

United States District Court
Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMERICAN SMALL BUSINESS
LEAGUE,

Plaintiff,

v.

SMALL BUSINESS ADMINISTRATION,

Defendant.

Case No. [20-cv-04619-MMC](#)

**ORDER GRANTING IN PART
PLAINTIFF’S MOTION FOR
ATTORNEY’S FEES AND COSTS**

Re: Dkt. No. 74

Before the Court is plaintiff American Small Business League’s (“ASBL”) “Motion for Attorney’s Fees and Costs,” filed March 27, 2023. Defendant United States Small Business Administration (“SBA”) has filed opposition, to which ASBL has replied. The motion came on for hearing on July 19, 2024. Aaron R. Field and Karl Olson of Cannata O’Toole & Olson LLP appeared on behalf of ASBL. James Bickford of the United States Department of Justice Civil Division appeared on behalf of the SBA.

Having read and considered the parties’ respective written submissions, and having considered the oral arguments made by counsel, the Court, hereby rules as follows.

BACKGROUND

Plaintiff ASBL is a California organization with the “core mission” of “promot[ing] and advocat[ing] for the interests of small business concerns through public policy change.” (See Complaint (“Compl.” ¶ 6, Doc. No. 1.) During the coronavirus pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, under which “the SBA was tasked with administering a new loan program, the PPP [Paycheck Protection Program], which offers often forgivable loans to qualifying small

1 businesses.” (See id. ¶ 10.) ASBL submitted several FOIA requests pertaining to the
 2 SBA’s administration of such funds. (See id. ¶ 18.)

3 **A. FOIA Requests at Issue**

4 On April 9, 2020, ASBL submitted a Freedom of Information Act (“FOIA”) Request
 5 to the SBA, whereby it sought documents “regarding advisory committees” that have
 6 worked with the SBA (“Initial Request”). (See id. ¶ 18.)¹

7 On April 16, 2020, ASBL “amended [the initial] FOIA request” (“Amended
 8 Request”) to seek: (1) “[r]ecords relating to any committee, advisory group, or panel the
 9 SBA has established to administer the \$350 billion CARES Act response to the
 10 coronavirus pandemic” (“CARES Committee Records”); (2) “[a] list of names and
 11 bio[graphies] of members who serve on any of the active SBA advisory committees”
 12 (“Committee Biographies”); (3) “[d]ata showing how the appropriated funds from the
 13 CARES Act were distributed through [the] PPP program [sic]” (“PPP Loan Data”); (4)
 14 “[a]ny communication between the White House, SBA, and Congress regarding requests
 15 for additional funding for the CARES Act and PPP Program [sic]” (“Interbranch
 16 Communications”). (See id. ¶ 18.)

17 _____
 18 ¹ The Initial Request reads as follows:

19 All documents indicating, containing, or relating to any committee, advisory
 20 panels or groups that currently work or have worked with the Small Business
 Administration (SBA) between January 1, 2014 and present

21 All documents indicating containing, or relating to the names of each
 22 individual on each committee, advisory panel, or group that currently works
 or has worked with the SBA between January 1, 2014 and present

23 All records of communications (written, oral, or electronic) containing, relating
 24 to, or based on any advisory panels or groups that currently work or have
 worked with the SBA between January 1, 2016 and the present

25 All records of communications (written, oral, or electronic) containing, relating
 26 to, or based on the names of each individual on each committee, advisory
 panel, or group that currently works or has worked with the SBA between
 January 1, 2014 and present

27 (See Decl. of Eric Benderson in Supp. of Def.’s Opp’n. to Mot. for Fees (“Benderson
 28 Decl.”) Ex. A, April 9, 2020, Email from ASBL to SBA, Doc. No. 76-1.)

1 On July 10, 2020, ASBL filed the instant action seeking declaratory and injunctive
2 relief under FOIA. (See id. ¶¶ 27–34.)

3 **B. Procedural History and Washington Post Litigation**

4 On May 12, 2020, the Washington Post filed suit in the District of Columbia,
5 seeking “[a]ll public data on every loan made through the [PPP].” (See Def.’s Opp’n. to
6 Pl.’s Mot. for Fees (“Def.’s Opp’n.”) at 2:1–5, Doc. No. 75 and WP Co. LLC v. SBA, No.
7 20-cv-1240 (D.D.C. filed May 12, 2020) (“Washington Post case”).) On July 6, 2020, SBA
8 released loan-level data for PPP loans except for the precise amounts of loans of
9 \$150,000 or more, and the names and addresses of borrowers of less than \$150,000,
10 which it claimed were exempt. (See id. at 2:6–14.) The parties in the Washington Post
11 case litigated the claimed exemption (see id. at 2:15–21), and, on November 5, 2020, the
12 district court in that action ordered the SBA to produce the withheld information, see WP
13 Co. LLC v. SBA, 502 F.Supp.3d 1 (D.D.C. 2020).

14 On September 4, 2020, ASBL moved for summary judgment (see Pl.’s Mot. for
15 Summ. J., Doc. No. 20), and, on October 26, 2020, this Court, in light of the overlap
16 between ASBL’s request and the requests at issue in the Washington Post case, stayed
17 the instant action pending a decision in the Washington Post case. (See Order, Doc. No.
18 35.) On November 20, 2020, after the ruling in the Washington Post case, this Court lifted
19 the stay. (See Order, Doc. No. 38.)

20 **C. SBA’s Productions**

21 **1. Records Responsive to the Initial Request**

22 Within approximately a month after the Initial Request was filed, the SBA informed
23 ASBL that such request returned “250,000 potentially responsive emails” and was
24 “unduly burdensome.” (See Decl. of Eric Benderson in Supp. of Def.’s Opp’n. to Mot. for
25 Fees (“Benderson Decl.”) Ex. E, November 2020 Letter from ASBL to SBA, Doc. No. 76-
26 5 (documenting history of communications between the parties).) On May 22, 2020,
27 ASBL identified its “priorit[y]” documents responsive to its request as those related to the
28 Regional Regulatory Fairness Board (“the RRFB Documents”), and, on June 12, 2020,

1 the SBA agreed to produce those documents. (See id.)

2 In January 2021, ASBL agreed to “narrow” what remained of the Initial Request to
3 “documents relating to ASBL, its president Lloyd Chapman, Raytheon Technologies
4 Corporation . . . Secretary of Defense Lloyd Austin, and the Advisory Committee on
5 Veterans’ Affairs” (“the Non-RRFB Documents”). (See Pl.’s Mot. for Fees (“Pl.’s Mot.”) at
6 4:11–15 citing Decl. of Karl Olson in Supp. of Pl.’s Mot. (“Olson Decl.”), Ex. D, January
7 27, 2021, Bickford Email to Olson Doc. No. 74-1 at 36, 39.) On August 20, 2021, the
8 Court ordered SBA to produce the remaining documents responsive to the narrowed
9 Initial Request by December 17, 2021. (See Minute Order, Doc. No. 51.)

10 **2. Records Responsive to the Amended Request**

11 **a. CARES Committee Records**

12 The SBA informed ASBL that it “ha[d] not established any committee . . . to
13 administer the CARES Act,” and, consequently, no records pertaining to this category
14 were produced. (See Benderson Decl. Ex. E at 2.)

15 **b. Committee Biographies**

16 The SBA produced the Committee Biographies on May 18, 2020, prior to the
17 commencement of litigation. (See id.)

18 **c. PPP Loan Data**

19 The SBA initially published PPP loan data on its website on July 6, 2020 (see
20 Benderson Decl. Ex. C, Manger Washington Post Declaration ¶ 88, Doc. No. 76-3), and,
21 pursuant to the Washington Post order, published the initially withheld data on December
22 1, 2020 (see Joint Status Report of December 12, 2020 at 3:6–8, Doc. No. 39).

23 Thereafter, ASBL contended it was seeking, by the third part of its Amended Request,
24 additional data regarding the PPP loans (see id. at 5–6); upon examination prompted
25 thereby, the “SBA determined that it possessed such data” (see Benderson Decl. ¶ 10),
26 and, on January 25, 2021, published it (see id. ¶ 11, Ex. F, Benderson Washington Post
27 Declaration, Doc. No. 73-6).

28 //

1 **d. Interbranch Communications**

2 On January 22, 2021, the SBA completed its initial production of records
3 responsive to ASBL’s request for interbranch communications (see Benderson Decl. Ex.
4 G, January 22, 2021 SBA Letter to ASBL, Doc. No. 76-7), which production comprised
5 nine pages of documents (see Olson Decl. ¶ 10). After a series of meet-and-confers
6 about that production, ASBL, by letter dated February 11, 2022, proposed “ten new
7 search terms” for the purpose of identifying additional records responsive to its request
8 for documents in this category. (See Olson Decl. ¶¶ 11–12; Ex. J, February 11, 2022,
9 SBA Letter to ASBL, Doc. No. 74-1 at 73–74.) Ultimately, the parties agreed to two new
10 searches, the first requiring the words “health,” “care,” “enhancement,” and “act” to
11 appear somewhere in the document, and the second requiring one of the words or
12 phrases “shake shack,” “lakers,” “ruth’s,” or “potbelly” to appear somewhere in the
13 document. (See Benderson Decl. Ex. M, January 10, 2023, SBA Letter to ASBL, Doc.
14 No. 76-13.) Both searches were to be limited to emails from the domains “who.eop.gov,
15 mail.house.gov, or senate.gov.” (See id.) On June 8, 2022, the Court entered an order
16 setting a production schedule for the documents responsive to these searches. (See
17 Order, Doc. No. 65.)

18 **3. Conclusion: SBA’s Productions**

19 On February 24, 2023, the parties informed the Court that “[t]he merits of the
20 dispute [were] . . . concluded.” (See Sixth Joint Status Report, Doc. 72.)

21 **DISCUSSION**

22 By the instant motion, ASBL seeks an award of attorney’s fees in the amount of
23 \$514,392.50, and an award of costs in the amount of \$2,691.40. (See Supplemental
24 Declaration of Irene Lee in Supp. of ASBL’s Mot. for Attorney’s Fees (“Supp. Lee Decl.”),
25 Ex. A, Doc. No. 78-1.)

26 **A. Eligibility**

27 Pursuant to FOIA, the Court “may assess against the United States reasonable
28 attorney fees and other litigation costs reasonably incurred” in a case where the plaintiff

1 has “substantially prevailed.” See 5 U.S.C. § 552(a)(4)(E)(i)G. A plaintiff “substantially
2 prevail[s]” by obtaining relief through: (1) “a judicial order, or an enforceable written
3 agreement or consent decree;” or (2) “a voluntary or unilateral change in position by the
4 agency, if the complainant’s claim is not insubstantial.” See 5 U.S.C. § 552(a)(4)(E)(ii)(I)–
5 (II). “A complaint is deemed ‘eligible’ for a fee award by satisfying either subsection.” See
6 Poulsen v. Dep’t. of Defense, 994 F.3d 1046, 1050 (9th Cir. 2021).

7 Where relief is obtained through a judicial order, the plaintiff, to be eligible for fees,
8 need not show “the FOIA lawsuit” caused the production. See Poulsen, 994 F.3d at 1050.
9 Moreover, even an order scheduling, rather than initially requiring, production suffices,
10 and “even when voluntarily agreed to by the government.” See id. at 1053–54.

11 Where, however, the plaintiff obtains relief through a voluntary “change in position
12 by the agency,” such plaintiff must “present convincing evidence that the filing of the
13 action had a substantial causative effect on the delivery of the information.” See First
14 Amend. Coalition v. U.S. Dep’t. of Justice, 878 F.3d 1119, 1128 (9th Cir. 2017) (internal
15 quotations and citation omitted). To determine whether a plaintiff has made the requisite
16 showing of causation, courts consider the following three factors: “(1) when the
17 documents were released, (2) what actually triggered the documents’ release, and (3)
18 whether [the plaintiff] was entitled to the documents at an earlier time.” See id. at 1129
19 (internal quotations and citation omitted).

20 **1. Non-RRFB Records**

21 In light of the Court’s production-rate order (see Doc. No. 51), the parties agree
22 ASBL is eligible for fees for work performed in connection with ASBL’s request for non-
23 RRFB documents (see Pl.’s Mot. at 10:17–23; Def.’s Opp’n. at 9:4–9).

24 **2. PPP Loan Data**

25 ASBL argues it is eligible for fees for work performed in connection with the SBA’s
26 production of the PPP loan data, for two reasons: first, because the Washington Post
27 court entered an order directing the SBA to produce responsive data, and second,
28 because the SBA produced additional data in January 2021 after investigating ASBL’s

1 request. (See Pl.’s Mot. for Att’y Fees (“Mot.”) at 10:24–27; 11:20–22, Doc. 74.) The SBA
 2 argues neither reason suffices to establish ASBL “substantially prevailed.” (See Def.’s
 3 Opp’n. at 11:7.)

4 **a. Production Pursuant to Washington Post Order**

5 ASBL, citing Judge Berzon’s concurrence in First Amend. Coalition, 878 F.3d at
 6 1131 (Berzon, J. concurring), contends the Washington Post court’s order requiring
 7 production of PPP loan data “qualifies as a judicial order through which ASBL obtained
 8 relief in this case,” because the “plain text” of FOIA does not require the order to be
 9 issued in the complainant’s case. (See Pl.’s Mot. at 10:24–11:6.)

10 In First Amend. Coalition, the Ninth Circuit held that a plaintiff, in order to meet the
 11 “substantially prevailed” requirement, must demonstrate “a causal nexus between the
 12 litigation and the voluntary disclosure or change in position by the Government”. See
 13 First Amend. Coalition, 878 F.3d at 1128 (“explicitly reject[ing] the notion that the 2007
 14 amendment [to FOIA] eliminated the need to establish causation once a lawsuit has been
 15 initiated”). Judge Berzon disagreed, noting “the text of the fees provision . . . plainly does
 16 not require a causal nexus between the litigation and the agency’s disclosure.” See id. at
 17 1130. ASBL argues Judge Berzon’s “plain text” reading of FOIA supports their contention
 18 that any judicial order, not just a judicial order in the complainant’s own case, can mean
 19 the complainant “substantially prevailed.” As set forth below, the Court disagrees.

20 Judge Berzon wrote only for herself; her position was rejected by the majority’s
 21 holding that, despite the lack of statutory text requiring it, “there must still be a causal
 22 nexus between the litigation and the voluntary disclosure.” See id. at 1128. With the
 23 majority’s opinion in mind, the Court concludes litigation in one case does not “cause”
 24 disclosure in another. In so holding, the Court finds persuasive the reasoning set forth in
 25 So. Cal. Public Radio v. U.S. Small Bus. Admin., No. 2:20-CV-06490-ODW, 2021 WL
 26 6752245, at *2 (S.D. Cal. Sept. 3, 2021), wherein the district court declined to grant fees
 27 “based solely on a judicial order in another case, especially when, as here, the plaintiff is
 28 not party to the other case and only indirectly benefitted from its ruling.” See id.

1 Accordingly, the Court finds ASBL is not eligible for fees based on the Washington
2 Post order.

3 **b. Production of Supplemental Data**

4 ASBL next argues it is eligible fees for this portion of its request based on the
5 SBA's January 25, 2021, production of supplemental PPP loan data, which took place
6 after SBA produced data in the Washington Post case. According to ASBL, such
7 subsequent production constitutes a qualifying "voluntary and unilateral change in
8 position." (See Pl.'s Mot. at 11:16–22.)

9 As noted, to determine whether a plaintiff has "substantially prevailed" by causing
10 the agency's voluntary or unilateral change in position, courts consider three factors: "(1)
11 when the documents were released, (2) what actually triggered the documents release,
12 and (3) whether [the plaintiff] was entitled to the documents at an earlier time." See First.
13 Am. Coalition, 878 F.3d at 1129 (finding causation where, prior to production, lawsuit
14 "spanned almost two and a half years" and plaintiff was "met with abject resistance
15 throughout the entire litigation") (internal quotations and citation omitted).

16 Although SBA maintains the release "was triggered by SBA's conclusion that the
17 records should have been produced in response to certain FOIA requests litigated in the
18 Washington Post case," and continues to argue ASBL was not entitled to the data under
19 the terms of its request (see Def.'s Opp'n. at 13:18–20), the SBA admits it looked for the
20 "additional information" as a result of ASBL's request (see id. at 4:4–15), and, as ASBL's
21 initial request sought data on "how" PPP loans were distributed (see Compl. ¶ 10), at
22 least some of the supplemental data was responsive to such request (see Def.'s Opp'n.
23 at 4 n.2 (noting data fields produced)).

24 Accordingly, the Court finds ASBL is eligible for fees incurred in obtaining the
25 supplemental data.

26 **3. Interbranch Communications**

27 ASBL contends it "substantially prevailed" on its request for interbranch
28 communications because the SBA "ultimately [produced records] totaling more than

1 17,000 pages” in response to negotiated search terms (see Pl.’s Mot. at 11:23–27), and
2 the Court issued an order “setting the production rate” for these searches (see Order,
3 Doc. No. 65). The SBA argues ASBL did not “substantially prevail” because said
4 searches were “new,” and were not fairly encompassed by the FOIA request at issue in
5 the litigation. (See Def.’s Opp’n. at 17:14–18:6.)

6 As noted, ASBL’s Amended Request included a request for “any communication
7 between the White House, SBA, and Congress regarding requests for additional funding
8 for the CARES Act and PPP Program.” (See Compl. ¶ 10.) As further noted, the parties
9 ultimately agreed to two searches: (1) emails that had “health AND care AND
10 enhancement AND act” in the document (“Health Care Enhancement Act search”), and
11 (2) emails that had “‘shake shack’ OR lakers OR ruth’s OR potbelly” in the document
12 (“Specific PPP Recipients search”), with both searches limited to emails from
13 who.eop.gov (the White House Executive Office of the President), mail.house.gov (the
14 House), or senate.gov (the Senate) domains. (See Benderson Decl. Ex. M.) As the SBA
15 notes, these searches resulted in the production of some documents that were unrelated
16 to the original FOIA request. (See Def.’s Opp’n. at 15:13–16:19.)

17 Although the Court accepts SBA’s assertion that many of the resulting emails were
18 outside the scope of ASBL’s request, the limitation of the search to communications
19 between the SBA, the White House, and the houses of Congress demonstrates that
20 ASBL was seeking documents within ASBL’s Amended Request, even if the results were
21 overinclusive. Accordingly, the Court finds that, given its issuance of a scheduling order,
22 ASBL is eligible for fees incurred in obtaining the production of interbranch
23 communications documents. See Poulsen, 994 F.3d at 1053–54.

24 **B. Entitlement**

25 Once a court has ascertained the plaintiff’s statutory eligibility for fees under either
26 subsection of § 552(a)(4)(E)(ii), it then “exercise[es] its discretion” to determine whether
27 the plaintiff has demonstrated it is “entitled” to fees. See Long v. U.S. I.R.S., 932 F.2d
28 1309, 1313 (9th Cir. 1991). In making that determination, courts consider four criteria: “(1)

1 the public benefit from the disclosure, (2) any commercial benefit to the plaintiff resulting
2 from the disclosure, (3) the nature of the plaintiff's interest in the disclosed documents,
3 and (4) whether the government's withholding of the records had a reasonable basis in
4 law." See id. Courts, in considering the above factors, "must be careful not to give any
5 particular criterion dispositive weight." See Church of Scientology of California v. U.S.
6 Postal Serv., 700 F.2d 486, 493 (9th Cir. 1983) (abrogated on other grounds).

7 **1. Public Benefit**

8 In weighing the public benefit factor, courts take into account the "degree of
9 dissemination and the likely public impact that might result from disclosure." See Church
10 of Scientology of California, 700 F.2d at 493. This factor weighs against an award of
11 attorney's fees when it "merely subsidizes a matter of private concern." See id.
12 Nevertheless, courts consider public benefit broadly, and have "recognized a public
13 interest in determining whether government programs . . . involve waste, fraud, or abuse."
14 See WP Co. LLC, 502 F.Supp.3d at 23. Where "at least one of the requested documents
15 was not previously available to the public," the public benefit factor weighs in favor of the
16 plaintiff. See Davy v. CIA, 550 F.3d 1155, 1159 (D.C. Cir. 2008).

17 As to all the categories of documents as to which the Court has found eligibility,
18 namely, the non-RRFB documents, the supplemental PPP data, and the interbranch
19 communications, the SBA, noting ASBL has not specified the content of the records it
20 received, argues ASBL has failed to show there was a public interest in those records.
21 The Court, however, finds the public interest factor weighs in favor of an award of fees as
22 to all three categories of documents, as ASBL sought and received previously non-public
23 documents regarding a highly publicized spending program.

24 Accordingly, this factor weighs in favor of an award of fees.

25 **2. Commercial Benefit and Nature of Plaintiff's Interest**

26 Courts consider the second and third factors together to determine "whether the
27 plaintiff had a sufficient private incentive to pursue his FOIA request even without the
28 prospect of obtaining attorneys' fees." See McKinley v. Fed Hous. Fin. Agency, 739 F.3d

1 707, 712 (D.C. Cir. 2014) (internal quotation and citation omitted). Where “a litigant seeks
2 disclosure for . . . personal reasons, an award of fees is usually inappropriate.” See
3 Cotton v. Heyman, 63 F.3d 1115, 1120 (D.C. Cir. 1995).

4 ASBL lacks any commercial interest in most of the documents it obtained in this
5 litigation, including the PPP supplemental documents and the White House and
6 Congressional communications documents, as well as those related to Raytheon
7 Technologies, Lloyd Austin, and the Advisory Committee on Veterans Affairs
8 (approximately half of the non-RRFB records). The SBA makes no argument as to
9 ASBL’s interest in the supplemental PPP loan data and interbranch communications. As
10 the SBA notes, however, a portion of the non-RRFB records ASBL sought as part of its
11 narrowed initial FOIA request related to ASBL itself and its president, Lloyd Chapman,
12 suggesting “a degree of self-interest.” (See Def.s’ Opp’n. at 10:12–14.) Although ASBL
13 argues even these records are in the public interest because “it is in the public’s interest
14 to know if the SBA is properly addressing small business concerns, including those
15 raised by ASBL and its [p]resident” (see Pl.’s Reply at 6:14–17), the Court is not
16 persuaded.

17 Accordingly, as to the supplemental PPP loan data and the interbranch
18 communications documents, as well as the portion of the non-RRFB documents that do
19 not pertain to ASBL, the Court finds this favor weighs in favor of an award of fees.

20 **3. Basis for Withholding**

21 “The fourth factor is ‘whether the government’s withholding had a reasonable basis
22 in law’; in other words, whether the government’s actions appeared to have ‘a colorable
23 basis in law’ or instead appeared to be carried out ‘merely to avoid embarrassment or to
24 frustrate the requester.’” See Eco. Rights Found. v. Fed. Emergency Mgmt. Agency, 365
25 F.Supp.3d 993, 1001 (N.D. Cal. June 14, 2018) citing Church of Scientology, 700 F.2d at
26 492 n.6.

27 As to the non-RRFB documents, SBA states it “did not withhold” those records but
28 was “merely ordered to produce them at a faster pace than it had proposed.” (See Def.’s

1 Opp'n. at 10:18–19.) The Court finds this factor weighs against an award of fees for work
2 performed in connection with the non-RRFB documents. In particular, given the broad
3 nature of the Initial Request and large number of documents that would be responsive
4 thereto, the Court finds it was not unreasonable for the SBA to delay production until the
5 searches were narrowed.

6 As to the supplemental PPP loan data, the SBA argues “ASBL has not shown it
7 was entitled to [this data] at an earlier time,” because ASBL “does not attempt to explain
8 how the [supplemental] data fields” were responsive to ASBL’s FOIA request. (See id. at
9 14:1–4.) As discussed above, however, the Court has found ASBL’s Amended Request
10 did encompass at least some of the responsive production. (See supra Part A.2.b.)
11 Accordingly, as to the supplemental PPP data, the Court finds this factor weighs in favor
12 of an award of fees.

13 As to the interbranch communications documents, the SBA argues the “enormous
14 gap” between ASBL’s request as originally formulated and the new searches shows the
15 SBA had “an exceedingly ‘reasonable basis in law’ for not performing those searches
16 sooner.” (See Def.’s Opp’n. at 19:2–4.) In response, ASBL argues “[t]he new searches
17 . . . could and should have been conducted initially” because “it was obvious that there
18 had to be more than nine pages of records” in response to the original request. In support
19 thereof, ASBL, citing Transgender Law Ctr. v. Immig. & Customs Enf’t., 46 F.4th 771, 780
20 (9th Cir. 2022), asserts the SBA “bear[s] the burden of demonstrating the adequacy of
21 their search beyond a material doubt.” (See Pl.’s Reply at 7:13–15.) Transgender Law
22 Ctr., however, addressed the merits of an agency’s compliance with FOIA not a
23 claimant’s entitlement to attorneys’ fees, an issue on which the claimant bears the
24 burden. See Long, 932 F.3d at 1309 (noting “prevailing party in FOIA action must
25 demonstrate both eligibility and entitlement to . . . recovery” of fee award).

26 In any event, irrespective of where the burden lies, in this instance the Court finds
27 the disparity between the original request and the eventual search terms supports the
28 SBA’s argument as to the initial withholding of some of the records. In that regard, of the

1 two searches ultimately run, only the Health Care Enhancement Act search appears to
 2 seek documents responsive to ASBL's Amended Request for communications regarding
 3 the SBA's "requests for additional funding." (See Compl. ¶ 18).² ASBL provides no
 4 explanation as to why it expected the Specific PPP Recipients search to return
 5 documents responsive to such request, and the Court finds SBA had a reasonable
 6 justification for the delay in initially running that search. Accordingly, as to the interbranch
 7 communications request, the Court finds this factor weighs in favor of an award of fees,
 8 but only as to the Health Care Enhancement Act search.

9 **4. Conclusion: Entitlement**

10 The Court, having weighed the relevant factors, finds ASBL is entitled to fees
 11 incurred in obtaining the supplemental PPP loan data and the interbranch
 12 communications documents pertaining to the Health Care Enhancement search, but not
 13 to the fees incurred in obtaining the non-RRFB documents or the Specific PPP
 14 Recipients search pursuant to the interbranch communications request.

15 **C. Fee Award**

16 With the above findings in mind, the Court determines a fee award is appropriate,
 17 see Church of Scientology, 700 F.2d at 492 (holding court "must exercise its discretion in
 18 determining whether a fee award is appropriate") (internal quotation and citation omitted),
 19 and next turns to that calculation.

20 **1. Pre-Litigation Work**

21 ASBL seeks \$44,668 in fees for work performed from April through June 2020,
 22 prior to the date this lawsuit was filed. (See Lee Decl. Ex. A.) "[W]ork performed during
 23 administrative proceedings prior to litigation is not recoverable under FOIA." See ACLU
 24 Immigr. Rights Proj. v. U.S. Immigr. & Customs Enf't., No. 16-cv-06066-JSC, 2018 WL
 25 488997, at *3 (N.D Cal. Jan. 19, 2018). The billing entries for this period reference
 26

27 ² The Paycheck Protection Program and Health Care Enhancement Act, Pub. L.
 28 No. 116-139, 134 Stat. 620 (2020), provided additional funding for the PPP.

1 administrative work, including activities such as “prepar[ing] and revis[ing] FOIA
 2 requests,” “[p]repar[ing] agency correspondence re: requests,” “attend[ing] calls with SBA
 3 re: FOIA requests,” and “[p]repar[ing] further agency correspondence” (see Lee Decl. Ex.
 4 A). The entries, however, also reflect work that is recoverable under FOIA, such as
 5 “[r]esearch[ing] legal issues presented by FOIA requests” and “[c]onsider[ing] and
 6 discuss[ing] possible lawsuit.” (See id.) See, e.g. Assoc. Gen. Contractors, Northern Nev.
 7 Chapter v. U.S. E.P.A., 488 F.Supp. 861, 864 (D. Nev. 1980) (finding plaintiff “entitled to
 8 reasonable compensation for services rendered in filing the action”); New York Times Co.
 9 v. Cent. Intel. Agency, 251 F.Supp.3d 710, 716 (S.D.N.Y. 2017) (finding plaintiff eligible
 10 for fees for work which “took place slightly before filing the complaint, all of which relates
 11 to drafting the complaint”).

12 Because roughly two-thirds of the described activities in the entries for work
 13 performed from April through June 2020 reflect work that is not recoverable under FOIA
 14 (see Lee Decl. Ex. A), the Court will award fees for only one-third of the time billed during
 15 this period, or \$14,890.³

16 2. Work Performed During Litigation

17 As discussed above, ASBL is ineligible for fees based on the PPP loan data
 18 produced in the Washington Post case, and it is not entitled to fees for the non-RRFB
 19 records or the documents produced pursuant to half of the interbranch communications
 20 request.

21 ASBL seeks \$150,880 in fees for work done from July through October 2020 (see
 22 Lee Decl. Ex. A), which sum the SBA argues should be reduced by two-thirds because
 23 most of such work was devoted to pursuing the PPP loan data. (See Def.’s Opp’n. at
 24 21:11–22:1.) The SBA’s argument is supported by ASBL’s billing records. (See Lee Decl.
 25 Ex. A (time entries including “work on motion for summary judgment,” “[r]eview and track
 26

27 ³ The Court notes that, for each time period discussed herein, the precision of its
 28 fee calculation is impeded by the form of ASBL’s submission, in which, as discussed later
 herein (see infra Part C.4), all entries are presented in block-billing format.

1 DC case re: PPP data,” and “CMC statement[s]” on related issues.) As discussed above,
2 the Court has found ASBL is ineligible for fees based on such work, and, accordingly, will
3 award fees for one-third of the work done in this time period, or \$50,293.

4 ASBL seeks \$152,268 in fees for work done from November 2020 through
5 December 2021 (see Lee Decl. Ex. A), which sum the SBA argues should be reduced by
6 two-thirds on grounds of excessiveness (see Def.’s Opp’n. at 24:9–10). The work done in
7 this time period resulted in the production of the non-RRFB records, which the Court has
8 determined does not support a fee award, but also the production of the supplemental
9 PPP loan data, which the Court has determined does support a fee award. (See Lee
10 Decl. Ex. A (time entries including “[r]eview and analy[sis] [of] records disclosed and not
11 disclosed by SBA regarding PPP loans; negotiation with “SBA re: search terms, and
12 request for search terms.”) Accordingly, the Court will award fees for one-half of the work
13 done in this time period, or \$76,134.

14 ASBL seeks \$106,798 in fees for work done from January through December
15 2022 (see Lee Decl. Ex. A), which sum the SBA argues should be reduced by one-half
16 because the litigation during the year 2022 was primarily concerned with the interbranch
17 communications request, to which the SBA disputes ASBL entitlement (see Def.’s Opp’n.
18 at 24:18–25:5). As discussed above, ASBL is entitled to fees for one-half of the
19 interbranch communications request. The billing entries in this period, however, also
20 reflect work done regarding the “Regional Regulatory Fairness Board records” (see Lee
21 Decl. Ex. A), which the SBA agreed to produce prior to litigation, and for which ASBL is
22 ineligible (see supra Background Part C.1.) Accordingly, the Court will award fees for
23 one-half of the work done in this period, or \$53,399.

24 In addition to the above-discussed time periods, ASBL seeks \$83,047 for work
25 done after January 2023, the majority of which includes \$74,957.50 in fees-on-fees. The
26 SBA does not dispute any of this request.

27 //

28 //

3. Voluntary Reductions

ASBL has voluntarily reduced its fee request by \$23,267.50, or \$14,957.50 of its request for fees-on-fees, and \$8,310 for fees based on a FOIA request not at issue in this litigation. (See Pl.'s Reply at 9:8–10, Lee Decl. Ex. A.)

4. Block Billing

Lastly, because the plaintiff has the burden to prove their fees were reasonably incurred, the Court may “reduce hours that are billed in block format” because such format “makes it more difficult to determine how much time was spent on particular activities.” See Welch v. MetLife Ins. Co., 480 F.3d 942, 948 (9th Cir. 2007) (impliedly accepting 20% reduction for block-billed entries); Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 971 (D.C. Cir. 2004) (noting block billing format “lump[s] together multiple tasks, making it impossible to evaluate . . . reasonableness).

In the instant case, ASBL has submitted, for the months April 2020 through May 2023, a “summary of major tasks” performed by all attorneys and paralegals on a monthly basis. (See Lee Decl., Ex. A.) The descriptions provided do not identify which employee performed which task, nor how much time was spent on each task. (See id.; see also The State Bar of California Arbitration Advisory 2016-02 (2016) (noting “[b]lock billing may . . . inadvertently or intentionally inflate the actual time a lawyer takes to complete the listed tasks [by] camouflaging non-compensable tasks”; citing earlier advisory in which it opined block billing “may increase time by 10% to 30%”).)

Although ASBL notes block billing is not “*per se*” prohibited (see Pl.'s Reply at 13:14), the records in the cases on which ASBL relies either provided considerably more detail than those submitted here, see Garcia v. Resurgent Capital Servs., No. Cv-11-1253 EMC, 2012 WL 3778852, at *8 (N.D. Cal. Aug. 30, 2012) (accepting block-billed records where daily entries “contain[ed] enough specificity as to individual tasks to ascertain whether the amount of time spent performing work was reasonable”), or were offered in a much shorter and far less complex case, see Fisher v. SJB-P.D., Inc., 214 F.3d 1115, 1121 (9th Cir. 2000) (noting blind patron’s ADA claim against restaurant that

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1 refused him and service dog entrance settled “[a] little over a year after the suit was
2 filed”).

3 Although, at the hearing on its motion, ASBL offered to provide more detailed
4 billing records to the Court, ASBL failed to do so upon receiving the SBA’s opposition,
5 wherein the SBA clearly raised a challenge to ASBL’s block billing. As a result, the SBA
6 was denied the opportunity to review, assess, and potentially challenge the records in a
7 more meaningful manner.


8 Accordingly, as to the hours awarded that were block billed, the Court reduces its
9 award by 20%, resulting in a fee award of \$203,596.40.⁴

10 **CONCLUSION**

11 For the reasons stated above, ASBL’s Motion for Attorney’s Fees and Costs is
12 hereby GRANTED in part and DENIED in part, and ASBL is hereby awarded
13 \$203,596.40 in fees and \$2,691.40 in costs, for a total award of \$206,287.80.

14
15 **IT IS SO ORDERED.**

16
17 Dated: August 6, 2024

18 
19 MAXINE M. CHESNEY
20 United States District Judge

21
22
23
24
25
26 _____
27 ⁴ This sum is calculated as follows: \$277,763 initial fee award, comprising \$14,890
28 (April–June 2020) + \$50,293 (July–October 2020) + \$76,134 (November 2020–
December 2021) + \$53,399 (January–December 2022) + \$83,047 (January–May 2023),
minus \$23,267.50 in voluntary reductions = \$254,495.50, minus twenty percent block
billing penalty = \$203,596.40.