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| <b>Matter of Faustino v New York City</b>  |
| 2020 NY Slip Op 30422(U)   |
| February 14, 2020  |
| Supreme Court, New York County   |
| Docket Number: 161126/2019   |
| Judge: Carol R. Edmead   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 35EFM

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IN THE MATTER OF DIOSO FAUSTINO FREEDOM OF  
INFORMATION LAW REQUEST,

INDEX NO. 161126/2019

Petitioner,

MOTION DATE N/A

- v -

MOTION SEQ. NO. 001

NEW YORK CITY, NEW YORK CITY POLICE  
DEPARTMENT, RECORDS ACCESS APPEALS, SGT.  
JORDAN S. MAZUR

**DECISION + ORDER ON  
MOTION**

Respondent.

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HON. CAROL R. EDMEAD:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 11, 12, 13, 14,  
15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ORDERED that the petition for relief, pursuant to CPLR Article 78, of Petitioner Dioso  
Faustino (Motion Seq. 001) is denied and the cross-motion by Respondent The City of New  
York seeking to deny the petition and dismiss the proceeding is granted; and it is further

ORDERED that Petitioner's application for reasonable attorney's fees is denied.

CASE DISPOSED

## MEMORANDUM DECISION

In this Article 78 proceeding, Petitioner Dioso Faustino seeks an order to compel Respondents to produce certain law enforcement records pursuant to Freedom of Information Law (FOIL) § 84, as well as Respondents' obligations under Public Officers Law § 89 (3). Respondents cross-move for an order, pursuant to CPLR §§7804(f) and 3211(a), denying the petition and dismissing the proceeding.

### BACKGROUND FACTS

The dispute that underlies this proceeding concerns a FOIL request sent by Petitioner to Respondents for New York City Police Department (NYPD) body worn camera footage. On December 9, 2018, members of the NYPD were summoned to Petitioner's residence in Staten Island after receiving a 911 call regarding a domestic disturbance at the residence. During the subsequent confrontation with the police, Petitioner Faustino Dioso was shot and fatally wounded (NYSCEF doc No. 16, ¶ 4).

On February 22, 2019, Petitioner's widow through her counsel sought access, pursuant to FOIL § 84, of the body worn camera footage worn by the officers involved (NYSCEF doc No. 3). Respondents acknowledged receipt of the request and indicated that a response should be expected in July 2019 (NYSCEF doc No. 4). On July 11, 2019, Petitioner appealed an alleged "constructive denial" of the request. However, Respondents did not issue their formal denial until July 16. The denial held that access to the body worn camera footage was exempt from FOIL pursuant to Public Officers Law § 87, along with a variety of other Public Health Law provisions (NYSCEF doc No. 7). Respondents' Records Access Appeals Officer (RAAO) then denied Petitioner's appeal on the grounds that it was premature as it was submitted before the determination, and as access to the requested records would interfere with the ongoing NYPD

Force Investigation Division investigation regarding the night of the incident (NYSCEF doc No. 8).

On August 5, 2019, Petitioner administratively appealed the July 16 denial. By electronic mail sent August 12, the RAAO denied the administrative appeal on several grounds, including that disclosure of the law enforcement records sought pursuant to FOIL would interfere with a pending law enforcement investigation (NYSCEF doc No. 8). Petitioner then commenced this Article 78 proceeding on November 14, seeking an annulment of Respondent's denial as well as an order requiring Respondents to make the body camera footage available. Petitioner also alleged that Respondent did not timely respond to the FOIL request.

On December 3, Respondents cross-moved to dismiss this proceeding on the grounds that the records sought by Petitioner are exempt from disclosure pursuant to N.Y. Public Officers Law §87(2)(e)(i), which proscribes disclosure of law enforcement records where such disclosure would interfere with a law enforcement investigation.<sup>1</sup>

In January 2020, the NYPD concluded its internal Force Investigation of the subject incident. Petitioner's counsel affirms that he received two hours of body camera footage of the NYPD officers, produced in eight parts, on January 21, 2020 and January 30, 2020 (NYSCEF doc No. 36, ¶¶ 14-15). However, Petitioner still avers that the footage was improperly withheld.

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<sup>1</sup> Respondents additionally contended that the verified petition was unreliable because it contained knowing misrepresentations of material facts, as Petitioner alleged that she never received the RAAO's final denial of the FOIL request. The receipt of the decision letter is a material fact because under Public Officers Law § 89(4), receiving the decision of the RAAO was a pre-requisite to the filing of an Article 78 petition challenging the NYPD's disclosure of documents. Counsel for Petitioner later affirmed that he was on vacation when the RAAO email was sent on August 12 and did not open the email until he read Respondents' cross-motion (NYSCEF doc No. 36, ¶ 8). Respondents argue that the petition should then have been amended to reflect this. However, given that Petitioner is now precluded from arguing that it never received the RAAO's final denial, the Court considers this matter to be moot and proceeds to the substantive issues.

## DISCUSSION

The legal standards that govern FOIL disputes in New York have been well documented by the Court of Appeals:

“The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies. The statute, enacted in furtherance of the public's vested and inherent “right to know,” affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information to “make intelligent, informed choices with respect to both the direction and scope of governmental activities” and with an effective tool for exposing waste, negligence and abuse on the part of government officers.

To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted. This presumption specifically extends to intra-agency and inter-agency materials... Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access”

(*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 565 [1986], citations omitted).

Given that the Court generally presumes all records are open and statutory exemptions to FOIL requests are to be construed narrowly, the standard of review of an Article 78 proceeding challenging an agency's denial of a FOIL request is more stringent than the general standard applicable to most Article 78 petitions (*see Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 158 [1<sup>st</sup> Dept 2010]).

As a preliminary matter, the Court notes that as Petitioner has now received the materials requested in the FOIL request, the relief sought within the petition is moot. However, the Court still writes to address the underlying substantive issue of whether Respondents properly withheld the footage pursuant to Public Officers Law § 87.

While law enforcement records are generally open to the public, Public Officers Law § 87(2)(e)(i) exempts from disclosure records that “are compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings.” This provision broadly permits an agency to make “a generic determination” that disclosure of a record would interfere with a judicial proceeding against a particular individual. (*Matter of Legal Aid Socy. v New York City Police Dept.*, 274 AD2d 207, 214-215 [1st Dept 2000], *lv dismissed and denied* 95 NY2d 956 [2000]; *see Matter of Whitley v New York County Dist. Attorney's Off.*, 101 AD3d 455, 455 [1st Dept 2012]; *Matter of Pittari v Pirro*, 258 AD2d 202, 206-208 [2d Dept 1999], *lv denied* 94 NY2d 755 [1999].) Thus, where police officers’ body worn camera footage relates to an ongoing criminal investigation or judicial proceeding against an individual, such footage may be withheld. The Court of Appeals has affirmed that the mere assertion that disclosure of law enforcement records would interfere with a pending proceeding is a sufficiently particularized justification for the denial of access to records (*Leshner v Hynes*, 19 NY2d 57, 63 [2012]).

Here, Petitioner sought body worn camera footage from the NYPD officers at the scene the night Dioso Faustino was fatally shot. The footage involves the use of force by officers and thus was integral evidence in the NYPD Force Investigation Division’s investigation of the events of that evening. The release of the footage while the investigation was still ongoing would thus clearly have interfered with the investigation. Petitioner contended in her initial FOIL request that the footage is not protected and is available without a court order pursuant to the First Department’s holding in *Matter of Patrolmen’s Benevolent Assn. of the City of NY v DeBlasio*, 171 AD3d 636 (1<sup>st</sup> Dept 2019). However, that case concerned the question of whether officer body worn camera footage should be considered “personnel records” protected from

disclosure under Civil Rights Law § 50-a. The First Department concluded that as the primary purpose of the footage is for “transparency, accountability, and public-trust building,” it is not exempt from disclosure under the Civil Rights Law, but did not address other statutory provisions under which the footage may nevertheless be exempt from public disclosure (*id.* at 637).

Petitioner also argues that her interest in the footage supersedes the NYPD’s interest in keeping its investigation confidential as her interest relates to a civil suit against the City of New York for wrongful death (NYSCE doc No. 2 at 3). However it is well established that a requester’s purpose in seeking access is irrelevant in deciding whether the requester is entitled to view the records, given that any member of the public has equal standing to request records under FOIL (*Bellamy v NYC Police Dept*, 59 AD3d 353, 355 [1<sup>st</sup> Dept 2009]). Given that FOIL is meant to afford any member of the public a right to view information regardless of status or purpose, the analysis turns on the nature of the record itself. Petitioner’s status is thus irrelevant to the Court’s determination that Respondents had a valid basis for protecting the body worn camera footage while the force investigation was still pending.

Regarding Petitioner’s request for attorney’s fees, pursuant to FOIL’s fee-shifting provision, a court must award reasonable counsel fees and litigation costs to a party that “substantially prevailed” in the proceeding if the court finds that the agency had no reasonable basis for denying access (Public Officers Law § 89[4][c][ii]). Petitioner argues attorney’s fees must be awarded as Respondents unreasonably withheld the footage sought and did not turn over the footage to Petitioner within a reasonable amount of time (NYSCEF doc No. 34, ¶ 35). However, attorney’s fees are not warranted as Petitioner did not substantially prevail. The Court has determined that Respondents had a valid basis under Public Officers Law § 87 for

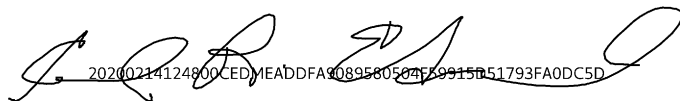
withholding the records during the investigation. Respondents promptly notified Petitioner at the conclusion of the investigation and has already disclosed the footage in full. Responds therefore fulfilled their obligations under FOIL, and the Court declines to shift attorney’s fees in this proceeding.

**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that the petition for relief, pursuant to CPLR Article 78, of Petitioner Dioso Faustino (Motion Seq. 001) is denied and the cross-motion by Respondent The City of New York seeking to deny the petition and dismiss the proceeding is granted; and it is further

ORDERED that Petitioner’s application for reasonable attorney’s fees is denied.



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2/14/2020

DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: