

<b>Jeffrey Deskovic Found. for Justice v New York City Police Dept.</b>
2021 NY Slip Op 30530(U)
February 25, 2021
Supreme Court, New York County
Docket Number: 155001/2017
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

<p><b>PRESENT:</b> <u>HON. BARBARA JAFFE</u></p> <p style="text-align: right;"><i>Justice</i></p> <p>-----X</p> <p>THE JEFFREY DESKOVIC FOUNDATION FOR JUSTICE, JEFFREY DESKOVIC,</p> <p style="text-align: center;">Petitioners,</p>	<p><b>PART</b></p>	<p><b>IAS MOTION 12</b></p> <p><b>INDEX NO.</b> <u>155001/2017</u></p> <p><b>MOTION DATE</b> _____</p> <p><b>MOTION SEQ. NO.</b> <u>002</u></p>
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- v -

NEW YORK CITY POLICE DEPARTMENT,  
JORDAN MAZUR,

**DECISION + ORDER ON  
MOTION**

Respondents.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 68-82 were read on this motion for \_\_\_\_\_ attorney fees \_\_\_\_\_.

By notice of motion, petitioners move pursuant to Public Officers Law (POL) § 89(4)(c) for an order awarding them attorney fees and costs. Respondents oppose.

I. PERTINENT BACKGROUND

By email dated February 17, 2017, counsel filed a Freedom of Information Law (FOIL) request seeking documents concerning a criminal case brought against a nonparty. Specifically, counsel sought statements of certain individuals concerning the criminal matter. (NYSCEF 44).

By letter dated February 27, 2017, the records access officer (RAO) acknowledged receipt of counsel's February 17 request, labeled "FOIL Req #: 2017-PL-2407," and advised that it was under review, that the letter does not constitute a denial of the records request, and that a determination on the request would be made within 90 business days. (NYSCEF 45).

By email dated February 27, 2017, counsel filed an appeal, alleging that his request had been constructively denied, as five business days had elapsed without a response. (NYSCEF 46).

By letter to counsel dated February 28, 2017, the records access appeals officer (RAAO) advised that the appeal was premature, as the request had been acknowledged within five business days, estimating that a determination of the request would be made within several weeks. (NYSCEF 47).

By letter dated March 1, 2017, the RAO denied the request pursuant to: (1) POL § 87(2)(f), as disclosure of the sought records “could endanger the life and safety of any person;” (2) POL § 82(2)(e)(iv), as disclosure “would reveal non-routine investigative techniques and procedures;” (3) POL § 87(2)(b), as disclosure “would represent an unwarranted invasion of personal privacy;” (4) POL §§ 87(2)(a) and (e), as the sought records “consist of Police Officer’s personnel records and are therefore exempt from disclosure under the provisions of Civil Rights Law Section 50-a.” Counsel was advised that appeals must be made within 30 days. (NYSCEF 48).

By email dated March 11, 2017, counsel filed another FOIL request, seeking documents concerning the nonparty’s criminal matter, specifically statements of certain individuals that were not sought in the February request. (NYSCEF 49).

By email dated March 13, 2017, counsel filed another FOIL request, again seeking documents concerning the nonparty’s criminal matter which is more expansive than those preceding, albeit also seeking the documents identified in the March 11 request. (NYSCEF 50).

By letter dated March 20, 2017, the RAO advised counsel that the March 11 request, labeled “FOIL Req #: 2017-PL-3414,” was received on March 13, 2017, that it was under review, that the letter does not constitute a denial of the records request, and that a determination on the request would be made within 90 business days. (NYSCEF 51).

By email dated March 28, 2017, counsel appealed the “denial” of his March 13 request.

(NYSCEF 52).

By letter dated April 3, 2017, the RAAO responded to counsel's March 28 appeal, advising him that the appeal, which the RAAO assumed related to request number 2017-PL-3414, was duplicative of the February 17 request, and observed that rather than appeal the February request denial, counsel filed another request for documents on March 13, 2017. He advised that the appeal of the March 13 request was premature, as the request had not been denied, per his March 20, 2017 letter, and that the request was being processed and a determination would be made in several weeks. (NYSCEF 53).

By letter dated April 19, 2017, the RAAO wrote that the March 11 request (2017-PL-3414) was denied as duplicative of the February request. (NYSCEF 54).

By letter to the RAAO dated May 10, 2017, counsel explained that three different requests had been made, but only the first two had been acknowledged and assigned request numbers. He also alleged that he had not received a response concerning his March 13 request, which was submitted on behalf of an entity different from that filing the first two requests. He advised that he intended to commence a proceeding pursuant to CPLR article 78 to compel disclosure of the documents requested in the March 13 request. (NYSCEF 56).

By email dated May 30, 2017, the RAAO acknowledged receipt of two records requests, one made in February (2017-PL-2407) and one made in March (2017-PL-3414), and advised that neither request was properly appealed, as counsel had appealed the requests prior to a final determination. (NYSCEF 55).

By notice of petition and verified petition dated June 1, 2017, petitioners brought this CPLR article 78 proceeding to challenge respondents' determination of their FOIL request dated March 13, 2017, and for an order directing respondents to provide records responsive to the

request or, alternatively, to produce them for an *in camera* inspection, and awarding them attorney fees, costs, and disbursements. Petitioners alleged, as pertinent here, that in contrast to the February 17 and March 11 requests, the March 13 request was not acknowledged by respondents. Petitioners thus challenged the “constructive denial” of the March 13 request. To the extent that the April 19, 2017 letter constitutes a denial of the March 13 request, petitioners denied that the request was duplicative of the February 17 request. (NYSCEF 1-2).

By notice of cross motion dated July 21, 2017, respondents cross-moved to dismiss the petition on the grounds that the records are exempt from disclosure pursuant to POL § 87(2)(e)(i) and (ii), the request is duplicative of petitioners’ first request, and petitioners failed to exhaust their administrative remedies. (NYSCEF 21).

By decision and order dated August 16, 2018, respondents’ cross motion was denied, and it was held that petitioners had exhausted their administrative remedies and that the “March 2017 FOIL request is not duplicative of an earlier one.” It was ordered that any other objections to disclosure of the records be addressed in an answer and memorandum of law. (NYSCEF 40).

By stipulation of partial settlement dated November 26, 2019, respondents produced all responsive records to petitioners, and the litigation was narrowed to the only issue remaining: whether petitioners are entitled to costs and attorney’s fees under POL § 89(4)(c). (NYSCEF 61).

## II. DISCUSSION

### A. Petitioners’ entitlement to attorney’s fees and costs

Where a person is denied access to a record after an appeal and brings an action pursuant to CPLR article 78, pursuant to POL § 89(4)(c), the court:

- (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.

A petitioner substantially prevails when “respondents, during the pendency of this proceeding, disclosed the records sought in the FOIL request.” (*Dioso Faustino Freedom of Info. Law Request v New York City*, AD3d , 2021 WL 498335 [1st Dept 2021]). That a respondent disclosed the records voluntarily is irrelevant. (*Id.*, quoting *New York State Defs. Ass'n v New York State Police*, 87 AD3d 193, 195 [3d Dept 2011]).

While petitioners received some documents from the Queens County District Attorney's Office, it is undisputed that during the pendency of this proceeding, they received all documents sought in their requests, and respondents disclosed over a third of the documents relating to petitioners' March requests, which respondents admittedly treated as a single request. Petitioners thus substantially prevail. (*See Barry v O'Neill*, 185 AD3d 503, 506 [1st Dept 2020] [petitioner substantially prevailed where respondent made no disclosures prior to commencement of proceeding and petitioner succeeded in obtaining substantial post-commencement disclosure]; *see also In re Saxton v New York State Dept. of Taxation and Finance*, 2013 WL 12161107, \*1 [Sup Ct, Albany County 2013], *mod* 130 AD3d 1224 [3d Dept 2015] [petitioner substantially prevailed where respondent disclosed some, albeit not all, documents responsive to FOIL request]).

As decided in the August 16 decision and order, petitioners' requests were not duplicative of the one made in February as petitioners had sought only statements from certain individuals, whereas in March, they sought far more information, such as other records and the statements of many other individuals. The denial of the March requests on the ground that they were

duplicative of the February request is unreasonable, and petitioners are thus entitled to an award of attorney's fees and costs.

As the basis for denial of the requests was their duplicativeness, to the extent respondents rely on other grounds to demonstrate the reasonableness of their denial, they are not considered. (*See Madeiros v New York State Educ. Dep't*, 30 NY3d 67, 74 [2017] [declining consideration of grounds relied on by agency that were not invoked in initial denial of petitioners' FOIL request]).

As petitioners are entitled to attorney fees under POL § 89(4)(c)(ii), a discretionary award for failure to respond timely under POL § 89(4)(c)(i) need not be addressed.

#### B. Amount of attorney fees and costs

Counsel contends that he worked 219.7 hours on this matter, with an hourly rate of \$525, and that he paid \$350 in filing fees, \$37.50 for a transcript of oral argument, and \$45 for service of process. He thus claims entitlement to \$115,775.00 in attorney fees and costs. (NYSCEF 69). He submits time sheets reflecting his work hours. (NYSCEF 70-71).

As counsel details his extensive and first-hand experience with the criminal justice system and FOIL requests, and notwithstanding his admission to the bar several months before the start of this proceeding, his claim of entitlement to an hourly rate commensurate with a seasoned lawyer skilled in prosecuting FOIL requests is warranted to the extent of an hourly rate of \$400. However, the record of the hours counsel claims to have expended is insufficiently specific (NYSCEF 70), and the contemporaneous billing records are hand-written and largely indecipherable (NYSCEF 71).

### III. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioners' motion for attorney fees and costs is held in abeyance

pending counsel's submission of a detailed breakdown of the hours expended, along with a word-processed version of NYSCEF 71 within 20 days of the date of this decision.

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2/25/2021  
DATE

  
BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE