

Vecchio v New York State Dept. of Motor Vehs.

2024 NY Slip Op 34596(U)

November 15, 2024

Supreme Court, Albany County

Docket Number: Index No. 902883-24

Judge: Julian D. Schreibman

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STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

LAURA VECCHIO, aka LAURA MINARICH,

Petitioner/
Plaintiff,

Decision & Order

- against -

Index No.: 902883-24

NEW YORK STATE DEPARTMENT OF
MOTOR VEHICLES,

Respondent/
Defendant.

Supreme Court, Albany County
Motion Return Date: August 9, 2024

Present: Julian D. Schreibman, JSC

Appearances: Zev Goldstein, PLLC
 Attorneys for Petitioner/Plaintiff
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 New City, New York 10956
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Schreibman, J:

The petitioner/plaintiff, Laura Vecchio (“Vecchio”), commenced this hybrid Article 78 petition and complaint against the New York State Department of Motor Vehicles (“DMV”) challenging the DMV’s denial of Vecchio’s motion to reopen her defaulted refusal hearing and the DMV’s response to Vecchio’s FOIL request. The DMV has answered Vecchio’s petition and complaint.

Factual and Procedural History

Vecchio was arrested for DWI on November 25, 2020. Vecchio's then-attorney subsequently received a document from the DMV captioned "Notice of Temporary Suspension and Notice of Hearing." The notice indicated that Vecchio's driver license was temporarily suspended because she allegedly refused to submit to a chemical test. The notice further indicated that Vecchio was required to appear in person for a hearing on her alleged test refusal. The notice stated that the hearing would be held at 9:00 AM but the box for the hearing's date was blank. A hand-written notation on the bottom of the notice read "DMV to notify."

The DMV claims that on December 21, 2020, it provided Vecchio with a Notice of Hearing indicating that her hearing would be held on January 25, 2021. Vecchio and her attorney at the time claim that they did not receive the second notice.

The DMV held the hearing on Vecchio's test refusal on January 25, 2021. Neither Vecchio nor the arresting officer appeared. The hearing officer found that Vecchio had waived her right to a hearing and revoked her driver's license. The Order of Revocation indicated that Vecchio's license was revoked "for at least 1 year" and stated that the license could be restored after she paid a \$500 civil penalty. The order provided instructions on how to appeal the revocation decision.

The DMV claims that it mailed the Order of Revocation to Vecchio's mailing address. Vecchio claims she did not receive it.

On November 9, 2021, Vecchio was convicted of DWI and a restriction was placed on her license requiring that an ignition interlock device ("IID") be installed on any car she drove. Sometime in 2022, Vecchio applied for restoration of her full driving privileges. The DMV denied the application because of her January 25, 2021, default revocation. Vecchio claims this is the first time she learned of her license revocation.

In September of 2023, Vecchio retained an attorney to help her regain her driving privileges. On October 10, 2023, Vecchio's current attorney emailed the DMV. The email briefly described the circumstances surrounding the revocation of Vecchio's license and stated that Vecchio never received a notice establishing a date for the revocation hearing. The email requested "copies of the hearing notices, report of refusal, and findings sheet for [Vecchio's Chem Test Refusal Hearing]." Sometime afterwards, the DMV informed Vecchio's attorney via a phone call that the October email he sent was being construed as an application to reopen the default, which the DMV would rule on.

On November 17, 2023, Vecchio's attorney emailed the DMV a second time and requested the same records he had previously asked for. The email also asked the DMV to "[p]lease consider this as our request to re-open the [defaulted revocation]."

The DMV issued a determination on Vecchio's application in a letter dated November 20, 2023, and signed by Melissa Topak, a DMV employee. The letter stated that "[n]either your client nor his attorney of record . . . appeared at this hearing and the Department was not properly notified of the reason for your absence from this hearing. The failure to appear was deemed a waiver of the hearing; therefore, the Administrative Law Judge revoked your client's license." The letter stated that, "[a]fter reviewing your request to reopen this case, it has been determined that the circumstances presented in this matter do not merit the reopening of this case. The revocation remains in effect." The letter concluded by declaring that "[t]his is a final administrative determination of the Department."

The DMV's determination letter was mailed to Vecchio's attorney. The envelope it was mailed in shows that postage was printed on November 21, 2023, but there is no postmark showing

when it was mailed. Vecchio's attorney avers that he did not receive the letter until November 24, 2023.

On November 24, 2023, Vecchio's attorney emailed the DMV. The email noted that the denial letter indicated that it was "a final administrative decision" and asked: "May we file an administrative appeal with DMV's Appeal Board, or must we now file an Article 78?" The email also complained that Vecchio had not yet received the requested records and noted that the denial letter "does not reference the reason [Vecchio] didn't show up: she never received any notice of the hearing." The email closed by "ask[ing] [the DMV to] reconsider [their] decision and allow [Vecchio] to proceed to a hearing."

Also on November 24, 2023, Vecchio's attorney filed a FOIL request with the DMV on Vecchio's behalf. Vecchio requested:

All records relating to refusal hearing case In Re Laura Vecchio, DMV # 20-73627, including but not limited to[]
all reports of refusal, and
all findings and disposition sheets DMV form AA-139, and
all hearing notices, and
all records that the hearing notices were sent and not returned, and
all records showing when the hearing notices, envelopes and postage were printed and all records showing which DMV employee sent out the hearing notices, and
a copy of all records reviewed by Melissa Topak, as referenced in her letter dated 11/20/2023.

"Records" includes computer records and metadata.

On December 19, 2023, the DMV provided Vecchio with 66 pages of documents and a videorecording of Vecchio's refusal hearing. A letter from the DMV that accompanied the disclosure stated, "We trust that the records provided are responsive to your FOIL request." The disclosed materials did not include any meta-data or records indicating (1) whether notices for the January 25, 2021, refusal hearing were mailed out and not returned; or (2) what records the DMV considered when ruling on Vecchio's application to reopen her refusal hearing.

On December 19, 2023, Vecchio sent a letter to the DMV Appeals Board indicating that she was appealing the November 20, 2023, denial of her request to vacate the revocation default and reopen her refusal hearing; the “constructive denial” of her request that the DMV reconsider the denial; and the DMV’s response to her FOIL request.

On December 22, 2023, the DMV Appeals Board denied the FOIL appeal. The Appeals Board found that, “[o]n December 19, 2023, the DMV FOIL Office provided you with all extant records responsive to your request.” Because Vecchio’s attorney was “not denied access to any records responsive to [his] request that the Department possesses or maintains,” the Appeals Board denied the FOIL appeal.

On December 23, 2023, the DMV Appeals Board also rejected Vecchio’s appeal of her application to vacate the revocation default and reopen her refusal hearing because “[t]he denial of a request to reopen a chemical test refusal default is not appealable to the Appeals Board.”

On March 25, 2024, Vecchio filed an Article 78 petition and complaint challenging the DMV’s FOIL response and denial of Vecchio’s application to reopen her refusal hearing. The petition and complaint includes 8 causes of action: (1) “Improper Foil Denial,” which proceeds under Article 78 and challenges the DMV’s FOIL response; (2) “Attorney’s Fees for FOIL,” which proceeds under Article 78 and seeks attorney’s fees and costs reasonably incurred in bringing the FOIL challenge; (3) “Unreasonable FOIL Delays,” which seeks a declaratory judgment declaring that the DMV unreasonably and improperly delayed when responding to Vecchio’s FOIL request; (4) “Lack of a Fair Vacatur Process,” which seeks a declaratory judgment declaring that the DMV failed to provide a full and fair opportunity to vacate her defaulted refusal hearing; (5) “Improper Default Conviction,” which proceeds under Article 78 and challenges the DMV’s denial of Vecchio’s application to reopen her refusal hearing; (6) “Improper Regulation 15 NYCRR 127.9,”

which seeks a declaratory judgment declaring that the regulation governing waivers of refusal hearings is improper; (7) “Improper Notices,” which seeks a declaratory judgment declaring that DMV decisions cannot take effect until they are mailed; and (8) “Unlawful Discrimination,” which seeks a declaratory judgment declaring that the DMV cannot consider criminal accusations, records, or papers sealed pursuant to CPL § 160.50 after an individual is acquitted.

On July 22, 2024, the DMV answered Vecchio’s petition and complaint. The DMV filed no motions seeking summary determination of any of Vecchio’s claims, but raised certain objections in point of law with regard to the Article 78.

Discussion

I. Causes of action seeking declaratory judgments

Vecchio’s third, fourth, sixth, seventh, and eighth causes of action seek a declaratory judgment. In a hybrid proceeding and action that asserts causes of action under Article 78 and seeks declaratory relief, “separate procedural rules apply” (*see Ballard v N.Y. Safety Track LLC*, 126 AD3d 1073, 1075 [3rd Dept. 2015]). The summary procedure applicable to Article 78 actions does not apply to causes of action seeking declaratory relief (*see, e.g., Muller v Zoning Bd. of Appeals Town of Lewisboro*, 192 AD3d 805, 808 [2nd Dept. 2021]). Thus, “[i]n the absence of a formalized motion requesting the ‘summary determination of the causes of action which seek declaratory relief, it is error for a court to summarily dispose of those causes of action’” (*Ballard*, 126 AD3d at 1075 [alterations omitted], quoting *Rosenberg v N.Y.S. Off. of Parks, Recreation, & Historic Preserv.*, 94 AD3d 1006, 1008 [2nd Dept. 2012]; *see also Parker v Town of Alexandria*, 138 AD3d 1467, 1468 [4th Dept. 2016]). The DMV answered Vecchio’s petition and complaint, but it has not filed a formalized motion requesting a summary determination of any causes of action seeking declaratory relief. Accordingly, the Court may not rule on Vecchio’s third, fourth, sixth, seventh, or eighth causes of action at this time.

II. Causes of action proceeding under Article 78

A. Challenge to denial of application to reopen refusal hearing

1. Statute of Limitations

Vecchio's fifth cause of action proceeds under Article 78 and challenges the DMV's decision denying her application to vacate the default revocation and reopen her refusal hearing. The DMV argues that this challenge is time-barred because the November 20, 2023, letter denying Vecchio's application was a final decision, and Vecchio filed her Article 78 petition more than four months after November 20, 2023. Vecchio argues that the DMV's decision was not final until after the DMV Appeals Board Processing Unit dismissed her appeal on December 23, 2023.

CPLR § 217(1) provides that "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner" (*see* CPLR § 217[1]; *see also* *Comptroller of City of N.Y. v Mayor of City of N.Y.*, 7 NY3d 256, 262 [2006] [explaining that an agency's determination will only be deemed final if (1) the agency has "arrived at a definite position on the issue inflicting actual injury"; and (2) "the injury may not be 'significantly ameliorated by either further administrative action or steps taken by the complaining party'"]). As a general rule, this statute of limitations does not begin to run until the petitioner has received notice of the determination (*see* *Biondo v N.Y.S. Bd. of Parole*, 60 NY2d 832, 834 [1983] ["[T]he petitioner cannot be said to be aggrieved by the mere issuance of a determination . . . when the petitioner has received no notice . . . of the determination by which he is said to be aggrieved."]; *Singer v N.Y.S. & Loc. Employees' Ret. Sys.*, 69 AD3d 1037, 1038 [3rd Dept. 2010] ["Generally, the statute of limitations begins to run when the party receives oral or written notice, or when the party knows or should have known, of the adverse determination."]). The burden of showing when a petitioner received notice of a final determination falls on the

administrative agency (*see Smith v State*, 201 AD3d 1225, 1229 [3rd Dept. 2022]; *Feldman v N.Y.S. Teachers' Ret. Sys.*, 14 AD3d 769 [3rd Dept. 2005]).

Vecchio avers that she did not receive the DMV's determination denying her application to reopen her refusal hearing until November 24, 2023. The DMV offers nothing that contradicts or questions this. Accordingly, the earliest the four-month statute of limitations could have begun to run was November 24, 2023 (*see Warburton v Dep't of Corr. Servs.*, 251 AD2d 831, 832 [3rd Dept. 1998] ["Although the final determination was rendered May 13, 1996, petitioner claims in his brief that he did not receive notice of the final determination until 'early June.' Here, we find respondents' assertion that the Statute of Limitations began to run on the date the determination was issued, without more, to be insufficient to shift the burden of persuasion to petitioner to establish that his petition was timely."]). Vecchio's Article 78 petition was therefore timely filed on March 25, 2024 (*see General Construction Law §§ 20, 30; see also Hudspith v Pierce-Arrow Motor Car Co.*, 180 AD 147, 148 (3rd Dept. 1917) (explaining that General Construction Law § 20's exclusion of the day from which any specified period of time is reckoned is "the same whether time be reckoned by days, weeks, months, or years")).

2. Merits

"Article 78 proceedings exist 'primarily to afford relief to parties personally aggrieved by governmental action,' and the CPLR article 78 proceeding effectively supersedes the 'common law writs of mandamus, prohibition, and certiorari to review'" (*see Horvath v. Eagan*, 188 AD3d 1616, 1617 [4th Dept. 2020], quoting 6 N.Y. Jur. 2d, Article 78 § 1 and Siegel & Connors, N.Y. Prac. § 557 [6th ed 2018]). When, as here, an Article 78 petition challenges "an administrative action involving the exercise of discretion for which no quasi-judicial hearing is required," the

proceeding is in the nature of a mandamus to review under CPLR § 7803(3) (*see Van Aken v Town of Roxbury*, 211 AD2d 863, 864 [3rd Dept. 1995]).

Judicial review of discretionary administrative actions under CPLR § 7803(3) is limited to “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion” (*see* CPLR § 7803[3]; *see also North Shore Ambulance & Oxygen Serv. v N.Y.S. Emergency Med. Servs. Council*, 200 AD3d 1527, 1529 [3rd Dept. 2021]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*see Kittle v D’Amico*, 141 AD3d 991, 993 [3rd Dept. 2016], quoting *Abramoski v N.Y.S. Educ. Dept.*, 134 AD3d 1183, 1185 [3rd Dept. 2015]).

The propriety of a discretionary action is judged “solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis” (*see Scherbyn v Wayne-Finger Lakes Bd. Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 [1991], quoting *Montauk Improvement v Proccacino*, 41 NY2d 913, 913 [1977]). For this reason, courts generally cannot affirm an agency determination unless the determination and the administrative record “contain sufficient information to permit this Court to both discern the rationale for the administrative action taken and undertake intelligent . . . review thereof” (*see Off. Bldg. Assocs., LLC v Empire Zone Designation Bd.*, 95 AD3d 1402, 1404–05 [3rd Dept. 2012]).

Vecchio petitioned the DMV to vacate her default and reopen her refusal hearing pursuant to VTL § 1194(2)(c). Pursuant to VTL § 1194, any person who drives in New York is “deemed to have given consent to a chemical test . . . for the purpose of determining the alcoholic and/or drug content of the blood” (*see* VTL § 1194[2]). A chemical test is only properly administered by or at the direction of a police officer who has reasonable grounds to believe the driver was operating

their vehicle under the influence of alcohol or drugs (*see* VTL § 1194[2][a][1]). Additionally, the driver must have been arrested for such a violation and must be appropriately warned of the consequences of failing to submit to a chemical test (*see* VTL § 1194[2][a][1], [b][1]). If the driver refuses to submit to a chemical test, their license may be temporarily suspended and later revoked (*see* VTL § 1194[2][b][1]). Before a license is revoked, however, the driver is entitled to a hearing on the propriety of the demand that they submit to chemical testing (*see* VTL § 1194[2][c]). An individual who fails to appear at their refusal hearing is deemed to have waived their right to the hearing and their license or privilege to drive may be revoked (*see* VTL § 1194[2][c]; 15 NYCCRR §§ 127.8, 127.9, 139.4[c]).

Anyone who is deemed to have waived a hearing for failure to appear may request a new refusal hearing (*see* 15 NYCCRR § 127.8; *see also* VTL § 1194[2][c]; 15 NYCCRR § 127.9[b]). A petition for a new hearing must be made “within a reasonable time” after the default” (*see* 15 NYCCRR § 127.8), or more accurately, “within a ‘reasonable time’ after . . . [the petitioner] first learned of the default” (*see Yarbough v Franco*, 264 AD2d 740, 741 (2nd Dept. 1999), *aff’d*, 95 N.Y.2d 342 [2000]). To show their entitlement to a new hearing, the petitioner must demonstrate both (1) “a reasonable excuse for the default”; and (2) “the existence of a meritorious claim” (*see SCI-Hi Prep Corp. v N.Y.S. Educ. Dept.*, 179 AD3d 1180, 1181 [3rd Dept. 2020], quoting *Blum v Pathstone Corp.*, 172 AD3d 1679, 1680-81 [3rd Dept. 2019]; *see also Tony’s Towing Serv., Inc. v Swarts*, 109 AD3d 475, 477 [2nd Dept. 2013] [“To vacate its default in appearing at the hearing scheduled for July 16, 2007, the petitioner was required to demonstrate, at the administrative level, that it had both a reasonable excuse for its failure to appear, and a potentially meritorious defense to the charges.”]).

The DMV's letter denying Vecchio's petition for a new refusal hearing stated that her request was being denied because "the circumstances presented in this matter do not merit the reopening of [her] case." Nothing in the administrative record provided by the DMV sheds any light on what, exactly, those "circumstances" were.¹ The Court cannot adequately review the DMV's determination without knowing the justification for that determination or the factual basis that supports it (*see, e.g., Price v Cnty. of Westchester*, 225 AD2d 217, 221 [3rd Dept. 1996] ["An agency's failure to provide a sufficient statement of the factual basis for its determination precludes adequate judicial review."]). Accordingly, the DMV's decision denying Vecchio's application to reopen must be annulled and the matter remitted for further proceedings (*see id.*).

B. FOIL challenge

1. Challenge to FOIL response

Vecchio's first cause of action challenges the DMV's FOIL response under Article 78. Vecchio takes issue with the DMV's failure to provide, or adequately certify that it did not possess, the following documents: "any records indicating that the hearing notices were actually mailed out and not returned"; "the records considered by Melissa Topak"; and "any meta-data" related to the records she requested.

"To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public" (*Gould v N.Y.C. Police Dept.*, 89 NY2d

¹ "Where there was no administrative hearing, the agency may submit an employee's or official's affidavit to explain the information that was before the agency and the rationale for its decision, and courts may consider such an affidavit even though it was not submitted during the administrative process" (*see Robins v N.Y.C. Off. of Chief Med. Exam'r*, 212 AD3d 541, 542 [1st Dept. 2023], quoting *Hammonds v N.Y.S. Educ. Dept.*, 206 AD3d 1334, 1334–35 [3rd Dept. 2022]; *see also Menon v State Dep't of Health*, 140 AD3d 1428, 1431 [3rd Dept. 2016] [explaining that "a responsive affidavit that was not part of the administrative record may be considered" if it "come[s] from an affiant with first hand knowledge of the decision-making process undertaken by the agency" (alterations and internal quotation marks omitted)]). The DMV declined to supplement the administrative record in this manner.

267, 274 [1996], citing Public Officers Law § 84). Under FOIL, all “government records are presumptively open to inspection and copying by the public unless they come within one of the narrowly construed exemptions of Public Officers Law § 87(2).” (*Miller v N.Y.S. Dept. of Transp.*, 58 AD3d 981, 982 [3rd Dept. 2009] “[A]n agency has the burden of demonstrating that an exemption applies ‘by articulating a particularized and specific justification for denying access.’”]; *Kosmider v Whitney*, 34 NY3d 48, 54 [2019], quoting *Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]).

Anyone requesting records through FOIL must “reasonably describe[]” the records they want (see Public Officers Law § 89[3][a]). This requirement “serves to enable an agency to locate and identify the records in question” (*Pflaum v Grattan*, 116 AD3d 1103, 1104 [3rd Dept. 2014]) and “is a ground for nondisclosure that is entirely separate from the exemption provisions” (*Konigsberg v Coughlin*, 68 NY2d 245, 251 [1986]). An agency denying a FOIL request for lack of a reasonable description “bears the burden to establish that the descriptions were insufficient for purposes of locating and identifying the documents sought” (*Jewish Press, Inc. v N.Y.S. Police*, 207 AD3d 971, 974 [3rd Dept. 2022], quoting *Reclaim the Records v N.Y.S. Dept. of Health*, 185 AD3d 1268, 1269 [3rd Dept. 2020]). “With particular respect to records that are maintained electronically, the agency must show ‘that the descriptions provided are insufficient for purposes of extracting or retrieving the requested documents from the virtual files through an electronic word search by name or other reasonable technological effort’” (*Puig v N.Y.S. Police*, 212 AD3d 1025, 1026 [3rd Dept. 2023] [alterations omitted], quoting *Pflaum*, 116 AD3d at 1104).

When an agency is unable to locate a reasonably described, unexempt record, Public Officers Law § 89(3) requires the agency to “certify that it does not have possession of such record or that such record cannot be found after diligent search” (see Public Officers Law § 89[3][a]).

Public Officers Law § 89 “does not specify the manner in which an agency must certify that documents cannot be located,” but “[n]either a detailed description of the search nor a personal statement from the person who actually conducted the search is required” (*see Rattley v N.Y.C. Police Dept.*, 96 NY2d 873, 875 [2001]). An agency may satisfy its certification obligation by simply “averring that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate.” (*See id.*)

The DMV’s response to Vecchio’s FOIL request stated “[w]e trust that the records provided are responsive to your FOIL request.” It contained no certification that the DMV did not possess any records related to mailing of hearing notices, records showing what documents were considered when Vecchio’s application to re-open was denied, or meta-data concerning any of the requested documents. The DMV denied Vecchio’s appeal of the FOIL response, explaining that “DMV FOIL Office provided you with all extant records responsive to your request,” but did not explain these omissions.

The DMV never certified that it conducted a diligent search for any of the documents Vecchio requested, and it never certified that it did not possess any particular requested records, and the Court questions whether the DMV’s assertion that it provided “all extant records” is an adequate certification as contemplated under Public Officers Law § 89(3). (*see Goldstein v Inc. Vill. of Mamaroneck*, 221 AD3d 111, 117–18 [2nd Dept. 2023] [“If there are certain types of records requested which are not maintained by the Village, proper certification that the Village is not in possession of the records includes precise identification of the records that are the subject of the certification.”]; *McFadden v Fonda*, 148 AD3d 1430, 1432 [3rd Dept. 2017] [“[T]he State Police satisfied the certification requirement by advising petitioner in writing that the requested records concerning the male victim could not be found after a diligent search, and, therefore, the State

Police was not required to disclose such records.”]; *Baez v Brown*, 124 AD3d 881, 884–85 [2nd Dept. 2015] [holding that respondent’s “statement that ‘nothing in the case file met [the petitioner’s] description of these items’” was not an adequate certification]; *Engels v Town of Parishville, Recs. Assessor Officer*, 86 AD3d 889, 890 [3rd Dept. 2011] [“The record demonstrates that respondent met its burden and established that after a diligent search, certain records covered by petitioner’s requests could not be located.”]; *Alicea v N.Y.C. Police Dep’t*, 287 AD2d 286, 287 [1st Dept. 2001] [“When an agency denies a FOIL request on the basis that the requested documents cannot be located in the agency’s file, it must certify that a diligent search was conducted and the documents are not in its possession.”)].

The answer to that question is academic, however, because the DMV has essentially admitted in these proceedings that it did not conduct a diligent search and does not know if it maintains or possesses some of the requested documents. In affidavit filed in support of the DMV’s answer to Vecchio’s Article 78 petition, Christopher Heer, the DMV Records Access Officer, acknowledged that Vecchio’s FOIL request “did include a broad reference to ‘records include [sic] metadata.’” Heer stated that the DMV did not respond to this portion of the FOIL request because the “office had no way of knowing how to respond without exercising independent judgment of the request or conducting legal research into the topic.”

Vecchio specifically requested the metadata associated with her requested records. The Court finds that the DMV has not carried its burden of establishing that this description was insufficient for the purpose of identifying and locating the documents she sought. (See Public Officers Law 89[3][a]; *Jewish Press, Inc.*, 207 AD3d at 974; compare *Barry v O’Neill*, 185 AD3d 503, 505-06 [1st Dept. 2020] [holding that petitioner’s “request for ‘complete copies’ of communications and documents cannot fairly be read to have implicitly requested metadata

associated with those copies”] with *Irwin v Onondaga Cnty. Res. Recovery Agency*, 72 AD3d 314, 317 [4th Dept. 2010] [holding that FOIL request for “records involving [petitioner’s] photograph that was used in the email, including the image file itself and any associated metadata” adequately requested metadata] and *Hearst Corp. v State, Off. of State Comptroller*, 24 Misc. 3d 611, 623 [N.Y. Sup. Ct. 2009] [holding that FOIL request for “‘an electronic copy’ of 14 specified payroll tables, as well as ‘related metadata . . .’” adequately requested metadata associated with requested records]). That the individuals responding to Vecchio’s FOIL request did not immediately know what metadata was, did not otherwise render Vecchio’s record request unreasonably described.

It is the obligation of a public officer or agency to work with a FOIL requestor to provide responsive records. Here, the DMV FOIL office could have taken action in this regard such as doing some research on the topic, or—as required by the relevant regulations—asked Vecchio to help “identify the records sought” or “ascertain the nature of records of primary interest” (*see* 21 NYCRR 1401.2(b)(2)-(3); *see also Goldstein*, 221 AD3d at 122 “[t]here is no evidence that, before denying the petitioner’s request in its entirety, the Village made any effort to work with her to more precisely define the information desired.”). A truly “diligent search” in this matter may have included one or more of these actions, but would certainly have included more than the DMV’s disregard of a branch of the FOIL request because a more detailed search was necessary. It is well-established that “[w]hen an agency denies a FOIL request based on the lack of a reasonable description, the burden is on the agency “to establish that the descriptions were insufficient for purposes of locating and identifying the documents sought.” (*Matter of Jewish Press, Inc. v New York State Police*, 207 AD3d 971, 974 [3rd Dept. 2022] [internal quotation marks, brackets and citations omitted]; *see also Matter of Konigsberg v Coughlin*, 68 NY2d 245, 249 [1986]). “With particular respect to records that are maintained electronically, the agency must

show that the descriptions provided are insufficient for purposes of extracting or retrieving the requested document[s] from the virtual files through an electronic word search [by] name or other reasonable technological effort.” (*Matter of Puig, v New York State Police*, 212 AD3d 1025, 1026 [3rd Dept. 2023] [internal citations, brackets and quotation marks omitted]; *see also Matter of Reclaim the Records v New York State Dept. of Health*, 185 AD3d 1268, 1269 [3rd Dept. 2020]. It is apparent from the record that this did not occur in the instant matter. Accordingly, the matter will be remitted to the DMV for it to conduct a diligent search for the documents requested by Vecchio and either (1) provide Vecchio with the responsive records it finds; or (2) certify that it does not possess particular records (*see Aron L. PLLC v City of Rochester*, 218 AD3d 1121 [4th Dept. 2023]; *Kairis v. Fischer*, 110 AD3d 1408, 1408–09 [3rd Dept. 2013]).

2. Reasonable attorney’s fees and costs

Vecchio’s second cause of action proceeds under Article 78 and seeks attorney’s fees and costs incurred in bringing her FOIL challenge.

Public Officers Law § 89(4)(c) provides that, in an Article 78 FOIL challenge, the court “shall assess, against such agency involved, reasonable attorney’s fees and other litigation costs reasonably incurred by such person in any case . . . in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access” (*see Public Officer’s Law* § 89[4][c][ii]). Thus, “[a] court *is* required to award the petitioner reasonable counsel fees and other litigation costs reasonably incurred where the petitioner has substantially prevailed and the court finds that the agency had no reasonable basis for denying access” (*Cohen v Alois*, 201 AD3d 1104, 1107 [3rd Dept. 2022] [emphasis omitted]).

“A petitioner substantially prevails when it receives all the information that it requested and to which it was entitled in response to the underlying FOIL litigation,” regardless of whether

