

Red Canary Song v New York City Dept. of Bldgs.

2025 NY Slip Op 33117(U)

August 19, 2025

Supreme Court, New York County

Docket Number: Index No. 159446/2024

Judge: Jeffrey H. Pearlman

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. JEFFREY H. PEARLMAN PART 44M

Justice

INDEX NO. 159446/2024
MOTION DATE 10/10/2024
MOTION SEQ. NO. 001

RED CANARY SONG

Plaintiff,

- v -

THE NEW YORK CITY DEPARTMENT OF BUILDINGS,

Defendant.

DECISION + ORDER ON MOTION

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, 17, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32

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

Procedural History

On May 16, 2024, Petitioner Red Canary Song ("Petitioner" or "RCS") submitted a voluminous Freedom of Information Law ("FOIL") request to Respondent New York City Department of Buildings ("DOB" or "Respondent") seeking: "... all records regarding the policies, procedures, regulations, guidance, and training materials pertaining to massage and bodywork locations,..." NYSCEF Doc No. 9.

In the request, Petitioner provided a general explanation of the subject matter as well as made several requests for specific records from locations in the City affected by DOB and other agencies.

By letter dated May 17, 2024, DOB denied the request on the same day they acknowledged receipt, stating:

"The Department of Buildings (DOB) has closed your FOIL request FOIL-2024-810-02177 for the following reasons: Your request under the Freedom of Information Law (FOIL) is being closed because the record is not a city record." NYSCEF Doc No. 12.

Petitioner timely appealed pursuant to Public Officers Law § 89(4)(a) on June 10, 2024. NYSCEF Doc No. 14. On June 11, 2024, DOB issued a determination denying the appeal, repeating that the subject matter was "not within the jurisdiction of DOB" and thus "no records exist." Verbatim they stated, "The Department [of Buildings] is in no way involved with enforcement of massage and bodywork services, and therefore, has no records [responsive to your request.]" NYSCEF Doc No.15.

On October 10, 2024, Petitioner commenced this Article 78 proceeding. NYSCEF Doc No. 1. DOB interposed a Verified Answer dated January 16, 2025, asserting that its denial was proper.

NYSCEF Doc No. 22. On February 12, 2025, Respondent filed a Memorandum of Law. NYSCEF Doc No. 32.

Parties' Contentions

Petitioner's Arguments.

Petitioner contends that DOB's response fails to satisfy FOIL's requirement of a "certification" that records do not exist or could not be found after a diligent search (Public Officers Law § 89[3][a]; *Matter of Rattley v. N.Y.C. Police Dept.*, 96 NY2d 873, 875 [2001]). RCS points to DOB's own published enforcement bulletins, which identify violations issued to massage parlors, as well as DOB's participation in the Roosevelt Avenue Task Force targeting such establishments. These public materials, Petitioner argues, demonstrate that DOB's blanket assertion of "no records" is inaccurate and arbitrary. Finally, Petitioner seeks attorneys' fees and costs pursuant to Public Officers Law § 89(4)(c), citing *Madeiros v. N.Y. State Educ. Dept.*, 30 NY3d 67, 74 (2017), which authorizes fees where an agency lacks a reasonable basis for denial.

Respondent's

Arguments.

DOB answers that it properly denied the request because "an agency cannot be compelled to create records it does not possess." (Answer, NYSCEF Doc No. 14., citing Public Officers Law § 89[3][a]). DOB analogizes to *Empire Ctr. for Pub. Policy v. N.Y. State Energy Research & Dev. Auth.*, 188 AD3d 1556, 1557 (3d Dept 2020), in which the Court held that a petitioner's reliance on "speculative public comments" was insufficient to establish the existence of responsive records. DOB further argues that its letters "constituted a certification within the meaning of FOIL," also citing *Rattley*, 96 NY2d at 875, where a conclusory NYPD statement was upheld as sufficient. Finally, DOB asserts that it acted reasonably and in good faith, and thus attorneys' fees are not warranted.

Standard of Review

Judicial review of an administrative determination under CPLR 7803(3) asks whether the determination was arbitrary and capricious, affected by error of law, or made in violation of lawful procedure.

When creating the Freedom of Information Law (FOIL), the legislature declared that "government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article." POL § 84

FOIL "imposes a broad duty on government to make its records available to the public" and reflects a "strong policy favoring public access to governmental records" (*Matter of Gould v. N.Y.C. Police Dept.*, 89 NY2d 267, 274–75 [1996]). Where an agency denies a request on the ground that records do not exist, it must "certify that it does not have possession of such record or that such record cannot be found after diligent search" (Public Officers Law § 89[3][a]; *Rattley*, 96 NY2d at 875).

The legislature amended FOIL to prevent agencies from denying large requests. Instead, they amended Public Officers Law to state,

An agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if

the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article.

L 2008, CH 223. Petitioner acknowledges this by stating in their requests to “[p]lease notify us prior to sending requested documents if associated fees for this request exceed \$100.”

Upon acknowledgement of the receipt of a FOIL request, DOB must meet its burden of conducting a diligent search. DOB must establish that it indeed conducted a search or that “the descriptions in the FOIL request were insufficient for purposes of locating and identifying the documents sought before denying a FOIL request” See, *Aron Law, PLLC v. New York City Department of Education*, 192 A.D.3d 552 (1st Dept 2021) citing *Matter of Asian Am. Legal Defense & Educ. Fund v. New York City Police Dept.*, 125 A.D.3d 531, 531, 5 N.Y.S.3d 13 [1st Dept. 2015], lv. denied 26 N.Y.3d 919, 2016 WL 699225 [2016].

While FOIL does not authorize courts to compel the creation of records, a petitioner is entitled to relief where the denial rests on conclusory or inaccurate assertions. A petitioner may further obtain an evidentiary hearing where it “articulates a demonstrable factual basis to support its contention that the requested documents existed and were within the respondent’s control” (*Oddone v. Suffolk County Police Dept.*, 96 AD3d 758, 759 [2d Dept 2012]).

Attorneys’ fees are available where the petitioner has “substantially prevailed” and the agency “had no reasonable basis for denying access” (*Madeiras*, 30 NY3d at 74).

Discussion

I. Adequacy of DOB’s Certification

DOB’s response stated only that it was “in no way involved” with enforcement of massage services and therefore had “no records.” Unlike the NYPD certification upheld in *Rattley*, which expressly stated that records could not be located after a search, DOB’s letters do not describe any search undertaken, nor do they affirm that no records exist after such a search. A conclusory denial that a matter is “not within [DOB’s] jurisdiction” does not satisfy the statute’s certification requirement. Moreover, directing Petitioner to another agency raises the question of the Respondent’s knowledge of records that may be responsive to the request.¹

II. Existence of Responsive Records

The Court further finds that Petitioner has articulated a demonstrable factual basis that responsive records exist. DOB’s own “Enforcement Action Bulletins,” published on its website, describe violations issued to businesses operating as massage parlors. DOB is also publicly acknowledged as a member of the Roosevelt Avenue Task Force, which coordinates enforcement against bodywork establishments. This distinguishes the present case from *Empire Center*, 188 AD3d at 1557, where the petitioner relied only on speculative inferences from agency statements. Here, DOB’s own publications directly contradict its claim of “no involvement.”

¹ Respondent directs Plaintiff, stating, “Please contact CITY HALL - Midtown Task Force- (Mayors Office of Special Enforcement) for further assistance with the related information within your attached document.” NYSCEF Doc Nos. 12, 13.

Accordingly, DOB’s categorical denial was arbitrary and capricious. If DOB maintains that no records exist, the appropriate remedy is an evidentiary hearing, where DOB must present testimony describing the timing and the scope of its search.

III. Attorneys’ Fees

Finally, the Court finds that Petitioner may have substantially prevailed, and DOB lacks a reasonable basis for its blanket denial. The agency’s broad disavowal of jurisdiction, in the face of its own published enforcement materials, is not a reasonable reading of FOIL. As the Court of Appeals has made clear, attorneys’ fees serve to “encourage compliance with FOIL’s mandates and deter unreasonable denials of access” (*Madeiras*, 30 NY3d at 74). Fees may therefore be appropriate.

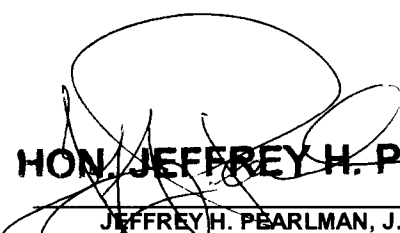
Conclusion

For the foregoing reasons, DOB’s determination must be annulled.

ORDERED and ADJUDGED:

1. The petition is **GRANTED**.
2. Respondent DOB shall, within thirty (30) days of service of this Decision and Order with notice of entry, conduct a diligent search for records responsive to Petitioner’s FOIL request, determine any cost to produce such records, and file with the Court a sworn certification detailing the scope and results as well as the cost to produce its search.
3. If DOB continues to assert that no responsive records exist, the Court shall hold an evidentiary hearing at which DOB must produce a witness with knowledge of the search conducted.
4. The issue of attorneys’ fees and costs pursuant to Public Officers Law § 89(4)(c) is **reserved** pending completion of Respondent’s search and any evidentiary hearing. Following such proceedings, the Court will determine whether Petitioner has “substantially prevailed” and whether DOB’s position lacked a reasonable basis.
5. The parties shall appear in Part 44 located at 60 Centre Street, Courtroom 321 for a compliance conference at 10:00 am on the 15 day of September, 2025.

8/19/2025
DATE

HON. JEFFREY H. PEARLMAN

 J.S.C.
 JEFFREY H. PEARLMAN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	