

Matter of Jaskaran v City of New York

2020 NY Slip Op 32424(U)

July 20, 2020

Supreme Court, New York County

Docket Number: 160223/2019

Judge: Eileen A. Rakower

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 6

Justice

In re Application

**In the Matter of the Application of
JACK JASKARAN**

INDEX NO. 160223/2019

Petitioner,

MOTION DATE

**for a Judgment under Article 78 of the
Civil Practice Law and Rules,**

MOTION SEQ. NO. 1

MOTION CAL NO.

-against-

**THE CITY OF NEW YORK;
and JAMES P. O'NEILL, in his official capacity as the
Police Commissioner of the City of New York,**

Respondents.

The following papers, numbered 1 to ____ were read on this motion for/to

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits _____
Replying Affidavits

Cross-Motion: X Yes No

Petitioner, Jack Jaskaran (“Petitioner”), brings this Article 78 proceeding against the City of New York and New York City Police Commissioner James P. O’Neill (collectively, “Respondents”) alleging that Respondents’ denial of disclosure of the documents requested on May 21, 2019 violated the Freedom of Information Law, N.Y. Pub. Off. Law § 87 (“FOIL”). Specifically, Petitioner requests the disclosure of the New York Police Department’s (“NYPD”) “Police Surgeons Manual,” or, in the alternative, an in-camera review of the manual. Petitioner also requests attorneys’ fees.

Respondents filed a cross-motion to dismiss, pursuant to CPLR §§ 7804(f) and 3211(a), requesting that the Petition be dismissed as moot and academic.

Oral argument was scheduled for this matter but could not proceed due to the pandemic, and the decision will now be rendered on the papers.

BACKGROUND

By letter dated May 17, 2019, Petitioner requested a copy of NYPD’s “Police Surgeon’s Manual.” (Verified Petition, Exhibit “A”). On May 21, 2019, Respondents denied Petitioner’s request, stating that pursuant Public Officers Law (“POL”) § 87(2)(e)(iv), the information would “reveal non-routine techniques and procedures.” (Verified Petition, Exhibit “D”). Petitioner

appealed the Respondents' denial on June 17, 2019. (Verified Petition at ¶ 28). Petitioner asserted that Respondents' blanket denial was improper because POL §87(2)(e)(iv) applies only to disclosures that would reveal "criminal techniques and procedures, except routine techniques and procedures." (*See id.*). On June 21, 2019, Respondents denied the appeal pursuant to POL § 87(2)(g), claiming exemption for the requested documents as inter-agency records. (Verified Petition, Exhibit "F"). Respondents also asserted that any records not exempt under POL § 87(2)(g) were exempt under POL § 87(2)(a) as "attorney work product and/or privileged communications." (*See id.*).

Petitioner commenced the instant Article 78 proceeding on October 21, 2019. On January 6, 2020, Respondents certified that a "diligent search" was conducted and disclosed an unredacted 8-page document titled "Police Surgeon's Guidelines" to Petitioner (Affirmation in Support of Cross-Motion to Dismiss at ¶ 14). Respondents averred in the letter that no other records were located, including the appendices mentioned in the "Police Surgeon's Guidelines." (*See id.*).

STANDARD OF REVIEW

Under New York law, FOIL is used to obtain public documents maintained by a governmental agency. "To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public." *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274 (1996) (*See also*, POL § 84). All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of § 87(2). *Id.* To ensure maximum access to government documents, the "exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption." *Id.* Further, "[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld." *Id.* (quoting *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979)). To invoke one of the exemptions of § 87(2), the agency must articulate "particularized and specific justification" for not disclosing requested documents. *Id.*

Pursuant to POL§ 89(3), an agency's obligations under FOIL are met when a diligent search is done, and either responsive records are disclosed, and/or the agency certifies that records could not be located. *Alicea v. New York City Police Dep't*, 287 A.D.2d 286, 287 (1st Dep't 2001). *See also Carty v. New York City Police Dep't*, 41 A.D.3d 150, 150 (1st Dep't 2007); *Taylor v. New York City Police Dep't FOIL Unit*, 25 A.D.3d 347, 347 (1st Dep't 2006); *Davidson v. Police Dep't of the City of New York*, 197 A.D.2d 466, 466 (1st Dep't 1993). The statute does not specify the manner in which an agency must certify that documents cannot be located. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required. *Rattley v. New York City Police Dep't*, 96 N.Y.2d 873, 875 (2001).

Under POL § 87(2)(e)(iv), "Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny

access to records or portions thereof that: (e) are compiled for law enforcement purposes and which, if disclosed, would: (iv). reveal criminal investigative techniques or procedures, except routine techniques and procedures.”

POL § 87(2)(g) exempts records that are inter-agency or intra-agency materials which are not: i. statistical or factual tabulations or data; ii. instructions to staff that affect the public; iii. final agency policy or determinations; or iv. external audits, including but not limited to audits performed by the comptroller and the federal government.

POL § 87(2)(a) pertains records that are specifically exempted from disclosure by state or federal statute.

DISCUSSION

1. Respondents’ Response to Petitioner’s FOIL request

The portion of the Petition which seeks an Order compelling disclosure of the requested documents is rendered moot by Respondents’ subsequent disclosure after Petitioner commenced the instant proceeding.

“When a Respondent produces records responsive to the Petitioner’s FOIL request (even with minimal redactions) as part of a motion to dismiss an Article 78 proceeding or at any time during the pendency of litigation, along with a certification that certain specific requested records were not able to be located after a diligent search, the petition is rendered moot.” *Guitt v. David*, No. 400610/2013, 2013 WL 5565896, *3 (S. Ct. N.Y. Cnty. 2013). *See also Taylor v. New York City Police Dept. FOIL Unit*, 25 A.D.3d 347, 347 (1st Dept. 2006); *Tellier v. New York City Police Dept.*, 267 A.D.2d 9, 10 (1st Dept. 1999); *Malerba v. Kelly*, 211 A.D. 2d 479, 480 (1st Dept. 1995).

Here, Respondents’ attorney affirmed:

“The undersigned reviewed all the records located and decided a further search was necessary. The undersigned herein certifies that a further diligent search was conducted of the records of the Medical Division, and the Office of the Supervising Chief Surgeon. Pursuant to the further diligent search, the only record located was a document titled Police Surgeon’s Guidelines, consisting of eight pages. This document has been released to Petitioner unredacted.”

(Affirmation in Support of Cross Motion to Dismiss at ¶ 14)

Petitioner’s contention that the document produced is not the document referred to in Respondents’ January 6, 2020 disclosure letter and that other records exist is unsupported. Petitioner contends that the 8-page manual makes no mention of the appendices referred to in

Respondents' January 6, 2020 letter which disclosed the 8-page manual. However, not only does the manual reference these appendices on page 3 in section III, subsection (c)(4), and page 5, section III, subsection (c)(7)(A), the document is unredacted, and any claim of redacted references to appendices is without merit.

Petitioner also submits testimony from a New York City Civil Commission proceeding in 2006, in which Dr. Robert Cucco, NYPD's pulmonologist at the time, testified to a manual that police surgeons use that lists each organ and lists qualifying diseases. (Affirmation in Opposition to Cross-Motion pp. 8). Dr. Cucco's testimony is insufficient to establish the existence of any such manual outside the Police Surgeon's Guidelines produced by Respondents, especially in light of the certification by Respondents' attorney that no responsive documents exist other than the 8-page manual produced to Petitioner. Respondent has therefore met its statutory obligations in complying with Petitioner's FOIL request.

2. Attorneys' Fees and Litigation Costs

Pursuant to POL § 89(c), "the court in such a proceeding: (i) 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, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall 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 and the court finds that the agency had no reasonable basis for denying access."

Accordingly, to satisfy the requirements entitling Petitioner to attorneys' fees, he must show that he substantially prevailed and the agency had no reasonable basis for denial. Prior to the filing his Verified Petition, Petitioner received no responsive documents. After the Petition was filed, Petitioner received the 8-page document. The Court of Appeals has held that a petitioner substantially prevailed when "petitioner's legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to her FOIL request - including both disclosure that was volunteered by the agency and disclosure that was compelled by Supreme Court's order." *Madeiras v. New York State Educ. Dep't*, 30 N.Y.3d 67, 79 (2017).

In *Madeiras*, 30 N.Y.3d at 72, the petitioner sought audit plans from the Department of Education ("DOE"). DOE denied disclosure and the petitioner commenced an Article 78 proceeding. *Id.* Before filing an Answer, the DOE released 55 pages of partially redacted documents. *Id.* "The Appellate Division concluded that the statutory requirement that petitioner 'substantially prevail' was not met because the 'majority of the [Department's] challenged redactions were appropriate.'" *Id.* at 79. In reversing the denial of attorneys' fees, the Court of Appeals emphasized that the Appellate Division's "analysis fails to take into account that the Department made *no* disclosures, redacted or otherwise, prior to petitioner's commencement of this CPLR article 78 proceeding." *Id.*

Here, Petitioner received no documents prior to litigation, and received the entirety of the records sought, unredacted, after commencing litigation. Therefore, for the purposes of his FOIL request, Petitioner has substantially prevailed.

The Court now turns to the question of whether Respondents had a reasonable basis for denying access to the requested document that was later produced. Respondents first denied Petitioner's request entirely, claiming an exemption under POL § 87(2)(e)(iv). As Petitioner correctly asserted in his appeal letter (Verified Petition, Exhibit "E"), this exemption applies only to records compiled for law enforcement purposes that would reveal "criminal investigative techniques or procedures, except routine techniques or procedures." Respondents failed to articulate a "particular and specific justification" for denial. *Gould*, 89 N.Y.2d at 274. Respondents merely stated that the records are exempt and offered no further explanation. Further, the responsive documents also reveal neither criminal techniques nor procedures.

On appeal, Respondents denied the request in its entirety again, citing to POL § 87(2)(g), which exempts inter- and intra-agency materials from disclosure, "except i. statistical or factual tabulations or data; ii. instructions to staff that affect the public; iii. final agency policy or determinations; or iv. external audits, including but not limited to audits performed by the comptroller and the federal government." However, Respondents failed to "demonstrate that the requested material qualifies for exemption." *Gould*, 89 N.Y.2d at 275. The requested guidelines are not "deliberative" as Respondents suggest but constitute both instructions to staff that affect the public and final agency policy or determinations. Respondents also claimed exemption under § POL 87(2)(a), contending that the records constitute attorney work product, and are exempt under CPLR 3101(b) and (c). (Verified Petition, Exhibit "F"). However, the responsive documents are a compilation of guidelines for surgeons in the NYPD, and do not include any information regarding open investigations or litigation that would be protected as attorney work product.

Respondents have failed to put forth a reasonable basis for their denial of Petitioner's FOIL request. Respondents disclosed all of the records sought after Petitioner commenced this proceeding. Respondents acknowledge in their cross-motion that upon commencement of litigation, a further search was necessary which produced the responsive documents. (Affirmation in Support of Cross-Motion at ¶ 14). Moreover, when produced, the documents were entirely unredacted. (*See id.*) The shifting justifications and subsequent production of the complete unredacted responsive 8-page document is sufficient to find that the reasons set forth for denial were arbitrary, and thus, Respondents had no reasonable basis for denial.

CONCLUSION

Respondents have furnished Petitioner with unredacted responsive documents, satisfying the FOIL request. Respondents certified that a diligent search was conducted, and no other responsive documents exist, thus rendering the instant proceeding moot. However, Respondents disclosed all of the records sought by Petitioner only after commencement of the instant proceeding without a reasonable basis for denying access. Thus, Petitioner has established entitlement to attorneys' fees, and, pursuant to § 89(c)(ii), this Court "shall assess...reasonable

attorneys' fees and other litigation costs." N.Y. Pub. Off. Law § 87(c)(ii). However, Petitioner's request for attorneys' fees is denied without prejudice. Petitioner did not produce invoices, statements, or any documents demonstrating the amount of fees sought. The Court grants Petitioner the opportunity to make an application by motion for the reasonable attorneys' fees incurred in the initial making of the motion with court costs within 30 days of the e-filed date of this order.

Wherefore it is hereby

ORDERED that Respondents' cross motion is granted to the extent that the Court finds that Respondents have satisfied their obligations in responding to the FOIL request; and it is further

ORDERED that Petitioner's request for attorneys' fees is denied without prejudice. Petitioner did not produce invoices, statements, or any documents demonstrating the amount of fees sought. The Court grants Petitioner the opportunity to make an application by motion for the reasonable attorneys' fees incurred in the initial making of the motion with court costs within 30 days of the e-filed date of this order.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: July 20, 2020

ENTER: 
J.S.C.

HON. EILEEN A. RAKOWER

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**