

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 173-4-20 Wncv

ENERGY POLICY ADVOCATES,
Plaintiff,

v.

ATTORNEY GENERAL'S OFFICE,
Defendant.

RULING ON EPA'S MOTION FOR FEES AND COSTS

Plaintiff Energy Policy Advocates (EPA) seeks an award of attorney fees and costs pursuant to 1 V.S.A. § 319(d)(1) after the court ordered Defendant the Attorney General's Office (AGO) to produce certain documents in response to EPA's public records requests. EPA claims that it substantially prevailed in this case and seeks all fees and costs incurred, including those fees incurred to seek this award (so-called fees on fees). It further seeks an upward adjustment to the attorney fee rate to reflect the superb results obtained by Attorney Hardin in this case. The AGO argues that it substantially prevailed, and no fees or costs should be awarded at all. It also argues that an award of costs against the State is not permissible under Rule 54(d)(1), and that if any fees are awarded at all, they should be calculated at a reasonable rate substantially lower than Attorney Hardin's regular rate, and there should be no upward adjustment.

In total, EPA seeks 45.7 hours of attorney time for the underlying litigation and 11.6 hours on the fee application and reply. Attorney Hardin's hourly rate is \$325. The total fees sought are \$18,622.50. EPA seeks a total of \$2,371.33 in costs. The total fees and costs sought are \$20,993.83.

The applicable fee and costs provision of the Public Records Act is as follows: "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).

Costs

The AGO argues that under Rule 54(d)(1) that no costs should be assessed against it. Rule 54(d)(1) includes this: "Costs shall be taxed against the State of Vermont only to the extent permitted by law." An assessment of costs other than fees is expressly permitted by 1 V.S.A. § 319(d)(1) in this context, however. While § 319(d)(1) does not expressly say that costs may be assessed "against the State," the provision applies in "any" case in which the requestor substantially prevails, and otherwise, it is clearly and necessarily implied. Other than

municipalities, the State is the principal target of the Public Records Act and records requests, and any interpretation of § 319(d)(1) shielding it from an award of costs but subjecting it to an award of fees would make little sense. Costs are available against the State.

Fees on fees

“Fees on fees” refers to the compensability of time incurred seeking the underlying fees. The general rule in similar contexts when there is a statutory right to fees is that “[r]easonable time expended in applying for statutory fees and litigating statutory fee issues is compensable.” 1 Alba Conte, *Attorney Fee Awards* § 4:21 (3d ed.). This is the rule under 42 U.S.C. § 1988 as well. See Sec. 1983 Litig. Stat. *Attorney Fees* § 4.11 (4th ed.) (“A party who prevails on the merits of her § 1983 claim, *and* who also succeeds in recovering § 1988(b) attorney’s fees, is entitled to recover reasonable attorney’s fees for the legal services rendered on the fee application.”). The AGO does not argue otherwise in this case, and nothing in 1 V.S.A. § 319(d)(1) casts doubt on the availability of fees on fees in this case. Fees on fees are available under 1 V.S.A. § 319(d)(1).

Attorney Hardin’s rate

EPA supported the reasonableness of Attorney Hardin’s hourly rate with, among other things, the affidavit of Attorney Brady Toensing, who is familiar with both Attorney Hardin and this type of litigation in Vermont. In response, the AGO has cited some rates appearing in older cases and has attempted to extrapolate forward in an effort at showing that \$325 is too high. The court is not persuaded by the AGO’s showing. Indeed, Judge Teachout approved Attorney Hardin’s \$325 rate several years ago in the case cited below. Attorney Hardin’s \$325 rate is reasonable in the circumstances of this case.

Who substantially prevailed

The principal dispute is who substantially prevailed. The court agrees with a prior ruling by Judge Teachout that in the public records context the determination of who substantially prevailed should not be reduced to a “formal mechanical test.” *Energy & Environment Legal Institute v. The Atty. Gen. of Vermont*, No. 349-6-16 Wncv, 2018 WL 6435578, at *1 (Vt. Super. Ct. July 2, 2018).

This is the consolidated case of what originated as four separately filed cases. Each represented certain records requests made by EPA to the AGO which were denied, denied again on administrative review, and then appealed. In two, EPA sought the production of several readily identifiable Common Interest Agreements (CIAs) entered into by the AGO and various other parties. EPA was successful on appeal. The court ordered the production of all withheld CIAs, and the court understands that the AGO already has complied with that order.

In the other two cases, EPA made several requests for communications falling within the purview of these CIAs. These requests generated thousands of pages of responsive documents running directly into predictable claims of privilege and work product immunity from the AGO. While these requests were not asserted frivolously or in bad faith, EPA had to have known that

any entitlement to production would be a serious longshot. In fact, the court denied access to them in their entirety under the work product rule. See generally *Energy Policy Advocates v. Attorney General's Office*, No. 173-4-20 Wncv, 2021 WL 4189795 (Vt. Super. Ct. July 16, 2021). EPA argues that the fact that its requests prompted the AGO to produce logs detailing the withheld documents nevertheless shows that it prevailed with these requests to some extent.¹

In these circumstances, EPA looks primarily to the records that were produced and seeks fees and costs for the entire litigation. The AGO looks at the total volume of responsive documents, the relatively few by comparison that were produced, and concludes that it substantially prevailed, and nothing should be awarded. EPA responds that it litigated the case efficiently and in good faith and should not be penalized for agreeing to consolidate the original four cases, which is what permits the AGO's mechanical calculation regarding how many documents were produced versus requested.

It is apparent to the court that EPA substantially prevailed on the part of this litigation focused on the CIAs, and the AGO substantially prevailed on the part of this litigation focused on the communications within the scope of the CIAs. EPA is entitled to an award of fees and costs to that extent.

Amount of the award

Attorney Hardin did not keep track of his hours in a manner readily susceptible to any detailed division between the parts in which EPA substantially prevailed and those in which it did not, and some issues would have overlapped in any event. On balance, the total number of hours expended on the underlying litigation as well as the fee application is quite reasonable, and the court has approved Attorney Hardin's hourly rate. Rather than order Attorney Hardin to attempt to reconstruct his hours in a manner that likely would devolve into speculation, the court concludes that the fair approach is to simply adjust downward from the total number of hours on the underlying litigation.

The total hours spent on the underlying litigation is 45.7. The court will adjust this figure downward by half to reflect the half of the litigation in which EPA did not substantially prevail, resulting in 22.85 compensable hours. There is no reason to adjust downward the 11.6 hours devoted to fee litigation. The court see no reason to adjust upward Attorney Hardin's hourly rate. Thus, EPA is entitled to compensation for 34.45 hours at \$325/hr., which is, \$11,196.25. EPA also is entitled to half its costs, \$1,185.67. The total award therefore is \$12,381.92.

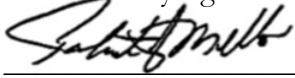
¹ This argument deserves no weight. The AGO had a statutory duty to produce a log of withheld materials in the course of denying the requests and logs sometimes are required to facilitate review of records request denials. In either event, the log is not the goal of the request, and a requestor is not entitled to costs and fees simply because one was produced.

Order

For the foregoing reasons, EPA's motion for fees and costs is granted in the amount of \$12,381.92.

SO ORDERED this 28th day of July, 2022.

Electronically signed on 7/27/2022 1:18 PM, pursuant to V.R.E.F. 9(d)

A handwritten signature in black ink, appearing to read "Robert A. Mello", written over a horizontal line.

Robert A. Mello
Superior Judge