

Matter of Puig v New York State Police

2021 NY Slip Op 33906(U)

November 10, 2021

Supreme Court, Albany County

Docket Number: Index No. 7208-21

Judge: Catherine E. Leahy-Scott

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.

STATE OF NEW YORK COUNTY OF ALBANY
SUPREME COURT

In the Matter of the Application of

ATTORNEY KENNETH PUIG and
THE LAW OFFICE OF KENNETH PUIG'S FREEDOM
OF INFORMATION LAW REQUEST,

Petitioners,

**DECISION, ORDER &
JUDGMENT**

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

Index No.: 7208-21
RJI No.: 01-21-ST1889

- against -

NEW YORK STATE POLICE and KEVIN P. BRUEN, in his
official capacity as New York State Police Superintendent,

Respondents.

Appearances: For Petitioners: The Law Office of Kenneth Puig
By: Kenneth Puig, Esq.

For Respondents: Letitia James, New York State Attorney General
By: Chris Liberati-Connant, Esq., Assistant Attorney General

Petitioners Attorney Kenneth Puig and the Law Office of Kenneth Puig's Freedom of Information Law Request (collectively referred to as "Petitioner") commenced this proceeding pursuant to CPLR article 78 against Respondents New York State Police and Kevin P. Bruen, Superintendent of New York State Police (collectively referred to as "Respondent") seeking (1) to compel Respondent to disclose "police disciplinary/misconduct records of active New York State Police Troopers assigned to Orange, Dutchess, and Ulster counties" pursuant to the Freedom of Information Law (FOIL) (see Public Officers Law art 6); (2) to compel Respondent to be "trained or retrained to comply with their obligations under [FOIL]"; and (3) an award of attorneys' fees and litigation costs (Verified Petition ¶ 1).

FACTS

By letter dated July 11, 2020, Petitioner sent a FOIL request to Respondent seeking (1) “copies of disciplinary records of all troopers who have been disciplined” and (2) “New York State Police Standard Operating Procedures, Manuals, Training Materials, Guidelines, Directives, and Rules and Regulations regarding driving while intoxicated arrests” (Verified Petition, Ex A). By letter dated July 17, 2020, Respondent confirmed receipt of Petitioner’s FOIL request and advised that a written response to same would be sent on or before September 18, 2020 (see id. Ex B). No response by Respondent was made on or before September 18, 2020.

By letter dated November 10, 2020, Respondent denied Petitioner’s request on the ground it “fails to reasonably describe the records [sought] as required by statute” (see id. Ex D at 1). With respect to Petitioner’s first request for disciplinary records, Respondent noted that it “employs, and has employed throughout its history, thousands of individuals” and contended Petitioner’s “exceedingly broad request makes no effort to identify any particular individual employee and specific time frame to enable [Respondent] to facilitate a search to locate any responsive records” (id.). Moreover, Respondent indicated that disciplinary records are maintained within an individual employee’s file and thus the records sought by Petitioner “could only be located by searching every employee’s individual files, a herculean task that is not required under FOIL” (id.).

As to Petitioner’s second request for policies and procedures relating to driving while intoxicated arrests, Respondent contended that such records were not sufficiently identified to enable it to conduct a reasonable search and, in any event, said records “are not indexed or categorized in a manner that allows [it] to reasonably locate and retrieve the broad scope of records potentially responsive to your request” (id. at 2).

By email dated December 7, 2020, Petitioner appealed Respondent's determination (see Verified Petition, Ex E). Initially, Petitioner argued Respondent failed to timely respond to its FOIL request. With respect to the denial of his first request for disciplinary records, Petitioner clarified he "will be satisfied with getting disciplinary records of all active and current NYSP State Troopers currently assigned to the following New York State counties – Orange, Dutchess, and Ulster" (see id. at 3). Petitioner reasoned that this modified request reasonably identified the specific information sought. As to Respondent's denial of Petitioner's second request for policies and procedures relating to driving while intoxicated arrests, Petitioner contended that Respondent's denial was insufficient as it failed to describe the indexing system utilized by Respondent in maintaining its policies and procedures.

