

**Sanctuary for Families, a Non-Profit Corp. v New
York Courts Off. of Ct. Admin.**

2022 NY Slip Op 33009(U)

September 9, 2022

Supreme Court, New York County

Docket Number: Index No. 151141/2022

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

-----X

SANCTUARY FOR FAMILIES, A NON-PROFIT CORPORATION

Petitioner,

- v -

NEW YORK COURTS OFFICE OF COURT ADMINISTRATION,

Respondent.

-----X

INDEX NO. 151141/2022

MOTION DATE 09/07/2022

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1 - 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 45

were read on this motion to/for ARTICLE 78- FOIL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47

were read on this motion to/for ATTORNEY - FEES.

Motion Sequence Numbers 001 and 002 are consolidated for disposition. The petition (MS001) to *inter alia* compel respondent to provide certain documents in response to its FOIL request is granted in part. The motion (MS002) by petitioner for legal fees is granted and there shall be a hearing to determine the amount.

Background

In this Freedom of Information Law (“FOIL”) proceeding, petitioner seeks records related to Referee Margaret Mulrooney in Family Court. The FOIL request, dated November 8, 2021 (NYSCEF Doc. No. 4), sought records about cases involving this referee, including information about complaints, investigations into this referee, and the cases she handled.

Petitioner alleges that when it did not receive a response, it sent a follow up email on December 17, 2021 (NYSCEF Doc. No. 6).

After being completely ignored, petitioner then sent an appeal to respondent on January 4, 2022 (NYSCEF Doc. No. 5). Eventually, respondent replied via email on January 13, 2022 and asserted that due to staffing issues, it would try to get petitioner a response within the next 2 weeks (NYSCEF Doc. No. 7). Those two weeks came and went, and so petitioner sent a follow-up email on January 28, 2022. When respondent, once again, did not reply, petitioner commenced this proceeding. That apparently got respondent's attention.

Respondent cross-moves to dismiss and complains that petitioner's request was overly broad and not drafted in a way that would permit a directed search. Nevertheless, it attaches a response to the FOIL request, dated April 28, 2022, and insists that it found 350 pages of documents. Respondent asserts that it had to make various redactions to the documents because the information involved records from Family Court but that it turned over all responsive documents to petitioner that were not subject to a FOIL exemption. Respondent acknowledges that it withheld 31 pages of documents as intra-agency materials that are non-final discussions containing subjective opinions.

Respondent asserts that petitioner's claims are now moot because it has fully responded and has sufficiently described the 31 pages it withheld. Respondent also demands that the Court reject petitioner's request for fees and costs.

In opposition to the cross-motion, petitioner insists that it is entitled to fees as the prevailing party and that respondent failed to produce logs concerning the documents it withheld. Petitioner demands that the Court do an *in camera* inspection of those documents. Petitioner characterizes the production as insufficient.

In reply, respondent emphasizes that it produced all records responsive to the request that could be reasonably located and identified and it withheld a small number of limited intra-agency documents exempt from disclosure under FOIL.

Discussion

“All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions . . . [B]lanket exemptions for particular types of documents are inimical to FOIL’s policy of open government. Instead, to invoke one of the exemptions of section 87(2), the agency must articulate [a] particularized and specific justification for not disclosing requested documents” (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-75, 653 NYS2d 54 [1996] [internal quotations and citations omitted]).

The Court’s analysis begins with the FOIL request itself and respondent’s belated letter in response. The FOIL request contained 11 categories of documents. Respondent insists that for categories 1 and 2, it attached documents with redactions (NYSCEF Doc. No. 17). These records sought information about complaints lodged against Referee Mulrooney and the total number of such complaints. Respondent also asserted it turned over the records it possesses for categories 5 and 9 (the total number of cases overseen by Referee Mulrooney in Bronx Family Court and Queens Family Court).

However, respondent indicates that it did not have records for 6 of the 11 categories of documents. It also insists that it need not create records to calculate the total number of complaints or cases about an employee. This Court agrees. “As a general rule, an agency responding to a FOIL request is not required to create any new record or data that is not already possessed and maintained by it as such” (*Jewish Press, Inc. v New York City Dept. of Correction*, 200 AD3d 1038, 159 NYS3d 124 [2d Dept 2021] [internal quotations and citations omitted]).

The purpose of FOIL is to encourage the disclosure of government records; it is not to require an agency to create records responsive to a FOIL request. Therefore, to the extent that the request would force respondent to create records or tabulate data, respondent was entitled to reject that request.

Respondent also certified that it disclosed all the relevant and responsive documents it possessed. That satisfies its burden under FOIL (*Rattley v New York City Police Dept.*, 96 NY2d 873, 730 NYS2d 768 [2001]).

With respect to the documents that respondent admits it withheld, the Court is satisfied that respondent sufficiently described the nature of those documents in order to fall under the intra-agency exemption.

Intra-agency communications are exempt from disclosure under FOIL if they are not “statistical or factual tabulations or data,” “instructions to staff that affect the public,” “final agency policy or determinations” or “external audits, including but not limited to audits performed by the comptroller and the federal government” (Public Officers Law § 87[2][g]). “[T]he exemption for intra-agency material does not apply as long as the material falls within one of the provision’s four enumerated exceptions. Thus, intra-agency documents that contain statistical or factual tabulations or data are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination” (*Gould*, 89 NY2d at 276). “[T]he purpose underlying the intra-agency exemption . . . is to protect the deliberative process of the government by ensuring that persons in an advisory role will be able to express their opinions freely to agency decision makers . . . [including] opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making” (*id.* at 276-77).

Respondent explained that it withheld 31 pages of documents about public complaints lodged against Referee Mulrooney that were responsive to category 1 of petitioner's FOIL request. It observed that each page is a copy of a "Complaint Follow-Up" that was drafted by UCS or OCA personnel for internal reasons and reflects subjective opinions. This specific explanation satisfies respondent's burden and the Court finds that there is no basis to conduct an *in-camera* inspection of these documents (*Hutchinson v Annucci*, 189 AD3d 1850, 1855, 136 NYS3d 560 [3d Dept 2020] [noting that a detailed explanation about withheld documents can render an *in camera* review as unnecessary]).

And petitioner failed to cite a sufficient reason for the Court to conduct an *in camera* review of these documents. Instead, petitioner speculates about respondent's allegedly inadequate response. Again, as stated above, the purpose of FOIL is to require an agency to give the documents it possesses, subject to certain exemptions. The Court cannot force respondent to give documents it claims it does not possess, especially where respondent certifies that it has disclosed the responsive documents it possesses. And questioning the quality of respondent's disclosure does not justify an *in camera* inspection. If that standard were applicable to FOIL cases, it would require an *in camera* inspection in nearly every single proceeding.

Here, respondent's late response addressed every one of the categories contained in petitioner's FOIL request and respondent asserts it turned over what it had. Petitioner's assertions that, essentially, it does not believe respondent's claims does not compel a different outcome. In a FOIL proceeding, unlike discovery during a plenary action, an agency can satisfy its burden as the respondent did here.

Legal Fees and Motion Sequence 002

In the petition and in this motion, petitioner seeks an award of \$22,775.00 in legal fees. The Court grants petitioner's request for legal fees and will hold a hearing to determine the amount of fees. The fact is that respondent failed to substantively respond until after petitioner brought this proceeding. While petitioner followed up on numerous occasions about the status of its FOIL request, respondent ignored petitioner for months until finally sending a three-sentence email in which it promised to respond within two weeks. Respondent then missed its own deadline. And it only substantively responded after this proceeding was filed.

This Court has reviewed numerous FOIL requests and recognizes that many requests, including the one at issue here, require significant resources in order to substantively respond. Certainly, as respondent pointed out, the nature of the instant request was broad (it sought documents from January 2000 to the present). Respondent could have, but did not, reply to the FOIL request and explain that the nature of petitioner's request required a substantial amount of time to investigate. Instead, respondent ignored the request and then ignored its own self-created deadline. Petitioner was entitled to bring a proceeding under these circumstances. And, clearly, that was the correct tactic as it forced respondent to finally pay attention and respond. Respondent cannot essentially force petitioner to bring this proceeding and then claim it does not have to pay legal fees. Petitioner substantially prevailed and is entitled to reasonable legal fees (*see Oustatcher v Clark*, 198 AD3d 420, 155 NYS3d 12 [1st Dept 2021 [awarding legal fees while also remanding the proceeding to the agency with instructions to produce records]).

The Court also observes that respondent complains that it did not have a full-time experienced FOIL records officer from October 2021 through May 2022 and so the FOIL responsibilities were shared by other employees of respondent. That is not petitioner's problem

nor is it a valid excuse. Respondent's seeming inability to adequately staff its FOIL section has nothing to do with its obligations to comply with FOIL. This Court is unaware of, and respondent did not cite, a FOIL provision that allows an agency to avoid its obligations because of that agency's internal staffing failures. Plus, if respondent truly had staffing issues, then why did it respond to petitioner that it would respond within two weeks and then *not* respond by that deadline? One would hope that an agency with a staffing crunch would ensure that responses to FOIL requests incorporated the capabilities of the office and not make promises it couldn't keep.

That petitioner's counsel is acting in a pro bono capacity is of no moment. That is not an excuse to avoid respondent's obligation to pay reasonable legal fees where it ignores its FOIL obligations.


Respondent objects to the amount requested by petitioner and asks for a reduction of the fees requested. Therefore, a hearing is required to determine the amount of legal fees to be awarded to petitioner. Because petitioner has substantially prevailed, petitioner will be entitled to recover the reasonable legal fees it has incurred so far in connection with this proceeding, as well as the hours it expends to prepare for and appear at the legal fees hearing.

The hearing shall be in person on October 19, 2022 at 10:00 a.m.

Accordingly, it is hereby

ORDERED that the petition (MS001) is granted only to the extent that petitioner is entitled to legal fees and the cross-motion to dismiss is denied, and the Clerk is directed to enter judgment accordingly in favor of petitioner and against respondent along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the motion (MS002) by petitioner for legal fees is granted, the issue of reasonable legal fees is severed and there shall be a hearing with respect to reasonable legal fees in person in Room 432 at 60 Centre Street on October 19, 2022 at 10 a.m.

<u>9/9/2022</u> DATE		 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE