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13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

17 _____)
ELECTRONIC FRONTIER FOUNDATION,)
18 Plaintiff,)
19 v.)
20 OFFICE OF THE DIRECTOR OF NATIONAL)
INTELLIGENCE,)
21 Defendant,)
22 _____)
23

No. C 07-5278 SI
**MEMORANDUM OF POINTS
AND AUTHORITIES IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR AWARD OF
ATTORNEY'S FEES AND
COSTS**

Hearing Date: May 23, 2008
Time: 9:00 a.m.
Courtroom: 10, 19th Floor

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9 *Welch v. Metropolitan Life Ins. Co.*,
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14 50 U.S.C. § 1801 *et seq.* -2-

15 OPEN Government Act of 2007,
16 Pub. L. No. 110-175, 121 Stat. 2524, S.2488, 110th Cong. § (a)(4)(E)(ii) -4-

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22 S. Rep. 104-272 -11-

23 S. Rep. No. 93-854 -9-

24 Ellen Nakashima, *A Story of Surveillance*, Washington Post, Nov. 7, 2007, at D1 -7-

25 Ryan Singel, *AT&T Sued Over NSA Eavesdropping*, available at
<http://www.wired.com/science/discoveries/news/2006/01/70126> -7-

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INTRODUCTION

1
2 Defendant Office of the Director of National Intelligence (“ODNI”) hereby opposes
3 plaintiff Electronic Frontier Foundation’s (“EFF” or “plaintiff”) motion for an award of
4 \$49,251.97 in attorney’s fees and costs under the Freedom of Information Act (“FOIA”).

5 Plaintiff’s motion should be denied because plaintiff has not established an entitlement to
6 a fee award. First, any public benefit derived from the limited procedural relief plaintiff
7 obtained in this case was marginal, at best. Second, plaintiff had a sufficient private and
8 commercial interest to pursue this case such that an award of fees would be inconsistent with the
9 policy goals of the FOIA attorney’s fees provision. Indeed, plaintiff proudly promotes its
10 representation of a class of individuals who have brought civil actions seeking monetary
11 damages against telecommunications carriers alleged to have assisted the Government with
12 intelligence activities following the September 11, 2001 attacks. Accordingly, plaintiff’s use of
13 the FOIA in this case to further its lobbying campaign opposing legislative amendments that
14 would potentially scuttle these lawsuits was sufficient motivation for plaintiff to vindicate its
15 rights under FOIA without the need for an award of attorney’s fees. Third, ODNI’s legal
16 positions throughout this case had a reasonable basis in law and were not asserted for purposes
17 of delay or to frustrate the plaintiff.

18 Even assuming, *arguendo*, that plaintiff is entitled to an award of fees, plaintiff is most
19 certainly not entitled to the extraordinary fee award it seeks. In light of the modest success that
20 plaintiff obtained in this case, plaintiff’s requested fee award is unreasonable, both with respect
21 to its hourly rates and the hours it expended in connection with this case. Plaintiff has not
22 carried its burden of producing satisfactory evidence that attorneys of similar experience in the
23 San Francisco legal community are billing paying clients at up to \$700 per hour for FOIA work.
24 Further, plaintiff’s time expenditures are subject to significant reduction because plaintiff seeks
25 payment for excessive and redundant work that plaintiff’s counsel has previously performed in
26 other similar FOIA cases. Applying these reductions, plaintiff should be awarded \$9,979.31 in
27 total fees and costs for this litigation.
28

1 For these reasons, as explained further below, plaintiff's motion for attorney's fees and
2 costs should be denied.

3 BACKGROUND

4 By letters dated August 31, 2007, plaintiff submitted two FOIA requests to ODNI for the
5 following documents: "all agency records from April 2007 to the present concerning briefings,
6 discussions, or other exchanges that Director McConnell or other ODNI officials have had with":
7 a) "members of the Senate or House of Representatives"; and b) "representatives of
8 telecommunications companies concerning amendments to FISA [Foreign Intelligence
9 Surveillance Act, 50 U.S.C. § 1801 *et seq.*, as amended], including any discussion of
10 immunizing telecommunications companies or holding them otherwise unaccountable for their
11 role in government surveillance activities." *See* Declaration of John F. Hackett ¶ 8 (attached as
12 Exhibit A to defendant's memorandum in support of motion for summary judgment; dkt. no. 37)
13 (hereinafter "Hackett Decl."). Plaintiff's letters also sought expedited processing of its FOIA
14 requests pursuant to 32 C.F.R. § 1700.12(c)(2), asserting that the public has a significant interest
15 in ODNI's efforts to amend the FISA. *See* Hackett Decl. ¶ 9.

16 On September 11, 2007, ODNI sent plaintiff two separate response letters acknowledging
17 receipt of plaintiff's FOIA requests and granting expedited processing for both requests. *See id.*
18 ODNI also informed plaintiff that the requests would be processed as soon as practicable. *See*
19 *id.*

20 Plaintiff filed its complaint in this action under the FOIA on October 17, 2007, seeking
21 expedited processing and release of the records described above. *See* Complaint For Injunctive
22 Relief (dkt. no. 1). On October 29, 2007, plaintiff filed a motion for preliminary injunction (dkt.
23 no. 6), requesting that the Court order ODNI: (1) to complete processing of plaintiff's FOIA
24 requests within 10 days, (2) to submit a *Vaughn* index within 20 days, and (3) to provide plaintiff
25 with a declaration within 30 days describing ODNI's compliance with the two aforementioned
26 requests for relief. *See* Plaintiff's Proposed Order.

27 On November 27, 2007, the Court granted plaintiff's motion in part and denied it in part.
28

1 See Order (dkt. no. 26). First, the Court ordered ODNI to provide an interim release of
2 responsive records to plaintiff on November 30, 2007, as ODNI had previously represented to
3 the Court that it would do. See Declaration of John F. Hackett ¶ 12 (attached as Exhibit 1 to
4 defendant's opposition to motion for preliminary injunction; dkt no. 22) (stating that ODNI
5 would provide interim release of records on November 30, 2007). Second, the Court ordered
6 ODNI to provide a final release of records no later than December 10, 2007. Third, the Court
7 denied plaintiff's request for a *Vaughn* index, but ordered ODNI to provide "an affidavit with its
8 final response setting forth the basis for withholding any responsive documents it does not
9 release." *Id.*

10 Consistent with the representations it made to the Court, ODNI provided plaintiff with an
11 interim release of responsive records on November 30, 2007. ODNI released 242 pages of
12 responsive records in full or in part. See Hackett Decl ¶ 15. On December 10, 2007, ODNI
13 provided a final release of responsive records as well as a declaration explaining the basis for its
14 withholdings. ODNI released an additional 267 pages of responsive records in full or in part.
15 See Hackett Decl ¶ 16. ODNI withheld only fourteen pages of responsive records in full. See
16 Hackett Decl ¶ 17.

17 On February 5, 2008, defendants moved for summary judgment with respect to certain
18 documents that plaintiff argued were improperly withheld. See dkt. no. 37 & 38. In response,
19 plaintiff changed its position and decided not to oppose defendant's motion. Thereafter, plaintiff
20 agreed to dismiss this action voluntarily with prejudice. See Stipulation of Dismissal (dkt. no.
21 44).

22 Plaintiff now seeks an award of \$49,251.97 in attorney's fees and costs for work
23 associated with filing this action as well as for preparing the motion for preliminary injunction
24 and the instant motion for fees. For the reasons explained herein, plaintiff's motion should be
25 denied.
26

27 ARGUMENT

28 **I. Plaintiff Is Not Entitled To An Award Of Attorney's Fees And Costs.**

1 Under FOIA, a district court “may assess against the United States reasonable attorney
2 fees and other litigation costs reasonably incurred in any case under this section in which the
3 complainant has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E). The award of attorney’s fees
4 is not mandatory. *Long v. IRS*, 932 F.2d 1309, 1313 (9th Cir. 1991) (per curiam). Consequently,
5 plaintiff must establish both eligibility for and entitlement to attorney’s fees. *Church of*
6 *Scientology v. U.S. Postal Service*, 700 F.2d 486, 489-90 (9th Cir. 1983).

7
8 ODNI does not contest plaintiff’s eligibility for a fee award in light of the relief that
9 plaintiff obtained from the Court’s November 10, 2007 Order granting plaintiff’s motion for
10 preliminary injunction “in part.”¹ However, plaintiff has failed to establish an entitlement to an
11 award of attorney’s fees based on the facts and circumstances of this case.

12 The legislative history of FOIA “makes clear that Congress did not intend an award of
13 attorney’s fees to be automatic.” *Church of Scientology*, 700 F.2d at 492. Instead, the Court
14 must determine whether awarding fees in the instant case “furthers the overriding policy of the

15
16 ¹ ODNI notes its objection to plaintiff’s contention that the new amendments to the FOIA
17 attorney’s fees provision apply retroactively to this case. See Plaintiff’s Motion at 4-5. On
18 December 31, 2007, the President signed into law the OPEN Government Act of 2007, which
19 amends the FOIA provision governing the award of attorney’s fees. See Pub. L. No. 110-175,
20 121 Stat. 2524, S.2488, 110th Cong. § (a)(4)(E)(ii). The amended attorney’s fee provision
21 legislatively overturns the Supreme Court’s decision in *Buckhannon Bd. & Care Home, Inc. v.*
22 *West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598 (2001), as applied in FOIA cases
23 and restores the application of the “catalyst theory” to attorney fee eligibility determinations.
24 Under the new FOIA fee amendment, the term “substantially prevail” is defined to include “a
25 voluntary change or unilateral change in position by the agency, if the complainant’s claim is not
26 insubstantial.” S.2488, 110th Cong. § (a)(4)(E)(ii). This amendment, however, does not apply
27 retroactively to a case such as this one where the parties’ conduct and the Court’s order giving
28 rise to the claim for attorney’s fees (*i.e.*, the November 10, 2007 Order) was issued prior to the
passage of the new law. Indeed, established Supreme Court precedent presumes that new
statutes will not be applied retroactively absent a clear congressional intent to the contrary and
Congress has expressed no such intent to apply the FOIA amendments retroactively, either in the
statutory text or the legislative history. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 237
(1995); see also *Zarcon v. NLRB*, 06-3161-CV-S-RED (W.D. Mo. Mar. 25, 2008) (holding that
OPEN Government Act does not apply retroactively) (attached as Exhibit 1). In any event, even
applying the *Buckhannon* standard to this case, ODNI does not dispute that plaintiff is eligible
for an award of attorney’s fees under Ninth Circuit precedent. See *Watson v. County of*
Riverside, 300 F.3d 1092, 1096 (9th Cir. 2002) (“A preliminary injunction issued by a judge
carries all the ‘judicial imprimatur’ necessary to satisfy *Buckhannon*.”).

1 FOIA.” *Guam Contractors Ass’n v. United States Department of Labor*, 570 F. Supp. 163, 167
2 (N.D. Cal. 1983). In exercising its discretion on this question, the district court must consider
3 four criteria: “(1) the benefit to the public, if any, deriving from the case; (2) the commercial
4 benefit to the complainant; (3) the nature of the complainant’s interest in the records sought; and
5 (4) whether the government’s withholding of the records sought had a reasonable basis in law.”
6 *Church of Scientology*, 700 F.2d at 492.

7 In the present case an award of attorney’s fees would be contrary to the purposes of the
8 FOIA because (1) any public benefit derived from the limited procedural relief plaintiff obtained
9 from the Court’s November 10, 2007 Order case was marginal, at best; (2) plaintiff had a
10 sufficient private and commercial interest to pursue this case vigorously without the added
11 incentive of an award of attorney’s fees; and (3) ODNI possessed a reasonable basis to oppose
12 the relief sought by plaintiff’s motion for preliminary injunction and, indeed, prevailed “in part.”

13 **A. No Significant Public Benefit Resulted From Plaintiff’s Limited Success On**
14 **Its Motion For Preliminary Injunction.**

15 Plaintiff misapprehends the public-benefit factor in contending that the public has
16 benefitted from the records disclosed as a result of this lawsuit. While it is axiomatic that the
17 release of any information to the public increases its knowledge by that information, Congress
18 did not have that broadly defined benefit in mind in enacting FOIA’s fee provision. *See Fenster*
19 *v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979); *Blue v. Bureau of Prisons*, 570 F.2d 529 (5th Cir.
20 1978). Rather, the benefit to the public must be evaluated in light of the benefit that derived
21 from the litigation. *Horsehead Industries, Inc. v. E.P.A.*, 999 F. Supp. 59, 68-69 (D.D.C. 1998);
22 *see also Chesapeake Bay Foundation v. Dep’t of Agriculture*, 108 F.3d 375, 378 (D.C. Cir.
23 1997).

24 In this case the net result of plaintiff’s success “in part” on its motion for preliminary
25 injunction was extremely limited. As explained in ODNI’s opposition to plaintiff’s motion for
26 preliminary injunction, ODNI represented to the Court that it would provide an initial release of
27 records on November 30, 2007. The Court agreed with this proposed date and it did not
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1 accelerate this deadline. The Court also denied plaintiff's request for a *Vaughn* index. Thus, the
2 only substantive relief plaintiff achieved in this case was an order requiring ODNI to complete
3 processing of the FOIA requests by December 10, 2007, a mere 21 days sooner than the
4 December 31, 2007 date proposed by ODNI. Plaintiff has not demonstrated how such minor
5 procedural relief "add[ed] to the fund of information that citizens may use in making vital
6 political choices." See *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979). Nor has plaintiff
7 established that the public received any significant benefit associated with the release of records
8 21 days sooner than ODNI's proposed schedule.

9 Moreover, plaintiff did not receive any more records that it would have otherwise
10 received had it never filed this lawsuit. With respect to the records released by ODNI, the Court
11 did not overrule any of ODNI's FOIA exemption claims and plaintiff voluntarily dismissed this
12 case in the face of ODNI's motion for summary judgment. Plaintiff, therefore, would have
13 received the same records from ODNI on December 31, 2007, in any event. For this reason, the
14 limited scheduling relief that plaintiff obtained in this case falls squarely within the category of
15 "[m]erely incidental or inevitable public benefits of disclosure from a FOIA suit" that does not
16 "automatically satisfy th[e] intentionally more rigorous requirement in [FOIA's fee provision]." *Guam Contractors*, 570 F. Supp. at 168. Because plaintiff achieved extremely limited success in
17 this case, the Court should award no fees. *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1119 (9th
18 Cir. 2000) (noting that where a plaintiff received only limited or technical success, the district
19 court "can simply award 'low fees or no fees'").
20

21 **B. Plaintiff Had A Sufficient Commercial And Private Interest To Pursue This**
22 **Action.**

23 The commercial-benefit and nature-of-complainant's-interest factors also weigh against
24 awarding plaintiff attorney's fees. Courts have typically construed these two factors together in
25 determining whether a plaintiff is eligible for attorney's fees. See *Church of Scientology*, 700
26 F.2d at 494. "[W]hen a litigant seeks disclosure for a commercial benefit or out of other personal
27 motives, an award of attorney's fees is generally inappropriate." *Tax Analysts v. U.S. Dep't of*
28

1 *Justice*, 965 F.2d 1092, 1093 (D.C. Cir. 1992).

2 Here, plaintiff had a strong commercial and private interest to pursue this case in order to
3 further its own lobbying and collateral litigation interests. As noted in plaintiff's motion for
4 preliminary injunction, plaintiff is the "Co-Lead Coordinating Counsel" in a variety of lawsuits
5 that plaintiff characterizes as "seeking to hold the government and cooperating
6 telecommunications carriers responsible for violating the law and privacy of individuals through
7 the NSA's massive and illegal warrantless spying program." See Plaintiff's Memorandum in
8 Support Of Motion For Preliminary Injunction at 4 (dkt. no. 10). A review of the complaints in
9 these actions reveals that plaintiff is seeking significant monetary and punitive damages from
10 these lawsuits. See *Hepting v. AT&T*, No. C-06-0672-VRW, Amended Class Action Complaint
11 For Damages, Declaratory and Injunctive Relief (dkt. no. 8). Media reports estimate that
12 plaintiff is seeking billions of dollars in damages. See Ryan Singel, *AT&T Sued Over NSA*
13 *Eavesdropping*, available at <http://www.wired.com/science/discoveries/news/2006/01/70126>.

14 Given plaintiff's significant financial stake in the outcome of this litigation, plaintiff has
15 launched a sophisticated lobbying campaign to defeat legislative amendments to the FISA that
16 would potentially end these lawsuits. See Ellen Nakashima, *A Story of Surveillance*, Washington
17 Post, Nov. 7, 2007, at D1 ("lawyers for the Electronic Frontier Foundation, which filed [a class
18 action lawsuit against various telecommunications companies] . . . are urging key U.S. senators
19 to oppose a pending White House-endorsed immunity provision that would effectively wipe out
20 the lawsuits.")² Plaintiff has devoted significant attention to the FISA immunity issue on its
21 web sites, urging visitors to contact their elected representatives to "oppose immunity for
22 lawbreaking telephone companies." See <http://www.stopthespying.org>; <http://www.eff.org/nsa>.
23 More significantly, plaintiff candidly admits that the documents released in this litigation "play a
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25
26 ² See also Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2007, S.
27 Rep. 110-209, 110th Congress, 1st Session, at 11 (concluding that telecommunications provides
28 "had a good faith basis for responding to the requests for assistance they received" and "should
be entitled to protection from civil suit").

1 role” in plaintiff’s campaign to oppose “amnesty for telecommunications companies taking part
2 in illegal electronic surveillance.” See EFF Wins Fast-Track Release of Telecom Lobbying
3 Records, available at <http://www.eff.org/press/archives/2007/11/28-0>.

4 In light of plaintiff’s commercial and private interest to pursue this case, an award of
5 attorney’s fees would be contrary to the underlying purpose of FOIA’s attorney-fees provision.
6 The purpose of that provision is “to remove the often insurmountable financial barriers the
7 average citizen face[s] when attempting to force governmental compliance with (FOIA), not to
8 provide an award to any plaintiff who successfully forced the government to disclose the
9 requested information.” *Ginter v. Internal Revenue Serv.*, 648 F.2d 469 (8th Cir. 1981), cited
10 with approval in *Church of Scientology*, 700 F.2d at 489. The statute, therefore, “acts as an
11 incentive for private individuals to pursue vigorously their claims for information.” *Manos v.*
12 *Dep’t of Air Force*, 829 F. Supp. 1191, 1192 (N.D. Cal. 1993). In this case, however, plaintiff
13 had sufficient motivation to bring this action independent of the attorney’s fees incentive. See
14 *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979) (“The private self-interest motive of, and
15 often pecuniary benefit to, the complainant will be sufficient to insure the vindication of the
16 rights given in the FOIA.”) (quoting S. Rep. No. 93-854, 93 Cong., 2d Sess. (1974)). To be sure,
17 given plaintiff’s significant financial stake in the pending telecommunication litigation, plaintiff
18 most certainly would have brought this lawsuit regardless of the availability of fees. Although
19 plaintiff disclaims a commercial benefit from the requested information in the sense of directly
20 soliciting business or revenue with the information it obtained, its private interest in opposing
21 legislation that would preemptively terminate its class action lawsuit was a sufficient incentive
22 for plaintiff to prosecute this case. *Tax Analysts*, 965 F.2d at 1095 (holding that “to suffice under
23 the second and third factors, a motive need not be strictly commercial; any private interest will
24 do.”).

25 For these reasons, the “public should not be required to finance” plaintiff’s private
26 lobbying campaign, which was undertaken “with an eye toward prosecuting some litigation to
27 [its] own benefit.” *Education/Instruction v. United States Dep’t of Justice*, 87 F.R.D. 112, 116
28

1 (D. Mass. 1980), *aff'd* 649 F.2d 4 (1st Cir. 1981). In a line of cases analogous to the present
2 context, courts have consistently held that “the use of FOIA as a substitute for discovery
3 constitutes a private, noncompensable interest.” *Ellis v. United States*, 941 F. Supp. 1068, 1079
4 (D. Utah 1996) (citing cases); *see also N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 143
5 (1975) (stating that FOIA’s primary purpose was not to benefit private litigants or to substitute
6 for civil discovery). Similarly, here, plaintiff employed the FOIA to gain access to the
7 communications of its adversary (ODNI) regarding legislative proposals that have the potential
8 to scuttle plaintiff’s class action lawsuits. *See Republic of New Afrika v. F.B.I.*, 645 F. Supp.
9 117, 121 (D.D.C. 1986) (concluding that plaintiff was “not simply acting as a nonprofit, public
10 interest group” when it employed FOIA in “order to aid its litigation” efforts); *see also Ellis*, 941
11 F. Supp. at 1079 (holding that plaintiffs “had a strong personal interest” in obtaining information
12 via FOIA because plaintiffs sought the information for use multi-million dollar litigation). The
13 legislative history of the FOIA confirms that Congress certainly did not intend for litigants such
14 as the plaintiff in this case to receive attorney’s fees when using the FOIA to pursue their own
15 private interests. *See S. Rep. No. 93-854*, 93 Cong., 2d Sess. (1974) (stating that courts “would
16 not award fees if a business was using the FOIA to obtain data relating to a competitor or as a
17 substitute for discovery in private litigation with the government.”).

18 **C. A Reasonable Basis Existed in Law For ODNI’s Positions In This Case.**

19 ODNI’s conduct in this litigation also demonstrates that plaintiff is not entitled to an
20 award of attorney’s fees. In order to prevail on the fourth factor of the entitlement analysis,
21 ODNI need only demonstrate that it had a reasonable basis for its positions. *See Church of*
22 *Scientology*, 700 F.2d at 494. Indeed, the agency’s position need not be ultimately vindicated in
23 court in order to be found reasonable. *Education/Instruction, Inc. v. U.S. Dept. of Housing and*
24 *Urban Development*, 649 F.2d 4, 8 (1st Cir. 1981). Rather, the agency must simply show that its
25 positions had a “colorable” basis and were not asserted “to avoid embarrassment or to frustrate
26 the requester.” *Church of Scientology*, 700 F.2d at 494 n.6 (quoting S. Rep. No. 93-854, 93
27 Cong., 2d Sess. (1974)); *see also Tax Analysts*, 965 F.2d at 1097 (stating that “the
28

1 reasonable-basis-in-law factor is intended to weed out those cases in which the government was
2 recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior.”).

3 Here, there is no evidence in the record that the ODNI delayed the processing of
4 plaintiff’s request “to avoid embarrassment or to frustrate the requester.” To the contrary, ODNI
5 granted plaintiff’s request to expedite processing of the FOIA requests at issue. Consistent with
6 the expedited processing provision of the FOIA, ODNI worked diligently to release responsive
7 records to plaintiff “as soon as practicable.” 5 U.S.C. § 552(a)(6)(E)(iii). As described more
8 fully in the November 9, 2007 declaration of John F. Hackett (attached as Exhibit 1 to
9 defendant’s opposition to motion for preliminary injunction; dkt no. 22), ODNI moved plaintiff’s
10 requests to the front of its processing queue (ahead of 42 other FOIA requests) and engaged in a
11 comprehensive search and review process to provide plaintiff with responsive records on an
12 expedited basis. ODNI never contended that it would not respond to Plaintiff’s request, nor did
13 ODNI seek to delay proceedings in this case in order to frustrate plaintiff. Rather, ODNI
14 produced over 500 pages of records, including previously classified information, to plaintiff on
15 an accelerated schedule. ODNI also agreed to litigate both the preliminary injunction motion
16 and its final withholdings (which plaintiff ultimately declined to challenge) on an expedited
17 schedule at plaintiff’s request. Under these circumstances, it would be inconsistent with FOIA’s
18 attorney fee provision to award fees where there is no evidence of bad faith or recalcitrance by
19 ODNI.³ See, e.g., *Ellis v. United States*, 941 F. Supp. 1068, 1080 (D. Utah 1996) (“Since
20 plaintiffs’ challenge is to the government’s delay in releasing the records rather than its
21

22 ³ Plaintiff unfairly attempts to equate ODNI’s conduct in this case with the defendant in
23 *Powell v. U.S. Dept. of Justice*, 569 F. Supp. 1192 (N.D. Cal. 1983). See Plaintiff’s Motion at 12
24 In *Powell*, the defendant took no action on the plaintiff’s FOIA request for “three and one-half
25 years.” *Id.* at 1194. ODNI, by contrast, moved plaintiff to the front of its processing queue in a
26 matter of days and provided plaintiff with all responsive records in less than three and one half
27 months. In contrast to plaintiff’s inapposite comparison, a case more analogous to the present
28 context is *LaSalle Extension University v. FTC*, 627 F.2d 481 (D.C. Cir. 1980). In that case the
D.C. Circuit explained that the agency “resisted disclosure of records for four months,” but the
court declined to award attorney’s fees after the agency released the records because there was
“no reason to conclude that the Commission’s behavior was truly recalcitrant or obdurate.” *Id.*
at 483, 386.

1 substantive claims of exemption, the reasonableness factor does not favor a fee award so long as
2 the government did not engage in obdurate behavior or bad faith.”); *Simon v. United States*, 587
3 F. Supp. 1029, 1032-33 (D.D.C. 1984) (“Here, without evidence of bad faith, the court declines
4 to impose a fee award to sanction sluggish agency response.”).

5 Further, ODNI had a “reasonable basis in law” for its opposition to plaintiff’s motion for
6 preliminary injunction. As an initial matter, the reasonableness of ODNI’s position is illustrated
7 by the fact that the Court denied plaintiff’s motion “in part” and did not alter or accelerate
8 ODNI’s proposed interim production date. *See Polynesian Cultural Center, Inc. v. NLRB*, 600
9 F.2d 1327 (9th Cir. 1979) (holding that fee award was improper where “Board’s claim of
10 exemption was not only reasonable but correct”); *Chesapeake Bay Found.*, 11 F.3d at 216
11 (internal citations omitted) (concluding that “there can be no doubt that a party is not entitled to
12 fees if the Government’s legal basis for withholding requested records is correct”). With respect
13 to the dispute regarding the deadline for final production of records, the Court merely required
14 ODNI to complete processing of plaintiff’s FOIA request 21 days sooner than ODNI’s proposed
15 date (*i.e.*, December 10, 2007 instead of December 31, 2007). To be sure, the Court’s order
16 provided plaintiff with some limited relief, but ODNI’s position regarding a final production date
17 was certainly not unreasonable, particularly given ODNI’s diligent efforts to process plaintiff’s
18 requests and the fact that FOIA’s expedited processing provisions do not require that processing
19 be completed within a time certain.⁴ 5 U.S.C. § 552(a)(6)(E)(iii) (directing agencies to “process
20 as soon as practicable any request for records to which [they have] granted expedited
21

22
23 ⁴ Plaintiff’s contention that ODNI asserted, in response to plaintiff’s preliminary
24 injunction motion, stale arguments that had previously been rejected by other courts is without
25 merit. As explained more fully in ODNI’s memorandum in opposition to plaintiff’s motion for
26 preliminary injunction, the cases relied upon by plaintiff involved situations in which the
27 government did not present evidence that processing the FOIA requests at issue in those cases
28 within twenty days would be impracticable. *See Electronic Privacy Information Center*
(“EPIC”) v. Dep’t of Justice, 416 F. Supp. 2d 30 (D.D.C. 2006); *Gerstein v. C.I.A.*, 2006 WL
3462658 (N.D. Cal. Nov. 29, 2006). Given this state of the law, ODNI’s decision to provide this
Court with a factual presentation that was missing from those cases was an entirely reasonable
legal position.

1 processing.”); S. Rep. 104-272, 1996 WL 262861, *17 (May 15, 1996) (“No specific number of
2 days for compliance is imposed by the bill since depending on the complexity of the request, the
3 time needed for compliance may vary.”).

4 * * *

5 In sum, plaintiff’s request for an award of attorney’s fees should be denied. At a
6 minimum, the request can be rejected on the second and third factors alone, given plaintiff’s
7 private interest in the documents. When the reasonableness of ODNI’s positions throughout this
8 litigation is considered, along with the fact that the modest relief plaintiff obtained from its
9 preliminary injunction motion did not provide a substantial public benefit, there is simply no
10 basis for an award of attorney’s fees in this case.

11 **II. Plaintiff’s Request For Over \$49,000 In Fees And Costs Is Unreasonable.**

12 Even assuming the Court concludes that plaintiff is entitled to a fee award, the Court
13 should nevertheless decline to award fees in the amount requested. Plaintiff’s request for
14 \$48,520 in attorney fees and \$731.97 in costs is unreasonable and cannot be justified.

15 When calculating an attorney’s fee award, the plaintiff must “submit his fee bill to the
16 court for its scrutiny of the reasonableness of (a) the number of hours expended and (b) the
17 hourly fee claimed.” *Long*, 932 F.3d at 1313-14. “If these two figures are reasonable, then there
18 is a strong presumption that their product, the lodestar figure, represents a reasonable award.”
19 *Id.* at 1314. The Court may then consider whether an adjustment to the lodestar figure is
20 appropriate based on case-specific factors. *Id.* at 1314 & n.4 (listing twelve factors relevant to
21 determination of a reasonable fee award). As explained further below, plaintiff’s lodestar
22 calculation is unreasonable, both with respect to its hourly rates and the hours it expended in this
23 litigation.
24

25 **A. Plaintiff’s Hourly Rates Are Not Reasonable.**

26 The Supreme Court has defined a reasonable hourly rate as “one that is adequate to
27 attract competent counsel, but that does not produce windfalls to attorneys.” *See Blum v.*
28

1 *Stenson*, 465 U.S. 886, 893-94 (1984) (citation and internal quotation marks omitted).
 2 Specifically, this rate should be based on the amount “a reasonable, paying client would be
 3 willing to pay,” bearing in mind that a reasonable, paying client “wishes to pay the least amount
 4 necessary to litigate the case effectively.”⁵ *See Arbor Hill Concerned Citizens Neighborhood*
 5 *Ass’n v. County of Albany*, 2008 WL 961313 (2d Cir. April 10, 2008). The burden of
 6 establishing the reasonableness of the hourly rate is on the fee applicant. *Blum*, 465 U.S. at 887
 7 (holding that “the burden is on the fee applicant to produce satisfactory evidence – *in addition to*
 8 *the attorney’s own affidavits* – that the requested rates are in line with those prevailing in the
 9 community for similar services by lawyers of reasonably comparable skill, experience and
 10 reputation.”) (emphasis added). This burden is generally met by “provid[ing] affidavits of
 11 practitioners from the same forum with similar experience” and “[d]ecisions by other courts
 12 regarding the reasonableness of the rate sought.” *Menlo Logistics, Inc. v. Western Express, Inc.*,
 13 2006 WL 436150, at *6 (N.D. Cal. Feb. 21, 2006). “The burden does not shift to [the defendant]
 14 to produce rebuttal evidence unless and until Plaintiff meets [its] initial burden. *Navarro v.*
 15 *General Nutrition Corp.*, 2005 WL 2333803 (N.D. Cal. Sept. 22, 2005) (noting that this burden
 16 shifting approach to attorney’s fees issues is “clearly established in the Ninth Circuit”).

17 Plaintiff in this case has not carried its initial burden of producing satisfactory evidence
 18 that attorneys of similar experience in the legal community are billing paying clients for FOIA
 19 work at the rates plaintiff seeks. Plaintiff’s counsel assert that their billing rates are as follows:

<i>Attorney Name</i>	<i>2007 Rate/hour</i>	<i>2008 Rate/hour</i>
David Sobel	\$600	\$700
Jennifer Granick	\$500	\$600

24
 25 ⁵ In *Arbor Hill*, the Second Circuit, in an opinion joined by former-Justice O’Connor
 26 sitting by designation, noted a number of factors that a district court should consider when
 27 deciding the fee that a reasonable, paying client would be willing to pay to litigate a case. As
 28 relevant to the present case, the Second Circuit noted that the district court should consider
 “whether an attorney might have an interest (independent of that of his client) in achieving the
 ends of the litigation” as well as whether the attorney might expect “other returns (such as
 reputation, etc.)” from the representation.

1 Kurt Opsahl	\$425	\$525
2 Marcia Hoffman	\$350	\$450

3 The only evidentiary support for these rates, however, is a conclusory, one sentence statement in
4 each of plaintiff counsel's declarations that claims their "rates are well within the prevailing
5 hourly rates in the San Francisco Bay Area for lawyers of comparable education, expertise, and
6 experience who handle matter of the type involved in this litigation. See Hoffman Declaration
7 ¶ 5; Granick Declaration ¶ 5; Opsahl Declaration ¶ 6; Sobel Declaration ¶ 5. In contravention of
8 the "clearly established" Ninth Circuit precedent, plaintiff's counsel offer nothing other than
9 their own speculative assertions to support their rates. This insufficient evidence should be
10 rejected by the Court. Indeed, other courts have held that similar "generalized and conclusory
11 'information and belief' affidavits" are inadequate to establish market rate for attorney's fees.
12 See *National Ass'n of Concerned Vets v. Sec'y of Def.*, 675 F.2d 1319, 1325 (D.C. Cir. 1982).

13
14 As attorneys employed by a non-profit public interest organization that essentially
15 represents itself in litigation, plaintiff's counsel does not have an established billing rate that
16 reflects how their own services have been valued in the market by paying clients. Although the
17 Supreme Court has held that attorneys for public interest organizations are entitled to "prevailing
18 market rates in the relevant community," *Blum*, 465 U.S. at 895, plaintiff must nonetheless carry
19 its burden of providing "evidence, other than the declarations of interested counsel, that 'the
20 requested rates are in line with those prevailing in the community for similar services of lawyers
21 of reasonably comparable skill and reputation.'" *Navarro*, 2005 WL 2333803 at *7 (quoting
22 *Jordan v. Multnomah County*, 815 F.2d 1258, 1263 (9th Cir. 1987)). Plaintiff has submitted no
23 such evidence that attorneys of similar experience in the San Francisco area are charging their
24 paying clients up to \$700/hour for FOIA work.⁶ Compare *Mendenhall v. National Transp.*

25
26 ⁶ Of course, even assuming some attorneys in the San Francisco area bill clients at the
27 hourly rates sought by plaintiff, there has been no showing in this case that those attorneys bill
28 their clients at this rate for FOIA work. See *Schwarz v. Sec'y of Health & Human Servs.*, 73
F.3d 895, 908 (9th Cir.1995) (holding that plaintiff must submit evidence of the "prevailing rate .
. . for similarly qualified lawyers working on a similar type of case"); see also *Camacho v.*

1 *Safety Bd.*, 213 F.3d 464, 472 (9th Cir. 2000) (holding that, in the absence of contrary evidence,
2 the submission of affidavits by four different attorneys with the same specialization as that of fee
3 applicant attorney explaining the market rate in the relevant fora satisfies the initial burden borne
4 by the fee applicant); *Dennis v. Chang*, 611 F.2d 1302, 1309 (9th Cir. 1980) (“Six affidavits of
5 other counsel were offered regarding the customary billing rate for attorneys in the community. .
6 . . These affidavits were sufficient to permit the court to determine a reasonable rate for
7 attorneys of comparable experience in cases of comparable complexity.”). In short, plaintiff has
8 cited no cases from the Northern District of California in which a court awarded plaintiff’s
9 requested hourly rates to attorneys of similar experience in FOIA cases, nor has plaintiff met its
10 initial burden of introducing affidavits from comparable FOIA practitioners in the San Francisco
11 area stating that plaintiff’s rates are reasonable.⁷

12 Indeed, a review of recent decisions in this district shows that plaintiff’s requested hourly
13 rates far exceed those rates that courts have found reasonable. Notably, in a 2005 FOIA case
14 before this Court, two attorneys with legal experience not dissimilar from two of plaintiff’s
15 counsel (Ms. Granick and Ms. Hoffman) submitted a fee bill for \$300/hour and \$180/hour,
16

17 *Bridgeport Financial, Inc.*, 2008 WL 1792808 (9th Cir. Apr. 22, 2008) (“we remand to the
18 district court with instructions to determine the proper amount of fees applying the legal standard
19 set forth above, and specifically by determining the prevailing hourly rate in the Northern
20 District [of California] for work that is similar to that performed in this case”); *Leaf v. County of*
21 *Los Angeles*, 2008 WL 686858 (9th Cir. Mar. 7, 2008) (affirming district court’s reduction of
hourly rate where “plaintiffs did not show that other Los Angeles attorneys charge \$400 for
similar cases”).

22 ⁷ Plaintiff argues that its counsel “was paid” its prevailing hourly rates in several other
23 cases. See Opshal Declaration ¶ 5. “While an attorney’s prior fee award may bear on the
24 selection of a reasonable fee in a later case . . . simply offering the prior award is not enough.”
25 *Schwarz*, 73 F.3d at 908 (requiring additional evidence that the requested rates are in line with
26 other attorneys in the community of similar skill). Moreover, it is unclear from plaintiff’s
27 declaration whether the rates paid to plaintiff’s counsel were awarded by courts that considered
28 the reasonableness of plaintiff’s request hourly rates in light of the standards discussed above.
To the extent the payment of fees in these case resulted from a private settlement by the parties
or anything other than “[d]ecisions by other courts regarding the reasonableness of the rate
sought,” plaintiff’s reliance on these cases is misplaced. See *Menlo Logistics, Inc.*, 2006 WL
436150, at *6.

1 respectively, based on rates derived from a paying client. *See American Small Business League*
2 *v. United States Small Business Association*, 04-CV-04250 SI, Declaration of Robert E. Belshaw
3 (attached as Exhibit 2). Even accounting for a modest increase in hourly rates from 2005 to
4 2007, the market rates established in *American Small Business League* are a far cry from the
5 unreasonable \$600/hour and \$450/hour rates sought by Ms. Granick and Ms. Hoffman,
6 respectively, in this case. *See Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (stating that a
7 “reasonable attorney’s fee” is “comparable to what is traditional with attorneys compensated by
8 a fee-paying client.”) (citations omitted).

9 In a recent attorney’s fees decision in this district, the court issued a comprehensive
10 opinion regarding reasonable hourly rates in the area of employment litigation in the San
11 Francisco area. *See Pande v. Chevrontexaco Corp.*, 2008 WL 906507 (N.D. Cal. April 1, 2008).
12 Notably, the *Pande* court reduced plaintiff’s requested hourly rates by significant margins. The
13 attorneys in that case were members of “sixty-five lawyer litigation firm located in San
14 Francisco” that was named “litigation boutique of the year” by the *American Lawyer*. *See*
15 <http://www.kvn.com/>. The senior partner (Susan Harriman) in a position similar to Mr. Sobel
16 here, sought fees at \$700/hour, but the Court reduced her rate to \$575/hour. A junior partner
17 (Crista Anderson) in the position similar to Ms. Granick here, sought fees at \$600/hour, but the
18 court reduced her rate to \$400/hour. A third year associate (Audrey Walton-Hadlock) similar to
19 Ms. Hoffman’s position here, sought fees at \$370/hour, but the Court reduced her fee to
20 \$200/hour. If anything, the rates sought by plaintiff in this case should be reduced further than
21 the fees awarded in *Pande*, given the comparative credentials of the attorneys in the two cases
22 and the relatively simple issues presented in this FOIA case when compared against the more
23 complex issues presented by a multi-week jury trial involving an employment litigation issue.
24 *See Long*, 932 F.2d at 1314 n.4 (holding that the “experience, reputation, and ability of the
25 attorneys” and the “novelty and difficulty of the questions involved” are factors to consider when
26 awarding fees) (quoting *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)). At a
27 minimum, the *Pande* court’s decision illustrates the unreasonable rates sought by plaintiff’s
28

1 counsel in this case.

2 In lieu of plaintiff's *ipse dixit* approach to establishing the proper market rates, the Court
3 should rely on the *Laffey* matrix to calculate the hourly rates in this case. The *Laffey* matrix is a
4 "widely recognized compilation of attorney and paralegal rate data" that is designed to provide
5 objective guidance in appropriate hourly rates for attorneys in the Washington, D.C. area.⁸ *In re*
6 *Chiron Corp. Securities Litigation*, 2007 WL 4249902 (Nov. 30, 2007 N.D. Cal.). District
7 courts in the Northern District of California as well as other courts in the Ninth Circuit have
8 accepted the *Laffey* matrix when calculating attorney's fees, with some modification for
9 economic differences between the San Francisco Bay Area and Washington, D.C. *See, e.g.*,
10 *Kempf v. Barrett Business Services, Inc.*, 2007 WL 4167016 (Nov. 20, 2007 N.D. Cal.); *In re*
11 *Portal Software, Inc. Securities Litigation*, 2007 WL 4171201 (N.D. Cal. Nov. 26, 2007); *see*
12 *also Center For Food Safety v. Johanns*, 2007 WL 3072860 (D. Haw. Oct. 18, 2007) *Ilick v.*
13 *Miller*, 68 F. Supp. 2d 1169 (D. Nev. 1999). Applying the 2007 adjusted *Laffey* matrix rates for
14 the San Francisco Bay area, as adopted by the court in *In re Portal Software* and which compare
15 favorably to the court-approved rates in *Pande*, plaintiff's hourly rates should be calculated as
16 follows:⁹

18 ⁸ The *Laffey* matrix is so named because of the case that generated the index. *See Laffey*
19 *v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other*
20 *grounds*, 746 F.2d 4 (D.C. Cir. 1984).

21 ⁹ ODNI objects to plaintiff's claim that its work on the motion for attorney's fees is
22 governed by plaintiff's "2008 hourly rate." Plaintiff has offered no evidentiary support for its
23 higher rates, which have increased approximately 30% from its 2007 rates. *See Pollard v. City*
24 *of Portland*, 2001 WL 34042624 at *4 (D. Or. Aug. 7, 2001) ("The reason for this annual
25 incremental increase in hourly rates is not disclosed by the record and is rather suspect, given
26 that the annual increase is more than the published annual cost of living increase and appears to
27 have no relation to any other relevant market index concerning the cost of doing business.").
28 Even assuming the Court concludes that plaintiff is entitled to a higher rate for 2008, the rate
should increase no more than 3%, in accordance with the relative adjustments to the Consumer
Price Index during the relevant time of this litigation. *See Jones v. Espy*, 10 F.3d 690 (9th Cir.
1993) (adjusting attorney's fee upward for increases in the cost of living as reflected in the
Consumer Price Index); *see also* Consumer Price Index, *available at*
<http://data.bls.gov/cgi-bin/surveymost>.

<i>Attorney Name</i>	<i>2007 Rate/hour</i>
David Sobel	\$484
Jennifer Granick	\$429
Kurt Opsahl	\$346.50
Marcia Hoffman	\$270.50

B. The Number Of Hours Expended By Plaintiff In This Litigation Is Unreasonable And Subject To Significant Reduction.

Once the hourly rates are established, the “next step in calculating the lodestar is for the Court to determine the number of hours reasonably expended in the litigation.” Navarro, 2005 WL 2333803, at *11. The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must exercise the same “billing judgment” it would in billing a private client. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The court should “exclude from this initial fee calculation hours that were not ‘reasonably expended,’ which includes hours that were “excessive, redundant, or otherwise unnecessary.” *Id.* at 434. Reducing plaintiff’s claimed time expenditures in this case by such redundant and excessive hours, this Court, if it awards anything at all, should not award anything but low fees in this case. As explained further below, ODNI’s specific objections to plaintiff’s hourly expenditures are well founded.

Plaintiff Obtained Limited Success In This Litigation. As a threshold matter, plaintiff’s hourly expenditures are subject to significant reduction in light of plaintiff’s limited success of this litigation. “Indeed, the most critical factor in determining the reasonableness of a fee award is the degree of success obtained.” *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (internal quotations omitted); *McGinnis v. Kentucky Fried Chicken of California*, 51 F.3d 805 (9th Cir. 1994) (“It is an abuse of discretion for the district court to award attorneys’ fees without considering the relationship between the ‘extent of success’ and the amount of the fee award.”). In this case, as described above, ODNI prevailed in significant part in this litigation. The Court did not overrule any of ODNI’s FOIA exemption claims and plaintiff voluntarily dismissed this case in the face of ODNI’s motion for summary judgment. Further, the Court’s November 26,

1 2007 Order clearly holds that plaintiff's motion for preliminary injunction was denied "in part."
2 Moreover, the Court declined to expedite the interim release of any records responsive to
3 plaintiff's FOIA requests and adopted ODNI's proposed release date (November 30, 2007).
4 ODNI went on to provide plaintiff with approximately half of the records responsive to its FOIA
5 request by the interim release date. Consequently, with respect to half of the records produced in
6 this case, plaintiff did not obtain any substantive relief from the Court beyond what ODNI was
7 willing to provide plaintiff in any event. For this reason, plaintiff's hours should be reduced by
8 50%, commensurate with plaintiff's limited degree of success on its motion for preliminary
9 injunction. *See Piper v. U.S. Dept. of Justice*, 339 F. Supp. 2d 13 (D.D.C. 2004) (reducing fees
10 by 50% in case where plaintiff "failed in part and prevailed in part").

11 A 50% across-the-board reduction is also warranted in light of the plaintiff's private
12 motivation to litigate this case. Even assuming the Court determines that plaintiff is entitled to a
13 fee award, there can be no question that plaintiff had "mixed public and private reasons for
14 pursuing this action and that fact must be taken into consideration" when calculating the fee
15 award. *See Playboy Enter., Inc. v. United States Customs Serv.*, 959 F. Supp. 11 (D.D.C. 1997)
16 (concluding that a reduction of 40% would properly reflect the costs that should be attributable
17 to plaintiff's private benefit"). As discussed above, plaintiff had a commercial and private
18 interest to pursue this case in order to further its own lobbying and collateral litigation interests.

19 *Improper Quarter Hour Billing* – In addition, plaintiff's hourly expenditures should be
20 reduced further because plaintiff has engaged in the disfavored practice of quarter-hour billing.
21 As reflected in plaintiff's billing records, plaintiff's counsel accounted for its time in quarter-
22 hour increments. *See Hoffman Declaration* ¶ 10; *Granick Declaration* ¶ 9; *Opsahl Declaration* ¶
23 9; *Sobel Declaration* ¶ 10. "Courts have recognized that the practice of billing by the
24 quarter-hour, not by the tenth is a deficient practice because it does not reasonably reflect the
25 number of hours actually worked." *Mahtesian v. Snow*, 2004 WL 2889922 at *9 (N.D. Cal. Dec.
26 14, 2005) (internal quotations omitted). Accordingly, "courts have found it appropriate to reduce
27 the fee award by a percentage, to account for the unearned increment resulting from the practice
28

1 of quarter-hour billing.” *Id.* Indeed, the Ninth Circuit recently affirmed a “20 percent
2 across-the-board reduction” in hours because a fee applicant “billed in quarter-hour increments.”
3 *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942 (9th Cir. 2007). Because plaintiff’s use of
4 quarter-hour billing practices resulted in a request for excessive hours, plaintiff’s hours should
5 be reduced by an additional 20% to ensure that plaintiff does not receive an undue benefit from
6 its “deficient practice.”

7 *Improper Block Billing* – Another significant problem with plaintiff’s billing records is
8 block billing. A “fee award may be reduced when block billing – the lumping together of
9 multiple tasks in a single time entry – makes it impossible to determine the reasonableness of the
10 time spent on each task.” *Petroleum Sales, Inc. v. Valero Ref. Co.*, C 05-3526, 2007 WL
11 2694207, *7 (N.D. Cal. Sept. 11, 2007). Courts in this district “frow[n] on block billing where
12 discrete and unrelated tasks are lumped into one entry, as the practice can make it impossible . . .
13 to determine the reasonableness of the hours spent on each task.” *Defenbaugh v. JBC & Assocs.*,
14 *Inc.*, 2004 WL 1874978, *9 (N.D.Cal. Aug. 10, 2004). In particular, Ms. Hoffman has entered
15 multiple tasks into several large time entries. *See* Hoffman Decl. ¶ 10 (time entries listed on
16 10/25/07, 10/26/07, 10/28/07, 10/29/07). When combined with plaintiff’s practice of quarter-
17 hour billing, it is impossible to determine how much time was spent on each task within these
18 entries. For this reason, Ms. Hoffman’s time entries for the dates listed above should be reduced
19 by an additional 10% to account for this unfavorable practice.¹⁰

20 *Redundant And Excessive Time Associated With Drafting Complaint.* Plaintiff seeks 11.5
21 hours of time associated with drafting and reviewing the complaint in this case. This figure
22 should be reduced substantially because plaintiff filed a nearly identical FOIA complaint against
23 the Department of Justice several weeks prior to filing its complaint in this case. *See Electronic*
24

25 ¹⁰ Ms. Hoffman’s billing summary also contains a mathematical error. Although Ms.
26 Hoffman states that her “Total 2007 hours” is 54.25, the sum of the hours listed in the itemized
27 hours column is 66. *See* Hoffman Decl. ¶ 10. Because that plaintiff’s counsel’s records do not
28 appear to be actual billing records, but are instead described as an “estimate” based on “a review
of [plaintiff’s] files,” *id.*, errors like this one raise questions about the overall accuracy of the
records.

