SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

BROOKE SHREIER GANZ and RECLAIM THE RECORDS.ORG,

Petitioner,

NEW YORK CITY DEPARTMENT OF RECORDS AND INFORMATION SERVICES,

Respondent.

REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITIONER's VERIFIED ARTICLE 78 PETITION

Index No. 101365/2014

REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITIONER's VERIFIED ARTICLE 78 PETITION

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PRELIMINARY STATEMENT

Respondents irrationally maintain that FOIL does not require them to provide copies of public records. This petition, brought pursuant to Public Officers Law Article 6 §§ 84 - 90, the New York State Freedom of Information Law (FOIL), was necessary to force respondents to confront what is plainly stated in the FOIL statute. It is only after this Petition was served on respondents that the Department of Records and Information Services ("DORIS"), an agency of the City of New York ("City")(collectively "Respondents"), reversed their denial of Ms. Ganz's request for copies of microfilm indexes stored and held for inspection at the Municipal Archives. As Ms. Ganz resides in California, it was unreasonable for her to travel to New York to simply inspect the records and she offered to pay for copies of the microfilm requested. Nonetheless, respondents denied petitioner's request on the sole basis that, as they alleged, they are not required to copy records pursuant to FOIL when they are available for inspection on site. Further, when petitioner requested an appeal of this unfounded denial, the agency failed to respond as provided by the statute. In light of the unreasonable denial of petitioner's request and subsequent failure to respond to her appeal on justifications contradicted by the plain language of the law, Petitioner is entitled to her attorney's fees and costs.

BACKGROUND

On January 5 2015, Ms. Ganz sent a FOIL request to the FOIL Records Access Officer at DORIS. See Petition, at Exhibit A. As support for the right of public access and her request, Ms. Ganz referenced the guidelines set forth by the New York State Committee on Open Government's ("Committee on Open Government") advisory opinion dated February 11, 1998 and the Court's

decision in *Gannett Co. v. City Clerk's Office*, 596 N.Y.S.2d 968 (N.Y. Sup. Ct. 1993). See Petition, at Exhibit A and Exhibit B.

Subsequent correspondence between Ms. Ganz and the agency led to a revised request for "index ledgers" to the City Clerk marriage license series (1908-1929) available to the public only on microfilm located at the Municipal Archives at 31 Chambers Street, New York, NY, 10007. See Petition, at Exhibit I.

After first informing Ms. Ganz that copies of the microfilm "would also be available for purchase at $35.00 per roll, plus shipping" (Petition, at Exhibit F) the FOIL Records Access Officer at DORIS reversed his position and denied the request. See Petition, at Exhibit N. By email dated April 28, 2015, Assistant Commissioner Kenneth R. Cobb ("Mr. Cobb") stated:

> In my message of February 26, 2015, I indicated that the microfilm of the marriage license index was available for purchase. This is incorrect. The indexes to vital records, in any format, **are not subject to FOIL and are not available for purchase.**

Petition, at Exhibit N (emphasis added).

By email dated April 28, 2015, Ms. Ganz expressed her disappointment in the reversal of DORIS's position, and requested an appeal. See Petition, at Exhibit K. She restated the basis for her belief that the documents were subject to disclosure, and again referenced the Committee on Open Government's advisory opinion dated February 11, 1998 and the Court's decision in *Gannett Co. v. City Clerk's Office*, 596 N.Y.S.2d 968 (N.Y. Sup. Ct. 1993). Id.

By email dated May 6, 2015, Mr. Cobb failed to acknowledge Ms. Ganz's request for an appeal. See Petition, at Exhibit I. Mr. Cobb also failed to forward her appeal to a DORIS Appeals

Officer or the Committee on Open Government or otherwise properly respond to the appeal. See Affidavit of Kenneth R. Cobb In Support Of Respondents' Verified Answer ("Cobb Affidavit").

Ms. Ganz herself contacted the Committee on Open Government and forwarded the appeal request and related correspondence. See Affirmation of Gillian Cassell-Stiga ("Cassell Aff.") attached hereto, at ¶ 3. August 12, 2015, the Committee on Open Government emailed an advisory opinion to Ms. Ganz and DORIS explaining the reasons the denial was in error. See Committee on Open Government advisory opinion dated August 12, 2015, attached to the Cassell Aff. at Exhibit A. This advisory opinion was sent directly to Mr. Cobb by email on August 12, 2015. Id.

Ms. Ganz filed the instant Petition on September 3, 2015. Cassell Aff. at ¶ 6. Both respondents The City of New York and DORIS were served copies of the Petition on September 4, 2015. Id. On September 22, 2015, Respondents contacted the undersigned to inform Petitioner that they had reversed their position and were now willing to produce the requested copies of the microfilm at the rate they had previously quoted Ms. Ganz. Id. at ¶ 7.

The bulk of the requested items were thereafter produced to Ms. Ganz through her counsel and counsel for Respondents on or about October 14, 2015. Id. at ¶ 10. Respondents have agreed to produce the remaining items to Ms. Ganz in a reasonable time. Id. Counsel for respondents were contacted prior to the filing of this reply to discuss the matter of attorneys fees, but respondents held then as they do now that their denial was supported by law. Id. at ¶ 8. Respondents have refused to compensate Ms. Ganz for the time and resources expended in bringing this action. Id.

ARGUMENT

Respondents defend the denial of Ms. Ganz's request and the refusal to properly respond to her appeal on the mistaken belief that FOIL does not require an agency to provide copies of

microfilm records available for viewing onsite. Respondent's position is contrary to the plain language of the statute and the long history of FOIL precedent governing the proper fee an agency may charge in providing requested copies of records. Notably, Respondents do not dispute that Ms. Ganz offered to pay for, and now in fact has paid for, the requested copies. Given the clearly established law on this issue it is unreasonable for respondents to claim the agency had no obligation under FOIL to produce the requested items or to respond to her appeal. While the requested items have now been produced to Ms. Ganz, it was only by bringing this Article 78 petition that the agency was forced to confront the basic requirements of the law stated plainly in the statute. Nonetheless, respondents continue to dispute that Ms. Ganz is entitled to her attorney fees and costs in bringing the instant action.

Respondents have engaged in precisely the unsupportable gamesmanship the counsel fee provision was designed to thwart. "The counsel fee provision was first added to FOIL in 1982, based up on the Legislature's recognition that persons denied access to documents must engage in costly litigation to obtain them and that "[c]ertain agencies have adopted a 'sue us' attitude in relation to providing access to public records," thereby violating the Legislature's intent in enacting FOIL to foster open government." Matter of New York Civ. Liberties Union v City of Saratoga Springs, 87 A.D.3d 336, 338 (3d Dep't 2011) *citing* Assembly Mem in Support, at 1, Bill Jacket, L 1982, ch 73. It was intended to "create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL." Id. *citing* Senate Introducer's Mem. In Support, Bill Jacket, L. 2006, ch. 492, at 5. Where petitioner has "substantially prevailed," POL § 89(4)(c)(i) and (ii) provide that a court may assess attorneys' fees and litigation costs against an agency in two circumstances: (i) the agency had no

reasonable basis for denying access, or (ii) the agency failed to respond to a request for appeal within the statutory time. Ms. Ganz is entitled to attorneys fees and costs under both sections of the statute.

It is of no movement that Respondents finally produced the requested items to Ms. Ganz, as only when confronted by the instant petition did such production occur. In fact, it is precisely because the agency's position was so unreasonable that Respondents chose to produce the requested items rather than face a reckoning with the law. The agency should not be incentivized to evade the requirements of FOIL law, by allowing for an avoidance of production until an Article 78 Petition is filed.

> To conclude otherwise would not only subvert the purposes of the statue, but would lead to a result where only a petitioner who fully litigated a matter to a successful conclusion could ever expect an award of counsel fees and a respondent whose position was meritless need never be concerned about the possible imposition of such an award so long as they ultimately settled a matter – however dilatorily – before the court heard the petition on the merits.

Matter of New York Civil Liberties Union, at 339-340. Petitioner carefully and with substantial effort provided the supporting legal precedent and applicable law to the agency prior to the denial and again prior to her request for an appeal. It was only after the filing of the Petition, that the agency was moved to reverse its clearly unreasonable denial.

I. The Refusal To Acknowledge the Plain Language of FOIL Constitutes an Unreasonable Denial and Entitles Petitioner to Attorneys Fees

Respondents denied petitioner's request on the unreasonable and plainly unfounded basis that the requested copies of microfilm were not subject to FOIL and Ms. Ganz is entitled to her attorneys fees and costs. N.Y. Pub. Off. § 89(4)(c)(i) provides that a court may assess attorneys' fees and litigation costs against an agency where there was no reasonable basis for denying access. Here,

Respondents maintain a position that is contradicted by the plain language of the FOIL statute, controlling precedent, and Committee on Open Government opinions. The agency was also put on notice of the controlling law prior to the filing of the Petition by the Committee on Open Government and Ms. Ganz herself. The agency has since provided no additional justifications for nondisclosure, nor do Respondents argue any applicable exception now. Having been forced to bring the instant action to fight such an absurd refusal to acknowledge the foundational provisions of FOIL, Ms. Ganz is entitled to her attorneys fees and costs.

The agency's simple denial of the fundamental fact FOIL obligates production of requested copies to petitioner is itself unreasonable. N.Y. Pub. Off. § 87(3)(a) provides that Ms. Ganz is entitled to copies of records requested. The plain language of N.Y. Pub. Off. § 87(3)(a) states:

> Each 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 acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section....**Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record** and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search.

N.Y. Pub. Off. § 87(3)(a) [emphasis added]

FOIL defines the term "record" to include: "[a]ny information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, **microfilms**, computer tapes or discs, rules, regulations or codes." N.Y. Pub. Off. § 86(4) (emphasis added).

N.Y. Pub. Off. § 87 further directs each agency to promulgate rules and regulations pertaining to the availability of records and procedures to be followed, including, but not limited to, "**the fees for copies of records** which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute." N.Y. Pub. Off. § 87(1)(b)(iii)(emphasis added).

The law of FOIL clearly provides that where an individual is willing to pay for the cost of copying, the agency must provide copies. The statute states:

> 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, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article. N.Y. Pub. Off. § 87(3)(a)

It is uncontested that Ms. Ganz agreed to pay for the copies of requested items. Further, Ms. Ganz specifically narrowed her request to only those items which were not available by other means either online or in other paper or electronic format. See Petition, at Exhibit I, J, and L. The subject of Ms. Ganz's request was unique microfilm records held only at the Municpal Archives for inspection. Ms. Ganz informed the agency of the public nature of her request and that the records would not be used for commercial purpose. Id. Ms. Ganz's sole intent was to perform not-for-profit research and make these inaccessible records available to the public at no cost. Id.

The agency's refusal on the basis it was not obligated to produce copies to Ms. Ganz is directly contradicted by the plain language of the statute. It is unclear from the affidavit submitted whether respondents now allege Ms. Ganz could have appeared at the Municipal Archives and the agency would properly have responded to a requested for copies on-site. This is nonetheless

irrelevant as Respondents instead informed Ms. Ganz that she was not entitled to copies of the microfilm whatsoever. See Petition, at Exhibit N ("The indexes to vital records, in any format, are not subject to FOIL and are not available for purchase."); Petition, at Exhibit P ("it is not an appropriate use of FOIL to request a copy of a record that is accessible to the public in the Municipal Archives."). Respondents quixotically maintain this position at present. See Cobb Aff. at ¶ 14-15.

Were it possible for Ms. Ganz to appear at the Municipal Archives and have her request properly received on-site it would not relieve the agency of the burden of properly responding to a similar request received by email. It is clearly established that if records are accessible, they should be made equally available to any person, without regard to status or interest. See Burke v. Yudelson, 51 A.D.2d 673, 673 (4th Dep't 1976) *citing* Advisory Resolution No. 3, 10/31/74, Access to Records to Any Person, Bulletin of State of New York Committee on Public Access to Records. Most importantly, the requested records are available on microfilm for public inspection only at the Municipal Archives and cannot be copied by a citizen on site. Petitioner could not have relieved the agency of any burden in copying these items by appearing in person at the Municipal Archives. Only the agency itself can copy the records.

II. The Refusal To Acknowledge Long Established Legal Precedent Constitutes an Unreasonable Denial and Entitles Petitioner to Attorneys Fees

FOIL provides a presumptive right of access to copies of public records. Respondents claim they were unable to locate the established precedent, which as cited above includes the plain language of the statute, making their position all the more unreasonable. See Respondent's Memorandum of Law in Support of Their Verified Answer, at 9. Petitioner will not here cite the large body of caselaw both upholding the right clearly stated by the plain language of the statute, and

further determining the appropriate fee that may be charged in different circumstances. It is nonetheless interesting to note the right has been extended beyond the types of records specifically enumerated by N.Y. Pub. Off. § 86(4) (**including microfilm**) to electronic records and even the software required to access and open such records. See N.Y. Pub. Interest Research Group v. Cohen, 188 Misc. 2d 658 (N.Y. Sup. Ct. 2001); Matter of TJS of N.Y., Inc. v. New York State Dept. of Taxation & Fin., 89 A.D.3d 239 (3d Dep't 2011).

Petitioner's case is remarkably similar to a 1981 case holding public tax maps were properly subject to the copying requirements of FOIL. See Szikszay v. Buelow, 107 Misc. 2d 886 (N.Y. Sup. Ct. 1981). Respondents in Szikszay similarly "argue[d] that public access has been granted to these maps from the time they were created in 1973, and that since the purpose of the statute was to create access to records which were not sold or otherwise already available to the public, tax maps are not governed by its provisions." Id., at 888. The Court held that the county tax map were subject to the copying requirements of FOIL and the fee schedule provided therein, unless another fee schedule was statutorily applicable. Id. Here, the microfilm records requested are specifically enumerated under N.Y. Pub. Off. § 86(4) as a record subject to FOIL's plain letter requirements.

Respondents' position is all the more unreasonable given they were informed by the Committee on Open Government that their position was unsupportable by law prior to the commencement of this action. On August 12, 2015, Petitioner received an advisory opinion from the Committee on Open Government stating that the records requested ***were*** subject to FOIL and that petitioner was entitled to copies. See Cassell Aff. at Exhibit A. The letter specifically indicates a copy was emailed directly to Mr. Cobb. Id. Thus, on or before August 12, 2015 the agency was put

on notice by direct communication from the Committee on Open Government that the agency's position was contrary to law.

Nonetheless, respondent, and in particular the records officer who directly received this advisory opinion, filed an affidavit dated November 19, 2015 in response to this petition which states, "It is my understanding based upon my conversations with counsel that FOIL does not require DORIS to produce materials via FOIL that DORIS has itself already made available to all members of the public at its own facility, i.e., the Municipal Archives." See Affidavit of Kenneth R. Cobb in Support of Respondents' Answer ("Cobb Aff."), at 14. This statement is untrue as the Committee on Open Government itself informed Kenneth R. Cobb directly on August 12, 2015.

Respondents now attempt to argue the denial of petitioner's request was not unreasonable as it was supported by caselaw, when in fact petitioner's request was supported by both caselaw and ***the plain language of the statute itself***. That respondents have failed to acknowledge the plain language of the statute, the Committee on Open Government opinion provided directly to the agency, and controlling precedent should further deem the agency's position unreasonable.

To support their untenable position, respondents cite to a number of cases ruling on facts bearing no resemblance to the case at bar. Respondents rely heavily on Sell v. New York City Dept of Educ., Index No. 101291/13, 2014 N.Y. Misc. LEXIS 2382, *11 (N.Y. Sup. Ct. May 23, 2014), but excerpt an incomplete quote from the court decision that notably omits the pertinent facts giving rise to the Court's ruling. "**Respondents have provided links to several documents Petitioner requested that are already publicly available, and Petitioner attached 29 pages of requested documents to his petition.** The Court does not need to order the DOE to provide records that are publicly available or that Petitioner already possesses." Id. at *11 (emphasis added). The documents

requested in *Sell* were either readily accessible online or already had been provided to petitioner once prior to the action. The circumstances here concerning unique microfilm indices held at the Municipal Archives are entirely distinct.

At the time the instant Petition was filed Ms. Ganz neither had in her possession copies of the requested records nor were the requested records publically available online. The requested records were only available for inspection on microfilm at the Municipal Archives, and copies had to be produced by the agency itself which it refused to do for her. For the same reasons stated above, all of the cases cited by Respondents are unavailing. See Freedberg v. Department of Navy, 581 F. Supp. 3 (D.D.C. 1982)(seeking documents available in the public court record and once already produced directly to petitioner); Crooker v. U. S. State Dep't, 628 F.2d 9 (D.C. Cir. 1980)(seeking documents produced prior from a separate agency). If anything, the cases cited by respondents further support the plain language of the FOIL statute, clearly requiring respondents to copy the requested microfilm records for Petitioner.

In Triestman v. United States Dep't of Justice, Drug Enforcement Admin., 878 F. Supp. 667, 671 (S.D.N.Y. 1995), Triestman requested *any* information made public about certain individual FBI agents, raising the issue of whether the agency was required to compile information otherwise readily available to the public. In regards to this information Court's opinion nonetheless states:

> In some cases, there may be a question as to what form of prior disclosure is sufficient to make information *readily available* to the public. In Freedberg and in the cases the court relied on, Crooker and Misegades, the information sought by the plaintiffs was readily available to them. In this case, the plaintiff's own characterization of the information that he seeks demonstrates that he seeks only information that is well within any definition of "public availability."

Triestman v. United States Dep't of Justice, Drug Enforcement Admin., 878 F. Supp. 667, 671-672 (S.D.N.Y. 1995)(emphasis added).

Respondents' failure to acknowledge the distinction between the facts of the present case and those cited is not rational. The Cobb's Aff. argues "...this strikes me as akin to requiring a public library to copy and produce via FOIL those books already freely available on its shelves." It is similarly irrational that a records officer would compare the accessibility of widely circulated books held in a public library to information contained on microfilm for inspection at only one location in the world. Further, the microfilm at issue cannot be copied manually on-site by petitioner herself as one might copy the desirable portions of a book held at a public library. A comparison to commercially available library books is unavailing.

In fact, providing the requested microfilm copies to petitioner in this case would have relieved respondents of the administrative burden of future production. Petitioner made clear her intent to create a searchable electronic index online and available to the public free of charge. See Petition, at Exhibit I. Respondents unreasonably denied Ms. Ganz's request in a manner contrary to the clear language of the statute and long established precedent, therefore Ms. Ganz is entitled to attorneys fees and costs.

III. The Failure to Respond to Petitioner's Request for an Appeal Entitles Her To Attorneys Fees

Respondents also failed to properly respond to Ms. Ganz's request for an appeal providing a separate basis for Petitioner's entitlement to attorneys fees and costs in bringing this action. N.Y. Pub. Off. § 89(4)(c)(ii) provides that a court may assess attorneys' fees and litigation costs against an agency where the agency failed to respond to a request for appeal within the statutory time. N.Y. Pub. Off. § 89(4)(a) states:

> Except as provided in subdivision five of this section, any person denied access to a record **may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who *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.** In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon. Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.

N.Y. Pub. Off. § 89(4)(a)(emphasis added).

Ms. Ganz requested an appeal on April 28, 2015. See Petition, at Exhibit K. The FOIL Records Access Officer at DORIS submitted an affidavit to this action testifying that he failed to respond to petitioner's reply as provided by statute. See Cobb Aff. at 18 ("As I did not at any point deny Petitioner access to the Subject Mircrofilm, her purported appeal was improper and therefore did not require a formal response from DORIS' Appeals Officer"). Importantly, the response was nonetheless a *per se* denial by law. N.Y. Pub. Off. § 89(4)(b)("Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial"). Respondent's failure to properly respond to Ms. Ganz's request for an appeal provides a separate basis for awarding petitioner her attorneys fees and costs in being forced to bring this action. See Matter of Adam D. Perlmutter, P.C. v. New York City Police Dept., 2013 N.Y. Misc. LEXIS 4724 (N.Y. Sup. Ct. Oct. 17, 2013)(appeal denied 69 days later). The subsequent review and reversal of the agency's position only occurred after the Petition was filed, nearly five months after Petitioner's request for an appeal.

Had the records officer properly forwarded the appeal to the "DORIS' Appeals Officer" and the Committee on Open Government, he would have been informed that his position was contrary to the law (at the very least by the Committee on Open Government). Unfortunately in this case, a

failure of the FOIL Records Access Officer at DORIS to read the statute or consult with authority entitles Petitioner to attorneys fees both for maintaining an unreasonable denial and for failing to respond to the appeal of that unreasonable denial.

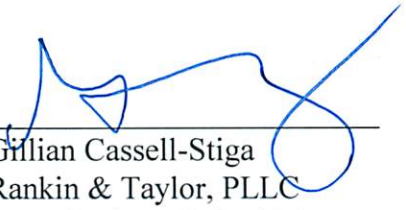
CONCLUSION

After Petitioner was forced to file the instant Petition, the agency produced the requested items to her. It is precisely this unreasonable gamesmanship that the attorneys' fee provision was intended to prevent. "On this record--and particularly in view of the fact that it was only through the use of the judicial process that petitioner was able to obtain the required disclosure and respondents evinced a clear disregard of the public's right to open government" the Court should award petition her attorneys fees and costs. Matter of New York Civ. Liberties Union v City of Saratoga Springs, 87 A.D.3d 336, 339 (3d Dep't 2011).

The agency had no reasonable basis for denying petitioner's request, failed to respond to her appeal as required, and only agreed to transfer all the requested items after the instant Petition was filed. The sole justification for respondents' failure is the unreasonable claim the microfilm records held at the Municipal Archives are not subject to FOIL, a position contrary to the plain language of the FOIL statute and condemned by a long body of established precedent. Respondents cite no other exceptions or justifications for the failure to produce the requested items as required. Respondents' position is all the more unreasonable in light of the specific guidance they were given by the Committee on Open Government prior to the filing of this action and their present denial of any existing precedent. Ms. Ganz is entitled to an award for fees and costs in bringing this Petition.

Dated: New York, New York
January 4, 2016

Respectfully submitted,

By: 

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