ F. Supp. 2d ___, No.

⁵ This is consistent with the way the *Laffey Matrix* establishes billing rates for individual attorneys based on years of experience, rather than charging rates based on the experience of the organization as a whole.

11-951 (CKK), 2014 U.S. Dist. LEXIS 123727, 2014 WL 4380292, at *8 (D.D.C. Sept. 5, 2014) (“Courts apply the *Laffey* matrix, ‘a schedule of charges based on years of experience,’ to determine reasonable hourly rates in order to compute the ‘lodestar’ amount.”). It was also reasonable and necessary for Ms. McCall and Mr. Rotenberg to spend time reviewing and editing these documents prior to filing. As the Executive Director of EPIC, Mr. Rotenberg is responsible for all legal actions and must review filings prior to submission. As the Director of EPIC’s Open Government Project and the lead attorney on the case at the time it was filed, Ms. McCall also had to carefully review the documents and oversee the final filing of the complaint.

EPIC’s request for fees regarding the drafting and filing of the complaint was reasonable. The Magistrate’s recommendation for fee reduction is based on an arbitrary fee determination proposed by the FBI and produces an outcome that is logically impossible. EPIC’s request for fees for the Complaint should be granted in full.

b. EPIC Is Entitled to Bill for Time Spent Reviewing Documents as a Necessary Part of This Litigation

EPIC properly billed for the 15.1 hours Mr. Butler spent reviewing documents “for the purpose of litigating this case,” and EPIC did not bill for any time spent reviewing the documents pursuant to its discussions with news media or for other purposes. *See EPIC v. DHS*, 999 F. Supp. 2d 61, 75 (D.D.C. 2013) (awarding fees for document review conducted for litigation purposes). Mr. Butler spent a total of 11.1 hours on intake and review of the 4,377 pages of documents released prior to the August 29, 2013, Joint Status Report. (*See Fee Motion Bill at 8-12; Joint Status Report, ECF No. 23 at ¶8*). Mr. Butler subsequently spent an additional 3 hours reviewing documents pursuant to the Joint Status Report in order to identify a representative sample of 500

pages for the FBI's proposed *Vaughn* index and reprocessing, and an additional hour reviewing the sample *Vaughn* Index and reprocessed documents. (See Fee Motion Bill at 12-13). Therefore, the total amount EPIC billed for time spent reviewing documents for litigation purposes was \$3,699.50.

The Magistrate recommended that EPIC's fee award be reduced by "\$3,763 for post-release document review." The Magistrate's determination was contrary to law. See *EPIC v. DHS*, 811 F. Supp. 2d 216, 239-40 (D.D.C. 2011). The Magistrate also provided no factual basis for the amount of his proposed reduction. The Magistrate concluded that EPIC should not be awarded fees for time spent reviewing documents because he found "more persuasive the logic of *CREW v. DOJ*, 825 F. Supp. 2d 226 (D.D.C. 2011)." The Magistrate further recommended that the Court "draw a distinction between hours spent evaluating the documents as opposed to hours spent engaging in various legal work pursuant to the litigation." The Magistrate ultimately recommended that EPIC should recover for legal work done following the *Open America* Order, but that those fees should be reduced by \$3,763. What the Magistrate failed to recognize was that EPIC only billed for time spent reviewing documents as necessary to perform the "legal work pursuant to this litigation." The Magistrate also incorrectly calculated the amount EPIC billed for time spent reviewing documents. The Magistrate's factual and legal errors should be corrected, and EPIC's award should not be reduced for time spent reviewing documents.

Courts in this Circuit have held that plaintiffs may be compensated for time spent reviewing documents produced during the course of the litigation. See *EPIC v. DHS*, 999 F. Supp. 2d 61, 75 (D.D.C. 2013); *EPIC v. DHS*, 811 F. Supp. 2d 216, 239-40 (D.D.C.

2011) (“Indeed, it would seem critical to the prosecution of a FOIA lawsuit for a plaintiff to review an agency's disclosure for sufficiency and proper withholding during the course of its FOIA litigation.”) This is consistent with the purpose of the FOIA, to compensate plaintiffs who substantially prevail with “reasonable attorney fees and other litigation costs reasonably incurred in any case” 5 U.S.C. § 552(a)(4)(E)(i). The time spent reviewing the adequacy of document production in support of future litigation decisions, such as a motion for summary judgment, as well as document review for the purpose of related filings, are necessary litigation activities in a Freedom of Information Act matter, and courts have so held. This distinction between document review necessary for the litigation and non-litigation-related document review was made clear in Judge Bates’ recent decision, which applied the same rule articulated in the *CREW* decision cited by the Magistrate. *See EPIC v. DHS*, 999 F. Supp. 2d at 75. The Magistrate is incorrect as a matter of law that EPIC cannot recover fees for its work reviewing documents for litigation purposes, and the Magistrate is wrong as a matter of fact because EPIC billed \$3,699.50, not \$3,763 for its document review in this case.

During this initial review, Mr. Butler spent on average of nine seconds per page, which is no more than the bare minimum amount of time necessary to verify the nature of the documents produced and the exemptions claimed by the FBI. EPIC staff and others in the news media have spent many more hours reviewing these documents since then, as evidenced by numerous news stories about the releases and the privacy implications of StingRay use. But EPIC only billed for the reasonable time spent for litigation purposes. EPIC would not have been able to draft the Joint Status Report or communicate effectively with opposing counsel regarding the substance of this case if it had not

completed the intake and review of these documents. Therefore, the time spent on the initial review of the documents was reasonable and a necessary component of this litigation.

After EPIC completed the initial review in order to draft the Joint Status Report and communicate with opposing counsel, the Defendant FBI agreed to reprocess and produce a sample *Vaughn* Index for 500 pages selected by EPIC. (See Joint Status Report, ECF No. 24; Joint Status Report, ECF No. 25). In order to select a useful 500-page sample, Mr. Butler spent a total of 3 additional hours reviewing the 4,377 pages of responsive records. Both parties agreed in the August 29, 2013, Joint Status Report that the selection of a 500-page sample was necessary “to try to resolve this matter prior to summary judgment to avoid using judicial resources.” (Joint Status Report, ECF No. 24 at ¶10). Mr. Butler subsequently spent one additional hour reviewing the sample *Vaughn* index and reprocessed pages. Therefore, the additional 4 hours spent reviewing documents was also reasonable and a necessary component of this litigation.

The Magistrate’s recommendation that the Court not award fees for time spent “evaluating the documents” because that was not time spent “engaging in various legal work pursuant to the litigation” is not consistent with the facts in this case. All of the time that EPIC spent reviewing documents was “pursuant” to legal work that was required in this litigation: drafting the Joint Status Report, communicating with opposing counsel, selecting the sample pages for the *Vaughn* Index, and negotiating the settlement. Even the specific examples of “legal” work that the Magistrate refers to, such as “internal discussions about the productions,” could not take place without the initial intake and review of the documents. What would counsel have to discuss if no one had reviewed the

documents? That activity was a necessary part of every subsequent litigation-related activity, and the total time spent was reasonable given the volume of records.

Finally, the Magistrate's recommended reduction of \$3,763 has no basis in fact. In the Report, the Magistrate stated that "[w]orking from Exhibit 8 of Plaintiff's Motion [28-9], the Court calculates that EPIC billed \$3,763 for document review," but cites no specific calculation or factual basis for that amount. EPIC billed a total of 11.1 hours for time spent by Mr. Butler reviewing documents prior to the August 29, 2013, Joint Status Report, which accounts for \$2,719.50 at the \$245 Laffey rate. EPIC also billed an additional 3 hours for time spent by Mr. Butler reviewing documents to select the 500-page sample for the *Vaughn* Index, and an hour reviewing the Index and reprocessed documents, which accounts for an additional \$980 at the \$245 Laffey rate. Therefore, billed for a total of \$3,699.50 for time spent reviewing documents pursuant to this litigation.

EPIC is entitled to fees for the time it spent reviewing documents for the purpose of litigation. The Magistrate's recommendation is contrary to law and the proposed distinction "between hours spent evaluating the documents as opposed to hours spent engaging in various legal work pursuant to the litigation" is impracticable and inconsistent with the facts of this case.

c. EPIC Is Entitled to Recover Fees-on-Fees

Courts in this circuit have repeatedly held that "hours reasonably devoted to a request for fees are compensable" in a FOIA matter. *EPIC v. DHS*, 999 F. Supp. 2d 61, 70 (D.D.C. 2013) (quoting *Judicial Watch v. DOJ*, 878 F. Supp. 2d 225, 240 (D.D.C. 2012)). In this case, EPIC's attorneys reasonably devoted 27 hours to its pursuit of fees, including the drafting and filing of a detailed motion with multiple exhibits and a reply

brief, following a good faith attempt to resolve the fee matter prior to November 12, 2013. (Fee Motion Bill at 16-17; Pl's Reply in Supp. of Mot. for Att'y Fees and Costs, Ex. 1). EPIC's attorneys have also now reasonably devoted 15.9 hours to these Objections in order to correct factual and legal errors in the Magistrate's Report. (See Ex. 2). All of these hours, as well as the time spent working on the litigation and settlement prior to November 12, 2013, were devoted to the resolution of the fee claim, and EPIC should be compensated for those hours in their entirety. Based on the appropriate hourly rates for EPIC's attorneys, EPIC is entitled to recover a total of \$12,308 in fees-on-fees for work done in this matter: \$7,054 for work on the initial motion and reply and \$5,254 for work on the Objections.

