STATE OF VERMONT
SUPERIOR COURT
CIVIL DIVISION

LOLA DUFFORT, Plaintiff, v. VERMONT AGENCY OF EDUCATION and VERMONT STATE BOARD OF EDUCATION, Defendants.	Rutland Unit Docket No. 380-7-16 Rdcv

Motion for Voluntary Partial Dismissal and for Fees and Costs

NOW COMES Plaintiff, Lola Duffort, by and through her attorneys, Lia Ernst and James Diaz, and hereby voluntarily moves to dismiss, without prejudice, Counts 4 and 5 of her Complaint.

In addition, as the prevailing party in this Public Records Act suit, Ms. Duffort hereby moves for reimbursement of her costs and fees reasonably incurred as provided for by the Act. *See* 1 V.S.A. § 319(d)(1). In support of this motion, Ms. Duffort submits the following memorandum of law.

Memorandum of Law

I. Background

In this Public Records Act suit, Plaintiff Lola Duffort, a journalist, sought a court order requiring the defendant public agencies to produce for inspection or provide copies of data records of hazing, harassment, and bullying ("HHB") incidents in each of Vermont's public schools. She sought these records because the public has a vital interest in knowing how well the Vermont Agency of Education ("AOE"), the Vermont

State Board of Education ("SBE"), and the schools they oversee meet the safety and educational needs of Vermont's children.

Annually, the AOE acquires electronic records containing data regarding HHB complaints and responses to those complaints from each public school, school district, and supervisory union in Vermont. These electronic records are imported into the AOE's electronic databases, producing AOE records containing school-level information. Annually, the SBE is required to report, "on a school by school basis," the number of complaints of HHB, and responses thereto, in Vermont's public schools. 16 V.S.A. § 164(17).

For nearly six months the defendants repeatedly denied Ms. Duffort's requests for these public records. In the face of defendants' recalcitrance, Ms. Duffort had no choice but to file a Complaint with this Court. Her Complaint, like her public records requests, requested that HHB data records be produced as a compilation if that was the most efficient and cost-effective method of production. On September 21, 2016, the defendants filed their Answer.[1] The Answer reiterated the defendants' earlier denials that compiling data records would require the creation of a new record, a discretionary decision under the Public Records Act.

On December 22, 2016, Ms. Duffort filed a motion for partial judgment on the pleadings, seeking judgment on the central claims of her Complaint, covered by Counts 1, 2, and 3. *See* Compl. ¶¶ 152-160 (stating causes of action for failure to produce public records and for failure to extract and compile data records). A hearing was held on April

[1] Ms. Duffort's Complaint included 28 exhibits of correspondence, emails, and agency documents referenced in the Complaint. Most of the defendants' responses to Ms. Duffort's allegations regarding these exhibits merely stated, "Denied insofar as Exhibit [ ] speaks for itself." Order on Pl.'s Mot. 3. As a consequence of the defendants' repeated non-response, this Court wrote "[i]f the court agrees that the exhibit in question says what the Plaintiff describes it as saying, this is the equivalent of an admission." *Id*. And, "[h]aving reviewed the exhibits, the court finds the Plaintiff's allegations [regarding exhibits] to be accurate." *Id*. "Thus, most of the allegations of the complaint are admitted [by the defendant]." *Id*.

17, 2017, at which defendants conceded that the records in question were, as Ms. Duffort had long argued, public records that they were required to produce in response to any public records request. On May 19, 2017, the defendants produced the compilation of the data records Ms. Duffort had sought *since January 26, 2016*. On May 22, 2017, this Court granted Ms. Duffort's motion, concluding that "the Defendants here have conceded that they possess in their databases the discrete pieces of information which Duffort seeks, [therefore] extracting and compiling that data does not amount to the creation of a new record." Order on Pl.'s Mot. 6-7 (quoting *Schladetsch v. U.S. Dep't of H.U.D.*, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000) (internal quotation marks and brackets omitted)).[2]

Despite six rounds of settlement discussions between March and September of 2017, the parties have been unable to find meaningful common ground to resolve their dispute over costs, fees, or other potential terms. Therefore, Ms. Duffort files this motion to resolve the case and receive reimbursement for attorneys' fees and costs under the Act.

II. Facts

As exhaustively detailed in the Complaint and motion for partial judgment on the pleadings, over the course of the six months preceding the initiation of this lawsuit, Ms. Duffort assiduously sought the disclosure of certain public records held by the AOE and SBE. She attempted to work with AOE personnel to figure out how to receive the data records she sought, quoted their own documents to them to justify her requests, and sent legal memoranda, through her counsel, to explain the longstanding legal basis for her request. She was rebuffed at every turn without meaningful explanation.

[2] As argued by Ms. Duffort before and after filing her Complaint, in substance this Court agreed that "the electronic query is akin to a manual search of file folders for the requested information, the fact that the search is done electronically rather than manually cannot change the result." Order on Pl.'s Mot. 4.

Until a month after oral argument on Ms. Duffort's motion for partial judgment, the Defendants assiduously refused to produce those records—without citing any exemptions or legal precedent to justify that refusal. Instead, the Defendants erected a variety of legally insufficient excuses that the PRA does not countenance—notwithstanding the fact that Vermont law requires the SBE to produce and make publicly available an annual report consisting of the *exact* information Ms. Duffort requested. *See* 16 V.S.A. § 164(17). At no point before or during this lawsuit did the defendants ever attempt to defend their position in the face of the detailed legal arguments Ms. Duffort presented. *See, e.g.*, Order on Pl.'s Mot. 5 n.3.

In addition to the admitted allegations[3] from the Complaint, this Court specifically found that the defendants admitted that:

> (1) the [AOE's] software system "is capable of searching, organizing, and producing a report from data contained in the Defendant [Agency's] databases"; (2) that although the Agency has the number of complaints made statewide, it does not have current records on a school-by-school or district-by-district basis; (3) the Agency could "recreate" a district level report but declined to do so. *See* Complaint ¶¶ 26, 48, 57-60, 61, 64, 68, 69. In addition, the records show that although the Agency had deleted the actual submissions from each school or district, it "could extract and compile information responsive to Ms. Duffort's request from [its] electronic databases," but declined to do so because this "would constitute the creation of new records." Complaint ¶¶ 95-100, 125, 130, 140.

Order on Pl.'s Mot. 3. This Court also found that "the [SBE] is required by law to report annually on the 'number and types of complaints of harassment, hazing or bullying . . . and responses to the complaints." *Id*. at 6 (citing 16 V.S.A. § 164(17)).

Because the Court (1) granted Ms. Duffort's motion on the pleadings, (2) the defendants eventually disclosed the records she sought, (3) Ms. Duffort's counsel was forced to incur significant expenses to dislodge the records, and (4) the Public Records

[3] *See* n.1 *supra*.

Act requires it, the defendants must reimburse Ms. Duffort's counsel for attorneys' fees and costs. Those fees and costs are described in detail in the attached affidavits and exhibits thereto. *See* Attachments A and B. The reasonableness of counsel's request for reimbursement is attested to by Anthony Iarrapino, an independent Vermont attorney in private practice who has successfully represented clients challenging denials of access to public records. *See* Attachment C. Upon the facts and law, having obtained the results sought in the Complaint, Ms. Duffort now moves for reimbursement of her reasonable costs and fees as mandated by 1 V.S.A. § 319(d)(1).

III. Ms. Duffort Is the Substantially Prevailing Party and Is Entitled to Reimbursement of Costs and Fees

The Public Records Act provides that this Court "shall assess against the public agency reasonable attorney's fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 1 V.S.A. § 319(d)(1). The legislature added this mandatory fee provision in order to encourage requestors to seek vindication in Vermont's courts of their rights of access to public records and to discourage public agencies from withholding records without clear legal justification. A public agency can only avoid the mandatory imposition of costs and fees by "conced[ing] that a contested record [is] . . . public; and provid[ing] the record . . . to the complainant" within "the time allowed for service of an answer under Rule 12(a)(1)" of the civil rules, *i.e.*, twenty days after the defendant has been served with the complaint. 1 V.S.A. § 319(d)(2).[4] That did not happen in this litigation. Here, the defendants did not surrender the records that Ms. Duffort sought until May 19, 2017, nearly ten months (303 days) after service of the Complaint. Reimbursement of the plaintiff's costs and fees is therefore mandatory so long as Ms. Duffort can be deemed to

[4]If the agency does so, an award of costs and fees to the requester becomes discretionary rather than mandatory. 1 V.S.A. § 319(d)(2).

have substantially prevailed.

A. Ms. Duffort Substantially Prevailed When This Court Granted Her Motion on the Pleadings and Ordered Surrender of the Records She Requested

The Vermont Supreme Court has interpreted the question of identifying the substantially prevailing open records litigant as being one of causation. In *Burlington Free Press v. University of Vermont*, the Court held that a requester has substantially prevailed in a Public Records Act enforcement action when the litigation (1) "was necessary to obtain the requested documents," and (2) had the result of dislodging some of the records. 172 Vt. 303, 307 (2002). Both factors are true here.

Ms. Duffort could not have obtained the records without litigation because the defendants repeatedly denied her requests upon an unfounded theory that they would have to create a new record. For months Ms. Duffort attempted to work with the defendants' staff to receive school-by-school data records. She was denied at every turn.

Five months after her initial request, Mr. Duffort made her final request for a compilation of school-by-school HHB data records through her counsel. Even after Ms. Duffort's counsel provided a five-page letter and legal memorandum describing the longstanding principle that "extracting and compiling [ ] data does not amount to the creation of a new record," the agency still denied access. *See* Attachment D (citing *Schladetsch*, 2000 WL 33372125, at *3 (requiring extraction and compilation of data records under FOIA)). Defendants' counsel responded with two sentences: "[Y]our records request would require the creation of new records that do not currently exist. We decline to create these records." *See* Attachment E. Ms. Duffort's appeal to the Secretary of Education was also denied without reference to Ms. Duffort's legal arguments. The defendants could not be convinced without litigation.

It was only during oral argument on Ms. Duffort's motion for judgment on the

pleadings that the defendants conceded that the data sought were public records. During the argument, this Court expressed serious concerns about the defendants' withholding of public records. One month later (three days before the publication of this Court's Order granting judgment to Ms. Duffort), the defendants sent Ms. Duffort the requested compilation of HHB data records—nearly sixteen months after Ms. Duffort's initial request. The evidence and admitted facts could not be clearer: the defendants would never have provided Ms. Duffort with the responsive records without this suit and her affirmative motion for judgment on the pleadings.

In its ruling, this Court determined that the defendants violated the Public Records Act by failing to extract and compile data records in their possession. As a result, Ms. Duffort received the records she had sought. It is indisputable that this suit was necessary to obtain and did dislodge the requested records. Therefore, Ms. Duffort has substantially prevailed and this Court must "assess against the public agency reasonable attorney's fees and other litigation costs reasonably incurred." 1 V.S.A. § 319(d)(1).

B. Ms. Duffort's Fees and Costs are Reasonable

The "lodestar figure" is the most useful starting point to calculate an award of attorneys' fees. *L'Esperance v. Benware*, 2003 VT 43, ¶ 22. The "lodestar figure" is "the number of hours reasonably expended on the case multiplied by a reasonable hourly rate." *Id*. In determining what amount is reasonable, trial courts have the discretion to consider such factors as "the novelty of the legal issue, the experience of the attorneys involved, and the results obtained in the litigation." *Id*. However, the question "is not whether the attorney's fee award is proportional to the damages, but rather whether the fee award is reasonable given the demands of the case." *Kwon v. Eaton*, 2010 VT 73, ¶ 20.

Ms. Duffort has substantially prevailed in this public records case. The records sought have been dislodged in the compiled form she requested, according to court ruling. Her attorneys spent a substantial amount of time researching her claims and provided legal analyses to the defendants' counsel in an effort to avoid litigation. *See* Attachment D. The defendants chose to not engage regarding the relevant legal precedent or Public Record Act provisions. *See* Attachment E. In addition, Ms. Duffort has attached affidavits from her attorneys in this matter describing their significant experience, expertise, efforts, fees, and costs. *See* Attachments A and B. Ms. Duffort's costs and fees request is eminently reasonable.

Should the defendants dispute the reasonableness of her attorneys' fees as described in the affidavits, "the record is often best served on the issue of reasonableness by the receipt of expert testimony from independent counsel." *Bruntaeger v. Zeller*, 515 A.2d 123, 128 (Vt. 1986). Ms. Duffort has attached an affidavit from an independent experienced attorney who has litigated public records cases in Vermont. *See* Attachment C. The affidavit attests to the reasonableness of the fees incurred by Ms. Duffort's counsel "given the amount of work, complexity of the issues involved, and painstaking efforts to resolve the matter without filing a Complaint, and subsequently without the need for a fees and costs motion." *Id*. ¶ 8. The affidavit also attests to the reasonableness of Ms. Duffort's attorneys' hourly rate as "very reasonable and commensurate with their experience in public records matters, the skill level displayed by the attorneys, the amount of responsibility assumed by the attorneys in connection with the matter, and as compared to other similarly experienced and skilled attorneys in Vermont." *Id*. ¶ 7.

Lastly, Ms. Duffort's voluntary dismissal of two of her five claims in this case does not affect her entitlement to the full measure of her reasonable costs and attorneys' fees.

"Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have [ ] attorney's fee[s] reduced simply because the trial court did not adopt each contention raised." *Human Rights Comm'n v. LaBrie, Inc.*, 668 A.2d 659, 669 (Vt. 1995). In this case, Ms. Duffort substantially prevailed on the merits of her legal argument regarding the heart of the case—the disclosure of a compilation of data records. And, importantly, none of her claims were substantively disputed by the Court or the defendants. Although claims 4 and 5 have not been considered by the Court, Ms. Duffort moves to dismiss them because she has accomplished all she sought to accomplish and sees no added benefits in expending the parties', the attorneys', and the Court's resources on those claims. In accordance with Vermont precedent and in the interests of judicial economy, her attorneys' fees should not be reduced as a result of her voluntary dismissal of two related but lesser claims.

IV. Conclusion

Because the defendants failed to surrender the records at issue to Ms. Duffort prior to their answer deadline, and because Ms. Duffort substantially prevailed by forcing the disclosure of the records she requested, Ms. Duffort is entitled to recoup the reasonable costs and fees in the itemized bills attached her counsels' affidavits.

_____/s/ Lia Ernst_____
Lia Ernst
ACLU Foundation of Vermont
137 Elm Street
Montpelier, VT 05602
(802) 223-6304
lernst@acluvt.org

_____/s/ James Diaz_____
James M. Diaz, Esq.
ACLU Foundation of Vermont
137 Elm Street
Montpelier, VT 05602
(802) 223-6304

Counsel for Lola Duffort
October 31, 2017

jdiaz@acluvt.org