

Saki Knafo v City of New York
2021 NY Slip Op 32720(U)
December 20, 2021
Supreme Court, New York County
Docket Number: Index No. 158404/2021
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH **PART** **14**

Justice

-----X

SAKI KNAFO,

Petitioner,

- v -

THE CITY OF NEW YORK, DERMOT SHEA IN HIS
CAPACITY AS THE POLICE COMMISSIONER OF THE
CITY OF NEW YORK,

Respondents.

-----X

INDEX NO. 158404/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER,
JUDGMENT ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for ARTICLE 78 FOIL.

The cross-motion by respondents to dismiss this proceeding is granted in part.

Background

In this FOIL case, petitioner claims that he sent a FOIL request to respondents concerning administrative subpoenas the NYPD may have issued relating to him. Petitioner is a journalist and argues that respondents improperly denied his FOIL request on the ground that he did not reasonably describe the records in order to permit the relevant agency to search for relevant records.

Respondents argue that it has since conducted a diligent search (in response to the petition), that there are no records and so the proceeding should be dismissed. They point out that in petitioner's amended pleading, he identifies (for the first time) certain interactions he may have had with a Lieutenant in the NYPD and that these details were not included in petitioner's FOIL request. Respondents point out that there are over 200,000 administrative subpoena files

(the universe of files from which petitioner seeks documents) and that there is no easy way to search the database.

Respondents also detail how they performed a search for relevant records requested by petitioner, including looking for petitioner's name, the aforementioned Lieutenant, petitioner's email address and petitioner's cell phone number and that no relevant records were found. They point out they found two administrative subpoenas with petitioner's last name but that they were unrelated to petitioner. Moreover, respondents insist that NYPD's Internal Affairs Bureau also conducted searches in its database and did not find any responsive documents.

In reply, petitioner acknowledges that the merits of the instant proceeding might be moot but that he is nevertheless entitled to legal fees. He also admits that he did not include a request for legal fees in the amended petition but that it was in the original petition.

Discussion

As an initial matter, the Court observes that the merits of this proceeding are moot as respondents established that they conducted a diligent search and found no relevant records. The only issue remaining is legal fees. Respondents claim in support of their cross-motion that petitioner has waived legal fees because they were not included in the amended petition and based on conversations with counsel for petitioner. However, petitioner denies that there was ever an agreement to waive legal fees.

Based on the record presented here, the Court finds that petitioner did not waive his right to recover legal fees. It seems that the request was removed from the amended petition as part of some sort of good faith effort to resolve this case by counsel for petitioner. But that does not end the Court's inquiry because, as petitioner points out, there was no agreement to waive these fees. And the facts in this proceeding merit an award of legal fees to petitioner.

“Although petitioner effectively concedes that the merits of her petition are moot as a result of NYPD's voluntary disclosure, petitioner's claim for attorney's fees and other litigation costs is not moot” (*Kohler-Hausmann v New York City Police Dept.*, 133 AD3d 437, 18 NYS3d 848 (Mem) [1st Dept 2015]).

“A court may award counsel fees and costs to a litigant who has ‘substantially prevailed’ in a FOIL case where the court also determines that the agency had no reasonable basis for denying access to the records sought” (*Competitive Enter. Inst. v Attorney Gen. of New York*, 161 AD3d 1283, 1284-85, 76 NYS3d 640 [3d Dept 2018]). “A petitioner substantially prevails under Public Officers Law § 89(4)(c) when it receive[s] all the information that it requested and to which it is entitled in response to the underlying FOIL litigation” (*id.* at 1286 [concluding that petitioner was entitled to legal fees where it received a complete response only after starting a FOIL proceeding]).

Here, just as in the case cited above, petitioner only received a complete response after starting the instant proceeding. Initially, petitioner was told that his request did not sufficiently describe the records even though he identified the specific type of document he was looking for and the parameters (such as his name [which is not common] and email address). In fact, respondents’ excuse shifted as the dispute continued; respondents then argued it had no way to search its administrative subpoenas. Setting aside the fact that this claim, if true, is absurd¹, respondents’ counsel clearly found a way to run searches in order to render the merits of this case moot.

The bottom line is that people should not have to get a lawyer to have their FOIL requests processed. Here, respondents clearly always had the capability to do the search but tried to get

¹ Respondents regularly receive all manner of FOIL requests; it is beyond comprehension that they would maintain databases without search functions and then deny a FOIL request on the ground that they cannot perform a search.

out of it without performing the required search. Petitioners should not have to go to court in order for respondents to pay attention and do what they are legally obligated to do under FOIL. If the respondents won't comply with the FOIL statute until someone gets a lawyer and goes to court, then respondents should pay for that lawyer. And even if there wasn't a specific request in the amended petition, the request for "such other and further relief" and this Court's statutory authority under FOIL allow this Court to grant legal fees.

If the parties cannot agree on a fee, then the Court will hold a hearing to determine the reasonable legal fees to be awarded to petitioner.

Accordingly, it is hereby ORDERED that the cross-motion by respondents to dismiss is granted in part; and it is further

ADJUDGED that the instant petition is granted only to the extent that petitioner is entitled to reasonable legal fees to be determined at a virtual hearing to be scheduled by the Clerk of this part and denied with respect to the remaining relief requested.

12/20/2021
DATE

ARLENE BLUTH, J.S.C.

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