

Roberts v New York City Police Dept.

2022 NY Slip Op 33761(U)

November 4, 2022

Supreme Court, New York County

Docket Number: Index No. 153229/2022

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

RICO ROBERTS

Petitioner,

- v -

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

-----X

INDEX NO. 153229/2022

MOTION DATE 10/31/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 58 were read on this motion to/for ARTICLE 78- FOIL.

The petition for on order directing respondent to comply with two Freedom of Information Law ("FOIL") requests is denied as moot; however, petitioner is entitled to reasonable legal fees as described below. Respondent's cross-motion to dismiss is denied.

Background

Petitioner submitted two FOIL requests on June 10, 2021 and, when this proceeding was commenced, he claims that respondent had not yet provided a single record in response. He argues that respondent set an initial deadline of October 26, 2021 to respond but failed to turn over any documents. Petitioner alleges that he administratively appealed these constructive denials, which were then denied by respondent, before bringing the instant proceeding. Petitioner insists that he is currently incarcerated for a murder he did not commit and seeks records concerning two shootings that occurred on the same day using the same gun.

After this proceeding was commenced, respondent sought and obtained four separate adjournments that extended the return date from May 23, 2022 to October 31, 2022. On October

28, 2022, respondent cross-moved to dismiss in part on the ground that it produced all the records it possesses in connection with both FOIL requests. The cover letter for the production of these documents is dated the same day as the cross-motion.

Petitioner points out that this cross-motion is untimely and asks the Court not to consider it. He questions how respondent could argue that it has records when it intimated that it initially had not records.

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 finds that the petition is moot. Forcing respondent to answer (as petitioner requests in reply) when it claims it has produced all records in its possession makes little practical sense. Petitioner does not expressly argue that there are other documents in respondent’s possession that he has not received or identified documents that he expected to receive but has not. 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]). Precedent in this area of law is clear that once respondent turns over documents and certifies that it has disclosed all relevant documents, the Court’s inquiry must end unless petitioner can identify something that is missing from the production. Of course, nothing prevents petitioner from making additional FOIL requests.

However, the Court also finds that 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 attorneys’ fees provision of FOIL was amended, effective December 13, 2017, to provide that the court ‘shall’ award counsel fees where the agency has no basis for denying access to the material sought. The legislative history of the recent amendment notes that often, people simply cannot afford to take a government agency to trial to exercise their right to access public information, and that an award of attorney’s fees is intended to encourage compliance with FOIL and to minimize the burdens of cost and time from bringing a judicial proceeding” (*Reiburn v New York City Dept. of Parks and Recreation*, 171 AD3d 670, 671, 98 NYS3d 49 [1st Dept 2019] [internal quotations and citations omitted]).

Here, respondent set a deadline of October 26, 2021 to respond to both FOIL requests at issue here and ignored its own deadlines. Petitioner utilized the appeal process for both requests and, eventually, commenced this proceeding in April 2022. The cover letters for the production of the documents at issue here are dated October 28, 2022, more than a year after respondent insisted it was going to produce the documents.

In other words, it took a year and five months for respondent to actually respond to these FOIL requests. As noted above, the purpose of the attorneys’ fees provision in FOIL is to encourage timely compliance with FOIL and minimize the costs of bringing an Article 78 proceeding. Respondent cannot force petitioner to bring this case to obtain the records, then turn over the requested records and claim that petitioner has not substantially prevailed. The fact is

that petitioner received the records he sought. Petitioner is directed to file a motion for reasonable legal fees on or before December 1, 2022.¹

The Court also observes that the parties make various arguments about the timeliness of each party's submissions. Respondent requested and received a fourth adjournment (over petitioner's objection) of the return date to October 31, 2022. It made a cross-motion to dismiss on October 28, 2022. While the original notice of petition set a return date significantly longer than seven days (it was filed on April 13, 2022 and set a return date of May 23, 2022), the notice of petition did not demand that the answering papers be served at least seven days before the return date pursuant to CPLR 2214(b) and so the cross-motion is timely (*see* CPLR 2215 [permitting the filing of a cross-motion to be filed three days before the return date]). Even if the cross-motion was untimely, the Court will consider the cross-motion because this Court prefers to consider cases on the merits and petitioner had a chance to offer opposition to the cross-motion.

However, the procedural dispute does not end there. Respondent had the audacity to send in a letter after the motion was submitted to complain that petitioner's reply is untimely. Of course, respondent dragged this summary proceeding along for nearly seven months and now wants to complain about petitioner filing an opposition to its cross-motion that, according to respondent, is a day late. Respondent is also incorrect that the opposition was not timely. It filed its cross-motion on a Friday and claims, bizarrely, that petitioner was required to file its opposition on a Sunday (one day before the return date). General Construction Law § 25-a clearly and obviously permitted petitioner to file the opposition on October 31, 2022 (the next business day).

¹ Of course, the parties are free to reach an agreement with respect to the issue of reasonable legal fees and avoid further motion practice.

Accordingly, it is hereby

ORDERED that the petition 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 issue of reasonable legal fees is severed and petitioner shall make a separate application for reasonable legal fees on or before December 1, 2022.

11/4/2022

DATE

ARLENE P. BLUTH, 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