

**Matter of Caesar & Napoli, P.C. v New York City
Police Dept.**

2020 NY Slip Op 33296(U)

October 7, 2020

Supreme Court, New York County

Docket Number: 152727/2020

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 6

Justice

**In the Matter of the Petition of
CAESAR AND NAPOLI, P.C. and JING YING CHEN,
MAN FONG LIU, as Administrator for Estate of SONG-AI
LI and MAN FONG LIU individually,**

Petitioners,

**INDEX NO. 152727/2020
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.**

**For a judgment pursuant to Article 78
of the Civil Practice Law and Rules**

DECISION AND ORDER

- against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answer – Affidavits – Exhibits _____

Replying Affidavits

Cross-Motion: Yes X No

Petitioners Caesar and Napoli, P.C. and Jing Ying Chen, Man Fong Liu, as Administrator for Estate of Song-Ai Li and Man Fong Liu, individually (collectively, “Petitioners”) bring this action pursuant to Article 78 of the New York Civil Practice Law and Rules (“Article 78”) for an Order compelling Respondent New York City Police Department (“Respondent”) to provide complete access to the investigation materials related to Petitioner Jing Ying Chen and Song Ai Liu’s traumatic injuries as a result of a fire that took place on December 19, 2018 at 113 Mott Street, Manhattan, NY; and declaring that Respondent’s decision to deny Petitioners, access to the documents and materials properly and legally requested was in violation of the Freedom Of Information Laws (“FOIL”). Additionally, Petitioners seek attorneys’ fees and costs pursuant to Public Officer’s Law § 89(4)(c)(ii). There is no opposition.

Relevant Background

On April 29, 2019, Petitioners sent a FOIL Request to Respondent seeking:

[U]nredacted departmental incident or accident reports, investigation reports, statements taken, factual findings, investigation documents, complete video footage, event dam records, accident reconstruction, dispatcher call logs, 911 call report (unredacted), ICAD report (unredacted), VESTA records, audio recordings, sprint reports (unredacted), photographs, memoranda and any other documentation generated during this investigation.

Enclosed please find a duly executed authorization signed by the victim to further assist you in this matter, Please further preserve and provide all call reports and audio transmissions and transcripts to or from the subject police vehicle for the day of this accident.

(Verified Petition, Exhibit A).

On April 30, 2019, Respondent sent Petitioners a response to the FOIL Request stating:

Your request has been assigned to Police Officer Conwell (646-610-6450) of this office. Before a determination can be rendered, further review is necessary to assess the potential applicability of exemptions set forth in FOIL, and whether the records can be located. I estimate that this review will be completed, and a determination issued within 90 business days of this letter.

This is not a denial of the records you requested. Should your request be denied in whole or in pan, you will then be advised in writing of the reason for any denial, and the name and address of the Records Access Appeals Officer.

(Verified Petition, Exhibit B).

On November 4, 2019, Respondent sent a letter to Petitioners stating that:

Responsive to your request, the following documents have been accessed and photocopied: complaint report, DD5's, aided report, photographs, and sprint report.

Redactions have been made to the document(s) in that release of such information would represent an unwarranted invasion of personal privacy 87(2)(b).

Redactions have been made to the document(s) in that release of such information would reveal non-routine investigative techniques 87(2)(e)(iv).

In regard to the 911 audio you requested, I must deny access to these records on the basis of Public Officers Law Section 87(2)(b) as such information, if disclosed would constitute an unwarranted invasion of personal privacy.

(Verified Petition, Exhibit C).

Respondent further stated that Petitioners had 30 days of the date of the letter to appeal Respondent's decision.

On November 11, 2019, Petitioners appealed Respondent's denial of the unredacted portions of Petitioners' FOIL Request. Thereafter, Sergeant Mazur contacted Petitioners' by email to determine what plaintiff is looking for. Petitioners responded that they are requesting unredacted records with witness information included and the 911 audio.

On November 25, 2019, Respondent sent a letter to Petitioners providing the 911 calls but redacting the calls and indicating that the NYPD was refusing to provide the unredacted documents as requested.

Legal Standard

“To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public (see, Public Officers Law § 84 [legislative declaration]).” *Gould v New York City Police Dept.*, 89 NY2d 267, 274 [1996]. “All government records are thus presumptively open for

public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2).” *Id.* at 274-275. “To ensure maximum access to government documents, the exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption.” *Id.* at 275 (citation omitted).

Public Officers Law § 87(2)(b) states, in pertinent part, “[e]ach agency shall ... make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article ...”

Agencies may deny a FOIL Request pursuant to POL § 87(2)(e), where “access to records that reveal criminal investigative techniques or procedures, except routine techniques and procedures”. *Fink v. Lefkowitz*, 47 N.Y.2d 567, 568 [1979]. “Indicative, but not necessarily dispositive, of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel.” *Id.* at 572

Pursuant to POL § 89(4)(c), a court may award reasonable attorney’s fees and litigation costs incurred where a party has “substantially prevailed” and when the agency “failed to respond to a request or appeal within the statutory time”; and the agency had no “reasonable basis” for denial. *See* POL § 89(4)(c). The Court of Appeals has stated, “[p]ursuant to FOIL’s fee-shifting provision, a court may award reasonable counsel fees and litigation costs to a party that ‘substantially prevailed’ in the proceeding if the court finds that (1) ‘the record involved was, in fact, of clearly significant interest to the general public,’ and (2) ‘the agency lacked a reasonable basis in law for withholding the record’ (Public Officers Law § 89 [4] [c]). Only after a court finds that the statutory prerequisites have been satisfied may it exercise its discretion to award or decline attorneys’ fees.” *Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 441 [2005].

Discussion

Here, Respondent has not submitted opposition and has failed to demonstrate how the requested documents fall in one of the enumerated exemptions of Public Officers Law § 87(2). “To ensure maximum access to government documents, the exemptions are to be narrowly construed, with the burden resting on the agency to

demonstrate that the requested material indeed qualifies for exemption.” *Gould*, 89 NY2d at 275 (citation omitted). Therefore, Respondent shall provide the unredacted documents requested in Petitioners’ FOIL Request.

Turning, to reasonable attorneys’ fees. Petitioners have substantially prevailed. Respondent has failed to provide a “reasonable basis” for denying Petitioners FOIL Request. However, Petitioner’s request for attorneys’ fees is denied without prejudice. Petitioner did not produce invoices, statements, or any documents demonstrating the amount of fees sought. The Court grants Petitioner the opportunity to make an application by motion for the reasonable attorneys’ fees incurred in the initial making of the motion with court costs within 30 days of the e-filed date of this order.

Wherefore it is hereby

ORDERED that the Petition is granted without opposition; and it is further

ORDERED that Respondent shall produce the unredacted documents requested in Petitioners’ April 29, 2019 FOIL Request within 20 days of service of this Decision and Order; and it is further

ORDERED that Petitioner’s request for attorneys’ fees is denied without prejudice. Petitioner did not produce invoices, statements, or any documents demonstrating the amount of fees sought. The Court grants Petitioner the opportunity to make an application by motion for the reasonable attorneys’ fees incurred in the initial making of the motion with court costs within 30 days of the e-filed date of this order.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: October 7, 2020

ENTER: 
J.S.C.
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION