

Wagner v New York City Dept. of Educ.

2023 NY Slip Op 31663(U)

May 17, 2023

Supreme Court, New York County

Docket Number: Index No. 151346/2023

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

Justice

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JIMMY WAGNER

Petitioner,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

-----X

INDEX NO. 151346/2023

MOTION DATE 04/28/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

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

The petition to *inter alia* direct respondent to conduct an adequate search for the records sought in petitioner’s Freedom of Information Law (“FOIL”) request is denied.

Background

On August 22, 2022, petitioner submitted a FOIL request that sought “all emails between the DOE from April 2021 until August 2022 from the following domain:

@scheinmanneutrals.com” (NYSCEF Doc. No. 4).

Respondent replied on August 30, 2022 that the request was not reasonably described and asked that petitioner “provide names and/or titles of senders/receivers (including email addresses, if possible) beyond the domain provided and key terms to be searched. It is also suggested that you narrow the timeframe” (NYSCEF Doc. No. 5).

Petitioner appealed that decision on August 30, 2022 and respondent observed in reply that it needed at least one custodian at respondent so it could successfully run the search in its

software. After more back and forth, respondent eventually denied the request (NYSCEF Doc. No. 10). It noted that it:

“attempted multiple electronic searches for emails within the specified time frame from @scheinmanneutrals.com to DOE's domain name @nyc.schools.gov (because no DOE custodians were provided). As the DRAO previously conveyed to you, those searches failed to execute and therefore, clarification was necessary in order to process this request. Specifically, I am informed that an electronic search with the parameters you provided commenced, persisted, and then timed out the next business day. Notably, you were not only given the opportunity to submit clarification, but the DRAO suggested ways to sufficiently narrow the scope, so that the request could be processed. Your correspondences make clear that you refused to modify the search parameters in any way” (*id.*).

Petitioner now seeks to appeal this denial. He insists that he exhausted his administrative remedies and that the FOIL request was reasonably described. Petitioner claims he simply wants all emails between respondent and the specific domain from April 2021 to August 2022. He insists that respondent's attempts to require him to narrow the parameters is not support by any statute. Petitioner argues that he offered sufficient identifying information to permit respondent to locate the requested records. He also insists that respondent may not rely on a burdensome argument as a basis to deny the instant FOIL request.

In opposition, respondent observes that its eDiscovery tool was not able to process the request. It explains that the search “timed out” each time and that it communicated this to petitioner. Respondent maintains that it has over one million email accounts, so a global search of every single email account (as petitioner requested here) simply cannot be processed. It claims this is why it requested that petitioner identify certain custodians at respondent so that it could process the search.

Respondent details how another city department (the Department of Health and Mental Hygiene) was able to respond to a FOIL request by petitioner seeking similar documents by applying a condition to limit responsive records to those where the domain

(scheinmannnaturals.com) would appear as a participant or anywhere in the sender/recipient fields instead of as a key term anywhere in the records. Respondent observes that applying that condition here resulted in another error message. It argues that DOHMH's search was possible because it involved only tens of thousands of accounts instead of the over one million at respondent.

In reply, petitioner disputes the number of accounts at respondent and that respondent has not established that the records are not reasonably described. He insists that there is no dispute about what documents petitioner is requesting and where such records are located. Petitioner maintains that there is a database for these records and that a simple script can be executed to run the search.

Discussion

“To promote open government and public accountability, FOIL imposes a broad duty on government agencies to make their records available to the public. 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. While FOIL exemptions are to be narrowly read, they must of course be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL” (*Abdur-*

Rashid v New York City Police Dept., 31 NY3d 217, 224-25, 76 NYS3d 460 [2018] [internal quotations and citation omitted]).

The key language under FOIL applicable to the instant request is found in Public Officers Law § 89(3)(a), which provides that “when an agency has the ability to retrieve or extract a record or data maintained in a computer storage system *with reasonable effort*, it shall be required to do so. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or data electronically. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record” (Public Officers Law § 89[3][a] [emphasis added]).

The Court finds that respondent’s answer demonstrates that it has acted reasonably to try and accommodate petitioner’s request and the Court therefore denies the petition. The context in this proceeding is critical to determining what is rational and reasonable. Respondent requested, on multiple occasions, that petitioner offer a custodian (i.e., an email address at respondent) so that respondent could perform the search without the search “timing out.” Petitioner chose not to do so and demanded that search be run with the purportedly over a million accounts at respondent. In other words, respondent made reasonable efforts to run the search in order to avoid receiving an error message and petitioner refused to budge.

Respondent’s efforts to find a solution, including efforts to duplicate searches related to a FOIL request with the Department of Health and Mental Hygiene, show that it tried to run a search within the confines of the computer software it possesses but that petitioner’s request was simply too broad. Respondent explains that there are simply too many accounts to run a search

on the software and that led to the error messages it received. As respondent details, requesting every email from over a million accounts with a specific domain (not even with a specific person at that domain) is not possible given the software that respondent possesses. That combined with the timeline of over a year and half resulted in respondent's inability to process the search.

The Court will not force respondent to repeatedly do a search that results in an error message or expend an infinite number of hours to locate the records. Respondent satisfied its burden by both contacting petitioner and by attempting to run the search in various ways. The purpose of FOIL is to provide public records upon request, provided that those requests can be satisfied with *reasonable effort*. For whatever reason, petitioner did not seem interested in reaching a solution.

The Court observes that petitioner, for the first time in reply, attempts to claim that respondent could run a specific script (NYSCEF Doc. No. 34) in order to perform a successful search. Making these arguments, including the submission of the expert affidavit, for the first time in reply is without merit and the Court cannot consider this as a basis to grant the petition. That petitioner alluded to the use of a third-party in its memo of law in support is of no moment; there is no dispute that the expert affidavit and the precise script were submitted for the first time in reply. Of course, nothing prevents petitioner from bringing another FOIL request and including a suggestion that respondent utilize this script to see if that makes a search possible.

The Court did not consider the letters filed by the parties (NYSCEF Doc. Nos. 35, 36), both of which were submitted well after the return date.

Accordingly, it is hereby

ORDERED that the petition is denied, this proceeding is dismissed and the Clerk is directed to enter judgment accordingly in favor of respondent and against petitioner along with costs and disbursements upon presentation of proper papers therefor.

5/17/2023
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 checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE