Maryland State Conference of NAACP Branches	*	IN THE
	*	CIRCUIT COURT
Plaintiff	*	FOR
v.	*	BALTIMORE COUNTY
Maryland State Police	*	Case No.: 03-C-07-011022
Defendant		

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OPINION AND ORDER

This is the latest battle between the parties in this longstanding and difficult case. This Court is asked to award counsel fees and costs to the Plaintiff (hereinafter "NAACP") by virtue of section 10-623(f) of the Maryland Public Information Act (hereinafter "MPIA").

This Court was asked by the Defendant (hereinafter "MSP") to first determine whether the NAACP was "entitled" to this relief under our law. At this request, the Court bifurcated the issues into one of entitlement *vel non* and secondly, if so, how much. After a hearing on the issue of entitlement, this Court entered an Opinion and Order finding the NAACP entitled to the fees/costs. This order was filed on March 28, 2014. This Court will not again recite its reasons for its determination of entitlement.

The Order also provided that "this Court will conduct a hearing on the amount, reasonableness and appropriateness of these fees and costs" (i.e., the how much). On May 12, 2014, the NAACP filed its Motion for Attorney's Fees and Costs and a Memorandum of Law in support thereof. To this memo were attached multiple documents including affidavits, declarations, and various exhibits all in support of NAACP's position.

On August 22, 2014, the MSP filed a Motion to Reconsider this Court's decision on the issue of NAACP's entitlement. The NAACP has responded in opposition to that Motion. The Court will rule on the motion by separate opinion and order.

On the same date, the MSP filed an opposition to NAACP's Motion for Attorney's Fees and Costs and a Memorandum of Law in support thereof. To its' memo were likewise attached multiple exhibits, including affidavits and other supporting documents.

On September 19, 2014, the NAACP replied to MSP's opposition. Thereafter, the MSP supplemented its Opposition to NAACP's Motion for Fees and Costs. Once again thereafter, the parties have filed pleadings and counter-pleadings all related to this particular issue, replies and counter-replies further filling up the now ponderous file in this litigation. Many trees have indeed been slaughtered in this dispute.

This Court has carefully reviewed, read, re-read and read again all of the pleadings and supporting documents on this issue. The Court has again reviewed the file in this case and the opinions of the Appellate Courts in this particular matter. The Court has reviewed the statute and the federal and state cases cited and has reviewed the Court's copious notes taken along the way.

Finally, on October 14, 2014, this Court held a hearing on the issue of fees and costs which included the Motion to Reconsider filed by the MSP regarding the entitlement determination and the NAACP's Motion for Fees/Costs and the opposition by the MSP. This Court heard arguments of counsel and held the matter *sub curia* pending this Opinion and Order. This Court again took copious notes during the arguments and has again reviewed same in its efforts herein.

DISCUSSION

Although it is obvious to all involved in this litigation, the crux of this case was the NAACP's request, years ago, under the MPIA, for certain documents in MSP's control related to the MSP's internal investigations of "racial profiling complaints" i.e., complaints that state troopers had stopped motorists on our state highways because they were black. The MSP took the position that certain of the documents they possessed were "exempt" under the statute and

refused to provide these to the NAACP through these many years. After two trips to the Court of Special Appeals and one to the Court of Appeals, and after prodigious efforts by both parties, the MSP was ultimately required to turn over these documents to the NAACP. This was finally done albeit years after the request.

The sheer number of the pleadings on this issue, their size i.e., width and breadth, the number of declarations, affidavits, supplemental declaration, supplemental affidavits, exhibits, attachments, charts, lists, overviews, etc. have created a daunting challenge for this Court. Scores of cases have been cited by both parties. Both have asked the Court to exercise its substantial discretion on this question in favor of that party. Indeed, the parties are virtually at polar opposites with respect to fees and costs with the NAACP seeking fees and costs of nearly $600,000, the MSP suggesting fees and costs substantially below $100,000.

This Court has discretion in this matter as is clearly described in the many cases cited by the parties. (See *Kline v. Fuller* and *Friolo II* cited by the NAACP and many other similar cases.) Indeed, this Court must be careful not to abuse this discretion. The amount of fees and costs awarded must be determined by the facts of each case (see the *Hensley* case cited by both). This Court must give a clear explanation to the parties of the factors and considerations employed by this Court in arriving at the end result. Any reviewing court must be able to follow this Court's reasoning to test the validity of this Court's findings.

The Court must also endeavor to keep in mind that it is now a question of "how much?" as opposed to revisiting its ruling on NAACP's "entitlement" to this relief.

This Court must carefully consider all the evidence before it decides. This the Court has done to the best of its ability. The Court is endeavoring to be fair herein.

This Court notes early on that it is not an accountant and takes some consolation in the belief that it need not do a formal "audit" of all the materials provided nor a line-by-line, hour-by-hour, day-by-day, item-by-item analysis of the efforts of counsel for the NAACP.

As was suggested in the memorandum of the NAACP, what this Court believes it should attempt to do is something comparable to "rough justice" (see *Fox v. Rice* cited by NAACP). This Court should not try to become a green eyeshade accountant. Therefore, it will not.

Additionally, this Court believes it may draw upon its own experience as a trial lawyer with over thirty years of trial experience and as a Circuit Judge now in excess of nine years. The Court has done this in its Opinion.

This Court is persuaded that the idea/purpose of the fee shifting statutes, such as the one in the instant matter, is indeed to attract competent counsel to prosecute these kinds of cases, to be a disincentive to the custodians of these records from denying their access and to encourage settlement of these types of matters (see *Hensley*).

There is clearly a calculation or approach which the Court must utilize on this issue and there is no dispute as to that. This is known as the "lodestar" calculation or analysis. This is supported by too many cases to enumerate. Simply put, the lodestar calculation represents the number of hours reasonably expended in this litigation multiplied by a reasonable hourly rate (see *Henley*, *Friolo I*, etc., etc.) (Court's emphasis). This Court has underscored the requirement that both the number of hours and the rate must be reasonable. As is evident, the parties cannot in any way agree on the issue of hours expended by counsel for the NAACP in this litigation.

Fortunately, the MSP does not contest the hourly rate charged by the lawyers (Venable and ACLU) but rather the number of hours. As an aside, this Court would have found the hourly rates reasonable and appropriate had it been required to do so.

Without attempting to be too fine nor all-inclusive, NAACP's position is generally founded upon the following arguments: the issues herein were of considerable importance with important public interests affected and which involved accountability on the part of the MSP; the NAACP achieved a precedent making victory; the MSP vigorously defended its position necessitating a vigorous and sustained effort by NAACP's counsel; the issues were neither

mundane nor simple; the results were, in a word, excellent for their clients and the NAACP secured an important victory; consequently, its lawyers should be fully and appropriately compensated; the fees are reasonable given the circumstances and the exercise of substantial billing judgment by counsel; the fees in this case are, by and by, comparable with the cases utilized by the NAACP as comparisons in its petition; that the exercise of billing judgment by counsel eliminated all time arguably "duplicative or excessive"; additionally, the billing rate was below that normally charged by counsel; that the time expended was carefully documented and included the following categories of effort:

1. Case development, background investigation and case administration
2. Pleadings
3. Motions practice
4. Discovery
5. Trial preparation and attendance
6. Appellate practice
7. Fee petition preparation and prosecution

That the expenses incurred were reasonable, necessary and appropriate.

The fees sought by the NAACP were for the efforts of the following attorneys: (Venable) S. Rosenthal, B. Schwald, R. Wilkins, J. Walker, H. Bladuell, J.D. Williams, and N. Beeson; (ACLU) D. Jeon, A. Cruice, K. Maguire, D. Rocah.

In support of the categories of that effort on behalf of the NAACP are various attachments including:

1. Venable time entries
2. Venable costs (Attachment A2)
3. Declaration of Deborah Jeon (Exhibit B)
4. ACLU Time Entries (Attachment B1)

5. Declaration/Opinion of Andrew Freeman, Esq. (Exhibit C)

6. Baltimore Business Journal Survey of Law Firms (Exhibit D)

Mr. Freeman is an attorney in Maryland with some twenty-eight years of practice. He is a litigator of broad experience in state and federal courts. He has been honored by various groups and served on the fee petition subcommittee of the United States District Court for Maryland in 2012-2013. Mr. Freeman has substantial experience in litigating attorney's fees. Mr. Freeman and his firm also have extensive experience in civil rights litigation. His opinion is that both the rates charged by counsel for the NAACP and the hours expended were "reasonable and necessary." Mr. Freeman is of the opinion that the fees were incurred and were necessary to accomplish the goals of the NAACP.

What were the goals of the NAACP? To this Court, as the NAACP correctly argues, they were to secure the internal records of the MSP related to their own investigations of complaints by Maryland motorists. To this Court, the counsel for NAACP was completely successful in achieving this main goal and their efforts secured the NAACP's purpose in this litigation.

This Court has carefully reviewed the NAACP's attached documents and all documents described. This includes the Supplemental Declaration of D. Jeon, Supplemental Affidavit of S. Rosenthal and the exhibits in support of the NAACP's reply to MSP's opposition.

This Court finds the evidentiary support for the fee petition provided by the NAACP to be detailed, specific, ordered, complete and quite persuasive.

Furthermore, the Court notes that in addition to the removal of any arguably duplicative or excessive work, counsel eliminated any work not necessary work for proof of the NAACP claims – it also eliminated work done by the attorney's on the waiver issue. Time was reduced for the pleading efforts by some 25%. There was a 25% reduction on the Motion's practice efforts. There was a 35% across the board reduction regarding trial prep and attendance. Counsel made extensive cuts to the time expended on appellate practice (this Court notes this

was obviously the most effort expended i.e., this phase) and D. Jeon's time was reduced by 25% for the fee petition phase.

This Court has carefully considered the affidavit and supplemental affidavit of S. Rosenthal, Esq., a Venable partner, who essentially led the Venable effort in this matter. Venable did the litigation with ACLU counsel providing guidance and support which is an arrangement which has been done in previous litigation in public service related cases. Mr. Rosenthal kept contemporaneous records of the services and hours he performed. This Court also carefully considered the declaration of Deborah Jeon, ACLU's attorney, who did the bulk of work on the fee petition. She also reduced her hourly rate from $450 to $400. The NAACP argues it should be compensated fully which would encompass all hours counsel reasonably expended in attaining its goals.

The MSP's position is in stark contrast to the position of the NAACP. Its' position, without placing too fine a description and not all inclusive, is generally founded upon the following: the fees are unjustified by the nature of this litigation; this litigation was only a matter of statutory interpretation; the matter involved in this litigation was mundane; the NAACP did not achieve excellent results but only limited success; the NAACP has exercised limited but insufficient billing judgment in the reduction of its fee petition; the hours now indicated for which the fees are sought are excessive, redundant or otherwise unnecessary; the pre-litigation activities should be reduced by 50%; the work was duplicative and unnecessary; the case of *Massey* is a proper comparable to this case and should be persuasive to this Court; the entirety of the effort of R. Wilkins should be deleted as unnecessary and redundant; as this Court found MSP's legal position vis-à-vis turning over the document not unreasonable, this finding should play a role in this Court's decision regarding fees and costs; as the NAACP only accepted redaction of the trooper's ID and the Court's ultimate inclusion of the complainant's ID equals a lack of success vis-à-vis the efforts of NAACP's counsel; it was the responsibility of the

NAACP to propose the full scope of redaction and failing to do so should result in a lesser fee award; the NAACP's position regarding personnel versus not personnel or redacted versus not redacted represents a lack of success and a waste of time and should be not compensable; as this case is only a PIA case it is fundamentally different than the civil rights cases used by the NAACP as comparables and this argument should have no real effect; the time expended by counsel for NAACP was excessively exorbitant and is now exorbitant; that this Court should consider the factors as follows:

A. Time and labor required;

B. The novelty and difficulty of the questions;

C. The skill required to perform the legal service properly;

D. Acceptance of the case precluded other employment by the attorney;

E. The customary fee for similar legal services;

F. Whether the fee is fixed or contingent;

G. Any time limitations imposed by the client or the circumstances;

H. The amount involved and the results obtained;

I. The experience, reputation and ability of the attorneys;

J. The undesirability of the case;

K. The nature and length of the professional relationship with the client;

L. Awards in similar cases (many of these factors are already subsumed within the initial lodestar calculation. See *Fiolo I*);

The MSP urges this Court to find that there was an inappropriate distribution of work amongst the lawyers; that this Court should greatly cut the time expended by counsel at the Court of Special Appeals and the Court of Appeals; that it was a wildly inefficient use of the attorneys' time and there were too many people doing the same thing.

The MSP attached several exhibits in support of its position. These include Timeline of Events (Exhibit A), Affidavit (Opinion) of Rignal W. Baldwin, Esq. (Exhibit B with Exhibits 1 and 2), "*Massey*" Memo and Order (Exhibit C), Excerpts from Memo in Support of Fees – *Massey* (Exhibit D), Master Reduction Worksheet (Exhibit E), Calculation Sheet (Exhibit F), Representation Agreement (Sealed) (Exhibit G), R. E. Wilkins Excerpted Entries (Exhibit H), D. L. Schwald Excerpted Entries (Exhibit I), J. E. Walker Excerpted Entries, (Exhibit J), D. Jeon Excerpted Entries (Exhibit K), *Miracycle Thompson v. Dallas*, No. 1243 (Md. App. March 14, 2014) (Exhibit L), Lieutenant Carter Timeline of Events (Exhibit M), E-mails between M. Bowen and A. Cruice (Exhibit N).

This Court has carefully reviewed all these exhibits. This includes the Supplemental Affidavit of M. Baldwin and Exhibit to the Supplemental Opposition by MSP.

Rignal W. Baldwin has been a member of the Maryland Bar for nearly forty years. He is a very experienced trial attorney focusing on business litigation, personal injury, professional liability and products liability. He practices in state and federal courts. He is a fellow of the American College of Trial Lawyers and is recognized to be in the top one percent of the trial lawyers in the country. He has been active with the Maryland Bar and has served on many important committees throughout his career. He also has served as an adjunct professor at the University of Baltimore and University of Maryland School's of Law. His experience includes some thirty civil rights cases and other matters involving fees and costs disputes. He has been qualified as an expert in both state and federal courts on the issue of appropriate attorney's fees. He has stated that he has reviewed virtually all the exhibits and all other documents involved in this particular dispute.

Mr. Baldwin opines that the suit involves statutory interpretation rather than extensive factual disputes and the legal issues were novel but were not complex from the standpoint of resources needed to litigate this case. Mr. Baldwin opines that the fees requested were neither

reasonable nor necessary. He believes the billing was unreasonable including billing for attorneys who are apparently unnecessary in this litigation and whose efforts appear to have been a duplication of the efforts of other attorneys. He opines that the total time devoted to specific tasks and time devoted by the attorneys whose efforts were not duplicative was also unnecessary and excessive. Mr. Baldwin takes exception to the number of hours the attorneys utilized collaboratively. He feels their work appears duplicative. These include Mr. Schwald's work and Mr. Wilkins' work. Mr. Baldwin believes Ms. Walker's efforts were essentially not necessary, excessive and quite redundant and that Ms. Jeon's contribution was also duplicative. His ultimate opinion is that the hours were excessive and unnecessary vis-à-vis various stages of the litigation.

It is interesting (or disconcerting) to this Court that we have two extremely qualified experts who have opinions of such enormous divergence vis-à-vis the efforts, hours expended and the reasonableness and necessity of these efforts. As counsel know, this Court can accept some, all or none of an expert's opinion.

The NAACP seeks costs of $11,537.32. The MSP takes the position that the appropriate amount of costs to reimburse the NAACP is $537.81. The NAACP's costs represent the expenses of legal research performed and certain delivery services used during the appellate stage of litigation. NAACP's counsel does not seek costs incurred during the trial stage nor for long distance telephone calls, postage, or in-house copies. To this Court, NAACP's position on costs is reasonable and the Court finds the costs requested by the NAACP fair, reasonable, necessary and 100% compensable. (See *Daly*, *Wheeler* cited by the NAACP).

At the end of the day, the NAACP seeks $577,731.31 in counsel fees and $11,537.52 in costs, a total of $589,268.83. The MSP urges this Court to award $73,691.89 in fees and $537.81 in costs, a total of $74,229.76. By this position, the MSP urges this Court to find that the NAACP is entitled to less than thirteen percent of its request. Their relative positions in this

instant matter are a metaphor for this entire litigation. The NAACP asked for the documents under a statute, the NAACP was entitled to these documents. The MSP refused in all respects throughout these many years. The NAACP prevailed and secured the documents it had sought. This Court finds as follows and in no particular order vis-à-vis the myriad arguments that have been made by both sides:

This Court hardly views the issues contained in this litigation as mundane.

This is so given the appellate court's treatment of this matter. The decision of the Court of Special Appeals to hear the matter a second time *en banc* certainly does not point this Court to a conclusion that it was mundane. The Court of Appeals' grant of certiorari again belies that suggestion. To this Court, this matter was singularly important and precedent establishing and not mundane.

Although one can argue that complexity is in the eye of the beholder, the two different approaches to reach essentially the same result by our two appellate court levels does not suggest simplicity or a lack of complexity to this Court. This Court believes it was a complex issue and not an easy one.

The MSP appears to downplay the importance of this case at the fees/costs juncture. It certainly did not take that position in its Motion to Stay and the Court finds an inconsistency.

Is this complex, important case sufficiently similar to *Massey v. Galley*? Ms. Jeon's Supplemental Declaration sheds significant light on the manifest differences between *Massey* and the instant case. As she stated and as this Court accepts, this case is "enormously more complex, hard fought, successful and impactful than *Massey*." This Court does not find Massey comparable.

MSP argues that seventy five percent of Ms. Walker's time should be eliminated. This Court finds it difficult if not impossible to accept that argument.

It was the MSP which drove this litigation. It certainly had the legal right to do so and its position was not legally unreasonable.

The MSP went on and on and on vis-à-vis the NAACP's request which required the NAACP to oppose it every step of the way. To view it otherwise makes no sense to this Court.

This Court has indeed considered the factors (A-L) in its Opinion (*Johnson v. Georgia Highway Express*, 488 F.2d 714 (1974)).

This Court determines that the NAACP wrote off enormous periods of time in exercising billing judgment resulting in an overall amount of time expended not unreasonable to this Court.

This Court finds the results achieved by the NAACP very good indeed. The NAACP was completely successful and in essence lost nothing. The results achieved are precedent setting both as to the issue of the exemptions themselves as it relates to these records and the very important issue of severability of these types of records.

This Court does not accept the conclusion that multiple attorneys equals ipso facto unnecessary, redundant or duplicative work. In a case such as this, multiple attorneys can and do offer different points of view, unique efforts and a synergy that is valuable to the overall effort. The collaborative effort in this particular litigation by counsel for the NAACP does not strike this Court as duplicative, redundant or unnecessary. This Court is not persuaded by the MSP's position in this regard.

Although this Court found the MSP reasonable or not unreasonable legally in its position regarding entitlement, that determination does not play a part in this Opinion.

This Court finds the ultimate approaches taken by the NAACP to achieve its results even if not reached by the appellate court or not entirely successful do not warrant a reduction in the fees sought by the NAACP.

As previously stated, NAACP's billing judgment appears very substantial to this Court. It takes a significant role in this decision in addition to the NAACP's voluntary reduction in their hourly rate normally charged by counsel.

This Court believes it was not the NAACP's responsibility to suggest to this Court the overall scope of the redactions of these records, if anything it was the responsibility of the MSP.

The MSP steadfastly stood by its position i.e., no records responsive to this request, for six plus years and three trips to the appellate courts of our state.

Given a review of the enormous evidence provided on this issue, this Court is simply not persuaded by Mr. Baldwin's opinion. Given all this Court has reviewed, the opinion of Mr. Freeman is persuasive to this Court.

The Defendant (here MSP) cannot litigate tenaciously and be heard to complain about the time necessarily spent by the Plaintiff in response. (*City of Riverside v. Rivera*, 477 U.S. 561 (1986)).

The MSP takes the position that a fair, reasonable fee is less than thirteen percent of that sought by the NAACP. This Court categorically rejects that argument.

A review of the time expended (after NAACP's reduction) does not lead this Court to conclude the effort was duplicative or redundant.

The cases cited the by NAACP as comparable, although not necessarily exactly the same as the instant litigation, are somewhat comparable to this Court and the Court has considered them in this Opinion.

This Court cannot determine the MSP's staffing of this case nor the efforts expended by counsel for the MSP and, ergo, cannot conclude that counsel for the MSP spent substantially less, as much, or more time on the case than counsel for the NAACP.

This Court believes that at least some deference should be granted to NAACP's counsel's professional judgment as to how much time was required to spend on this case – after all, the NAACP prevailed (*Moreno v. City of Sacramento*, 534 F.3d 1106 (2008)).

The fees this Court awards are not meant to punish the MSP but rather to compensate the successful Plaintiff (NAACP) for advancing the legislatively determined public benefit. This statement resonates with this Court.

CONCLUSION

As remarked above, the efforts of the parties and the very size of the litigation vis-à-vis fees/costs are truly a metaphor for the entire case. This Court has attempted to consider all the factors deemed important in a determination of the "how much." To this Court, the NAACP should be compensated fully vis-à-vis fees and costs. Consequently, it is this 23rd day of December, 2014, ordered that the Maryland State Police shall pay to the NAACP, on account of reasonable counsel fees and costs the sum of $577,731,31 in fees and $11,537.52 in costs, a total of $589,268.83. It is so ORDERED.

Hon. Timothy J. Martin