

<b>Matter of Cobb v Forbes</b>
2025 NY Slip Op 35253(U)
December 22, 2025
Supreme Court, Kings County
Docket Number: Index No. 521549/2023
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22<sup>nd</sup> day of December 2025

HONORABLE FRANCOIS A. RIVERA

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In the Matter of the Application of

MICHAEL COBB a/k/a SEAN ELLERBY,

Petitioner,

- against -

For a Judgment under Article 78 of the Civil Practice Law and Rules

GEORGE FORBES, FOIL Appeals Officer for the: Kings County District Attorney’s Office, and the KINGS COUNTY DISTRICT ATTORNEY’S OFFICE,

Respondents.

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**DECISION AND ORDER**

Index No.: 521549/2023

In Camera Review: 9/15/2025

Ms. Seq. No.: 1

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of petition filed on July 26, 2023, under motion sequence number one, by petitioner Michael Cobb a/k/a Sean Ellerby for an order pursuant to CPLR article 78 and the Freedom of Information Law (FOIL) (Public Officers Law Article (1) directing the respondent Kings County District Attorney’s Office (KCDA) to produce all documents and records relating to the arrest, investigation and prosecution of petitioner in the case of *People v Michael Cobb a/k/a Sean Ellerby*, Supreme Court, Kings County, Indictment Number 10070/91, and (2) awarding petitioner’s counsel his legal fees and expenses incurred in making the instant petition for relief. The petition is opposed.

- Notice of petition
- Verified petition
  - Exhibits A-P
- Affirmation in opposition
- Memorandum of law in opposition
  - Exhibits A-H
- Affirmation in reply
- Supplemental affirmation in support
- Supplemental affirmation in opposition

## BACKGROUND

### *Short Form Order Dated January 11, 2024*

In a short form order dated January 11, 2024, the Court adjourned the Article 78 petition to March 13, 2024 with directions for the petitioner to file an affirmation/affidavit outlining the specifics of his FOIL request, response received, appeal issues and results, and what issues remain by January 25, 2024. The Court directed respondent to file a responsive affirmation/affidavit by February 16, 2024.

### *Decision and Order Dated April 2, 2024*

In its decision and order dated April 2, 2024, following oral argument on the record held on March 14, 2024, the Court directed that KCDA shall provide, by April 16, 2024, a response to each item that the petitioner listed in his supplemental affirmation dated January 24, 2025 as having not been provided to petitioner to date. The response for each of these items shall either be providing that document to petitioner or providing the Court with the explanation or specific statutory basis for that item not being provided. The matter was scheduled for a conference on May 16, 2024.

### *Decision and Order Dated August 23, 2024*

In its decision and order dated August 23, 2024, the Court substantively addressed the petition and ordered as follows. “[T]he petition is granted only to the extent that: (1) the KCDA is directed to submit to the court the attorney notes claimed to fall with the intra-agency exemption and unredacted copies of the redacted records and any documentation supporting the privacy exemptions relied upon for the redactions for an in camera review on or before October 31, 2024; (2) in the event that the KCDA has not already done so, the KCDA must conduct a diligent

search of its records, and produce the records to the extent they are not subject to exemptions already before the court, or supply petitioner with a proper certification that such records cannot be located on or before October 31, 2024; and (3) the unredacted records and any applicable certifications, must be delivered to Chambers on or before October 31, 2024, no later than 3:30 p.m., to the 11<sup>th</sup> Floor, at Kings County Supreme Court – Civil Term, located at 360 Adams Street, Brooklyn, New York, with a coversheet to the attention of Justice Francois A. Rivera, indicating the index number, and the words, ‘For the Judge’s Eyes Only.’”

***Decision and Order Dated March 18, 2025***

By decision and order dated March 18, 2025, the Court directed KCDA to upload the certification it submitted to the Court in October 2024 to NYSCEF no later than March 28, 2025.

The Court directed KCDA to appear in-person, in Part 52, on April 29, 2025 at 2:15 p.m.. under the cloak of an in camera review for the Court to obtain further information about its redactions. The Court directed KCDA to be prepared to address specific privacy interests and to provide proof relevant to witness confidentiality and/or safety concerns with respect to the redactions made, if it maintains that the exemptions apply. KCDA was to be prepared to clarify redactions with respect to the Court’s concerns, especially with respect to the ambiguities and inconsistencies described in the decision and order. Additionally, on the return date KCDA was directed to either deliver to the Court a supplemental certification pertaining to item 20.05 or the records pertaining to item 20.05 for in camera inspection. KCDA was to submit to the Court unredacted versions of the redacted pages it submitted for in camera inspection as explained above. Furthermore, KCDA was directed to submit to the Court legible versions of the illegible pages it submitted for in camera inspection as explained in the order.

With respect to the handwritten attorney notes provided to the Court for in camera review

and contained in the file as “inter-agency or intra-agency materials” under Public Officers Law § 87 (2) (g), the Court found that the exemption applies and these documents were properly withheld.

***Interim Order Dated May 6, 2025***

The Court adjourned the April 29, 2025 appearance to June 4, 2025 at 2:30 p.m.

***In Camera Review on June 4, 2025***

An in camera review in the above-captioned matter was held on June 4, 2025. Petitioner was initially present to address newly discovered documents, but was excused for the purpose of the scheduled in camera inspection. The Court continued its in camera review, under seal. Following this appearance, the Court issued a decision and order, dated June 9, 2025.

***Decision and Order Dated June 9, 2025***

By decision and order dated June 9, 2025, KCDA was permitted to provide a superseding submission of unredacted and semi-redacted records it had previously provided to correct any errors in redactions and any applicable and updated certifications for in-camera inspection. KCDA was directed to provide an updated certification which addresses newly discovered evidence and item 20.5 as discussed during the in camera review.

KCDA was also directed to clearly explain in its submission of semi and unredacted records the rationale and exemptions for each redaction in the format discussed during the in camera review. In its submission, KCDA was directed to reference the Court’s decision and order dated March 18, 2025 and its decision and order dated August 23, 2024 to ensure that the Court’s concerns are sufficiently addressed. KCDA was directed to provide semi and unredacted versions of the documents that had been previously redacted and legible copies of the documents the Court

deemed illegible. It was also directed to provide the Court with the semi and unredacted newly discovered documents and clearly delineate what was provided to the petitioner, what was not provided to the petitioner, and the clear rationale/exemption for each omitted document or redaction. The submission was directed to be delivered to Chambers on or before August 15, 2025, no later than 3:30 pm, to the 11<sup>th</sup> Floor, at Kings County Supreme Court – Civil Term, located at 360 Adams Street, Brooklyn, New York with a coversheet addressed to the attention of Justice Francois A. Rivera, indicating the index number, and the words, “For the Judge’s Eyes Only.”

In its order the Court clarified that the issue as to whether the newly discovered documents would be subsumed within the underlying FOIL determination or whether they would be subjected to a separate FOIL determination was not being addressed at this juncture.

***Interim Order Dated August 8, 2025***

The Court granted an extension of KCDA’s submission to September 15, 2025.

***In Camera Submission, September 15, 2025***

The instant decision and order addresses KCDA’s in camera submission on September 15, 2025. The Court acknowledges timely receipt of KCDA’s submission on September 15, 2025.

The submission consisted of a compact disc. The compact disc contains six folders labeled 1) Certification, 2) Corrected Publication, 3) Documents Previously Redacted, 4) Illegible Documents, 5) New Documents, and 6) Witness Relocation.

The folder labeled “Certification” consists of KCDA’s certification in accordance with the Public Officers Law § 89 (3). It certifies that after a diligent search, no records responsive to items of 20.13 and 20.18 of the petitioner’s January 24, 2024 supplemental affirmation were located within the relevant files of the KCDA. Further, no additional records or information were located that were “actually or arguably responsive to items 20.1, 20.2, 20.3, 20.4, 20.5, 20.6, 20.7, 2.8

[sic], 20.9, 20.10, 20.11, 20.12, 20.14, 20.15, 20.16, 20.17, 20.19, 20.20, 20.21, 20.22, 20.23, 20.24, 20.25, and 20.26” of the petitioner’s supplemental affirmation.

The folder labeled “Corrected Publication” consists of three PDF documents. The first file is KCDA’s cover letter regarding the corrected publication, which is four pages. The second file is labeled “Corrected Semi-Redacted case file – Cobb” and is 1099 pages. The third file is labeled “Unredacted case file – Cobb” and is 1099 pages.

The folder labeled “Documents Previously Redacted” consists of six PDF documents. The first is a cover letter from KCDA regarding the documents previously redacted, which is two pages. The second is labeled “Page 711”. The third is labeled “Page 753-770”. The fourth is labeled “Page 776”. The fifth is labeled “Page 778”. The sixth is labeled “Page 857”.

The folder labeled “Illegible Documents” consists of sixteen PDF documents. The first is a cover letter from KCDA regarding the illegible documents, which is two pages. The second is labeled “Page 107-124”. The third is labeled “Page 142-145”. The fourth is labeled “Page 236”. The fifth is labeled “Page 238”. The sixth is labeled “Page 241”. The seventh is labeled “Page 263”. The eighth is labeled “Page 384”. The ninth is labeled “Page 385”. The tenth is labeled “Page 406”. The eleventh is labeled “Page 439”. The twelfth is labeled “Page 470”. The thirteenth is labeled “Page 482”. The fourteenth is labeled “Page 564-568”. The fifteenth is labeled “Page 638”. The sixteenth is labeled “640”.

The folder labeled “New Documents” consists of two PDF documents and one folder. The first document is a cover letter from KCDA regarding the new documents, which is four pages. The second document is labeled “New Documents Proposed Redactions” and consists of 370 pages. The folder is labeled “New Documents by Category” and consists of three folders labeled “Not Purchased”, “Purchaed [sic]”, and “Withheld.” The “Not Purchased” folder contains three

PDF documents labeled 1) “Duplicate files from Newly Discovered Production” and is three pages, 2) “Duplicates Containing Non-Substantive Differences” and is nine pages, and 3) “Duplicates of Already Produced Documents to Counsel or Prior Requests” and consists of 141 pages.

The folder labeled “Witness Relocation” consists of three PDF documents. The first is a cover letter from KCDA regarding witness relocation. The second is labeled “Relocation Records Previously Provided” and consists of 34 pages. The third is labeled “Witness Relocation and Custody Records Withheld” and consists of 65 pages.

## LAW AND APPLICATION

“Under FOIL, government records are ‘presumptively open’ for public inspection and copying, unless they fall within an enumerated statutory exemption of Public Officers Law § 87(2)” (*Matter of Villalobos v New York City Fire Dept.*, 130 AD3d 935, 936 [2d Dept 2015], citing *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274 [2005]). “The exemptions are to be ‘narrowly construed’ so as to ensure maximum public access” (*Matter of Villalobos v New York City Fire Dept.*, 130 AD3d 935, 936 [2d Dept 2015], citing *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [2005]). The “burden rests on the agency to demonstrate that the requested material in fact qualifies for exemption” (*Matter of Villalobos v New York City Fire Dept.*, 130 AD3d 935, 936 [2d Dept 2015]). “To meet that burden, the agency must ‘articulate particularized and specific justification’ for the nondisclosure at issue” (*id.*, citing *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]).

### *Certification*

The Court credits the certification indicating that after a diligent search records responsive

to items 20.13 and 20.18, as well as to items 20.1, 20.2, 20.3, 20.4, 20.6, 20.7, 2.8<sup>1</sup>, 20.9, 20.10, 20.11, 20.12, 20.14, 20.15, 20.16, 20.17, 20.19, 20.20, 20.21, 20.22, 20.23, 20.4, 20.25, and 20.26 were not located (*see Matter of Lost Lake Holdings LLC v Hogue*, 231 AD3d 1406, 1408-1409 [3d Dept 2024]).

### ***Corrected Publication***

The KCDA provided a superseding submission of redacted and unredacted records in order to remove the inconsistencies noted by the Court in its March 18, 2025 order. KCDA's cover letter indicates that KCDA corrected the numerous errors in its prior submission and that the proposed redactions are both consistent and in compliance with the KCDA's redaction policies.

With respect to the redactions itemized in its cover letter, KCDA proposes redactions of information of a personal nature (addresses, telephone numbers, social security numbers and/or similar identifying information) regarding complainants and/or witnesses pursuant to Public Officers Law §§ 87 (2) (b), (e), (f), and 89 (2). The Court credits these redactions (*see Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 438-439 [2014]; *see Matter of De Oliveira v Wagner*, 274 AD2d 904 [3d Dept 2000]; *see Matter of Stronza v Hoke*, 148 AD2d 900, 901 [3d Dept 1989]; *see Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 348 [1st Dept 1999]).

KCDA proposes withholding page 514 in its entirety citing to Family Court Act § 166, Family Court Act § 381.3, and Public Officers Law § 87 [2] [a]). However, upon review, the Court does not see how the fax cover sheet found under this page number falls under the exemption cited. Perhaps the page number cited was improperly cited. Alternatively, KCDA did not provide enough detail to explain why this page should be redacted. As such the Court finds that KCDA did

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<sup>1</sup> Although the certification indicates reference to item 2.8, the Court understands this to apply to item 20.8.

not meet its burden for withholding the page under the exemption cited.

Otherwise, based upon the Court's in camera inspection of the unredacted documents, the Court is of the view that petitioner was provided with all information not specifically exempted under FOIL (*see Matter of De Oliveira v Wagner*, 274 AD2d 904, 905 [3d Dept 2000]).

### ***Documents Previously Redacted***

The Court directed KCDA to submit to the Court unredacted versions of pages 711, 753-770, 776, 778, and 857 for in camera review. On June 4, 2025 during in camera inspection, KCDA explained to the Court that the redactions to those documents were not made by the KCDA's Freedom of Information Law (FOIL) Unit while responding to the petitioner's request but rather they were hand redactions by the ADA assigned to prosecute the petitioner's criminal case, in fulfillment of the KCDA's Discovery obligations as they existed at the time of the petitioner's trial.

KCDA's cover letter indicates that the KCDA has located unredacted copies of the above-referenced records and provided them for the Court to review.

With respect to pages 711, 778, and 857, KCDA proposed certain redactions of a personal nature (addresses, telephone numbers, social security numbers and/or similar identifying information) regarding complainants and/or witnesses pursuant to Public Officers Law §§ 87 (2) (b), (e), (f), and 89 (2). The Court credits these redactions (*see Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 438-439 [2014]; *see Matter of De Oliveira v Wagner*, 274 AD2d 904 [3d Dept 2000]; *see Matter of Stronza v Hoke*, 148 AD2d 900, 901 [3d Dept 1989]; *see Matter of Johnson v New York City Police Dept*, 257 AD2d 343, 348 [1st Dept 1999]).

With respect to pages 753-770 and 776, KCDA indicated that although the redactions were

consistent with contemporary discovery practice at the time of petitioner's prosecution more than three decades ago, there would be no basis, under FOIL, to redact the names on those pages as the law exists today. The Court therefore directs release of these records unredacted to the petitioner.

### ***Illegible Documents***

The Court directed KCDA to submit unredacted and legible versions of pages 107-124, 142-145, 236, 238, 241, 263, 384, 385, 406, 439, 470, 482, 564-568, 638, and 640.

With respect to pages 107-124, 142-145, 236, 238, 241, 263, 384, 385, 406, 439, 470, 482, 638, and 640, KCDA proposed certain redactions of a personal nature (addresses, telephone numbers, social security numbers and/or similar identifying information) regarding complainants and/or witnesses pursuant to Public Officers Law §§ 87 (2) (b), (e), (f), and 89 (2). The Court credits these redactions (*see Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 438-439 [2014]; *see Matter of De Oliveira v Wagner*, 274 AD2d 904 [3d Dept 2000]; *see Matter of Stronza v Hoke*, 148 AD2d 900, 901 [3d Dept 1989]; *see Matter of Johnson v New York City Police Dept*, 257 AD2d 343, 348 [1st Dept 1999]).

With respect to pages 564-568, KCDA proposes to withhold these pages in their entirety because these pages constitute portions of New York Criminal History Reports of different persons. These records are provided to the District Attorney's Office by the Division of Criminal Justice Services (DCJS) and are available only to "qualified agencies." (*see Executive Law § 837 [8]*) and are exempt from disclosure (*see Public Officers Law § 87 [2] [a]*; 9 NYCRR § 6150.4 [b] [6]; *see Matter of Gerace v Mandel*, 267 AD2d 386, 386 [2d Dept 1999]; *see Matter of Woods v Kings County Dist. Attorney's Off.*, 234 AD2d 554, 555 [2d Dept 1996]; *see Bennett v Girgenti*, 226 AD2d 792, 792 [3d Dept 1996]). The Court permits withholding these pages.

### *New Documents*

In its decision and order dated June 9, 2025, the Court clarified that the issue as to whether the newly discovered documents would be subsumed within the underlying FOIL determination or whether they would be subjected to a separate FOIL determination was not being addressed at this juncture. In its submission to the Court, the KCDA has provided the Court with a supplemental production of records, of newly discovered documents. The Court declines to incorporate any supplemental production into the instant Article 78 proceeding.

### *Witness Relocation*

In its decision and order dated March 18, 2025, the Court directed KCDA to either deliver to the Court a supplemental certification pertaining to item 20.05, witness relocation information or the records pertaining to item 20.05 for in camera inspection. The KCDA provided this information for in camera inspection.

The Court is satisfied the Court's concerns regarding records and/or information pertaining to witness relocation have been sufficiently addressed by KCDA (*see* Public Officers Law § 87 [2] [f]; *see Matter of Stonza v Hoke*, 148 AD2d 900, 900 [3d Dept 1989]; *see Matter of Nalo v Sullivan*, 125 AD2d 311, 312 [2d Dept 1986]).

### *Attorney Fees*

“The Public Officers Law authorizes an award of attorneys’ fees where the petitioner has substantially prevailed in the FOIL proceeding and the agency either lacked a reasonable basis for denying access to the requested records or failed to respond to a request or appeal within the statutory time” (*Lost Lake Holdings LLC v Hogue*, 231 AD3d 1406, 1412 [3d Dept 2024], quoting *Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 78 [2017]). “A petitioner has

‘substantially prevailed’ within the meaning of Public Officers Law § 89(4)(c) when the commencement of the CPLR article 78 proceeding ultimately succeeds in obtaining the records responsive to the FOIL request, whether by court order or by voluntary disclosure” (*Sethi v Town of Hempstead*, 233 AD3d 787, 788 [2d Dept 2024], quoting *Matter of Madeiros v. New York State Educ. Dept.*, 30 NY3d 67, 79 [2017]). However, the Court may determine that the petitioner did not “substantially prevail” in a proceeding warranting an award of attorney’s fees and litigation costs “where the petition was, for the most part, properly denied” (*see Lepper v Village of Babylon*, 230 AD3d 582, 583-584 [2d Dept 2024], citing *Tuckahoe Common School District v Town of Southampton*, 179 AD3d 929, 931 [2d Dept 2020]).

Here, the Court finds that the petitioner has substantially prevailed over the course of the FOIL proceedings. The commencement of the instant CPLR article 78 proceeding resulted in obtaining additional records that were not previously disclosed to the petitioner.

Petitioner is to submit an affirmation of attorney fees itemizing its activity on or by January 22, 2026, with any opposition to be filed on or by January 29, 2026. The return date will be February 5, 2026.

## CONCLUSION


The branch of the petition by petitioner Michael Cobb a/k/a Sean Ellerby for an order pursuant to CPLR article 78 and the Freedom of Information Law (FOIL) (Public Officers Law Article (1) directing the respondent Kings County District Attorney’s Office (KCDA) to produce all documents and records relating to the arrest, investigation and prosecution of petitioner in the case of *People v Michael Cobb a/k/a Sean Ellerby*, Supreme Court, Kings County, Indictment Number 10070/91 is granted to the extent.

The branch of the petition by petitioner Michael Cobb a/k/a Sean Ellerby for an order

pursuant to CPLR article 78 and the Freedom of Information Law (FOIL) directing the respondent Kings County District Attorney's Office (KCDA) to award petitioner's counsel his legal fees and expenses incurred in making the instant petition for relief is granted to the extent that petitioner's counsel is to submit an affirmation of attorney fees itemizing its activity on or by January 22, 2026, with any opposition to be filed on or by January 29, 2026. The return date will be February 5, 2026.

The foregoing constitutes the decision and order of this Court.

ENTER:



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J.S.C.