SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

----------X

INDEX NO. 156176/2022

MOTION DATE 11/16/2022

MOTION SEQ. NO. 001

In the Matter of

JASMINE GONSALEZ,

Petitioner,

- v -

NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY

Respondents.

DECISION, ORDER, and JUDGMENT

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In this CPLR article 78 proceeding, the petitioner seeks judicial review of a March 24, 2022 Metropolitan Transportation Authority (MTA) Freedom of Information Law (FOIL) Appeals Officer's determination denying her appeal of a March 2, 2022 New York City Transit Authority (NYCTA) FOIL Unit determination that had denied her request for agency records pursuant to FOIL (Public Officers Law § 84, *et seq.*). In her request, the petitioner had sought all notices of claim in the possession of the MTA or NYCTA filed between January 1, 2014 and August 19, 2021 that were related to stairways P5 and P6 at the Church Avenue subway station in Brooklyn that served the B and Q trains, as well as the landing in between those stairways. The petitioner also seeks an award of attorneys' fees pursuant to Public Officers Law § 89(4)(c). The respondents answer the petition and submit the administrative record. The petition is granted, the petitioner shall be awarded attorneys' fees, and, on or before April 13, 2023, the respondents shall provide the petitioner either with responsive notices of claim, or a statement

that they have no responsive notices of claim. On or before March 13, 2023, the petitioner shall submit an affidavit of attorneys' services.

On August 19, 2021, the petitioner submitted the FOIL request described above to the MTA. Shortly thereafter, a representative of the MTA FOIL Unit acknowledged receipt, indicating that it anticipated having the requested records available by November 23, 2021, but cautioning that there could be delays in providing records as a result of the ongoing COVID-19 pandemic. On December 6, 2021, after the petitioner had not received the requested records, she appealed to the MTA FOIL Appeals Officer, asserting that the MTA FOIL Unit had constructively denied her request. In a determination dated December 30, 2021, the Appeals Officer granted the appeal, and remitted the matter back to the MTA FOIL Unit for further response. When the petitioner still had not received a response by February 23, 2022, she again appealed, alleging constructive denial for a second time.

On March 2, 2022, while the petitioner's second administrative appeal was pending, the NYCTA FOIL Unit finally responded to her request, informing her that it "cannot be fulfilled as described" because had not "reasonably described" the documents sought within the meaning of Public Officers Law § 89(3)(a). The NYCTA FOIL Unit explained that "[w]hether a request is reasonably described may be dependent upon the nature of an agency's filing or record keeping system," and cited the Court of Appeals' decision in *Matter of Konigsberg v Coughlin*, (68 NY2d 245 [1986]). The NYCTA FOIL Unit further explained that, with respect to the search criteria provided by petitioner, "[t]he requested records are not organized or kept in a manner that permits for practical retrieval, and as such, your request would require the agency to engage in herculean efforts to search, locate and retrieve the records, if any."

On March 7, 2022, the petitioner administratively appealed the March 2, 2022 determination to the MTA FOIL Appeals Officer, contending that she had "provided very specific information," including "date range, the subway station, city and state, the trains that stop at that station as well as the exact staircase I am requesting records for," and that, hence, her request

was not "overbroad, vague, unclear, ambiguous and insufficient." In a March 24, 2022 determination, the MTA FOIL Appeals Officer denied her appeal, concluding that a search for the requested records "cannot be conducted" because the request "fail[ed] to meet the requirement that FOIL requests must be reasonably described pursuant to Public Officers Law § 89(3)(a)." Although the Appeals Officer acknowledged that the petitioner's request included "date range, the subway station, city and state, the trains that stop at the station as well as the exact staircase," he explained that a search for all notices of claim referable to a particular accident location could not be conducted using those criteria due to the nature of the agency's filing and record keeping system, as notices of claim "are not filed or organized in a manner such that they may be searched for by a certain common location, much less by a common 'theme' such as 'with relati[on to] the stairwells/stairs.'" Rather, the MTA FOIL Appeals Officer concluded that notices of claim cold only be searched by notice of claim number, implicitly suggesting that they might also be searched by date of filing. The Appeals Officer concluded that any search necessary to comply with the petitioner's request would "cause the agency's FOIL Team to engage in 'herculean efforts' to identify and locate the requested records."

This CPLR article 78 proceeding ensued.

