

**Cuddy Law Firm, P.L.L.C v New York City Dept. of  
Educ.**

2019 NY Slip Op 32964(U)

October 10, 2019

Supreme Court, New York County

Docket Number: 150011/2019

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

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CUDDY LAW FIRM, P.L.L.C,

Index No.  
150011/2019

Petitioner,

- against -

**DECISION  
and ORDER**

NEW YORK CITY DEPARTMENT OF EDUCATION,  
RICHARD A. CARRANZA, as Chancellor of the New  
York City Department of Education,  
HOWARD FRIEDMAN, as Records Access Appeals  
Officer of the New York City Department of Education,  
TONI GANTZ, as Deputy to the Department of Education  
via Howard Friedman, and  
JOSEPH A. BARANELLO, as Chief Privacy Officer,  
Records Access Officer & Executive Agency Counsel of  
the New York City Department of Education,

Mot. Seq. 1

Respondents.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Cuddy Law Firm, P.L.L.C (“Petitioner”) brings this action pursuant to Article 78 of the New York Civil Practice Law and Rules (“Article 78”) for an Order directing Respondents New York City Department of Education (“DOE”), Richard A. Carranza (“Carranza”), as Chancellor of DOE, Howard Friedman (“Friedman”), as Records Access Appeals Officer of DOE, Toni Gantz (“Gantz”), as Deputy to DOE, via Friedman, and Joseph A. Baranello (“Baranello”), as Chief Privacy Officer, Records Access Officer & Executive Agency Counsel of DOE (collectively, “Respondents”) to produce a complete electronic copy of the records requested in Petitioner’s Freedom of Information Law Requests (“FOIL Requests”) dated July 9, 2018. Respondents oppose.

Relevant Background

On July 9, 2018, Petitioner submitted two FOIL Requests to Baranello. The First FOIL Request sought information regarding all attorney’s fees paid by

Respondents over a two-and-a-half-year period in spreadsheet format with regard to certain educational hearings and evaluation. Petitioner specifically requested: (1) Impartial Hearing Officer (“IHO”) case numbers; (2) the names of attorneys and paralegals requesting payment; (3) their payment rates; (4) the hours billed per person; (5) their itemized expenses and; (6) subtotal and total amounts billed. The Second FOIL Request sought information related to Independent Educational Evaluations paid for by DOE over the same period. Petitioner specifically requested: (1) impartial hearing case numbers; (2) the type of evaluation; (3) the names of evaluators; (4) the amount to be paid for the evaluation; (5) the date on which the evaluations were paid.

On July 16, 2018, Baranello emailed Petitioner a letter acknowledging Petitioner’s FOIL Requests and indicating that another response would arrive by August 13, 2018. On August 14, 2018, Baranello emailed Petitioner stating that the records would be provided by January 16, 2019.

On September 12, 2018, Petitioner filed an appeal with Friedman. On September 28, 2018, Grantz sent Petitioner a letter denying Petitioner’s September 12, 2018 appeal. Grantz stated that there had not been a constructive denial and DOE was continuing to locate and produce responsive documents on a rolling basis.

On November 8, 2018, Petitioner sent a letter to the New York State Committee on Open Government (the “Committee”) requesting guidance on how to move forward in obtaining the records requested in the FOIL Requests. On November 26, 2018, Petitioner received a letter from the Committee, advising Petitioner that the September 28, 2018 denial gave rise for Petitioner to initiate an Article 78 proceeding against DOE.

Petitioner commenced this action on January 1, 2019 by filing a Verified Petition as an Article 78 special proceeding. On Feb 7, 2019, Respondents produced a spreadsheet with information partially responsive to Petitioner’s First FOIL Request. The spreadsheet did not contain IHO numbers, attorneys’ names, itemized expenses, legal fees paid, the dates the fees were paid or the names of attorney’s or firms that were paid. On February 8, 2019, Respondents filed an Answer. The application was marked fully submitted once the parties submitted a copy of the transcript of oral argument held on July 2, 2019 .

#### Parties’ Contentions

Petitioner contends that Respondents constructively denied Petitioner’s FOIL requests when Baranello failed to provide documents on a rolling basis as directed by Grantz. Petitioner further contends that the production date of January 16, 2019,

was unreasonable, and therefore was a constructive denial of the FOIL Requests. Petitioner argues that Respondents' denial of Petitioner's appeal on September 28, 2018 constituted a final determination, and thus Petitioner has exhausted its administrative remedies with regards to the First FOIL Request. Petitioner asserts that the failure of DOE to respond in any way to the Second FOIL Request constitutes a constructive denial of the request. Petitioner contends that the withholding of these documents is a violation of FOIL, and that Respondents have no reasonable basis for doing so. Furthermore, Petitioner argues that it has substantially prevailed in this matter and is therefore entitled to attorney's fees under Public Officers Law ("POL") § 89(4)(c).

In opposition, Respondents contend that Petitioner has not exhausted all of its administrative remedies and Petitioner's FOIL Requests were not constructively denied. Respondent argues that the time required to satisfy Petitioner's First FOIL Request was reasonable, and that a final response was issued on February 7, 2019. Respondents assert that the effort required to fully comply with Petitioner's FOIL Requests would constitute an undue burden. Respondents argue that they cannot comply without an outside professional's assistance due to lack of adequate staff and that they are barred from obtaining assistance by privacy concerns under 20 U.S.C. § 1232(g) 34 C.F.R. Part 99 ("FERPA"), which requires DOE to appoint an official review board to protect the privacy of their students. Respondents argue that the records sought by Petitioner are "legion", maintained by multiple offices, not in a standard format and the retrieval process would be "difficult and time consuming."

Respondents contend that the spreadsheet produced on February 7, 2019 was DOE's final determination in regard to the First FOIL Request. Respondents argue that POL § 89(3) requires only "reasonable effort," and that DOE does not have the resources to comply with Petitioner's request in full.

Respondents argue that Petitioner has not "substantially prevailed" in this matter because it has received a significant amount of information from Respondents, and therefore Petitioner should not be awarded attorney's fees and costs. Respondents further argue that if attorney's fees are awarded, the fees should be reduced because Petitioner would not agree to an adjournment, which caused unnecessary delay and submissions to the court.

#### Legal Standard

"All agency records are presumptively available for public inspection and copying, unless they fall within 1 of 10 categories of exemptions, which permit agencies to withhold certain records." *Hanig v. State Dep't of Motor Vehicles*, 79 N.Y.2d 106, 108 [1992] (citations omitted). "Those exemptions are to be narrowly

construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption (Public Officers Law § 89 [4] [b]).” *Id.* “[T]o invoke one of the exemptions of section 87 (2), the agency must articulate particularized and specific justification for not disclosing requested documents.” *Gould v. New York City Police Dep’t*, 89 N.Y.2d 267, 275 [1996]. Moreover, “an agency responding to a demand under [FOIL] may not withhold a record solely because some of the information in that record may be exempt from disclosure. Where it can do so without unreasonable difficulty, the agency must redact the record to take out the exempt information.” *Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals v. Mills*, 18 NY3d 42, 45 [2011].

“[J]udicial review of an administrative determination is limited to the grounds invoked by the agency” and “the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.” *Madeiros v. New York State Educ. Dep’t*, 30 N.Y.3d 67, 74 [2017] (citation omitted). “Although review of an administrative determination is generally limited to the grounds invoked by the agency at the time of its determination, this principle of administrative law [does] not preclude [this Court] from addressing the... newly raised exemption where, as here the confidentiality rights of third parties not before the court are implicated by the disclosure determination”. *Empire Healthchoice Assurance, Inc. v. Clement*, 60 Misc. 3d 1207(A) [N.Y. Sup. Ct. 2018] (citations omitted).

FERPA prohibits the disclosure of education records that contain identifying information of students and their families “absent written consent from the parent of the student, a subpoena or court order, or the applicability of some other exception. *See* 20 U.S.C. § 1232(g). “FERPA is a privacy statute, and no party has a right under FERPA to obtain information from education records except parents and eligible students.” *Matter of Huseman v NY City Dept. of Educ.*, 2016 NY Slip Op 30959[U] [Sup Ct, NY County 2016]. DOE must appoint a panel to safeguard student privacy, and this panel is the sole entity permitted to perform this function. *See* 20 U.S.C. § 1232(g).

Under POL § 89(3)(a), “[e]ach entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances, of the request.” *See* POL § 89(3)(a). “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.” *Id.*

“Public Officers Law § 89 (3) mandates no time period for denying or granting a FOIL request, and rules and regulations purporting to establish an absolute time period have been held invalid on the ground that they were inconsistent with the statute.” POL § 89(4)(a) states that when a person who is denied access to a record files an appeal, an entity “shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought.” *See* POL § 89(4)(a). “[W]hen a respondent provides an approximate date by which it shall provide its response and ‘fails to respond to a request within a reasonable time after the approximate date given,’ the petitioner may deem this as a constructive denial of his or her FOIL request.” *Matter of Gajadhar v NY Police Dept.*, 61 Misc 3d 1218[A] [Sup Ct, NY County 2018].

“[I]t is well-settled that administrative remedies are considered exhausted only after the agency has completed the FOIL request and has rendered a final adverse determination of any administrative appeal of that request.” *Matter of Hernandez v Kelly*, 2014 NY Slip Op 30149[U] [Sup Ct, NY County 2014].

Pursuant to POL § 89(4)(c), a court may award reasonable attorney’s fees and litigation costs incurred where a party has “substantially prevailed” and when the agency “failed to respond to a request or appeal within the statutory time”; and the agency had no “reasonable basis” for denial. *See* POL § 89(4)(c). The Court of Appeals has stated, “[p]ursuant to FOIL’s fee-shifting provision, a court may award reasonable counsel fees and litigation costs to a party that ‘substantially prevailed’ in the proceeding if the court finds that (1) ‘the record involved was, in fact, of clearly significant interest to the general public,’ and (2) ‘the agency lacked a reasonable basis in law for withholding the record’(Public Officers Law § 89 [4] [c]). Only after a court finds that the statutory prerequisites have been satisfied may it exercise its discretion to award or decline attorneys’ fees.” *Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 441 [2005].

### Discussion

Here, Petitioner has received a final determination compliant with FOIL in response to its first request. Respondents provided Petitioner with a spreadsheet that redacted certain information pursuant to FERPA, which squarely falls within the exceptions of POL §§ 87(2)(a) and (b). Respondents acknowledged Petitioner’s appeal and stated that the date of production was January 16, 2018. This was not a constructive denial as Petitioner requested two and a half years of records,



numbering in the thousands, that were not immediately available to DOE. DOE is statutorily prohibited from acquiring outside assistance to produce the records more quickly under 20 U.S.C. § 1232(g), thus Respondents are not in violation POL § 89(a)(3)'s requirement to engage an outside professional service if possible.

Furthermore, Respondents have now produced a 79-page spreadsheet that substantially addresses Petitioner's request and includes: law office names, hourly rates claimed, total amounts claimed, other costs claimed, final settlement amounts and the dates of the claims and settlements. The information withheld, namely individual attorney's names as well as IHO numbers, could potentially reveal identifying information about students. "FERPA's regulations define 'personally identifiable information' broadly to encompass not only a student's name, address, date of birth, but also information that is linkable to a specific student." *Id.* citing 34 C.F.R. § 99.3. Respondents have withheld information DOE reasonably believes could lead to the identification of individual students and have complied with both FOIL and FERPA. Thus, Petitioners claim as to the first FOIL request is denied.

After oral argument held on July 2, 2019, Respondents notified the Court that DOE has fully responded to the Second FOIL Request. However, at the time that Petitioner filed the Article 78 proceeding, the second request was under review by DOE and no final determination had been made, thus Petitioner had not exhausted its administrative remedies.

Petitioner has not substantially prevailed in the instant proceeding, as it has received a compliant response to its First FOIL Request, and Petitioner did not exhaust its administrative remedies for its Second FOIL Request. Thus, attorney's fees and costs are denied.

Wherefore it is hereby

ORDERED that the Petition is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: OCTOBER 10, 2019



Eileen A. Rakower, J.S.C.