those documents were turned over voluntarily or pursuant to a court order (*see Aron L. PLLC*, 214 AD3d 1186, 1190 [3rd Dept. 2023] [alteration and internal quotation marks omitted], quoting *Aron Law PLLC v Town of Fallsburg*, 199 AD3d 1286, 1290-91 [3rd Dept. 2021]). “A pertinent consideration in determining whether an agency had a reasonable basis for denying a FOIL request is whether the agency reasonably claimed the records were exempt from disclosure under Public Officers Law § 87(2)” (*Aron L. PLLC*, 214 AD3d at 1190, quoting *Vertucci v N.Y.S. Dept. of Transp.*, 195 AD3d 1209, 1210 [3rd Dept. 2021]). When, as here, a petitioner successfully challenges the sufficiency of an agency’s certification under Public Officers Law § 89, the petitioner may have substantially prevailed, even if all he receives is a proper certification that no responsive records could be found after a diligent search (*see Legal Aid Soc. v N.Y.S. Dep’t of Corr. & Cmty. Supervision*, 105 AD3d 1120, 1122 [3rd Dept. 2013] [“The fact that full compliance with the statute was finally achieved in the form of a certification that the requested record could not be found after a diligent search, as opposed to the production of responsive documents, does not preclude a petitioner from being found to have substantially prevailed, for the petitioner received the full and only response available pursuant to the statute under the circumstances.”]; *McGee v Bishop*, 192 AD3d 1446, 1452 [3rd Dept. 2021] [holding that petitioner did not substantially prevail where the agency “did not—until ordered by the Supreme Court—properly certify that no responsive records could be located after a diligent search” but no further responsive records existed and “petitioner did not complain about the lack of formal certification”]).

The DMV failed to carry its burden of establishing that Vecchio’s request for metadata was insufficient for the purpose of identifying and locating the records she sought, and the DMV articulated no reasonable basis for denying that request (*see Jewish Press, Inc.*, 207 AD3d at 974). Further, the DMV failed to properly certify that it conducted a diligent search and did not possess

records related to the mailing of hearing notices or indicating what documents were considered before denying Vecchio's application to reopen her refusal hearing. Upon remittal, the Court expects that the DMV will locate and disclose the previously provided records in their "native form" to satisfy Vecchio's request for metadata (*see Irwin*, 72 AD3d at 320-22). Regardless of what is ultimately disclosed, however, Vecchio challenged the certification in the DMV's FOIL response, and at minimum, the Court expects the DMV will provide her with a certification, in accordance with applicable law and regulations, that responsive records could not be found after a diligent search. The Court therefore holds that Vecchio has substantially prevailed in her Article 78 FOIL challenge and is entitled to reasonable attorney's fees and other litigation costs reasonably incurred in bringing that action (*see Public Officer's Law* § 89[4][c][ii]).

The Court has otherwise considered any arguments not specifically addressed herein and finds them unavailing, not ripe for review, or unnecessary to reach.

The premises considered, it is hereby

ORDERED that the first cause of in Vecchio's Article 78 petition, which challenges the DMV's FOIL response is **GRANTED** in part; and it is further

ORDERED that the Vecchio's FOIL request is **REMITTED** to the DMV for further proceedings consistent with this Decision and Order; and it is further

ORDERED that the second cause of in Vecchio's Article 78 petition, which seeks attorney's fees and costs incurred in bringing her FOIL challenge is **GRANTED**; and it is further

ORDERED that Vecchio shall submit to the Court an affidavit detailing such fees and costs, on notice to the respondent, within 45 days from entry of this Decision and Order; and it is further

ORDERED that the fifth cause of action in Vecchio's Article 78 petition, which challenges the DMV's denial of Vecchio's application to reopen her refusal hearing is **GRANTED** in part; and it is further

ORDERED that the decision of the DMV denying Vecchio's application to reopen her refusal hearing is **ANNULLED** and the matter is **REMITTED** to the DMV for further proceedings consistent with this Decision and Order; and it is further

ORDERED that a status conference will be held on December 20, 2024 at 11:30 a.m., virtually via MS Teams.

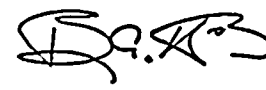
This shall constitute the Decision and Order of the Court. The original Decision and Order is being filed with the Albany County Clerk via NYSCEF. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: November 15, 2024
Kingston, New York

ENTER,


JULIAN D. SCHREIBMAN, JSC



11/18/2024

Papers Considered: Petition/Complaint, dated March 24, 2024, with exhibits A-R; Answer, dated July 22, 2024; Notice of Motion for Summary Judgment, dated May 28, 2024; Statement of Material Facts, dated May 28, 2024; Affirmation of Christopher L. Heer, Esq., dated July 22, 2024, with exhibits A-D; Affidavit of Paul St. Onge, dated July 15, 2024; Memorandum of Law in Support of Answer, dated July 22, 2024; and Reply Affirmation of Zev Goldstein, Esq., dated August 8, 2024.