As the courts repeatedly have made clear,

> "on the issue of whether a particular document is exempt from disclosure under the Freedom of Information Law, the oft-stated standard of review in CPLR article 78 proceedings, i.e., that the agency's determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable"

(*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 109 AD2d 92, 94 [3rd Dept 1985], *affd* 67 NY2d 562 [1986]; *see Matter of Prall v New York City Dept. of Corrections*, 129 AD3d 734 [2d Dept 2015]; *Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153 [1st Dept 2010]). Rather, upon judicial review of an agency's determination to deny a FOIL request, the court must assess whether "the requested material falls squarely within a FOIL exemption" and whether the agency, upon denying such access, "articulat[ed] a

particularized and specific justification for denying access" (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d at 566). In other words, the court may only review an agency's FOIL determination to ascertain whether the determination to invoke a particular statutory exemption was affected by an error of law (*see Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 246 & n 2 [2018], *affg* 140 AD3d 419, 420-421 [1st Dept 2016]; *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531, 531 [1st Dept 2015]; CPLR 7803[3]).

A FOIL request must be "for a record reasonably described" (Public Officers Law § 89[3]; *see Matter of Konigsberg v Coughlin*, 68 NY2d at 249-250). FOIL "places the burden on petitioner to reasonably describe the documents requested so that they can be located" (*Matter of Mitchell v Slade*, 173 AD2d 226, 227 [1st Dept 1991]; *see Matter of M. Farbman & Sons, Inc. v New York City Health & Hosps. Corp.*, 62 NY2d 75, 83 [1984]; *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.,* 125 AD3d at 531]). Nonetheless, the agency must make some showing that "the descriptions were insufficient for purposes of locating and identifying the documents sought" (*Matter of M. Farbman & Sons, Inc. v New York City Health & Hosps. Corp.*, 62 NY2d at 83). Consequently, as long as the description of the records is sufficiently specific to permit their location and retrieval, an agency "cannot evade the broad disclosure provisions of that statute upon the naked allegation that the request will require review of thousands of records" (*Matter of Konigsberg v Coughlin*, 68 NY2d at 249 [citation omitted]).

Public Officers Law § 89(3)(a) provides that

> "[a]n 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"

"Moreover, an agency may recover the costs of engaging an outside service from the person or entity making such a request" (*Matter of County of Suffolk v Long Is. Power Auth.*, 119 AD3d 940, 942 [2d Dept 2014]; *see Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 161-162 [1st Dept 2010]).

Nonetheless, "'[a] valid basis for denying [a] FOIL request has been established—at least with respect to [paper] files—when they are 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 2015], quoting *Matter of Konigsberg v Coughlin*, 68 NY2d at 250; *see Matter of Jewish Press, Inc. v New York State Police,* 207 AD3d 971, 974 [3d Dept 2022] ["agency staff are not required to engage in herculean or unreasonable efforts in locating records to accommodate a person seeking records"]; *Matter of Aron Law v New York City Dept. of Educ.*, 192 AD3d 552, 552-553 [1st Dept 2021]; *Matter of Reclaim the Records v New York State Dept. of Health,* 185 AD3d 1268, 1272 [3d Dept 2020] [respondent established that its indexing system did not permit searching either its paper or electronic records by the name of an entity, and had no method for searching its paper or digital correspondence records for the terms provided in the FOIL request]).

In *Matter of Aron Law*, the Court explained that, with respect to the request at issue there, "'the descriptions in the FOIL request were insufficient for purposes of locating and identifying the documents sought before denying a FOIL request for reasons of overbreadth'" (*Matter of Aron Law v New York City Dept.of Educ.*, 192 AD3d at 552, quoting *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d at 531). In this regard, the Court noted that the affidavit of the New York City Department of Education's Records Access Officer (RAO) explained that the agency's database contained files relating to some 14,000 FOIL requests, organized into a like number of folders and containing roughly between 100,000 and 500,000 individual files. The RAO said that he had attempted to

formulate a search for documents responsive to the petitioner's request and that, given the resulting extremely broad search and the massive database, "the system's search never appears to end during the course of a day" (*Matter of Aron Law v New York City Dept. of Educ.*, 192 AD3d at 553). The RAO concluded that the only way to identify responsive documents would be visually to examine approximately 5,400 folders, covering requests made in the preceding five years, which contained tens of thousands of files, and that this task would take an employee some 900 hours to complete (*see id.; cf. Matter of Jewish Press, Inc. v New York City Dept. of Educ.*, 183 AD3d 731, 731-732 [2d Dept 2020] [agency conceded that it could locate documents, despite voluminous nature of the records that it was required to search; hence, it erroneously invoked the FOIL exemption applicable to requests that did not "reasonably describe" the documents sought]).

Here, as in *Matter of Aron*, the decision maker explained that the agency's indexing system was not organized or indexed to enable personnel to search documents by the criteria articulated by the applicant which, in this case, was by accident location. Unlike the decision maker in *Matter of Aron*, however, the MTA FOIL Appeals Officer merely asserted, without any factual support, that the work involved in locating responsive records would be "herculean." In his determination, he did not identify how many notices of claim the respondents had received between 2014 and 2021 or how many needed to be reviewed properly to respond to the petitioner's request, he did not state how those records were organized or indexed other than by claim number, and he did not estimate how long it would take MTA or NYCTA employees to search and review their records in order to provide a proper response to the petitioner's request. In short, his determination was conclusory. An administrative determination may not be sustained where, as here, the decision maker provides only a "perfunctory recitation" of relevant statutory factors, legal standards, or other required considerations as a basis for his or her conclusions (*Matter of BarFreeBedford v New York State Liq. Auth.*, 130 AD3d 71, 78 [1st Dept

2015]; *see Matter of Wallman v Travis*, 18 AD3d 304, 308 [1st Dept 2005] ["perfunctory discussion"]).

Moreover, the court notes that General Municipal Law § 50-e(2) articulates the required content of notices of claim, and provides for a simplified format, in which the claimant must identify, among other things, "the place where" the claim arose. Since the respondents can easily determine when claims were filed, as claim numbers are based on the date of filing, and the notice of claim forms are easily reviewable to determine, at the very least, which of the five boroughs of the City in which the claim against NYCTA arose, it is not apparent that "herculean" efforts would be required to ascertain which notices of claim referred to accidents occurring in Brooklyn. Those notices could then be segregated from other notices of claim to review and ascertain on which subway or bus line the claimed accident occurred. There is a seeming inconsistency between appellate precedent declining to exempt an agency from searching and producing records merely because of the "voluminous" nature of the records to be searched, and precedent applying the exemption to requests that are not "reasonably described" because the search would be "herculean" due the agency's indexing protocol. The court concludes that the instant dispute presents only a case of potentially voluminous records that could be searched without significant difficulty regardless of the respondents' indexing protocol. Hence, the petition must be granted.

While this court is keenly aware of the appellate precedent exempting agencies from responding to FOIL requests where the required search would be nigh impossible to undertake, it also notes that much of that case law has been developed over a significant period of years, during which MTA and NYCTA, despite these precedents, continued to organize and index paper records in a manner meant to shield them from compliance with FOIL, so that they never would have to respond to a FOIL request seeking documents referable to prior accidents at their transit facilities. The practical effect of the respondents' policy of maintaining their notice of claim records in paper form, rather than storing them electronically, with text recognition

software, is underscored by the FOIL section providing that "[w]hen an agency has the ability to retrieve or extract a record or data maintained in a computer storage system *with reasonable effort*, it shall be required to do so" (Public Officers Law § 89[3][a] [emphasis added]). This provision requires disclosure "if the [requested] records are maintained electronically . . . and are retrievable with reasonable effort . . . . In such a situation, the agency is merely retrieving the electronic data that it has already compiled and copying it onto another electronic medium" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 464-465 [2007]). The court concludes that the respondents should not be permitted to create a bureaucratic "cone of silence" intended to thwart any attempt by a personal injury plaintiff to ascertain whether prior accidents had occurred at a particular site, and thus further shield them from tort liability, despite having received actual written notice of a defective or dangerous condition at their transit facilities. The respondents' mission as public transportation agencies not only includes transporting passengers from one place to another, but doing so in the safest possible manner. If the respondents' record-keeping system is, in fact, as they described it, then it is appalling that they have no proper method of documenting or determining where recurring or unremediated dangers or defects exist, which runs counter to their mission.

In light of the foregoing, it is

ADJUDGED that the petition is granted; and it is

ORDERED that, on or before April 13, 2023, the respondents shall provide the petitioner either with the notices of claim responsive to her request, or a statement that they have no notices of claim responsive to her request; and it is further,

ORDERED that, on or before March 13, 2023, the petitioner shall submit an affidavit or affirmation of attorneys' services in support of her application for an award of attorneys' fees.

This constitutes the Decision, Order, and Judgment of the court.

1/13/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE