

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RENSSELAER

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-against-

CITY OF TROY and TROY POLICE DEPARTMENT,

Respondents.

INDEX NO: _____

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

On September 15, 2020, the New York Civil Liberties Union (the “NYCLU”) submitted a request for records under the Freedom of Information Law (“FOIL”) (the “Request”) to the City of Troy and the Troy Police Department (the “TPD”) (together, “Respondents”). Over the course of over eight months since the filing of the Request, Respondents have not provided a substantive response or even provided a threshold response to 24 of the Request’s 32 portions in clear violation of their FOIL obligations. Though the Respondents produced a small sample of documents, they continue to withhold improperly records responsive to the majority of the Request, including records that are vital to the public’s understanding of police accountability practices in Troy. Respondents’ failure to respond to the Request within a reasonable amount of time and failure to comply with the statutory deadline for responding to the NYCLU’s subsequent administrative appeal are clear violations of their obligations under FOIL.

This Article 78 proceeding seeks relief from this Court to compel Respondents to respond to the FOIL request seeking records relevant to police accountability in Troy – including information that might reveal any patterns of discriminatory policing and information that had been previously shielded under the Civil Rights Law § 50-a (“Section 50-a”) before its repeal in June 2020. Having exhausted administrative remedies, the NYCLU now seeks judicial relief to require Respondents to produce promptly all responsive records. Petitioner also seeks an award of attorneys’ fees and costs in light of Respondents’ failure to adhere to FOIL’s statutory requirements.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

A. The Repeal of Section 50-a

The repeal of Section 50-a, which was signed into law in June 2020, came at an important

time in our nation’s history. Nationwide protests following the police killing of George Floyd prompted lawmakers to re-examine the public’s interest in enhanced law enforcement transparency and accountability. Until the summer of 2020, the greatest obstacle to transparency regarding police misconduct in New York was Section 50-a, which generally insulated police disciplinary records from public disclosure. C.R.L. § 50-a(1) (repealed June 12, 2020). Although the intended breadth of Section 50-a when first enacted in 1976 was narrow, its scope quickly expanded. Indeed, according to a report from the Department of State Committee on Open Government, by 2014, Section 50-a had been “expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that conceivably could be used to evaluate the performance of a police officer.” (See Exhibit A to the Verified Petition).

However, there was a growing consensus in New York that Section 50-a impeded police accountability and racial justice. Amid the nationwide reckoning with racism following the deaths of George Floyd, Breonna Taylor, and others; the deepening societal frustration with police secrecy and misconduct; and the public demand for increased police transparency and oversight; Governor Andrew Cuomo signed the #Repeal50a Bill (S8496/A10611) on June 12, 2020. (See Exhibit B to the Verified Petition).

B. Upon the Repeal of Section 50-a, the NYCLU Submitted a FOIL

Request to Respondents

The NYCLU submitted the Request to Respondents on September 15, 2020, seeking records—many of which had previously been shielded from the public by Section 50-a—related to conduct of the TPD’s officers. The Request seeks, *inter alia*, documents related to the TPD’s disciplinary records, use of force, stops, civilian complaints, policies, investigative reports, diversity, trainings, and collective bargaining agreements. (See Exhibit C to the Verified Petition).

On September 21, 2020, Respondents acknowledged receipt of the NYCLU’s Request and

indicated that they would respond on or before October 20, 2020. (*See* Exhibit D to the Verified Petition). However, Respondents failed to provide any response by that date.

Over the course of several months, Respondents repeatedly extended their deadline without substantive justification or explanation. On October 29, 2020, the NYCLU sent an electronic communication to Respondents inquiring when they would be responding. (*See* Exhibit E to the Verified Petition). On November 6, 2020, Respondents stated that they would respond to the Request on or before December 4, 2020. (*See* Exhibit F to the Verified Petition). Respondents provided no response by that deadline. On December 7, 2020, the NYCLU again sent an electronic communication to Respondents inquiring when they would provide a response. (*See* Exhibit G to the Verified Petition). Respondents replied that they would respond on or before January 8, 2021. (*See* Exhibit H to the Verified Petition). For the third time, Respondents failed to meet their own deadline.

