

**New York Civ. Liberties Union v City of Saratoga
Springs**

2010 NY Slip Op 34045(U)

November 17, 2010

Supreme Court, Saratoga County

Docket Number: 2009-4158

Judge: Thomas D. Nolan

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This opinion is uncorrected and not selected for official publication.



STATE OF NEW YORK

SUPREME COURT

COUNTY OF SARATOGA

THE NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-against-

DECISION AND ORDER

RJI No. 45-1-2009-1687

Index No. 2009-4158

THE CITY OF SARATOGA SPRINGS and
THE SARATOGA SPRINGS POLICE DEPARTMENT,

Respondents,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

2010 DEC 20 PM 2:13
SARATOGA COUNTY
CLERK'S OFFICE
BALLESTON SPA, NY

FILED

PRESENT: HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

APPEARANCES: NEW YORK CIVIL LIBERTIES UNION FOUNDATION
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The final unresolved issue in this CPLR Article 78 proceeding is whether petitioner should be awarded attorney's fees and costs.

Briefly the background. In April 2009, petitioner served upon respondent a Freedom of Information Law (FOIL) request seeking certain records pertaining to the use by the City's police

department of conducted energy devices a/k/a “stun guns” or “tasers”. In July 2009, well beyond the time within which they were required to do so, respondents denied the request. In October 2009, petitioner commenced this CPLR Article 78 proceeding. Respondents did not answer the petition; rather they indicated that they intended to reconsider the denial. Several conferences by telephone and in person were then held between the parties’ counsel and the court. In March 2010, respondent produced to petitioner all the records requested except one which the City produced but redacted in three places. The parties stipulated that the court decide whether the City’s redactions were appropriate or not. Based upon written submissions and an in camera review, the court decided that petitioner be provided with an unredacted copy of that record. Respondents complied with the court’s order and consequently petitioner was provided with all the records it sought.

Petitioner now seeks to recover attorney’s fees and litigation costs of \$10,059.80. Public Officers Law § 89 (4) (c), as amended in 2006, provides:

The court in such a [FOIL] proceeding may assess, against such agency involved, reasonable attorney’s fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, when: (i) the agency had no reasonable basis for denying access; or (ii) the agency failed to respond to a request or appeal within the statutory time.

Prior to § 89 (4) (c)’s amendment, attorney’s fees and costs could be awarded in the court’s discretion when (1) petitioner “substantially prevailed” (2) the record(s) requested were of “clearly significant interest to the general public; and (3) “the agency lacked a reasonable basis in law for withholding the record”. Matter of Powhida v City of Albany, 147 AD2d 236, 238 (3rd Dept 1989).

Section 89 (4) (c) as amended eliminated the general public interest requirement and added as a ground for the award of attorney's fees, the government agency's delay in timely responding to the FOIL request or appeal. Matter of Maddux v New York State Police, 64 AD3d 1069 (3rd Dept 2009). Awards under § 89 (4) (c) however still fall within the court's discretion even when all of the statutory prerequisites are established. Matter of Carnevale v City of Albany, 68 AD3d 1290 (3rd Dept 2009).

Petitioner is correct that respondents failed to respond to petitioner's FOIL request within the time periods specified in Public Officers Law § 89 (3) (a). But, after this proceeding was commenced, respondents, rather than litigating the matter, attempted with the court's involvement to reach an acceptable resolution. Petitioner agreed to this procedure and participated in an informal approach to achieve a mutually satisfactory outcome. The approach worked and respondents voluntarily produced all the records petitioner sought, leaving only one limited issue for the court.

Petitioner substantially prevailed in this proceeding, and respondents implicitly conceded that they had no reasonable basis for initially denying access to the records requested. Also, respondent failed to comply with the statutory time periods to respond to the FOIL request. Thus, the court may award under § 89 (4) (c) attorney's fees and litigation costs to petitioner. see Matter of Purcell v Jefferson County District Attorney, __AD3d__, 2010 WL 3817361 (4th Dept, Oct. 1, 2010). Yet, under the facts presented, particularly the essentially informal and voluntary adopted approach to resolving most of the controversy, the court, as an exercise of its discretion, declines to do so.

Petitioner's motion is denied, without costs.

This constitutes the decision order of the court. The original decision and order is returned to the counsel for respondents. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for respondents is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry, and notice of entry of the decision and order.

So Ordered.

Thomas D. Nolan, Jr.

HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

DATED: November 17, 2010
Ballston Spa, New York

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SARATOGA COUNTY
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ENTERED

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Kathleen A. Marchione
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Saratoga County Clerk