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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SETH ROSENFELD,

No. C-07-3240 EMC

Plaintiffs,

**ORDER GRANTING PLAINTIFF'S
MOTION FOR AN AWARD OF
ATTORNEYS' FEES AND COSTS**

v.

U.S. DEPARTMENT OF JUSTICE, *et al.*,

(Docket No. 149)

Defendants.

Plaintiff Seth Rosenfeld filed a complaint on June 19, 2007, against Defendants United States Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI"), seeking the disclosure of certain government documents under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. *See* Compl ¶ 1. After multiple years of litigation, including three rounds of cross-motions for summary judgment, this Court entered a final order and judgment in favor of the Plaintiff on March 28, 2012. *See* Stipulation and Order to Enter Judgment (Docket No. 146), Entry of Judgment (Docket No. 147). Now before the Court is Plaintiff's Motion for an Award of Attorneys' Fees and Costs (Docket No. 149). For the reasons stated below, the Court **GRANTS** Plaintiff's Motion and awards Plaintiff a total of **\$363,217.60** in fees and costs.

I. FACTUAL & PROCEDURAL BACKGROUND

Seth Rosenfeld is a professional journalist. He has written numerous publications about the FBI's activities in connection with the University of California during the Cold War, and the impact those activities had on the "academic freedom and civil liberties" of American citizens. Eighth Decl. Of Seth Rosenfeld (Docket No. 153) ¶ 1. Much of his research and writing has drawn

Attachment C

C. A. 04-0814

1 extensively from “FBI records released pursuant to the Freedom of Information Act.” *Id.* ¶ 5. Over
2 the course of his career, Plaintiff has used these records to publish articles about the FBI’s activities
3 at the University of California during nationally prominent events in the 1950s and 1960s, including
4 the FBI’s political surveillance of University of California students and faculty, and the FBI’s
5 attempts to oust Clark Kerr as president of the University. *Id.* ¶ 2. Plaintiff is currently writing a
6 book about the FBI’s activities in connection with the University that expands upon his published
7 articles. *Id.* ¶ 3.

8 Plaintiff’s present case flows from a rather protracted dispute between Rosenfeld and the FBI
9 over whether certain documents in the FBI’s custody ought to be released under FOIA. Plaintiff
10 has, at various times, requested FBI records concerning former President Ronald Reagan “and the
11 individuals who were closely associated with him during the Cold War period.” *Id.* ¶ 18. His FOIA
12 requests asked for FBI documents on Ronald Reagan from the date of the first record on file up to
13 the year 1979. *Id.* ¶ 19. Rosenfeld maintains that the records he requested “shed light on the FBI’s
14 deep involvement with Ronald Reagan during this period, and are thus directly relevant to the FBI’s
15 relationship with him during his Governorship and in regards to FBI activities relative to UC [the
16 University of California].” *Id.* ¶ 18.

17 Plaintiff claims that Reagan was an FBI informant and that the FBI played an integral role in
18 supporting Reagan’s political career. *See* Seventh Decl. of Seth Rosenfeld (Docket No. 138-1) ¶¶ 4,
19 6, 9. Plaintiff seeks information about how the FBI’s operations impacted Reagan’s political career,
20 his shaping of government policy while Governor of California, and the exercise of constitutionally
21 protected activities by American citizens during this time period. Eighth Rosenfeld Decl. ¶¶ 24-26.

22 On June 19, 2007, Rosenfeld filed a complaint alleging that the FBI failed to release all of
23 the documents he requested under FOIA. Compl. ¶ 1 (Docket No. 1); *see also* First Amended
24 Compl. ¶ 13 (Docket No. 13). In the five years following the filing of that complaint, the parties
25 have gone through four separate rounds of summary judgment motions, three of which were cross-
26 motions for summary judgment. *See* Docket No. 27 (Defendants’ First Motion for Summary
27 Judgment); No. 82 (Defendants’ Second Motion for Summary Judgment); No. 99 (Defendants’
28 Third Motion for Summary Judgment); No. 133 (Plaintiff’s Third Motion for Summary Judgment).

1 On each of these summary judgment rounds, Rosenfeld was largely the prevailing party. *See* Docket
2 No. 47 (Memorandum and Order on Cross-Motions for Summary Judgment); No. 98 (Memorandum
3 and Order on Second Set of Cross-Motions for Summary Judgment); No. 115 (Memorandum and
4 Order on Defendants' Third Motion for Summary Judgment); No. 143 (Redacted Order Granting
5 Plaintiff's Motion for Summary Judgment). This Court entered a final order and judgment in favor
6 of the Plaintiff on March 28, 2012. Stipulation and Order to Enter Judgment (Docket No. 146);
7 Entry of Judgment (Docket No. 147). The Plaintiff maintains that "at a minimum" this litigation led
8 the FBI to release in excess of 3,398 pages of materials related to President Reagan, *see* Eighth
9 Rosenfeld Decl. ¶ 89, in the course of what the court described as "the FBI's Herculean efforts at
10 compliance with [its] FOIA obligations," *see* Memorandum and Order on Second Set of Cross-
11 Motions for Summary Judgment at 4.

12 Rosenfeld now moves for an award of attorneys' fees and costs under FOIA's fee-shifting
13 provision. In total, Plaintiff seeks an award of \$442,917.62, which includes \$85,570 in fees and
14 costs incurred by counsel for Plaintiff in preparing the instant motion. *See* Pl.'s Mot. for an Award
15 of Fees and Costs (Docket No. 149) at 25; Pl.'s Reply Memorandum in Support of Mot. for Fees and
16 Costs at 15 ("Pl.'s Reply Mem.") (Docket No. 156). The FBI objects to Rosenfeld's fee motion and
17 argues that attorneys' fees and costs should not be awarded in any amount for three reasons: (1) that
18 Rosenfeld is ineligible to receive attorneys' fees because he did not substantially prevail in the
19 litigation, (2) that Rosenfeld is not entitled to an award because the FBI made good faith efforts to
20 respond to his FOIA requests, and (3) that his requested award amount greatly exceeds what is
21 reasonable in a case of this type. *Opp.* to Pl.'s Mot. for Award of Fees and Costs (Docket No. 155)
22 ("Def.'s Response Brief").

23 II. DISCUSSION

24 A. Legal Standard

25 The fee-shifting provision of FOIA states that a "court may assess against the United States
26 reasonable attorney fees and other litigation costs reasonably incurred in any case under this section
27 in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E). "Substantially
28 prevailed" in this context means that a "complainant has obtained relief through either . . . a judicial

1 order, or an enforceable written agreement or consent decree; or . . . a voluntary or unilateral change
2 in position by the agency, if the complainant's claim is not insubstantial." *Id.* Fee and cost awards
3 are not automatically awarded to a prevailing party under FOIA. *See Church of Scientology of*
4 *California v. U.S. Postal Serv.*, 700 F.2d 486, 489 (9th Cir. 1983). Rather, plaintiffs "must present
5 convincing evidence" that they are both *eligible* for an award of attorney's fees and that they are
6 *entitled* to such an award. *See id.*, 700 F.2d at 489, 492. *See also Long v. U.S. I.R.S.*, 932 F.2d
7 1309, 1313 (9th Cir. 1991) ("In order to receive an award of fees, a prevailing party in a FOIA
8 action must demonstrate both eligibility for and entitlement to such a recovery.").

9 The Ninth Circuit has crafted a two-step process for determining whether a party may be
10 awarded fees and costs under § 552(a)(4)(E). To be *eligible* for an award, a party must show both
11 that "(1) the filing of the action could reasonably have been regarded as *necessary* to obtain the
12 information," and that "(2) the filing of the action had a *substantial causative* effect on the delivery
13 of the information." *Church of Scientology of California*, 700 F.2d at 489 (emphasis in original).

14 Once a court deems a party eligible to recover fees and costs, it then exercises its "discretion
15 to determine whether the plaintiff is *entitled* to fees." *Oregon Natural Desert Ass'n v. Locke*, 572
16 F.3d 610, 614 (9th Cir. 2009) (emphasis added). Entitlement to an award of fees under FOIA is a
17 separate analysis; a "determination of eligibility does not automatically entitle the plaintiff to
18 attorney's fees." *Church of Scientology* at 489. To determine whether a party is entitled to fees, a
19 court must evaluate a number of equitable factors, including (1) the public benefit resulting from
20 FOIA disclosures in the case, (2) the commercial benefit to the party resulting from the disclosures,
21 (3) the nature of the party's interest in the disclosed records, and (4) whether the government's
22 rationale for withholding the records had a reasonable basis in law. *Long v. U.S. I.R.S.*, 932 F.2d
23 1309, 1313 (9th Cir. 1991). These "criteria are not exhaustive, however, and the court may take into
24 consideration whatever factors it deems relevant in determining whether an award of attorney's fees
25 is appropriate." *Long*, 932 F.2d at 1313 (internal quotation marks omitted). The Ninth Circuit has
26 made clear that "[t]he decision to award attorney's fees is left to the sound discretion of the trial
27 court." *Church of Scientology* at 492.

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1 If a court determines that a party is both eligible and entitled to receive fees, that party “must
 2 submit his fee bill to the court for its scrutiny of the reasonableness of (a) the number of hours
 3 expended and (b) the hourly fee claimed.” *Long* at 1313-14. If these two figures are reasonable in
 4 light of the difficulty of the case and the skill of the attorneys involved, there is a “strong
 5 presumption” that their product “represents a reasonable award.” *Long* at 1314. A court may revise
 6 upward or downward the resulting “lodestar figure”¹ if “factors relating to the nature and difficulty
 7 of the case overcome this strong presumption and indicate that such an adjustment is necessary.”
 8 *Id.*² However, once a party is deemed both eligible and entitled to fees, “the award must be given
 9 and the only room for discretion concerns the reasonableness of the amount requested.”³ *Id.* A

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¹ Referring to this method of attorney fee award calculation as the “lodestar” approach may have originated with the Third Circuit’s opinion in *Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3rd Cir. 1973) (“the amount thus found to constitute reasonable compensation should be the *lodestar* of the court’s fee determination”) (emphasis added).

² The *Long* court cited with approval twelve factors that may be considered in revising a fee award. They are

- (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the “undesirability” of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Long at 1314 (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)). These factors may, however, overlap to some degree with the “lodestar figure” if they served as a basis for the calculation of that initial amount. *Long* at 1314, Fn. 4.

³ A court may reduce the amount of hours used to calculate a fee award “where documentation of the hours is inadequate; if the case was overstaffed and hours are duplicated; if the hours expended are deemed excessive or otherwise unnecessary.” *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). *Chalmers* examined an award of fees and costs under the fee-shifting provision for civil rights actions provided by statute under 42 U.S.C. § 1988. The Ninth Circuit cites approvingly to *Chalmers* and other § 1988 cases in discussing the metrics of fee-shifting under FOIA. See e.g. *Long* at 1314. Indeed, *Rosenfeld v. United States*, 859 F.2d 717, 724 (9th Cir.1988) explicitly holds that FOIA and § 1988 are “comparable” where awards of attorney’s fees are concerned.

1 district court awarding fees and costs “should provide a detailed account of how it arrive[d] at
2 appropriate figures for the number of hours reasonably expended and a reasonable hourly rate.” *Id.*

3 B. Eligibility for Attorneys’ Fees

4 The FBI contends “[t]he record here shows that Plaintiff has not demonstrated significant
5 relief though a judicial order nor a voluntary or unilateral change in position by the agency with
6 respect to a not insubstantial claim,” and is, therefore, not eligible for an award of attorneys’ fees.
7 Def.’s Response Brief at 6. If anything, the record demonstrates quite the opposite. A party has
8 “substantially prevailed” under FOIA, as noted above, when it obtains “relief through either...a
9 judicial order, or an enforceable written agreement or consent decree; or...a voluntary or unilateral
10 change in position by the agency, if the complainant’s claim is not insubstantial.” 5 U.S.C. §
11 552(a)(4)(E)(ii). Thus, if a “sufficient causal nexus exists between [plaintiff’s] litigation and the
12 release of the documents,” that is enough to “warrant a determination that [plaintiff] is eligible for
13 attorney fees.” *Fund for Constitutional Gov’t v. Nat’l Archives & Records Serv.*, 656 F.2d 856, 872
14 (D.C. Cir. 1981).

15 The record demonstrates both that Rosenfeld’s suit against the FBI resulted in his receiving
16 judicial orders granting the relief sought in his complaint, and that the suit acted as the “catalyst” in
17 prompting the FBI’s “voluntary unilateral changes in position” that resulted in the disclosure of
18 documents he sought. Plaintiff’s First Amended Complaint (“FAC”), filed on October 22, 2007,
19 advanced five separate causes of action seeking the disclosure of certain records pertaining to (1)
20 former President Reagan, (2) former Alameda County prosecutor Herbert Ellingwood, (3) former
21 University of California Vice-Chancellor Alex Sherriffs, (4) former union official Roy M. Brewer,
22 and (5) the former President’s older brother Neil Reagan. *See* FAC (Docket No. 13) at 7-22. The
23 FAC advanced three additional causes of action seeking the disclosure of (6) records from the FBI’s
24 Field Office in Sacramento, California, carrying the “80” designation, (7) records pertaining to the
25 Motion Picture Industry Council, the Labor League of Hollywood Voters, and the Motion Picture
26 Alliance for the Preservation of American Ideals, and (8) certain additional records pertaining to
27 former President Reagan. *Id.* at 22-30. In the four years of litigation following Rosenfeld’s filing of
28 the complaint, the FBI released approximately 7412 pages of materials to Plaintiff under FOIA, the

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1 last three pages of which were released pursuant to an order of this Court. *See* Eighth Rosenfeld
2 Decl. (Docket No. 153) Ex. ZZ (consisting of fifteen FBI cover letters detailing the release of
3 documents to Plaintiff). All of the materials released fell within the ambit of these eight causes of
4 action. *See id.*

5 The FBI claims that “no evidence beyond timing” shows that Rosenfeld’s suit “had a
6 substantial causative effect on the delivery of information.” Def.’s Response Brief at 7. This
7 argument overlooks the fact that “timing” can directly inform whether a “causal nexus exists
8 between the litigation and [defendant’s] surrender of these documents.” *Church of Scientology of*
9 *California v. Harris*, 653 F.2d 584, 588 (D.C. Cir. 1981) (hereinafter “*Harris*”). In *Harris*, the
10 Court of Appeals for the District of Columbia Circuit reversed a district court’s decision to deny an
11 award of attorney’s fees under FOIA, in part, because the court failed to consider a release of
12 documents by the Attorney General – documents sought by the Church of Scientology in its lawsuit
13 – as part of its assessment of the Church’s relative success in the case. The Court of Appeals
14 reasoned:

15 The initiation and prosecution of this litigation, however, was in our
16 opinion the direct cause of their disclosure, for absent this litigation,
17 following the unsuccessful administrative request, the General
18 Counsel’s files would never have been searched, the 31 documents
19 would never have been identified as falling within the scope of
20 Scientology’s FOIA request, and the documents would never have
21 been evaluated to determine whether they should or could be released .
22 . . . The timing of the Attorney General’s letter does not eliminate the
23 fact that if the litigation had never been brought the documents would
24 never have been disclosed. It was the litigation that produced the 31
25 documents, not the letter.

21 *Harris*, 653 F.2d at 589.

22 The Ninth Circuit has adopted a similar position for assessing the causal connection between
23 a plaintiff’s FOIA suit and the release of requested documents during litigation. “[T]he mere fact
24 that defendants have *voluntarily* released documents” during the pendency of a lawsuit “does not
25 preclude an award of attorney’s fees to the plaintiff” under FOIA’s fee-shifting provision. *Church*
26 *of Scientology of California*, 700 F.2d at 492 (citing *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1365 (D.C.
27 Cir.1977)). Where sought-after FOIA documents are released during litigation, a court must
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1 examine “(1) when the documents were released; and (2) what actually triggered the documents’
2 release” in assessing whether a plaintiff has “substantially prevailed” in his case. *Id.*

3 As in *Harris*, there is no indication in the record here that the Defendants would have
4 searched back through their files “or released any of the contents thereof in the absence of this
5 litigation.” *Harris*, 653 F.2d at 588. Prior to filing suit, Rosenfeld timely appealed the FBI’s
6 conclusion that it had released all the requested files as required under FOIA. *See* Memorandum and
7 Order on Cross-Motions for Summary Judgment (Docket No. 47) at 2-9. Up to that point, the FBI
8 had released 2,787 pages of responsive records related to Ronald Reagan, Compl. (Docket. No. 1) ¶¶
9 22, 24, 231 pages related to Roy Brewer, *id.* ¶ 69, and 49 pages related to the League of Hollywood
10 Voters, *id.* ¶ 113. The record indicates Rosenfeld had exhausted his administrative remedies and
11 received what amount to final determinations that the government had met its obligation under
12 FOIA. Memorandum and Order on Cross-Motions for Summary Judgment at 10-13; *see also* Eighth
13 Rosenfeld Decl. ¶¶ 60-73. Rosenfeld wrote numerous letters to the FBI setting forth instances in
14 which he believed the FBI had failed to release appropriate records, *see e.g.* Compl, Ex. H and I, but
15 his letters either received no substantive reply or were added to the government’s “substantial”
16 backlog of FOIA appeals, *see* Compl, Ex. K. Among other things, Rosenfeld sought thousands of
17 pages of records identified as responsive that were referred out to other agencies for processing, as
18 well as responsive records awaiting a declassification review by the FBI. *See* Compl, Ex. H. Seeing
19 no alternative way of obtaining the documents, Rosenfeld turned to the courts for relief.

20 This is not a case where the FBI, “upon actual and reasonable notice, made a good faith
21 effort to search out material and to pass on whether it should be disclosed.” *Harris* at 588 (citing
22 *Cox v. U.S. Dept. of Justice*, 601 F.2d 1, 6 (D.C. Cir. 1979)). Rather, it is much more analogous to a
23 situation where “the agency, upon actual and reasonable notice, decided to act upon an assumption
24 as to the nature of certain material and was then obliged to release most of that material when the
25 light of litigation exposed the error of its assumption.” *Harris* at 588. Over the course of this
26 litigation, the FBI offered several reasons to support its decisions to withhold the materials
27 Rosenfeld requested, or to limit the scope of its search for responsive documents, such as by arguing
28 that Plaintiff had failed to exhaust his administrative remedies, *see* Defs.’ Mot. for Summary

1 Judgment (Docket No. 27), or that it had conducted adequate searches and already released all
2 responsive, non-exempt records, *id.*; *see also* Defs.’ Second Mot. for Summary Judgment (Docket
3 No. 82). However, time and again it revised its earlier conclusions and opted to release materials to
4 Plaintiff in the face continued of litigation. The Defendants’ own letters demonstrate how
5 Rosenfeld’s initiation of suit on June 19, 2007, prompted the FBI to revisit its earlier denials of
6 Plaintiff’s FOIA request and release additional material. *See e.g.* Eighth Rosenfeld Decl. (Docket
7 No. 153) Ex. ZZ.(containing FBI letter dated February 6, 2009, communicating the release of an
8 additional 911 pages of responsive materials, and noting that “[d]ocuments responsive to your
9 [2007] request continue to be processed and will be released to you”); *id.* Ex. ZZ.(containing FBI
10 letter dated January 29, 2010, communicating the release of an additional 44 pages of responsive
11 materials located and re-processed “[p]er agreement made between the FBI and plaintiff during the
12 pre-Case Management Conference meeting on November 2, 2009”). As noted, *supra*, over the span
13 of four years following Rosenfeld’s filing of the complaint, the FBI released approximately 7412
14 pages of materials to Plaintiff under FOIA. *See* Eighth Rosenfeld Decl. (Docket No. 153) Ex. ZZ
15 (consisting of fifteen FBI cover letters detailing the release of documents to Plaintiff).

16 Viewing the litigation as a whole, the record demonstrates that “but for the institution and
17 prosecution of this suit, the documents ultimately obtained by [Plaintiff] . . . would never have been
18 released.” *Harris at 588*. On these facts, “it is clear that the suit was necessary and causally linked
19 to the release of the documents obtained.” *Id.* Thus, both the timing and circumstances of the FBI’s
20 release of documents in this case indicate that Rosenfeld’s FOIA lawsuit was, at root, “what actually
21 triggered the documents’ release.” *Church of Scientology of California at 492*. As such, he has
22 demonstrated that the “lawsuit was *reasonably necessary* and that it had a *substantial causative*
23 *effect* on the release of documents” at issue, and he is therefore is eligible to receive an award of
24 attorneys’ fees under FOIA. *Id.* at 491 (emphasis in original).

25 C. Entitlement to Attorneys’ Fees

26 Having determined that Rosenfeld is eligible to receive a fee award, the Court next considers
27 whether he is also entitled to an award. The decision as to whether a party is entitled to an award of
28 fees and costs “is left to the discretion of the district court.” *Church of Scientology at 489*. Courts

1 look to the four factors described in *Long* as a guide to exercising their discretion, keeping in mind
2 “the basic policy of the FOIA to encourage the maximum feasible public access to government
3 information.” *Nationwide Bldg. Maint., Inc. v. Sampson*, 559 F.2d 704, 715 (D.C. Cir. 1977); *see*
4 *also Church of Scientology* at 494.

5 Turning to the first *Long* factor – an examination of the public benefit resulting from FOIA
6 disclosures in this case – the Court notes that the FBI does not dispute that this factor weighs in
7 favor of a fee award. *See* Def.’s Response Brief at 11 (stating that Defendants “do not necessarily
8 contest that the information obtained through this FOIA request is of any benefit to the public”).
9 Coupled with the court’s prior recognition that “[t]he public maintains a significant interest in
10 knowing the extent of the FBI’s involvement in furthering Reagan’s political aspirations,”
11 Memorandum and Order on Second Set of Cross-Motions for Summary Judgment (Docket No. 98)
12 at 20, the Court finds that this factor weighs in favor of Rosenfeld’s entitlement to fees and costs.

13 The next two factors – the commercial benefit to the party resulting from the disclosures and
14 the nature of the party’s interest in the disclosed records – are closely related and often assessed
15 together. *See Church of Scientology* at 494; *Tax Analysts v. U.S. Dept. of Justice*, 965 F.2d 1092,
16 1095 (D.C. Cir. 1992). As a general matter, “if either commercial benefit will inure to the plaintiff
17 from the information” obtained, or “plaintiff intends to protect a private interest” through the use of
18 FOIA, “an award of attorney’s fees is not recoverable.” *Church of Scientology* at 494. In contrast,
19 “where plaintiff is indigent or a nonprofit public interest group, an award of attorney’s fees furthers
20 the FOIA policy of expanding access to government information.” *Id.* More specific to the case at
21 hand, Ninth Circuit precedent in this area teaches that courts assessing these two factors “[sh]ould
22 generally award fees if the complainant’s interest in the information sought was scholarly or
23 journalistic or public-oriented.” *Long* at 1316 (quoting *Church of Scientology* at 493, which quotes
24 in turn S.Rep. No. 854, 93d Cong., 2d Sess. at 19 (1974)).

25 As the facts described above note, Rosenfeld is a professional journalist who made his
26 underlying FOIA request to find supporting materials for a book he is readying for publication.
27 Eighth Rosenfeld Decl. ¶¶ 1, 30. The FBI asks this Court to depart from the general favorable
28 treatment afforded scholars and journalists under this prong of the entitlement analysis because

1 "Plaintiff has a financial incentive to pursue his [FOIA] request and litigation." Def.'s Response
2 Brief at 11. Pointing to *Morley v. U.S.C.I.A.*, 828 F. Supp. 2d 257 (D.D.C. 2011), where an author
3 and journalist was denied attorney's fees under FOIA, in part, because of his financial incentive to
4 use FOIA to acquire source documents for use in his book, the FBI argues that this Court should also
5 find that Rosenfeld's FOIA requests here "were primarily grounded in the commercial purpose of
6 the publication of a book on the FBI." *Id.* The court in *Morley*, however, focused heavily on the
7 fact that the plaintiff there sought "records from the CIA at little or no charge under FOIA to avoid
8 expending his own time and money to obtain the documents from NARA [the National Archives and
9 Records Administration]." *Morley*, 828 F. Supp. 2d at 265 (emphasis added). There is no evidence
10 in this case that Rosenfeld sought to obtain a similar pecuniary advantage through FOIA. Nor has
11 the FBI shown the records sought were otherwise available elsewhere.

12 Further, the "mere intention to publish a book does not necessarily mean that the nature of
13 the plaintiff's interest is purely commercial." *Davy v. C.I.A.*, 550 F.3d 1155, 1160 (D.C. Cir. 2008)
14 (internal quotation marks omitted). "Surely," the *Davy* court held, "every journalist or scholar may
15 hope to earn a living plying his or her trade, but that alone cannot be sufficient to preclude an award
16 of attorney's fees under FOIA." *Id.* Given the unique treatment afforded journalists and scholars
17 under this prong of the entitlement test, the Court finds that both the commercial benefit and
18 plaintiff's interest factors in *Long* weigh in favor of Rosenfeld's entitlement to a fee award.

19 The final factor – whether the government's rationale for withholding the records had a
20 reasonable basis in law – directs a court to consider whether an agency's administrative denial of a
21 FOIA request had "a colorable basis in law," or whether the denial "appeared to be merely to avoid
22 embarrassment or to frustrate the requester." *Church of Scientology of California* at 492, Fn. 6
23 (citing S.Rep. No. 93-854, 93rd Cong. 2nd Sess. 19 (1974)). An agency denying a FOIA request
24 "must be careful not to read the request so strictly that the requester is denied information the agency
25 well knows exists in its files, albeit in a different form from that anticipated by the requester. To
26 conclude otherwise would frustrate the central purpose of the Act." *Hemenway v. Hughes*, 601 F.
27 Supp. 1002, 1005 (D.D.C. 1985).

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1 The FBI argues that this factor weighs against an award of attorneys' fees here because
2 "bureaucratic difficulty, not recalcitrant behavior, delayed the FBI's response to Plaintiff's
3 requests." Def.'s Response Brief at 8. It maintains that, "although the Court's orders yielded the
4 production of some [additional] documents or information, the FBI had a reasonable basis for its
5 initial search and disclosures." *Id.* at 9. Further, "given the sheer volume of the information
6 requested, the age of the records sought, the length and difficulty of the many searches conducted,
7 and Plaintiff's frequent questions regarding the records," under the circumstances "[t]he actions
8 taken by the FBI to process and release records [were] reasonable." *Id.* The court's orders in this
9 matter do not support the FBI's assertion.

10 As mentioned above, the court issued four separate orders in this case on the parties' motions
11 for summary judgment. The content of these orders reveals quite readily the unreasonableness of the
12 government's rationale for withholding the records requested by Rosenfeld. On the first set of
13 Cross-Motions for Summary Judgment, the Court rejected the FBI's administrative exhaustion
14 argument noting that "[a] plain reading of the FOIA statute and the DOJ regulations do not support
15 defendants' claim that Rosenfeld must appeal interim releases" of materials, and that the
16 government's position amounted to attempts "to shield the disclosure of information by marshaling
17 administrative technicalities." Memorandum and Order on Cross-Motions for Summary Judgment
18 (Docket No. 47) at 12-13. As to the adequacy of the FBI's search for responsive documents, the
19 Court directed the government to submit additional information because it "failed to provide
20 sufficient evidence" in several areas "to enable the court to determine the reasonableness of [its]
21 search." *Id.* at 17.

22 Similarly, in its Order on the second set of Cross-Motions for Summary Judgment, the Court
23 rejected Defendant's contention that it had conducted a reasonable search for responsive documents.
24 It found in some instances that the FBI was "unable to demonstrate that the documents identified . . .
25 are non-existent, outside the scope of the request, or irrelevant," and in other instances the FBI's
26 "failure to search for, let alone produce, specific, identified documents the existence of which are
27 not disputed demonstrates that an adequate search was not performed." Memorandum and Order on
28 Second Set of Cross-Motions for Summary Judgment (Docket No. 98) at 6, 7. Indeed, the Court

1 specifically noted how “[t]he FBI’s current position, one favoring non-disclosure over disclosure,
2 goes against the dictates of FOIA” in that “FOIA favors disclosure.” *Id.* at 8. In the same Order, the
3 Court rejected the FBI’s argument that certain of the requested Reagan-related documents were
4 exempt from disclosure for law enforcement purposes under 5 U.S.C. § 552(b)(7)(c), holding that
5 “[i]nformation regarding acts taken to protect or promote Reagan’s political career, or acts done as
6 political favors to Reagan serve no legitimate law enforcement purpose” and “could not have been
7 undertaken for legitimate law enforcement investigations.” *Id.* at 15.

8 In its Memorandum and Order on Defendants’ Third Motion for Summary Judgment as Moot
9 (Docket No. 115), the Court granted and denied in part the FBI’s summary judgment motion
10 because, although progress had been made in carrying out its FOIA responsibilities, the FBI had not
11 yet produced “a mutually acceptable subset of [] responsive documents” to Rosenfeld, and was
12 therefore ordered to “reprocess 1,300 randomly selected documents” from the pool of 13,000
13 responsive records and communicate the results to Rosenfeld. *Id.* at 8. Finally, in this Court’s
14 Redacted Order Granting Plaintiff’s Motion for Summary Judgment (Docket No. 143), the Court
15 rejected the FBI’s argument that a particular three-page document discussing “traffic violations of an
16 individual closely associated with Ronald Reagan” had to be released only in redacted form due to
17 privacy concerns and law enforcement purposes. *Id.* at 5.

18 While it is true that “the FBI engaged in extensive efforts to respond to Plaintiff’s FOIA
19 requests,” and that the FBI prevailed on some of its claims in this case, on balance the record does
20 not support the FBI’s argument that it “had a reasonable basis for its initial search and disclosures.”
21 Def.’s Response Brief at 9. For the most part, the FBI had no such reasonable basis. Thus, this
22 fourth factor – whether the government’s rationale for withholding the records had a reasonable
23 basis in law – also weighs in favor of the Plaintiff’s entitlement to a fee award. In sum, all four of
24 the *Long* criteria weigh in the Plaintiff’s favor, and as such the Court finds that Rosenfeld is entitled
25 to an award of attorneys’ fees under FOIA.

26 D. Reasonableness of Amount Requested

27 Having concluded that “the plaintiff is both eligible for and entitled to recover fees, the
28 award must be given and the only room for discretion concerns the reasonableness of the amount

1 requested.” *Long* at 1314. In assessing the reasonableness of the amount requested, the Court turns
2 to the plaintiff’s fee bill and scrutinizes the “reasonableness of (a) the number of hours expended
3 and (b) the hourly fee claimed. If these two figures are reasonable, then there is a ‘strong
4 presumption’ that their product, the lodestar figure, represents a reasonable award.” *Id.* at 1313-14
5 (internal quotation marks omitted). The Ninth Circuit has instructed district courts to “provide a
6 detailed account of how it arrives at appropriate figures for the number of hours reasonably
7 expended and a reasonable hourly rate.” *Id.* (internal citations and quotations omitted).

8 1. Hourly Fee Claimed

9 In assessing a reasonable hourly rate for the lodestar figure, courts consider the prevailing
10 market rate in the community for similar services by lawyers of reasonably comparable skill,
11 experience, and reputation. *Blum v. Stenson*, 465 U.S. 886, 895-96, and Fn. 11 (1984). The relevant
12 community for purposes of determining the prevailing market rate is generally the “forum in which
13 the district court sits.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008).
14 “Affidavits of the plaintiffs’ attorney and other attorneys regarding prevailing fees in the
15 community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs’
16 attorney, are satisfactory evidence of the prevailing market rate.” *United Steelworkers of America v.*
17 *Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). “The defendant may introduce rebuttal
18 evidence in support of a lower hourly rate.” *Sorenson v. Mink*, 239 F.3d 1140, 1145 (9th Cir. 2001).

19 The burden is on the fee applicant to produce satisfactory evidence “that the requested rates
20 are in line with those prevailing in the community for similar services by lawyers of reasonably
21 comparable skill, experience, and reputation.” *Blum*, 465 U.S. at 896. Here, Rosenfeld claims that
22 reasonable attorney rates for this case range from \$100 to \$700 per hour. To support these claims,
23 Plaintiff’s attorneys James Wheaton and David Greene have submitted declarations indicating that
24 the rates they claim as reasonable are, in fact, the rates they charged their clients over the relevant
25 time period (the rates Greene bills have increased over the five years this case has been in litigation);
26 they are not claiming their current billing rates for all hours. Their declarations also cite recent cases
27 where they received fee awards at or near the hourly rates claimed in this motion. *See Declaration*
28 *of James Wheaton in Support of Plaintiff’s Motion for [an] Award of Fees and Costs (Docket No.*

1 150) (“Wheaton Decl.”) ¶ 24 (citing fee award of \$700 per hour in *Environmental Law Foundation*
2 *v. Laidlaw Transit*, San Francisco Superior Court case no. CGC-06-451832); Fourth Declaration of
3 David Greene in Support of Plaintiff’s Motion for an Award of Attorneys’ Fees and Costs (Docket
4 No. 151) ¶ 11 (citing fee award of \$500 per hour in *Moreland LLC v. Old Republic Title Co.*, San
5 Mateo Superior Court case no. civ-487714). Greene requests that his hourly rate in this fee award be
6 set at \$550 per hour despite receiving only \$500 per hour in *Moreland*. This increase of \$50 per
7 hour is not unreasonable, given that Greene has acquired three additional years of experience since
8 receiving his fee award in *Moreland* in 2009.

9 Plaintiff has also submitted a Declaration of Richard Pearl in Support of Plaintiff’s Motion
10 for an Award of Attorneys’ Fees and Costs. Pearl’s declaration (“Pearl Declaration”) (Docket No.
11 152) describes, *inter alia*, his experience with attorney’s fees awarded by California courts and his
12 opinions regarding the bills of Rosenfeld’s counsel in this case. Pearl’s data on compensation rates
13 in this market confirms that Wheaton, an attorney with 28 years of experience, would likely
14 command an hourly billed rate between \$640 and \$875, based on hourly rates paid to litigators by
15 California law firms. *See* Pearl Decl. at 12-27. Similarly, Pearl’s data confirms that Greene, who
16 has 21 years of experience, would command between \$495 and \$785 per hour. *Id.* The hourly rates
17 requested by Wheaton and Greene in this matter fit comfortably within those ranges.

18 Wheaton’s declaration further states that the ‘legal fellows’ employed in his office are billed
19 at the fee rate of \$200 per hour, and student interns are billed at \$100 per hour. Wheaton Decl. ¶¶
20 26-27. Maria Williams, a former staff attorney in Wheaton’s office with ten years of experience in
21 other areas of law, was billed at \$250 per hour for her work on this case. *Id.* at 26. Plaintiff has not
22 produced any evidence of past fee awards supporting the hourly rates claimed for legal fellows,
23 student interns, or Ms. Williams. However, he has submitted a declaration from Richard Pearl
24 providing market data that generally supports the rates of compensation requested for all attorneys
25 and student workers in this case. Pearl’s data shows that attorneys with ten years of experience,
26 such as Williams, bill at \$430 to \$600 per hour in this market, placing her requested billing rate of
27 \$250 per hour for this motion well below typical market value. *See* Pearl Decl. at 12-27. Plaintiff’s
28 requested rate of \$200 per hour for Legal Fellows, who are the equivalent of entry-level associates,

1 falls just below Pearl's range of \$225 to \$395 per hour typically billed for first-year associates. *Id.*
2 Plaintiff's requested rate of \$100 per hour for student interns falls within the \$100 to \$260 range
3 typically billed for interns and law clerks.

4 In this Court's experience, the hourly rates requested here are in line with fee awards made in
5 other recent cases in the San Francisco area. *See, e.g., Californians for Disability Rights v.*
6 *California Dept. of Transp.*, C 06-05125 SBA MEJ, 2010 WL 8746910 (N.D. Cal. Dec. 13, 2010)
7 *report and recommendation adopted sub nom. Californians for Disability Rights, Inc. v. California*
8 *Dept. of Transp.*, C 06-5125 SBA, 2011 WL 8180376 (N.D. Cal. Feb. 2, 2011) (awarding hourly
9 rate of \$730 for attorney with 26 years of experience; comparable to \$700 per hour sought by
10 Wheaton in this motion; not comparable to \$539.55 per hour set by *Laffey* matrix (described *infra*));
11 *Wren v. RGIS Inventory Specialists*, C-06-05778 JCS, 2011 WL 1230826 (N.D. Cal. Apr. 1, 2011)
12 *supplemented*, C-06-05778 JCS, 2011 WL 1838562 (N.D. Cal. May 13, 2011) (awarding hourly rate
13 of \$650 for attorney with 17 years of experience; exceeding \$550 per hour rate sought by Greene in
14 this motion; not comparable to \$429 to \$539.55 per hour rate set by *Laffey* matrix).

15 a. *Laffey Matrix*

16 The FBI argues that the hourly rates suggested by Plaintiff are unreasonably high, and
17 proposes that the Court adopt hourly rates set forth in the "*Laffey*" matrix along with applicable
18 locality adjustments in order to set a more reasonable rate. Def.'s Response Brief at 17. The *Laffey*
19 matrix is "an inflation-adjusted grid of hourly rates for lawyers of varying levels of experience in
20 Washington, D.C." *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454 (9th Cir. 2010)
21 (citations omitted). Using this index for setting hourly rates, Plaintiff's attorneys would receive a
22 fee award based on an hourly rate falling somewhere between \$236.50 and \$539.55. *See* Def.'s
23 Response Brief at 18. While the *Laffey* matrix has been used to set rates for attorney fee awards by
24 courts in this district in the recent past, *see e.g. San Francisco Baykeeper v. W. Bay Sanitary Dist.*,
25 C-09-5676 EMC, 2011 WL 6012936 (N.D. Cal. Dec. 1, 2011); *Salinas v. Lavender Inv., Inc.*, C09-
26 04541 HRL, 2012 WL 368637 (N.D. Cal. Feb. 3, 2012), the Ninth Circuit recently questioned its
27 broader value as a tool for use in evaluating attorney's fees motions.

28

1 In *Prison Legal News v. Schwarzenegger*, the Ninth Circuit rejected a defendant's argument
2 that a district court should have applied the *Laffey* matrix in fixing an attorney fee award; the court
3 held that "just because the *Laffey* matrix has been accepted in the District of Columbia does not
4 mean that it is a sound basis for determining rates elsewhere, let alone in a legal market 3,000 miles
5 away. It is questionable whether the matrix is a reliable measure of rates even in Alexandria,
6 Virginia, just across the river from the nation's capital." *Id.* at 454 (citing *Robinson v. Equifax Info.*
7 *Servs., LLC*, 560 F.3d 235, 245 (4th Cir.2009)). Without a more substantial showing that the rates in
8 *Laffey* matrix would be "in line with those prevailing in the community for similar services by
9 lawyers of reasonably comparable skill, experience, and reputation," *Blum*, 465 U.S. at 896, this
10 Court declines Defendant's invitation to use the matrix. This is especially so where, as here,
11 Plaintiff has submitted competent evidence showing market rates in this area (including those
12 awarded by courts) which substantially exceed the *Laffey* index.

13 The Court finds that Plaintiff has offered sufficient evidence to show that the proposed
14 hourly rates for inclusion in the lodestar figure accurately reflect the hourly rates these individuals
15 would likely receive in the San Francisco area legal market. Other than arguments in support of
16 using the *Laffey* matrix, the government offers no rebuttal evidence to Plaintiff's proposed hourly
17 rates.

18 2. Number of Hours Expended

19 For the purposes of calculating the 'lodestar' figure, the Court has discretion in determining
20 the number of hours reasonably expended on this case. *See Chalmers v. City of Los Angeles*, 796
21 F.2d 1221; *see also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (stating that a district court has
22 discretion in determining the amount of a fee award which is "appropriate in view of the district
23 court's superior understanding of the litigation and the desirability of avoiding frequent appellate
24 review of what essentially are factual matters"). The fee applicant bears the burden of
25 "documenting the appropriate hours expended" in the litigation and therefore must "submit evidence
26 supporting the hours worked." *Hensley*, 461 U.S. at 433, 437. Reasonably expended time is
27 generally time that "could reasonably have been billed to a private client." *Moreno v. City of*
28 *Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008). To this end, the applicant must exercise "sound

1 billing judgment” regarding the number of hours worked, and a court should exclude from a fee
 2 applicant’s initial fee calculation hours that were not “reasonably expended,” such as those incurred
 3 from overstaffing, or “hours that are excessive, redundant, or otherwise unnecessary.” *Hensley*, 461
 4 U.S. at 433.

5 Plaintiff submits five declarations supporting his proposal for the number of hours
 6 reasonably expended on this case. *See* Docket Nos. 150-152, 153 Exs. 1 and 2. The information
 7 contained in the declarations can be summarized as follows:

<u>Charges Billed from Case Inception to January 31, 2011</u>			
Attorney/Staff Member	Hours Worked	Hourly Rate	Total
David Greene	410.2	\$460 - \$550	\$198,461.80
Geoffrey King	33.27	\$200.00	\$6,654.00
James Leonard	6.37	\$200.00	\$1,274.00
Maria Williams	52.75	\$250.00	\$13,187.50
Michael Gorman	43.5	\$200.00	\$8,700.00
Benjamin Stein	119.8	\$200.00	\$23,960.00
Student Interns	383.67	\$100.00	\$38,367.00
Subtotal	1049.56		\$290,604.30
<u>Charges Billed from January 31, 2011 to March 5, 2012</u>			
James Wheaton	52.35	\$700.00	\$36,645.00
David Greene	21.93	\$550.00	\$12,061.50
Lowell Chow	64.25	\$200.00	\$12,850.00
Student Interns	15.16	\$100.00	\$1,516.00
Subtotal	153.69		\$63,072.50
<u>Charges Billed from March 5, 2012 to Present</u>			
James Wheaton	43.35	\$700.00	\$30,345
David Greene	92.3	\$550.00	\$50,765
Lowell Chow	22.3	\$200.00	\$4,460
Subtotal	157.95		\$85,570
Grand Total (All Fees & Hours)	1361.2		\$439,246.80

1 Given the scope and length of this case, the number of court proceedings recorded in the docket, and
2 the detailed nature of the billing records submitted by Rosenfeld's counsel, the number of hours
3 proposed by Plaintiff for inclusion in the initial lodestar figure appear reasonable. The record
4 clearly shows that the parties, through multiple years of litigation including four rounds of motions
5 for summary judgment, expended significant attorney time on this matter. As a consequence, and in
6 light of the contested and protracted nature of this suit, the Court finds that the total number of
7 compensable hours incurred by Plaintiff is reasonable.

8 a. Defendant's Challenges

9 The FBI objects to Plaintiff's billing records and proposed hourly figures on five grounds:
10 (1) that they include unjustified hours (i.e. insufficiently documented), (2) that they include time
11 spent reviewing FOIA documents, (3) that they include duplicative or unnecessary billed time, (4)
12 that they include hours billed by unpaid legal interns, and (5) that they include "clerical" or
13 "administrative" time. *See* Def.'s Response Brief at 12-16.

14 In support of the first objection, the FBI points to the declaration of James Wheaton and
15 suggests that he inexplicably shifted from billing 0.1 hours while reviewing automated ECF e-mails
16 from this Court to 0.2 hours during the course of this case. *See* Def.'s Response Brief at 14. Having
17 reviewed the declaration at issue – the Declaration of James Wheaton in Support of Plaintiff's
18 Motion for [an] Award of Fees and Costs (Docket No. 150), Ex H – the Court fails to detect any
19 such pattern. The balance of the FBI's argument on this point fails to specify any other *particular*
20 discrepancy in the Plaintiff's documentation of hours worked on this case. Mere generalized
21 allegations of unjustified billing not supported by specific citations to evidence in the record are
22 insufficient to warrant a reduction in the lodestar figure. *Cf. Premier Med. Mgmt. Sys., Inc. v.*
23 *California Ins. Guarantee Ass'n*, 163 Cal. App. 4th 550, 564 (2008) (Under analogous California
24 law, a party challenging "fees as excessive because too many hours of work are claimed" must point
25 "to the specific items challenged, with a sufficient argument and citations to the evidence. General
26 arguments that fees claimed are excessive, duplicative, or unrelated do not suffice.").

27 To the extent that descriptions in Plaintiff's time records are general in nature, such
28 descriptions are sufficient to support a fee award if they describe the general subject matters upon

1 which time was spent. *See San Francisco Baykeeper v. W. Bay Sanitary Dist.*, C-09-5676 EMC,
2 2011 WL 6012936, at *11 (N.D. Cal. Dec. 1, 2011) (“[p]laintiff’s counsel ... is not required to record
3 in great detail how each minute of his time was expended. But at least counsel should identify the
4 general subject matter of his time expenditures.”) (internal citations and quotations omitted). The
5 descriptions here are sufficiently detailed to support an award. For instance, David Greene’s records
6 show entries which are all clearly related to this litigation. *See e.g.* Declaration of James Wheaton,
7 Ex. H (4.15 hour time entry under “Ronald Reagan” subheading for David Greene on March 2,
8 2011, states “read and review defendants’ settlement conference statement; draft settlement
9 conference statement; telephone conference with client re: settlement”). Further, placing Plaintiff’s
10 attorneys’ billing records in context of the history of this case helps illuminate what might otherwise
11 appear to be vague time entries. “Basing the attorneys’ fee award in part on reconstructed records
12 developed by reference to litigation files and other records” is an established practice in this circuit.
13 *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1473 (9th Cir.1983). Defendant
14 does not take issue with any other *specific* aspect of Plaintiff’s billing descriptions. Therefore, no
15 deductions will be taken from the lodestar on account of Plaintiff’s alleged billing discrepancies.

16 On the second objection – time spent reviewing FOIA documents – the FBI has failed to
17 provide any evidence that this time billed by Plaintiff’s attorneys was not spent for the purpose of
18 litigating this case. *See* Pl.’s Reply Brief at 13 (describing time at issue as spent to “ensure that the
19 agency had actually produced the records,” to “prepare motions for summary judgment,” to prepare
20 evidence on “adequacy of searches,” etc.). No time will be subtracted from the lodestar on account
21 of this challenge.

22 b. Duplicative Time

23 On the third issue – the inclusion of duplicative or unnecessary billed time – the FBI makes
24 only specific mention of the fact that two attorneys spent approximately 205 hours in preparing the
25 Plaintiff’s Second Motion for Summary Judgment. *See* Def.’s Response Brief at 15. As this Court
26 noted in last year in *Stonebrae v. Toll Bros.*, “[w]hile it is not uncommon to have co-counsel in
27 litigation, and fees are commonly awarded to multiple attorneys, counsel seeking fee awards bear
28 the risk that the lodestar will be subject to scrutiny and possible reduction due to unreasonable

1 inefficiencies and duplicative efforts engendered by multiple counsel.” *Stonebrae v. Toll Bros.*, No.
 2 C-08-0221 EMC, 2011 WL 1334444, at *12 (N.D. Cal. April 7, 2011). Plaintiff has made no
 3 counter-argument to this specific objection other than by citing to a prior decision of this Court for
 4 the proposition that “by and large, the court should defer to the winning lawyer’s professional
 5 judgment as to how much time he was required to spend on the case.” Pl.’s Reply Brief at 13 (citing
 6 *San Francisco Baykeeper v. W. Bay Sanitary Dist.*, C-09-5676 EMC, 2011 WL 6012936, at * 9
 7 (N.D. Cal. Dec. 1, 2011)). While that may be true, relying on this sentiment alone and in isolation
 8 does not, in the view of this Court, reflect an exercise of appropriate billing judgment.

9 “Hours that are not properly billed to one’s client also are not properly billed to one’s
 10 adversary pursuant to statutory authority.” *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir.
 11 1980). The identification of “duplication of effort by the co-counsel assigned to [a] case . . .
 12 necessitates some reduction of the hours claimed.” *Herrington v. County of Sonoma*, 883 F.2d 739,
 13 747 (9th Cir. 1989). While it is impossible to ascertain with precision the number of unnecessarily
 14 duplicative and redundant hours spent resulting from multiple counsel performing overlapping work,
 15 having reviewed the record the Court estimates that subtracting ten percent of the time claimed by
 16 both attorneys on this motion constitutes an appropriate reduction. The second set of cross-motions
 17 for summary judgment were indeed complex in nature, but they were not so markedly different from
 18 the other cross-motions in this case as to warrant these two counsel spending more than 15% of all
 19 compensable time factored into the lodestar on this set of motions. Plaintiff does himself a
 20 disservice by failing to justify *with particularity* why this set of motions required a disproportionate
 21 amount of attorney time. As such, the initial lodestar figure shall be reduced by \$8946.⁴

22 c. Billing for Unpaid Workers and “Clerical” Time

23 The fourth objection raised by the FBI – the inclusion of hours billed by unpaid legal interns
 24 – does not withstand scrutiny. “If an attorney’s fee [award] . . . is to yield the same level of

25 _____
 26 ⁴ This figure represents a reduction of 16.152 hours for David Greene at \$500 per hour (his
 27 2009 billing rate), and a reduction of 4.35 hours for Michael Gorman at \$200 per hour (his 2009
 28 billing rate). The FBI has pointed to no other specific instance of duplication. The Court finds no
 other obvious overlap except for one instance where a student intern billed 3 hours for observing a
 settlement conference (\$300 charge), an issue that is addressed by the general billing judgment
 deduction taken herein.

1 compensation that would be available from the market, the increasingly widespread custom of
2 separately billing for the services of paralegals and law students who serve as clerks, must be taken
3 into account.” *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 286 (1989) (citing *Ramos v. Lamm*, 713
4 F.2d 546, 558 (10th Cir. 1983)) (internal quotations omitted). That those law students and interns
5 worked without pay is of no consequence so long as the rates for which their work was billed is
6 “consistent with market rates and practices.” *Id.* Further, as the Supreme Court noted in *Jenkins*,
7 “[b]y encouraging the use of lower cost [workers] rather than attorneys wherever possible,
8 permitting market-rate billing of [worker] hours encourages cost-effective delivery of legal services
9 and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil
10 rights statutes.” *Id.* at 288 (citing *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 846 (7th
11 Cir. 1984)) (internal quotation marks omitted). Defendant has not shown that Plaintiff cannot
12 recover fees for unpaid workers *per se*. Therefore, no time will be subtracted from the lodestar on
13 account of this challenge.

14 Finally, the FBI’s objection to Plaintiff’s attorneys’ billing for “clerical” or “administrative”
15 time, as with many of its other objections, does not warrant a reduction in the hourly figures used to
16 calculate the lodestar. The government’s brief on this point is rather tentative, stating “it *seems*
17 *likely* that these fees would fall under ‘general overhead.’” *See* Def.’s Response Brief at 16
18 (emphasis added). The FBI offers no evidence to show that this administrative time was, in fact,
19 spent as general overhead time needed to run a legal office, and the Plaintiff’s attorneys’
20 clarification that entries of this kind refer to “case management tasks such as conferring with co-
21 counsel and the client on strategy, document management, plus routine supervision of other legal
22 personnel,” all charges “routinely billed to clients,” support its remaining in the lodestar figure.
23 Pl.’s Reply Brief at 14. No deductions will be taken from the lodestar on account of Plaintiff’s
24 billing for “clerical” or “administrative” time, as the time captured in these entries “could reasonably
25 have been billed to a private client.” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir.
26 2008).

27 ///

28 ///

1 d. Unsuccessful Claims

2 “If a plaintiff has prevailed on some claims but not others, fees are not awarded for time
3 spent litigating claims unrelated to the successful claims, and the trial court should award only that
4 amount of fees that is reasonable in relation to the results obtained.” *Chavez v. City of Los Angeles*,
5 47 Cal. 4th 970, 989 (2010) (internal quotations and citations omitted). The record reflects that
6 Rosenfeld prevailed on the majority of his claims in this matter, but it cannot be said that he
7 succeeded on every claim in every motion. Notably, the Court’s order on the second set of cross-
8 motions for summary judgment shows that, while prevailing overall on the motion, Plaintiff received
9 mixed results with the arguments he advanced, particularly his argument that the parties’ 1996
10 settlement agreement ought to apply to this case. *See* Memorandum and Order on Second Set of
11 Cross-Motions for Summary Judgment (Docket No. 98).⁵ The Court recognizes that time spent on
12 successful claims in this case is not easily segregable from time spent on unsuccessful claims.
13 Nevertheless, hours claimed may be adjusted based on the ultimate success of one’s efforts; “the
14 extent of a plaintiff’s success is a crucial factor in determining the proper amount of an award of
15 attorney’s fees.” *Hensley* at 440. “There is no precise rule or formula for making these
16 determinations. The district court may attempt to identify specific hours that should be eliminated,
17 or it may simply reduce the award to account for the limited success. The court necessarily has
18 discretion in making this equitable judgment.” *Id.* at 436-37. Therefore, to account for time spent
19 on unsuccessful claims, the Court will deduct ten percent, or \$13,688.15, from the time billed for
20 work specifically on the second set of cross-motions for summary judgment.⁶

21 _____
22 ⁵ The Court finds that, generally, Rosenfeld lost on the extreme scope of his arguments in
23 this motion regarding adequacy of the FBI’s search, but won on challenges regarding the
24 withholding of specific documents (*i.e.* improperly claimed exemptions). For example, Plaintiff
25 argued that the FBI had to search *all* of its record systems for responsive documents. The Court
26 rejected this, and said that only systems *likely to contain* responsive documents had to be searched
(consistent with FOIA’s requirements). The Court applied the same rationale in denying Plaintiff’s
argument that *all* (not just likely responsive) files with designators ‘80’ and ‘100’ had to be re-
processed. He also lost on his argument that the release standards in the 1996 settlement agreement
ought to apply to this case.

27 ⁶ This figure represents ten percent of \$136,881.50, the adjusted lodestar figure attributable
28 to this motion after having deducted \$8946 to account for duplicative hours. *See* Declaration of
James Wheaton in Support of Plaintiff’s Motion for [an] Award of Fees and Costs (Docket No. 150),
Ex A. (claiming an initial amount of \$145,827.50 for this motion).

1 e. Overall Exercise of Billing Judgment

2 While the Court rejects most of the government's objections to Plaintiff's claimed hours in
3 this matter, it notes that neither Plaintiff's fee motion nor his billing records demonstrate that he
4 employed any overt or identifiable reduction in claimed hours to account for inefficiency, waste, and
5 duplication. "Counsel for the prevailing party should make a good faith effort to exclude from a fee
6 request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private
7 practice ethically is obligated to exclude such hours from his fee submission." *Hensley v. Eckerhart*,
8 461 U.S. at 434. "[T]he fee applicant bears the burden of establishing entitlement to an award and
9 documenting the appropriate hours expended and hourly rates. The applicant should exercise
10 'billing judgment' with respect to hours worked . . ." *Id.* at 437. Having failed to demonstrate and
11 document in the record that he exercised appropriate billing judgment to eliminate such
12 inefficiencies, the Court will therefore reduce Plaintiff's final fee award by ten percent. *See Walker*
13 *v. U.S. Dept. of Hous. & Urban Dev.*, 99 F.3d 761, 770 (5th Cir. 1996) ("The proper remedy when
14 there is no evidence of billing judgment is to reduce the hours awarded by a percentage intended to
15 substitute for the exercise of billing judgment."); *see also In re Smith*, 586 F.3d 1169, 1174 (9th Cir.
16 2009) ("We have recognized that . . . the district court has the authority to make across-the-board
17 percentage cuts . . . in the number of hours claimed . . . as a practical means of trimming the fat from
18 a fee application.") (internal quotation marks and citations omitted); *Moreno v. City of Sacramento*,
19 534 F.3d 1106, 1112 (9th Cir. 2008) (a "district court can impose a small reduction, no greater than
20 10 percent – a "haircut" – based on its exercise of discretion and without a more specific
21 explanation"). The application of this overall ten percent "haircut" to account for billing judgment,
22 taken after factoring in all other deductions, amounts to a reduction of \$41,661.27 from Plaintiff's
23 initial lodestar calculations.

24 E. Costs Incurred Bringing Fee Motion

25 In addition to work performed on the merits of this case, Plaintiff seeks a total of \$85,570.00
26 in fees for his attorneys' time spent on this fee motion. *See* Pl.'s Fee Mot. at 25; Pl.'s Reply Br. at
27 15 (denominated "Charges Billed from March 5, 2012 to Present" in table above). In this Circuit,
28 plaintiffs may recover attorney's fees for time reasonably expended on a motion for attorney fees

1 and costs. *Brown v. Sullivan*, 916 F.2d 492, 497 (9th Cir. 1990). An inflated request for a “fees-on-
2 fees” award may be reduced to an amount deemed reasonable by the awarding court. *See Jadwin v.*
3 *County of Kern*, 767 F. Supp. 2d 1069, 1140 (E.D. Cal. 2011) (denying attorney’s motion for “fees-
4 on-fees” due to lack of a reasonable basis for such an award); *Serrano v. Unruh*, 32 Cal. 3d 621, 635
5 (1982) (“Prevailing parties are compensated for hours reasonably spent on fee-related issues. A fee
6 request that appears unreasonably inflated is a special circumstance permitting the trial court to
7 reduce the award or deny one altogether.”) (emphasis omitted). The Court has reviewed Plaintiff’s
8 request for fees-on-fees and finds that the requested award for fees is excessive. The Court has
9 reviewed the record and finds a high degree of duplication and lack of specificity in describing the
10 activity. The motion was not particularly complicated and does not warrant the hours spent which
11 comprise the \$85,000 lodestar particularly in light of the expertise of these attorneys in these
12 matters. In addition to the ten percent reduction for billing judgment described above, the Court cuts
13 20% (*i.e.*, \$17,114) from the fees on fee.

14 F. Lodestar Figure

15 Applying these rates to the hours claimed by Plaintiff results in an initial lodestar figure of
16 \$439,246.80. From this initial figure, the Court deducts \$8946.00 for duplicative time, \$13,688.15
17 to reflect Plaintiff’s mixed success on the second cross-motion for summary judgment, and \$17,114
18 from the fees on the fee motion. This results in an adjusted lodestar figure of \$399,498.65.
19 Subtracting a further ten percent from this adjusted figure to account for inefficiencies and the
20 exercise of billing judgment results in a final fee award of \$359,548.78. The Court also awards the
21 sum of \$3,668.82 representing Plaintiff’s full costs in this matter as they were reasonably incurred.
22 *See Wheaton Decl.* ¶ 8. Having found that Rosenfeld substantially prevailed in this suit, and that the
23 government lacked a reasonable basis in law for withholding the records at issue, the Court rejects
24 the FBI’s argument that costs incurred ought to be borne by each party respectively.

25 **III. CONCLUSION**

26 For the reasons stated above, the Court finds that Rosenfeld has demonstrated both eligibility
27 for and entitlement to an award of attorney’s fees. The record in this case demonstrates the presence
28 of a causal nexus between Rosenfeld’s lawsuit and the FBI’s release of the documents sought by

1 Plaintiff, and as such Plaintiff has “substantially prevailed” in prosecuting his FOIA claims. Further,
2 all four *Long* factors considered by district courts in assessing entitlement to a fee award under
3 FOIA weigh in Rosenfeld’s favor. Together, these two findings establish Rosenfeld’s eligibility and
4 entitlement to a fee award. After scrutinizing Plaintiff’s billing records, and adjusting the number of
5 hours claimed to account for duplicative time, unsuccessful claims, and inefficiency, the Court
6 **GRANTS** Plaintiff’s Motion for an Award of Attorneys’ Fees and Costs, and awards Plaintiff a total
7 of **\$363,217.60** in fees and costs.

8 This order disposes of Docket No. 149.

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10 IT IS SO ORDERED.

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12 Dated: October 17, 2012

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15 EDWARD M. CHEN
16 United States District Judge
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United States District Court
For the Northern District of California