

**Matter of Hell Gate, LLC v City of New York Off. of
the Mayor**

2024 NY Slip Op 33229(U)

September 13, 2024

Supreme Court, New York County

Docket Number: Index No. 160022/2023

Judge: John J. Kelley

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**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
HELL GATE, LLC,

Petitioner,

- v -

THE CITY OF NEW YORK OFFICE OF THE MAYOR,

Respondent.

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INDEX NO. 160022/2023

MOTION DATE 07/12/2024

MOTION SEQ. NO. 001

**DECISION, ORDER, AND
JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

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

In this CPLR article 78 proceeding, the petitioner---an owner and publisher of an internet-based news site and blog---seeks judicial review of the New York City Office of the Mayor Records Access Appeals Officer's (RAAO's) constructive denial of an appeal from the respondent's constructive denial of its initial request for agency records pursuant to the Freedom of Information Law (Public Officers Law § 84, *et seq.*; hereinafter FOIL). After the petitioner commenced this proceeding, the respondent provided the petitioner with 137 pages of documents that were responsive to the request, asserted that it had conducted a complete and diligent search for records, contended that it had produced all responsive documents in its possession, and argued that its production rendered this proceeding academic. The petitioner contends, however, that the respondent did not search any personal telephones of its employees for text and email messages responsive to the request, and searched only one City-issued cellphone. It further contended that it is entitled to an award of attorneys' fees.

The petition is granted only to the extent that: (a) the respondent is directed to conduct an additional limited investigation into the contents of cellphones issued by the City to

employees of the Office of the Mayor, in order to ascertain whether any texts and e-mail messages are responsive to the petitioner's request, and to provide the petitioner with all records that are not exempt from disclosure, and (b) the petitioner is awarded the reasonable attorney's fees that it incurred in prosecuting this proceeding, and shall submit an affirmation of attorney's services and attorney's invoices referable thereto, as set forth herein. The petition is otherwise denied, and the proceeding is otherwise dismissed.

On September 12, 2022, the petitioner submitted a FOIL request to the respondent, asking that the respondent provide it with records consisting of "Emails, text messages, or other written logs of communication between Scott Sartiano, the owner of Zero Bond, and his surrogates, and Mayor Eric Adams, and his surrogates, between 1/1/2022 and 9/12/2022." On September 13, 2022, the respondent acknowledged receipt of the petitioner's FOIL request, and asserted that it would not deny or provide records responsive to the request within the five days required by Public Officers Law § 89(3)(a), but instead indicated that it expected to complete its response to the request on October 18, 2022 (*see id.* [where agency acknowledges receipt of request, but cannot produce records or deny the request within five days, it must provide "a statement of the approximate date" on which it will produce the records or deny the request, "which shall be reasonable under the circumstances of the request"]]). On four separate occasions beginning on October 18, 2022, the respondent's Records Access Officer (RAO) unilaterally "extended" the due date for the response "due to volume of requests that we have received," and unilaterally scheduled the final response date for April 27, 2023.

On June 5, 2023, the petitioner, deeming the respondent's failure to produce the requested records or deny the request by April 27, 2023 to constitute a constructive denial thereof, administratively appealed the denial to the respondent's RAAO, thus obligating the RAAO to respond to the appeal within 10 days of receipt of the appeal (*see* Public Officers Law §89[4][c]). When the RAAO did not respond to the petitioner's administrative appeal by June

15, 2023, the petitioner deemed that failure to constitute a constructive denial of the appeal (see *id.*), and commenced this proceeding on July 31, 2023.

In a determination dated August 4, 2023, and thus made in response to the commencement of the proceeding, the RAAO granted the administrative appeal, but indicated that she would direct the RAO to provide the petitioner with the requested records no earlier than September 30, 2023. The RAO nonetheless did not produce the records by September 30, 2023. Rather, on November 17, 2023, a date prior to its service of an answer in this proceeding, the respondent produced 137 pages of records responsive to the petitioner's FOIL request. When it finally answered the petition on December 7, 2023, it contended that it had conducted a diligent search and produced all of its records responsive to the petitioner's thus rendering this proceeding academic. In reply, the petitioner noted that the respondent's search involved only an inquiry into the contents of one cellphone issued by the City to one of the respondent's employees, and no inquiries into personal cellphones owned by the respondent's employees that might contain texts or email messages responsive to the request. The petitioner also argued that the proceeding had not been rendered academic by the respondent's production because it was entitled to an award of attorneys' fees.

A respondent agency may discharge its duty pursuant to FOIL by certifying that it has produced all relevant records (21 NYCRR 1401.2[b][5]), and that additional "records of which the agency is a custodian cannot be found after diligent search" (21 NYCRR 1401.2[b][7][ii]; see Public Officers Law § 89[3][a]; *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001]; *Matter of Yonamine v New York City Police Dept.*, 121 AD3d 598, 598 [1st Dept 2014]). Where, as here, the agency has made such a certification, a CPLR article 78 proceeding to review such a determination usually will be rendered academic (see *Matter of Tarantino v New York City Police Dept.*, 136 AD3d 598, 599 [1st Dept 2016]; *Matter of Taylor v New York City Police Dept. FOIL Unit*, 25 AD3d 347 [1st Dept 2006]; *Matter of Tellier v New York City Police Dept.*, 267 AD2d 9 [1st Dept 1999]). Moreover, a certification of a diligent

search need not follow any specific form, nor need it include a statement of a person with personal knowledge of the search; rather, a statement in an attorney's affirmation is sufficient to support the certification (*see Matter of Rattley v New York City Police Dept.*, 96 NY2d at 875; *Matter of Tarantino v New York City Police Dept.*, 136 AD3d at 599; *Matter of Yonamine v New York City Police Dept.*, 121 AD3d at 598). The issue before the court is whether the certification here was adequate to render the proceeding academic.

A "record" maintained by an agency that may be subject to production under FOIL is defined by that statute as

"any information kept, held, filed, produced or reproduced *by, with or for an agency* or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes"

(Public Officers Law § 86[4] [emphasis added]). The petitioner has cited, and research has revealed, no authority for the proposition that emails or text messages sent to or from a personal cellphone or computer of an agency's employee, constituting a communication with non-governmental actor such as Sartiano or Zero Bond, is a "record" within the meaning of that provision. This court concludes that such written communications do not constitute information kept, held, filed, produced or reproduced by, with, or for an agency. Hence, the respondent did not fail to satisfy its obligation to conduct a diligent search for records responsive to the petitioner's request by failing to investigate the contents of personal and private cellphone and computers owned by the respondent's employees. To the extent that a communication was sent to a City-issued computer or cellphone by an employee of the respondent on that respondent's personal device, or received on a City-issued cellphone or computer from an employee's private device, the respondent has certified that such records have been produced (*cf.* Public Officers Law § 87[2][g][i-iii] [exempting certain intra-agency materials from disclosure under FOIL, an exemption that might apply to records created by virtue of communications sent to or from only City-issued electronic devices]). Hence, the branch of the petition seeking to

compel the respondent to conduct a search of the contents of its employees' electronic devices is denied, and that portion of the proceeding is dismissed.

Based on a review of the administrative record, however, the court agrees with the petitioner, that, to the extent that the respondent has not fully investigated the contents of City-issued electronic devices to ascertain whether communications were sent to or received via text or email from Sartiano, his surrogates, or Zero Bond, it must do so. Hence, the branch of the petition seeking to compel the respondent to conduct such a search is granted, and the respondent is directed, on or before November 13, 2024, to conduct such a search and produce any records discovered thereby, or to assert any other FOIL exemption that might be applicable to such records.

“In order to create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL, the Legislature has provided for the assessment of an attorney's fee and other litigation costs in FOIL proceedings” (*Matter of Cook v Nassau County Police Dept.*, 140 AD3d 1059, 1060 [2d Dept 2016] [citations and internal quotation marks omitted]; see Public Officers Law § 89[4][c]; *Matter of McNerney v Carmel Cent. Sch. Dist.*, 204 AD3d 1012, 1013 [2d Dept 2022]; *Matter of Edmond v Suffolk County*, 197 AD3d 1297, 1299 [2d Dept 2021]). Thus, “[t]he court . . . 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” Public Officers Law § 89 “in which such person has substantially prevailed . . . when the agency failed to respond to a request or appeal within the statutory time,” or “the court finds that the agency had no reasonable basis for denying access” (Public Officers Law §§ 89[4][c][i], [ii]). Prior to 2006, the law required that, for attorneys' fees to be awarded, the documents involved must be of clearly significant interest to the general public. Pursuant to L 2006, ch 492, the Legislature amended FOIL to remove that statutory requirement.

As explained by the Court of Appeals, “[o]nly after a court finds that the statutory prerequisites have been satisfied may it exercise its discretion to award or decline attorneys’ fees” (*Beechwood Restorative Care Ctr. v. Signor*, 5 NY3d 435, 441 [2005]). “A petitioner has ‘substantially prevailed’ within the meaning of Public Officers Law § 89(4)(c) when the commencement of the CPLR article 78 proceeding ultimately succeeds in obtaining the records responsive to the FOIL request, whether by court order or by voluntary disclosure” (*Matter of McDevitt v Suffolk County*, 183 AD3d 826, 828 [2d Dept 2020]; see *Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 79 [2017]; *Matter of McNerney v. Carmel Cent. Sch. Dist.*, 204 AD3d at 1014). Where, as here, “it was the initiation of this proceeding which brought about the release of the documents” (*Matter of Powhida v City of Albany*, 147 AD2d 236, 239 [3d Dept 1989]), the petitioner is deemed to have “substantially prevailed” (see *Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d at 79).

Hence, the court grants that branch of the petition which sought an award of attorneys’ fees. The petitioner thus is directed, on or before October 17, 2024, to submit to the court an affirmation of attorneys’ services and invoices for legal services, after which the court shall determine the appropriate award of attorneys’ fees to it.

In light of the foregoing, it is,

ORDERED and ADJUDGED that the petition is granted to the extent that:

- (a) the respondent shall, on or before November 13, 2024, conduct a search of the contents of electronic devices, such as mobile phones, cellphones, and computers that it had issued to its employees, in order to ascertain whether communications were sent to or received from Scott Sartiano, his surrogates, or Zero Bond between January 1, 2022 and September 12, 2022, via text or email, and either provide those records to the petitioner or assert any statutory exemption from disclosure; and
- (b) the petitioner shall, on or before October 17, 2024, submit to the court an affirmation of attorneys’ services and invoices for legal services, after which the court shall determine the appropriate award of attorneys’ fees to it; and it is further,

ORDERED that the petition is otherwise denied; and it is further,

ADJUDGED that the proceeding is otherwise dismissed.

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

9/13/2024
DATE


JOHN J. KELLEY, 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