In a letter dated January 11, 2021, the NYCLU filed an administrative appeal of the Respondents' constructive denial of the Request. (*See* Exhibit I to the Verified Petition). The administrative appeal rested on the fact that Respondents, after having the Request for nearly four months, had neither provided a threshold response nor produced a single record responsive to the Request, and they had missed three of their self-imposed deadlines to respond. On January 11, 2021, after receiving an electronic copy of the NYCLU's administrative appeal, Respondents told the NYCLU that they would respond to the Request on or before February 11, 2021. (*See* Exhibit J to the Verified Petition). However, for the fourth time, Respondents failed to meet their own self-imposed deadline to provide a threshold response to the Request. Respondents also provided no response regarding the NYCLU's administrative appeal by the statutorily required 10 business day deadline of January 28, 2021. *See* Public Officers Law § 89 (4)(a).

Instead of responding within the statutory time or providing a complete response to the

NYCLU's administrative appeal as required by statute, Respondents produced a small sample of documents, and again sought to extend the deadline. On February 19, 2021, the NYCLU received an electronic communication from Respondents, stating that "pursuant to response from the City's Appeals officer," they "released all of the responsive documents associated with [eight] portions of the Request." (See Exhibit K to the Verified Petition).¹ While Respondents attached some records responsive to these eight portions of the Request—most of which were readily available and required no redactions—they failed to produce all records responsive to those limited portions of the Request and failed to provide any records responsive to the other 24 portions of the Request.² Respondents concluded the communication stating that they anticipated responding to the additional 24 portions of the Request on or before March 19, 2021. The NYCLU received no further response by March 19, 2021, making it the fifth time Respondents failed to provide a response by their own deadline.

More than eight months have passed since Respondents' receipt of the Request, and yet Respondents have not produced records responsive to the vast majority of the Request. Indeed, as of the filing of this Petition, Respondents have not produced a single record responsive to 75 percent of the Request, claimed any exemptions, or responded to the administrative appeal.

¹ Respondents attached a small subset of the records responsive to these eight portions of the request: 205 pages of collective bargaining materials, 26 pages of use of force guidelines, 10 pages of blank police forms, 3 pages of demographic information, and 2 pages about the Police Objective Review Board.

² The 24 portions of the Request for which Respondents have not produced a single responsive document include records regarding: officer discipline; use of force incidents; police-involved death incidents; stops and detentions; complaints about misconduct (other than a blank form); immigration-related enforcement; complaint history of active TPD officers; and more.

Respondents also failed to provide all responsive documents for the portions of the Request for which they produced some records. In response to Section B(1) for "All directives, orders, guidance, procedures, memoranda, rules, regulations, training, explanatory materials, forms, and other statements of policy concerning officers' use of force," Respondents produced only 26 pages of material comprised of two general orders regarding "use of physical force" and "deadly force." In response to Section B(3) of the Request for "Examples of all forms or reports (i.e., blank forms or reports) used to document uses of force," Respondents produced only two forms: a K9 Deployment Form and a Response to Resistance Form.

Having exhausted administrative remedies, the NYCLU files this Article 78 proceeding seeking immediate production of responsive records, as well as attorneys' fees and costs.

ARGUMENT

I. RESPONDENTS VIOLATED FOIL BY FAILING TO PRODUCE RECORDS OR RESPOND TO THE APPEAL WITHIN THE STATUTORY TIME.

By failing to respond to the Request within a reasonable time, by repeatedly missing its own deadlines to provide a threshold response, and by failing to respond to the NYCLU's administrative appeal within the statutory time, Respondents have denied the Request. *See* Public Officers Law § 89 (4)(a). This Court should order Respondents to immediately provide responsive documents.

A. Respondents' Constructive Denial Entitles the NYCLU to Initiate an Action in State Court.

Respondents' failure to respond to the NYCLU's administrative appeal within 10 business days constitutes a denial of the appeal and entitles the NYCLU to initiate this action in state court. *See* 21 NYCRR 1401.7(f) ("A failure to determine an appeal within 10 business days of its receipt by granting access to the records sought or fully explaining the reasons for further denial in writing shall constitute a denial of the appeal."); *see Council of Regulated Adult Liquor Licensees v City of New York Police Dept.*, 300 A.D.2d 17, 18 (1st Dept 2002) ("Petitioners exhausted all administrative remedies when, after submitting their appeal of the Department's initial denial of their request, they received no reply from the Department within the statutorily mandated 10-day response period."); *Village of Brockport v Calandra*, 191 Misc.2d 718, 727 (Sup Ct, Monroe County 2002), *aff'd* 305 A.D.2d 1030 (4th Dept 2003) ("[w]here an appeal is not addressed within

10 days, the requesting party has exhausted its administrative remedies and may initiate a challenge to a constructive denial of access under C.P.L.R. article 78”). The NYCLU is, thus, entitled to bring this action to state court.

B. Respondents’ Eight-Month Delay to Provide a Threshold Response to the Majority of the Request, and Their Failure to Respond to the NYCLU’s Administrative Appeal, Violate FOIL.

Respondents failed to meet their obligations under FOIL by repeatedly missing deadlines and failing to respond to the Request within a reasonable amount of time, and by failing to provide even an initial response to 24 of the Request’s 32 portions more than eight months after receiving the Request. In response to a written request for records, “an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search.” *Legal Aid Soc. v New York State Dept. of Corr. & Community Supervision*, 105 A.D.3d 1120, 1121 (3d Dept 2013), quoting *Matter of Beechwood Restorative Care Ctr. v Signor*, 5 N.Y.3d 435, 440-441 (2005); see Public Officers Law § 89 (3)(a). An agency is required to respond to a FOIL request within five business days, or provide a statement of the approximate date, which should be reasonable under the circumstances, when such request will be granted or denied. Public Officers Law § 89 (3)(a). Here, Respondents have failed to provide any approximate date—let alone a reasonable one—for their production.

First, Respondents failed to determine whether to grant or deny the Requests within the period it identified in its own deadlines. Even assuming those dates were “reasonable under the circumstances of the request,” Public Officers Law § 89(3)(a), Respondents then issued repeated extension letters as a matter of course, notwithstanding that FOIL permits only “a” date certain that accounts for the agency’s delay – *see id.* – and that “there is no provision in the statute for

repeated extensions.” See Committee on Open Government Advisory Opinion FOIL-AO19372 (Feb. 5, 2016); see also Committee on Open Government Advisory Opinion FOIL-AO18008 (Feb. 22, 2010) (“Pursuant to § 89(3)(a), an agency cannot engage in one delay after another.”). Instead FOIL’s statutory provisions governing the time for response “clearly are intended to prohibit agencies from unnecessarily delaying disclosure.” See Committee on Open Government Advisory Opinion FOIL-AO19034 (May 6, 2013). By repeatedly extending their own self-imposed deadlines, that is precisely what Respondents have done.

Second, regardless of Respondents’ self-imposed deadlines, at this point Respondents’ delay has become unreasonable under any circumstance. Specifically, over eight months after receiving the Request, Respondents have failed to grant or deny the vast majority of the Request. They have yet to produce one single document responsive to 24 of the Request’s 32 portions or to indicate whether they ever intend to do so. Such delays are not reasonable and are in violation of Respondents’ obligations under FOIL. In one instructive case involving a FOIL request seeking 30 categories of documents and over 11,000 responsive documents, the Third Department noted that the respondent could reasonably take three months to provide access to all of the documents. See *Miller v. New York State Dep’t of Transp.*, 58 AD3d 981,983 (3d Dept 2009); see also *Matter of Linz v. The Police Department of the City of New York*, 226 NYLJ, Dec. 17, 2001 at 18, col 1 (Sup Ct, NY County 2001) (rejecting as “unreasonable” the NYPD’s proposed delay of four months to respond to an extremely voluminous request for records involving every 911 call made in the City of New York over a period of several years—plus related code books and dispatch information). Here, with Respondents’ failure to respond extending far beyond the time period courts permitted in those cases, the delay at issue has plainly become unreasonable.

Respondents further violated their FOIL obligations by missing the deadline to respond to the NYCLU’s administrative appeal. Because Respondents repeatedly missed their own deadlines

to make even the threshold determination of whether they would grant any portion of the Request and had not provided a single responsive record after nearly four months, in January the NYCLU appealed pursuant to Public Officers Law § 89 (4). An agency is required to respond to such administrative appeals “within ten business days” by “explain[ing] in writing . . . the reasons for further denial, or provid[ing] access to the record sought.” Public Officers Law § 89 (4)(a). Respondents failed to do so. For these reasons, Respondents have failed to meet their obligations under FOIL and this Court should order Respondents to produce promptly all records responsive to the Request.