By letter dated December 23, 2020, Respondent remanded Petitioner's modified request for disciplinary records to the Records Access Officer and denied the appeal as to the second request for policies and procedures relating to driving while intoxicated arrests (see Verified Petition, Ex F). As to the second request, Respondent stated "[t]o the extent that the New York State Police does not have a singular 'New York State Police Standard Operating Procedure' or 'Manual' regarding driving while intoxicated arrests[,] your request would require the Division to search for and produce various unidentified internal policies and training material (to the extent any such information exists) which goes far beyond the scope of [FOIL] as being reasonable" (id. at 1-2).

In response to the appeal, Petitioner contested whether a Records Appeal Officer had authority to remand his modified request (see Verified Petition, Ex G). As such, by letter dated February 26, 2021, Petitioner advised he was treating Respondent's December 23, 2020 letter as a constructive denial of his modified request (see id.).

Respondent formally denied Petitioner's modified request for disciplinary records by letter dated April 1, 2021 (see Verified Petition, Ex H). Specifically, Respondent advised it is "not able to conduct a search of [its] disciplinary records based on what county a Member is assigned to work in" (id.). As set forth in its initial denial, Respondent reiterated that it maintains disciplinary records by individual employee and, as such, said records "could only be located by searching every employee's individual files, a herculean task not required under FOIL" (id.). Petitioner appealed this determination by letter dated April 28, 2021 (see Verified Petition, Ex I). No response has been made with regard to this administrative appeal (see Verified Petition ¶ 19) and, as such, this appeal was deemed constructively denied on May 12, 2021 (see Public Officers Law § 89 [4] [a]). This CPLR article 78 proceeding ensued.

ARGUMENTS

Specifically, Petitioner seeks (1) to compel Respondent to disclose "police disciplinary/misconduct records of active New York State Police Troopers assigned to Orange, Dutchess, and Ulster counties" pursuant to the Freedom of Information Law (FOIL); (2) to compel Respondent to be "trained or retrained to comply with their obligations under [FOIL]"; and (3) an award of attorneys' fees and litigation costs (Verified Petition ¶ 1). As an initial matter, Petitioner contends he is entitled to the police disciplinary records due to Respondent's failure to timely respond to Petitioner's FOIL request (see id. ¶ 19). Additionally, Petitioner contends that Respondent improperly denied his request for disciplinary records on the ground that the records sought were too voluminous (see id. ¶ 20). Indeed, Petitioner reasons that the modified request for disciplinary records of active New York State Troopers assigned to Orange, Dutchess, and Ulster counties obviates any concerns that the request was overbroad or production would be herculean

task (see id.). Petitioner also seeks attorneys' fees pursuant to Public Officers Law § 89 due to Respondent's purported willful failure to respond to Petitioner's FOIL request (see id. ¶¶ 58-64).

Respondent argues that an agency does not waive its objections to a FOIL request by failing to timely respond to same (Mem of Law in Opp, at 5). Stated differently, Respondent contends its failure to timely respond to a FOIL request does not entitle Petitioner to the ultimate relief sought (see id.). Moreover, Respondent argues that Petitioner's FOIL request was not reasonably described and, as such, was properly denied. In support of this contention, Respondent submits an Affirmation from Shannon M Brundige, Esq., Assistant Counsel for the New York State Police Office of Counsel, who is responsible for, among other things, "providing legal advice to and assisting the NYSP's FOIL Unit in connection with processing FOIL requests received by NYSP" (Affirmation of Shannon M. Brundige, Esq. [Brundige Aff] ¶ 3). Ms. Brundige attested "Petitioner's FOIL request is not in any way aligned with the nature, structure and storage manner of NYSP databases that collect Member work location" (id. ¶ 14). Ms. Brundige explains that members of the New York State Police work across county lines or in multiple counties in a single day and Respondent does not maintain employee records by the county in which the employee works. Thus, to accommodate Petitioner's request for disciplinary records, Respondent contends it would need to search every active trooper's file to determine whether they have been disciplined.

With respect to Petitioner's other relief sought, Respondent contends that Petitioner has failed to establish a clear legal right to compel Respondent to engage in training or retraining relative to its obligations under FOIL and is not entitled to attorneys' fees.

DISCUSSION

Timeliness

Petitioner's contention that he is entitled to the relief sought in the Petition for Respondent's failure to timely respond to his FOIL request is without merit. Where an agency renders untimely determinations on a FOIL request and/or an administrative appeal, the petitioner's remedy is to commence a proceeding pursuant to CPLR article 78 (see Matter of DeCorse v City of Buffalo, 239 AD2d 949, 949-950 [4th Dept 1997]), which is what Petitioner did here. Stated differently, Petitioner is not entitled to the relief sought merely because Respondent failed to timely respond to its FOIL request or timely decide the administrative appeal.

Propriety of the Response to Petitioner's FOIL request

"To promote open government and public accountability, FOIL imposes a broad duty on government agencies to make their records available to the public" (Matter of Abdur-Rashid v New York City Police Dept., 31 NY3d 217, 224 [2018], rearg denied 31 NY3d 1125; see Public Officers Law § 84). "Public Officers Law § 89 (3) (a) requires that documents requested pursuant to FOIL be 'reasonably described' in order to enable the agency to locate the records in question" (Matter of Jewish Press, Inc. v New York City Dept. of Educ., 183 AD3d 731, 732 [2d Dept 2020]; see Matter of Reclaim the Records v New York State Dept. of Health, 185 AD3d 1268, 1269 [3d Dept 2020] [{"(t)he statute places the initial burden on the person or entity making a FOIL request to provide a reasonable description of the records sought for this purpose"}]).

However, "agency staff are not required to engage in herculean or unreasonable efforts in locating records to accommodate a person seeking records" (Comm on Open Govt FOIL-AO-

18949 [2012]).¹ Thus, courts have held FOIL requests fails to “reasonably describe” the records sought where the request is “open-ended” (Marks v United States, 578 F2d 261, 263 [9th Cir 1978] [“broad, sweeping requests lacking specificity are not permissible” under FOIL]) or where the respondent agency “would have to manually search through every document filed . . . going back over 45 years” (Matter of Bader v Bove, 273 AD2d 466, 467 [2d Dept 2000], lv denied 95 NY2d 764 [2000]). Additionally, a FOIL request is properly denied when the responsive documentation is “not indexed in a manner that would enable the identification and location of documents” (Matter of Pflaum v Grattan, 116 AD3d 1103, 1104 [3d Dept 2014], quoting Matter of Konigsberg v Coughlin, 68 NY2d 245, 250 [1986]; see Matter of Jewish Press v Metropolitan Transp. Auth. of the State of N.Y., 193 AD3d 460, 461 [1st Dept 2021]; Matter of Reclaim the Records, 185 AD3d at 1272) or where the “request requires the creation of a new record” (Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 464 [2007]; see Matter of Gannett Co. v James, 86 AD2d 744, 745 [4th Dept 1982]).

Initially, the Court notes that Petitioner has not challenged the denial of his initial FOIL request for the disciplinary records of all troopers who have been disciplined and for policies and procedures relating to driving while intoxicated arrests (see Verified Petition ¶ 24). Consequently, any claims relating to the initial FOIL request are deemed abandoned (see generally Matter of Kairis v Fischer, 138 AD3d 1360, 1360 n * [3d Dept 2016]; Matter of Hynes v Goord, 30 AD3d 652, 653 [3d Dept 2006]).

Petitioner’s modified request “for disciplinary records of all active and current NYSP State Troopers currently assigned to the following New York State counties – Orange, Dutchess, and

¹ “While advisory opinions from the Committee on Open Government are not binding authority, they may be considered to be persuasive based on the strength of their reasoning and analysis” (Matter of Pflaum v Grattan, 116 AD3d 1103, 1105 n * [3d Dept 2014] [internal quotation marks and citation omitted]).

Ulster” (Verified Petition, Ex E at 3) fails to reasonably describe the documents sought with sufficient specificity to enable Respondent to identify and locate the documents. The Affirmation of Ms. Brundige, Assistant Counsel for the New York State Police Office of Counsel, establishes “Petitioner’s FOIL request is not in any way aligned with the nature, structure and storage manner of NYSP databases that collect Member work location (Brundige Aff ¶ 14). Specifically, Ms. Brundige affirmed that (1) disciplinary records are maintained within the file of each individual employee, (2) “NYSP does not file, maintain or index employee records by what county they work out of” and (3) “NYSP is unable to search for disciplinary records based on the county that a Member is assigned to work in because the personnel database utilized to query the work location of Members does not include the ability to search by county” (*id.* ¶¶ 13-14). Additionally, Ms. Brundige indicated that there may be instances where members work in multiple counties on the same day (*see id.* ¶ 14). Consequently, Respondent “established a valid basis for denying the FOIL request by showing that any responsive records are not indexed in a manner that would enable the identification and location of documents” (*Matter of Jewish Press*, 193 AD3d at 461). In short, the description of the documents “by county” is insufficient for purposes of locating and identifying the documents (*see Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531, 531 [1st Dept 2015] [description in the FOIL request for “‘businesses’ frequented’ by Middle Eastern, South Asian, or Muslim persons” was insufficient for purposes of locating and identifying documents sought because the possible 500,000 responsive documents were “not necessarily searchable by ethnicity, race, or religion”], *lv denied* 26 NY3d 919 [2016]).

Petitioner’s reliance on *Matter of Jewish Press, Inc. v New York City Dept. of Educ.* (183 AD3d 731 [2d Dept 2020]) is misplaced. In that case, the Appellate Division, Second Department concluded that the respondent agency improperly denied the petitioner’s FOIL request for copies

of forms used by the respondent's employees to request absences for religious observances on the ground the documents were not reasonably described (see id. at 732). In holding the request was reasonably described, the Second Department noted "the respondent concede[d] that it [could] locate the requested records" and "acknowledge[d] that the [requested] forms [were] maintained at the schools where the relevant employees are currently or were last assigned" (id.). No such concession is made here. Indeed, Respondent specifically indicated its inability to locate the requested documents short of reviewing the individual employment file of each active employee (see Matter of Aron Law, PLLC v New York City Dept. of Educ., 192 AD3d 552, 552-553 [1st Dept 2021]).

Compel Training

Petitioner also seeks a writ of mandamus to compel "Respondent be trained or retrained to comply with their obligations under [FOIL]" (Verified Petition ¶ 28). "A writ of mandamus is an extraordinary remedy that lies only to compel the performance of acts which are ministerial and mandatory, not discretionary, and only when there is a clear legal right to the relief sought" (Matter of Cafferty v Mihalko, 182 AD3d 848, 850 [3d Dept 2020]; see Matter of Maron v Silver, 14 NY3d 230, 249 [2010]). Petitioner has not established a clear legal right in the Public Officers Law or otherwise to compel Respondent to be trained or retrained with respect to its obligations under FOIL. Consequently, the petition seeking such relief must be denied.

Attorneys' Fees

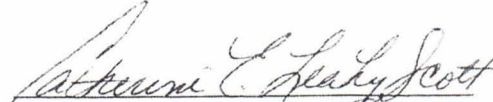
A court may award attorneys' fees and litigation costs to a petitioner who "substantially prevailed" in a proceeding seeking disclosure under FOIL (see Public Officers Law § 89 [4] [c] [i]). As this Court has denied the release of the requested documents, the request for attorneys' fees and costs is denied (see Matter of New York Civ. Liberties Union v City of Syracuse, 72 Misc

3d 458, 467 [Sup Ct, Onondaga County 2021]; Matter of Prall v New York City Dept. of Corr., 40 Misc 3d 940, 947-948 [Sup Ct, Queens County 2013], affd 129 AD3d 734 [2d Dept 2015]).

Accordingly, it is hereby:

ORDERED AND ADJUDGED that the petition is DENIED and the proceeding is DISMISSED.

Dated: November 10, 2021
Albany, New York


CATHERINE E. LEAHY SCOTT
Acting Justice of Supreme Court

The Court considered the following papers in rendering this Decision and Judgment:

- (1) Notice of Verified Petition, dated August 13, 2021.
- (2) Verified Petition, dated August 13, 2021, with attachments.
- (3) Answer, dated September 22, 2021.
- (4) Respondent's Memorandum of Law in Opposition, dated September 22, 2021.
- (5) Affirmation of Shannon M. Brundige, Esq., dated September 17, 2021, with attachments.
- (6) Verified Reply Affirmation of Kenneth Puig, dated October 6, 2021.