

Mintz & Gold LLP v New York City Taxi & Limousine Commn.
2014 NY Slip Op 31821(U)
July 9, 2014
Supreme Court, New York County
Docket Number: 101306/2013
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN

Justice

PART 21

MINTZ & GOLD LLP,

Petitioner,

- against -

INDEX NO. 101306/13

MOTION DATE 5/8/2014

MOTION SEQ. NO. 001

THE NEW YORK CITY TAXI & LIMOUSINE
COMMISSION, a charter-mandated agency, and MEERA
JOSHI, in her capacity as TLC Deputy Commissioner of
Legal Affairs/General Counsel,

Respondents.

The following papers, numbered 1 to 6 were read on this Article 78 petition

Order to Show Cause—Verified Petition — Exhibits 1-17

No(s). 1-2

Notice of cross motion—Affirmation in Support of cross motion — Exhibits A-
C; Affidavit of Meera Joshi — Exhibits 1-13

No(s). 3-4; 5

Affirmation of Steven Mintz — Exhibit A

No(s). 6

Verified Answer — Exhibits A-T

No(s). 7

Second Affirmation of Steven Mintz — Exhibits 1-14

No(s). 8

Upon the foregoing papers, this petition is decided in accordance with
the annexed decision, order and judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

HON. MICHAEL D. STALLMAN

Dated: 7/9/14
New York, New York

[Signature], J.S.C.

1. Check one:.....
2. Check if appropriate:.....PETITION IS:
3. Check if appropriate:.....

X CASE DISPOSED ☐ NON-FINAL DISPOSITION
☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
MINTZ & GOLD LLP,

Petitioner,

Index No. 101306/2013

- against -

THE NEW YORK CITY TAXI & LIMOUSINE
COMMISSION, a charter-mandated agency, and
MEERA JOSHI, in her capacity as TLC Deputy
Commissioner of Legal Affairs/General Counsel,

**Decision, Order and
Judgment**

Respondents.
-----X

HON. MICHAEL D. STALLMAN, J.:

In this Article 78 proceeding, petitioner seeks to compel respondent New York City Taxi & Limousine Commission (TLC) to respond to petitioner's Freedom of Information Law (FOIL) request. Petitioner seeks an order (1) directing the TLC to produce for inspection copies of all records requested in petitioner's October 23, 2012 FOIL request; and (2) awarding petitioner reasonable attorney's fees and litigation costs pursuant to Public Officers Law § 89 (4) (c).

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

BACKGROUND

Petitioner seeks to compel respondent TLC to respond to petitioner's FOIL request dated October 23, 2012. In the request, petitioner asked for copies of the following:

“1. Any and all records concerning the decision by the [TLC] in or around 2007 to permit yellow taxi medallion owners to retain 5% of each taxi fare paid by credit card as reimbursement for their associated costs and expenses, including without limitation, the rule or regulation promulgated by TLC, TLC notices issued in connection with the new rule, hearing minutes, hearing transcripts and any other documents or information received, reviewed and/or considered by TLC in making its determination (whether in favor of or in opposition to the proposal).

2. Any and all records concerning the decision by TLC in July 2012 to raise the fleet lease caps so that yellow taxi drivers will reimburse medallion owners for credit card processing fees in the form of a lease cap increase instead of a 5% withholding on credit card transactions, including without limitation, the rule or regulation promulgated by TLC, TLC notices issued in connection with the new rule, hearing minutes, hearing transcripts and any other documents or information received, reviewed and/or considered by TLC in making its determination (whether in favor of or in opposition to the proposal).

3. Any and all records concerning the decision by TLC in July 2012 to have yellow taxi medallion owners withhold from drivers 6 cents per ride for the purpose of providing healthcare services and disability coverage for drivers, including without limitation, the rule or regulation promulgated by TLC, TLC notices issued in connection with the new rule, hearing minutes, hearing transcripts and any other documents or information received, reviewed and/or considered by TLC in making its determination (whether in favor of or in opposition to the proposal). Please also provide any and all records concerning the nature of the health and disability plan to be funded, the entity or entities that will administer the fund, the benefits to be

provided, the real cost of the plan and/or the funding sources (other than the drivers' contribution).

4. Any and all records concerning executive sessions that were held by TLC in 2012 in connection with TLC's determination to raise the fleet lease caps so that drivers will reimburse medallion owners for credit card processing fees in the form of a lease cap increase instead of a 5% withholding of credit card transactions.

5. Any and all records from January 2008 through the present concerning the number of yellow taxi passengers who pay their fare using a credit or debit card, and records to show whether the number of yellow taxi fares paid by credit or debit card has increased or decreased since credit card usage began, including without limitation, any studies or information gathered to evidence the increase (or decrease) in credit card usage by yellow taxi passengers since 2008.

6. Any and all records concerning the decision by TLC (and/or its Chairman) in July 2012 to change the exterior markings of yellow taxicabs, including without limitation, the decision to remove the rate of fare decal and the word "Taxi" from the exterior of yellow taxicabs. Please also provide any and all records concerning the authority of the TLC Chairman to make such a change to the exterior markings, and any notices, rules or regulations issued by TLC in connection with this decision, as well as any hearing transcripts, hearing minutes, and any other documents or information TLC (or its Chairman) received, reviewed, and/or considered in making its determination.

7. Any and all records concerning the decision by TLC in July 2012 to grant no portion of the (approximately) 17% fare increase to the fleet owners in the form of an increase in the Lease Cap, including but not limited to any hearing transcripts, hearing minutes, studies, financial information other documents or information TLC (or its Chairman) received, reviewed and/or considered in making its determination."

(Petition Ex. 1.)

[*5]

By letter dated January 31, 2013, after a delay due to Hurricane Sandy (*see* Petition Ex. 4), the TLC responded to petitioner's request with some responsive documents. (Petition Ex. 6.) The letter stated in part,

"In order to ensure that the TLC completes a thorough search I am still gathering potentially responsive documents. Additional documents will be sent to you as they become available. In the meantime, I have enclosed responsive documents to your request.

With respect to item 1, your request has been granted and the responsive documents are enclosed.

With respect to item 2, your request has been granted and the responsive documents are enclosed.

With respect to item 3, your request has been granted and the responsive documents are enclosed. Please note that although TLC rules relating to the healthcare service plan have passed, an RFP has not yet been announced. Therefore, the TLC does not possess a record of responsive documents relating to the funding or administration of the fund.

With respect to item 4, the TLC does not possess a record of an executive session you referenced in your request.

With respect to item 5, your request has been granted and the record you requested is enclosed.

With respect to item 6, your request has been granted and the documents you requested are enclosed.

With respect to item 7, your request has been granted and the documents you requested are enclosed."

(*Id.*)

[* 6]

By letter dated March 1, 2013, the TLC responded to petitioner's request producing additional responsive documents. (Petition Ex. 8.) The letter stated in part,

"Enclosed are two additional documents that are responsive to your request. The first item consists of an internal memo which has been disclosed in part. Portions of the document have been redacted pursuant to 87(2)(g) of the New York State Public Officers Law (POL) since those portions are inter-agency communications exempt from disclosure through FOIL. The second item consists of public comments that were received by the [TLC] in response to the fare and lease cap rule proposals. Portions of this document, specifically personal e-mail addresses, as well as personal home addresses have been redacted pursuant to 87(2)(b) of the POL. The disclosure of those items would constitute an unwarranted invasion of personal privacy."

(*Id.*)

By letter dated March 28, 2013, petitioner included a non-exhaustive list of items that allegedly had not been produced by the TLC and appealed the purported effective denial of the FOIL request. (Petition Ex. 10.) The letter stated in part,

"Although we have received some documents responsive to our request, we know that more responsive, easily accessible documents exist but have not been produced, since these missing documents were specifically referred to in documents that were produced to us.

By way of example, the following documents represent a non-exhaustive list of items that have not been produced to us despite being expressly referenced in documents we received on January 31, 2013 and/or March 1, 2013:

(1) the May 31, 2012 lease cap hearing transcript (referenced in several documents);

(2) the April 30, 2010 petition to raise the fare and lease cap submitted by the Metropolitan Taxicab Board of Trade; the October 26, 2010 letter from the Committee for Taxi Safety requesting that the TLC review and raise industry lease caps; and the May 4, 2011 New York Taxi Workers Alliance Proposal requesting an increase of both the rate of fare and lease caps (referenced on pages 5-6 of the June 21, 2012 internal TLC memo);

(3) TLC's own estimate of fleet profits, and the additional data on revenue and cost items provided by industry representatives used to prepare those figures (referenced on page 14 of the July 9, 2012 TLC Fare and Lease Cap Public Hearing transcript); and

(4) the Draft Environmental Impact Statement (EIS) prepared by the TLC on or about May 31, 2012, estimating a rate of return of 3.2% for independent medallions (referenced on page 54 of the public comments that were received by the TLC in response to the fare and lease cap rules proposals).