II. THE NYCLU IS ENTITLED TO ATTORNEYS’ FEES.

The NYCLU is entitled to reasonable attorneys’ fees and litigation costs on two separate grounds, given Respondents’ failure to adhere to FOIL’s requirements. *First*, the NYCLU is entitled to mandatory attorneys’ fees and costs because Respondents failed to provide any basis, reasonable or otherwise, for denying access to the records. *Second*, even if the NYCLU were not entitled to mandatory fees—which it is—it is within this Court’s discretion to grant fees when a government agency flouts its legal obligations under FOIL by failing to respond to a FOIL request within the statutory time, as Respondents have done here.

Courts are required to assess reasonable attorneys’ fees and costs when, like here, the agency had “no reasonable basis for denying access” to the records in dispute and a party has “substantially prevailed.” *See* Public Officers Law § 89 (4)(c). Courts have held that parties “substantially prevailed” in situations where the agency constructively denied their requests by failing to disclose records responsive to a FOIL request. *See Matter of Madeiros v New York State Educ. Dept.*, 30 N.Y.3d 67, 79 (2017) (finding that the petitioner “substantially prevailed” when the filing of the lawsuit prompted the disclosure of records); *Bottom v Fischer*, 129 A.D.3d 1604, 1605 (4th Dept 2015) (petitioner substantially prevailed when respondent made disclosures only

after “the court directed it to justify their nondisclosure”). Here, Respondents have constructively denied the Request by failing to respond within a reasonable time, and they denied the administrative appeal by failing to respond within 10 business days. Respondents failed to articulate any basis, let alone a reasonable one, for denying access to the vast majority of records sought. If this Court orders Respondents to disclose the requested documents in response to this Petition or justify its non-disclosure—or if Respondents begin to voluntarily disclose the records in response to this lawsuit—the NYCLU will have “substantially prevailed” for the purposes of this provision.

Further, this Court has discretion to grant fees when a party has “substantially prevailed” and the “agency failed to respond to a request or appeal within the statutory time.” Public Officers Law § 89 (4)(c). The Supreme Court in Rockland County held that where a respondent was “delinquen[t]” in adhering to FOIL’s statutory time, the petitioner was entitled to fees. *Lucas v Bd. Of Educ. of East Ramapo Cent. Sch. Dist.*, 57 Misc.3d 1207(A), 2017 NY Slip Op 51297(U), *4 (Sup Ct, Rockland County 2017). The Court found that because the respondent “failed to either grant or deny the petitioners’ FOIL requests and failed to render a decision with respect to the petitioners’ appeals of the constructive denials of their FOIL requests,” the “purpose in permitting an award of attorney’s fees and costs in a proceeding such as this—to deter unreasonable delays and denials of access—is entirely warranted.” *Id.* Similarly, here, Respondents have not granted or denied the vast majority of the Request and have failed to respond to the NYCLU’s appeal within the statutory time-frame provided by New York Public Officers Law § 89 (4)(c)(ii). *See South Shore Press, Inc. v Havemeyer*, 136 A.D.3d 929 (2d Dept 2016) (finding attorneys’ fees warranted when the entity failed to comport with the statutory time limits of FOIL); *Acme Bus Corp v County of Suffolk*, 136 A.D.3d 896, 898 (2d Dept 2016) (finding an award of attorneys’ fees appropriate, when, among other things “the respondents did not timely decide the petitioner’s

agency appeal”). As in *Lucas* and the other cases cited above, if the NYCLU prevails this Court should grant attorneys’ fees to dissuade further improper behavior, as Respondents have demonstrated here by repeatedly missing deadlines and creating unnecessary delays.

CONCLUSION

For the foregoing reasons, Petitioner NYCLU respectfully requests that the Court order the Respondents City of Troy and the Troy Police Department to produce promptly all the records the NYCLU requested in the Request, and to pay reasonable attorneys’ fees and costs associated with this litigation.

Dated: New York, New York
May 19, 2021

By /s/ Jamie L. Wine

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CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Jamie Wine, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth 22 NYCRR § 202.8-b, because it contains 2,855 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this Memorandum.

Dated: New York, New York
May 20, 2021

/s/ Jamie L. Wine
Jamie L. Wine