COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. SUPERIOR COURT DEPARTMENT
C.A. No. 1885CV01526A

GATEHOUSE MEDIA, LLC,)
Plaintiff,)
)
v.)
)
CITY OF WORCESTER,)
Defendant)

CITY OF WORCESTER'S OPPOSITION TO PLAINTIFF'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

Defendant, City of Worcester (City), hereby opposes the motion of Plaintiff Gatehouse Media, LLC, parent company of the Worcester Telegram & Gazette newspaper, for an award of attorneys' fees and costs.

1. Attorneys' Fees and Costs are Not Warranted Under the Statute

The Public Records Law (PRL), G. L. c. 66, § 10A, recognizes that when there is a precedential basis for the municipality's position, the Court should not award attorneys' fees. G. L. c. 66, § 10A.[1] Here, no precedent was exactly on point, which placed the City in a unique position. The public records requests at issue were from a newspaper reporter, but prompted by a letter from opposing counsel in civil rights litigation complaining about internal investigations and police officer defendants in those cases. The City took the position that the requests significantly

[1] (2) The superior court may award reasonable attorney fees and costs in any case in which the requester obtains relief through a judicial order, consent decree, or the provision of requested documents after the filing of a complaint. There shall be a presumption in favor of an award of fees and costs unless the agency or municipality establishes that:

(i) the supervisor found that the agency or municipality did not violate this chapter;

(ii) the agency or municipality reasonably relied upon a published opinion of an appellate court of the commonwealth based on substantially similar facts;

(iii) the agency or municipality reasonably relied upon a published opinion by the attorney general based on substantially similar facts;

(iv) the request was designed or intended to harass or intimidate; or

(v) the request was not in the public interest and made for a commercial purpose unrelated to disseminating information to the public about actual or alleged government activity.

interfered with its defense of the police officers, considering that the public records requests were for the same internal police investigations and officer complaint records that were the subject of discovery disputes and litigation over protective orders in the civil rights cases. Therefore, the City asserted good faith arguments based on prior cases interpreting exemption (d), the deliberative process exemption, for records substantially related to pending litigation, as well as other exemptions to the PRL, for its withholding and redacting of the records. The Superior Court did not grant Plaintiff's motion for preliminary injunction, nor did it decide the motion for summary judgment in Plaintiff's favor. The Court's denial of these motions confirms that this was a novel issue and the City was not patently wrong in its interpretation. Although following trial, the Court disagreed with the City's position as to the applicability of some exemptions, the City's reliance on available precedent and relative success at various stages of this case should preclude recovery of attorneys' fees and costs.

The City relied upon the few cases that addressed exemption (d) of the PRL when the records requested were substantially related to active litigation. The City cited the DaRosa case for the proposition that a public entity, when engaged in litigation, should not be impeded in its defense of matters by being required to produce documents that are the subject of the litigation merely because it is a public entity. See DaRosa v. City of New Bedford, 471 Mass. 446, 453-4 (2015). "Where an agency, as here, is engaged in litigation, decisions regarding litigation strategy and case preparation fall within the rubric of 'policy deliberations'" referenced in exemption (d). Id. at 458 (citing Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. 444, 445-6 (2007) (holding that attorney-client privileged communications were exempt from the definition of "public records," and to require a governmental entity to produce those documents as public records would "severely inhibit the ability of government officials to obtain quality legal advice essential to the discharge of their duties, place public entities at an unfair disadvantage vis-à-vis

private parties with whom they transact business and for whom the attorney-client privilege is all but inviolable, and impede the public's strong interest in the fair and effective administration of justice.") Further, the Superior Court and the Secretary of the Commonwealth, Public Records Division (through the Supervisor of Records), the administrative body governing public records, had found that records that are substantially related to ongoing litigation fall within exemption (d). Lafferty v. Martha's Vineyard Comm'n, No. CIV.A. 03-3397, 2004 WL 792712, at *3 (Mass. Super. Apr. 9, 2004) (citing Kent v. Commonwealth, Civil No. 982693, 2000 WL 1473124, at *4-5 (Mass. Super. Ct. July 27, 2000);[2] Babets v. Sec'y of Human Servs., 403 Mass. 230, 237 n. 8 (1988) (stating that exemption (d) protects documents from disclosure "while the deliberative process is ongoing and incomplete.")). The Superior Court in Lafferty, likewise, did not depart from this line of cases and opinions, holding that when a public entity is involved in litigation, it must develop "policy positions" that may evolve throughout the litigation, so that the deliberative process is ongoing and incomplete, and records related to the litigation are exempt from disclosure pursuant to exemption (d). When a public records request has involved documents subject to litigation, the Supervisor has declined to opine because of the application of exemption (d).[3]

The internal investigations and officer complaint records Plaintiff sought were at the heart of civil rights litigation in which the police officers are named defendants – vigorously litigated and/or produced only on a limited basis and also subject to protective orders – so that the City's argument was well-supported that the records were "substantially related" to civil rights litigation and subject to exemption (d). Although the Court's findings state that the City claimed an

[2] Also cites to *Letter-Determination* of the Supervisor of Public Records, SPR 91/039, April 19, 1991, at 3; and *Letter-Determination* of the Supervisor of Public Records, SPR 93/186, June 2, 1993, at 7.

[3] See Judge Rotenberg Educational Center, Inc. v. Commissioner of DDS, Bristol County Probate and Family Court, Docket No. 86E-00 18-01. The litigation concerned the same subject as the public records request, which was the standard of care of behavioral treatment of persons with intellectual or developmental disabilities. Id. Again, where the records in question were the subject of a dispute in active litigation, the Supervisor declined to opine on the matter. Id. at 3. Attorney Bednar filed a request for reconsideration, and the Supervisor declined to reverse her earlier finding that the public records were the subject of a dispute in active litigation. Id. at 5.

exemption for "all records" pertaining to the civil rights litigation, the City respectfully represents that it claimed an exemption only for certain internal WPD investigations and complaint histories of the police officers, records that were specifically at issue in the civil rights litigation and discovery disputes, and which were protected and kept confidential in that litigation as demonstrated by the protective orders.[4] The City acted in accordance with its duties as a public employer to defend the City and its employees. See G. L. c. 258, § 2 ("[t]he public attorney shall defend the public employee with respect to the cause of action at no cost to the public employee ….") (emphasis added); Maimaron v. Com., 449 Mass. 167, 173 (2007). 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.

Further, attorneys' fees are not warranted with regard to the City's prior application of exemption (c), as the PRL at the time of the request provided an exemption from mandatory disclosure "personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion

[4] The City must respectfully clarify that it did not argue that the protective orders precluded the City from the production of its own records. It is true that the protective orders prevent only the plaintiffs from publicly disclosing internal investigations and officer complaint records. The City cited those protective orders as evidence that the production of those records are litigated in the federal court in the discovery process, motion practice for the protective orders and motions to compel, and in the end, were protected from public disclosure by the federal court. Thus, the City's position was that the protective orders showed that the records sought in this case were "substantially related" to the federal court litigation, treated as confidential, and fell within exemption (d).

of personal privacy." G. L. c. 4, § 7, Twenty-sixth (c).[5] The City cited exemption (c), the privacy and personnel file exemption, for redactions to conclusions of internal investigations produced to Plaintiff, but, as the Court recognized, the City changed its policy in the summer of 2020, approximately six months prior to the legislative change, and was no longer redacting those conclusions by the time of trial. (See 6/2/21 Decision at 10.) The City had previously relied on the most recent litigation between the parties, Worcester Telegram & Gazette Corporation v. Gary Gemme, Chief of Police, City of Worcester, Worcester Superior Court Civil Action No. 08-2742E, in redacting the dispositions of the internal affairs investigations. In that case, in ruling on a motion for preliminary injunction, the Superior Court noted that "the plaintiff will not be successful regarding the request … seeking unredacted disclosures of the dispositions of the complaints against [the police officer], which the Appeals Court has determined to be part of a personnel file and exempt from disclosure." (1/13/10 Decision at 8 n.4, citing Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 2-3, n.2 (2003)).

The City further relied on precedent and statutory authority for the remaining redactions and withholding of records. Pursuant to the application of exemption (f), G. L. c. 4, § 7, Twenty-sixth (f), the City withheld internal investigations that were pending at the time the request was made. See Bougas v. Chief of Police of Lexington, 371 Mass. 59, 61-2 (1976). The City properly redacted information from the BOPS investigation reports produced that was within the parameters of exemption (a), which applies to records "specifically or by necessary implication exempted from disclosure by statute." G. L. c. 4, § 7, cl. 26(a). The redactions did not concern the conduct of police officers, but rather included statutorily protected information concerning domestic violence/abuse, adjudicated crimes and juvenile offender record information. The City was not

[5] "An Act Relative to Justice, Equity and Accountability in Law Enforcement in the Commonwealth," St. 2020, c. 253, § 2, an emergency act, approved Dec. 31, 2020, effective Dec. 31, 2020, in cl. Twenty-sixth, rewrote subcl. (c), "provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation." G. L. c. 4, § 7.

protecting information with these redactions about the police officers; instead, it was satisfying its duty to comply with the PRL and statutes that pertain to the status and protection of records. The City relied on precedent in withholding or redacting, as appropriate, portions of the requested records of the Worcester Police Department pursuant to the PRL.

2. The Requested Award Should be Substantially Reduced

Assuming, *arguendo*, Plaintiff is entitled to attorneys' fees, any award should be substantially reduced from Plaintiff's request of $214,467.00, as it does not comport with the reasonableness test contained in Linthicum v. Archambault, 379 Mass. 381, 398 (1979) (abrogated on other grounds, Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp., 418 Mass. 737 (1994)) and Fontaine v. Ebtec Corp., 415 Mass. 309, 325-26 (1993). When reasonable attorneys' fees are ordered to be paid in a litigation, the factfinder, in determining the amount of reasonable attorneys' fees, "should consider the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation, and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." Linthicum, 379 Mass. at 388-9. "No one factor is determinative, and a factor-by-factor analysis, although helpful, is not required." Berman v. Linnane, 434 Mass. 301, 303 (2001). Further, the court is not required to perform an itemized review of the bill, but can consider the bill as a whole. Id. In determining the reasonableness of time, "[t]he judge should begin his inquiry with the amount of time documented by the plaintiff's attorney. Then the judge decides whether this amount of time was reasonably expended." Killeen v. Westban Hotel Venture, LP, 69 Mass. App. Ct. 784, 790-1 (2007), quoting Stowe v. Bologna, 417 Mass. 199, 203-4 (1994) (further quotations and citations omitted).

The First Circuit likewise uses the lodestar method for fee award cases, and is persuasive authority for the analysis of relevant factors.

> A reasonable fee typically is determined through the lodestar method, which involves multiplying the number of hours productively spent by a reasonable hourly rate to calculate a base figure. In fashioning the lodestar, a district court may adjust the hours claimed to eliminate time that was unreasonably, unnecessarily, or inefficiently devoted to the case. Subject to principles of interconnectedness, the court may disallow time spent in litigating failed claims. It also may adjust the lodestar itself, upwards or downwards, based on any of several different factors, including the results obtained and the time and labor actually required for the efficacious handling of the matter.
>
> Reasonableness in this context is largely a matter of informed judgment. There are, however, guideposts in the case law. For instance, a district court may deem an expenditure of time unreasonable if the reported hours are "excessive, redundant, or otherwise unnecessary." By like token, it may discount or disallow the total hours claimed if it determines that the time is insufficiently documented.

Torres-Rivera v. O'Neill-Cancel, 524 F.3d 331, 336 (1st Cir. 2008) (internal citations and quotations omitted) (quoted by Cocroft v. Smith, No. 10-40257-TSH, 2015 U.S. Dist. LEXIS 16013, at *3-4 (D. Mass. Nov. 30, 2015)). The burden of proving the reasonableness of the attorney's fees incurred rests with the party seeking payment of those fees. See Watts Water Techs., Inc. v. Fireman's Fund Ins. Co., No. CIV.A. 05-2604-BLS2, 2007 WL 2083769, at *9 (Mass. Super. July 11, 2007) (citing Snow v. Mikenas, 373 Mass. 809, 812 (1977) (party claiming attorney's fees bears "both the burden of going forward with evidence and the burden of persuasion on the issue of the reasonableness of attorneys' fees"); Liberty Mutual Ins. Co. v. Continental Cas. Co., 771 F.2d 579, 582 (1st Cir. 1985) ("It is obvious that the party claiming such expenditures has the burden of proving them, including the burden of proving whether the fees were in fact reasonable.")) Interestingly, Plaintiff attaches the federal court decision (Hillman, J.) in Robert Thayer et al. v. City of Worcester, U.S.D.C. No. 13-40057-TSH (D. Mass. Mar. 29, 2017) (attached to Affid. of J. Pyle as Ex. 2), in support of its position that its attorneys' requested hourly rates are reasonable for the Worcester area. Although the federal court found in that case that the requested hourly rates for the attorneys were severely inflated, which led to an initial reduction in the $1,016,439.60 fees request to $596,762.50, the court also imposed an additional $87,057.12 in reductions for inflated and duplicative hours and overstaffing, and $16,888.00 for preparing the

fees petition was denied in its entirety. (See Thayer, Affid. of J. Pyle, Ex. 2.)

a. *The hours claimed by Plaintiff, compared to the results obtained, are excessive.*

In addition to the determination of a reasonable hourly rate for the attorneys involved, the Court should examine the number of hours reasonably expended. See Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 295 (1st Cir. 2001) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). "[I]t is the court's prerogative (indeed, its duty) to winnow out excessive hours, time spent tilting at windmills, and the like." Id. at 296. As in Massachusetts, the First Circuit does not require "that courts set forth hour-by-hour analyses of fee requests. Such an approach would be unduly burdensome and leave the judge 'so deluged with details that [they are] unable to view the claims for fees in perspective.'" Jacobs v. Mancuso, 825 F.2d 559, 562 (1st Cir. 1987), quoting Gabriele v. Southworth, 712 F.2d 1505, 1507 (1st Cir. 1983). In order to compensate for an excessive number of hours, courts have taken a percentage reduction from the number of hours requested. See Cent. Pension Fund of the Int'l Union of Operating Eng'rs & Participating Emplr. V. Ray Haluch Gravel Co., 745 F.3d 1, 5 (1st Cir. 2014) (reduction of claimed hours by one-third across the board to adjust for those that were excessive and/or unnecessary); Wagner v. City of Holyoke, 404 F.3d 504 (1st Cir. 2005), C.A. No. 98-30170-MAP (reduction of claimed hours by slightly more than 20% to account for excesses).

The excesses of Plaintiffs' counsel here can be found in various categories. First, Plaintiff was unsuccessful through most phases of this case. On page 4 of Plaintiff's memorandum, it sets out the fees requested for various stages of the case. For the first phase, labeled, "Complaint and Preliminary Injunction Phase," Plaintiff seeks 68.7 hours totaling $23,055.00. However, Plaintiff was unsuccessful at the preliminary injunction phase, and so that time spent "tilting at windmills" is not chargeable to the City. See Gay Officers Action League, 247 F.3d at 296. In denying the Plaintiff's motion for preliminary injunction on November 27, 2018, the Court held the records

"are the subject of dispute in active litigation [and] subject to a protective order entered by the federal district court; 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 under the public records law." (11/27/18 Decision at 2.) Since some of the records were also pending internal investigations, likewise, the Court held that it could not make a preliminary declaration that the records were not exempt from disclosure. Id. Thus, Plaintiff failed to establish a likelihood of success on the merits of its claims. Id. at 3. The Court also found that Plaintiff did not satisfy the requirements for a preliminary injunction because it did not show a lack of adequate remedy at final judgment and an absence of irreparable harm should the records be released. Id. The Court rejected Plaintiff's argument that it would suffer irreparable harm without immediate access to the records, but the City was at risk of harm. Id. "[R]equiring the City to produce the officer complaint records may impact ongoing policy developments, litigation strategy, and the litigation process." Id. Therefore, the "balance of equities" weighed in the City's favor and for denying the injunction. Id. Plaintiff should not recover for its unsuccessful attempt at a preliminary injunction.

Likewise, Plaintiff requests $52,482.50 for 156.2 hours spent unsuccessfully litigating the motion for summary judgment. In the December 17, 2019, decision denying the parties' cross-motions for summary judgment, the Court held that specific proof must be elicited regarding the exemptions to the PRL and the records reviewed on a case-by-case basis through a hearing procedure. (12/17/19 Decision at 2.) The Court could not make a decision on the applicability of the exemptions as a matter of law based on the summary judgment record. Id. Thus, the Court did not find that Plaintiff was entitled to prompt production of the records and ordered that a hearing on the merits of the case was required. Id. at 3. Plaintiff also pursued litigation in the summary judgment phase on issues, such as exemption (a), where the City had a clear duty to

redact information[6] concerning domestic violence/abuse, adjudicated crimes and juvenile offender records, which Plaintiff did not continue to pursue at trial. The hours associated with Plaintiff's unsuccessful summary judgment motion are not chargeable to the City.

Next, Plaintiff seeks $65,940.50 for 182.5 hours labeled as incurred in the "pretrial phase." Although it is unclear why so many hours were devoted, separate and apart from the 124.7 hours labeled as "trial," this time also included unnecessary and unsuccessful litigation. In particular, an excessive amount of hours was spent researching trial procedures and preparing a "pretrial report," with the only obvious result being a joint and routine eight-page pre-trial memorandum filed on January 28, 2020, doc. 16. So many entries reference researching and writing a letter to the City regarding a "Vaughn index," which resulted in a one and a half-page letter dated February 11, 2020. Plaintiff further includes researching and writing an unsuccessful "motion to expedite," which was summarily denied due to the set schedule of the case and the Supreme Judicial Court's order that governed deadlines in the midst of the COVID-19 pandemic. (Plaintiff's Memo. Ex. 7 at 7-9; see 7/7/20 Order, doc. 18.) Plaintiff's excessive and unnecessary pre-trial litigation is not chargeable to the City.

As indicated, Plaintiff alleges 124.7 hours were spent in the "trial" phase of the case, for which it seeks $49,539.50. Although the Court agreed with Plaintiff's position that the City could not withhold records pursuant to exemption (d), and ordered the records be produced for Plaintiff's counsel's review with redactions pursuant to (a), (c) and (f), there was no final judgment entered. The trial was a non-jury hearing conducted on one day in-person, but for two more days remotely on Zoom, with the Court hearing closing arguments on a fourth day. The issues were limited to

[6] Exemption (a), the statutory exemption, is for records "specifically or by necessary implication exempted from disclosure by statute," G. L. c. 4, § 7, cl. 26(a).

whether exemptions to the PRL applied, and were not unusually complex. Thus, the attorneys' fees Plaintiff seeks for the trial phase are also disproportionate to the results obtained.

Finally, the 50.6 hours for $23,449.50 that Plaintiff seeks for the "post-trial phase" are also excessive. The City produced to the Plaintiff the officer complaint records, without redaction, within thirty days and the eight internal investigation files, with very limited redaction to four files (together with a redaction log and the unredacted versions of the four files), within sixty days, as the Court ordered. (See 6/2/21 Order at 33-4.) Plaintiff did not challenge any of the redactions the City made and there were no further issues in dispute. The City's decision to disclose information previously redacted and withheld is not a concession of the merits of the City's arguments, but a recognition of the Court's decision with regard to exemption (d), the changes in the law by the police reform legislation, as well as the fact that in the three years since the public records case was pending, the related civil rights matters in federal court had mostly resolved. Given that Plaintiff received all of the records it sought, pursuant to the Court's order, obviating the need for further litigation, demonstrates the excessiveness of Plaintiff's request. Further, included in this amount sought is fifteen hours for a total of $7,050.00 for the attorneys' fees petition itself, which should be merely a ministerial task for a minimal rate, and, thus, should be denied in its entirety. (See Thayer, Affid. of J. Pyle, Ex. 2 at 10.)

The time expended and attorneys' fees requested for all phases of this case are disproportionate and excessive compared to the Plaintiff's limited success only in the final stage of the case, following trial. Therefore, the Court should employ an across the board reduction of 60%,[7] which would subtract $128,680.20, for a baseline of $85,786.80, to more accurately reflect Plaintiff's limited success and the time associated with the issues upon which Plaintiff prevailed.

[7] See Schand v. McMahon, 487 F. Supp. 3d 71, 81 (D. Mass. Sept. 16, 2020) (Affid. of J. Pyle, Exh. 4) (holding that the attorneys' fees request of $2,778,769.50 would be twice reduced by 60% due to block billing, overstaffing and the time spent on unsuccessful claims, which after further reductions resulted in an award of $347,759.20).

b. *The number of attorneys was excessive*.

When reviewing a fees petition, "the time for two or three lawyers in a courtroom or conference, when one would do, may obviously be discounted." Hart v. Bourque, 798 F.2d 519, 523 (1st Cir. 1986) (quotations and citations omitted). "Fee-shifting statutes … [are not intended] to serve as full employment or continuing education programs for lawyers and paralegals. A trial court should ordinarily greet a claim that several lawyers were required to perform a single set of tasks with healthy skepticism." Lipsett v. Blanco, 975 F.2d 934, 938 (1st Cir. 1992). In Cocroft, the federal court questioned the number of attorneys employed to work on the straightforward civil rights case – four senior level attorneys, one junior level attorney, and a legal intern – and applied a 40% reduction to compensate for the excess. Cocroft, 2015 U.S. Dist. LEXIS 160310, at *7. Indeed, "a court should not hesitate to discount hours if it sees signs that a prevailing party has overstaffed a case." Gay Officers Action League, 247 F.3d at 297. Turnover within a firm and transfer of duties amongst legal representation, which is exhibited by time spent by each new attorney "reviewing files," writing reviews of case statuses and conferencing with other counsel is an indication that time was spent "without regard to productivity" and is an "office defect, not chargeable to defendants." Hart, 798 F.2d at 523.

Here, Plaintiff's counsel has overstaffed the case with two attorneys, Jeffrey Pyle and Michael Lambert, and a paralegal, when the litigation was handled by one attorney for the City. The case may have been used as a teaching tool for a less-experienced associate in Attorney Lambert, but that duplicative time spent without regard to productivity is a defect not chargeable to the City. For example, Plaintiff seeks a total of 17.3 hours and $5,900 for both Attorneys Pyle and Lambert to schedule, prepare for and attend the motion for preliminary injunction hearing, and 22.6 hours and $8,054 for both attorneys to prepare for and attend the summary judgment hearing, where only Attorney Pyle argued at both hearings. These hours are far in excess of the number

that should have been required for an experienced litigator such as Attorney Pyle to prepare for a hearing, and represent the duplication of efforts by two attorneys, when one should have sufficed. (See Thayer, Affid. of J. Pyle, Ex. 2, at 9) (expressing concern over an experienced litigator charging over thirty hours to prepare for a preliminary injunction hearing and two experienced litigators charging twenty and thirteen hours to prepare for a summary judgment hearing, which warranted a further 15% reduction for overstaffing). In this case, a similar 20% reduction of $17,157.36 for overstaffing is warranted, bringing the total down to $68,629.44.

c. *Plaintiff's attorneys' block billing is also indicative of excess*.

"Block billing can be defined as the time-keeping method by which an attorney lumps together the total daily time spent working on a case, rather than itemizing the time expended on specific tasks." Conservation Law Found., Inc. v. Patrick, 767 F. Supp. 2d 244, 253 (D. Mass. 2011) (citations omitted). Such a practice is disfavored and has prompted courts to apply a 20% reduction in total fees. See id. at 253-4. Here, it can be difficult to parse what hours were incurred for what specific task due to the attorneys' practice of block billing. The following entries, which are examples of block billing, but are not the only defective entries, illustrate the difficulty in parsing out specific tasks and time spent:

9/14/18	JJP	Revise complaint to track new developments; email and telephone conference with M. Lambert re drafting of memorandum	1.30	$552.50
9/14/18	MJL	Review file; conference with J. Pyle; research case law on Massachusetts public records law exemption (d); draft memorandum in support of preliminary injunction	4.10	$1,025.00
12/18/18	MJL	Review case file; legal research on next steps after preliminary injunction; conference with J. Pyle re: same	2.30	$575.00
3/26/19	MJL	Research pending cases and chart of outstanding concise office histories and investigation files; draft memorandum on same; email exchanges with J. Pyle re same.	4.80	$1,272.00
4/3/19	MJL	Revise memorandum in support of motion for summary judgment; legal research re: same; conference with J. Pyle re same.	3.70	$980.00
6/4/19	MJL	Review and revise affidavit of B. Petrishen and memorandum of law in support of motion for	5.80	$1,537.00

		summary judgment; draft joint appendix; locate and sort exhibits for joint appendix; review complaint and attached exhibits; conference with J. Pyle re joint appendix; conference with P. Kammer re same.		
1/16/20	MJL	Legal research on trial procedures in Massachusetts public records cases and joint pretrial statement; conference with J. Pyle re same; review motion to convert pretrial conference to scheduling conference.	2.20	$616.00
10/9/20	JJP	Complete review of Vaughn indexes; draft letter to Court re legal issues that should be addressed pretrial; conference with W. Quinn re trial procedure and letter; finalize and send letter to Honorable J. Kenton-Walker	3.20	$1,456.00
10/20/20	MJL	Draft and revise trial memorandum; legal research re same; conference with J. Pyle re same	9.20	$2,576.00
10/23/20	JJP	Prepare trial memorandum; prepare exhibit list; email to W. Quinn re exhibits and Vaughn index.	5.70	$2,593.50
11/16/20	JJP	Review email from Court re conducting further trial by Zoom; prepare stipulation re redactions claimed; prepare for cross-examination of J. Thompson; prepare and ship box with contested exhibits to Court for trial.	4.70	$2,138.50

(Affid. of J. Pyle, Ex. 7.) Given the numerous entries of block billing, Plaintiff's request should be reduced by another 20%, $13,725.89, bringing the total down to $54,903.55.

d. *The burden on the Worcester taxpayers should further reduce the request.*

In this case, of utmost concern is the burden of a high fees award on City taxpayers. In Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 559 (2010), the Supreme Court reversed a fees award of $10.5 million by a District Court in Georgia, an award that was enhanced because of the "extraordinary" results in obtaining a consent decree in behalf of children in the foster care system in two counties near Atlanta. The court made clear that § 1988 was not intended to enrich attorneys, and that because the fees are often paid by state and local taxpayers, out of limited municipal budgets, money which then "cannot be used for programs that provide vital public services." Id. at 559. The court compares the $4.5 million enhancement as allowing the plaintiffs' attorneys to earn as much as the richest law firms in the country, which "would be paid by the taxpayers of Georgia, where the annual per capita income is less than $34,000." Id. at 559, n.8.

Further, the court notes that "the annual salaries of attorneys employed by the State range from $48,000 for entry-level lawyers to $118,000 for the highest paid division chief." Id. "Section 1988 was enacted to ensure that civil rights plaintiffs are adequately represented, not to provide such a windfall." Id. (Emphasis added.)

This case did not involve an "extraordinary" situation as the case bringing about change on behalf of foster care children in Georgia, but municipal finances should be considered in a case against a governmental entity, brought by a for-profit entity represented by counsel from a large Boston law firm. Therefore, for comparison, the same figures from the City of Worcester are the following:

2019 per capita income within the City of Worcester	$28,555[8]
FY22 compensation range for City of Worcester attorneys	$74,425 – 168,189[9]

Plaintiffs' request for fees and costs in the amount of $217,695.05 is over 7.62 times the per capita income for the City. The requested hourly rates for Plaintiff's attorneys are multiple times the hourly rate of compensation for City attorneys. This request, made by one of the biggest firms in Massachusetts, should not produce a windfall to the firm on the backs of the City taxpayers. Thus, a further 20% reduction of $10,980.71, for a reduced total of $43,922.84, should be imposed.[10]

3. Conclusion

In summary, attorneys' fees and costs should not be awarded in this case pursuant to G. L. c. 66, § 10A, because of the novel issue this case presented with regard to the application of the deliberative process exemption (d) to public records requests for internal police investigations and

[8] https://www.census.gov/quickfacts/fact/table/worcestercitymassachusetts/AGE29529 (last accessed on 10/19/21).

[9] http://www.worcesterma.gov/uploads/6b/1f/6b1f2107dd73476ef0d9efad970c4705/budget-fy22.pdf (last accessed on 10/19/21).

[10] For further comparison, see the decisions attached to the Affidavit of J. Pyle as exhibits 5, reflecting a limited $22,592.50 attorney's fees award from the Massachusetts State Police Department to the Boston Globe Media Partners, LLC in a PRL case and exhibit 6, a notice of a $25,000 attorney's fees award to the defendants in a strategic litigation against public participation (SLAPP) case, pursuant to G. L. c. 231, § 59H.

officer complaint records that were the subject of discovery disputes and litigation in pending civil rights cases in which the police officers were defendants. The City relied on precedent to support its position, and the case was not decided in Plaintiff's favor at either the preliminary injunction stage, or at summary judgment. If the Court does grant an award, Plaintiff's request should be substantially reduced to reflect Plaintiff's relative lack of success on the issues in dispute through the various stages of litigation, the overstaffing of attorneys, the use of block billing and the consideration of the effect of the award on the Worcester taxpayers.

CITY OF WORCESTER

By its attorneys,

Michael E. Traynor
City Solicitor

/s/ Wendy L. Quinn
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CERTIFICATE OF SERVICE

I, Wendy L. Quinn, hereby certify that I served upon Plaintiff the within City of Worcester's Opposition to Plaintiff's Motion for Award of Attorneys' Fees and Costs by emailing a copy of the same to the following on this 22nd day of October, 2021:

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/s/ Wendy L. Quinn
Wendy L. Quinn
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