

At a Special Term of the Rensselaer County Supreme Court, held in and for the County of Rensselaer, in the City of Troy, New York, on the 9 day of February 2023.

PRESENT: HON. RICHARD J. MCNALLY, JR.

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

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

DECISION AND ORDER
Index No. EF2021-268862

-against-

CITY OF TROY,

Respondents.

APPEARANCES: Latham & Watkins LLP
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MCNALLY, J.

Petitioner, the New York Civil Liberties Union (“NYCLU”), commenced the instant CPLR article 78 proceeding against respondent, the City of Troy, challenging the partial denial of a New York State Freedom of Information Law (“FOIL”) request it made seeking certain law enforcement records. Respondent filed an Answer and motion to dismiss seeking dismissal of the petition. Petitioner opposes the relief sought by respondent.

BACKGROUND

A. Petitioner’s FOIL Request

On September 15, 2020, petitioner submitted to respondent a FOIL request seeking the following categories of records believed to be in the possession of the Troy Police Department: (a) disciplinary, (b) use of force, (c) stops, temporary detentions, and field interviews, (d) complaints about employee misconduct, (e) immigration and citizenship-related enforcement, (f) complaints filed with the City of Troy Police Review Board, (g) diversity in the ranks, and (h) all current governing policies. The 9-page request is separated into 32 different categories of records, which are further broken down into subcategories seeking specific types of documents.

Petitioner’s request coincided with the repeal of Civil Rights Law § 50-a (“Section 50-a”). Section 50-a provided that, law enforcement personnel records, “used to evaluate performance towards continued employment or promotion . . . shall be considered confidential.” In June 2020, amidst the national conversation surrounding police misconduct, then-Governor Cuomo signed into law the repeal of Section 50-a, with the intention of increasing transparency of law enforcement records.

B. City of Troy's Response

John Salka, Deputy Director of Public Information of the City of Troy, acknowledged receipt of the FOIL request in an email dated September 21, 2020. Salka's email denoted the "scope and complexity" of the request and stated that a response would be forthcoming on or before October 20, 2020. When respondent did not produce a response, petitioner followed up with respondent via email on October 29, 2020. Salka responded to petitioner's email on November 6, 2020, again explaining that the submission would require additional time to process due to its scope and complexity. Salka provided another approximate response date of December 4, 2020. Respondent did not produce a response by December 4, 2020. Petitioner, again, followed up with respondent via email on December 7, 2020. Salka replied on December 8, 2020, and estimated a new approximate response date of January 8, 2021, citing the need for additional time to locate and compile responsive records. Respondent did not produce a response to petitioner's FOIL request by January 8, 2021.

C. Administrative Appeal

On or about January 11, 2021, petitioner filed an administrative appeal asserting respondent constructively denied its FOIL request. Petitioner cited respondent's failure to meet its own self-imposed deadlines, failure to produce a response on multiple occasions, and the passage of nearly 4 months as the basis for the constructive denial. On that same day, Salka sent an email to petitioner stating he intended on responding to the FOIL request and explained that the request had been delayed due to its complexity, further complicated by the COVID-19 global pandemic and workplace protocols affecting staffing levels. In the email, Salka set a new approximate response date of February 11, 2021.

Petitioner alleges, that respondent did not decide its administrative appeal within the statutory 10-day period (on or before January 23, 2021). However, on January 26, 2021, the City of Troy's Corporation Counsel and FOIL Appeal Officer, Richard Morrissey, Esq., issued a decision, which stated the following:

[T]he fact that the request is complex and appears to call for a voluminous response does not mean each part or subpart of the request is equally daunting. Some unexceptionable parts may be more answerable than others. Some requests may properly be denied. In any event, the agency must begin to respond substantively to appellant's request with a view to completion within a reasonable time. Accordingly, the agency is hereby directed to disclose responsive documents as appropriate on or before February 19, 2021. To be clear, I am not directing that the agency respond to the entire request all at once. I view it as sufficient and reasonable that the agency respond to such parts of the request as it readily can, and make good faith efforts to respond to the more complex requests on a continuing basis so that further disclosures shall be made on or before March 19, April 23, and only if absolutely necessary May 21. If any part of the request is denied, good and sufficient reason must be given. Accordingly, the appeal is denied in part and granted in part as stated herein.

D. Post-Appeal Document Production

On February 19, 2021, petitioner received an email from Salka, stating that "pursuant to response from the City's Appeals Officer," the City has "released all of the responsive documents associated with the following [eight] portions of the request." Salka attached the following responsive documents: 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 regarding the police review board. Respondent did not disclose any documents regarding officer discipline, complaint history of active officers on the Troy Police Department, or any other documents responsive to the other portions of petitioner's FOIL request. Salka concluded

the communication stating that he anticipated having a response to the additional 24 portions of the FOIL request on or before March 19, 2021. Petitioner received no response or production of documents by that date. The record does not reveal any claim by respondent, during this 5-month time-period, that petitioner did not have a right to the records sought in the request and at no point did respondent assert any exemption under FOIL.

E. Article 78 Petition

Petitioner filed the instant article 78 proceeding, on May 20, 2021, alleging respondent did not render a decision on its administrative appeal within the 10-day statutory time period. Respondent did, however, issue a decision on January 23, 2021. A copy of the decision was mailed to petitioner's counsel which was lost in the firm's mailroom. In a letter dated June 3, 2022, petitioner acknowledged receipt of the decision after its discovery on June 2, 2022.

F. Post-Petition Document Production

On May 21, 2021, Salka notified petitioner in an email that additional responsive documents were available to them for review. On July 19, 2021, petitioner acknowledged receiving Use of Force reports and IAB documents from respondent. Respondent's time to answer the verified petition was extended, as respondent continued to produce responsive documents on a rolling basis and the parties made attempts to resolve the petition.

On November 20, 2021, during a conference with this Court and the parties, respondent agreed to provide all remaining documents to petitioner on or before January 14, 2022. On January 12, 2022, respondent's counsel sent to petitioner a flash drive containing Use of Force Reports from 2010, 2011, and 2012. On January 14, 2022, and January 24, 2022, counsel for respondent provided additional responsive documents.

By letter dated February 14, 2022, respondent denied part of petitioner's FOIL request which sought "documents related to complaints against police officers that were ultimately determined to be unfounded or unsubstantiated, or those that still may be open." Respondent claimed that disclosure of such records would constitute an unwarranted invasion of personal privacy, relying on Public Officers Law §§ 84 and 87, case law, and advisory opinions from the New York State Committee on Open Government. Thereafter, respondent filed an Answer and motion to dismiss seeking dismissal of the petition.

ANALYSIS

The Freedom of Information Law promotes open government and public accountability and, therefore, "imposes a broad duty on government to make its records available to the public" (*Gould v New York City Police Department*, 89 NY2d 267, 274 [1996]). Under FOIL, agency records are presumptively available for public inspection and copying unless the requested documents fall within one of the exemptions set forth in Public Officers Law § 87 (2) (*see Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 746 [2001]). "Upon receipt of a FOIL request, an agency is duty-bound to conduct a diligent search of the records in its possession responsive to the request and to state, in writing, the reason for the denial of access" (*Matter of Moody's Corp. & Subsidiaries v New York State Dept. Of Taxation & Fin.*, 141 AD3d 997, 999 [3d Dept 2016] [internal quotation marks and citations omitted]). "[I]f circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgment 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" (Public Officers Law § 89 [3] [a]).

“When faced with a FOIL request, 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” (*Matter of Gartner v New York State Attorney General's Off.*, 160 AD3d 1087, 1089 [3d Dept 2018] [citations omitted]). An agency that seeks to withhold documents or portions thereof pursuant to one or more of the statutory exemptions must articulate a “particularized and specific justification” for not disclosing requested documents and moreover must “make a particularized showing that a statutory exemption applies to justify nondisclosure” (*Gould*, 89 NY2d at 273, 275). “[T]he burden rest[s] on the agency to demonstrate that the requested material indeed qualifies for exemption [O]nly where the material requested falls squarely within . . . one of these statutory exemptions may disclosure be withheld” (*Id.* at 274-275 [internal quotation marks and citations omitted]).

A. Objections in Point of Law

Initially, respondent contends petitioner’s argument for disclosure of unsubstantiated and unfounded disciplinary complaints is barred by collateral estoppel. “Collateral estoppel is a flexible doctrine that precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity” (*Matter of Anonymous v New York State Justice Ctr. for the Protection of People with Special Needs*, 167 AD3d 113, 116 [3d Dept 2018] [internal quotation marks and citations omitted]).

Specifically, respondent claims that petitioner previously raised the issue of whether the personal privacy exemption under Public Officers Law § 87 (2) (b) allows municipalities and their police departments to categorically withhold unfounded and unsubstantiated law

enforcement disciplinary records in the *Matter of N.Y. Civ. Liberties Union v City of Syracuse* (72 Misc.3d 458, 458-468 [Sup. Ct. Onondaga Cty. May 5, 2021]). The trial court in *City of Syracuse* decided that Public Officers Law § 87 (2) (b) did allow municipalities and their police departments to categorically withhold such documents. Respondent seeks to collaterally estop petitioner from relitigating the issue in this case given it has been previously decided against petitioner in the *City of Syracuse* case.

The issue presented, which calls for the interpretation of the personal privacy exemption under FOIL and its applicability to unfounded and unsubstantiated disciplinary records, is a pure question of law and, as a result, collateral estoppel would not apply (*see CitiMortgage, Inc. v Ramirez*, 192 AD3d 70,72 [2020] [internal quotation marks and citations omitted]; *see also Held v New York State Workers' Comp. Bd.*, 58 AD3d 971, 972-973 [3d Dept 2009]).

Additionally, since the filing of respondent's Answer and motion to dismiss, the Fourth Department reversed the lower court decision in *City of Syracuse*, (discussed more fully below) establishing precedent in favor of petitioner's position rendering respondent's defense of collateral estoppel inapplicable, given the that the legal issue is no longer decided against petitioner (*Matter of New York Civ. Liberties Union v City of Syracuse*, 210 AD3d at 1404).

B. Merits of the Petition

Turning to the merits of the petition, respondent has denied petitioner's FOIL request as it pertains to law enforcement records containing unfounded and unsubstantiated complaints, asserting the personal privacy exemption under FOIL. It is well settled, that an agency may deny access to records or portions thereof that, if disclosure, would cause "an unwarranted invasion of personal privacy" (Public Officers Law § 87 [2] [b]). The personal privacy exemption

incorporates a nonexhaustive list of categories of information that would statutorily constitute unwarranted invasions of personal privacy if disclosed, such as the employment histories and personal references of applicants for employment (Public Officers Law § 89 [2] [b] [i]), as well as any information of a personal nature when disclosure would result in economic or personal hardship to the subject party where such information is not relevant to the work of the agency requesting or maintaining it (Public Officers Law § 89 [2] [b] [iv]).

Respondent argues that the personal privacy exemption under FOIL permits law enforcement agencies to withhold law enforcement records related to unsubstantiated and unfounded complaints. This issue has been addressed by the Fourth Department in two recent decisions, *Matter of New York Civ. Liberties Union v City of Syracuse*, 210 AD3d 1401, 1401-1407 [4th Dept 2022] and *Matter of New York Civ. Liberties Union v City of Rochester*, 210 AD3d 1400, 1400-1401 [4th Dept 2022]). Both cases hold that the personal privacy exemption does not allow municipalities to categorically withhold police personnel records (*Matter of New York Civ. Liberties Union v City of Syracuse*, 210 AD3d at 1404; *Matter of New York Civ. Liberties Union v City of Rochester*, 210 AD3d at 1401 [4th Dept 2022]).

Respondent further argues that this Court is not bound by the holdings in *Matter of New York Civ. Liberties Union v City of Syracuse* or *Matter of New York Civ. Liberties Union v City of Rochester*, this Court disagrees. “Stare decisis is the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law[,] once decided by a court, will generally be followed in subsequent cases presenting the same legal problem” (*Matter of State Farm Mut. Auto Ins. Co. v Fitzgerald*, 25 NY3d 799, 819 [2015] [internal quotation marks and citations omitted]). Thus, this Court is bound by the recent

decisions rendered by the Fourth Department cited above (*see Matter of Wayne Ctr. for Nursing & Rehabilitation, LLC v Zucker*, 197 AD3d 1409, 1412 [3d Dept 2021]; *see also Shoback v Broome Obstetrics & Gynecology, P.C.*, 184 AD3d 1000, 1001 [3d Dept 2020]).

Here, petitioner's request for unfounded and unsubstantiated complaints was not formally denied until Morrissey's February 14th letter (17 months after petitioner's initial FOIL request), stating "[d]isclosure of such records would constitute an unwarranted invasion of personal privacy, and might be libelous." Respondent failed to specifically articulate how the responsive records fall under the personal privacy exemption or otherwise provide a viable rationale for blocking disclosure. This Court finds respondent's blanket denial violates Public Officers Law §87 (3) (a) (*Matter of New York Civ. Liberties Union v City of Syracuse*, 210 AD3d at 1404; *Matter of New York Civ. Liberties Union v City of Rochester*, 210 AD3d at 1401).

Therefore, respondent is directed to review the law enforcement records sought by petitioner and locate all open and unsubstantiated claims of misconduct, by officers with the Troy Police Department, for the time period specified. Further, its respondent's obligation under FOIL to, "identify those law enforcement disciplinary records or portions thereof that may be redacted or withheld as exempt, and provide the requested law enforcement disciplinary records to petitioner subject to any redactions or exemptions pursuant to a particularized and specific justification for exempting each record or portion thereof" (*Matter of New York Civ. Liberties Union v City of Rochester*, 210 AD3d at 1401).

