

STATE OF VERMONT
WINDSOR COUNTY, SS.

MARK G. EARLE,
Plaintiff

v.

STATE OF VERMONT,
DEPARTMENT OF SOCIAL AND
REHABILITATION SERVICES,
Defendant

WINDSOR SUPERIOR COURT

DOCKET NO. S238-96 WrC

DECISION AND ORDER RE: ATTORNEY'S FEES

INTRODUCTION

This case concerns plaintiff's efforts to discover, from defendant SRS, information about plaintiff's own childhood. *Inter alia*, plaintiff sought access to documents containing investigatory reports concerning himself, and concerning another individual who may have abused plaintiff when they both were younger. Plaintiff succeeded in obtaining a court order requiring SRS to provide access to the documents, under the dual theories of (1) the Access to Public Records Act, 1 V.S.A. §§ 315-320, and (2) the Vermont Rules of Civil Procedure, V.R.C.P. 27 (discovery before action). Plaintiff now requests attorney's fees for the earlier litigation, relying upon the same dual theories.

FINDINGS OF FACT

Based on the evidence admitted at the hearing on September 30, 1996, the court makes the following Findings of Fact:

1. Attorney Michael F. Hanley, through his firm Plante, Hanley & Brannen, P.C. represents the Plaintiff, Mark G. Earle, in relation to a potential claim against the Defendant, Department of Rehabilitative and Social Services of the State of Vermont. No complaint has been filed yet as the claim is under investigation. The claim concerns sexual assaults upon Mr. Earle in 1982 when Mr. Earle was six years old and in SRS custody, and the alleged perpetrator was a member of the household in which Mr. Earle was placed by SRS.

2. The fee arrangement between Mr. Earle and Plante, Hanley & Brannen, P.C. is a contingency one, defined as "33 1/3% of gross amt recovered, 40% on appeal" The

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law firm maintains detailed records of all time spent on the case by various attorneys and other personnel in the firm. The value of each increment of time is also recorded based on billing rates ranging from \$45 to \$180 per hour. Mr. Hanley is the lead attorney and his billing rate is shown as \$180 per hour, which is his rate for commercial litigation. Mr. Brannen, whose billing rate is \$140 per hour, has also spent considerable time on the case, and specifically those portions that relate to the instant legal action for obtaining records from SRS. As of September 11, 1996, the total calculated value of time spent on the unfiled claim against SRS together with this action for obtaining information, based on the time records and billing rates identified, was \$14,216.

3. The firm began to work on the case in November of 1995. The following month, Mr. Hanley sent a letter to SRS requesting a copy of Mr. Earle's file, together with a general release from Mr. Earle. The request was broadly worded. In January 1996, Mr. Hanley sent a followup letter to Assistant Attorney General Michael Duane, who represents SRS. This letter was also broadly worded. Having received no reply, he addressed a letter to Attorney General Jeffrey Amestoy in February 1996. All of these letters made broad requests for Mr. Earle's file for purposes of civil litigation. On February 16, 1996, Mr. Duane wrote back to Mr. Hanley detailing reasons that the entire file could not be sent "given the breadth of Mr. Earle's release." He pointed out statutory provisions concerning the confidentiality of SRS records and the fact that the confidentiality of information related to other individuals and family members was involved. He suggested invoking the court in the civil proceeding Mr. Hanley had referenced "so that any disclosure of the Department's records could be appropriately limited to their necessity for use in that proceeding." He also directed Mr. Hanley to other potential sources of the information. He invited Mr. Hanley to call "at your earliest convenience to see if we can attempt to resolve this dilemma."

4. In March, there were telephone calls between the attorneys, but apparently no resolution. In April, 5.5 hours of attorney time were spent in preparing a complaint. On May 13, 1996, Mr. Hanley and Mr. Duane met at Mr. Hanley's office to review Mr. Hanley's requests in relation to the files and the information they contained. On May 15, 1996, Mr. Hanley sent a followup letter specifying the material he was seeking from the SRS files.

5. On May 22, 1996, this case was filed, in which Plaintiff sought a court order requiring SRS to provide access to the files under the Access to Public Records Act. On June 19, 1996, Mr. Hanley suggested in a letter to Mr. Duane that the parties stipulate to the appointment of a master to review all SRS files and redact any inappropriate material. In June, Mr. Hanley's firm spent approximately seven hours of attorney time responding to a Summary Judgment Motion filed by the State on behalf of SRS. An additional amount of time was spent preparing a Motion to Amend the complaint, and an Amended Complaint to add a claim for access to the files based on V.R.C.P. 27. In July, Mr. Hanley's firm devoted approximately 11 hours of attorney time on its own Motion for Summary Judgment, as well as further responses to the State's motion.

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6. On August 31, 1996, Judge Fisher entered an order providing Plaintiff with access to the SRS files, but not ordering a deposition as requested by the Plaintiff. She also ordered that Plaintiff's claim for attorneys fees be set for hearing.

7. A hearing was held on the request for attorneys fees on September 30, 1996. At the hearing, Plaintiff presented expert testimony from Attorney William Donahue, who had reviewed the pleadings, correspondence, and redacted billing statement in the case. He testified that attorney fees for the work done, which excluded the time spent specifically investigating the merits of Plaintiff's unfiled claim, were fair and reasonable according to those documents in the amount of \$10,243.76. He spent approximately three hours reviewing the documents, and two hours for attendance at the hearing. His own billing rate is \$125 per hour and his total bill for services requested is \$593.75. Both attorneys presented legal arguments about the standards the court should use in determining eligibility for attorneys fees, and in determining the amount of attorneys fees, if any, to which the Plaintiff was entitled. Following the hearing, Judge Fisher issued a further entry order clarifying her prior order and the purpose of the hearing.

8. The court finds that 5.5 hours of attorney time was spent on preparing and filing the complaint in this case. This time and expense was easily avoidable if the Department had followed its own recommendation, and that of Mr. Hanley, to set up a mechanism for providing access to Mr. Earle of the information to which he was entitled, while at the same time protecting the confidentiality of other persons whose information was protected from public exposure by statute. Eighteen hours of attorney time was spent in working on cross motions for summary judgment. This required analysis and exploration of a new issue of law in the wake of the Vermont Supreme Court's decision in Sabia v. State, 6 Vt.L.W. 359 (1995). Specifically, the Department had valid concerns in protecting the confidentiality of other persons referenced in the materials Plaintiff was seeking, but this duty could not be used as a shield to conceal the actions of its own staff and prevent Plaintiff from gaining access to information that would help him therapeutically, and/or help him determine whether he had a cause of action of the type recognized by the Court in Sabia. Costs of filing and service in this case are \$173.42.

CONCLUSIONS OF LAW

Introduction

Plaintiff has succeeded in obtaining a court order requiring SRS to provide access to the pertinent documents. Now plaintiff seeks attorney's fees for the work expended in litigating his claims. Plaintiff requests a total amount of \$11,521.51, consisting of \$10,243.76 (for time spent by plaintiff's attorney litigating the issue of access to the records), plus \$684.00 (for time spent by plaintiff's attorney preparing for the September 30 hearing on attorney's fees), plus \$593.75 (for services of an expert witness at the September 30 hearing).

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Attorney's Fees

In general, Vermont follows the "American Rule," which requires each party to bear his or her own attorney's fees. However, the burden may be relieved by statute or by contract. Gramatan Home Investors Corp. v. Starling, 143 Vt. 527, 535 (1983). The court has discretion to award attorney's fees under the Public Records Act where the complainant has substantially prevailed. 1 V.S.A. § 319(d); Animal Legal Defense Fund v. The Institutional Animal Care and Use Committee of U.V.M., 159 Vt. 133, 140 (1992). The court also has discretion to award attorney's fees under the Vermont Rules of Civil Procedure, as a sanction against a party who causes unnecessary litigation by failing to comply with legitimate discovery requests. V.R.C.P. 37; In re R.M., 150 Vt. 59 (1988); John v. Medical Center Hospital of Vermont, 136 Vt. 517 (1978). Plaintiff seeks attorney's fees under both of these theories.

Public Records Act

Plaintiff claims that he is entitled to receive attorney's fees under § 319(d) of the Vermont Public Records Act, 1 V.S.A. §§ 315-320. The legislature has stated the underlying policy of the Act as follows:

It is the policy of this subchapter to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution. Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment. All people, however, have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer. Consistent with these principles, the general assembly hereby declares that certain public records shall be made available to any person as hereinafter provided. To that end, the provisions of this subchapter shall be liberally construed with the view towards carrying out the above declaration of public policy.

1 V.S.A. § 315. The Vermont Supreme Court has noted that, under the stated policy, the exceptions should be construed strictly against the custodians of the records, and any doubts should be resolved in favor of disclosure. Trombley v. Bellows Falls Union H.S., 160 Vt. 101, 106-07 (1993); Finberg v. Murnane, 159 Vt. 431, 434 (1992); Caledonian-Record Publishing Co. v. Walton, 154 Vt. 15, 20 (1990).

One of SRS's responses to plaintiff's claim has been to argue that the Act does not apply to the records in this case. The SRS documents relating to the plaintiff are protected from access by the general public by confidentiality provisions of Title 33. Thus, with respect to the general public, the documents fall under various exceptions to

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the rule of access. See 1 V.S.A. § 317(b)(1) (records which by law are designated confidential or by a similar term); § 317(b)(2) (records which by law may only be disclosed to specifically designated person); § 317(b)(7) (personal documents relating to an individual . . .). However, these records may be disclosed to "specifically designated persons," § 317(b)(2), and plaintiff is one such person. With the possible exception of some redactable material, these records are not confidential with respect to him; they concern him directly, and they may have been created as the product of investigation that was conducted specifically for his benefit.

SRS also contends that the requested records fall within the exception described in § 317(b)(14) (records which are relevant to litigation to which the public agency is a party of record). The short answer to this argument is that the records are not relevant to any ongoing litigation, other than this case concerning access to the records. The exception described in § 317(b)(14) might relieve SRS from disclosure in a case where the plaintiff had an ongoing suit for damages against SRS, and where a privilege (such as work product privilege) prevents access under the normal rules for discovery. SRS suggests that the instant case should be decided entirely under V.R.C.P. 27, and not under the Access to Public Records Act. However, it is unlikely that the legislature intended § 317(b)(14) to eliminate all application of the public records act merely because the plaintiff is *contemplating the possibility* of a lawsuit.

In effect, these records fall within an exception to the exceptions to the Access to Public Records Act. SRS's view is that the Act does not apply because the records are confidential with respect to the general public. Plaintiff's view is that the Act does apply because the records are not confidential with respect to him, and they do not fit squarely within any exception. Given the ambiguity in the statute, the court is inclined to construe the act "against the custodians of the records." Trombley, 160 Vt. at 107. Accordingly, plaintiff had a right to access under the Act, and he may now seek attorney's fees under § 319(d). The Supreme Court provided tacit approval for this view with its discussion in Lucas v. Hahn, 162 Vt. 456 (1994). That case included a claim for access to school records pertaining to the plaintiff, which were confidential from the public point of view. The Court's response to the plaintiff's claim was that the school had complied with the Act, and not that the Act did not apply to those records. Id. at 460.

The Vermont Access to Public Records Act provides for attorney's fees as follows:

(d) The court may assess against the public agency reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

1 V.S.A. § 319(d). The Vermont Supreme Court has noted that the Act grants the trial court discretion in awarding reasonable attorney's fees and other litigation costs where "the complainant has substantially prevailed." Animal Legal Defense Fund v. The

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Institutional Animal Care and Use Committee of U.V.M., 159 Vt. 133, 140 (1992). Vermont courts have not developed specific standards for analyzing claims to attorney's fees, but the Supreme Court has indicated that the trial court must exercise its discretion, and that such discretion may not be exercised "for reasons clearly untenable or to an extent clearly unreasonable." Id. at 140.

Given the lack of specific guidance from the Vermont Supreme Court, it is reasonable for this court to consider the standards for addressing claims to attorney's fees under the analogous federal statute, the Freedom of Information Act (FOIA), which provides as follows:

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

5 U.S.C. § 552(a)(4)(E). The state and federal provisions are virtually identical. Each statute includes a requirement that the complainant must have "substantially prevailed," but neither statute provides additional factors for the courts to consider. The statutory history of the FOIA indicates an understanding on the part of Congress that, absent legislative direction on the matter, courts would develop criteria for determining the propriety of awarding attorney's fees in particular cases. See Vermont Low Income Advocacy Council v. Dunlop, 71 F.R.D. 343, 345 (1976), *aff'd sub nom Vermont Low Income Advocacy Council v. Usery*, 546 F.2d 509.

The United States Court of Appeals for the District of Columbia Circuit has described the applicable federal standard as follows:

. . . To determine whether to award fees, the District Court must conduct a two-party analysis. . . . First, it must determine whether the party requesting fees is eligible for them. . . . "Eligibility" concerns whether a party has "substantially prevailed" as required by section 552(a)(4)(E) of FOIA. Under established case law, a party is eligible for attorneys' fees when it is shown that the lawsuit was (1) reasonably necessary and (2) that the litigation substantially caused the requested records to be released. . . .

Second, the court must determine whether a party is entitled to fees. Eligibility for fees does not guarantee entitlement. . . . There are at least four considerations to be weighed by the court in determining whether an *eligible* FOIA litigant is also *entitled* to attorneys' fees: (1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) whether the Government had a reasonable basis for withholding requested information.

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Chesapeake Bay Foundation, Inc. v. United States Dept. of Agriculture, 11 F.3d 211, 215-16 (D.C. Cir. 1993) (original emphasis) (citations omitted). This court's view is that the federal criteria provide an appropriate standard for addressing claims under the Vermont Access to Public Records Act.

In the instant case, plaintiff has "substantially prevailed." He has succeeded in obtaining a court order for access to the documents, and it appears that the court order was necessary to achieve access. Plaintiff made numerous attempts to negotiate with SRS for access to the documents, but SRS never released all the documents until the court issued its order. Plaintiff has demonstrated "eligibility" for an award of attorney's fees.

In addressing plaintiff's "entitlement" to attorney's fees, it is appropriate to consider the four factors discussed in Chesapeake Bay Foundation. The court notes that the plaintiff's purposes are mixed, and include both therapeutic and pecuniary interests. He has pursued access to the documents in order to explore the possibility of filing suit against SRS in a Sabia type of claim. At the same time, he wants to learn more about his childhood background, in hopes that the additional information will help him to deal with his current psychological problems. To the extent that plaintiff seeks information that might support a cause of action against SRS, the case is for private purposes rather than public benefit. On the other hand, the public derives benefit to the extent that plaintiff utilizes the SRS information for therapeutic purposes, and the Vermont Supreme Court has stated that "social policy consideration" underlie its recognition of the right of action in a Sabia claim. 6 Vt.L.W. 359 at 364. SRS conducts its investigations and maintains its files for purposes of assisting Vermont children who are at risk for abuse and neglect. Plaintiff furthers those public purposes when he uses information from SRS records in learning to cope with his past experiences as an abused child. Because plaintiff's purposes contain elements of public benefit, and the information he sought is essential to pursuing and achieving that benefit, plaintiff is entitled to some amount of attorney's fees, even though plaintiff also has individual financial interests involved.

The final factor for the court's consideration is the reasonableness of the government's basis for withholding the requested information. It is relevant to examine the actions of the parties in negotiating access to the documents. It is in the public interest to shift the burden of the expense to those responsible for the litigation. Bisson v. Ward, 160 Vt. 343, 347 (1993). In the instant case, both parties contributed to the difficulty in resolving the dispute. Plaintiff's initial requests were broad, and unaccompanied by any citation to the law upon which he relied or any recognition of the duty SRS had to others to maintain confidentiality. It is understandable that SRS would be reluctant to respond to such requests, especially because the agency is charged with maintaining the confidentiality of many of its records. Indeed, it is difficult to conclude that SRS was unreasonable in continuing to argue for some measure of protection against disclosure until the court ordered the organization to turn over the documents.

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SRS is probably correct in asserting that no Vermont court has ever held that SRS investigatory files qualify as public records. However, SRS contributed to the need for litigation by failing to follow up on its own suggestion to provide plaintiff with the information he needed in a reasonable fashion. Once the nature of plaintiff's potential litigation was made known to SRS in May of 1996, i.e., a possible Sabia suit against SRS itself, SRS appears to have become far less willing to produce any file information than it had been originally, and instead pursued a court order protecting its files in a general way. SRS's nonresponsive behavior contributed to plaintiff's difficulties in obtaining any level of access to his file. It is reasonable for SRS to pay part of the costs incurred.

When considering the amount of the attorney's fees to be awarded, the court must consider the reasonable worth of the services rendered. Human Rights Commission v. LaBrie, 6 Vt.L.W. 255, 259 (1995). This generally involves multiplying the number of hours reasonably expended times a reasonable hourly rate, which may not be the actual billing rate of the claimant's attorney. Id. However, it also can involve numerous other factors, such as the nature and importance of the business, the professional standing and attainments of the attorney, *etc.* Parker, Lamb & Ankuda, P.C. v. Krupinsky, 146 Vt. 304, 306 (1985) (*citations omitted*). In this case, it also involves consideration of the four factors discussed in Chesapeake Bay Foundation, and the status of the law governing the issues and the question of who should bear the costs of litigation in an undeveloped area of the law.

Applying these factors to the case at hand, the court concludes that Plaintiff is entitled to attorneys fees for the effort his attorney was required to spend to invoke the court process to get any access to records. This includes the 5.5 hours spent preparing and filing the complaint. The eighteen hours spent on the motions for summary judgment involved work on a novel question of law, and the Department had a good faith basis for seeking a result that ensured that it would be in compliance with its statutory obligation to protect the confidentiality of other persons referred to in Mr. Earle's SRS files. It did not have a basis for withholding access altogether. Taking these factors into account, the court concludes that it is reasonable to hold the Department responsible for one-quarter of this effort, or 4.5 hours. Thus, the total time for which SRS is responsible for plaintiff's attorneys fees is 10 hours. While Mr. Hanley's personal hourly rate for commercial work is \$180 per hour, the hourly rate of his expert witness, \$125, represents a fair and reasonable value of attorneys services for this case. Therefore, the court concludes Plaintiff is entitled to 10 x \$125 or \$1,250 in attorneys fees pursuant to 1 V.S.A. §319(d). He is not entitled to attorneys fees for the hearing on September 30, 1996, as the issues at that hearing were original questions of law. The Department is also responsible for the court costs Plaintiff incurred in having to bring the suit of \$173.42, but not the expert witness cost of \$593.74. This corresponds to the court's conclusion that SRS should be responsible for basic cost of having to file suit, plus one-fourth of the effort needed to address the new legal issues the case presented on access to SRS records, but not the legal issues related to determination of attorneys fees. The cost plaintiff incurred for an expert in seeking to prove the reasonableness of

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\$10,000 in attorneys fees was a discretionary expense, and therefore is not included in the award. Therefore, the total amount to which the Plaintiff is entitled is \$1,423.42 (\$1,250 + 173.42 = \$1,423.42.)

The court is satisfied that this amount, lifted out of the overall context of the investigation of the unfiled claim, represents the value of attorney time and expense that Plaintiff's attorney should not have had to incur in obtaining access to Mr. Earle's SRS files on Mr. Earle's behalf. Plaintiff took his total accumulated bill and removed a portion related specifically to the underlying claim, whereas the court has isolated the specific time increments reasonably necessary to obtaining access to the file. The Court will not charge SRS with the full cost of litigation expenses related to the underlying Sabia claim, or related to undeveloped areas of the law where there is a legitimate clash of legal principles. While Defendant has suggested that the fee arrangement between Mr. Earle and his attorney is a contingent one anyway, and Mr. Earle is not paying the bills, the award represents the effort that Mr. Earle's attorney should not have had to absorb in acquiring access to this information, less some costs attributable to the lack of well-developed law on the applicability of the Access to Public Records Act on confidential SRS files, which are allocated between the parties. The time Plaintiff's attorneys spent before April 1996 is not compensable, since that was within the realm of normal and predictable investigation time, given all the circumstances, and Mr. Hanley's original letters were extremely broad and made no effort to address the problem of protecting the confidentiality of others as required by statute.

V.R.C.P. 27

Plaintiff also seeks attorney's fees under V.R.C.P. 27, Discovery Before Action or Pending Appeal. The rule provides a procedure for pursuing discovery prior to filing any cognizable action, and certainly the rule applies to the instant case, where the plaintiff sought to discover records from SRS before deciding whether or not to pursue a lawsuit. However, the rule focuses on the methods available for discovery, as part of an overall scheme for discovery. Rule 27 does not include any specific provision allowing recovery of attorney's fees for the conduct of routine discovery.

The Rules of Civil Procedure do provide the court with discretion to impose sanctions against a party who causes unnecessary litigation by failing to comply with legitimate discovery requests. See V.R.C.P. 37 (Failure to Make Discovery: Sanctions). The purpose is to encourage compliance with legitimate requests where opposition is not substantially justified. The imposition of sanctions is necessarily a matter of judicial discretion. John v. Medical Center Hospital of Vermont, 136 Vt. 517, 519 (1978).

However, the trial court's discretion is not unlimited. The ultimate sanction of

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dismissal is available only where there has been bad faith or deliberate and willful disregard of a court order. Id. at 519. Likewise, the sanction of witness preclusion is appropriate only if there has been a failure to comply with a specific discovery order. In re R.M., 150 Vt. 59, 63 (1988). Indeed, the entire structure of the rule suggests that sanctions are generally appropriate only after a party has failed to comply with an order. "If an order issued under Rule 37(a) is disobeyed, resort may then be had to Rule 37(b) for a further order imposing sanctions." V.R.C.P. 37, reporter's notes at 184.

In the instant case, SRS did not comply with plaintiff's discovery requests until after plaintiff obtained a court order requiring disclosure. However, SRS's position was not entirely unjustified, given the statutory confidentiality of the investigatory files. Moreover, SRS complied promptly after the court issued its order. The court concludes that the Rules of Civil Procedure do not provide a basis for attorney's fees in this case. For this reason, the court has specifically excluded from its calculations above on Access to Public Records grounds compensation for time spent on the Motion for an Amended Complaint, or the Amended Complaint.

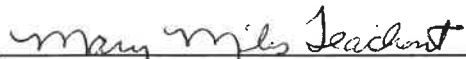
Conclusion

Based on the attorney's fees provisions of the Vermont Access to Public Records Act, SRS shall be liable to the plaintiff for \$1,423.42 in attorney's fees. The Rules of Civil Procedure do not provide an alternate basis for the award of fees.

ORDER

SRS shall pay attorney's fees to the plaintiff in the amount \$1,423.42.

Dated this 18th day of February, 1997.



Hon. Mary Miles Teachout,
Presiding Superior Court Judge

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