COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
C.A. No. 1885CV01526A

GATEHOUSE MEDIA, LLC,

Plaintiff,

v.

CITY OF WORCESTER,

Defendant.

GATEHOUSE MEDIA, LLC'S REPLY IN SUPPORT OF ITS MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

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The City of Worcester litigated this case tooth-and-nail for three years. It advanced every theory it could think of (and then some) to withhold public records about its police officers' alleged misconduct. The City's aggressive stance thwarted the early and efficient resolution of the case, before significant fees and costs were incurred. Plaintiff Gatehouse Media, LLC was required to pursue this matter through trial, where it emerged wholly victorious.

Now the City asks the Court to deny Gatehouse its presumptive award of attorneys' fees and costs altogether, or alternatively to slash its requested hours by 80%. As explained below, the City's arguments are contrary to the Public Records Law and fail to establish that any reduction whatsoever is warranted. The City brought this litigation on itself; it must reap what it has sown and pay Gatehouse's reasonable attorneys' fees and costs. *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 299–300 (1st Cir. 2001) (size of fee award "dictated in large part by the tenacity with which the Commonwealth defended [the case]," citing Galicians 6:7 ("whatsoever a man soweth, that shall he also reap")).

1. The City has Not Overcome the Presumption in Favor of Fee-Shifting. The City does not dispute that the statutory presumption in favor of fee-shifting applies. Nonetheless, it asks the Court to make no award on the ground that there was no "precedent . . . exactly on point" on every question of law in the case. (Opp. at 1). The Court should reject this argument.

As explained in Gatehouse's memorandum, the Public Records Law imposes a presumption of fee-shifting except for certain exceptions, none of which apply. (Memo at 2). One exception is where the "municipality reasonably relied upon a published opinion of an appellate court of the commonwealth based on substantially similar facts." G.L. c. 66, § 10A(d)(2)(ii). The City points to no such opinion, because none exists.

In fact, as the City well knows, there was precedent "exactly" on point, holding that the determinations of internal affairs investigations are not "personnel" records. The City simply chose to ignore it. (*See* Findings of Fact, Conclusions of Law, and Order ("Order") at 32 ("The city was aware of *Worcester II* and should have applied it properly.")) Precedent also established the proper, narrow construction of exemption (d), *DaRosa v. New Bedford*, 471 Mass. 446 (2015); the City chose an application that "cannot be reconciled" with its language. (*Id.* at 17).

Regardless, the Court should not accept the City's argument that its "novel" interpretations of exemptions should excuse it from paying Gatehouse's reasonable attorneys' fees. (Opp. at 2). Such a ruling would be contrary to the letter and purpose of the Public Records Law, which seeks to ensure transparency to government by awarding most successful plaintiffs their reasonable fees. To deny fees whenever a government lawyer comes up with a strained interpretation of an exemption that a court has not previously rejected would deeply frustrate that purpose, and would encourage future mischief, litigation, and expense.[1]

2. The Court Should Not Reduce the Requested Fees for "Limited Success."

The Court should deny the City's request to apply a 60% across-the-board reduction in Gatehouse's hours to "reflect Plaintiff's limited success and the time associated with the issues

[1] Notably, the City acknowledges that it has viewed its refusal to honor Gatehouse's public records requests as part of its "defense" of officers sued in federal court for police misconduct. (Opp. at 4 ("While the civil rights litigation was pending, the City was required to maintain its statutory duty to defend the police officers, which overlapped with the City's defense of the public records suit. The City took the position that the release of complaint histories of the officers and internal investigations would severely impede the defense of the police officers in the federal litigation.")) This orientation is deeply problematic. City's Law Department was not private counsel for the defendant police officers. The City had a legal obligation both to defend the officers in the litigation, *and* to obey the Public Records Law. These commands do not conflict, but if the Law Department believed they did, the solution was not to take a "position" that violated the Public Records Law; it was to refer one representation or the other to outside counsel. This admission is relevant to the Court's consideration of Gatehouse's motion for punitive damages.

upon which Plaintiff prevailed." (Opposition at 11).[2] There was no "limited success" here. Gatehouse prevailed on every decided issue. It has received all the records it requested, after three years of toil and trouble. Because Gatehouse has "prevailed up and down the line" and achieved "a 100% success rate," a "claims-based, results-obtained fee reduction is wholly inappropriate." *Coutin v. Young & Rubicam Puerto Rico, Inc*., 124 F.3d 331, 340 (1st Cir. 1997).

Contrary to the City's arguments, Gatehouse cannot be denied fees for the hours it reasonably spent bringing motions that sought to expeditiously resolve the legal issues in this case, such as its motion for a preliminary injunction and the cross-motions for summary judgment. The questions in case were legal ones: whether the City's asserted exemptions applied to the records requested. Such determinations are frequently made on motions under Rule 65 and Rule 56. *See, e.g.*, *Patriot Ledger v. Masterson*, No. 09-400, 2009 WL 928796, at *2 (Mass. Super. Ct. Apr. 2, 2009) (where applicability of exemption is "strictly a legal question," public records claims are "best addressed" on "a motion for preliminary injunction"); *Bos. Globe Media Partners, LLC v. Dep't of Pub. Health*, 482 Mass. 427, 453 (2019) (public records determination on cross-motions for summary judgment). Use of such procedures accord with the statutory command that public records cases be expedited. G.L. c. 66, § 10A ("the superior court shall, when feasible, expedite the proceeding.")

Early in the case, Gatehouse sought a determination on a motion for a preliminary injunction that the Concise Officer History records are public. (It did not seek the same ruling as to the longer, more detailed investigation files). The motion judge accepted the City's representation that "some of the complaint records are subject of dispute in active litigation

[2] The City does not dispute that the hourly rates Gatehouse has requested are reasonable. Nor could it—they are consistent with other recent awards in the area, including in a case against the City of Worcester. (Pyle Aff., Exs. 2-6). Accordingly, the Court should not impose any reduction in the rates requested.

subject to a protective order entered by the federal district court," and held "at this stage of the proceedings, the court is not in a position to make a finding that the records at issue are subject to disclosure . . . ." (Nov. 19, 2008). The City, which had the burden of persuasion, did not put the protective orders into the record; the motion judge thus had no way of knowing that they did not in fact "prohibit the city's release" of the records, as this Court later found. (Order at 16). The fact that the City succeeded in muddying the waters early stage in the case does not mean Gatehouse's time pursuing the motion was unreasonable.

As for summary judgment, both Gatehouse and the City cross-moved, agreeing that no facts were in dispute and that Rule 56 was a proper vehicle to decide the applicability of the exemptions. Gatehouse successfully opposed the City's cross-motion. (Paper No. 10). The motion judge could have ordered narrowing, *in camera* review, and further summary judgment hearing rather than marking down the case for trial; that he chose the latter course, notwithstanding the absence of a factual dispute, does not mean that Gatehouse was unreasonable to move for summary judgment. Regardless, the research and briefing on the summary judgment motions was hardly wasted—it ultimately contributed to Gatehouse's Trial Memorandum and Request for Findings of Fact and Rulings of Law. It was time well-spent.

3. The Case Was Not Over-Staffed. The City complains that Prince Lobel assigned an associate, Michael Lambert, to help staff the case. The complaint is ironic, since Mr. Lambert's billing rate throughout the case was about 60% of Jeffrey Pyle's rate. (Memorandum at 7). Doubtless, had Attorney Pyle handled the case on his own, the City would have complained about paying his rate for all hours in the case. (Pyle Aff., Ex. 6 (modestly reducing requested award in part because some work on the case "could have been performed by more junior attorneys at a lower hourly rate"). In any event, the use of two lawyers was hardly

inappropriate given the City's everything-plus-the-kitchen-sink defense. "After setting such a militant tone and forcing the plaintiff[] to respond in kind, it seems disingenuous for the [City] to castigate the plaintiff[] for putting too many troops into the field." *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 298 (1st Cir. 2001) (approving of four lawyers on one case).

4. The "Block-Billing" Objection is Meritless. Contrary to the City's complaint, to the extent Gatehouse's entries combine tasks, they generally do so for closely-related tasks, permitting the Court to determine whether the time was reasonably spent. For example:

11/19/2020	JJP	Trial preparation, including assembly of exhibits and review and revision of cross of J. Thompson; emails re trial exhibit binders.	5.20	$2,366.00

Such an entry describes a period of time spent preparing for trial; the Court can readily determine whether it is reasonable. The other supposed "block-billing" entries are similar.

5. The City's Demographic Information is Irrelevant. Finally, the City demands a 20% reduction in the lodestar based on the average per capita income in Worcester and the salaries of attorneys in the City's Law Department. The City purports to rely on *Perdue v. Kenny A. ex. rel. Winn*, 559 U.S. 542 (2010), which, in the course of reversing and remanding a $4.5 million *enhancement* of an award beyond the lodestar, observed in a footnote that the annual per capita income in the defendant state was $34,000. Needless-to-say, *Perdue* does not remotely suggest that a properly-calculated lodestar amount—which necessarily applies local billing rates—can be further reduced to approximate a city's average income or an opposing counsel's salary. Once again, the City advances an unserious argument that simply wastes the Court's time.

The City has failed to justify any reduction in Gatehouse's fee request whatsoever. Instead, having litigated this case aggressively to the point of bad faith, it twists law, fact, and logic in support of an absurdly low award in the apparent hope the Court will split the difference. The Court should not entertain this approach; it should allow the request in full.

Respectfully Submitted,

GATEHOUSE MEDIA, LLC

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Date: October 29, 2021

CERTIFICATE OF SERVICE

I, Jeffrey J. Pyle, hereby certify that I served the foregoing document on the City of Worcester by email on October 29, 2021.

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