IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION Defendant.	) No. 1:12-cv-00667-CKK-AK

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE DEFENDANT'S OBJECTIONS TO THE MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDATIONS

The FBI's objections to the Magistrate's recommendations regarding EPIC's award for "fee on fees" are inconsistent with well-established precedents and current practice, and should be rejected. There is simply no evidence, nor does the agency contend, that EPIC's application for fees on fees was "exorbitant, unfounded, or procedurally defective." *Commissioner, INS. v. Jean*, 496 U.S. 154, 163 (1990). In fact, courts routinely award fees on fees in FOIA cases substantially greater than the amount EPIC requested in this case. *See*, *e.g.*, *Citizens for Responsibility and Ethics in Wash. v. Fed. Elect. Comm'n*, ___ F. Supp. 2d ___, No. 11-951-CKK, 2014 WL 4380292 (D.D.C. Sept. 5, 2014) (awarding more than $25,000 in fees on fees for work on the fee petition and opposition to the agency's objections to the Magistrate report and recommendations); Order, *Pub. Emp. Env't Responsibility v. U.S. Inter. Boundary and Water Comm'n*, 968 F. Supp. 2d 85 (Oct. 18, 2013) (No. 10-0019) (granting an award of $24,084.50 for fees on fees in a FOIA case) [hereinafter *PEER*]; *ACLU v. DEA*, No. 11-1997, 2012 WL 5951312 (N.D. Cal. Nov. 8, 2012) (ordering the defendant to pay more than $30,000 in

fees on fees for a fee motion and reply in a FOIA case). The FBI's remaining objections should also be rejected because the agency has not provided new evidence or authority to support departing from the Magistrate's recommendation.

The Magistrate recommended that this Court find EPIC eligible and entitled to recover attorney fees and costs. (Report, ECF No. 38, at 5-8). EPIC sought a total of $30,565 for 108.7 hours its attorneys worked from the initiation of this case, April 18, 2012, through the November 12, 2013, Joint Status Report, and a total of $7,054 in fees on fees for 27 hours spent on the motion and reply. These hours were accurately and contemporaneously recorded by EPIC's attorneys and represent a reasonable expenditure of time given the nature of the legal work completed, including responding to the FBI's motions and oppositions in this matter. Further, the vast majority of hours were billed at the lowest attorney rate on the *Laffey* scale. As a direct result of the FBI's Objections, EPIC has now incurred an additional $3,420 for 10.3 hours spent on this Memorandum in Opposition. *See* Exs. 1-4. The FBI has not identified a single case that supports the conclusion that EPIC spent an unreasonable amount of time litigating this fee matter, and its request for a fees on fees reduction should be rejected.

Courts in this Circuit have found that the "usual method for calculating a reasonable fee amount is to 'multiply the hours reasonably expended in litigation by a reasonable hourly fee, producing the lodestar amount.'" *EPIC v. DHS*, 999 F. Supp. 2d 61, 70 (D.D.C. 2013) (citing *Judicial Watch, Inc. v. DOJ*, 774 F. Supp. 2d 225, 232 (D.D.C. 2011)). Fees on fees should be awarded for "hours 'reasonably expended' in preparing a fee petition" in a FOIA case. *EPIC v. DHS*, 811 F. Supp. 2d 216, 240 (D.D.C. 2011) (citing *Sierra Club v. EPA*, 769 F.2d 796, 808 (D.C. Cir. 1985)). EPIC has spent a

reasonable amount of time responding to the agency's opposition and objections, and EPIC should be compensated if it prevails in the fee litigation.

The FBI's objections have turned this straightforward fee petition into a complex dispute that has now required extensive briefing by both parties. Rather than argue that EPIC's award should be reduced because of errors in billing or excessive time spent on particular tasks, the FBI seeks to prolong this fee dispute by inviting the court to weigh whether the fees on fees that EPIC reasonably incurred are "*reasonable* in light of the merits fees awarded by the court." (emphasis added) (Def. Obj. at 6). Such analysis is contrary to the Supreme Court's express direction in *INS v. Jean* that "[a] request for attorney's fees should not result in a second major litigation," and would strain judicial economy if imposed in routine fee disputes. 496 U.S. 154, 163 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

EPIC has sought a straightforward resolution of its fee claim since the substantive issues in this case were settled in November of 2013, but the FBI has chosen to engage in numerous objections rather than agree to settle for a reasonable sum based on the number of hours expended multiplied by the standard *Laffey* rates. The FBI now seeks to benefit from its own recalcitrance by arguing that EPIC's hours spent responding to the agency's own fee objections should not be recoverable even if EPIC prevails in the fee dispute.

The FBI Has Not Identified a Single Case Supporting the Conclusion that EPIC's Requested Fees on Fees Award is Unreasonable, Excessive, or Abnormal for a Case of This Type

The FBI argues that EPIC's fees on fees award should be reduced to $2,488.50, but the agency has not cited any evidence to show that EPIC's billing records are inaccurate or that EPIC spent an unreasonable amount of time preparing its fee motion and reply. Moreover, the FBI has not identified a single case where a court has reduced a

fees on fees request as small as the one EPIC put before the Court. This Court will find that the total number of hours EPIC billed on this fee matter is consistent with, or lower than, the amount billed by other attorneys in similar matters. A quick review of cases cited in the FBI's objections shows that the fees on fees requested by EPIC are smaller by orders of magnitude than the fees on fees requested in other cases.

In *LaShawn A v. Berry*, No. 89-1754, 1998 WL 35243112 (D.D.C. Feb. 18, 1998), a civil rights case arising under 42 U.S.C. § 1983, the plaintiffs requested an interim award of $2,419,373.17 in fees and costs, including more than $300,000 in fees on fees. *Id*. at 6-9.[1] In *Salazar v. District of Columbia*, another civil rights suit brought under § 1983, plaintiffs sought a total of $1,283,000.86, including $143,886.51 for fees on fees. 991 F. Supp. 2d 39, 46, 57 (D.D.C. 2014). The court ultimately reduced certain portions of the fees on fees requested, and awarded the plaintiff awarded the plaintiffs roughly $113,000 in fees on fees. *Id*. at 57-58.[2] In *Heard v. District of Columbia*, this court reduced the plaintiffs requested $108,829.70 fees on fees award to $56,500. No. 02-296, 2006 WL 2568013, at *19-20 (D.D.C. Sept. 5, 2006).

All of these cases involved fees on fees requests totaling in the hundreds of thousands of dollars, which EPIC agrees would be excessive if sought in a FOIA case

[1] The court did not provide the exact sum of fees on fees requested by the attorneys, but capped the fees on fees recovery at 15% of the total $2,419,373.17 (roughly $360,000). *Id*. at *6. The Court noted that the plaintiffs had billed for 88.5 hours of paralegal work on the fees litigation, as well as $2,479.15 in expenses for the fees litigation. *Id*. at *9, *10 n.15. It is also relevant to note that this fee award would be *substantially higher* under current *Laffey* rates.

[2] The court reduced the $56,892.15 plaintiff sought for work on a motion for reconsideration by 30%, and reduced the $85,922.87 sought for work on fee settlement negotiations by 15%. *Id*. at 58.

similar to the one before this Court.[3] But even by the FBI's own calculation, EPIC did not request more than $12,000 for time spent engaged in settlement negotiations, time spent preparing the fee motion, and time spent preparing the fee reply. EPIC billed for the bare minimum number of hours needed to assemble its billing records and draft a concise and accurate fee motion, as well as respond to the agency's memorandum in opposition.

The Supreme Court made clear in *Hensley v. Ekerhart*, 461 U.S. 424 (1983), that "[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." *Id*. at 433. Lower courts can of course exclude hours that are not "reasonably expended," and courts may also reduce a proposed fee award if a plaintiff fails "to prevail on claims that were unrelated to claims on which he succeeded." *Id*. at 434. However, when a case involves a single or integrated claim, the court "should focus on the significance of the overall relief obtained by the plaintiff" rather than attempt to view the suit as a "series of discrete claims." *Id*. at 435. Courts in this Circuit have applied this test to FOIA fee claims, and in particular to fees on fees claims. *See*, *e.g.*, *EPIC v. DHS*, 811 F. Supp. 2d 216, 237-38, 240 (D.D.C. 2011); *CREW v. DOJ*, 825 F. Supp. 2d 226, 232-33 (D.D.C. 2011). *C.f. EPIC v. DHS*, 999 F. Supp. 2d 61, 77 (D.D.C. 2013) (reducing fees on fees request by 15% based on certain procedural flaws in the fee petition); Order, *PEER*, 968 F. Supp. 2d 85 (D.D.C. Oct. 18, 2013) (reducing an "excessive" fees on fees request of $33,475.50 to $24,084.50 in a FOIA case).

[3] The FBI's reference to *Coulter v. Tennessee*, 805 F.2d 146 (6th Cir. 1986), is off point because that case involved the review of a fee request by one attorney in a case where the lead attorney had already recovered fees. *Id*. at 148.

The touchstone of the fee petition process is simplicity; the process should be as straightforward and predictable as possible, and a "request for attorney's fees should not result in a second major litigation." *Eckerhart*, 461 U.S. at 437.

The FBI's Proposed Fees on Fees Reasonableness Test Would Add Unnecessary Complexity and Uncertainty Into the Fee Litigation Process

The Supreme Court stated in *INS v. Jean* that fees on fees may be discounted with "exorbitant, unfounded, or procedurally defective fee applications." *Jean*, 496 U.S. at 163. But there is simply no evidence, nor does the agency contend, that EPIC's fee application has any of these characteristics. In *Jean*, the Court sought to resolve a circuit split over whether a "District Court must make a second finding of no 'substantial justification' before awarding respondents any fees for the fee litigation" under the Equal Access to Justice Act (EAJA). *Id*. at 157. The EAJA directs a court to award "fees and other expenses" to private parties suing the United States if "the position of the United States was not 'substantially justified.'" *Id*. at 155. It is appropriate for courts to award fees "for time and expenses incurred in applying for fees," but the Government in *Jean* argued that the court should not allow recovery of "fees for any litigation about fees" unless "the court finds their position in fee litigation itself was not substantially justified." *Id*. at 158. The Court rejected this argument on both statutory and policy grounds, noting that requiring a separate finding at the fees on fees stage "would multiply litigation." *Id*. at 163.

The Court in *Jean* was especially concerned with the negative impact that this additional fees on fees requirement would have on both judicial economy and access to justice. *Id*. As the Supreme Court succinctly summarized, allowing this "exception to fee litigation theoretically can spawn a 'Kafkaesque judicial nightmare' of infinite litigation

to recover fees for the last round of litigation over fees." *Id*. at 163. That is precisely what would happen if the court were to adopt the FBI's proposed "reasonableness in light of the merits fees" test. In order to resolve whether the fees on fees in this case were reasonably "proportional" to the merits fees would require further briefing and analysis that would result in additional fees on fees being incurred, which the FBI could then challenge as being "unreasonable" in light of the merits fees (or even in light of the prior round of fees on fees). The FBI's test would have no limiting principle to prevent the additional waste of scarce judicial resources. Furthermore, applying this test at the fees on fees stage would unfairly "impose the cost of fee litigation on prevailing parties," which would "resurrect" the "financial deterrent" that cost-shifting statutes like the FOIA and EAJA aim to eliminate. *See id*. at 164. This is precisely the outcome the Court sought to avoid when it said that district courts can already "recognize and discount" any "[e]xorbitatnt, unfounded, or procedurally defective fee applications" without imposing additional threshold tests that would only multiply the litigation. *Id*. at 163.

The FBI's Offer of Judgment is Irrelevant to the Reasonableness Analysis, Since Offers of Judgment Are Already Evaluated Under Rule 68

The FBI's final argument should be rejected because it is contrary to the express purpose of Rule 68, and would impose an unnecessarily complex test on what should be a straightforward fee claim. When the Defendant in a FOIA case makes a Rule 68 offer, the plaintiff will not be allowed to recover costs (including attorney fees) for work done after that offer if the total amount awarded for post-offer work is *less than* the offer. *EPIC v. DHS*, 982 F. Supp. 2d 56, 62 (D.D.C. 2013) (citing Fed. R. Civ. P. 68(d)). The purpose of Rule 68 "is to encourage settlement and avoid litigation." *Marek v. Chesny*, 473 U.S. 1, 5 (1985). The Rule accomplishes this in a neutral way, by imposing a clear rule that

plaintiffs "who reject an offer more favorable than what is thereafter recovered" will "not recover attorney's fees for services performed after the offer is rejected." *Id*. at 10. The rule explicitly does not require that Plaintiffs accept offers well below what they ultimately recover, and there is no reason to impose such a requirement through a "reasonableness" analysis. The FBI's proposed "reasonable offer" standard would eliminate all certainty in the Rule 68 process and reduce the likelihood of settlement. Under Rule 68, the FBI's Offer of Judgment would only preclude EPIC's award of fees on fees for work done after November 12, 2013, if the total amount of fees awarded by this Court for EPIC's work prior to that Offer were less than $12,500. The Magistrate recommended that EPIC be awarded $20,799 for its work done prior to the Offer of Judgment.[4] Therefore, the FBI's proposed reduction should be rejected.

Conclusion

For the reasons outlined in EPIC's Motion for Attorneys' Fees and Reply in Support of Motion for Attorneys' Fees, EPIC is both eligible for and entitled to obtain fees in this matter under the FOIA. Furthermore, EPIC objects to the FBI's proposal that its award of fees on fees should be reduced to $2,488.50. The FBI has never contested the accuracy of EPIC's billing records or the reasonableness of the time EPIC spent on the fee motion, reply, or settlement negotiations. For these reasons, the Court should award EPIC an award of attorneys' fees, costs, and fees on fees as outlined in EPIC's Objections to the Magistrate's Report and Recommendation, plus any additional fees for the time spent on this response in opposition as the Court sees necessary.

[4] EPIC has objected to some of the Magistrate's findings and recommendations, and argues that it should be entitled to a total of $40,101.50 (including $7,054 in fees on fees for the motion and an additional $5,254 for the objections) plus an additional $3,420 for work on this opposition.

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Respectfully Submitted,

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