UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR PUBLIC INTEGRITY, Plaintiff, v. FEDERAL ENERGY REGULATORY COMMISSION, Defendant.	Civil Action No. 04-2112 (EGS) ECF

PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS

Plaintiff, Center for Public Integrity, by its counsel moves that the Court award Plaintiff attorneys' fees in the amount of $4,872 and litigation costs of $350.

Accompanying this Motion is the Declaration of Peter Newbatt Smith and a Proposed Order.

Respectfully submitted,

/s/

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS

Plaintiff, Center for Public Integrity, under the Freedom of Information Act (5 U.S.C. § 552) is eligible for and entitled to an award of attorney fees and litigation costs in this case.

BACKGROUND AND PROCEDURAL HISTORY

On February 26, 2004, Plaintiff, Center for Public Integrity ("CPI," or "the Center") made a Freedom of Information Act request to Defendant, Federal Energy Regulatory Commission ("FERC"), seeking documents related to communications "between the Federal Energy Regulatory Commission and companies considering construction of liquefied natural gas facilities," including some three dozen specifically named companies. *See* Complaint at ¶ 5; Def.'s Mot. for Summary Judgment (Docket #10), Layton Decl. ¶ 3 and Exhibit A.

Before this lawsuit was begun, Defendant produced approximately 70 e-mail exchanges and 54 other documents in connection with three partial responses to Plaintiff's FOIA Request, dated respectively April 23, May 10, and July 20, 2004. Layton Decl. ¶ 6, 7 and 9, and Exhibits B, C, and D.

Plaintiff filed its Complaint in this case on December 6, 2004. Defendant responded on January 6, 2005, with a Motion to Dismiss (Docket #4), which argued that Plaintiff had failed to

exhaust administrative remedies. In its supporting Memorandum, at 4, Defendant acknowledged that "[a]s of January 6, 2005, the Commission has *not denied* Plaintiff's FOIA request," (emphasis added) but nevertheless argued, at 5, that Plaintiff had failed to comply with the agency's regulations, citing 18 C.F.R. § 388.110(a)(1). That regulation provides: "A person whose request for records, request for fee waiver or reduction, or request for expedited processing is *denied* in whole or part may appeal that determination to the General Counsel or General Counsel's designee within 45 days of the determination." (Emphasis added.)

Plaintiff, in opposing the Motion to Dismiss, remarked on Defendant's inconsistency on this point. Pl.'s Opp. to Mot. to Dismiss (Docket #5), at 2. Among other arguments, Plaintiff also noted, at 4-5, that Defendant's previous responses to the FOIA Request did not contain notice of the right to file an administrative appeal as required by FOIA (5 U.S.C. § 552(a)(6)(A)(i)) and in particular by Oglesby v. United States Dep't of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990) (where agency "did not provide notice of appellant's right to appeal, its response was insufficient under the FOIA to trigger the exhaustion requirement and appellant was free to file suit").

Defendant voluntarily withdrew its Motion to Dismiss. *See* Docket #7.

Defendant's fourth partial response to the FOIA Request, dated March 4, 2005, withheld 263 e-mail messages in their entirety, asserting FOIA Exemption 5 as justification. Layton Decl. ¶ 11 and Exhibit E. Defendant subsequently produced seven of these messages before the Court ruled. *See* Layton Decl. ¶ 11. Defendant's fifth partial response, dated March 7, 2005, produced 22 documents and withheld, in whole or in part, six documents, asserting FOIA Exemption 7(F) as justification. Layton Decl. ¶ 13 and Exhibit G. Defendant's sixth and final response, dated March 22, 2005, produced five e-mail messages and five other documents. Layton Decl. ¶ 14 and Exhibit I.

In April through June 2005, the parties briefed their cross-motions for summary judgment. *See* Docket #10, 12, 16, and 17. After examining the withheld records *in camera*, this Court ordered Defendant to produce to Plaintiff redacted portions of the 256 withheld e-mails and to provide the Court with additional information about the six other withheld documents. Opinion and Order dated September 27, 2006 (Docket #19).

Defendant has produced to Plaintiff redacted portions of the 256 previously withheld e-mails. In addition, Defendant has produced four of the six other documents. The parties have stipulated to the dismissal of Plaintiff's remaining claims (Docket #26), which pertained only to withheld portions of two documents.

ARGUMENT

Plaintiff is eligible for an award of attorneys' fees and costs as the prevailing party in this case. Plaintiff is entitled to such an award principally because Defendant's legal positions had no reasonable basis in law.

I. Plaintiff Has "Substantially Prevailed" in This Lawsuit.

This Court, in its Opinion and Order of September 26, 2006, granted Plaintiff summary judgment "as to the Exemption 5 issue" (slip op., at 11), and denied summary judgment to either party, without prejudice, "as to the Exemption 7(F) issue" (*Id.*). There can be no question that Plaintiff has "'been awarded some relief by [a] court' … in a judgment on the merits" and is therefore eligible for an award of attorneys' fees. Oil, Chemical & Atomic Workers International Union v. Department of Energy, 288 F.3d 452, 455-56 (D.C. Cir. 2002) (quoting Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 603 (2001)).

II. All Relevant Factors Counsel the Court, in its Discretion, to Award Attorneys' Fees to Plaintiff.

The Court of Appeals for this circuit has directed that at least four specific criteria be considered "in determining whether a substantially prevailing FOIA litigant is entitled to attorney's fees: (1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) the reasonableness of the agency's withholding." Tax Analysts v. Department of Justice, 965 F.2d 1092, 1093 (D.C. Cir. 1992); see also Weisberg v. Department of Justice, 745 F.2d 1476, 1498 (D.C. Cir. 1984); LaSalle Extension University v. FTC, 627 F.2d 481, 483 (D.C. Cir. 1980); Cuneo v. Rumsfeld, 553 F.2d 1360, 1364 (D.C. Cir. 1977). The trial court may take other factors into account (Cox v. Department of Justice, 601 F.2d 1, 7 (D.C. Cir. 1979); Cuneo, 553 F.2d at 1364), and "[a]pplication of these factors should not be mechanistic." Lasalle, 627 F.2d at 484 n.5. The primary historical source for these four factors was language adopted by the Senate in 1974 amending the FOIA. *See* discussion in Cuneo, 553 F.2d at 1364. Although Congress decided not to write write these four factors into the statute, the cases cited above demonstrate that the courts have followed the conference committee's suggestion that they consider such criteria. S. Conf. Rep. No. 1200, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6285, 6288.

A. There is a presumption that journalistic use of released information provides a "public benefit."

The Center for Public Integrity is a journalistic organization, and it has already published information about the relationship between the Federal Energy Regulatory Commission and the energy companies it regulates. *See* Kevin Bogardus, "Appealing to a Higher Authority," http://www.publicintegrity.org/oil/report.aspx?aid=430, December 7, 2004.

The relevant Senate committee in 1974 suggested that "[u]nder the first criterion [i.e., benefit to the public] 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." S. Rep. No. 854, 93d Cong., 2d Sess. 19; cited with approval by *Des Moines Register v. Department of Justice*, 563 F.Supp. 82, 84 (D.D.C. 1983).

B. Plaintiff's interest in the requested information is not commercial, but journalistic and public-interest oriented.

The second and third considerations are closely related, and many courts have considered them together. The Center for Public Integrity sought the requested information in connection with its journalistic investigation of the energy industry.

The Senate report suggests that under these criteria, courts should usually award fees "where the complainant was indigent or a nonprofit public interest group" and "if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented." S. Rep. No. 854, 93d Cong., 2d Sess. 19.

C. The government's position has been unreasonable and without a basis in law.

This Court has directly rejected Defendant's representations that the withheld e-mails "do not contain segregable non-exempt portions." *See* identical language in Layton Decl. ¶ 12 and (in Def.'s Reply/Opp., Docket #16) Cupina Decl. ¶ 4. Several court decisions have found that a failure to release segregable non-exempt information can be "unreasonable" for purposes of the entitlement analysis. *See* Poulsen v. U.S. Customs & Border Prot., No. 06-1743 (N.D. Cal. Jan. 17, 2007); Long v. IRS, No. 74-724 (W.D. Wash. Apr. 3, 2006); McCoy v. Fed. Bureau of Prisons, No. 03-383 (E.D. Ky. Aug. 16, 2005).

Defendant's initial Motion to Dismiss was also without legal basis. It conceded that Defendant had not denied Plaintiff's FOIA Request, while claiming that Plaintiff should comply with a regulation for appealing denied requests. *See* Pl.'s Opp. to Mot. to Dismiss, at 2. Furthermore, Defendant's Motion to Dismiss was barred by the controlling precedent of Oglesby. See *Id.*, at 4-5.

III. Calculation of Fee Award.

Plaintiff requests an award of costs in the amount of the $350 filing fee. Plaintiff requests an award of attorneys' fees for 17.4 of the hours expended in this lawsuit by its employee, counsel Peter Newbatt Smith. The U.S. Attorney's "Laffey Matrix" suggests that an hourly rate of $280 is appropriate for an attorney of Mr. Smith's experience during the 2004-2005 period when the bulk of the hours were spent. The total attorneys' fees requested are therefore $4,872, and the total attorneys' fees and costs, $5222.

CONCLUSION

For the foregoing reasons, Plaintiff asks the Court to award it attorneys' fees in the amount of $4,872, plus costs of $350.

Respectfully submitted,

/s/

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