VERMONT SUPERIOR COURT

RUTLAND UNIT CIVIL DIVISION

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

STATE'S REPLY TO PLAINTIFF'S MOTION FOR PARTIAL DISMISSAL, ATTORNEYS' FEES and COSTS

NOW COMES the Vermont Agency of Education and the Vermont State Board of Education (the State), by and through Attorney General Thomas J. Donovan, Jr., and responds to Plaintiff's Motion for Partial Dismissal, Attorneys' Fees, and Costs. The State has no objection to Plaintiff's Motion for Partial Dismissal, but opposes the Motion for Attorneys' Fees and Costs as unreasonable and excessive.

I. Introduction

This case arose because the reports Plaintiff requested on hazing, harassment, and bullying did not exist,[1] and the State exercised its right under the Public Records Act not to create public records. The question in this case was whether and how the underlying data in the State's incident reporting database could be produced as public records, with FERPA-

[1] The State Board of Education is required by statute to create annual reports on hazing, harassment, and bullying incidents, both statewide and school-by-school. 16 V.S.A. § 164(17). The Board created the statewide reports and provided them to Plaintiff, but had not created school-by-school reports at the time suit was filed. As a practical matter, much of the information in the school-by-school report is protected by the federal Family Educational Rights and Policy Act (FERPA), so many data cells must be suppressed. Despite the requirement in Title 16, these reports did not exist until May 2017.

protected data suppressed. When the State saw that the data existed in a .txt format, it voluntarily offered to provide the data to Plaintiff. No court decision was necessary.

The State volunteered to provide the data – and created and provided the reports – before any input from the court.

The court ruled that the State has an obligation to "extract and compile" data from its database, and granted Plaintiff's motion. At least in some respects, Plaintiff has substantially prevailed and is entitled to reasonable fees and costs to that extent. However, Plaintiff's request for attorneys' fees and costs is excessive.

The State respectfully requests that the court limit any award to the reasonable fees and other litigation costs reasonably incurred in this matter.

II. Background

In February 2016, Plaintiff requested school-by-school reports of hazing, harassment and bullying incidents for three school years from 2012 through 2015. After the State responded that it did not have the requested school-level reports, Plaintiff requested the underlying data. The State responded that it did not have the data, which are provided on an annual basis by Vermont schools, because the transitory records from the schools are destroyed after the data is uploaded to the Agency's incident reporting system. Plaintiffs brought suit in July 2016, and moved for partial judgment on the pleadings in December 2016.

As the State explored settlement options, it discovered that records of raw data received from the schools were available in .txt format and provided a sample page to Plaintiff on April 6, 2017. **Exhibit A.** Although the data files were largely incomprehensible, the State conceded that they were public records.

On April 17, 2017, the court heard oral argument on Plaintiff's Motion for Partial Judgment on the Pleadings. At the argument, the State informed the court that the data files were available and could be provided to Plaintiff. The State also stated that it would create a key to use in deciphering the .txt files. The court asked Plaintiff if the data and the key would be sufficient to resolve the case, and Plaintiff asked the court to issue a decision on the pending motion.

After oral argument, the State opted to create the school-level reports Plaintiff had requested originally. On May 19, 2017, the State provided these reports, with FERPA redactions, to Plaintiff in lieu of the data .txt files. **Exhibits B1 and B2 (email and attachment).**

The court issued its decision on May 23, 2017, granting Plaintiff's Motion for Partial Judgment on the Pleadings, on Counts I – III of the Complaint. On June 12, 2017, the State provided Plaintiff with a formal records response letter, **Exhibit C,** and another copy of the school-by-school reports. To date, Plaintiff has not appealed that response.

Plaintiff now moves for attorneys' fees and costs, and seeks dismissal of the remaining counts in her Complaint: Count Four – Failure to Meaningfully Consult, and Count Five – Failure to Provide Notice. The State does not object to dismissal of these claims. The State objects to the motion for fees and requests it deny it as unreasonable and excessive.

III. Plaintiff's Motion for Attorneys' Fees and Costs

Plaintiff seeks $37,054.33 in attorneys' fees, plus $449.20 in costs. The Public Records Act provides for "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). Thus, the Plaintiff bears the burden of demonstrating:

(1) that she "substantially prevailed" in litigating this matter; and

(2) that the claimed fees and costs are reasonable, considering:

a. the reasonableness of the hourly rate(s); and

b. whether the fees and costs were "reasonably incurred" in the instant litigation.

Each element is discussed in turn.

A. Substantially Prevailed

Whether the Plaintiff has substantially prevailed in this case is the threshold test for the Court's determination of any award of a reasonable fee. A claimant has substantially prevailed if he or she proves that the lawsuit "could reasonably be regarded as necessary" to obtain the requested records, and that the litigation had a "substantial causative effect on the release of the documents." *Burlington Free Press v. University of Vermont,* 172 Vt. 303, 305, 779 A.2d 60, 63 (2001) (citing *Chesapeake Bay Found. v. United States Dep't of Agric.*, 11 F.3d 211, 216 (D.C.Cir. 1993); *Abernethy v. I.R.S.*, 909 F.Supp. 1562, 1567 (N.D. Ga. 1995)). The Court takes a "flexible and reasoned approach" to determine the substantially prevailing party, based upon who "achieved a 'comparative victory' on the issues actually litigated . . . ." *Burton v. Jeremiah Beach Parker Restoration and Const. Management Corp.*, 2010 VT 55, ¶ 8, 188 Vt. 583, 585, 6 A.3d 38, 41 (citing *Fletcher Hill, Inc. v. Crosbie*, 2005 VT 1, ¶ 8, 178 Vt. 77, 872 A.2d 292). Although Plaintiff received the reports prior to any court order, and although Plaintiff now seeks to dismiss the remaining counts of the complaint, Plaintiff did obtain the records and then a favorable decision on several counts. Thus, she may have substantially prevailed in at least some aspects of the litigation. "[T]he question of whether any party to a lawsuit substantially prevailed is left to

the trial court's discretion." *Birchwood Land Co., Inc. v. Ormond Bushey & Sons, Inc.*, 2013 VT 60, ¶ 31, 194 Vt. 478, 494, 82 A.3d 539, 550 (affirming trial court decision not to award attorney's fees under the Prompt Payment Act to contractor where contractor's right to payment was not contested) (quoting *Fletcher Hill, Inc. v. Crosbie*, 2005 VT 1, ¶ 8, 178 Vt. 77, 872 A.2d 292). However, even to the extent that the court determines that Plaintiff meets the threshold requirement of entitlement to fees or costs, it should award only those fees and costs that were reasonably incurred in litigating the public records case.

B. Plaintiff's Claim for Attorneys' Fees is Excessive

The Public Records Act includes a mandatory provision for attorneys' fees and costs. 1 V.S.A. § 319(d)(1). By its own terms, the statute authorizes only "reasonable attorney's fees and other litigation costs reasonably incurred in any case under this section." *Id.* Thus, even though the law mandates an award of fees and costs to the substantially prevailing party, Plaintiff can only recover the fees that are reasonable, and that were reasonably incurred in litigating the lawsuit.

Plaintiff's claim for costs of filing, mailing, and travel appear reasonable and reasonably incurred. But, as set forth below, a significant portion of the fees claimed were not for work necessary to the litigation of this lawsuit for production of agency records. Such fees should be denied as excessive and unreasonable.

It is well-established in Vermont that trial courts have broad discretion to determine reasonable attorney's fees. *Perez v. Travelers Ins. ex rel. Ames Dep't Stores, Inc.*, 2006 VT 123, ¶¶ 8-9, 181 Vt. 45, 49–50, 915 A.2d 750, 754 (2006) (citing *Electric Man, Inc. v. Charos*, 2006 VT 16, ¶ 6, 179 Vt. 351, 895 A.2d 193; *L'Esperance v. Benware*, 2003 VT 43, ¶ 21, 175 Vt. 292, 830 A.2d 675; *Gramatan Home Investors Corp. v. Starling*, 143 Vt. 527,

535-36, 470 A.2d 1157, 1162 (1983)); accord *Bonanno v. Verizon Bus. Network Sys*, 2014 VT 24, ¶ 23, 196 Vt. 62, 93 A.3d 146; *Parker, Lamb & Ankuda, P.C. v. Krupinsky*, 146 Vt. 304, 307, 503 A.2d 531, 533 (1985) (observing that trial court enjoys "wide discretion in fixing the reasonable value of legal services"); *see also, McKinstry v. Fecteau Residential Homes, Inc.*, 2015 VT 125, ¶ 12, 200 Vt. 392, 398, 131 A.3d 1123, 1129.

To determine whether fees are reasonable, courts generally begin by determining "the number of hours reasonably expended ***on the case*** multiplied by a reasonable hourly rate." *Perez*, 2006 VT 123, ¶ 10, 181 Vt. 45, 49–50, 915 A.2d 750, 754-55 (quoting *L'Esperance*, 2003 VT 43, ¶ 21, 175 Vt. 292, 830 A.2d 675) (emphasis added). This is referred to as the "lodestar" test. *Perez*, 2006 VT 123, ¶ 3, *L'Esperance*, 2003 VT 43, ¶ 22; *see also, Human Rights Comm'n v. LaBrie, Inc.*, 164 Vt. 237, 250, 668 A.2d 659, 668 (1995) ("Fee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims."). The number of hours claimed here – approximately 188.9 hours – is excessive, as discussed below.

1. Hours not Reasonably Incurred in the Lawsuit Should be Excluded

Plaintiff's claim for attorneys' fees is excessive because it includes fees for hours not "reasonably incurred" in prosecution of the case. The billing statements appended to Plaintiff's Motion as Exhibit 1, Attachments A and B reflect substantial fees for work related to the record requests well prior to any work related to legal action, excessive hours on specific tasks once work on the lawsuit commenced, and fees for incurred after the records were produced, including thousands of dollars spent on activity in settlement negotiations. Hours that are "excessive, redundant, or otherwise unnecessary" should be

excluded from Plaintiff's claim. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (deciding attorneys' fee claim in civil rights case). The hours claimed should be reduced to those reasonably incurred in advancing any successful claims in this lawsuit.

Approximately 37.85 hours of attorney time was claimed for services related to the records requests and appeal, provided prior to any work on the lawsuit. Exhibit 1, Attachment A. These hours were not incurred in litigation, so should be disallowed. The plain language of the Public Records Act provides for "reasonable attorney 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) (emphasis added). Fees incurred in making or assisting with the request or the administrative appeal should not be included.

Plaintiff claims fees for over 30 legal and clerical hours for preparing the representation agreement and complaint. A fee award should be reduced for excessive time spent on a task. *See, e.g., Grisham v. City of Fort Worth, Texas*, 837 F.3d 564, 571 (5th Cir. 2016) (affirming determination that time spent by plaintiff's counsel was excessive, including 34.3 hours for preparation of the complaint, and remanded for the trial court to allow but reduce the fees accordingly). The court should exercise its discretion to disallow excessive and redundant hours spent on individual tasks.

There are also hours claimed for work outside of the case: Plaintiff seeks over 30 hours of attorney time spent on settlement, over two-thirds of which were incurred after the State provided Plaintiff with the reports. While settlement is laudable, these hours were not spent in legal action to "obtain the production of agency records," 1 V.S.A. § 319(a), and should not be included in an award of fees.

Similarly, other fees incurred after the State provided Plaintiff with the school-level reports should also be disallowed. It is clear from Plaintiff's motion to dismiss her remaining claims that she had obtain the records sought and the case could have been concluded after she received the records from the State. Fees incurred after that point – approximately 22.83 hours, in addition to the time spent on settlement negotiations after the records were provided – were not reasonably incurred in litigating to obtain the records.

Attorney's fees not reasonably incurred by litigating to obtain agency records are excessive and should be excluded from Plaintiff's claim.

2. Hourly Rate must be Reasonable

The trial court also has discretion to determine whether the hourly rate charged is reasonable, considering the facts and circumstances of each case. Factors may include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 717–19 (5th Cir. 1974). Other factors include the prevailing market rates in the jurisdiction for the type of work and experience level of the billing attorney, *Wells Fargo Bank v. Sinnott*, No. 2:07-CV-169, 2010 WL 297830 at *6 (D. Vt. Jan. 19, 2010) (citing *Cabrera v. Jakabovitz*, 24 F.3d 372, 392 (2d Cir. 1994); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County*

of Albany, 522 F.3d 182, 186-190 (2d Cir. 2008)); *see also Fine Foods, Inc. v. Dahlin*, 147 Vt. 599, 523 A.2d 1228, 1231–32 (Vt.1986) (factors in determining reasonableness of attorney's fees include the "nature and importance" of the case, billing counsel's "professional standing and attainments," usual fees charged for similar services in same vicinity and the same court).

There is no question that attorneys working for a nonprofit organization or the government are entitled to fees based on prevailing market rates. *LaBrie*, 164 Vt. at 250 (citing *Blum v. Stenson*, 465 U.S. 886, 888, 104 S.Ct. 1541, 1543, 79 L.Ed.2d 891 (1984)). However, the court may make its own determination of whether rates or hours are reasonable and has discretionary authority to adjust hours and rates it finds unreasonable under the circumstances. *See, Kwon v. Eaton*, 2010 VT 73, ¶ 22, 188 Vt. 623, 629, 8 A.3d 1043, 1050 (mem.) (noting that trial court is in the best position to evaluate the reasonableness of legal fees and is afforded substantial discretion).

Plaintiff has made no showing concerning the fee agreement in this case or what other clients have paid for these attorneys' services – or for other attorneys' legal services – in similar matters. The supporting affidavit from a private practitioner not engaged on this matter is conclusory and establishes only the affiant's opinion, without providing any detail, information or analysis to aid the court. For example, the affiant does not state his own billable or effective hourly rate, how many hours he billed and properly recovered in the Public Records Act matter he handled, his knowledge or experience in exercising billing judgment in work for clients in the relevant market or other hourly rates or practices of attorneys in central Vermont with four or six years' legal experience.

The court may exercise its discretion to determine whether the $200 hourly rate claimed here – or the number of hours incurred in litigation to recover records – is reasonable.

3. Court has Discretion to Determine Reasonable Award

It is important to note that even where a statute mandates fees to the substantially prevailing party, the trial court has wide discretion to determine the reasonable amount of fees. *See, e.g., L'Esperance,* 2003 VT 43, ¶ 22, 175 Vt. 292, 830 A.2d 675 (court applying mandatory fee provision in Consumer Protection Act can adjust lodestar amount based on various factors, including "the novelty of the legal issue, the experience of the attorney, and the results obtained in the litigation.").

For example, in *McKinstry v. Fecteau Residential Homes, Inc.*, the Vermont Supreme Court upheld the trial court's decision to award only $10,000 of a $69,614 fee claim under the Consumer Protection Act's mandatory fee provision. 2015 VT 125, ¶¶ 12-13. The Court held that the court below had correctly considered the result of the litigation in determining a reasonable fee award, and stated: "it is not within the court's discretion to determine whether to award such fees, but rather its task is to determine what constitutes reasonable fees in each instance." *Id.*, ¶ 13 (citing *L'Esperance,* 2003 VT 43, ¶ 21). Similarly, the Public Records Act mandates a fee award to the substantially prevailing party, 1 V.S.A. § 319(d)(1), but the trial court retains discretion in any given case to determine reasonable fees reasonably incurred in litigation.

The Superior Court, Civil Division, Washington Unit exercised such discretion in the *Prison Legal News* case to determine reasonable attorney's fees under the Public Records Act's mandatory fee provision. *Prison Legal News v. Corrections Corp. of America*, No.

332-5-13 Wncv, 2015 WL 5311513 *2 (Sept. 1, 2015) (Teachout, J.). As the court noted, the case concerned the novel issue of whether the defendant was subject to the Act, and there was "virtually no dispute over whether any particular document is subject to this or that exemption. Records were not withheld because the agency thought the records were exempt or because it knew that they were not exempt but resisted releasing them anyway." *Id.* Given the unusual and novel nature of the case, the court held that an award of the full amount of the fees claimed would not further the purpose of the mandatory fee provision, "to encourage agencies to respond to records requests promptly and properly and to eliminate any inducement to wrongly withhold publicly accessible information from those who are unable to afford an attorney." *Id.* The trial court in *Prison Legal News* awarded the substantially prevailing party 40% of the fees claimed. *Id.*

Here, the school-level reports Plaintiff requested did not exist at the time suit was filed, and the State did not withhold records under claim of exemption. By the time the court issued a decision, the State had created and produced the actual reports Plaintiff had originally requested. No court order was required for Plaintiff to obtain any of the records.

The issue of the underlying data is more complicated. Although not initially apparent, the data .txt files existed when Plaintiff filed suit. But the State produced a sample of these data files once they were discovered and offered to produce the rest, with a key, at oral argument on Plaintiff's Motion for Partial Judgment on the Pleadings. The question of the State's obligation to extract and produce data from government databases was also discussed at oral argument as presenting somewhat novel issues, and certainly was a focus of the court's decision on Plaintiff's Motion for Judgment on the Pleadings.

By creating the school-by-school reports, and by offering to provide the data files with a key with which to decipher the data, the State made strong effort to comply in good faith with its obligation under the Public Records Act and to resolve this matter.

The State asks that the Court consider these factors in its determination of what attorney's fees Plaintiff reasonably incurred in litigating this case to obtain public records.

IV. Conclusion

For the foregoing reasons, the State respectfully requests that the court deny or substantially reduce any award of fees in this action, and dismiss the remaining counts in this action.

DATED at Montpelier, Vermont this 15th day of November 2017.

STATE OF VERMONT
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