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15 IN THE UNITED STATES DISTRICT COURT
16 THE NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 PUBLIC.RESOURCE.ORG, a California non-) Case No. **3:13-CV-2789**
19 profit organization,) [Assigned to the Hon. William H. Orrick]
20 Plaintiff,) **NOTICE OF MOTION AND MOTION FOR**
21 vs.) **ATTORNEYS' FEES AND COSTS;**
22 UNITED STATES INTERNAL REVENUE) **DECLARATIONS OF KARL OLSON AND**
SERVICE,) **THOMAS R. BURKE WITH EXHIBITS A-**
23 Defendants.) **B**
24 Date: September 16, 2015
25 Time: 2:00 p.m.
26 Dept.: Courtroom 2, 17th Floor
27)
28)

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on September 16, 2015, at 2:00 p.m., in Courtroom 2 of
3 the United States District Court for the Northern District of California, located at 450 Golden
4 Gate Avenue, 17th Floor, San Francisco, CA 94102, or as soon thereafter as the matter may be
5 heard, Plaintiff Public.Resource.Org, Inc. (“PublicResource.Org”) will and hereby does move
6 this Court for an order compelling the Internal Revenue Service (the “IRS”) to pay
7 PublicResource.Org’s attorneys’ fees and costs in full within 30 days. This Motion is based on 5
8 U.S.C. § 552(a)(4)(E), the attorney-fee provision in the Freedom of Information Act (“FOIA”).

9 *First*, PublicResource.Org is eligible to be reimbursed its attorneys’ fees and costs
10 because this action was necessary to compel the IRS to produce nine IRS Form 990 tax returns
11 requested by PublicResource.Org in machine-readable Modernized e-File (“MeF”) format.
12 PublicResource.Org prevailed in spite of the IRS’s steadfast refusal to comply with FOIA.

13 *Second*, PublicResource.Org is entitled to fees because the equitable factors favor
14 granting fees here, as (1) the public benefit resulting from FOIA disclosures in the case is clear;
15 (2) there was no commercial benefit to the party resulting from the disclosures; (3)
16 PublicResource.Org’s interest in the Form 990s in MeF format was to make the data more
17 accessible, which would foster the public’s ability to oversee non-profit organizations and the
18 IRS; and (4) there was no reasonable basis for the IRS to withhold the Form 990s in MeF format.

19 PublicResource.Org, therefore, respectfully requests that the Court grant this Motion and
20 order the IRS to pay in full within 30 days the attorneys’ fees PublicResource.Org has incurred in
21 the amount of \$219,535, plus fees incurred in connection with this Fee Motion, times a 1.5
22 multiplier and \$1,272.46 in costs. This request is reasonable because it is within the range of
23 awards found to be reasonable by courts, is supported by declarations, is reasonable in light of
24 the importance of this action and the extent of the success achieved – including the fact that it
25 compelled the IRS to change its practices regarding the release of documents in machine
26 readable format – and should be awarded in full.

27 ///

28 ///

1 This Motion is based on this Notice of Motion, the attached Memorandum of Points and
2 Authorities, the Declarations of Karl Olson and Thomas R. Burke with Exs. A-B, all other
3 records and files in this action, and upon such further oral and/or documentary matters as may be
4 presented to this Court at or before the hearing on this Motion.

5

6 DATED: This 29th day of July, 2015

DAVIS WRIGHT TREMAINE LLP

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By: _____/s/ Thomas R. Burke_____
THOMAS R. BURKE
Attorneys for Plaintiff Public.Resource.Org

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I. SUMMARY OF ARGUMENT AND BACKGROUND

1 Under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), a “court may assess
2 against the United States reasonable attorney fees and other litigation costs reasonably incurred
3 in any case ... in which the complainant has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E).
4 This attorney-fee provision was added because “Congress realized that an allowance of fees and
5 costs was necessary in FOIA actions to encourage full public disclosure of government informa-
6 tion.” *Exner v. F.B.I.*, 443 F. Supp. 1349, 1352 (S.D. Cal. 1978) (citation omitted) *aff’d* 612 F.2d
7 1202 (9th Cir. 1980). In doing so, it “made a clear determination that an award of attorney fees
8 is appropriate and desirable whenever a complainant prevails in FOIA litigation.” *Id.*

9 Pursuant to these principles, and as the prevailing party in this action, Plaintiff
10 Public.Resource.Org, Inc. (“PublicResource.Org”) is both eligible and entitled to recover its
11 attorneys’ fees and costs. After overcoming a motion to dismiss, PublicResource.Org secured an
12 Order from this Court requiring the Internal Revenue Service (the “IRS”) to produce nine
13 electronically filed IRS Form 990s of tax-exempt charitable non-profit organizations in machine-
14 readable Modernized e-File (“MeF”) format. Before this lawsuit and throughout this litigation,
15 the IRS opposed production of the Form 990s in MeF format, contending that it was not required
16 to do so because FOIA did not apply, and because complying with PublicResource.Org’s FOIA
17 request would impose a significant burden. This lawsuit, however, established conclusively that
18 the IRS’s assumptions and legal positions were mistaken. Indeed, this Court in two separate
19 published orders established that the IRS had to comply with FOIA because it was not
20 superseded by section 6104 of the Internal Revenue Code and that producing the nine Form 990s
21 in MeF format would not impose a significant burden on or interfere with the IRS’s functions.
22 Dkt. ## 42, 62.

23 As a result of these rulings, PublicResource.Org, watchdog organizations, and journalists
24 will have access to information that they will be able to more easily process, scrutinize, and
25 study. In turn, the public will be able to better understand and monitor the granting and
26 administration of tax-exempt status to non-profits. Thus, researching and investigating the IRS
27 and non-profit organizations promotes transparency and public awareness, which confers a
28

1 public benefit. PublicResource.Org, as non-profit organization dedicated to governmental
2 transparency, sought this information and brought this action for this public benefit.

3 Because the PublicResource.Org was forced to bring this action in order to receive the
4 Form 990s in MeF format under FOIA, PublicResource.Org's counsel has devoted significant
5 time and incurred litigation costs in representing PublicResource.Org in this matter. Thus, by
6 this Motion, PublicResource.Org asks this Court to order the IRS to pay in full within 30 days
7 the attorneys' fees that PublicResource.Org's counsel incurred in the amount of \$219,535, plus
8 fees incurred in connection with this Fee Motion, times a 1.5 multiplier given that the IRS was
9 compelled to change its practices regarding machine readable documents, along with \$1,272.46
10 in costs. As set forth below, this fee request is easily within the range of awards found to be
11 reasonable by courts, is supported by declarations, and is reasonable in light of the extent of the
12 success achieved and the importance of this action. *See* Section III, IV, *infra*.

13 II. THE COURT SHOULD AWARD PUBLICRESOURCE.ORG ITS FEES.

14 Public.Resource.Org is entitled to its fees and costs in this action. To recover attorneys'
15 fees pursuant to FOIA, a plaintiff must first demonstrate it has "substantially prevailed." 5
16 U.S.C. § 552(a)(4)(E). A party may "substantially prevail" through either a "judicial order" or a
17 "voluntary or unilateral change in position by the agency" over a not-insubstantial claim. *Id.* In
18 addition, courts grant fee awards to parties they deem both "eligible" and "entitled." *Church of*
19 *Scientology of Cal. v. U.S. Postal Serv.*, 700 F.2d 486, 489 (9th Cir. 1983). In this case,
20 PublicResource.Org is both eligible and entitled to fees because its persistence has culminated in
21 the release of nine Form 990s in MeF format.

22 A. PublicResource.Org Is Eligible for an Award of Fees as the Prevailing Party.

23 The Ninth Circuit has held that to be eligible for an award of attorney's fees in a FOIA
24 suit, "a party must show both that (1) the filing of the action could reasonably have been
25 regarded as necessary to obtain the information"; and (2) that it "had a substantial causative
26 effect on the delivery of the information." *Church of Scientology*, 700 F.2d at 489 (citing *Exner*,
27 443 F. Supp. at 1353); *Long v. I.R.S.*, 932 F. 2d 1309, 1313 (9th Cir. 1991) (per curiam). "In
28 evaluating whether these criteria have been satisfied, a court should consider when the

1 information was delivered, whether or not the threat of a court order triggered the delivery of the
2 information, and whether the plaintiff was entitled to the documents at an earlier time.” *Am.*
3 *Small Bus. League v. U.S. Small Bus. Admin.*, 2009 WL 1011632, at *2 (N.D. Cal. Apr. 15,
4 2009).

5 Without question, it was only through this litigation and the two orders this Court issued
6 that documents were disclosed to PublicResource.Org. In fact, PublicResource.Org attempted to
7 obtain the forms in MeF format without litigation. After it submitted its FOIA request on March
8 11, 2013, and the IRS denied the request nine days later, PublicResource.Org sought
9 reconsideration of its request but the IRS declined to reconsider its denial. *See* Compl. ¶¶ 45-46,
10 49; Ex. F-H. Then, PublicResource.Org sent two follow-up letters to clarify the matter but to no
11 avail. *See* Compl. ¶¶ 51-52. Thus, in order to obtain the forms in MeF format as FOIA required
12 – as Public.Resource.Org ultimately proved – PublicResource.Org’s only option was to litigate.
13 *See Am. Small Bus. League*, 2009 WL 1011632, at *2 (“Because plaintiff exhausted its
14 alternative means to obtain the information, it became necessary to file an action.”)

15 Even after PublicResource.Org filed this action and devoted hours to an unsuccessful
16 mediation effort, the IRS failed to provide the forms in MeF format, but instead moved to
17 dismiss pursuant to F.R.C.P. 12(b)(6), on grounds that FOIA did not apply to
18 PublicResource.Org’s request because it was superseded by section 6104 of the Internal Revenue
19 Code. *See* Dkt. # 14. After this Court denied the IRS’s motion to dismiss, the IRS filed a cross-
20 motion for summary judgment, claiming that producing the Form 990s in MeF format would
21 impose a significant burden on and/or interfere with the IRS’s functions. *See* Dkt. # 46. Only
22 after the Court denied the IRS’s motion for summary judgment and granted
23 PublicResource.Org’s motion for summary judgment did the IRS provide PublicResource.Org
24 with the Form 990s in MeF format. *See Am. Small Bus. League*, 2009 WL 1011632, at *2
25 (“court order favoring plaintiff had a substantial causative effect on the delivery of the requested
26 information” because the documents were provided only after court instructed agency to do so
27 and there was no evidence timing was a result of another factor).

28

1 Because this litigation was both necessary and resulted in the agency’s delivery of the
2 forms in MeF format, PublicResource.Org is eligible for attorneys’ fees.

3 **B. PublicResource.Org Is Entitled to Recover Its Fees.**

4 Once a court has determined that a party is “eligible” for fees, it may in its discretion
5 determine whether a party is “entitled” to fees by taking into consideration equitable factors
6 including, but not limited to “(1) the public benefit resulting from FOIA disclosures in the case,
7 (2) the commercial benefit to the party resulting from the disclosures, (3) the nature of the party’s
8 interest in the disclosed records, and (4) whether the government’s rationale for withholding the
9 records had a reasonable basis in law.” *Rosenfeld v. DOJ*, 904 F. Supp. 2d 988, 994 (N.D. Cal.
10 2012). All four factors weigh in favor of granting fees here.

11 **1. PublicResource.Org Litigated This Matter And Sought The Form 990s
12 in MeF Format To Serve The Public Interest, Not Its Own.**

13 The first factor “relates to the degree of dissemination and likely public impact from
14 disclosure of the requested information.” *Am. Small Bus. League*, 2009 WL 1011632, at *3
15 (citation omitted). “Types of requests that might justify fee awards include a request for
16 information to be used in a publication or a request by a public interest group for information that
17 furthers a project benefitting the general public.” *Id.*; see also *Church of Scientology*, 700 F.2d at
18 492 n.6 (“Under the first criterion a court would award attorney’s fees, for example, where a
19 newsman was seeking information to be used in a publication[.]”) (quoting S. Rep. No. 93-854
20 at 19 (1974)). Further, “[t]he information need not be of public interest as long as there is a
21 public benefit from the fact of its disclosure.” *O’Neill, Lysaght & Sun v. D.E.A.*, 951 F. Supp.
22 1413, 1423 (C.D. Cal. 1996) (citing *Church of Scientology*, 700 F.2d at 493). In weighing this
23 factor, courts are instructed to “take into account the degree of dissemination and the likely
24 public impact that might result from disclosure.” *ACLU v. DEA*, 2012 U.S. Dist. Lexis 190389,
25 at *10 (N.D. Cal. Nov. 8, 2012). In *ACLU*, for instance, the court emphasized that the released
26 documents received “widespread media attention[.]” *Id.* Similarly, the court in *Electronic
27 Frontier Foundation v. Office of the Dir. of Nat’l Intel.*, 2008 U.S. Dist. Lexis 44050, at *7 (N.D.
28 Cal. June 4, 2008), noted that “[u]pon defendant’s release of the requested documents, plaintiff

1 immediately posted the requested information on its website for public access” and publicized
2 their availability in press releases.

3 Throughout this action, PublicResource.Org has provided ample evidence showing the
4 strong public interest in accessing Form 990s in machine-readable format. Indeed, as noted by
5 several of the declarants who supported PublicResource.Org’s summary judgment motion,
6 production of these documents in MeF format will allow PublicResource.Org, other watchdog
7 groups, and journalists to more easily combine this data with other datasets to better understand
8 the relationship between public and private dollars in providing social services and to produce
9 extensive, in-depth empirical research. Declaration of Beth Simone Noveck [Dkt. # 49], ¶¶ 10-
10 11. Analysis of this data will also be broader and more comprehensive. Declaration of Ken
11 Berger [Dkt. # 51], ¶ 8; Declaration of Kendall Taggart [Dkt. # 52], ¶ 9.

12 Additionally, availability of returns in MeF format will enhance journalists’ and
13 organizations’ reporting on the non-profit sector and the IRS’s performance, allowing
14 widespread publication and dissemination of data found in Form 990s. *See* Declaration of Scott
15 Klein [Dkt. # 50], ¶¶ 6–8. This undertaking also advances the public interest by informing
16 citizens about their government’s conduct, thereby contributing to the “fund of information used
17 by citizens to make important political choices.” *See O’Neill, Lysaght & Sun*, 951 F. Supp. at
18 1423 (citation omitted). As this Court succinctly explained in granting PublicResource.Org’s
19 motion for summary judgment, “[p]roduction of the data in MeF format would allow
20 Public.Resource.Org and other requestors to more easily review the operations of the non-profit
21 entities who submit Form 990s, but would also shed additional light on the IRS’s operations;
22 specifically how the IRS treats different non-profit entities and how well the IRS complies with
23 its statutory duties to release certain information and withhold other information about the Form
24 990 filers.” *Public.Resource.org v. I.R.S.*, --- F.Supp.3d ---, 2015 WL 393736, at *2 (N.D. Cal.
25 Jan. 29, 2015) (citations omitted).

26 Moreover, this action had the added public benefit of forcing the IRS to comply with the
27 Electronic Freedom of Information Act Amendments of 1996, which requires an agency to
28 “provide [records] in any form or format requested by the person if the record is readily

1 | reproducible by the agency in that form or format.” 5 U.S.C. § 552(a)(3)(B) (“E-FOIA”). As a
2 | result of this action, not only has PublicResource.Org received the nine Form 990s in MeF
3 | Format it requested, but other organizations and individuals may now also request Form 990s in
4 | MeF format. *See Los Angeles Gay & Lesbian Cmty. Servs. Ctr. v. IRS*, 559 F. Supp. 2d 1055,
5 | 1060 (C.D. Cal. 2008) (“Plaintiff’s legal action had public benefit in that it enforced Defendant’s
6 | compliance with FOIA with regard to a search of public value”) (citations omitted).

7 | **2. PublicResource.Org’s Lack of a Commercial Benefit from Disclosure**
8 | **and the Nature of Its Interests in This Request Support the Award of**
9 | **Fees.**

9 | The second and third factors, which courts in the Ninth Circuit consider “jointly,” also
10 | point in PublicResource.Org’s favor. *Electronic Frontier Foundation*, 2008 U.S. Dist. Lexis
11 | 44050, at *8. These factors “relate to whether the plaintiff requested information for a private
12 | commercial benefit only or whether the public interest benefitted from the release of the
13 | requested information.” *Am. Small Bus. League*, 2009 WL 1011632, at *3 (citation omitted).
14 | “For example, a court might allow recovery of attorneys’ fees for an indigent plaintiff or a non-
15 | profit public interest group, but not for a large corporate plaintiff.” *Id.*; *see also Rosenfeld*, 904
16 | F. Supp. 2d at 998 (“where plaintiff is ... a nonprofit public interest group, an award of
17 | attorney’s fees furthers the FOIA policy of expanding access to government information.”)
18 | (citation omitted).

19 | Here, PublicResource.Org’s request was not motivated by a commercial or private
20 | interest. Nor has the PublicResource.Org derived any commercial benefit following the IRS’s
21 | disclosure of the requested records. As a non-profit organization, PublicResource.Org sought the
22 | requested information to better understand the IRS and the operations of the non-profit entities
23 | who submit Form 990s and to provide the public this information. Moreover, as discussed in
24 | detail above, the public interest benefitted from the release of the Form 990s in MeF format. As
25 | a result, PublicResource.Org’s interest in these forms clearly falls in the category of
26 | “scholarly[,]” “journalistic[,]” and “public-interest oriented.” *ACLU*, 2012 U.S. Dist. Lexis
27 | 190389, at *11. *See also Baker v. Dep’t of Homeland Security*, 2012 U.S. Dist. Lexis 165240 ,
28 |

1 *17 (M.D. Pa. Nov. 19, 2012) (“[plaintiff’s] motive in litigating this case under FOIA was not
2 commercial, but rather investigatory.”)

3 **3. The IRS Lacked Any Reasonable Basis in Law for Withholding the**
4 **Requested Information.**

5 Finally, the fourth factor considers “whether defendant’s withholding of the requested
6 information had a reasonable basis in law, [and] relates to whether the government agency’s
7 actions appeared to have a ‘colorable basis in law’ or instead appeared to be carried out ‘to
8 frustrate the requester.’” *Am. Small Bus. League*, 2009 WL 1011632, at *4 (citation omitted).
9 Under this factor, “[t]he question is not whether [the requestor] has affirmatively shown that the
10 agency was unreasonable, but rather whether the agency has shown that it had any colorable or
11 reasonable basis for not disclosing the material until after [the requestor] filed suit.” *Davy v.*
12 *C.I.A.*, 550 F.3d 1155, 1162-63 (D.C. Cir. 2008). The government carries the burden of showing
13 that it had a colorable or reasonable basis for not disclosing the material until after the plaintiff
14 filed suit. *Id.* at 1163.

15 The IRS’s refusal to release the Form 990s in MeF format was legally suspect throughout
16 this litigation, and found support in no on-point authority. Further, the IRS ignored controlling
17 and persuasive authority. In fact, in denying the IRS’s motion to dismiss, this Court held that
18 “there is *no basis* to conclude that FOIA is superseded by section 6104.” *Public.Resource.Org v.*
19 *I.R.S.*, 50 F. Supp. 3d 1212, 1214 (N.D. Cal. 2014) (emphasis added). The IRS’s position was
20 particularly unreasonable considering PublicResource.Org’s FOIA request was narrow, that the
21 IRS originally received those forms from the non-profit organizations that filed them in the MeF
22 format, that the IRS had the records available in that format and could have readily produce them
23 at any time, and that no FOIA exemption applied.¹

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27 ¹ Moreover, “it is possible for a court to find a reasonable basis in law but still weight
28 [sic] the other factors in favor of an award.” *O’Neill, Lysaght & Sun*, 951 F. Supp. at 1425
(citation omitted).

1 **III. THE FEES SOUGHT BY PUBLICRESOURCE.ORG ARE REASONABLE.**

2 After the court determines “the plaintiff is both eligible for and entitled to recover fees,
3 the award must be given and the only room for discretion concerns the reasonableness of the
4 amount requested.” *Rosenfeld*, 904 F. Supp. 2d at 1001(quoting *Long*, 932 F.2d at 1314). “In
5 assessing the reasonableness of the amount requested, the Court turns to the plaintiff’s fee bill
6 and scrutinizes the ‘reasonableness of (a) the number of hours expended and (b) the hourly fee
7 claimed. If these two figures are reasonable, then there is a ‘strong presumption’ that their
8 product, the lodestar figure, represents a reasonable award.” *Id.*; *Moreno v. City of Sacramento*,
9 534 F.3d 1106, 1112 (9th Cir. 2008) (A trial court “should defer to the winning lawyer’s profes-
10 sional judgment as to how much time he was required to spend on the case; after all, he won, and
11 might not have, had he been more of a slacker.”).

12 Applying these criteria, PublicResource.Org’s lodestar in the amount of \$219,535, plus
13 the fees incurred in connection with this Fee Motion,² is reasonable. *First*, as discussed above,
14 the public has a substantial interest in the information that will be more easily gleaned from
15 Form 990s in MeF format, and in the public oversight of the official duties of the IRS, which was
16 achieved through this litigation. Further, by successfully prosecuting this action,
17 PublicResource.Org’s lawsuit was necessary to vindicate the public’s right of access and to
18 discourage future efforts to thwart the public’s right of access to government records.

19 *Second*, this case required considerable time and effort due to the IRS’s continued refusal
20 to comply with FOIA mandates. PublicResource.Org prepared a fact-intensive complaint with
21 several exhibits to explain the need for and importance of release of documents in the MeF
22 format, it opposed IRS’s motion to dismiss, it engaged in fruitless settlement negotiations, it
23 opposed the IRS’s motion for summary judgment, and it moved for summary judgment with
24

25 ² PublicResource.Org is entitled to fees for the time expended in preparing this fee
26 motion. *See Rosenfeld*, 904 F. Supp. 2d at 1008 (“In this Circuit, plaintiffs may recover
27 attorney’s fees for time reasonably expended on a motion for attorney fees and costs.”)
28 PublicResource.Org estimates that it will incur between \$15,000 and \$25,000 in connection with
this Fee Motion and reply brief. *See* Burke Decl. ¶ 9. With its reply, PublicResource.Org will
provide a supplemental declaration supporting these fees. *Id.*

1 several supporting declarations and exhibits. *See* Dkt. ## 1, 17, 47-55. PublicResource.Org also
2 attempted to avoid incurring fees from filing this motion, but the IRS ignored
3 PublicResource.Org’s repeated overtures to discuss fees. Declaration of Thomas R. Burke,
4 (“Burke Decl.”) ¶ 1.

5 *Third*, this case was managed efficiently and economically. PublicResource.Org’s
6 counsel have particular expertise in public records litigation and efficiently divided
7 responsibilities in this litigation, avoiding duplicative efforts. Burke Decl. ¶¶ 3-4 6. In total,
8 PublicResource.Org’s counsel spent over 458 hours on this matter, which is reasonable and
9 consistent with public records litigation. *Id.* ¶ 6; Olson Decl. ¶ 5. Notably, in making this
10 motion, PublicResource.Org’s counsel exercised billing judgment by removing any billing
11 entries that were even potentially duplicative or unnecessary to achieve the favorable results for
12 PublicResource.Org and by eliminating or reducing various tasks, such as time associated with
13 reviewing drafts, scheduling hearings or conferences, and preparing for court hearings. Burke
14 Decl. ¶ 6; Olson Decl. ¶ 5.

15 *Fourth*, counsel’s hourly rates are well within the range charged by counsel with similar
16 experience and expertise at other private firms in Northern District of California. *See* Olson
17 Decl. ¶ 7; Burke Decl. ¶ 8. To establish that its attorneys’ billing rates are reasonable for the
18 market, a prevailing party may present declarations from its own attorneys and from other
19 attorneys – as PublicResource.Org has done here – regarding the prevailing fees in the market
20 and rate determinations in other cases. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 894 n.11
21 (1984); *United Steelworkers of America v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir.
22 1990); *Cortes v. Metro. Life Ins.*, 380 F. Supp. 2d 1125, 1131 n.3 (C.D. Cal. 2005). The
23 prevailing attorneys’ actual billing rates are also highly relevant. As one court observed, “‘the
24 **best evidence** [of an attorney’s reasonable hourly billing rate] would be the hourly rate
25 customarily charged by the [applicant] himself or by his law firm.’” *Elser v. I.A.M. Nat’l*
26 *Pension Fund*, 579 F. Supp. 1375, 1379 (C.D. Cal. 1984) (emphasis added) (quoting *Nat’l Assoc.*
27 *of Concerned Veterans v. Sec. of Def.*, 675 F.2d 1319, 1325-26 (D.C. Cir. 1982)). “Unless
28 counsel is working outside his or her normal area of practice, the billing-rate multiplier is, for

1 practical reasons, usually counsel's normal billing rate." *Moore v. James. H. Matthews & Co.*,
 2 682 F.2d 830, 840 (9th Cir. 1982).³ The following tables summarize the requested hourly rates
 3 per year and timekeeper based on their normal billing rate:

2013			
Timekeeper	Rate	Hours	Fees
Thomas Burke	585	75.6	\$44,226.00
Jason J. Callan	210	1.1	\$231.00
Kathleen Cullinan	290	12.3	\$3,567.00
Dan Laidman	330	28.9	\$9,537.00
Alexis Liistro	355	32.1	\$11,395.50
Ronald G. London	515	29.8	\$15,347.00
Bret Masterson	205	4.7	\$963.50
2013 TOTAL		184.5	\$85,267.00

2014			
Timekeeper	Rate	Hours	Fees
Thomas Burke	620	91.1	\$56,482.00
Dan Laidman	355	116.2	\$41,251.00
Ronald G. London	540	23.3	\$12,582.00
2014 TOTAL:		230.6	\$110,315.00

2015			
Timekeeper	Rate	Hours	Fees
Thomas Burke	645	26.1	\$16,834.50
Dan Laidman	395	12.3	\$4,858.50
Ronald G. London	565	4	\$2,260.00
2015 TOTAL :		42.4	\$23,953.00

GRAND TOTAL:		457.5	\$219,535.00
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3 Numerous courts have held that the actual rate charged by counsel to private clients is generally the best evidence of a reasonable hourly rate. *See, e.g., Nat'l Assoc. of Concerned Veterans*, 675 F.2d at 1326 ("the actual rate that applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate"); *Tomazzoli v. Sheedy*, 804 F.2d 93, 98 (7th Cir. 1986) ("[f]or private counsel with fee-paying clients, the best evidence is the hourly rate customarily charged by counsel or by her law firm"); *Ohio-Sealy Mattress Mfg. v. Sealy*, 776 F.2d 646, 660 (7th Cir. 1985) ("hourly rates used to compute the lodestar are typically the rates lawyers charge clients who pay on a regular basis").

1 Burke Decl. ¶ 6; Ex. A. PublicResource.Org has submitted declarations of two veteran public
2 records litigators – Thomas R. Burke and Karl Olson – both with decades of experience in public
3 records litigation and media law. Burke ¶¶ 3-4; Olson ¶¶ 2-3. Both attest that the total fee
4 request is reasonable and the rates requested in this matter are well within the prevailing rates
5 awarded to counsel of similar skill and expertise in the market (if not below the market rate
6 during this relevant period). Burke ¶ 7; Olson ¶¶ 4-5.

7 *Finally*, a review of other public records cases and Northern District cases confirms the
8 reasonableness of PublicResource.Org’s total fee request and requested hourly rates. *See Id.* For
9 example, earlier this year, in *Los Angeles Times Communications LLC and The McClatchy*
10 *Company DBA The Sacramento Bee v. University of California Board of Regents*, Mr. Burke’s
11 firm as the prevailing party in that CPRA litigation was awarded \$233,225 in attorneys’ fees
12 including (nearly \$80,000 in “fees on fees”) based on hourly rates that mirror those requested
13 here. Burke Decl. ¶ 7 (describing other examples); Olson ¶ 5 (describing cases). Recently, in
14 *Wynn v. Chanos*, 2015 WL 3832561, at *3 (N.D. Cal. June 19, 2015), this Court awarded the
15 prevailing party in a motion to strike under California’s anti-SLAPP statute a total award of
16 \$390,149.63 with hourly rates between \$750 and \$1,085 for partners and between \$570 and \$710
17 for associates, which is noticeably in excess of the hourly rates sought here.

18 Further, the requested fee award and hourly rates are reasonable compared to other FOIA
19 cases in the Northern District. In *Rosenfeld*, 904 F. Supp. 2d at 1004, for example, the court
20 found that in 2012, hourly rates between \$460 and \$700, with a total award of \$363,217.60 in
21 fees and costs, were reasonable for successful prosecution of a FOIA action. *See also The Sierra*
22 *Club v. E.P.A.*, ---F. Supp. 3d ---, 2014 WL 6895928, at *18 (N.D. Cal. Dec. 8, 2014) (finding
23 hourly rates between \$350 and \$650 reasonable in a FOIA action); *Hajro v. U.S. Citizenship &*
24 *Immigration Servs.*, 900 F. Supp. 2d 1034, 1054 (N.D. Cal. 2012) (finding \$550 to \$625 for lead
25 counsel and \$450 to \$600 for associated counsel reasonable and awarding \$318,568 in attorneys’
26 fees in a FOIA action).

1 **IV. A MODEST ENHANCEMENT OF THE LODESTAR IS APPROPRIATE.**

2 Because of the extent of its success and the importance of this action to the public,
3 PublicResource.Org is entitled to a 1.5 multiplier of its fees. Under FOIA, a “court may
4 authorize an upward or downward adjustment from the lodestar figure if certain factors relating
5 to the nature and difficulty of the case overcome this strong presumption and indicate that such
6 an adjustment is necessary.” *Long*, 932 F.2d at 1314. For instance, in *Powell v. D.O.J.*, 569 F.
7 Supp. 1192, 1204 (N.D. Cal. 1983), the court adjusted a lodestar figure upward by applying a
8 multiplier of 1.5 where the attorney worked pro bono for his client and the attorney’s work was
9 “at a higher level of competence than that of attorneys with similar experience.” *See also*
10 *Trulsson v. Cnty. of San Joaquin Dist. Attorney’s Office*, 2014 WL 5472787, at *9 (E.D. Cal.
11 Oct. 28, 2014) (awarding 1.5 multiplier in an employment discrimination case in part because of
12 the results obtained in the litigation and the contingent risk); *White v. City of Richmond*, 559 F.
13 Supp. 127, 134 (N.D. Cal. 1982) aff’d, 713 F.2d 458 (9th Cir. 1983) (awarding 1.5 multiplier in
14 civil rights action primarily because of the contingent nature of the plaintiffs’ cases and the
15 extent of the success achieved).

16 Here, PublicResource.Org achieved impressive results. PublicResource.Org not only
17 prevailed in this litigation and secured the release of nine previously withheld Form 990s in
18 Machine Readable format, but this FOIA litigation also produced two valuable published
19 opinions from this Court. *See* Burke Decl. ¶ 5; *see also, Public.Resource.Org*, 2015 WL 393736
20 (granting PublicResource.Org’s summary judgment motion); *Public.Resource.Org*, 50 F. Supp.
21 3d 1212 (denying IRS’s motion to dismiss). Moreover, this action greatly advanced the public
22 interest. In fact, as a result of this Court’s order requiring the IRS to produce the requested nine
23 Form 990s in MeF format, the IRS issued a statement that it would change its practices regarding
24 machine readable format. Burke Decl. ¶ 5. Specifically, the IRS noted that it “has been actively
25 considering the district court’s ruling in the Public.Resource.Org case” and made clear that it
26 “has made substantial progress in developing a technology solution that, when perfected, will
27 allow the IRS to provide electronically-filed Forms 990 in a machine-readable format.” *Id.*; *see*
28 *also* Suzanne Perry, *The Chronicle of Philanthropy*, “IRS Plans to Begin Releasing Electronic

1 Nonprofit Tax Forms Next Year,” June 30, 2015 (available at
2 <https://philanthropy.com/article/IRS-Plans-to-Begin-Releasing/231265>); Cory Doctorow,
3 *BoingBoing*, “IRS finally agrees to do something about its \$1.5 trillion nonprofit database,” June
4 30, 2015 (available at <http://boingboing.net/2015/06/30/irs-finally-agrees-to-do-somet.html>).
5 Finally, as in *Powell*, PublicResource.Org was represented in this case on a pro bono basis; thus,
6 PublicResource.Org’s counsel’s “potential for receiving fees is contingent not only on whether
7 plaintiff substantially prevails in this lawsuit but also on this court’s willingness to award fees in
8 its discretion.” *Powell*, 569 F. Supp. at 1204. For these reasons, the Court should grant a 1.5
9 multiplier in this case.

10 **V. PUBLICRESOURCE.ORG IS ENTITLED TO REASONABLE COSTS.**

11 Costs of litigation are authorized under 5 U.S.C. § 552(a)(4)(E) and should be awarded in
12 this case. Costs which are out-of-pocket expenses that an attorney would normally bill a fee-
13 paying client are properly added to reasonable compensation. *See Kuzma v. I.R.S.*, 821 F.2d 930,
14 933 (2d Cir. 1987). In *Kuzma*, the court recognized that the litigation cost provision of FOIA
15 permits broader recovery than the taxable cost provision of 28 U.S.C. §1920 and permitted
16 recovery of costs related to “photocopying, postage, covers, exhibits, typing, transportation and
17 parking fees.” *See also Hajro*, 900 F. Supp. 2d at 1054 (awarding \$2,446.29 in costs). Here, the
18 costs include filing fees, duplication, legal research (billed at cost) and delivery fees incurred in
19 this litigation. Burke Decl. ¶ 9. As a result, PublicResource.Org is entitled to recover \$1,272.46
20 in costs.

21 **VI. CONCLUSION**

22 This hard fought FOIA litigation helped to make public and accessible important data
23 from the IRS in a format that will provide valuable transparency into the operation of all non-
24 profit organizations. Thus, for the reasons set forth above, PublicResource.Org respectfully

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requests that this Court order the IRS to pay in full within 30 days the attorneys' fees
PublicResource.Org has incurred in the amount of \$219,535, plus fees incurred in connection
with this Fee Motion, times a 1.5 multiplier and \$1,272.46 in costs.

DATED: This 29th day of July, 2015

DAVIS WRIGHT TREMAINE LLP

By: /s/ Thomas R. Burke
THOMAS R. BURKE
Attorneys for Plaintiff Public.Resource.Org