

Matter of Romero v City Univ. of N.Y.

2024 NY Slip Op 33690(U)

October 17, 2024

Supreme Court, New York County

Docket Number: Index No. 150307/2023

Judge: Shahabuddeen Abid Ally

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. SHAHABUDEEN ABID ALLY

PART 16

Justice

In the Matter of the Application of

ALDEMARO ROMERO,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules,

-against-

THE CITY UNIVERSITY OF NEW YORK and BARUCH
COLLEGE,

Respondents.

INDEX NO. 150307/2023

MOTION DATE 7/13/2023

MOTION SEQ. NO. 001

DECISION & ORDER

The following e-filed documents, listed by NYSCEF document number, were read on this motion (Seq. No. 1) to/for **ARTICLE 78 (BODY OR OFFICER)**: 1-11, 24-45, 47

In this proceeding pursuant to Article 78, petitioner ALDEMARO ROMERO ("Petitioner") seeks an order that, among other relief, requires respondents BARUCH COLLEGE ("Baruch") and THE CITY UNIVERSITY OF NEW YORK ("CUNY"; and, together with Baruch, "Respondents") to produce documents responsive to Petitioner's Freedom of Information Law ("FOIL") request within 30 days. Petitioner commenced this proceeding on January 11, 2023, by filing a Verified Petition and Notice of Petition. After a number of adjournments, on June 28, 2023, Respondents cross-moved, pursuant to CPLR §§ 404(a) and 7804(f) and Rules 406 and 3211(a), to dismiss. Petitioner filed a reply on July 12, 2023. For the reasons discussed below, Respondents' cross-motion is **GRANTED**, Petitioner's Notice of Petition is **DENIED**, and the Verified Petition is **DISMISSED**.

A. BACKGROUND

Petitioner is a former professor at Baruch and the former dean of Baruch's Weismann School of Arts and Sciences. (Dais Affirm. (NYSCEF Doc. 25) ¶ 4) On December 24, 2021,

Petitioner submitted a FOIL request to Respondents requesting copies of “any electronic communications, notes, minutes, or any other written communication[,] including, but not limited to[,] emails, regarding [Petitioner] . . . generated or received by” a list of 12 separate individuals (the “Initial FOIL Request”). (Verified Pet. (NYSCEF Doc. 1) ¶¶ 10-11; *id.* Ex. 1 (NYSCEF Doc. 4); Dais Affirm. ¶ 6; *id.* Ex. A (NYSCEF Doc. 26)) Respondents acknowledged receipt of the Initial FOIL Request by email on January 5, 2022, stating that Petitioner would be “notified in writing within 20 business days whether [his] request will be granted in whole or in part or denied or will be given a date by which the College will make that determination.” (Verified Pet. ¶ 13; *id.* Ex. 2 (NYSCEF Doc. 5); Dais Affirm. ¶ 8; *id.* Ex. B (NYSCEF Doc. 27))

On February 11, 2022, Respondents responded to the Initial FOIL Request by email stating, in relevant part:

The records requested cannot be located with reasonable effort and your request is too broad and does not reasonably describe records in the possession of this agency.

Please clarify your request by providing us with search terms and dates in order to enable us to locate records responsive to your request. If you do not provide this information to us by March 3, 2022, we will deem your request withdrawn.

(Verified Pet. ¶ 15; *id.* Ex. 3 (NYSCEF Doc. 6); Dais Affirm. ¶ 12; *id.* Ex. C (NYSCEF Doc. 28)) By separate emails sent on February 11, 16, 23, and 28 and March 2 and 4, 2022, Petitioner provided certain clarification on the Initial FOIL Request. (Verified Pet. ¶¶ 16-17; *id.* Exs. 4-5 (NYSCEF Docs. 7-8); Dais Affirm. ¶¶ 13-16; *id.* Exs. D-J (NYSCEF Docs. 29-35)) Although Respondents requested that Petitioner provide search terms and date ranges, Petitioner provided only date ranges. (*See* Verified Pet. Exs. 4-5; Dais Affirm. Exs. D-G, I-J) The majority of the date ranges offered for the custodians were for periods between three or four years in length. (*See* Verified Pet. Exs. 4-5; Dais Affirm. Exs. D-G, I-J)

On March 11, 2022, Respondents acknowledged receipt of Petitioner’s multiple, separate email clarifications as one revised FOIL request (the “Revised FOIL Request”). (Verified Pet. Ex. 5 (NYSCEF Doc. 8); Dais Affirm. ¶ 17; *id.* Ex. K (NYSCEF Doc. 26); *see also* Verified Pet. ¶ 18) Like Respondents’ acknowledgement of the Initial FOIL Request, their acknowledgement of the Revised FOIL Request stated that Petitioner would, within 20 days, be notified in writing whether the request is granted (in whole or in part) or denied or would otherwise be informed of the date

on which Respondents would make such a determination. (Verified Pet. Ex. 5; Dais Affirm. ¶ 17; *id.* Ex. K)

On April 8, 2022, Respondents sent an email to Petitioner extending Respondents' time to respond to the Revised FOIL Request to October 7, 2022. (Verified Pet. ¶ 19; *id.* Ex. 6 (NYSCEF Doc. 9); Dais Affirm. ¶ 18; *id.* Ex. L (NYSCEF Doc. 37)) In the email, Respondents explained the reason for the extension as follows:

Because of the large volume of records requested, the nature of the records requested which will most likely require legally appropriate redaction, the specified nature of the request and the manner in which the records are maintained that will require each document to be reviewed individually, the College will respond to your request by October 7, 2022.

The College will endeavor to give you a determination sooner if we are able to do so. . . .

(Verified Pet. Ex. 6; Dais Affirm. ¶ 18; *id.* Ex. L) Respondents also informed Petitioner that if he "disagree[s] with any ruling made in connection with this request, [he] can appeal within 30 days of the date hereof to Mr. Derek Davis, General Counsel and Senior Vice President for Legal Affairs" for CUNY. (Verified Pet. Ex. 6; Dais Affirm. ¶ 18; *id.* Ex. L) Although Petitioner responded to Respondents' April 8 email with surprise at the delay in producing the requested communications, Petitioner did not appeal to Mr. Davis. (*See* Verified Pet. Ex. 6; Dais Affirm. ¶ 19; *id.* Ex. M (NYSCEF Doc. 38)) Respondents, in turn, replied to Petitioner's April 11 email further explaining the reasons for the delay:

As stated in my correspondence of April 8, your request of December 24, 2021, and subsequently revised requests through March 4, 2022, yielded a **huge number of emails**. For example, a search in five of the requested email accounts with the parameters you provided has already returned 5,304 emails, and there are 7 more individual email accounts per your request which we still have to retrieve emails from. At this rate, we may be looking at 10,000 emails. I need to read every one of these emails to determine whether there is information in the emails that should be excluded under FOIL. Therefore, as stated previously, I will need six months to review the thousands of records you requested and will respond by October 7, 2022.

(Verified Pet. Ex. 6; Dais Affirm. ¶ 20; *id.* Ex. N (NYSCEF Doc. 39))

On October 7, 2022, Respondents informed Petitioner that a two-month extension to determine the Revised FOIL Request was necessary given the large volume of documents requiring

review. (Verified Pet. ¶ 20; Dais Affirm. ¶ 23; *id.* Ex. O (NYSCEF Doc. 40)) Specifically, Respondents informed Petitioner that

the College has now collected the requested documents; however, because of the large number of files and types of files requiring line by line review and legally required redactions, it will take at least two (2) months to make a determination on this request. Accordingly, the College will provide you with a determination on this request by December 7, 2022.

(Dais Affirm. ¶ 23; *id.* Ex. O) In the October 7 email Petitioner was again advised of his right to appeal within 30 days. (Dais Affirm. ¶ 23; *id.* Ex. O) Petitioner neither responded to the email nor appealed. (*Id.* ¶ 23)

On December 7, 2022, Respondents informed Petitioner by email that the Revised FOIL Request would be granted in part and that responsive documents would be produced to Petitioner no later than April 30, 2023. (Verified Pet. Ex. 7 (NYSCEF Doc. 10); Dais Affirm. ¶ 24; *id.* Ex. P (NYSCEF Doc. 41)) The reason for the April 30 production date was “[d]ue to the volume of documents requested and the associated time for review and redaction by counsel.” (Verified Pet. ¶ 22; *id.* Ex. 7; Dais Affirm. ¶ 24; *id.* Ex. P) Petitioner was again advised of his right to appeal within 30 days. (Verified Pet. Ex. 7; Dais Affirm. ¶ 24; *id.* Ex. P)

By email dated December 8, 2022, Petitioner submitted an appeal of the December 7, 2022 determination to Mr. Davis. (Verified Pet. ¶ 23; *id.* Ex. 7; Dais Affirm. ¶ 25; *id.* Ex. Q (NYSCEF Doc. 42)) Mr. Davis subsequently denied the appeal by letter dated December 20, 2022, writing, in relevant part:

As an initial matter, you claim that you made your request “almost two years ago.” This is not accurate. Your request was submitted on December 24, 2021, approximately one year ago. To the extent that you are requesting a review of the possible production dates preceding the College’s December 7, 2022 email, your appeal is denied. Under the POL, “any person denied access to a record may within thirty days appeal in writing.” *See* POL § 89(4)(a). In February 2022, after the College asked you to help narrow the search, you did not appeal. Further, despite the fact that the College’s April 8, 2022 and October 7, 2022 emails regarding the proposed timeline specifically informed you of your right to appeal, you did not specifically do so. Again, you submitted the FOIL Appeal on December 8, 2022, well beyond the 30-day deadline to challenge these prior determinations. Thus, your appeal on these grounds is untimely.

Although your appeal of the College’s December 7, 2022 email extension is timely, it is similarly denied. First, it must be noted that the College has not denied your request. Second, contrary to the assertions in your FOIL

Appeal, the College has not provided you with “excuses” or otherwise failed to comply with its “promises.” Rather, as the College has explained to you, it is in the process of reviewing the thousands of records potentially responsive to your request. This is in accordance with the POL, which states . . . [that] if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.” See POL § 89(3)(a). Additionally, the Committee on Open Government notes that, when an agency selects a date for response, “the date must be reasonable based on attendant facts and circumstances.” See FOIL AO 19667.

As noted, over the course of the few months following the original submission of you[r] request, the College attempted to narrow the scope of the records you sought. Despite this, your request still required the College to search 12 email[] accounts for emails spanning many years. That search is now complete, resulting in the identification of thousands of potentially responsive emails, totaling thousands of megabytes. Each of these emails, in turn, requires individual review and, where appropriate, legally authorized redactions. Given the volume and scope of your request, the College’s timeline for production cannot be deemed unreasonable under the circumstances. This conclusion is further supported by the fact that the College has been responsive to you throughout the process. As such, your FOIL Appeal is denied.

(Verified Pet. ¶ 24; *id.* Ex. 8 (NYSCEF Doc. 11); Dais Affirm. ¶ 26)

Petitioner commenced this Article 78 proceeding on January 11, 2023, alleging that Respondents constructively denied the Revised FOIL Request. (*See* Verified Pet.) In the Verified Petition, Petitioner requests that the Court order Respondents to produce documents responsive to the Revised FOIL Request within 30 days, that the Court declare that Respondents violated the POL, and that Respondents be ordered to pay Petitioner his costs and attorney’s fees in this proceeding. (*See id.*)

While this proceeding was pending, Respondents allegedly produced all responsive documents to Petitioner from each of the 12 identified custodians, as well as production logs identifying which, if any, documents were withheld or redacted and the bases therefor. (Dais Affirm. ¶ 28; Cooney Affirm. (NYSCEF Doc. 43) Ex. A (NYSCEF Doc. 44)) Each of five separate productions were made by sending an email to Petitioner’s counsel containing a password-protected link to download the documents or otherwise informing counsel that documents concerning new custodians had been uploaded to the link. (*See* Cooney Affirm. Ex. A) The password was provided to

Petitioner's counsel separately by email. (*See id.*) Respondents' first production, concerning three of the twelve custodians, was made on February 16, 2023. (Dais Affirm. ¶ 28; Cooney Affirm. Ex. A) The second production, concerning two additional custodians, was made on March 10, 2023. (Dais Affirm. ¶ 28; Cooney Affirm. Ex. A) The third production, concerning three more custodians, was made on April 18, 2023. (Dais Affirm. ¶ 28; Cooney Affirm. Ex. A) The fourth production, concerning another three custodians, was made on May 1, 2023. (Dais Affirm. ¶ 28; Cooney Affirm. Ex. A) And the fifth and final production, concerning the one remaining custodian, was made on June 1, 2023. (Dais Affirm. ¶ 28; Cooney Affirm. Ex. A) In total, the productions comprise 35,853 pages. (Dais Affirm. ¶¶ 28-29)

B. DISCUSSION

It is well established that when a government agency produces records responsive to a petitioner's FOIL request during the pendency of an Article 78 proceeding, the proceeding is rendered moot. *Lambrou v. New York City*, 210 A.D.3d 588, 589 (1st Dep't 2022) ("Respondents' review and determination of petitioner's FOIL request after the commencement of this article 78 proceeding rendered the proceeding moot."); *Cobado v. Benziger*, 163 A.D.3d 1103, 1105 (3d Dep't 2018) ("Where a petitioner receives an adequate response to a FOIL request during the pendency of his or her CLR article 78 proceeding, the proceeding should be dismissed as moot because a determination will not affect the rights of the parties." (internal quotation marks and citation omitted)); *Taylor v. N.Y.C. Police Dep't FOIL Unit*, 25 A.D.3d 347, at *1 (1st Dep't 2006) ("[T]he petition was rendered moot by respondents' production of records responsive to the requests as part of their motion to dismiss the instant proceeding."); *Davidson v. Police Dep't of the City of N.Y.*, 197 A.D.2d 466, 466-67 (1st Dep't 1993) ("The I.A.S. court properly denied the petition for records pursuant to [FOIL] as moot inasmuch as respondent provided petitioner with records responsive to the request during the pendency of the litigation.").

Here, Respondents establish, through their submissions, that they produced a combined 35,853 pages of documents, from all 12 of the requested custodians, in response to the Revised FOIL Request during the pendency of this proceeding. Significantly, Petitioner does not deny that these records and accompanying logs were produced. Instead, he appears to argue that Respondents have failed to carry their burden to demonstrate that this proceeding is moot because they have not put the actual produced documents and logs on the public docket, instead only

submitting the emails containing the download links. Petitioner appears to believe that it is incumbent upon this Court to review all 35,853 pages of documents and the logs to determine whether any documents were improperly withheld or redacted, without any specific objection to any withholding or redaction, any briefing on any such objection, and without any reference whatsoever to improper withholding or redaction in the Verified Petition. Petitioner is mistaken. Even if Respondents had put the production and logs on the public docket, the Court still would not undertake such a plenary, undirected, and unassisted review of tens of thousands of pages of documents. That is beyond the scope of this proceeding, as established by the Verified Petition, and beyond the role and practical capability of the Court. Should Petitioner take issue with any specific document withheld or redacted by Respondents allegedly pursuant to some exemption to FOIL, Petitioner may raise those objections in a separate proceeding commenced pursuant to a properly tailored pleading. *See Lambrou*, 210 A.D.3d at 589 (“Petitioner did not seek to amend the petition to challenge respondents’ later determination of the FOIL request, and the validity of respondents’ claimed exemptions are not before this Court in this proceeding.”).¹

Where a petitioner asserts the constructive denial of her FOIL request, as Petitioner does here, the decision to award costs and attorney’s fees is within the court’s discretion. *See* POL § 89(4)(c)(i); *Lambrou*, 210 A.D.3d at 589; *Cobado*, 163 A.D.3d 1103, 1107 (citing *Madeiras v. N.Y.S. Educ. Dep’t*, 30 N.Y.3d 67, 79 (2017)). Here, the Court finds, in the exercise of its discretion, that Respondents’ conduct does not warrant the imposition of costs and attorney’s fees. Respondents’ submissions demonstrate that, while they were unable to meet their self-imposed deadlines for production, they consistently communicated and adequately explained to Petitioner the reasons for the delays, and the explanations appear reasonable in light of the broad scope of the requests and limited resources available to Respondents to satisfy them. Further, it does not appear to this Court that Respondents only produced documents to Petitioner as a result of the commencement of this instant Article 78 proceeding but instead maintained the intent to produce responsive records regardless of Petitioner’s filing.

Accordingly, it is hereby

¹ The Court notes that Petitioner has not sought to amend his Verified Petition to address any allegedly improper withholding or redaction by Respondents in the more than year since Respondents made their final production on June 1, 2023.

ORDERED and ADJUDGED that Respondents' cross-motion to dismiss (Seq. No. 1) is **GRANTED**; and it is further

ORDERED and ADJUDGED that Petitioner's Verified Petition and Notice of Petition (Seq. No. 1) are **DENIED**; it is further

ORDERED that Respondents shall serve a copy of this Decision and Order upon Petitioner and upon the Clerk of the General Clerk's Office with notice of entry within twenty (20) days thereof; and it is further

ORDERED that service upon the Clerk of Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (Revised August 15, 2019);² and it is further

ORDERED that any requested relief not expressly addressed herein has been considered and is denied; and it is further

ORDERED that the Clerk shall mark Motion Sequence No. 1 decided in all court records; and it is further

ORDERED that the Clerk shall mark this proceeding disposed in all court records.

This constitutes the decision, order, and judgment of the Court.

October 17, 2024

DATE



SHAHABUDDIEN ABID ALLY, A.J.S.C.

CHECK ONE:

MOTION:

CROSS-MOTION

CHECK IF APPROPRIATE:

CASE DISPOSED
GRANTED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED
DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
OTHER
STAY CASE
REFERENCE

² The protocols are available at <https://www.nycourts.gov/LegacyPDFS/courts/ljd/supctmanh/Efil-protocol.pdf>.