1 *Frontier Foundation v. U.S. Department of Justice*, 07-CV-1732 (RBW) (D.D.C.) (Complaint
2 attached as Exhibit 3). Like the complaint in this case, the complaint in the *U.S. Department of*
3 *Justice* case sought records regarding communications with Congress and telecommunications
4 companies concerning proposed amendments to the FISA. It is also clear from the dates on
5 plaintiff's billing records, which begin with an entry on October 6, 2007, that plaintiff was in
6 possession of a final copy of the DoJ complaint, which was filed on September 27, 2007, when
7 plaintiff began work on this case. In light of plaintiff's prior work on a nearly identical FOIA
8 case, there is no reasonable basis to expend 11.5 attorney hours on a project that involved little
9 more than making relatively minor formatting changes to an existing document. *See Doran v.*
10 *Corte Madera Inn*, 360 F. Supp. 2d 1057, 1062 (N.D. Cal. 2005) (reducing fee award for time
11 associated with preparing "a form pleading" that was used by counsel "in other ADA lawsuits).
12 Nor would any reasonable paying client pay an attorney for such redundant work. Three hours,
13 at most, is a reasonable figure for time associated with work on the complaint in this case.
14 Consequently, Ms. Hoffman's time entries for 10/6/07, 10/8/07, 10/9/07, and 10/16/07
15 (collectively 9.0 hours) should be reduced to two hours and Mr. Sobel's time entry for 10/6/07
16 (2.5 hours) should be reduced to one hour.

17 *Unsuccessful Time Drafting Motion To Shorten Time* – Plaintiff also seeks some
18 unspecified amount of time associated with drafting a motion to compel ODNI to respond to the
19 preliminary injunction motion on an expedited basis. The precise amount of time plaintiff's
20 counsel spent on this motion is impossible to determine, given Ms. Hoffman's block billing
21 practices discussed above, but it appears plaintiff seeks approximately 6 hours based on the time
22 entries of Ms. Hoffman and Ms. Granick's billing records. No fees should be awarded for this
23 work because the Court did not grant plaintiff's motion. To the contrary, the parties stipulated to
24 an expedited briefing schedule with respect to plaintiff's motion for preliminary injunction. *See*
25 *Joint Stipulation For Briefing And Hearing Schedule On Plaintiff's Motion For Preliminary*
26 *Injunction And Motion For Order Shortening Time For Hearing* (dkt. no. 19.). The Court
27 adopted this schedule and denied plaintiff's motion as moot. *See Order* (dkt. no. 21). Because
28

1 plaintiff did not prevail on this motion, it is not entitled to fees or costs associated with this
2 work. Accordingly, Ms. Granick is not entitled to an award in this case and Ms. Hoffman's
3 entries on 10/25/07, 10/26/07, 10/28/07, and 10/29/07 (all of which are block billed) are each
4 subject to a one hour reduction.

5 *Time Drafting Preliminary Injunction Motion and Reply* – Plaintiff seeks approximately
6 40 hours of attorney time associated with researching and drafting papers associated with its
7 motion for preliminary injunction and reply brief. This time should be reduced for several
8 reasons. First, the lead counsel in this matter, David Sobel and Marcia Hoffman, wrote similar
9 briefs in *Electronic Privacy Information Center v. Department of Justice*, 06-0096 (HHK)
10 (D.D.C.), the case plaintiff relied upon heavily in seeking relief in this case. *See* Exhibits 4 & 5.
11 To be sure, time is required to prepare any brief or motion, but it is quite clear that plaintiffs
12 were not writing on a clean slate when they prepared the filings in this case. *See Long*, 932 F.2d
13 at 1314 n.4. Second, Ms. Hoffman claims she spent 11.5 hours reviewing 9th Circuit law
14 governing preliminary injunction standards. *See Hoffman Decl.* ¶ 10 (time entries listed on
15 10/19/07, 10/22/07). Given the large number of preliminary injunctions decided by the Court of
16 Appeals and the courts of this district, researching the proper standards should have taken two
17 hours, at most. Indeed, plaintiff has filed similar preliminary injunctions in this circuit on
18 several prior occasions. *See, e.g., Hepting v. AT & T Corp.*, 439 F. Supp. 2d 974, 979 (N.D. Cal.
19 2006). Accordingly, no reasonable paying client would pay an attorney \$4000 (the fee Ms.
20 Hoffman seeks for this work) to perform such a simple research task that plaintiff had previously
21 accomplished. *Cf. Lipsett v. Blanco*, 975 F.2d 934, 938 (1st Cir. 1992) (stating that attorney's
22 fees statutes are not designed to serve as "continuing education programs for lawyers[.]"). For
23 these reasons, any time entries associated with the preliminary injunction brief should be reduced
24 by 10% and Ms. Hoffman's time entries, specifically, on 10/19/07 and 10/22/07 should be
25 reduced to a combined two hours.

26 *Plaintiff's Request For "Fees For Fees" Should Be Reduced Based on Its Limited*
27 *Success In The Litigation.* In addition to fees related to the merits of this litigation, plaintiff
28

1 seeks \$10,476.25 in fees related to the preparation of its motion for attorneys fees. This amount,
2 however, should be reduced 70% in proportion to plaintiff's limited success in this litigation and
3 because of its quarter billing practice. *See Comm'r, INS v. Jean*, 496 U.S. 154, 163 n.10 (1990)
4 (holding that because district courts must "consider the relationship between the amount of the
5 fee awarded and the results obtained, fees for fee litigation should be excluded to the extent that
6 the applicant ultimately fails to prevail in such litigation."); *Schwarz*, 73 F.3d at 909 ("we have
7 held that a district court does not abuse its discretion by applying the same percentage of merits
8 fees ultimately recovered to determine the proper amount of the fees-on-fees award.").

9 CONCLUSION

10 For the foregoing reasons, plaintiff's motion for attorney's fees and costs should be
11 denied. In the event, however, that the Court concludes that fees should be awarded, the award
12 should be significantly less than plaintiff requests. Specifically, the amount should be reduced to
13 \$9,979.31, using the reduced hourly rates established by the *Laffey* Matrix and the reduced hours
14 identified above. *See* Exhibit 6 (table itemizing reductions).

15
16
17 Dated: March 18, 2008

Respectfully submitted,

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