

Aron Law, PLLC v New York City Law Dept.
2021 NY Slip Op 30621(U)
March 5, 2021
Supreme Court, New York County
Docket Number: 153208/2020
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

ARON LAW, PLLC

Plaintiff,

- v -

NEW YORK CITY LAW DEPARTMENT,

Defendant.

-----X

INDEX NO. 153208/2020
MOTION DATE 05/26/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 18, 19, 20, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

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

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Aron Law, PLLC (motion sequence number 001) is granted, and this matter is remanded to the respondent New York City Law Department for reconsideration in accordance with the terms of this decision; and it is further

ORDERED that the petitioner's request for the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees that petitioner may recover against the respondent is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the petitioner shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

In this Article 78 proceeding, petitioner Aron Law, PLLC (Aron) seeks to compel the records access officer (RAO) of the respondent New York City Law Department (NYCLD) to comply with a Freedom of Information Law (FOIL) request (motion sequence number 001). For the following reasons, the petition is granted.

FACTS

On February 13, 2020, Aron submitted a FOIL request to the NYCLD for a “litigation log” consisting of the following items:

“In an Excel file, a log of all litigation that was active over the past 3 years, including: index number, commencement date, agency being sued, current status, disposition date, type of litigation, form of proceeding (plenary, Article 78, etc.), category of claims (personal injury, Title 7, IDEA, 1983, etc.), forum of litigation, settlement amount, attorneys fees awarded, if so, how much, if disposed, by settlement or judgment, if disposed, by judge or jury.”

See verified petition, ¶ 9; exhibit 1. On February 20, 2020, the NYCLD sent Aron an email stating that:

“Your request under the Freedom of Information Law (FOIL) has been reviewed and is granted in part and denied in part because some of the records or portions of records are disclosable and others are exempt from disclosure under FOIL.”

Id., ¶ 11; exhibit 3. On that same day, an NYCLD records access officer (RAO) sent Aron a letter in which the agency provided the following disclosure:

“You are herein granted access to such a list; you are accordingly referred to: 1) a report on the New York City Law Department’s website, accessible at: <https://www1.nyc.gov/site/law/public-resources/nyc-administrative-code-7-114.page>. This report details civil actions filed against the Police Department or individual Police Officers, or both, during the five-year period preceding the first day of the month when the report was posted, which resulted from allegations of improper police conduct, including, but not limited to, claims involving use of force, assault and battery, malicious prosecution, or false arrest or imprisonment; 2) a report on the New York City Law Department’s website, accessible at: <https://www1.nyc.gov/site/law/public-resources/nyc-administrative-code-7-113.page>. This report details civil actions filed against the Department of Corrections or individual employees, or both, during the five-year period preceding the first day of the month when the report was posted, which resulted from allegations of misconduct; and 3) the New York City OpenData website’s posting of ‘Case-Related Information About Civil Litigation,’ accessible at:

<https://data.cityofnewyork.us/City-Government/Case-Related-Information-About-CivilLitigation/pjgc-h7uv>. This dataset details the commenced civil actions handled by the New York City Law Department from fiscal year 1960 through fiscal year 2018, which are maintained in the Law Department's case management system as of January 15, 2019. Note that for both postings, all disposition amounts reflect the total for the case and cannot be attributed to a particular defendant, other than the City of New York. Also note that these databases will be updated this month with current information."

Id., ¶ 10; exhibit 2 (the RAO's decision). On March 2, 2020, Aron submitted an administrative appeal of the NYCLD's FOIL response in an email which stated as follows:

"We hereby appeal the determination to the above referenced request. None of the links provided offer all the documents sought in the request. Furthermore, in accordance with the Court of Appeals in 2007 *Data Tree, LLC v Romaine*, 9 NY3d 454, I reiterate our request for an Excel file containing the requested data."

Id., ¶ 13; exhibit 6. On April 10, 2020, NYCLD records access appeals officer (RAAO) sent

Aron a letter denying the appeal which stated as follows:

"As [the RAO] stated in her determination, this office does not maintain a document as described in your request, in Excel or any other format. The two databases to which [the RAO] referred you in her determination contain all the information in the possession of this office that is responsive to your request. For that reason, [the RAO's] determination is affirmed."

Id., ¶ 17; exhibit 7 (the RAAO's decision). Aggrieved, Aron then commenced this Article 78

proceeding on June 3, 2020 to compel the NYCLD's compliance with its FOIL request. *See*

verified petition. The NYCLD eventually filed an answer on November 24, 2020. *See* verified

answer. This matter is now fully submitted (motion sequence number 001).

DISCUSSION

Regarding the FOIL (Public Officers Law §§ 84-90), the Court of Appeals recently reaffirmed that:

"To promote open government and public accountability, FOIL imposes a broad duty on government agencies to make their records available to the public (see Public Officers Law § 84). The statute is based on the policy that 'the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.' Consistent with the legislative declaration in Public Officers Law § 84, FOIL is liberally construed and its statutory exemptions narrowly interpreted. All records are presumptively available for public inspection and copying, unless the agency

satisfies its burden of demonstrating that “the material requested falls squarely within the ambit of one of [the] statutory exemptions.”
Matter of Abdur-Rashid v New York City Police Dept., 31 NY3d 217, 224-225 (2018) (internal citations omitted). Aron’s petition recites the foregoing statutory standard, and asserts that “[the NYCLD’s] outright refusal to provide any of the requested records, even in redacted form, has no reasonable basis in law,” and that its “boilerplate denial fails to pass muster under any of the cited exemptions.” *See* petitioner’s mem of law at 6. The NYCLD’s answer does not assert any exemptions set forth in Public Officers Law § 89 (2), but instead sets forth the affirmative defense that it “provided all the data responsive to [Aron’s] request that had been vetted, and does not track the remainder of information requested.” *See* verified answer, ¶¶ 54-84. The NYCLA’s RAO more specifically avers that “the City’s OpenData website contains most of the information [Aron] requested,” that said information is vetted and updated once each year, that a “program called LawManager . . . is the only case management software used by the [NYCLD],” and that the NYCLD does not make LawManager entries for three of the categories of information which Aron requested¹. *See* Conway affirmation, ¶¶ 10-32. Aron’s reply papers state that the three subject websites were frequently non-functional, note that the NYCLD admitted that it failed to disclose three categories of the information sought without asserting an exemption, and argue that the NYCLD failed to satisfy FOIL by merely referring it to a public website, instead of providing a paper or electronic document disclosure. *See* Aron reply affirmation, ¶¶ 5-25. Upon reviewing the applicable case law, the court finds for Aron.

As was previously noted, the Court of Appeals acknowledges that the “FOIL is [to be] liberally construed and its statutory exemptions narrowly interpreted,” and that “[a]ll records are

¹ The NYCLD’s RAO also notes that the RAO’s decision inaccurately referred to “two” websites when it should have said “three” in accordance with the RAO’s decision which it upheld. *See* Conway affirmation, ¶¶ 9-10.

presumptively available for public inspection and copying, unless the agency satisfies its burden of demonstrating that ‘the material requested falls squarely within the ambit of one of [the] statutory exemptions.’” *Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d at 225 (internal citations omitted); *see also Matter of Markowitz v Serio*, 11 NY3d 43, 50 (2008); *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462–463 (2007); *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 (1996). On that latter point, the Court observed that “from the outset of FOIL, the legislature expressly exempted certain agency records from public access, recognizing that there is sometimes ‘a legitimate need on the part of government to keep some matters confidential.’” *Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d at 225, citing *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 (1979). However, the Court has taken pains to articulate that it is only “in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, [that] disclosure will not be ordered,” and that an “agency does not have carte blanche to withhold any information its pleases,” but that “[r]ather it is required to articulate particularized and specific justification.” *Matter of Fink v Lefkowitz*, 47 NY2d at 571, citing Public Officers Law § 87 (2); *see also Matter of Livson v Town of Greenburgh*, 141 AD3d 658, 660 (2d Dept 2016). Here, however, neither the RAO’s decision or the RAAO’s decision cited any of the disclosure exemptions set forth in Public Officers Law § 87 (2). Instead, the latter decision affirmed the former on the sole ground that “[t]he two databases² to which [the RAO] referred you in her determination contain all the information in the possession of this office that is responsive to your request.” However, that affirmation necessarily also applied to the February 20, 2020 email which accompanied the RAO’s decision, which plainly stated that Aron’s FOIL request “is granted in part and denied in

² Actually three databases.

part because some of the records or portions of records are disclosable and others are *exempt from disclosure under FOIL*.” See verified answer, exhibit 3 (emphasis added). Thus, the RAAO’s order is disingenuous because it does not identify which Public Officers Law § 87 (2) exemptions provided the basis for its denial of Aron’s FOIL request. This violates the Court of Appeals’ directive that an agency which seeks to avoid disclosure must identify the statutory exemptions that it seeks to rely on. Here, instead, the RAAO’s decision merely asserts that the bulk of the material that Aron sought was available on public websites. That is insufficient. In a case that appears to be on point, this court (D. Lefkowitz, J.) observed that “[t]here is no provision in Public Officers Law § 87 (2) or any other state or federal statute exempting materials from disclosure on a FOIL application because such materials are also available or have been acquired from another agency; so denial of petitioner’s application for such reason would be unlawful.” *Matter of McCrory v Village of Mamaroneck*, 34 Misc3d 603, 629 (Sup Ct, Westchester County 2011), citing *Matter of Gould v New York City Police Dept.*, 89 NY2d at 274–275; *Matter of Fink v Lefkowitz*, 47 NY2d at 571; see also *Matter of Competitive Enter. Inst. v Attorney Gen. of N.Y.*, 161 AD3d 1283, 1286 (3d Dept 2018) (“Having received a complete response and the actual document only after commencing the proceeding, we conclude that petitioner substantially prevailed, even if the document was available in the public domain, as there is no exception for public records per se”). In this case, the NYCLD appears to have improperly based its denial of Aron’s FOIL request on the same “non-exemption.” Consequently, the court vacates that denial and remands Aron’s FOIL request to the NYCLD to make a production that comports with Public Officers Law § 87.

The second branch of Aron’s petition argues that it “is entitled to an award of legal costs and fees associated with compelling compliance with foil” pursuant to Pub. Off. Law § 89 (4)

(c). *See* verified petition, ¶¶ 30-31. The NYCLD responds that Aron’s request is premature because “there has not yet been a finding on the merits, and [Aron] has not ‘substantially prevailed’” as the statute defines that term. *See* verified answer, ¶¶ 85-91. Aron replies that “according to Public Officers Law §89 (4) (c) (ii), as amended on Dec. 13, 2017, when an agency had no reasonable basis to deny a FOIL request, an award of attorney fees is mandatory.” *See* Aron reply affirmation, ¶¶ 22-25. Again, the court finds for Aron.

Public Officers Law §89 (4) (c) (ii) provides that a court reviewing a FOIL request in an Article 78 proceeding “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 (emphasis added).” *See e.g., Matter of Faustino Freedom of Information Law Request v New York City*, __ AD3d __, 2021 NY Slip Op 00907 (1st Dept 2021). A petitioner will be deemed to have “substantially prevailed” - and be entitled to legal fees - where it receives a complete response from a respondent agency only after the petitioner has commenced an Article 78 proceeding. *Matter of Competitive Enter. Inst. v Attorney Gen. of N.Y.*, 161 AD3d at 1286 (internal citation omitted). This rule obtains even if the requested material was available in the public domain, since there is no per se statutory exception for public records. *Id.*, 161 AD3d at 1286. Aron has “substantially prevailed” in this proceeding because the court has determined that it is entitled to receive a document production from the NYCLD in response to its FOIL request. The court also determines that the NYCLD “had no reasonable basis for denying” Aron’s FOIL request, since the NYCLD’s “public availability” rationale is plainly not among the valid disclosure exemptions listed in Public Officers Law § 87 (2). As a result, the court concludes that Aron is entitled to an award of legal fees pursuant to

Public Officers Law §89 (4) (c) (ii) in an amount to be determined at a hearing. See e.g., *Matter of Barry v O'Neill*, 185 AD3d 503 (1st Dept 2020).

Accordingly, the court concludes that Aron’s Article 78 petition should be granted in full.

DECISION

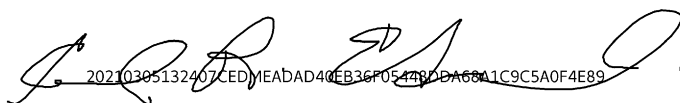
ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Aron Law, PLLC (motion sequence number 001) is granted, and this matter is remanded to the respondent New York City Law Department for reconsideration in accordance with the terms of this decision; and it is further

ORDERED that the petitioner’s request for the recovery of attorney’s fees is severed and the issue of the amount of reasonable attorney’s fees that petitioner may recover against the respondent is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the petitioner shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk’s Office (Room 119), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).


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<u>3/5/2021</u> DATE					<u>CAROL R. EDMEAD, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE