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

Reply in Further Support of Ms. Duffort's Motion for Attorneys' Fees and Costs

NOW COMES Plaintiff, Lola Duffort, by and through her attorneys, Lia Ernst and James Diaz, responding to the defendants' opposition motion to her motion for reasonable fees and costs. The defendants' objections to Ms. Duffort's motion for fees are without legal basis, would result in increased litigation and increased improper withholding of public records if accepted by this Court, and are based on an incorrect reading of the facts. Ms. Duffort is entitled to the fees and costs as described in her attorneys' itemized time records, and the defendants should be ordered to compensate them for their work, without which the public records at issue would never have been produced.

Memorandum of Law

I. The Defendants Knowingly Failed to Meet Legal Obligations to Produce Public Records

To make a long story short, since at least March of 2016, the Vermont Agency of Education ("the Agency") knew it had records containing the exact information Ms.

Duffort sought—school-by-school data reports of hazing, harassment, and bullying ("HHB") incidents. *See* Compl. Ex. N ("it would constitute the creation of new records to pull [school-by-school HHB data] together via a new query/report to respond to [Ms. Duffort's] request. We are prohibited from providing the raw databases and/or text files as they currently exist because they contain personally identifiable information."); *See* Compl. Ex. P (Agency's General Counsel confirming that the data records were in text (.txt) format and that the Agency annually imported these data records into its databases); *See* Comp. Ex V (the Agency's General Counsel again confirming that the school-by-school "incident data persist in the state-level database, [but] reside in separate database tables"). In complete disregard of this knowledge and Ms. Duffort's right of access under the Public Records Act, the Agency refused to provide those records—claiming they did not exist.

The State Board of Education ("the State Board"), an unfunded independent body staffed and supported by the Agency of Education, also knew it had a statutory obligation to create and publish a "school by school" report of hazing, harassment, and bullying incidents. *See* 16 V.S.A. § 164(17); Compl. ¶¶ 29, 107-08. In complete disregard of the law, the State Board ignored this statutory requirement and refused to provide that report upon Ms. Duffort's request. *See* Compl. ¶¶ 111-18.

The defendants' assertions, repeated throughout their opposition to Ms. Duffort's motion for fees, that the records Ms. Duffort sought "did not exist" at the time of her requests or were only "discovered" in April of 2017 are demonstrably false. Admitted documents in the record clearly show that Agency staff knew the Agency possessed records containing the information sought by Ms. Duffort, but still refused to provide these records until the eve of a court decision against them.

What's more, the defendants have already admitted to this Court that the Agency has

collected and possessed HHB Data records, the records Ms. Duffort sought, *for years*. Answer ¶¶ 15, 16, 24, 97; *see* Def.'s Opp. Mot. Ex. B2; *see also* Order on Pl.'s Mot. 3 ("Having reviewed the exhibits, the court finds the Plaintiff's allegations [regarding exhibits] to be accurate. Thus, most of the allegations of the complaint are admitted [by the defendant]."). This Court has also accepted the defendants' statements in attachments to the Complaint as admissions. And regarding Ms. Duffort's request for specific data to be extracted from public records and compiled for her review, this Court accepted as fact that the Agency "could extract and compile information responsive to Ms. Duffort's request from [its] electronic databases" at the time of her requests. Order on Pl.'s Mot. 3.

The Court should reject the defendants' attempt at revisionist history in opposition to admitted facts. If the Court does not grant Ms. Duffort's fee motion for the reasons specified in her opening motion and *infra*, this Court should provide those fees and costs to dissuade public agencies, in particular the defendants, from knowingly refusing *for over one year* to perform their legal duty to provide public information to the public upon request.

II. Ms. Duffort's Need for Legal Counsel and Litigation Is Supported by the Defendants' Repeated Refusals and Obstruction

This case arose because the defendants assiduously and repeatedly refused to provide public records in their possession, despite knowing the records were responsive to Ms. Duffort's requests. Ms. Duffort, a journalist employed at the time by the Rutland Herald, requested the Agency provide records showing the number of HHB incidents in each of Vermont's public schools. Annually, the Agency electronically collects these data from Vermont's public schools. Vermont statute requires the State Board to annually produce these data records in a publicly available "school by school" report on HHB. 16 V.S.A. § 164(17). Despite having these records, and despite being advised of their legal

obligations, Agency officials repeatedly refused to provide these public records to Ms. Duffort. Similarly neglectful of its legal obligations, the State Board never created the statutorily required HHB report.

Over the course of six months, Ms. Duffort showed the Agency and State Board the Public Records Act and Title 16 statutory requirements to produce the information she sought, and their own documents stating that they annually collect the data records she sought. Her first formal request stated "[t]his is a public records request[] . . . for the data collected by the Agency of Education . . . regarding the number of reported bullying incidents and the number of verified incidents." *See* Compl. ¶ 56, Ex. G. This request was denied for multiple demonstrably false reasons—no such record exists, such records would be fully redacted if produced, the defendants would have to "create" the records to produce them. *See* Compl. ¶¶ 57-69, Ex. G Ms. Duffort repeatedly rephrased her requests in an effort to dispel any possible confusion regarding her request. The denials kept coming—from the Agency's Public Records Officer, General Counsel, and the Secretary of Education—even though the Agency admitted to collecting and receiving HHB data records from every public school in Vermont. *See* Compl. Exs. E-I, J, L. Needless to say, the repeated denials were perplexing.

After being turned away for the seventh time, Ms. Duffort contacted undersigned counsel for assistance. Her attorneys attempted to resolve the dispute informally through phone calls and email. Upon the request of the Agency's General Counsel, they wrote a letter with relevant questions to the Agency. In response to these written questions, the Agency's General Counsel admitted that the Agency had the data records Ms. Duffort sought, but refused to produce the data records with redactions[1] or to

[1] At oral argument on April 17, 2017, the defendants finally admitted that they were legally required to provide responsive documents in their possession, with redactions if applicable. The legal requirement to redact and produce public records with exempt material can be found at 1 V.S.A. § 318(e).

extract and compile data therefrom. *See* Compl. Ex. P.

One June 15, 2016, Ms. Duffort, through her counsel, submitted her final records request. Compl. Ex. X. The five-page request included a thorough legal analysis of the longstanding caselaw making clear that 1) extracting and compiling data from a database is not the creation of a new record, and 2) records containing the information sought by Ms. Duffort must be produced, even if some portion may be redacted under a statutory exemption. In response, and without so much as acknowledging the legal analysis, the Agency sent a two-line email repeating its incorrect mantra—Ms. Duffort's request would require the creation of new records and the Agency opts to not create them. *See* Compl. Ex. Y. A written appeal to the Secretary of Education was similarly denied, again without legal analysis. *See* Compl. Ex BB.

Ms. Duffort filed this action in July of 2016, the defendants filed a joint Answer, and Ms. Duffort filed her Partial Motion for Judgment on the Pleadings in December of 2016. On May 19, 2017, over a month after oral argument, and at the prodding of Ms. Duffort's counsel to honor their promise of disclosure made at oral argument, the defendants finally provided the records Ms. Duffort sought since January of 2016. *See* Def.'s Opp. Mot. Ex. B1.

III. Ms. Duffort's Attorneys' Fees Are Reasonable and the Defendants Have Made No Showing Otherwise

The Public Records Act states that "the 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). It is undisputed that Ms. Duffort substantially prevailed in this case, but the defendants claim that Act limits the award of attorneys' fees to work performed "in litigation"–that is, on nothing outside of the work required actually on and during the judicial action. *See* Def.'s Mot. Opp. 7, 10. But, the statute does *not* refer to fees

expended "in litigation." In fact, the statute is largely silent on what constitutes attorney work and costs "reasonably incurred in the case." Thankfully, for decades, courts around the country have decided that where statutes provide attorneys' fees for work "reasonably expended on the litigation" or "related to the litigation," courts can, and in some cases must, award attorneys' fees for work "outside" of the judicial action.

Despite the admitted facts showing that the Agency had the records Ms. Duffort sought all along, the defendants, largely without legal citation, challenge the reasonableness of Ms. Duffort's attorneys' fees. The defendants fail to provide any evidence to overcome the two affidavits with itemized billing records provided by Ms. Duffort's attorneys and the affidavit from independent counsel describing the reasonableness of her attorneys' fees. Nonetheless, the defendants question the fees' reasonableness on four bases:

1) Representation in administrative complaint processes and pre-complaint legal work were not "incurred in the lawsuit,"
2) Representation in post-motion for judgment settlement negotiations were "outside the case,"
3) Ms. Duffort's attorneys' hourly rate and hours expended on certain tasks were "excessive,"
4) Ms. Duffort's request presented "somewhat novel issues."

Defendants' asserted arguments are legally and factually meritless. As discussed *infra*, Ms. Duffort's attorneys are entitled to reasonable fees for work done before and after the receipt of the records sought in this case. Moreover, the defendants' proposed conclusions would discourage proper requests for records and disincentivize settlement, while increasing litigation and litigation costs.

As a preliminary matter, this Court has acknowledged that the Agency had the

sought-after records all along, and therefore should award reasonable fees incurred because the Agency unnecessarily caused and prolonged the litigation. Repeatedly, the defendants' falsely claimed they did not have records that were responsive to Ms. Duffort's requests, despite knowing they possessed responsive data records. The defendant's also claimed they were under no obligation to extract and compile the data records requested by Ms. Duffort, despite being shown the longstanding caselaw and clear statutory language making it clear that they had exactly that obligation. Without these falsehoods, the defendants would have had no choice but to produce the records in its possession. The defendants' fraudulent denials of valid public record requests unnecessarily required legal counsel and litigation. On this basis alone they should be liable for attorneys' fees because they unnecessarily prolonged the case. *See In re Appeal of Helen Gadhue*, 149 Vt. 322, 328-29 (1987).

A. Pre-Complaint Attorney Time Is Included in Attorney Fee Calculations Where the Work Is Related to the Litigation

For purpose of awarding attorneys' fees in Vermont, "the touchstone is reasonableness." *Perez v. Travelers Ins. ex rel. Ames Dep't Stores, Inc.*, 2006 VT 123, ¶ 13. To be reasonable, "time entries must be accurate and allow the court to assess whether the work performed was *related to* the litigation." *Id*. (emphasis added). A reasonable "proffered fee encompasses all hours *reasonably expended* on the litigation." *Kwon v. Eaton*, 2010 VT 73, ¶ 22 (emphasis in original) (internal quotation marks omitted). Similarly, the U.S. Supreme Court found that a prevailing party is entitled to compensation for time "reasonably expended *on the litigation*." *Webb v. Board of Educ. of Dyer County*, 471 U.S. 234, 242 (1985) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)) (emphasis added). Time is reasonably expended "on the litigation" when it is

"useful and of a type ordinarily necessary to secure the final result obtained from the litigation." *Penn. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561 (1986). No Vermont case describes what "related to the litigation" or "reasonably expended on the litigation" signify with regard to attorney work required during mandatory prior administrative proceedings when the statute is silent. However, other courts, including the U.S. Supreme Court, view such attorney work as "reasonably expended on the litigation," and therefore compensable.

In *Webb*, a § 1983 suit, the U.S. Supreme Court agreed that services performed before a lawsuit is formally commenced can be performed "on the litigation." 471 U.S. at 243. In *Webb*, a teacher sought attorneys' fees for the entirety of work completed in "*optional* administrative proceedings" that occurred between two and five years *before* the litigation was commenced. *Id*. at 242 (emphasis added). Although finding it within the discretion of the district court to deny the plaintiff's *entitlement* to attorneys' fees for pre-litigation optional administrative proceedings, the Court emphasized how "[t]he petitioner made no suggestion that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the . . . litigation to the stage it reached." *Id*. at 243. Going further, the Court specifically named "work associated with the development of the theory of the case" and "drafting of the initial pleadings" as among the most "obvious examples" of pre-litigation work that is performed "on the litigation." *Id*. And, the Court highlight that,unlike the plaintiff in *New York Gaslight Club, Inc. v. Carey* who was awarded attorneys' fees for the pre-litigation exhaustion of statutorily required administrative remedies, Webb had no statutory requirement to exhaust administrative remedies before filing the court action. *Id*. at 240-41 n.17.

Since *Webb*, courts around the country have repeatedly reviewed whether pre-

litigation attorney work was "useful" and "ordinarily necessary to advance" the litigation to determine whether pre-litigation attorneys' fees were awardable as work performed "on the litigation." *See Sierra Club v. U.S.Envtl. Prot. Agency*, 625 F. Supp. 2d 863, 871 (N.D. Cal. 2007); *Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608, 630 (6th Cir. 2013); *Lambert v. Fulton County, Ga.*, 151 F. Supp. 2d 1364, 1371-73 (N.D. Ga. 2000); *Watkins v. Fordice*, 7 F.3d 453, 458 (5th Cir. 1993). Compensable activities can include services in preparation for filing the lawsuit, background legal research, attorney discussions and strategy sessions, negotiations, and routine activities such as making phone calls and reading correspondence related to the case. *Lambert*, 151 F. Supp. 2d at 1369-70 (citing federal Supreme, Circuit, or District Court cases for each proposition). Most importantly, where a law requires the exhaustion of administrative steps before filing the subsequent action in court, reasonable pre-litigation attorneys' fees are an entitlement. *Sierra Club*, 625 F. Supp. 2d at 870-71.

For instance, in *Sierra Club*, the Clean Air Act required sending a letter describing a violation to the EPA agency head as a prerequisite to filing suit under the Act. In preparing to draft that letter, the Sierra Club's attorney conducted necessary background research into the regulatory and legal landscape and investigated relevant facts. The Northern District of California awarded fees for the preparatory and drafting work because preparing the notice was "necessary to the filing of" the lawsuit—distinguishing the case from *Webb*'s lack of a fee award for time spent on "*optional* administrative proceeding[s]." *Id*. at 870; *but see also Alvarez v. Haywood*, No. 1:06-cv-745, 2011 WL 13130851, at *8 (N.D.N.Y. Aug. 29, 2011) (awarding attorneys' fees for "advising" Plaintiff in pre-litigation labor arbitration because, although not a statutory prerequisite to filing suit, it was a "related administrative proceeding" that "advanced" the subsequent litigation)

The situation here is almost identical to that in *Sierra Club*. Ms. Duffort's requested pre-litigation fees are for attorney advice and representation in mandatory administrative proceedings that were "necessary to the filing of" the lawsuit. Like the Clean Air Act's violation letter requirement, the Public Records Act requires a "person [be] aggrieved by the denial of a request for public records" as a prerequisite to filing an action in the Vermont Superior Court. 1 V.S.A. § 319(a). The Public Records Act contains a statutorily designated two-step process for making requests for public records before filing litigation: 1) an initial request for records, and 2) an appeal to the head of the public agency for any adverse determination. *Id*. at § 318(a). Because these administrative steps are prerequisites to filing suit, they are clearly "of a type ordinarily necessary to advance the" litigation, and thus "reasonably incurred in [the] case." This Court should follow other courts, not punish Ms. Duffort for seeking the assistance of an attorney in mandatory administrative proceedings, and provide fees for the attorneys' work as clearly "necessary" to the subsequent litigation—especially here where the Agency had no justifiable reason to withhold public records in their entirety.

The Court should also find Ms. Duffort's counsel's pre-filing investigatory and complaint drafting work to be part of the "development of the theory of the case." *Webb*, 471 U.S. at 243. There can be no serious argument that the drafting of the Complaint is not work performed "on the litigation," and the defendants offer none. *See* i*d*. Furthermore, it is obvious that "some investigation and research must be done [before filing a complaint] to comply with Rule 11(b)" because failure to do so may subject an attorney to sanctions. *Sierra Club*, 625 F. Supp. 2d at 870. Although "Rule 11(b) does not require that investigation costs be reimbursed . . . the Rule does provide guidance as to what investigation or pre-litigation activities are reasonable." *Id*. Thus, in *Sierra Club*, preparatory investigation, background research, and other tasks "vital in ascertaining

the scope of the issues" were deemed essential to the "development of the theory of the case." *Id*. at 871. Additionally, in *Alvarez*, the Northern District of New York awarded attorneys' fees for pre-litigation time spent drafting internal memoranda regarding whether plaintiff's counsel's firm should take the case, deeming the charges to "fall[] under the category of developing a theory of the case." 2011 WL 13130851, at *8.

In addition to time spent drafting the Complaint and representing or counseling Ms. Duffort in mandatory administrative proceedings, Ms. Duffort's attorneys' time records show pre-filing investigatory tasks that were crucial to the development of the theory of the case and in drafting the Complaint itself. These tasks include phone calls with Ms. Duffort, reviewing and drafting correspondence with the defendants, and researching and writing legal memoranda for both her attorneys' firm leadership to determine whether to take her case and to support Ms. Duffort's records request. These are exactly the types of tasks courts have viewed as necessary for the "development of the theory of the case." *See Webb* 471 U.S. at 243; *Sierra Club*, 625 F. Supp. 2d at 869; *Alvarez*, 2011 WL 13130851, at *8; *N.Y. State Ass'n for Retarded Children v. Carey*, 711 F.2d 1137, 1146 (2d Cir. 1983) (affirming compensation for background research because it was "essential" to plaintiff's success).

Ms. Duffort is entitled to fees for her attorneys' research and preparatory work throughout the pre-litigation process, even though it was originally done to prepare thorough public records requests, because that work would have otherwise been necessary to prepare the complaint. Ms. Duffort should not be punished for seeking to provide legal analysis to an apparently ignorant or unconcerned Agency in her effort to avert unnecessary litigation. Her efforts, before and after acquiring legal representation, assiduously sought to avoid conflict by collegially asking questions of the Agency, providing written questions upon request from the Agency, and providing an in-depth

legal analysis of her right to access the requested public records. To deny fees for time spent on necessary and useful pre-litigation work designed to prevent litigation would both encourage public agencies to make baseless denials and perversely punish thorough requestors while rewarding those who would move quickly toward litigation. In the interests of good practice, encouraging the collegial Vermont way, and judicial economy, this Court should award full fees for Ms. Duffort's attorneys' pre-litigation work in this case.

B. Attorney Time on Settlement Negotiations Is Time Spent "on the Litigation"

The defendants next claim, without legal citation, that attorney time expended representing Ms. Duffort in negotiations to settle her lawsuit was not "reasonably incurred in litigating to obtain the records." Defs.' Opp. Mot. 8. Of course, this standard is not found in the Public Records Act, and even so, the Vermont Supreme Court has agreed that attorneys' fees should be awarded for settlement negotiations on policy grounds. Each point is discussed in turn below.

The defendants claim that 1 V.S.A. § 319(a) precludes attorneys' fees after an agency provides the requested records. However, contrary the defendants' inapposite citation to 1 V.S.A. § 319(a), as discussed *supra*, this section only describes the necessity of administrative exhaustion before filing an action to "order the production of agency records improperly withheld." It does not reference fees and costs. In fact, the Act does not expressly preclude attorneys' fees in any section.[2]

[2] The Act does include a limited circumstance where attorneys' fees transition from mandatory to discretionary. The award of attorneys' fees becomes discretionary upon the combination of three circumstances: 1) the public agency concedes the contested records are public, 2) the public agency provides the records, *and* 3) the public agency completes steps 1 and 2 "within the time allowed for service of an answer under V.R.C.P. 12(a)(1)." 1 V.S.A. § 319(d)(2). Even where those circumstances all apply, fees are still awardable. *Id*. Regardless, in this case, the

The Vermont Supreme Court has expressly allowed and encouraged recovery of fees for representation in alternative dispute resolution ("ADR"). *Electric Man, Inc. v. Charos*, 2006 VT 16, ¶¶ 14-15. In *Electric Man*, the Court overturned a trial court's refusal to award attorneys' fees associated with mandatory or voluntary mediation. *See generally id.* As a matter of public policy, the Court justified an entitlement to fees for representation in ADR because denial would discourage voluntary participation or encourage only minimal participation in mandatory ADR. *See id.* at ¶ 15. ADR is an inherently valuable part of litigation in Vermont. It is required in many types of civil cases. *Id.* Achieving voluntary settlement without trial and with as little litigation expense as possible supports judicial economy and compromise over the litigiousness common in other states. *See id.*

For these same reasons, this Court must provide Ms. Duffort's attorneys' fees for representation in six months of voluntary negotiations that sought to settle this dispute without additional litigation. Although the requested records were eventually provided and judgment was received on Counts 1-3, there were still two claims remaining to be litigated. In addition, there was still the attorney's fee motion, as contemplated in the statute, that remained a part of the case. To ensure that good-faith settlement negotiations remain a vibrant part of practice in Vermont, particularly in Public Records Act suits, Ms. Duffort should receive her attorneys' fees and costs for representation in good faith negotiations that sought to avert additional litigation over remaining claims, fees, and costs.

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defendants did not provide the records "within the time allowed for service of an answer." Therefore, the timing of the production of records is irrelevant to the award of attorneys' fees. Furthermore, it is not clear that defendants have ever conceded that the requested compilation of data records in their possession is a public record they were required to produce.

C. The Defendants Have Not Presented a Shred of Evidence to Impugn the Reasonableness or Counter the Evidence Supporting Ms. Duffort's Attorneys' Rate and Time Spent on Tasks

The defendants challenge the number of hours associated with the drafting of the complaint and Ms. Duffort's counsel's hourly rate as "excessive." Def.'s Opp. Mot. 7-8. If attorneys' fees are in dispute, "the record is often best served on the issue of reasonableness by the receipt of expert testimony from independent counsel." *Bruntaeger v. Zeller*, 147 Vt. 247, 255 (1986). The determination of whether rates and hours expended are reasonable is largely within the trial court's discretion, and counsel seeking fees "has the burden to provide evidence of services upon which value can be determined." *Id*. at 254. The credibility and weight given to such evidence are determinations committed to the trial court's discretion. *L'Esperance v. Benware*, 2003 VT 43, ¶ 28.

In *L'Esperance*, the Vermont Supreme Court affirmed the trial court's fee award based upon the fee requestor's itemized billing records and testimony from an experienced litigator that the submitted attorney invoice was "very reasonable." *Id*. The Court deemed this to be "sufficient evidence upon which the trial court could make its decision." *Id*. However, in *Bruntaeger*, where the plaintiff merely submitted a bill that detailed work performed but not the amount of time devoted to each enumerated task, and there was no testimony from counsel or witnesses called to establish the reasonableness of the bill, the Court found the evidence insufficient to establish the reasonableness of the fees. 147 Vt. at 255.

In this case, Ms. Duffort's counsel have each submitted affidavits attesting to their experience, expertise, hourly rate, and the number of hours spent in representation of Ms. Duffort in this matter. These affidavits included attested-to copies of each attorney's itemized time and cost records with the amount of time devoted to each enumerated

task. Ms. Duffort also attached the affidavit of an independent attorney, Anthony Iarrapino, experienced in Vermont litigation and public records suits. Mr. Iarrapino attested to the reasonableness of Ms. Duffort's counsel's rate of $200 per hour and total fees (and by extension total hours) related to her case. Moreover, Ms. Duffort has attached the Vermont Department of Labor's 2017 statutory fee schedule increase (raising the statutory attorney fee to $205.00 per hour and paralegal fee to $75.00 per hour) for representation of an injured worker who substantially prevails in a workers' compensation case. *See* Attachment B regarding WC Rule 20.1340. The evidence provided by Ms. Duffort's counsel shows the reasonableness of the number of hours spent on her complaint and the attorneys' hourly rate.

On the other side of the ledger, the defendants have not provided any evidence whatsoever to challenge the hourly rate or support their claim of excessiveness. The defendants have not provided their own attorneys' time records, hourly rate, or total time spent on the case. They have not provided affidavits from their own counsel or independent counsel regarding the reasonableness of an attorney's hourly rate, or a reasonable amount of time to spend crafting a complaint of this complexity. Instead they offer baseless assertions and inapposite case citations.

For instance, in claiming that 30.3 hours spent preparing the complaint and drafting the representation agreement is excessive, the defendants cite *Grisham v. City of Fort Worth, Texas,* 837 F.3d 564, 571 (5th Cir. 2016). The defendants say this case found that 34.3 hours on a complaint is excessive. Defs.' Opp. Mot. 7. But, the Circuit Court, as is customary in attorneys' fee appeals, simply decided not to disturb the district court's finding on excessiveness. The Fifth Circuit then remanded because the lower court actually denied *all* fees related to preparing the complaint on the basis of excessiveness. The decision says nothing about *how* to determine excessiveness. Importantly, the

determination of excessiveness at the District Court was based on a very particular set of facts.[3] Failing to provide any relevant caselaw or evidence, the defendants cannot overcome the evidence provided by Ms. Duffort.

Even if 30.3 hours spent drafting on a complaint and a retainer agreement could be excessive in some cases, it was not in this case. Although Ms. Duffort's counsel regrets the mixing in one time entry of drafting the representation agreement and the complaint, the maximum time spent drafting the agreement is estimated to be two hours. This leaves 28.3 hours spent on the Complaint. In an effort to supply the court with all relevant information and show the absurdity of the defendant's denials, Ms. Duffort's counsel meticulously prepared a twenty-page complaint with twenty-eight attachments. Including the details of six months of records requests and correspondence related thereto was crucial to tell the complete story, and that took time. The time spent drafting and compiling the complaint was "reasonable given the demands of the case." *Kwon*, 2010 VT 73, ¶ 20.

D. The Legal Precedents at Issue Are Well-Known and Longstanding

As noted by the defendants, trial courts have broad discretion to determine a

[3] The lower court initially performed a "cursory" review of the bill to find the time spent on the complaint was excessive, alluding to the attorney's experience in preparing similar complaints, the work already done to prepare a demand letter before the complaint, and the hourly rate of $450. However, on remand, the district court expanded on its reasoning. On its second look, the district court determined 34.3 hours spent on the complaint was excessive because the attorney requesting fees had "prepared exactly the same kind of suit papers so many times in the past that the preparation of the initial suit papers in this action would have been simply routine for [the attorney], using the same outline, format, legal authorities, and verbiage he repeatedly had used before." Thus, the lower court's decision of excessiveness was based on the ease with which that particular attorney would have been expected to have completed a draft complaint in that case. *Grisham v. City of Fort Worth, Tex.*, No. 4:15-cv-324-A, 2015 WL 13187063 (N.D. Tex. Sept. 3, 2015), vacated and remanded by *Grisham*, 837 F.3d 564 ("The court is satisfied that an attorney having the experience [the attorney] claims to have would have been able to prepare the [] complaint in a period of no more than eight to ten hours."). *Grisham* is not applicable here, where it was necessary for Ms. Duffort's Complaint to meticulously include the multiple requests for public records and quotes from and citations to nearly thirty attachments. It was not a complaint for which Ms. Duffort's attorneys could adopt the same language, claims, or fact-pattern from other previously filed complaints.

reasonable fee award based on a variety of factors, including "the novelty of the legal issue, the experience of the attorney, and the results obtained in the litigation." *L'Esperance*, 2003 VT 43, ¶ 22. Consequently, in *McKinstry v. Fecteau Residential Homes, Inc.*, the Supreme Court did not disturb a reduced fee award of $15,000 (subsequently offset by $5,000 deposit previously paid to the plaintiff by the losing party) where there were "minimal [damages] recover[ed], . . . recovery was questionable from the start, and [there was a] lack of any public purpose served."

Here, the defendants urge the Court to reduce the fee award requested by Ms. Duffort's counsel because the case presented "somewhat novel issues" and the public records "did not exist" at the time suit was filed. Although not explained, the defendants argue Ms. Duffort's case is somehow analogous to *Prison Legal News v. Corrections Corporation of America*, No. 332-5-13, 2015 WL 5311513 (Vt. Sup. Sept. 1, 2015). Leaving aside whether that fee reduction was properly decided, Ms. Duffort's case was simply not novel and therefore is utterly distinguishable.

In *Prison Legal News*, the Washington Superior Court reduced the mandatory public records fee award because the novelty of the issues presented made it "inequitable" to require full fees. 2015 WL 5311513, at *2. The defendant, CCA, was a privately owned prison corporation contracted by the state, but not explicitly subject to the Public Records Act. Because it was "understandable that CCA might not have predicted that the court would find it subject to the Act," it was deemed inequitable to provide full fees. *Id*. However, fees were still deemed necessary and awarded. The court agreed that "the work performed, the hours billed and the rates charged are reasonable" but awarded 40% of the fees due to the equities. In Ms. Duffort's case, there are no issues of equity to justify any reduction. The legal issues were simply not novel, and the fact remains that the defendants knew they had responsive public records and chose to withhold them in

defiance of Ms. Duffort's right of access.

First, the concept that extracting and compiling information from disparate locations does *not* amount to the creation of a new record has been settled FOIA law since 1978. *See Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454, 456 (D.D.C. 1977), *aff'd*, 574 F.2d 636 (D.C. Cir. 1978); *see also Schladetsch v. U.S. Dep't of H.U.D.*, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000) ("The fact that the agency may have to search numerous records to comply with the request and that the net result of complying with the request will be a document the agency did not previously possess is not unusual in FOIA cases."). It is also longstanding law that the Public Records Act's exceptions to disclosure are construed "strictly against the custodians of records," and "any doubts are resolved in favor of disclosure." *Bain v. Windham County Sheriff*, 191 Vt. 190 (2012). Similarly, it is well-known that the Vermont Supreme Court regularly finds federal court decisions construing FOIA persuasive in interpreting analogous provisions in the Public Records Act. *See Toensing v. Attorney General*, 2017 VT 99, ¶ 18; *Rutland Herald v. Vt. State Police*, 2012 VT 24, ¶ 68.

In Ms. Duffort's case, the legal issues discussed above all came into play. Ms. Duffort requested the agency extract and compile discrete pieces of information from its electronic records if that was the most efficient method of production. Even if the defendants did not know about the relevant law or bother to research it themselves, Ms. Duffort repeatedly provided citations to and quotations from this caselaw in her record requests—long before she filed this litigation. In response, the defendants provided no legal analysis regarding the longstanding caselaw she provided; indeed, even in litigating this case, the defendants have never engaged with this caselaw or attempted to argue a legal basis for their actions. If the legal issues were "somewhat novel" to the defendants, it is because they failed to conduct their own research or review or respond

to Ms. Duffort's citations. The defendants should not be rewarded for willfully remaining ignorant of their longstanding legal obligation to have provided Ms. Duffort with the public records she sought.

Second, as discussed in Part I, it is simply not credible for the Agency to claim that it did not know it was obligated to provide the .txt files known to be in its possession, or for the State Board to fail to produce a statutorily required report upon request. Public agencies must "provide for free and open examination of records." 1 V.S.A. § 315(a). Public agencies must "promptly produce the record" at issue for viewing or copying. *Id*. at § 318(a). And, all public records must be disclosed upon request unless a specific exemption can be applied. Where such an exemption applies, the record must still be produced with exempt portions redacted. *Id.* at § 318(e). The defendants failed to produce disclosable records in their possession in any form, instead claiming that no such records existed. This has been shown to be demonstrably false. *See* Part I *supra*. The Act's requirement that the Agency produce public records in full or redacted form was not novel. The Vermont caselaw on the requirement to produce and redact has been developing since at least 1993. *See Trombley v. Bellows Falls Union High Sch. Dist. No. 27*, 150 Vt. 101, 107 (1993). Regarding the State Board, the statute requiring the State Board to produce the "school by school" data has been on the books for years. The legal issues at play were longstanding and not novel.[4]

IV. Conclusion

Because Ms. Duffort substantially prevailed in her case, longstanding caselaw

[4] The defendants' attempt to erect a good-faith bar to Ms. Duffort's entitlement to her full attorneys' fees fails for an additional reason: the Public Records Act does not condition a grant of fees and costs on an agency's bad faith. Tellingly, a defendant that loses an Open Meeting Law ("OML") case can avoid paying the plaintiff's attorneys' fees if the court finds that (1) the defendant had a reasonable factual and legal basis for its position and acted in good faith or (2) the defendant cured its violation according to mandatory pre-litigation procedures. 1 V.S.A. § 314(d). The latter provision bears some resemblance to the PRA's safe-harbor provision that makes fees discretionary when defendants quickly produce the records, *see supra* note 2, but the former has no analogue in the Public Records Act. An agency's supposed good faith thus is of no consequence in determining a prevailing plaintiff's entitlement to fees and costs in a suit to enforce the Public Records Act.

entitles her to attorneys' fees and costs for all work itemized in the bills provided by her counsel, she provided uncontroverted evidence on the reasonableness of her attorneys' rates and time expended, and the defendants knowingly defied their legal obligations in failing to produce the requested records for nearly sixteen months, this Court should award Ms. Duffort full attorneys' fees and costs as in the itemized bills attached to her attorneys' affidavits and updated in exhibits hereto. *See* Att. A, Ex. 1; att. A to Pl.'s Mot for Fees.

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