

**Matter of Frey v Mount Sinai Med. Ctr.**

2023 NY Slip Op 31038(U)

March 28, 2023

Supreme Court, New York County

Docket Number: Index No. 805389/2022

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT:** HON. JOHN J. KELLEY **PART** **56M**

*Justice*

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In the Matter of

CHRISTOPHER FREY

Petitioner,

- v -

MOUNT SINAI MEDICAL CENTER,

Respondent.

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**INDEX NO.** 805389/2022

**MOTION DATE** 01/03/2023

**MOTION SEQ. NO.** 001

**DECISION, ORDER, and  
JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2

were read on this motion to/for RELEASE RECORDS.

In this proceeding pursuant to Public Health Law § 18, the petitioner seeks disclosure, in electronic form, of copies of the complete medical chart referable to his treatment at the respondent's facilities. The respondent has not answered or opposed the petition. The petition is granted, and the respondent is directed to provide the petitioner with certified copies of any such records or charts, in electronic form, in accordance herewith.

On August 22, 2022, the plaintiff's attorneys mailed the respondent a request for the plaintiff's electronic medical records, without date limitation, and enclosed a HIPAA-compliant authorization signed by the plaintiff. Instead of providing the electronic records in a CD format, the respondent invoiced the plaintiff's attorney for the sum of \$5,240.75, reflecting the per-page cost allowed by the Public Health Law for reproduction of paper copies of records. In response, the petitioner wrote to the respondent, indicating that, pursuant to federal law, he was entitled to the production of his records in electronic form without having to pay a fee.

Public Health Law § 18(2) provides that, subject to certain conditions not applicable here, "upon written requests of any qualified person, a health care provider shall furnish to such

person, within a reasonable time, a copy of any patient information requested, . . . which the person is authorized to inspect to this subdivision.” The definition of “qualified person,” as articulated in Public Health Law § 18(1)(g), includes “any properly identified subject; . . . or an attorney representing a qualified person. . . . A qualified person shall be deemed a ‘personal representative’ of the individual for purposes of the federal health insurance portability and accountability act of 1996 and its implementing regulations,” thus authorizing the attorney to request the subject medical records. Pursuant to Public Health Law § 18(2)(e), the price that a medical facility may charge for reproduction of paper medical records is \$.75 per page.

As the petitioner correctly points out, however, regulations promulgated by the Secretary of Health and Human Services (HSS) pursuant to the federal Twenty-First Century CURES Act (114 P.L. 255, Title IV, § 4006, Dec. 13, 2016, amending the Health Information Technology for Economic and Clinical Health Act [42 USC §§ 17931-17941]), now limit the amount that may be charged to patients or their representatives for production of electronic media containing medical records. As set forth in 45 CFR 171.302, effective June 30, 2022,

“[a]n actor’s practice of charging fees, including fees that result in a reasonable profit margin, for accessing, exchanging, or using electronic health information will not be considered information blocking when the practice meets the conditions in paragraph (a) of this section, *does not include any of the excluded fees* in paragraph (b) of this section, and, as applicable, meets the condition in paragraph (c) of this section”

([emphasis added]; see 42 USC § 300jj-52 [defining and regulating “information blocking” by entities and persons in possession of a patient’s medical records]). Thus, although fees may be imposed for the production of medical records under certain circumstances (see 45 CFR 171.302[a]), pursuant to 45 CFR 171.302(b)(2), a fee cannot be imposed when “a fee [is] based in any part on the electronic access of an individual’s E[lectronic] H[ealth] I[nformation] by the individual, their personal representative, or another person designated by the individual.” Moreover, this limitation on the imposition of fees applies not only to the individual patient, but “to another person designated by the individual” (*id.*), such as that individual’s attorney.

As the petitioner correctly argues, this federal regulatory scheme expressly prohibits the imposition of per-page fees for the production of electronic media containing medical information. The Department of HHS nonetheless has issued a guidance, permitting those producing medical records to charge only the sum of \$6.50 for the cost of the first-class postage necessary to mail the CD containing the records. The petitioner's attorneys note that they demanded production of the relevant CD and offered to pay the respondent \$6.50 for postage, but that the respondent never replied to the demand.

"Under New York law, patients and those similarly situated have generally been entitled to court orders granting them access to their medical records for purposes of litigation. This is obviously true in instances in which litigation has actually been commenced . . . and it is even true when litigation is merely contemplated" (*Wheeler v Commissioner of Soc. Servs.*, 233 AD2d 4, 9 [2d Dept 1997] [citations omitted]; see *Matter of Marte v New York Presbyterian-Columbia Univ.*, 2023 NY Slip Op 30824[U], \*2, 2023 NY Misc LEXIS 1175, \*2 [Sup Ct, N.Y. County, Mar 14, 2023] [Kelley, J.]; *Matter of Cummings v Perkins*, 2022 NY Slip Op 31047[U], \*2, 2022 NY Misc LEXIS 1600, \*2 [Sup Ct, N.Y. County, Mar. 30, 2022] [Kelley, J.]; *Matter of Kaplan v North Shore Univ. Hosp.*, 117 Misc 2d 734, 736 [Sup Ct, Nassau County 1982]). Although the petitioner noted that he already had commenced a medical malpractice action against several health-care providers in 2021 in the Supreme Court, Queens County, and that the respondent here is not named as a defendant in that action, the petitioner is not limited to seeking the disputed records solely by way of a nonparty subpoena duces tecum in the pending Queens County action.

Accordingly, it is

ADJUDGED that the petition is granted, without opposition; and it is,


ORDERED that the respondent, Mount Sinai Medical Center, shall, on or before May 1, 2023, provide the petitioner's attorney with a complete set of the petitioner's electronic health information, in the form of a CD, CD-R, thumb drive, or other easily accessible physical medium,

and shall not provide the electronic information via on-line or cloud-based services such as Dropbox and the like, and the respondent shall be limited to charging the petitioner's attorney the sum of \$6.50, as and for the cost of postage for mailing the electronic information storage medium or device; and it is further,

ORDERED that the petitioner shall serve a copy of this Decision, Order, and Judgment upon the respondent's legal department by regular, first-class mail

This constitutes the Decision, Order, and Judgment of the court.

3/28/2023  
DATE

  
JOHN J. KEENE, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: