COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

22-P-282

GATEHOUSE MEDIA, LLC

vs.

CITY OF WORCESTER.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

In June of 2018, the plaintiff, Gatehouse Media, LLC (Gatehouse), which owns the Worcester Telegram and Gazette newspaper, filed two public records requests seeking documents from the city of Worcester (city) relating to alleged misconduct by its police officers. After the city claimed that the documents were protected from disclosure by various exemptions to the Public Records Law, Gateway brought the current action. Following three years of litigation, including a four-day trial, the city eventually turned over the requested records (subject to limited redactions that Gatehouse does not contest). Accordingly, the case-in-chief has been resolved.

What remains is a dispute over the amount of attorney's fees and costs to which Gatehouse is entitled. The judge who presided at trial and oversaw some of the pretrial proceedings

awarded Gatehouse approximately $98,000 out of the approximately $214,000 that Gatehouse had requested. She arrived at that figure using a lodestar method that applied a "blended rate" of $365 per hour. On appeal, Gatehouse accepts this blended rate, but challenges three aspects of what the judge did. First, Gatehouse argues that the judge erred in excluding from recovery all time spent in propounding a pretrial motion to expedite the case. Second, Gatehouse similarly argues that the judge erred in precluding from recovery all time spent in assembling the fees petition. Third, Gatehouse argues that the judge abused her discretion in applying an across-the-board fifty percent fee reduction to the remaining hours. For the reasons that follow, we vacate and remand two aspects of the judgment. Otherwise, we affirm.

Background. The first request that Gatehouse made was for public records related to internal affairs investigations arising out of twelve identified police incidents. The second was for lists of internal affairs investigations and outcomes (known as "concise officer histories") for seventeen identified police officers. Except with regard to four internal affairs investigations that were then still ongoing, the city initially indicated its willingness to release the responsive documents. However, the city had a change of heart because the officers at issue in the second request were defendants in a pending civil

rights action. In vigorously opposing the requested disclosures, over the next several years the city raised an array of shifting defenses. As the trial judge expressly found in awarding punitive damages, some of these defenses were raised in bad faith. Through these efforts, the city successfully kept disclosure at bay, fending off Gatehouse's motion for preliminary injunction and motion for summary judgment. A trial date was set for November of 2020.

Meanwhile, two outside developments occurred that affected the case. One was the onset of the COVID-19 pandemic. The other was the national public reckoning that arose in the wake of the murder of George Floyd (which increased Gatehouse's interest in making the requested documents public). Frustrated by the city's continued refusal to release the documents, Gatehouse sought a way to try to expedite the proceedings. The efforts culminated in a motion to expedite that Gatehouse filed in July of 2020. That motion sought, among other things, to compel the city to produce on an expedited schedule a so-called "Vaughn index" listing all responsive documents as well as justification for not producing those records that were being withheld. The trial judge denied the motion. After the key issues were resolved at trial, the city finally released the records (again, subject to minor redactions that Gatehouse does

not contest). Additional facts relating to the fees request are reserved for later discussion.

Discussion. 1. Attorney's fees for the motion to expedite. As noted, the trial judge declined to award Gatehouse any attorney's fees for its unsuccessful motion to expedite. In the key sentence of her memorandum of decision, she explained her reasoning as follows: "The court finds the time spent on that motion to be nothing more than 'tilting at windmills,' and it is the duty of the court to exclude that time. See Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 296 (1st Cir. 2001)."

We discern no error in the judge's decision to decline to award fees for the motion. As noted, the motion was not successful at advancing the litigation. While Gatehouse's frustration with the course of the litigation was understandable, the motion was asking the judge to expedite the case near the inception of the pandemic and under circumstances where trial already had been set for a few months later. The judge could reasonably conclude that no fees should be awarded for this aspect of Gatehouse's efforts.[1] Twin Fires Inv., LLC v.

[1] We note that the judge also stated that Gatehouse based its motion to expedite on an issue "unrelated to this case," namely, "the public's need to be aware of potential problem officers, and what the Worcester Police department had done to address incidents of police misconduct, because of the death of George Floyd." Gatehouse maintains that the judge erred as a matter of

Morgan Stanley Dean Witter & Co., 445 Mass. 411, 431 (2005) (no abuse of discretion where judge did not award fees for claims on which party did not prevail due to "nature of the . . . submission").

2. Time spent preparing fees petition. The time spent preparing and defending a request for attorney's fees is generally recoverable where a statute allows for fee shifting. Stratos v. Department of Pub. Welfare, 387 Mass. 312, 325 (1982). Moreover, as a result of a 2016 enactment, a party who successfully enforces the Public Records Law is presumptively entitled to recover its attorney's fees. See G. L. c. 66, § 10A (d) (2), inserted by St. 2016, c. 121, § 10. Of course, fees for preparing the fees petition are recoverable only to the extent they are reasonable. Here, the judge ruled that "the 20.3 hours spent on preparing this fee petition [was] unreasonable, and those fees are denied in their entirety." Accepting that the judge was justified in concluding that the time spent preparing the fees petition was excessive,[2] it hardly

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law in concluding that these concerns were "unrelated" to the case. Reading the judge's comment in context, we do not view it as suggesting that there was anything untoward about Gatehouse's references to its motion being motivated by concerns about racial justice. Rather, we believe the judge was saying that such concerns -- despite their importance -- did not suffice to allow Gatehouse's motion under the circumstances.

[2] It bears noting that at least some of the time spent in compiling the fees petition was presumably done in anticipation

follows that this portion of Gatehouse's request for the time spent preparing the petition should be denied in its entirety. A remand for the judge to reexamine this issue is thus warranted. See Commonwealth v. Gonsalves, 437 Mass. 1022, 1023 (2002) ("[w]here, as here, the [judge] chooses to make a substantial adjustment in fees and costs, reasons are necessary for [the] ruling").

3. Fifty-percent reduction in compensable time. The judge "recognize[d] that some of the fees came from responding to the city's filings, including continually responding to the city's bad faith reliance on [two of the claimed exemptions from disclosure], as well as deciphering the verbose, confusing, and incomplete Vaughn affidavits." The judge also acknowledged that the quality of the legal work represented "experienced and capable" advocacy. Nevertheless, the judge concluded that "[e]ven taking into account the [city's] behavior, the court still finds the 540.2 hours to be unreasonable as excessive, duplicative, and redundant." The judge decided that taking the considerations together and "considering the billing as a whole," a fifty-percent reduction was warranted.

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that the city would aggressively contest the requested fees. In fact, the city responded to the fees petition with a sixteen-page opposition.

One of the reasons the judge ordered such a dramatic discounting was the presence of "some block billing." This is a valid consideration that may justify a reduction, although not where "how the time was allocated among several tasks performed on the same day [wa]s not critical." Haddad v. Wal-Mart Stores, Inc., 455 Mass. 1024, 1026-1027 (2010). In any event, our review of the record reveals only a few instances in which counsel's timekeeping records could be characterized as block billing. It appears that the deep discounting done here was driven instead by the judge's other concerns over "overstaffing" and "duplication of work." We turn then to those concerns.

The key passage of the judge's memorandum of decision addressing overstaffing and duplication states as follows:

> "Both Attorneys . . . billed for preparation and attendance on motion hearings and trial; however, only Attorney Pyle made presentations. In addition, both attorneys billed many hours for drafting the memoranda for the preliminary injunction, summary judgment, trial, and the final request for findings and rulings. Attorney Lambert spent many hours researching the applicable law. However, the legal arguments raised were virtually the same at each stage of the proceedings, and the written submissions were duplicative, such that the time spent was excessive and redundant."

We recognize that "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, and that significant deference is owed to the judge's evaluation of such issues. Nevertheless, having reviewed the record, we are left

with a firm conviction that the judge's concerns in this regard are overstated. While some discounting based on duplication of efforts may be warranted, we are unable to see how that figure would approach fifty percent even when viewed together with "some block billing."

With regard to the staffing of the case, we note, for example, that it is hardly unusual for a party's trial court hearing to be staffed with two counsel even if only one is actively questioning witnesses or presenting argument, as both counsel nevertheless may be needed to respond to issues that arise. See Keville v. McKeever, 42 Mass. App. Ct. 140, 156 (1997) (argument that "time billed by more than one attorney in the courtroom or in depositions when only one attorney's presence was necessary" insufficient to reduce award because this "d[id] not explain why any of the supposed examples involve[d] duplicative or unnecessary efforts"). Compare Haddad, 455 Mass. at 1027 (deducting 100 hours from time spent on appeal because, "[g]iven the factual and legal complexity of the case, four attorneys may have been necessary at trial, but that level of staffing was not required for the appellate proceedings").

With respect to the briefing of the case, while there certainly was overlap among the legal issues implicated at each stage of the proceedings, this alone did not make the briefing

duplicative. Especially in light of the city's shifting legal defenses and the significant issues that arose at each subsequent stage of the proceedings, we have great difficulty discerning how any duplication of effort here was sufficient to justify such a deep discount in the amount of fees allowed.[3] "Even if one assumes that some part of counsel's efforts may have been superfluous or duplicative, and that such part as was not, may to some extent have been routine rather than novel, . . . the amount allowed seems inadequate. . . . The matter should be reconsidered and a fresh award made upon findings." Kennedy v. Kennedy, 20 Mass. App. Ct. 559, 563-564 (1985).

Finally, we note the important public policy implications at stake. "[T]he purpose of the public records law[] [is] to provide 'the public broad access to governmental records'" (citation omitted). Rahim v. District Attorney for the Suffolk Dist., 486 Mass. 544, 548 (2020). Therefore, fee-shifting provisions, such as those in G. L. c. 66, § 10A (d) (2), "act as a powerful disincentive against unlawful conduct" and "provide

[3] We note that once each round of Gatehouse's briefing did not convince the court to order disclosure of the documents, it was reasonable for Gatehouse to spend time changing and editing its subsequent briefs to improve its advocacy. We note as well that although the briefing at the preliminary injunction, summary judgment, and trial stages addressed some overlapping issues, some of those issues could have and probably should have been resolved earlier in the litigation, as a matter of law.

an incentive for attorneys to provide representation in cases that otherwise would not be financially prudent for them to take on . . . [where] claims are too small to warrant an expenditure of funds for counsel." Commonwealth v. Augustine, 470 Mass. 837, 842 (2015). With these concerns in mind, we vacate so much of the judgment that (1) denied in its entirety Gatehouse's request for fees connected to the petition for fees, and (2) reduced the compensable time by fifty percent, and remand those

matters for reconsideration. In all other respects, the judgment is affirmed.[4]

So ordered.

By the Court (Milkey, Ditkoff & Englander, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: January 11, 2023.

[4] Gatehouse has requested that we award appellate attorney's fees consistent with the practice of fee-shifting statutes. See Stratos, 387 Mass. at 325 ("As a general rule, time spent in establishing and defending a fee, or objecting to an unduly small award, should be included in the final calculation of the award. Exclusion of such services would dilute the value of the award, and so frustrate the purpose of the act authorizing fees"). In general, "[w]hen the plaintiff has obtained an award that, despite errors in calculation, is not plainly unreasonable," appellate attorney's fees are not required for "an appeal initiated by the plaintiff." Id. Gatehouse has not established that the fee award was "plainly unreasonable," nor yet established that it will obtain a significantly higher fee award. Accordingly, in our discretion, we deny Gatehouse's request for appellate attorney's fees. See Yorke Mgt. v. Castro, 406 Mass. 17, 19 (1989).

[5] The panelists are listed in order of seniority.