The Magistrate recommended that EPIC's award be reduced by \$3,587.50 because "the request for fees-on-fees is premature." (Recommendations at 14). The Magistrate also recommended "deferring on a decision with respect to fees-on-fees until the trial court's final determination of fees, an accounting for the hours spent in litigating fees." (Report at 13-14). However, the Magistrate noted earlier in his Report that he favored "resolving the question of attorneys' fees in the first instance, and only then considering the question of fees-on-fees," (Report at 9 n.5) but then failed to recommend any award for fees-on-fees. The Magistrate's recommendations are inconsistent, factually inaccurate, and contrary to law. They should be overruled.

First, as a factual matter the Magistrate has simply misstated the total amount requested by EPIC in its Motion and Reply, including the amount of fees-on-fees requested. EPIC requested \$3,469.50 in supplemental fees-on-fees for its work on the Reply, in addition to the \$34,152.50 in fees, costs, and fees-on-fees that it requested in its

initial Motion. (See Pls. Reply in Supp. of Mot. for Att’y Fees and Costs, ECF No. 32 at 1). The total amount EPIC billed through the Reply motion was therefore \$37,622. Of that total, \$3,469.50 was billed for work on the Reply and \$3,587.50 for work on the initial Motion. Another \$1,105.50 was billed for time spent preparing the initial billing record for settlement negotiations in October 2013 and \$1,504.00 for time spent on settlement negotiations (including communications with opposing counsel and internal discussions and research). (See Fee Motion Bill at 15-16). All of this time is compensable, and EPIC is entitled to recover the full amount because it prevailed on the fee issue before the Magistrate.

Second, the Magistrate’s recommendation that EPIC’s fees-on-fees should be deferred has no basis in fact or law. Courts in this Circuit have found that fees-on-fees should be awarded for “hours ‘reasonably expended’ in preparing a fee petition” in a FOIA case. *EPIC v. DHS*, 811 F. Supp. 2d 216, 240 (D.D.C. 2011) (citing *Sierra Club v. Environmental Protection Agency*, 769 F.2d 796, 808 (D.C. Cir. 1985)). EPIC’s motion for fees, including the request for fees on fees, was before the Magistrate. As the Magistrate had earlier determined that EPIC was eligible and entitled to fees, the Magistrate should have, as a matter of law, made a determination as to the fees on fees to which EPIC is entitled.

Courts have also declined to reduce fees-on-fees awards except in cases where the amount billed was “patently unreasonable” or so unreasonable that it would generate a “windfall.” See *Heard v. D.C.*, No. 02-296, 2006 WL 2568013 at *19-21 (D.D.C. Sept. 5, 2006) (awarding plaintiff \$56,500 in fees for a single fee petition, after reducing plaintiff’s original request for \$108,829.70). Courts generally have not reduced fees-on-

fees requested in FOIA cases where the plaintiff “prevailed on the major issues raised in the Motion for Attorneys Fees,” namely eligibility and entitlement, even if the plaintiff did not prevail on every disputed fee issue. *See CREW v. DOJ*, 825 F. Supp. 2d 226, 233 (D.D.C. 2011),

EPIC attorneys reasonably devoted hours towards recovering fees in this case, and the Defendant FBI has not disputed the accuracy of those hours or provided evidence to show that they are unreasonable. Furthermore, the Magistrate Report concluded that EPIC is eligible for and entitled to recover attorney fees and costs under the FOIA. Therefore, EPIC should be awarded 100% of the fees-on-fees it incurred for time spent prior to the Magistrate report. EPIC should also be awarded 100% of the fees-on-fees it is now incurring on objections to the factual and legal errors in the Magistrate’s Report.

Conclusion

EPIC objects to the errors of fact and the recommendations that are contrary to law in the Magistrate’s Report, and hereby requests that the Court adopt the following modified recommendation:

- No reduction in the \$350 litigation costs sought by Plaintiff;
- No reduction for work on the Complaint and other filing documents;
- Reduction of \$2,774.50 for work done preparing the Joint Proposed Schedule;
- No reduction for work reviewing documents for litigation purposes;
- No reduction for other work (i.e., work other than document review) following the FBI’s production of documents in accordance with the Court’s *Open America* order;

- No reduction based on the FBI's Laffey Matrix analysis; and
- No reduction on the basis of billing anomalies.

Therefore EPIC should be awarded the initial \$37,622 that it requested in its fee motion and reply, minus the reduction of \$2,774.50, as well as an additional \$5,254 in fees-on-fees for its work on the objections, for a total award of \$40,101.50.

October 3, 2014

Respectfully Submitted,

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