C. Attorney's Fees

Finally, this Court will address petitioner's request for attorney's fees in this matter. The court may award counsel fees and other litigation costs to a litigant who substantially prevails,

when the agency had no reasonable basis for denying access to the requested records or the agency failed to respond to a request within the statutorily prescribed time (Public Officers Law § 89 [4] [c]). Nevertheless, even when the statutory prerequisites are satisfied, the decision whether to award attorney's fees rests in the discretion of the court and will not be overturned in the absence of an abuse of such discretion (*Matter of Carnevale v City of Albany*, 68 AD3d 1290, 1293 [3d Dept 2009]; *Matter of Maddux v New York State Police*, 64 AD3d 1069, 1070 [3d Dept 2009]).

Here, respondent argues it timely responded to petitioner's "complex" FOIL request in compliance with agency response protocols set forth in Public Officers Law § 89 (3) (a) (*citing Matter of Save Monroe v New York State Dep't of Transp.*, 197 AD3d 808, 809 [3d Dept 2021]). This Court finds the facts in this case distinguishable from those in *Matter of Save Monroe*, where the responding agency produced responsive documents in compliance with self-imposed deadlines and timely decided the administrative appeal filed in that case.

Here, for a period of at least 4 months, respondent missed self-imposed deadlines to produce responsive documents to petitioner's FOIL request and only started to produce records until after petitioner filed its administrative appeal. Proof before this Court also establishes that respondent failed to timely decide petitioner's administrative appeal. Petitioner's appeal was sent FedEx overnight priority, on January 12, 2021, and received by respondent on January 13, 2021 (Verified Petition, Exhibit I). Respondent's appeal decision was due no later than January 23, 2021, but ultimately was not decided until January 26, 2021 (Public Officers Law § 89 [4] [a], [b]; 21 NYCRR 1401.7 [f] [determination of an appeal must be decided within ten business days of its receipt]). Lastly, although respondent surely had knowledge early on that it possessed

unfounded and unsubstantiated complaints against police officers within its department, it did not deny that portion of petitioner's FOIL request until February 14, 2022, nearly 17 months after petitioner filed its FOIL request.

This Court finds petitioner has "substantially prevailed" within the meaning of Public Officers Law § 84 (4) (c) (*see Matter of Legal Aid Society v New York State Department of Corrections and Community Supervision*, 105 AD3d 1120, 1121 [3d Dept 2013]; *Matter of New York State Defenders Assn. v New York State Police*, 87 AD3d 193, 195 [3d Dept 2011]). This Court also finds that petitioner has been subjected to the very kinds of "unreasonable delays and denials of access" which the attorney's fee provision seeks to deter (*Matter of New York Civ. Liberties Union v City of Saratoga Springs*, 87 AD3d 336, 338 [3d Dept 2011] [internal quotation marks and citation omitted]; *see also Matter of 101CO, LLC v New York State Dept. of Envtl. Conservation*, 189 AD3d 1948, 1950 [3d Dept 2020]). Under the circumstances presented here, an award of counsel fees and costs is warranted.

This Court has considered all remaining arguments and find them to be without merit.

Accordingly, it is

ORDERED AND ADJUDGED, that the petition is granted; and it is further

ORDERED AND ADJUDGED, that respondent violated Public Officers Law § 89 (3) (a) and is hereby directed to disclose the requested information to petitioner within 15 days from the date of this Decision and Order/Judgment; and it is

ORDERED, that within 30 days of the date of this Decision and Order/Judgment, petitioner's counsel shall submit, on notice to respondent's counsel, an affirmation setting forth

petitioner's counsel's qualifications, billing rate, billing records and the attorney's fees and litigation costs sought, along with a proposed order for such fees and costs; and it is further

ORDERED, that within 15 days of service of petitioner's counsel's affirmation and proposed order, respondent may submit opposition papers, if any, concerning the reasonableness of the fees and costs; and it is further

ORDERED, that petitioner's counsel may submit a reply to any objections within 5 days of service of the objections, and, if necessary, a hearing of the subject the fees and costs will be scheduled thereafter.

The Court has uploaded the original Decision and Order/Judgment to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the Office of the Rensselaer County Clerk.

Counsel for the plaintiff is not relieved from the applicable provisions of CPLR 2220 or the Uniform Rules of Supreme and County Courts § 202.5b (h) (2), insofar as it relates to service and notice of entry of the filed document upon all other parties to this special proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

Uniform Rules of Supreme and County Courts § 202.5b (b) (2) (i) directs that service upon nonparticipating parties must be made in hard copy.

SO ORDERED!
ENTER

Dated: February 9, 2023
Troy, New York


RICHARD J. MCNALLY, JR.
Supreme Court Justice

Papers Considered:

NYSCEF Docketed numbers 1-124.