

NO. 19CI-4289

JEFFERSON CIRCUIT COURT
DIVISION ONE (1)
JUDGE ERIC J. HANER

INSTITUTE FOR JUSTICE

PLAINTIFF

v.

**ORDER DENYING DEFENDANTS' MOTION TO RECONSIDER
AND AWARDING STATUTORY PENALTIES, ATTORNEY'S FEES, AND
COURT COSTS TO PLAINTIFF**

BRANDON COAN, et al.

DEFENDANTS

* * * * *

This case is before the Court on (1) the supplemental proof pertaining to statutory penalties and attorney's fees filed by Plaintiff Institute for Justice ("IJ") on June 14, 2022 and (2) the motion to reconsider filed by Defendants Brandon Coan, Pat Mulvihill, Scott Reed, and Barbara Sexton-Smith (the "Councilmembers") on June 19, 2022. Both filings have been fully briefed by the parties. The Court heard oral arguments on August 12, 2022. A video recording of the proceeding was reported under digital recording no. 30-01-22-DR-068. Because the Councilmembers' motion to reconsider would, if granted, dispose of the need to consider IJ's right to statutory penalties and attorney's fees, the Court addresses the Councilmembers' motion first and IJ's supplemental proof second.

I. THE COUNCILMEMBERS' MOTION TO RECONSIDER

On May 23, 2022, the Court granted summary judgment in IJ's favor on its claims against the Councilmembers under Kentucky's Open Records Act. See *generally* Order Addressing the Parties' Cross Mots. for Summ. J. Based on its review of the record, the Court determined that the Councilmembers willfully violated the Open Records Act by withholding responsive records until after IJ filed a lawsuit against them and by redacting the names of private citizens from the records that they produced without providing any justification to substantiate their concerns over privacy. See *id.* 6-9. The Court awarded

costs, attorney's fees, and statutory penalties under KRS 61.882(5) contingent upon IJ providing additional proof showing the precise number of records withheld by the Councilmembers from June 10 to July 26, 2019 and all costs and attorney's fees that it believes it is entitled to recover for its efforts to obtain responsive records from the Councilmembers up until September 20, 2019. See *id.* 7-10.

The Councilmembers ask the Court to reconsider its order granting summary judgment in IJ's favor. See Defs.' Mot. to Reconsider. The Councilmembers contend that the Court's determination that it willfully violated the Open Records Act by redacting the names of private citizens is inconsistent with "well-settled law that names can be, and regularly are, redacted under the [Open Record Act's] personal privacy exemption pursuant to KRS 61.878(1)(a)." Defs.' Mem. in Supp. of Mot. to Reconsider 1. The Councilmembers also argue that the Court's determination that they willfully withheld records under the Open Records Act "solely because [they] failed to communicate with [IJ] . . . and establish a deadline for producing responsive records" is "not the law" and "places a substantial liability on [them] based on an arbitrary deadline created by IJ's filing of its complaint," while in addition ignoring proof in the record showing that they were "working the entire time to provide the requested, voluminous record to IJ." *Id.* 1-2.

The Court cannot accept either argument advanced by the Councilmembers for reconsidering its order granting summary judgment in IJ's favor. The Councilmembers' arguments show a fundamental misunderstanding of the Court's order. Contrary to the Councilmembers' assertions, the Court did not hold that there was a "blanket ban" on withholding the names of private citizens or that names "can never be redacted" under the Open Records Act. Defs.' Mem. in Supp. of Mot. to Reconsider 3, 6. Nor did the Court fail to undertake the "balancing test between privacy interests and public interests" required by the law to determine whether the names were subject to disclosure under the Open Records Act. *Id.* 6. To provide some indication of the process that it went through to determine whether the names were subject to disclosure under the Open Records Act, the Court cited to controlling case law concerning the issue, see

Order Addressing the Parties' Cross Mot. for Summ. J. 9, which also happens to set forth and apply the same two-part test that the Councilmembers claim was not fully undertaken by the Court. See *Cape Publ'ns, Inc. v. Univ. of Louisville Found., Inc.*, 260 S.W.3d 818, 824 (Ky. 2008) ("Accordingly, we must apply a two-part test to determine whether the Courier–Journal may compel disclosure of the Foundation donors. First, we must determine whether the information sought is of a personal nature. Second, we must examine whether the public disclosure of this information would constitute a 'clearly unwarranted invasion of personal privacy.' We do this by weighing the privacy interests of the persons involved against the public's interest in disclosure. Because this inquiry involves a question strictly of law, our review is de novo.") (internal citations omitted). Ultimately, the Court found that the names were subject to disclosure under the Open Records Act, not because of any "blanket ban" against non-disclosure, but because the Councilmembers presented no evidence, other than that the names that they redacted belonged to private citizens, to substantiate their concerns over privacy or, in other words, to "counterbalance" the obvious interest that both IJ and the public had in knowing who specifically was lobbying them to impose restrictive measures on food trucks.¹ See Order Addressing the Parties' Cross Mot. for Summ. J. 9 ("Though the Councilmembers were justified in redacting the contact information of individual citizens in the documents that they produced, they *have not presented any proof* that could justify their decision to redact the names of those individual citizens.") (emphasis added). The Court also found that the Councilmembers willfully violated the Open Records Act, once again, not because names of private citizens can "never be redacted," but because they redacted the names without providing an adequate justification for doing so and in

¹ Merely pointing out that names of private citizens "can be" and "regularly are" redacted under the Open Records Act, which is all the Councilmembers' position amounts to, is not enough to show that the balance of private and public interests tilts in favor of non-disclosure.

conscious disregard of IJ's rights under the Open Records Act.² *See id.* The Councilmembers' arguments provide no basis for disturbing the Court's determination that they willfully violated the Open Records Act by redacting the names from the documents that they produced.

The Court also rejects the Councilmembers' argument concerning its determination that they willfully violated the Open Records Acts by withholding responsive records until after IJ filed a lawsuit against them. Contrary to the Councilmembers' assertions, the Court did not make that determination "solely because [they] failed to communicate with [IJ] . . . and establish a deadline for producing responsive records." Defs.' Mem. in Supp. of Mot. to Reconsider 1. In addition to finding that they failed to communicate with IJ and establish a deadline for producing responsive records, the Court held that the Councilmembers "have not presented any proof that could justify their decision to withhold the records that they produced on July 26, 2019 for such a long period of time after the Attorney General rendered his decision" and that the "Attorney General's decision made clear that IJ had a right to receive any documents in the Councilmembers' possession that were responsive to the second item of its request." Order Addressing the Parties' Cross Mot. for Summ. J. 8. The Court also had before it evidence of numerous omissions and redactions by the Councilmembers of dubious legality,³ some of which they corrected at IJ's request and some of which served as the basis for yet another finding that they had willfully violated the Open Records Act. *See id.* 4, 9. Given the evidence in the record of the Councilmembers' pattern of withholding responsive records, the Court was unable to place much weight on the somewhat vague and self-serving affidavit from Louisville Metro Council's records custodian stating that the Councilmembers

² The Councilmembers' inattention to the nuances of the law, even after the Attorney General's decision made it perfectly clear what IJ's rights were, is precisely why the Court found that they willfully violated the Open Records Act. If, instead of asserting a nonexistent "blanket" exemption authorizing the redaction of names simply because they belong to private citizens, the Councilmembers had articulated a valid justification for withholding the names, such as, for instance, would have been the case if they had sought to redact the names of those citizens who requested that their communications remain confidential or where the content of a particular communication was highly sensitive, then the Court likely would have made a different determination.

³ For example, the Councilmembers initially redacted the names of businesses and of individuals associated with businesses from the documents that they produced without, once again, providing any justification for doing so. *See* Order Addressing the Parties' Cross Mot. for Summ. J. 4. The Councilmembers only removed the redactions after IJ objected to them. *See id.* 4-5.

were “working the entire time to provide the requested, voluminous record to IJ,” which is why it ultimately found that the Councilmembers willfully withheld records in violation of the Open Records Act.⁴ The Councilmembers’ arguments provide no basis for departing from that determination.

For the foregoing reasons, the Court must deny the Councilmembers’ request to reconsider its order granting summary judgment in IJ’s favor.

II. THE INSTITUTE’S SUPPLEMENTAL PROOF PERTAINING TO STATUTORY PENALTIES AND ATTORNEY’S FEES

As noted above, the Court awarded costs, attorney’s fees, and statutory penalties to IJ pursuant to KRS 61.882(5). See Order Addressing the Parties’ Cross Mot. for Summ. J. 7-10. That award was contingent upon IJ providing additional proof showing the precise number of records withheld by the Councilmembers from June 10 to July 26, 2019 and all costs and attorney’s fees that it believes it is entitled to recover for its efforts to obtain responsive records from the Councilmembers up until September 20, 2019. See *id.* In accordance with the Court’s instructions, IJ has presented additional proof providing a calculation of the records withheld by the Councilmembers from June 10 to July 26, 2019 and showing all of the costs and attorney’s fees it has incurred to obtain responsive records from the Councilmembers up until September 20, 2019, along with a description and dates of all hours worked, the nature of the services performed, and the hourly rate charged by each attorney or paralegal. See Exs. A & B to Pl.’s Supplement of R. Calculation & Atty’s Fees. The Councilmembers have filed exceptions to IJ’s submission, contending that IJ is not entitled to any statutory penalties because the extent of their wrongdoing is “very minimal” and “not egregious” and resulted in “little to no harm” and that the amount of attorney’s fees sought to be recovered by IJ is “highly unreasonable.” Defs.’ Exceptions to Pl.’s Calculation & Atty’s Fees 2, 3, 5.

⁴ In addition, in the Court’s view, the evidence of the Councilmembers’ combined acts establishes the same type of ongoing pattern of non-compliance that the Kentucky Court of Appeals has held constitutes a willful violation of the Open Records Act, regardless of whether a month-and-a-half long delay in producing responsive records or whether a failure to communicate and establish a deadline for producing response records would be, taken in isolation, sufficient to support a finding of willfulness. See *City of Taylorsville Ethics Comm’n v. Trageser*, 604 S.W.2d 305, 313 (Ky. App. 2020).

Having reviewed IJ's submission, the Court finds that it is entitled to recover from the Councilmembers \$4,600.00 in statutory penalties and \$9,263.50 in attorney's fees pursuant to KRS 61.882(5). The \$4,600.00 in statutory penalties represents \$100.00 for each of the 46 days that transpired between the date on which the Attorney General's decision became final on June 10, 2019 and the date on which the Councilmembers first produced responsive records on July 26, 2019. The Court believes that it is appropriate to award IJ substantially less than the maximum amount of penalties authorized by KRS 61.882(5) (*i.e.* \$25.00 per day per record) because the record shows that it has not consistently asserted its rights with the sort of diligence that would suggest an extraordinary amount of prejudice stemming from the initial delay in the Councilmembers' production of responsive records, although IJ's lack of diligence in no way excuses the Councilmembers' wrongdoing.

Considering the complexity and demands of the case and relying in part on its own expertise, the Court finds \$9,263.50 to be a reasonable attorney's fee for the efforts that IJ had to undergo to obtain responsive records from the Councilmembers up until September 20, 2019.⁵ The billing records presented by IJ show that it incurred a total of \$18,748.00 in attorney's fees from June 25 to September 20, 2019 in an effort to obtain responsive records from the Councilmembers. See Ex. B to Pl.'s Supplement of R. Calculation & Atty's Fees. Several of the 39 individual billing items for that period of time, however, relate to seemingly interminable conferences, communications, edits, and reviews conducted by various legal professionals at the firm representing IJ. See *id.* In arriving at what it considers to be a reasonable

⁵ Whether authorized by contract or statute, the determination of what constitutes a "reasonable" attorney's fee is the responsibility of the court relying in part on its own expertise. See *Key v. Mariner Fin., LLC*, 617 S.W.3d 819, 824 (Ky. App. 2020). To determine the reasonableness of attorney's fees, a court may consider various factors, including: the time and labor required, the difficulty of the questions involved, the skill required to perform the legal service, the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer, the customary fee charged for a similar service, the amount involved in the case, the time limitations, the length of the professional relationship with the client, the experience and reputation of the lawyer, and whether the fee is fixed or contingent. See *Brown v. Fulton, Hubbard & Hubbard*, 817 S.W.2d 899, 901 (Ky. App. 1991) (citing SCR 3.130 (1.5)). The burden is on the party who is seeking attorney's fees to demonstrate that the amount sought is "not excessive and accurately reflects the reasonable value of bona fide legal expenses incurred." *Capitol Cadillac Olds, Inc. v. Roberts*, 813 S.W.2d 287, 293 (Ky. 1991).

attorney's fee, the Court deducted many items pertaining to those conferences, communications, edits, and reviews because they do not provide enough information to determine whether the underlying services were truly necessary. The deductions made by the Court amount to \$9,484.50.

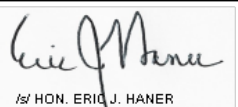
Turning to the Councilmembers' exceptions to IJ's additional proof, the Court rejects the Councilmembers' argument that IJ is not entitled to statutory penalties under KRS 61.882(5) for the reasons set forth in its order granting summary judgment in IJ's favor and in the previous section addressing the Councilmembers' motion to reconsider. The Court believes that the Councilmembers have raised legitimate concerns about whether the amount of attorney's fees sought to be recovered by IJ is reasonable. That is why the Court deducted \$9,484.50 off the total amount of attorney's fees that IJ incurred from June 25 to September 20, 2019. The Court believes that its award of attorney's fees satisfactorily resolves the Councilmembers' concerns about the reasonableness of the attorney's fees that IJ seeks to recover.


III. CONCLUSION

For the foregoing reasons, the Councilmembers' motion to reconsider is DENIED.

IT IS HEREBY ORDERED AND ADJUDGED that IJ is entitled to recover from the Councilmembers, pursuant KRS 61.882(5), \$4,600.00 in statutory penalties and \$9,263.50 in attorney's fees, plus all court costs herein expended.

This Order is final and appealable, there being no just cause for delay.



 /s/ HON. ERIC J. HANER
electronically signed
9/14/2022 12:24:21 PM ET

ERIC J. HANER
JEFFERSON CIRCUIT COURT JUDGE

cc: Natalie Johnson
April A. Wimberg