UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 03-8023 AHM (RZx) Date March 19, 2007

Title H. RAY LAHR v. NATIONAL TRANSPORTATION SAFETY BOARD, *et al.*

Present: The Honorable A. HOWARD MATZ, U.S. DISTRICT JUDGE

Stephen Montes	Not Reported	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys **NOT** Present for Plaintiffs: Attorneys **NOT** Present for Defendants:

Proceedings: **IN CHAMBERS (No Proceedings Held)**

I. INTRODUCTION

On November 16, 2006, Plaintiff H. Ray Lahr ("Plaintiff") moved for an award of attorneys' fees and costs under the Freedom of Information Act ("FOIA"), based on 5 U.S.C. § 552(a)(4)(E).[1] That statute provides that "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." The Court must examine Plaintiff's eligibility for the award, his entitlement to the award, and the reasonableness of the amount he requests. *Long v. United States Internal Revenue Serv.*, 932 F.2d 1309, 1311 (9th Cir. 1991). Defendants argue that Plaintiff is not entitled to such an award because his prosecution has not bestowed any benefit on the public and because a reasonable basis existed in law for them to withhold the material that the court ordered be turned over. Defendants further argue that the amount Plaintiff requests should be reduced, because it includes time that is non-compensable and unjustifiable hourly rates. For the reasons that follow, the Court GRANTS Plaintiff's motion for attorneys' fees and costs, albeit in an amount lower than what Plaintiff requested.

II. ANALYSIS

A. Eligibility for the Award

A plaintiff in a FOIA action is eligible for an award of attorneys' fees and costs if the plaintiff has "been awarded some relief by a court, either in a judgment on the merits or in a court-ordered consent decree." *Davy v. C.I.A.*, 456 F.3d 162, 165 (D.C. Cir. 2006) (internal citations omitted). Defendants do not argue that Plaintiff is not *eligible* for (as opposed to *entitled* to) an award. In the Court's August 31, 2006 and October 4, 2006 orders, the Court ordered 26 of the 32 contested records requested by Plaintiff. As a result, the Court finds that Plaintiff has "substantially prevailed" and is thus eligible for an award of attorneys' fees and costs.

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[1] Dkt. No. 121.

B. Entitlement to the Award

In deciding whether Plaintiff is entitled to an award of attorneys' fees and costs, "the district court must consider four criteria: (1) the public benefit from disclosure, (2) any commercial benefit to the plaintiff resulting from disclosure, (3) the nature of the plaintiff's interest in the disclosed records, and (4) whether the government's withholding of the records had a reasonable basis in law." *Long v. United States Internal Revenue Serv.*, 932 F.2d 1309, 1313 (9th Cir. 1991) (internal citations omitted). "These four criteria are not exhaustive, however, and the court may take into consideration whatever factors it deems relevant in determining whether an award of attorney's fees is appropriate." *Id.* (internal citations omitted).

In *Church of Scientology of California v. United States Postal Service*, the Ninth Circuit provided guidelines illustrating how courts should apply these four factors to determine entitlement. 700 F.2d 486, 492-95 (9th Cir. 1983) (remanding to the district court to determine whether plaintiff had substantially prevailed and whether attorneys' fees should be awarded) [hereinafter *Church of Scientology*]. The Ninth Circuit advised that "the criteria listed in the Senate Judiciary Committee's Report on the Freedom of Information Act [hereinafter "Report"] should be considered in conjunction with the existing body of law on the award of attorney's fees." *Church of Scientology*, 700 F.2d at 492. *Church of Scientology* then discussed various cases to illustrate the application of each of the factors.

1. Public Benefit

The Report suggested that under this criterion, "a court would ordinarily award fees, for example, where a newsman was seeking information to be used in a publication or a public interest group was seeking information to further a project benefitting the general public, but it would not award fees if a business was using the FOIA to obtain data relating to a competitor or as a substitute for discovery in private litigation with the government." *Id.* at 492 n.6. *Church of Scientology* discussed *Blue v. Bureau of Prisons*, a Fifth Circuit case in which the court "stressed that in weighing the public benefit factor the district court should take into account the degree of dissemination and the likely public interest that might result from disclosure." *Id.* at 493 (analyzing *Blue v. Bureau of Prisons*, 570 F.2d 529, 533-34 (5th Cir. 1978)). *Blue* explained that the public benefit factor "speaks for an award where the complainant's victory is likely to add to the fund of information that citizens may use in making vital political choices." *Blue*, 570 F.2d at 533-34.

Church of Scientology also discussed *Goldstein v. Levi*, in which the district court found a public benefit in a suit by a producer for a public television station to procure FBI files concerning statements made during the investigations of the Rosenberg espionage case. *Id.* (analyzing *Goldstein v. Levi*, 415 F.Supp. 303, 305 (D.D.C. 1976). *Church of Scientology* also instructed that "[w]hile obtaining a favorable legal ruling,

standing alone, does not establish the public benefit criterion, the district court may take into consideration the fact that the plaintiff has so prevailed when determining entitlement to attorney's fees." *Id.*

In the Court's first (August 31, 2006) Order, the Court stated that "the public interest in ferreting out the truth [about the explosion of TWA Flight 800] would be compelling indeed." *Lahr v. Nat'l Transp. Safety Bd.*, 453 F.Supp.2d 1153, 1167 (C.D. Cal. 2006); Aug. 31 Order, 12. Defendants dispute whether any of the records released in this action actually succeeded in "ferreting out the truth" or in supporting the Plaintiff's theory that the crash of TWA 800 resulted from an errant missile strike. (Opp'n, 7:7-8:12). Defendants are plainly incorrect. Although this Court explicitly refrained from making a finding either affirming or repudiating the official government conclusion, the records Plaintiff succeeded in establishing a right to obtain do indisputably shed light on that question.

Plaintiff provides ample evidence of the public's interest in the information obtained in this case. According to Plaintiff, TWA Flight 800 has already been the subject of nine books and over 2,000 newspaper articles. A Google search yields over 147,000 web page hits. Plaintiff adds that well-qualified experts will analyze the disclosures and several will publish reports of their findings on the websites of Flight 800 Independent Researcher's Organization (at flight800.org) and the Association of Retired Airline Professionals (at www.twa800.com). At least two magazines have already published articles about this Court's ruling. See Reply, page 5.

Plaintiff has gone to great lengths to disseminate the records at issue in this case. Plaintiff states that his website [http://raylahr.entryhost.com/updates.htm] "displays almost all of the records he received from the various agencies - over 1,500 pages." The website also allegedly includes "the case docket sheet, linked to significant filings, the CIA and NTSB animations, three unofficial animations, videotaped statements of four eyewitnesses, seven experts, and three members of the probe - all of which were lodged in this case."

The Court finds that Plaintiff has satisfied the "public benefit" prong.

2. Commercial Benefit

Plaintiff acknowledges that he "has no 'commercial interest in the documents' within the meaning of that term as used by the FOIA." This factor is inapplicable.

3. Nature of Plaintiff's Interest

The Report states that under this factor, "a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented, but would not do so if his interest was of a frivolous or purely

commercial nature." *Church of Scientology*, 700 F.2d at 492 n.6. Plaintiff is a distinguished former pilot with an abiding interest in flight safety and aerodynamics. As previously described, the information released either has or will lead to scholarly analysis of TWA Flight 800. Defendants offer no opposition to Plaintiff's argument that this factor weighs in his favor.

4. Reasonable Basis in Law

The Report states that under this factor, "a court would not award fees where the government's withholding had a colorable basis in law but would ordinarily award them if the withholding appeared to be merely to avoid embarrassment or to frustrate the requester." *Church of Scientology*, 700 F.2d at 492 n.6. In *Cotton v. Heyman*, the D.C. Circuit reiterated that the government "need only have 'a colorable basis in law' for the court to consider the 'reasonable basis in law' factor in determining a FOIA plaintiff's entitlement to attorney's fees." 63 F.3d 1115, 1121 (D.C. Cir. 1995) (internal citations omitted). The D.C. Circuit explained that "what is required is a showing that the government had a reasonable basis in law for [its position] and that it had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977).

Plaintiff argues that the CIA's first response to the request for records did not have a colorable basis in law. In its January 26, 2001 FOIA response letter, the CIA wrote, "[w]e have researched this matter, and have learned that the pertinent data, and resulting conclusions, were provided by the National Transportation Board (NTSB). CIA simply incorporated the NTSB conclusions into our videotape." (Mot., 7:9-12) (citing June 16, 2004 Lahr Affidavit, Ex. 16). That was not correct.

In construing Defendants' deliberative process privilege and Exemption 5 contentions, the Court ordered them to produce information that was not predecisional or that was purely factual and thus non-deliberative. Defendants, however, point out that the Court also upheld their withholding of some materials. That some material may have been withheld properly does not preclude a finding that the withholding of other records lacked a reasonable basis in law.

As to exemptions 6 and 7(C), Defendants did not offer any evidence to rebut Plaintiff's challenges to their privacy assertions. Defendants argue that they had no obligation to so respond, because the Supreme Court has held that "where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). Defendants argue that Plaintiff failed to establish more than a "bare suspicion," but the Court found that "the public interest in uncovering agency malfeasance and wrongdoing outweighs [Defendants' claimed privacy interest]." *Lahr v.*

Nat'l Safety Bd., 453 F.Supp.2d at 1185; Aug. 31 Order, 42.

The material at issue regarding Exemption 4, concerning confidential commercial information, was technical information Boeing provided to the government. The Court found that the withheld information is publicly available and that Defendants had failed to show a likelihood of substantial competitive harm. *Id.* at 1182; Aug. 31 Order, 37. Defendants argue that their withholding had a colorable basis in law, because the Court stated there was "a factual dispute as to whether Boeing [would] suffer substantial competitive harm" if the information was released. *Lahr v. Nat'l Transp. Safety Bd.*, 2006 WL 2854314 at *18 (C.D. Cal. 2006); Oct.4, 2006 Order, 33. But in that order and in the earlier order (453 F.Supp.2d at 1182), the Court found that Defendants failed to meet their burdens to justify withholding.

C. Reasonableness of the Amount Requested

Plaintiff initially sought $175,532 in attorneys' fees and $2,232 in costs, for a total of $177,864. The fees were based on a calculation of 654 hours time expended by John H. Clarke and 150 hours by a then-law student/clerk named Thomas Leffler. Mr. Clarke "charged" (for purposes of Plaintiff's motion) $250.00 per hour. For Mr. Leffler the "charge" was $80.00 per hour.

After Defendants filed their opposition papers, Plaintiff conceded that they had raised certain meritorious objections and agreed to reduce the fees by $10,956. Specifically, Plaintiff acknowledged, in principle, the impropriety of receiving fees for efforts to prove that the CIA acted in bad faith, a contention not upheld by this Court, and for efforts opposing the CIA's successful motion for a stay. Plaintiff also conceded that Mr. Clarke's "hourly rate" for 2002 and 2003 should be $220. But Plaintiff then added another $2,750 for the time Mr. Clarke spent in preparing the Reply Papers. So with attorneys fees in the revised amount of $169,658 and costs in the amount of $2,232, Plaintiff now seeks a total of $171,890. The Court awards $144,210 in fees and $2,232 in costs. This award includes compensation for preparing the reply brief. The award is based upon the Court's personal knowledge of this case, the substance of the pleadings, the Court's prior orders and opinions, and its strong sense of what this case fundamentally was about. *See, The Traditional Cat Assn. v. Gilbreath*, 340 F.3d 829, 834 (9th Cir. 2003). The ruling is based upon the following findings, factors and considerations.

1. General Principles

It is unnecessary for the Court to reiterate the standard principles governing this motion, given that the parties themselves have cited many of the applicable cases. In general, the Court follows *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983); *Kerr v. Screen Extras Guild*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951, 96 S.Ct. 1726 (1976); *Blum v. Stenson*, 465 U.S. 886 (1984) and *Ketchum v. Moses*, 24 Cal.

4th 1122 (2001). The Court has reviewed, but does not have to carefully scrutinize, all the entries of the timekeepers. *See Evans v. Evanston*, 941 F.2d 473, 476 (7th Cir. 1991), *cert. denied* 112 S.Ct. 3028 (1992).

2. Reasonableness of Hours for Which Plaintiff Seeks Recovery

Plaintiff has the burden of proving that he is entitled to recover the amounts he seeks. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Compensation is not appropriate for work that was excessive, redundant or otherwise unnecessary. *Hensley v. Eckerhart*, supra, at 433-34. The customary method for determining the reasonableness of attorneys' fees is known as the lodestar method. *Morales v. San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996). According to the "lodestar" method, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939. The Court may adjust the "presumptively reasonable" lodestar figure based on the factors delineated in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), if any were not already subsumed in the lodestar calculation.[2] *Morales*, 96 F.3d at 363. The Court, however, is not necessarily required to consider every factor, but only those in dispute and necessary to support the reasonableness of the award. *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1158 (9th Cir. 2002).

The Court finds that to a certain extent, Plaintiff's counsel's efforts *were* excessive and unnecessary. As just one example, and as the Court previously noted both in court and in its orders, the attorneys for *both* sides in this case created immense difficulty for the Court by affixing "multiple and confusing identifications to given documents" (453 F. Supp.2d at 1161, n.1). As a result, their papers were sometimes close to impossible to evaluate; one couldn't match up their respective positions or even be sure which items they were addressing. A substantial portion of the responsibility for that bewildering mess was attributable to Plaintiff's counsel, whose very enumeration of the FOIA requests also was unnecessarily repetitious and confusing. In court, moreover, Mr. Clarke sometimes was unable to explain his position succinctly or responsively. So at least part of the time Mr. Clarke devoted to this case was excessive. The Court finds that a fair and appropriate reduction is 15 percent. With the 15% reduction in the compensable hours, it is unnecessary to make itemized revisions.

In reaching these conclusions, the Court specifically notes the following:

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[2] Factors that are built into the reasonable hours component or the reasonable rate component include "(1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, . . . (4) the results obtained." *Morales*, 96 F.3d at 364, n.9, quoting *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1464 (9th Cir. 1988); *see* also *Yahoo! v. Net Games, Inc.*, 329 F.Supp. 2d 1179, 1182 (N.D. Cal. 2004) (considering the contingent nature of a fee agreement as a factor deemed subsumed in the initial lodestar calculation).

- Plaintiff is not precluded from recovering for hours devoted to preparing affidavits in CV 02-08708 AHM (RZx). That case was dismissed without prejudice in light of the 2003 amendment adding the CIA as a party-defendant. But those affidavits became part of the record in this case and the Court incorporated them, or considered them, in rendering its decisions.

- The same conclusion applies to recovery for hours expended in drafting papers in papers in opposition to the NTSB's initial summary judgment motion.

- The Court would not credit Plaintiff for hours devoted to Mr. Schulz's affidavits; Mr. Clarke's Reply Declaration contains no sworn statement even touching upon that contention.

3. Reasonableness of Hourly Rates

"To inform and assist the Court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence - in addition to the attorney's own affidavits - that the requested rates are those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."

Blum v. Stenson, 465 U.S. 886, 896, n.11, 104 S.Ct. 1541, 1547 (1984) (noting that courts properly require prevailing attorneys to justify the reasonableness of the requested rate or rates).

The parties dispute whether Mr. Clarke really commanded hourly rates of $220-$250. Mr. Clarke maintained an unconventional practice, to be sure, and although his efforts on behalf of clients challenging so called "federal executive branch corruption" are commendable - - his zealous advocacy on behalf of Captain Lahr is particularly noteworthy - - one is forced to conclude that the basis for establishing as "reasonable" the rates he is "charging" is not overwhelming. (Certainly, Mr. Dale's unilluminating declaration is hardly strong evidence.) On the other hand, for the years 2003-2006, an hourly rate of $220/$250 is unquestionably modest, especially by Los Angeles standards. And Mr. Clarke does have fairly lengthy and varied litigation experience. Furthermore, the Court refuses to penalize him for maintaining the kind of practice he has had.

In summary, the Court finds that the hourly rates for which Mr. Clarke seeks compensation are not unreasonable. The same applies to Mr. Leffler's $80.00 hourly rate. The work he performed, some of which may be classifiable as clerical, was necessary and consistent with this Court's requirements.

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4. Costs

The Court awards the full $2,232 in costs.

III. CONCLUSION

For the foregoing reasons, the Court awards $144,210 in fees and $2,232 in costs to Plaintiff, for a total of $146,442.

No hearing is necessary. Fed. R. Civ. P. 78; L.R. 7-15.

THIS ORDER IS NOT INTENDED FOR PUBLICATION.

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