The glaring omission of documents that were specifically referenced in TLC public transcripts and memoranda demonstrates the deficiency in the search for responsive documents. Since we have not received these additional responsive and easily accessible documents in a timely manner, we consider the request to have been denied, and are respectfully appealing the denial of these records."

(Id.)

By letter dated April 8, 2013, the TLC construed petitioner's March 28, 2013 letter as a new FOIL request and enclosed the additional documents petitioner requested with its letter. (Petition Ex. 11.) The letter stated in part,

"With respect to your current appeal, you requested the following documents: (1) the May 31, 2012 lease cap hearing transcript; (2) the April 30, 2010 petition to raise the fare and lease cap submitted by the

Metropolitan Taxicab Board of Trade; (3) the October 26, 2010 letter from the Committee for Taxi Safety requesting that the TLC review and raise industry lease caps; (4) the May 4, 2011 New York Taxi Workers Alliance proposal requesting an increase of both the rate of fare and lease caps; (5) TLC's own estimate of fleet profits, and the additional data on revenue and cost items; [and] (6) the Draft Environmental Impact Statement (EIS) prepared by the TLC on or about May 31, 2012.

You contend that, because the above-referenced documents - though never specifically referenced in your original request - were not provided to you, this constitutes a denial of your FOIL request.

Since the documents were not identified in your initial request, I hereby construe your letter dated March 28, 2013, as a new FOIL request. (FOIL # 19071). Enclosed are the following responsive documents"

(Id.)

By letter dated May 8, 2013, petitioner informed the TLC that the original request was for "any and all records," which encompassed the documents listed in the March 28, 2013 letter, therefore petitioner did not make a second FOIL request. (Petition Ex. 12.) The letter stated in part,

"We believe that you have misread and mischaracterized our March 28, 2013 letter, which was not a new request, but rather it was an appeal of our initial one. Our original request, made on October 23, 2012 . . . was for 'any and all records' concerning several matters. This request was met with a deficient search, and what ensued was a piecemeal production wherein the [TLC] produced to us only specific documents we identified for it. However, it is not our obligation to identify documents for the TLC to produce. Thus, if the TLC continues to delay its search with this back-and-forth correspondence and does not produce any and all records responsive to our [o]riginal [r]equest, we will commence an Article 78 proceeding and seek full attorney's fees pursuant to Section 89(4)(c) of the Public Officers

[*9]
Law.”

(*Id.*)

By letter dated May 21, 2013, the TLC denied petitioner’s May 8, 2013 appeal to the original request designated as #18565 and the request designated as #19071. (Petition Ex. 13) The letter stated in part,

“[N]ow, taking an expansive reading of your requests, enclosed are comments received in response to publication of the TPEP rules that were approved in December 2012, a small portion of which refer to the not yet effective health care fund deduction.

In sum, the TLC’s productions have been responsive, timely and most significantly were the result of a thorough search as attested to by the Records Access Officer [] in the attached certification. Accordingly, to the extent your [May 8, 2013] letter is an appeal to the TLC’s response to request #18565 and request #19071 it is denied.”

(*Id.*)

Petitioner commenced this Article 78 proceeding on September 20, 2013. By letter dated October 30, 2013, the TLC provided the additional documents petitioner listed in paragraph 23 of the petition. (Joshi Aff. Ex. L.) Attached to the letter was a certification from the Records Access Officer stating, “I certify that a reasonable search for records was conducted pursuant to the New York State Freedom of Information Law” (*Id.*) The letter stated in part,

“Please be advised, this letter, and the documents attached hereto, are intended to serve as a supplemental response to the above FOIL request,

[* 10]
dated March 28, 2013.

Please find attached the following documents cited in your memorandum of law and submitted in support of your verified petition [], filed with the Supreme Court, County of New York, on September 20, 2013:

1. November 29, 2012 T-PEP TLC public commission hearing transcript . . . ;
2. May 14, 2012 letter from Metropolitan Taxicab Board of Trade to the TLC;
3. May 29, 2012 letter from Metropolitan Taxicab Board of Trade to the TLC; and
4. With respect to your request for “additional data available to it” that the TLC used to estimate fleet profits, enclosed are:
 - a. A copy of the TLC notice titled ‘Notice of Public Hearing Relative to Fares and Lease Caps,’ [] issued in advance of the May 31, 2012 Public Hearing on Lease Caps for the purpose of, (amongst other things), soliciting comments to be used by the TLC in estimating fleet profits;
 - b. All documents received in response to this request.”

(*Id.*) In addition Joshi stated in her affidavit, “I have been personally involved in this matter and in the search made for the October 30, 2013 production and I can attest that once the unintentional oversight was noticed, all additional documents were produced and there are no further documents responsive to petitioner’s request.” (Joshi Aff. ¶ 22.)

By way of notice of cross motion to dismiss, dated November 13, 2013,

respondents cross moved to dismiss the instant proceeding as moot and opposed petitioner's request for attorney's fees. By interim order dated February 5, 2014, this Court denied the cross-motion and directed respondents to submit their answer, deliver an unredacted version of the TLC internal memorandum dated June 21, 2012, with redacted material highlighted for in camera review by this Court, and produce certain additional documents. On March 5, 2014, respondents submitted to petitioner directly the unredacted June 21, 2012 TLC internal memorandum, "because it had been served and filed in other court proceedings challenging the lease cap rules." (Verified Answer ¶¶ 53-54, Ex. Q.) Respondents also submitted to petitioner the additional documents identified in the interim order. (*Id.* ¶ 54, Ex. Q.) On April 2, 2014, respondents filed their verified answer.

Respondents argue that the petition should be dismissed because the TLC provided all responsive documents to petitioner and therefore petitioner's challenge is moot. Respondents also argue that petitioner is not entitled to attorney's fees and expenses in the instant proceeding.

DISCUSSION

FOIL Request

Public Officers Law § 87 (2) requires that public agencies "make available

for public inspection and copying all records,” except those that are exempt.

“[T]he burden at all times rests with the agency to justify any denial of access to requested records” under FOIL. (*Matter of New York State Rifle and Pistol Assn., Inc. v Kelly*, 55 AD3d 222, 224 [1st Dept 2008].) Here, the TLC has not denied petitioner access to any records pursuant to a FOIL exemption; rather, it has engaged in a diligent search for records responsive to petitioner’s request and produced such records as were located on January 31, 2013, March 1, 2013, April 8, 2013, May 21, 2013, October 30, 2013, and March 5, 2014. (Petition Ex. 6, 8, 11, 13; Joshi Aff. Ex. L; Verified Answer Ex. Q.) Moreover, the TLC argues that the four additional documents identified and produced on March 5, 2014, “were not readily identifiable by TLC as to what they were - it was only after TLC continued to search and guess into what was referenced in the testimony of non-TLC staff or officials, that TLC was able to ascertain that which petitioner sought.” (Verified Answer ¶ 59.)

Petitioner asserts that there must be more responsive documents as respondents have produced only 51 documents in response to the seven categories described in its October 23, 2012 FOIL request. Assuming *arguendo* that there were additional documents allegedly not produced deeming petitioner’s request a tacit denial, “[w]hen an agency denies a FOIL request . . . it must certify that a

diligent search was conducted and the documents are not in its possession. The manner of certification, though, is not delineated by statute.” (*Matter of Alicea v New York City Police Dept.*, 287 AD2d 286, 287 [1st Dept 2001].) Here, the TLC satisfied its statutory obligation by averring that a reasonable search had been conducted pursuant to FOIL, all additional documents had been produced and there are no further responsive documents to petitioner’s request. (Petition Ex. 13.; Joshi Aff. Ex. L; Joshi Aff. ¶ 22.) Moreover, in their verified answer sworn to by Jessica Taylor, Assistant General Counsel for the TLC, respondents specifically stated that, as “petitioner has in its possession all of the documents set forth in this Court’s Interim Decision - which are documents which were requested for the first time in petitioner’s papers in opposition to respondents’ cross-motion to dismiss, petitioner now has all documents in response to the FOIL requests . . . [.]” (Verified Answer ¶ 65.)

Once an agency certifies to the court that it has provided the petitioner with all responsive documents in its possession, the petitioner is required to “articulate a demonstrable factual basis to support its contention that the requested documents exist and are within the agency’s control.” (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 279 [1996].) Here, petitioner only speculates that the TLC has not produced all documents responsive to its FOIL request. (*See Mitchell*

v Slade, 173 AD2d 226 [1st Dept 1991]; *Matter of Corbin v Ward*, 160 AD2d 596 [1st Dept 1990]; *see also Matter of Morgan v Nassau County Police Dept.*, 197 AD2d 579 [2d Dept 1993].) For example, regarding request number 3 from the October 23, 2012 FOIL request, petitioner argues that,

“Simple logic dictates that individuals at the TLC would have discussed the advisability of creating a driver healthcare fund. They would have discussed the uses of such a fund, such as whether it would purchase full-on health insurance, disability insurance, etc. Certainly, they would have discussed the decision to set the drivers charge at six (6) cents not three (3) cents or ten (10) cents. That decision must have been based on some calculation or must have resulted from some discussion - whether internal or external -of the appropriate rate. Surely the TLC could not have decided six (6) cents per ride was the appropriate charge without consulting some outside professional with a deeper familiarity with the healthcare industry. Indeed, there must have been hundreds, if not thousands, of TLC e-mails (internal or external) about the idea of a driver healthcare fund. But, in response to [petitioner’s] FOIL requests, the TLC appears to have produced only seventeen (17) documents regarding the driver healthcare fund . . . [.]”

(Petitioner Sur-Reply MOL at 5-6.) However, petitioner’s argument does not “articulate a demonstrable factual basis to support its contention” that more responsive documents exist than were actually produced. (*Gould*, 89 NY2d at 279.) Indeed, petitioner has failed to show by more than speculation that more than 51 documents exist and / or are within the TLC’s control in response to its FOIL request. (*See Mitchell*, 173 AD2d at 226; *Corbin*, 160 AD2d at 596.)

Nevertheless, petitioner identifies four additional items allegedly within the

TLC's possession that have not been produced, which are as follows:

(1) agendas for meetings or correspondence between the TLC, Mayor's Office for Immigrant Affairs and staff of the Deputy Mayor for Health and Human Services which concluded in the June 21, 2012 internal memorandum that "much of this goal [of providing benefits to drivers] will be accomplished through the federal Affordable Care Act (ACA)";

(2) models developed by the Freelancers Union and by unions representing home health care aides referenced in the June 21, 2012 internal memorandum to "determine that (a) 'it may also be possible for an entity to use a modest amount of funding to attract insurers to develop insurance programs tailored from drivers' needs profile' and (b) that 'there is a need for disability insurance' for drivers";

(3) analysis of the lease cap and fare structure referenced in the October 28, 2011 internal TLC memorandum; and

(4) results of the For Hire Vehicle (FHV) Driver Survey.

(Petitioner Sur-Reply MOL at 8). "Public Officers Law § 89 (3) places the burden on petitioner to reasonably describe the documents requested so that they can be located." (*Mitchell*, 173 AD2d at 227.) It cannot be said that these four belatedly specified items were reasonably described under petitioner's original FOIL request or whether these items are even documents that exist or are within the TLC's possession. However, because petitioner has identified these four items specifically, and they appear to broadly relate to petitioner's original FOIL request, to the extent that the aforementioned items are existing documents in the TLC's possession and have not been produced, the TLC is directed to produce

them to petitioner. The Court notes that the TLC submitted directly to petitioner an unredacted version of the TLC internal memorandum dated June 21, 2012 (Verified Answer Ex. Q); thus the issue of petitioner's request for an unredacted version of that particular document is moot.

Attorney's Fees

As to petitioner's request for attorney's fees, Public Officers Law § 89 (4) (c) provides that a court may award reasonable attorney's fees and costs if the agency unreasonably denied the FOIL request or if the agency failed to respond to a request or appeal within the statutory time period. Neither of these factors apply in the instant proceeding. Moreover, the TLC substantially complied with petitioner's FOIL request and the items listed in petitioner's FOIL request "are not of clearly significant interest to the general public." (*Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 442 [2005] [internal quotation marks omitted].) Therefore, petitioner's request for attorney's fees is denied.

CONCLUSION

Accordingly, it is hereby,

ORDERED and ADJUDGED that the branch of the petition compelling the TLC to respond to petitioner's FOIL request is granted to the extent that, within 45 days from the date of this decision, respondents are directed to deliver to petitioner

the four additional items listed on page 14 of this Decision, Order, and Judgment to the extent that the additional items are documents within the TLC's possession and have not already been produced, and the petition is otherwise denied; and it is further

ADJUDGED that the branch of the petition seeking an order awarding attorney's fees is denied.

Dated: July 9, 2014
New York, New York

ENTER:



J.S.C.

HON. MICHAEL E. STALLONE

UNFILED JUDGMENT

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