

McCreery v New York City Dept. of Transp.

2024 NY Slip Op 31273(U)

April 11, 2024

Supreme Court, New York County

Docket Number: Index No. 154601/2020

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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DAVID MCCREERY,

Petitioner,

- v -

NEW YORK CITY DEPARTMENT OF TRANSPORTATION,
POLLY TROTTENBERG, IN HER OFFICIAL CAPACITY AS
COMMISSIONER OF THE NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, ANDREW
BURDESS, IN HIS OFFICIAL CAPACITY AS FOIL
APPEALS OFFICER OF THE NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, THE CITY OF
NEW YORK

Respondents.

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INDEX NO. 154601/2020

MOTION DATE 04/10/2024¹

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32- 47, 48

were read on this motion to/for ARTICLE 78.

The cross-motion to dismiss the instant petition, which seeks to annul the purportedly wrongful denial of petitioner’s Freedom of Information Law (“FOIL”) request is granted only as described below. However, petitioner is entitled to legal fees as respondents only turned over responsive records in response to this petition.

Background

Petitioner explains that he filed a FOIL request in September 2019 with respondents for “digital files containing illustrations of city landmarks prepared for the NYCDOT [respondent

¹ Although this proceeding was only reassigned to the undersigned this week, the Court is well aware that this proceeding has been pending for far too long. The Court apologizes, on behalf of the Court system, for the inexplicable delay in the resolution of this proceeding.

New York City Department of Transportation] for use in its WalkNYC city maps” (NYSCEF Doc. No. 1, ¶ 2). He claims that he received a denial letter from respondents in which they claimed that all responsive records were disclosed as part of a prior 2014 FOIL request. Specifically, respondents noted that “Please see our responses previously sent to you with respect to FOIL 2014-04475. We have no additional responsive records” (NYSCEF Doc. No. 25).

Petitioner appealed this initial denial and respondents adhered to their initial determination. They concluded that “Pursuant to your appeal, NYCDOT conducted an additional search and review of records. In consideration of that search and review, no responsive record was located. All responsive records have been provided. Accordingly, your appeal request is denied” (NYSCEF Doc. No. 27). Petitioner argues that records were improperly shielded from disclosure due to copyright issues but that is not a proper grounds to deny his FOIL request. He argues that respondents are not a competitor in any commercial marketplace.

Respondents cross-move to dismiss and observe that petitioner sought icons and illustrations used in the WalkNYC program, an initiative they describe as a “standardized pedestrian wayfinding system.” Respondents observe that they turned over documents to petitioner in response to his 2014 FOIL request. They claim, however, that he never appealed that determination and that he cannot do so now. Respondents insist any arguments about the 2014 FOIL request are time-barred.

However, respondents claim that they subsequently provided petitioner with “all updated icons and illustrations during the pendency of this proceeding.” Yet, respondents still argue that the Court should dismiss this petition.

In opposition to the cross-motion (which petitioner uploaded as an “answer”), he observes that respondents turned over responsive records as a result of the instant proceeding.

He questions how his claims could be time-barred under these circumstances. Petitioner also claims that he suspects respondents have additional records that are responsive that respondents are refusing to disclose.

In reply, respondents argue that they conducted a diligent search for responsive records and that no other responsive records exist. They add that petitioner did not articulate which files he believes are responsive to his latest request (the 2019 FOIL request) that he has not received. Respondents emphasize that there is substantial overlap between the records they previously provided to petitioner concerning his 2014 FOIL request and those records petitioner requested in 2019.

The Court did not consider petitioner's additional filing (also uploaded as an "answer") as it is a sur-reply filed without any apparent permission.

Discussion

"To promote open government and public accountability, FOIL imposes a broad duty on government agencies to make their records available to the public. The statute is based on the policy that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government. Consistent with the legislative declaration in Public Officers Law § 84, FOIL is liberally construed and its statutory exemptions narrowly interpreted. All records are presumptively available for public inspection and copying, unless the agency satisfies its burden of demonstrating that the material requested falls squarely within the ambit of one of the statutory exemptions. While FOIL exemptions are to be narrowly read, they must of course be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL" (*Abdur-*

Rashid v New York City Police Dept., 31 NY3d 217, 224-25, 76 NYS3d 460 [2018] [internal quotations and citation omitted]).

The Court observes that this proceeding is now moot given that respondents contend that they turned over documents and have certified that they possess no other responsive documents (*Rattley v New York City Police Dept.*, 96 NY2d 873, NYS2d 768 [2001] [noting that an agency satisfies its obligation by certifying that it has disclosed all responsive documents]). That petitioner suspects respondents may have other documents is not a basis to require respondents to turn over documents that they do not possess. As respondents observed, they interpreted the FOIL request as best they could in order to provide petitioner with the information he was seeking.

Petitioner did not adequately articulate which exact files he claims that respondents possess that they did not turn over. His insistence that that there were two color schemes that were not turned over to him is not a basis to order respondents to disclose additional documents as respondents contend that these color schemes do not exist.

The question remaining in this proceeding concerns legal fees. There is no doubt that although respondents claim that petitioner's request is time-barred as it was a duplicate of a 2014 FOIL request, that is not exactly accurate; respondents had updated records and decided to turn them over in September 2020 (after this proceeding was commenced). That means, in this Court's view, that petitioner substantially prevailed and is entitled to recover legal fees (*NYP Holdings, Inc.* 220 AD3d 487, 489, 198 NYS3d 7 [1st Dept 2023] [[awarding legal fees in a FOIL proceeding]). The fact is that respondents took contradictory positions in this dispute. They initially denied petitioner's request on the ground that they had already responded to his 2014 FOIL request and no other responsive records existed (*see* NYSCEF Doc. Nos. 25, 27).

And yet they turned over records that they characterize as updated illustrations. Specifically, respondents allege that “Moreover, in a continuing reasonable effort to ensure that Petitioner has the most comprehensive and updated illustrations and icons, DOT transmitted additional WalkNYC records to Petitioner on September 11, 2020” (NYSCEF Doc. No. 9 at 2). Obviously, if there were responsive records to turn over, then they should not have denied petitioner’s most recent request. And turning over responsive records suggests that the requests were not entirely duplicative, which means that this Court is unable to find that the petitioner’s 2019 FOIL request is an attempt to evade the statute of limitations applicable to petitioner’s 2014 FOIL request.

Petitioner should not have had to commence a proceeding in order to get these “updated records.” Therefore, petitioner is entitled to reasonable legal fees as he received records only after bringing the instant proceeding. He shall make a separate motion for such fees on or before April 30, 2024.


The Court also observes that there is no need to permit respondents to answer as the facts in this dispute are fully presented (*Nassau BOCES Cent. Council of Teachers by Dreaper on Behalf of Adult Educ. Instructors v Bd. of Co-op. Educ. Services of Nassau County*, 63 NY2d 100, 102, 480 NYS2d 190 [1984]).

Accordingly, it is hereby

ORDERED that the cross-motion by respondents is granted only to the extent that the instant FOIL request is now moot; and

ADJUDGED that the petition is denied (without costs or disbursements to any party) as moot only with respect to the FOIL request and the issue of reasonable legal fees is severed; and it is further

ORDERED that petitioner shall make a separate motion for such fees on or before April 30, 2024.

<u>4/11/2024</u> DATE	 ARLENE P. BLUTH, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE