

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JUSTIN H. PHILLIPS,

Plaintiff,

-v-

UNITED STATES BUREAU OF THE  
CENSUS,

Defendant.

22-cv-9304 (JSR)

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

On August 11, 2023, plaintiff, Justin H. Phillips, filed a motion for attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(F)(i) of the Freedom of Information Act ("FOIA") and entitled [plaintiff] is presumptively reasonable under the lodestar approach generally applied to fee applications in the Second Circuit." N.Y. Times Co., 251 F. Supp. 3d at 713.

### **III. Discussion**

The Census Bureau contests each step of the analysis, arguing that plaintiff is not eligible for fees, plaintiff is not entitled to fees, and plaintiff's requested fees are unreasonable. For the reasons explained below, the Court finds that although plaintiff is eligible to recover attorneys' fees and costs, plaintiff is not entitled to recover his attorneys' fees and costs.

#### **A. Eligibility for Fees**

Plaintiff is eligible for attorneys' fees and costs if he substantially prevailed in this lawsuit. See Pietrangelo, 568 F.3d at 343. "[S]ubstantially prevailed" is statutorily defined as

























because of the expense associated with maintaining a file of that size. See Def. Mem. at 4; Keller Decl., ¶ 35 (“As these were intermediate, experimental files, responsible fiscal management prompted their deletion.”). Because the 2010 file had been deleted, the Census Bureau was not obligated to produce that file pursuant to FOIA. See, e.g., Piper v. U.S. Dep’t of Just., 294 F. Supp. 2d 16, 21-22 (D.D.C. 2003); Landmark Legal Found. v. E.P.A., 272 F. Supp. 2d 59, 66-67 (D.D.C. 2003). Furthermore, as the Government correctly points out, its decision to recreate a comparable file to the requested 2010 file does not reflect an obligation imposed on the Census Bureau under FOIA. See Am. C.L. Union v. Dep’t of Just., 681 F.3d 61, 71 (2d Cir. 2012) (“FOIA does not obligate agencies to” “creat[e] documents.”). Instead, the Census Bureau’s decision to recreate the file was a recognition of the academic importance of such a file. See Keller Decl., ¶ 36. Plaintiff, for his part, does not dispute the reasonableness of the Census Bureau’s decision to deny his request to disclose the 2010 file.<sup>3</sup>

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<sup>3</sup> Instead, plaintiff cites to an inapposite case, Warren v. Colvin, 744 F.3d 841, 843-45 (2d Cir. 2014), which only addressed the first step in the fee-shifting analysis and involved a concession from the Government that the plaintiff could recover the costs that he sought. See Reply Br. at 7-8.

Accordingly, the Court finds the Census Bureau's decision to withhold the requested 2010 file is reasonable.

Second, it was reasonable for the Census Bureau to deny plaintiff's request to release the 2020 file because it fell within the parameters of FOIA Exemption 3. "FOIA Exemption 3 applies to records 'specifically exempted from disclosure by statute,' provided that the statute 'requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue.'" Wilner v. Nat'l Sec. Agency, 592 F.3d 60, 71 (2d Cir. 2009) (quoting 5 U.S.C. § 552(b)(3)). As relevant here, the Census Bureau contended that the 2020 file was not subject to disclosure pursuant to Sections 8(b) and 9 of the Census Act. See Baldrige v. Shapiro, 455 U.S. 345, 355 (1982) ("Sections 8(b) and 9(a) of the Census Act . . . qualify as withholding statutes under Exemption 3."). Specifically, those statutory provisions prohibit the Census Bureau from "furnish[ing] copies of tabulations and other statistical materials which . . . disclose the information reported by, or on behalf of, any particular respondent," 13 U.S.C. § 8(b), or generally from "mak[ing] any publication whereby the data furnished by any particular establishment or individual under this title can be identified," 13 U.S.C. § 9(a)(2).

As the declaration from Dr. Keller explains, which is "accorded a presumption of good faith," Florez v. Cent. Intel. Agency, 829 F.3d 178, 182 (2d Cir. 2016), the commingled

confidential data (which was ultimately removed from the 2020 file that was released) and the noisy measurements themselves could not be disclosed under these statutory provisions. Keller Decl., ¶¶ 40-41. Plaintiff does not appear to take issue with the commingled confidential data being exempt from disclosure (and if he did, it would be meritless). Instead, plaintiff appears to believe that the noisy measurements themselves would not lead to the risk of disclosing respondent's information. See Pl. Mem. at 11; Reply Br. at 8. However, what plaintiff overlooks is that the Census Bureau was not able to confirm that the noisy measurements would not risk disclosure of respondent's information until after December 2022, when plaintiff's FOIA request was denied. Specifically, the Census Bureau had identified that the heightened level of "demographic detail" included in the noisy measurements could meaningfully "increase the risk of reconstruction-abetted re-identification," and it was not until March 2023, that "the empirical risk assessment" was completed such that the Census Bureau could approve the release of the noisy measurement files. Keller Decl., ¶¶ 29, 40. Accordingly, at the time it opposed disclosure, the Census Bureau had a reasonable basis for doing so, as it had not yet completed the internal processes to confirm the release of the noisy measurements would not risk re-identification. Further to the Census Bureau's credit, as soon as it was confirmed that it was safe to release the noisy

measurements, the Census Bureau did so. See Keller Decl., ¶¶ 38-41.

Accordingly, the Court finds that the Census Bureau had a reasonable basis for refusing to produce both the 2010 and 2020 files. Therefore, this factor weighs heavily in favor of the Census Bureau.

Weighing all the factors, the Court finds that plaintiff is not entitled to recover attorneys' fees and costs. It is not at all clear that plaintiff's lawsuit caused the Census Bureau to release the noisy measurement files, when longstanding efforts to do just that had preceded the filing of his request and lawsuit. Furthermore, the Census Bureau's decision to recreate files, which it had reasonably determined in their original state were not subject to disclosure either because the files had been previously destroyed or because it was prohibited by statute, should be rewarded, not punished with an award of attorneys' fees. Although factors two and three weigh in favor of plaintiff, his scholarly interest in the files cannot outweigh the lack of evidence that




his lawsuit caused the release of the files and the reasonableness of the Census Bureau's decision to withhold the files.

**IV. Conclusion**

Accordingly, plaintiff's motion for attorneys' fees and costs is denied. The Clerk is respectfully directed to close docket entry number 21.

SO ORDERED.

Dated: New York, NY  
January 22, 2024

  
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JED S. RAKOFF, U.S.D.J.