

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
RECLAIM THE RECORDS and BROOKE SCHREIER
GANZ,

Petitioners,

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

Index No.: 04058-18

-against-

NEW YORK STATE DEPARTMENT OF HEALTH,

Respondent.

MEMORANDUM OF LAW IN OPPOSITION TO VERIFIED PETITION

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PRELIMINARY STATEMENT

Respondent, New York State Department of Health (“DOH”) respectfully submits this memorandum of law in opposition to the legal arguments asserted in the Verified Petition dated June 20, 2018.

In this proceeding, brought pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”), Petitioners, Reclaim The Records and Brooke Schreier Ganz (hereinafter “Ganz”), seek an order and judgment pursuant to CPLR §7803(1) seeking the following relief to the Petitioners: (a) directing respondent DOH to produce all records and documents responsive to Petitioners’ October 17, 2017 FOIL request #17-10-253; (b) directing respondent to explain the manner in which records are kept that allegedly prevent a search for responsive documents; (c) directing respondent to produce information regarding its employees who conducted the search and their duties; (d) directing respondent to produce information about the subject matter of its records; (e) directing respondent to produce information about the search terms used to look for the records and documents requested; (f) directing respondent to certify that a diligent search was conducted that failed to produce responsive records and documents requested; (g) awarding petitioners costs and disbursements and legal fees and (h) any other and further relief as the Court may deem just and proper.

Petitioners’ claims have no merit, the FOIL exceptions invoked by Respondent are applicable, and/or all responsive documents which Petitioner is entitled to have been provided. Accordingly, Petitioner’s claims should be denied, and the Verified Petition should be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

A. Petitioner's FOIL request #17-10-253 – October 17, 2017.

By letter and email sent October 17, 2017, Brooke Schreier Ganz (the "Requester") submitted a FOIL request for:

all (1) correspondence, (2) emails, (3) proposals, (4) drafts, (5) notes, (6) agreements, (7) contracts, (8) meetings and (9) calendar entries, (10) phone logs, (11) meeting minutes, (12) budget items, (13) receipts, (14) vendorization forms or data, (15) bids, (16) evaluation materials, (17) Freedom of Information Law (FOIL) records requests and their associated correspondence and (18) any appeals, and (19) any other documentation or communications between the New York State Department of Health and Ancestry.com, or (20) such materials within the New York State Department of Health about Ancestry.com. Ancestry.com might also be listed as (1) Ancestry, (2) Ancestry LLC, (3) Ancestry.com LLC, (4) Ancestry.com holdings, (5) Ancestry.com Holdings LLC, or (6) similar terms.¹

I am requesting these materials for all dates between January 1, 2015 to October 17, 2017, inclusive. (See, Affidavit of DOH Records Access Officer Rosemarie Hewig, Esq. ("Hewig Affd."), ¶7; Affidavit of DOH Records Access Appeal Officer David J. Spellman ("Spellman Affd."), ¶6; Verified Petition, ¶12).

A copy of the request ("FOIL #17-10-253") is annexed to the Hewig Affidavit and the Spellman Affidavit respectively as **Exhibit A**, and also to the Verified Petition as Exhibit A.

On October 18, 2017, the Records Access Office ("RAO") issued an acknowledgement letter advising the Requester that FOIL #17-10-253 had been received. (Hewig Affd., ¶8) Additionally, the letter noted that "[a] determination as to whether your request is granted or denied will be reached in approximately 20 business days or we will notify you in writing if the responsible program area(s) should require additional time to locate, assemble, and review documents that may be responsive to your request." (Id.) A copy of the RAO's acknowledgement letter is annexed to the Hewig Affidavit as **Exhibit B**.

¹ The numbering has been added to this paragraph for clarity, and was not present in the original FOIL request.

On November 15, 2017, the RAO sent an extension letter with an estimated date of completion of January 23, 2018. (Hewig Affd., ¶9). A copy of the RAO's extension letter is annexed to the Hewig Affidavit as **Exhibit C**, and to the Verified Petition as Exhibit Q.

B. The FOIL Response – January 23, 2018

On January 23, 2018, DOH issued a complete and final response to the request. (See, Hewig Affidavit, ¶10, Ex. "D" thereto; Spellman Affd., ¶7, Ex. "B" thereto; Verified Petition, Ex. "R"). This response constituted a partial grant of access to records and a partial denial of the request and, summarized briefly, provided the following:

1. Requester was provided with records responsive to the portion of the request concerning "Freedom of Information Law (FOIL) requests and their associated correspondence" (Hewig Affidavit, ¶11, Ex. "D" thereto; Spellman Affd., ¶7, Ex. "B" thereto; Verified Petition, Ex. "R");
2. Requester was advised that the responsive materials provided in response to part 1 above contained redactions pursuant to POL § 87(2)(b) because disclosure would constitute an unwarranted invasion of personal privacy and § 87(2)(g) as inter-agency or intra-agency materials (Hewig Affidavit, ¶14, Ex. "D" thereto; Spellman Affd., ¶7, Ex. "B" thereto; Verified Petition, Ex. "R");
3. Requester was advised that the New York State death index had been previously released to requester in response to a separate FOIL request (Hewig Affidavit, ¶12, Ex. "D" thereto; Spellman Affd., ¶7, Ex. "B" thereto; Verified Petition, Ex. "R");
4. Requester was advised that with respect to the portion of the request concerning appeals pertaining to Ancestry.com, no records responsive to the request had been located (Hewig Affidavit, ¶15, Ex. "D" thereto; Spellman Affd., ¶7, Ex. "B" thereto; Verified Petition, Ex. "R");
5. Finally, Requester was advised that the remainder of the request was denied pursuant to POL §89(3) as the request failed to reasonably describe the records sought with sufficient detail to enable DOH to locate them. The requester was asked to provide a list of specific employees whose communications the requester was seeking as well as the subject matter of the types of records sought. (Hewig Affidavit, ¶¶16 - 21, Ex. "D" thereto; Spellman Affd., ¶7, Ex. "B" thereto; Verified Petition, Ex. "R").

A more detailed description of the January 23, 2018 FOIL response is described in the accompanying Affidavit of Rosemarie Hewig, Esq., ¶¶11 – 21, which Affidavit is incorporated herein by reference.

C. Petitioner's Appeal – February 20, 2018

By letter dated February 20, 2018, Petitioner's counsel appealed the denial of a portion of Ms. Ganz's FOIL request No. 17-10-253 (the "FOIL Appeal"). (Spellman Affd., ¶8). A copy of the FOIL Appeal is attached to the Spellman Affidavit as **Exhibit C**. (See also Verified Petition at Exhibit T).

D. Response to Appeal

By letter dated February 26, 2018, DOH responded to the February 20, 2018 appeal by upholding RAO's response in its entirety. (Spellman Affd., ¶9). A copy of the appeal determination letter is annexed to the Spellman Affidavit as **Exhibit D**. The determination advised the Requester that DOH correctly applied POL §89(3) with respect to the nineteen elements of the request as applied to all of the approximately 5,400 DOH employees. (Spellman Affd., ¶9; Ex. "D" thereto).

The appeal determination noted that the email records for 5,400 DOH employees would need to be searched for all six permutations of Ancestry as well as the catch-all of "similar terms". Such a catch all is a never-ending, self-perpetuating haystack of similar possible terms. (Spellman Affd., ¶10; Ex. "D" thereto).

Although the materials provided in response to the request included redactions pursuant to POL §87(2)(b) because disclosure would constitute an unwarranted invasion of personal privacy and §87(2)(g) as inter-agency or intra-agency materials, the appeal did not contest such redactions

and thus such redactions were not addressed in the appeal determination. (Spellman Affd., ¶11; Ex. “D” thereto).

While Petitioner alleges that the appeal provided additional specificity as to the records sought, any additional details provided were still insufficient. (Spellman Affd., ¶12). The appeal stated that the subject matter of the request was business and contracts with DOH and Ancestry.com, yet the plain wording of the request does not support the conclusion that it was intended to be so narrowly construed. (Spellman Affd., ¶12; Ex. “C” thereto). Additionally, the appeal states that emails sought are “likely” to belong to certain divisions of DOH and that “some of the relevant emails may be between” certain divisions. (Id.) Again, this is insufficient to allow a comprehensive search to be completed. (Id.) According to DOH’s Records Access Appeal Officer Spellman, if RAO conducted a search that it knew may only uncover “some” responsive materials, this would not be an appropriate response to a FOIL request. (Id.) There is nothing barring Petitioner from submitting a follow-up FOIL request using more specific subject matter terms or limiting the universe of potential custodians to specific DOH divisions. (Id.) To date, the RAO has received no such follow-up request. (Hewig Affd., ¶20).

Plaintiff’s claim that no response was forwarded concerning the FOIL Appeal is inaccurate. On February 26, 2018, DOH’s Records Access Appeal Officer Spellman was advised that the appeal determination had been mailed to the Requester. (Spellman Affd., ¶13). Craig Rippon, a DOH administrative assistant whose duties include mailing appeal determinations, mailed said determination by placing it in a postage paid envelope using regular mail and depositing the envelope in a post office box or official depository of the United States Postal Service at the Empire State Plaza Post Office. (Id.) According to Spellman, this is the standard procedure used to mail

all appeal determinations. (Id.) An affidavit of mailing is annexed to Spellman's Affidavit as **Exhibit E**.

Additionally, on February 26, 2018, Craig Rippon forwarded a copy of the appeal determination to Robert Freeman, the Executive Director of the Committee on Open Government, pursuant to the provisions of POL § 89(4)(a). A copy of the email is annexed to Spellman's Affidavit as **Exhibit F**. (Spellman Affd., ¶14, Ex. "F" thereto). The appeal determination mailed to the Requester on February 26, 2018 has not been returned to DOH as undeliverable. (Spellman Affd., ¶15).

RELEVANT STATUTORY PROVISIONS

The Freedom of Information Law is contained in Public Officers Law ("POL"), Article 6, §§ 84-90.

POL 87(2) provides, in relevant part:

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

- (a) are specifically exempted from disclosure by state or federal statute;
- (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;

...

- (f) if disclosed could endanger the life or safety of any person;
- (g) are inter-agency or intra-agency materials which are not:
 - i. statistical or factual tabulations or data;
 - ii. instructions to staff that affect the public;
 - iii. final agency policy or determinations;
 - iv. external audits, including but not limited to audits performed by the comptroller and the federal government[.]

Public Officers Law § 87(2)(a), (b), (f), (g).

POL § 89(3)(a) requires:

Within five business days of the receipt of a written request for a record *reasonably described*, [an agency] 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 record 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... (emphasis added).

Furthermore, POL § 89(3)(a) provides:

an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.

If the agency, upon evaluating a production deadline, determines that it must extend the estimated due date so that a diligent search and review of records can be appropriately completed, nothing in the statute prevents it from doing so and such extensions do not render the ultimate response untimely.

POL § 89(4)(a) provides:

...any person denied access to a record may within thirty days appeal in writing such denial to...the person therefor designated...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...Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.

POL §89(4)(b) requires that a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to Article seventy-eight of the Civil Practice Law and Rules.

ARGUMENT

**POINT: RESPONDENT DID NOT FAIL TO PERFORM A DUTY ENJOINED
UPON IT BY LAW.**

A. Respondent DOH produced all records and documents responsive to the portion of Petitioners' October 17, 2017 FOIL request #17-10-253 that was "reasonably described."

POL § 89 (3)(a) places the burden on the petitioner to "reasonably describe" the documents requested so that a search can be made by the agency by supplying the information required to retrieve the requested documents.

With respect to the portion of FOIL #17-10-253 pertaining to "Freedom of Information Law (FOIL) requests and their associated correspondence," this portion of the request was reasonably described and thus RAO was able to perform a comprehensive search and provide responsive materials. Specifically, as set forth in the accompanying Affidavit of DOH RAO Rosemarie Hewig, Esq., the RAO released two FOIL requests received from Jared Akenhead at Ancestry.com, dated March 9, 2017 and June 22, 2017 and an RAO acknowledgement letter for each request. (Hewig Affd., ¶11; Ex. "D" thereto). In regard to the March 9, 2017 request, the RAO additionally released an extension letter dated April 7, 2017, as well as an email from the RAO dated May 15, 2017 confirming that the request was closed. (Id.) In regard to the June 22, 2017 request, the RAO additionally released two extension letters dated July 24, 2017 and September 26, 2017. (Id.)

Certain of these materials were redacted pursuant to POL §87(2)(b) because disclosure would constitute an unwarranted invasion of personal privacy and POL §87(2)(g) as inter-agency or intra-agency materials. (Id., ¶14). It does not appear that Petitioner is contesting these redactions as the Petition broadly requests that DOH produce all record and documents responsive to the Request, but does not specifically reference redactions contained within the released

materials. (Id.) Furthermore, these redactions were not addressed in the Requester's appeal dated February 20, 2018, nor in the appeal determination letter issued on February 26, 2018. (Id.) In any event, the redactions were appropriate under the cited sections of the POL.

Furthermore, with respect to Mr. Akenhead's March 9, 2017 request, the RAO advised the Requester that she was already in possession of the records released to Mr. Akenhead pursuant to her own FOIL request number 16-01-037, which request is not at issue in this proceeding. (Id., ¶12).²

As the RAO is a discrete unit within DOH's Division of Legal Affairs, it was able to identify any and all individuals who may have had involvement in the handling or processing of FOIL requests and perform a search of its files to identify any FOIL requests or related correspondence between the RAO and "Ancestry". (Id., ¶13). Furthermore, due to the size of the RAO unit and longevity of its staff, it was able to ascertain that there were no FOIL requests from any requesters with terms similar to "Ancestry" within the requested time period. Thus, it was able to respond to the portion of FOIL #17-10-253 requesting FOIL requests and their associated correspondence. (Id.)

Further, as it pertains to the portion of the request for FOIL appeals, this too was reasonably described and the RAO was able to perform a search and advise Petitioner "that after conducting a diligent search, no records responsive to your request have been located." (Id., ¶15).

² It should be noted that while Petitioner goes into great detail regarding the history leading up to FOIL #17-10-253, including numerous correspondences between RAO and Ms. Ganz regarding potential fees to inspect the records sought in request 16-01-037, the RAO did release the records Ms. Ganz sought under 16-01-037 to Ms. Ganz on May 15, 2017 without charging a fee of any kind. (Hewig Affd, ¶ 12).

B. Portions of Petitioners' October 17, 2017 FOIL request #17-10-253 were overbroad and not "reasonably described" and therefore were properly denied pursuant to POL 89(3).

In *Matter of Farbman & Sons v New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, the Court of Appeals held that demands under FOIL need not meet the stringent requirement under CPLR 3120 that documents be "specifically designated." *Id.*, at 82-83. The Court recognized that the requirement of POL § 89 (3) that documents be "reasonably described" was to enable the agency to locate the records in question. *Id.*, at 83. "[A]n agency is not required to provide records in response to a FOIL request if the effort required to do so is unreasonable." *Matter of Huseman v. New York City Dept. of Educ.*, 2016 N.Y. Misc. LEXIS 1951, * 14 (N.Y. County Sup. Ct. 2016), citing, *Matter of New York Comm. For Occupational Safety & Health v. Bloomberg*, 72 A.D.3d 153, 162 (1st Dept. 2010); see also, Exhibit "A" hereto, *GWR Medical, Inc. v. New York State Dept. of Health, et al*, Index No. 3172/15, at p. 17 (Kings County Supreme Court 2017) (Edwards, J.).

Despite the RAO's ability to respond to specific, discrete portions of FOIL #17-10-253, the remainder of the request was not reasonably described. (Hewig Affd., ¶16). As detailed in the accompanying Affidavit of DOH's RAO Rosemarie Hewig, there are 20 separate categories of information requested which could be maintained by any of the 5,400 DOH employees. (*Id.*) As there are no limitations as to the subject matter of records sought, the RAO would have been required to ask each and every DOH employee to conduct a search of his or her paper files, electronic files and emails to determine if they had any materials containing the word "ancestry." (*Id.*) Each program area of DOH would also be tasked with searching every shared file, whether physical or electronic, and shared agency email accounts for the word "ancestry." (*Id.*)

Furthermore, the RAO would be required to advise each employee to search not only for five variations of the word “ancestry,” but also any terms similar to the word “ancestry.” (Id.) This introduces a subjective element into a search, as each employee would be inquired to interpret what terms are similar to “ancestry.” (Id.) A request that requires such interpretation can hardly be labeled as a reasonably-described request. (Id.)

Furthermore, even if the RAO was somehow able to undertake and manage the herculean tasks of coordinating with each of the 5,400 DOH employees and manage each employee’s response, it would then be tasked with performing a legal review of each document provided for responsiveness and other exemptions as allowed by Public Officer’s Law. (Id., ¶17). It is likely that, due to the use of the phrase “similar term,” the uncertainty and subjectivity that DOH employees experienced when searching their files would continue as the RAO attempted to review the documents provided to them to determine if they were, in fact, responsive. (Id.) Again, this subjective element is indicative of the fact that the request is not reasonably described. (Id.)

While Petitioner asserts that she provided “numerous search terms, including numerous terms for the form of requested material,” she is overlooking the fact that rather than defining the scope of the search, “numerous search terms” have the effect of broadening the universe of potentially responsive documents. (Id., ¶18). It is difficult to think of a single one of DOH program areas and sub-program areas that would not be the potential custodian to a single one of the 20 subject areas provided. (Id.) The sheer volume of search terms is, in fact, one of the elements the RAO took into consideration when determining that FOIL #17-10-253 failed to describe the records sought with sufficient detail to locate them. (Id.)

Petitioner’s contention that FOIL #17-10-253 provided “several search terms” for Ancestry.com has the same practical effect. (Id., ¶19). Rather than serving to describe the records

sought, the more terms provided broaden the scope of the search that would have to be undertaken. By directing that any terms similar to “Ancestry.com” must also be taken into consideration when conducting a search, FOIL #17-10-253 is requesting an endless search. (Id.)

Rather than simply denying FOIL #17-10-253, the RAO conducted searches for items for which it could ascertain the universe of potentially responsive custodians. (Id., ¶20). Furthermore, in addition to advising the Requester that the remainder of the request was denied, the RAO also advised the Requester what information would be helpful to allow the RAO to conduct a comprehensive search in response to future FOIL requests. (Id.) Specifically, RAO advised that due to the “considerable number of individuals employed by the Department of Health, a list of specific employees whose communications you are seeking, as well as the subject matter of the types” could assist the RAO in performing a diligent search. There is nothing stopping the Requester from submitting a follow-up request describing the records she is seeking with more specificity. (Id.) To date, the RAO has received no such follow-up request. (Id.)

The RAO’s policy when it receives any FOIL request which asks for communications, correspondence or emails between broadly defined recipients within DOH is to deny the request as being unreasonably described pursuant to POL 89(3) and request further specificity to enable it to conduct a comprehensive and complete search. (Id., ¶21). It would not be appropriate for the RAO to guess which of many program areas may have responsive documents but fail to canvass DOH in its entirety when a request written as broadly as Ms. Ganz’s request is clearly indicates that it is seeking any materials “within New York State Department of Health.” (Id.) Similarly, while Petitioner alleges that “the identify of specific DOH employees who communicated with Ancestry.com” could be culled from reviewing responsive materials, Petitioner is again overlooking the fact that a search of just those employees identified would not constitute a comprehensive search and would not fulfil DOH’s responsibilities to conduct a diligent search.

Furthermore, DOH does not generally maintain records by names of entities. (Id.) In other words, DOH does not have a method for searching the entire agency's records using the name of an entity. (Id.) Accordingly, DOH is unable to conduct a search for correspondence, e-mail or otherwise, between an "entity" and DOH absent specific names of individuals who are party to the correspondence. (Id.)

Courts have upheld Agency requests for more specific, reasonable descriptions of documents sought in FOIL requests. *Matter of Johnson Newspaper Corp. v. Stainkamp*, 94 A.D.2d 825, 826 (3d Dept. 1983); *Matter of Urban Justice Ctr. v New York Police Dept.*, 2010 N.Y. Misc. LEXIS 4258, *21-25 (N.Y. County Sup. Ct. 2010).

The Committee on Open Government – which oversees administration of FOIL – has issued an advisory opinion stating, in essence, that a record is not "reasonably described" if agency staff must "engage in herculean or unreasonable efforts" to accommodate the Requester. Camille S. Jobin-Davis, FOIL-AO-18949 (Aug. 20, 2012) (citing *Konigsburg v. Coughlin*, 68 N.Y.2d 245 (1986)). Here, the breadth of Petitioner's request made a response unfeasible. Petitioner failed to "reasonably describe" the records it sought as required by POL § 89(3)(a) and DOH's denial of request with a suggestion that Ms. Ganz submit a new request with a list of specific employees whose communications are sought as well as subject matter of the types of records sought was appropriate.

C. DOH appropriately fulfilled its duties regarding record certification

In this case, DOH's RAO's response letter stated that a search had been conducted related to Petitioner's request concerning "Freedom of Information Law (FOIL records and their associated correspondence" pertaining to Ancestry.com. (Petitioner's Ex. "R").

If the agency cannot locate a “reasonably described” record requested under FOIL, it must certify that it does not possess the record or that it cannot be found after diligent search. (POL§ 89[3][a]). As the statute does not specify the manner of certification, “[n]either a detailed description of the search nor a personal statement from the person who actually conducted the search is required.” *Brennan Ctr. For Justice v. NYC Police Dept.*, 2017 N.Y. Misc. LEXIS 5138, * 19-20 (NY County Dec. 22, 2017); *Matter of Rattley v New York City Police Dept.*, 96 N.Y.2d 873, 875 (2001); *Matter of Oddone v Suffolk County Police Dept.*, 96 A.D.3d 758, 761 (2d Dept 2012).

In its response letter, the RAO advised Petitioner that a diligent search had been conducted for any appeals related to FOIL requests received from Ancestry.com, no responsive records had been located. (Hewig Affd., ¶15).

In respect of the portion of the request denied pursuant to POL 89(3), a certification would not be appropriate in these circumstances. A certification is only appropriate when an agency is able to perform a search and, as a result of such search, is unable to locate the records sought. Here, the RAO advised Petitioner that it was unable to undertake a search as the request failed to reasonably describe the records sought. (Hewig Affid §15). As the RAO was unable to conduct a search based on the wording of the request, it is not required to certify that a search was completed. Thus, a certification, which Requester is asking for in subparagraph (f) of the request for relief in the Notice of Verified Petition would be inappropriate here.

D. DOH is not required to produce information regarding the manner in which records are kept, a detailed description of the searches it performs nor information regarding employees who conducted the search.

Petitioner alleges that DOH failed to describe its searches for records pursuant to its obligations under POL §89(3). As stated above, nothing in the Public Officers Law requires DOH to describe its search procedures or explain the manner in which records are kept, as sought in requests for relief (b) and (e) in the Notice of Verified Petition. Furthermore, the mention of searches in POL 89(3) occurs in the context of an agency's certification that it does not have possession of a record or that such record cannot be found after diligent search, not that an agency should describe its searches or its inability to perform a search. Thus, the Petitioner's request that the court order respondent DOH to produce information regarding the manner in which records are kept, pursuant to subparagraph (b) of the request for relief in the Notice of Verified Petition is without basis in law.

Petitioner's request that DOH produce information about the search terms used to look for responsive records, pursuant to subparagraph (e) of the request for relief in the Notice of Verified Petition, is similarly without merit. It is sufficient that a search was conducted by the RAO which resulted in the release of materials on January 23, 2018. (Hewig Affd, ¶23). This search also resulted in the finding that additional responsive materials had been provided to the Requester on a portable drive in response to a separate FOIL request. (Id.) Finally, the RAO conducted a search for FOIL appeals, which located no responsive materials. (Id.) This was the extent of the searches that the RAO was able to complete, as the rest of the request was unreasonably described, vague and overly-broad request and it is irrelevant which employees conducted the search or their job description. Furthermore, as the RAO was unable to conduct a search in regard to the remainder

of the request, and thus denied the remainder of the request under POL 89(3), Petitioner's request for the search terms utilized by the RAO is wholly inapplicable to these facts and circumstances.

Finally, there is nothing contained in the Public Officers Law which requires the RAO to produce information regarding employees who conducted a search for responsive materials or their duties, as requested pursuant to subparagraph (c) of the request for relief in the Notice of Verified Petition. As stated above, it is sufficient that a search was conducted by the RAO which resulted in the release of materials on January 23, 2018 as well as the determination that no FOIL appeals were located. (Hewig Affd, ¶ 23), (Id.) Additionally, while Petitioner contends that if DOH had provided her with information regarding DOH employees she may have been able to provide DOH with "a list of specific employees whose communications" were sought, it should be noted that Ms. Ganz never submitted a FOIL request for this information, nor is there anything in Public Officer's Law which requires the DOH to provide such information be provided.

E. DOH's website provides a subject matter list of all records for review, inspection, and/or copying on its website.

Pursuant to request for relief (d) in the Notice of Verified Petition Petitioner requests that the Court direct DOH to produce information regarding the subject matter of its records. Pursuant to POL § 87(3)(c), DOH provides a subject matter list of all records available for review, inspection and/or copying on its website at:


(https://www.health.ny.gov/regulations/foil/subject_matter_list.htm) (Hewig Affd, ¶24).

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Court deny all relief requested in the Verified Petition, dismiss this proceeding, and order such other and further relief as the Court shall seem just and equitable.

Dated: Albany, New York
September 21, 2018

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Exhibit 1

At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of December, 2016.

P R E S E N T:

HON. GENINE D. EDWARDS,

Justice.

-----X

GWR MEDICAL, INC.,

Petitioner,

- against -

Index No. 3172/15

NEW YORK STATE DEPARTMENT OF HEALTH,
HOWARD A. ZUCKER, MD, JD, IN HIS CAPACITY AS
COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF
HEALTH, THE DEPARTMENT OF HEALTH RECORDS ACCESS
APPEALS OFFICER, AND THE DEPARTMENT OF HEALTH RECORDS
ACCESS OFFICER,

Respondents.

-----X

The following papers numbered 1 to 16 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1-4</u>
Opposing Affidavits (Affirmations)_____	<u>5-9</u>
Reply Affidavits (Affirmations)_____	<u>10-11</u>
Memoranda of Law_____	<u>12-15</u>
Unredacted CD Produced In Camera_____	<u>16</u>

Upon the foregoing papers, this is a CPLR article 78 proceeding by petitioner GWR Medical, Inc. (petitioner) against respondents New York State Department of Health (the DOH), Howard A. Zucker, M.D., J.D., in his capacity as the Commissioner of the DOH, the

DOH Records Access Appeals Officer, and the DOH Records Access Officer¹ (collectively, respondents). Petitioner moves, by order to show cause, under motion sequence number one, for an order: (1) reversing respondents' March 3, 2015 denial of its administrative appeal of respondents' denial of requests for information made by it pursuant to the Freedom of Information Law (Public Officers Law § 84 et seq.) (FOIL), (2) compelling respondents to comply with their duties under FOIL and 21 NYCRR Part 1401² by disclosing all portions of the requested records not subject to any exemption or privilege within a designated number of days following the resolution of this application, and (3) awarding it the costs and attorney's fees incurred by it in this proceeding.

Petitioner, in its petition, similarly seeks an order reversing the March 3, 2015 denial of its administrative appeal of respondents' denial of its FOIL requests, determining that respondents have violated FOIL, compelling respondents to comply with their duties under FOIL and 21 NYCRR Part 1401, and awarding it the costs and attorney's fees incurred by

¹Jonathan Karmel, in his capacity as the DOH Records Access Appeals Officer, and Danielle Levine, Esq., in her capacity as the Acting DOH of Health Records Access Officer, were originally named as respondents, but petitioner omitted the names of these respondents since subsequent to the commencement of this proceeding, these respondents left their positions at the DOH.

²21 NYCRR 1401.1 (b) provides that "[t]his Part provides information concerning the procedures by which records may be obtained from an agency as defined by subdivision 3 of section 86 of the Public Officers Law," and that "[n]o agency regulations shall be more restrictive than this Part." 21 NYCRR 1401.1 (c) provides that "[a]gency personnel shall furnish to the public the information and records required by the Freedom of Information Law, as well as records otherwise available by law."

it in this proceeding. It also seeks an order reversing those portions of its May 29, 2015 and June 17, 2015 administrative determinations that denied its administrative appeals of its FOIL requests.

FACTS AND PROCEDURAL BACKGROUND

Petitioner is a durable medical equipment provider enrolled in New York Medicaid. It supplies products used for topical oxygen wound therapy (TOWT). On October 7, 2014, the DOH informed petitioner that Medicaid coverage for TOWT would be eliminated, effective December 1, 2014.³

On October 16, 2014, petitioner, through its attorney, Lindsay Borgeson, Esq. (Borgeson), sent the DOH a FOIL request consisting of 15 parts (FOIL Request #14-10-213). FOIL Request #14-10-213 sought 12 categories of documents and sought, in three inquiries, the names of three contact persons. On October 21, 2014, petitioner, through Borgeson, made a second FOIL request (FOIL Request #14-10-303), which sought nine items. FOIL Request #14-10-213 and FOIL Request #14-10-303 (collectively, the FOIL requests), together, contained a total of 24 specific inquiries which sought information regarding the basis for the DOH's decision to terminate Medicaid coverage for TOWT.

The DOH's Records Access Office acknowledged its receipt of FOIL Request #14-10-213 by a letter via electronic mail dated October 17, 2014, and acknowledged its receipt

³Petitioner has challenged this determination in a CPLR article 78 proceeding, which has been decided by the court herewith (*see GWR Medical, Inc. v New York State Dept. of Health*, Sup Ct, Kings County, index No. 16212/14).

of FOIL Request #14-10-303 by a letter via electronic mail dated October 24, 2014. Both of these letters advised Borgeson that the DOH would forward the request to the appropriate DOH program areas to identify documents that were responsive to her requests and which may be made available pursuant to all applicable provisions of FOIL. These letters further advised her that “[a] determination as to whether your request is granted or denied will be reached in approximately 20 business days or we will notify you in writing if the responsible program area(s) should require additional time to locate, assemble, and review documents that may be responsive to your request.”

With respect to FOIL Request #14-10-213, after assessing the program which could have potentially responsive records, the Records Access Office contacted the Office of Health Insurance Programs (OHIP), which is responsible for Medicaid program management and oversight. The Records Access Office requested that OHIP staff perform searches for responsive records. With respect to FOIL Request #14-10-303, after consulting different program areas and their staffs seeking documents responsive to these requests, the DOH determined that the main program that would have documents responsive to this request was its Medicaid Data Warehouse.

Thereafter, the DOH communicated with petitioner’s attorney about the FOIL requests and sought further information and clarification from her with respect to these requests. Petitioner was dissatisfied with the DOH’s delay in responding to its FOIL requests. Therefore, on February 13, 2015, petitioner, through its attorney, submitted an administrative

appeal of respondents' denial of its FOIL requests. On March 3, 2015, respondents denied petitioner's administrative appeal.

On March 13, 2015, petitioner commenced the instant CPLR article 78 proceeding by its order to show cause seeking to contest respondents' March 3, 2015 denial of its February 13, 2015 administrative appeal. On March 20, 2015, the order to show cause was signed and the original return date set for the petition was April 8, 2015. Subsequently, the parties entered into stipulations, which adjourned the return date for the petition several times in order to provide respondents with additional time to respond to petitioner's FOIL requests.

On April 13, 2013, the DOH provided a further response to FOIL Request #14010-303. This response informed petitioner that Item No. 1 of that request requested an inter-agency document which would be withheld under Public Officers Law § 87 (2) (g), that the DOH did not maintain records responsive to Item Nos. 2 through 8, and that no materials responsive to Item No. 9 had been located.

On May 11, 2015, the DOH provided a further response to FOIL Request #14-10-213.

On May 13, 2015, petitioner filed an administrative appeal of respondents' April 13, 2015 FOIL response relating to FOIL Request #14-10-303. On May 29, 2015, respondents denied in part and granted in part petitioner's administrative appeal of their response to FOIL Request #14-10-303. On June 2, 2015, petitioner filed an administrative appeal of respondents' May 11, 2015 FOIL response relating to FOIL Request #14-10-213. On June 17, 2015, the DOH denied in part and granted in part petitioner's administrative appeal of

their response to FOIL Request #14-10-213. The DOH's May 29, 2015 and June 17, 2015 administrative determinations included additional responses to the FOIL requests.

In a letter dated June 30, 2015 from the Records Access Office of the DOH, petitioner's attorney was notified that in regard to petitioner's FOIL Request #14-10-213, the DOH was continuing to process it and would advise her when/if the responsive materials would be available for release or if the time needed to complete the request extended beyond July 28, 2015. The June 30, 2015 letter was followed by eight more letters, dated July 28, 2015, August 25, 2015, September 23, 2015, October 22, 2015, November 9, 2015, November 25, 2015, December 30, 2015, and January 11, 2016, with each letter extending the time needed to complete the request. On February 2, 2016, the DOH provided a response to certain items/inquiries in FOIL Request #14-10-213. On March 2, 2016, petitioner submitted an administrative appeal challenging this response. On March 17, 2016, the DOH denied petitioner's administrative appeal.

Petitioner, in the instant proceeding, claims that the DOH's response to FOIL Request #14-10-213 contained improperly redacted documents with respect to Item Nos. 5, 7, and 12. Petitioner also claims the DOH inaccurately certified that it had no responsive records with respect to Item Nos. 1, 2, 11, 13, 14, and 15. Petitioner further claims that the DOH's responses to FOIL Request #14-10-213 was unreasonably untimely.

With respect to FOIL Request #14010-303, petitioner, in its petition, sets forth that as to Item No. 1, it accepts the DOH's disclosure and its certification that no additional

responsive records exist. As to Item Nos. 2 through 8 of FOIL Request #14010-303, petitioner also asserts that it accepts the DOH's certification that no responsive records exist. Petitioner only alleges that these responses to FOIL Request #14010-303 were untimely.

In addition, petitioner seeks to recover its attorney's fees and costs. It claims that it is entitled to recover these attorney's fees and costs because it had to bring this proceeding in an effort to obtain the responses to its FOIL requests to which it claims that it was entitled.

DISCUSSION

Redaction of Items 5, 7, and 12

"FOIL requires that state and municipal agencies 'make available for public inspection and copying all records,' subject to certain exemptions" (*Matter of Madera v Elmont Pub. Lib.*, 101 AD3d 726, 727 [2d Dept 2012], quoting Public Officers Law § 87 [2]; *see also Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]; *Matter of Dilworth v Westchester County Dept. of Correction*, 93 AD3d 722, 724 [2d Dept 2012], *lv denied* 19 NY3d 810 [2012]). "To further the goal of FOIL, which is to provide access to government records, an agency claiming an exemption from disclosure bears the burden of showing that the requested material 'falls squarely within the ambit of one of the statutory exemptions'" (*Matter of Madera*, 101 AD3d at 727, quoting *Matter of Verizon N.Y., Inc. v Bradbury*, 40 AD3d 1113, 1114 [2d Dept 2007]; *see also Matter of Dilworth*, 93 AD3d at 724; Public Officers Law § 89). "To meet that burden, the agency must articulate a 'particularized and specific justification for denying access'" (*Matter of Madera*, 101 AD3d at 727, quoting

Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566 [1986]; see also *Matter of Verizon N.Y., Inc.*, 40 AD3d at 1114). “Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed” (*Matter of Madera*, 101 AD3d at 727, quoting *Matter of Dilworth*, 93 AD3d at 724; see also *Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 567 [1984]; *Church of Scientology of N.Y. v State of New York*, 46 NY2d 906, 907-908 [1979]).

One of these FOIL exemptions “protects against the disclosure of “inter-agency or intra-agency materials”, predecisional memoranda or other nonfinal recommendations prepared to assist an agency decision maker” (*Matter of Madera*, 101 AD3d at 727, quoting *Matter of Akras v Suffolk County Dept. of Civ. Serv.*, 137 AD2d 523, 523 [2d Dept 1988], quoting Public Officers Law § 87 [2] [g]). This FOIL exemption is set forth in Public Officers Law § 87 (2) (g), which provides that “[e]ach agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that: “i. are inter-agency or intra-agency materials” unless they are: “statistical or factual tabulations or data; ii. instructions to staff that affect the public; iii. final agency policy or determinations; [or] iv. external audits, including but not limited to audits performed by the comptroller and the federal government.”

“[T]he purpose of the intra-agency exception is to allow individuals within an agency to exchange their views freely, as part of the deliberative process, without the concern that

those ideas will become public” (*Matter of Town of Waterford v New York State Dept. of Env'tl. Conservation*, 18 NY3d 652, 658 [2012]; *see also Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 488 [2005]). “While the term ‘inter-agency materials’ is not defined under the FOIL statute, New York’s courts have construed this term to mean ‘deliberative material,’ i.e., communications exchanged for discussion purposes not constituting final policy decisions” (*Matter of Russo v Nassau County Community Coll.*, 81 NY2d 690, 699 [1993]; *see also Matter of Xerox Corp. v Town of Webster*, 65 NY2d 131, 132-133 [1985]).

The intra-agency exemption applies to communications between employees of a state agency “exchanged for discussion purposes not constituting final policy decisions” and “recommendations by employees within the agency used to assist the decision makers in formulating a determination” (*Matter of Bass Pro, Inc. v Megna*, 69 AD3d 1040, 1041-1042 [3d Dept 2010]). This intra-agency exemption also covers material prepared by outside consultants at the behest of a state agency (*see Matter of Xerox Corp.*, 65 NY2d at 132-133; *Matter of 124 Ferry St. Realty Corp. v Hennessy*, 82 AD2d 981, 983 [3d Dept 1981]; *Matter of Sea Crest Constr. Corp. v Stubing*, 82 AD2d 546, 549 [2d Dept 1981]).

“‘Opinions and recommendations that would, if prepared by agency employees, be exempt from disclosure under the Freedom of Information Law as intra-agency materials do not lose their exempt status simply because they are prepared for the agency, at its request, by an outside consultant or another agency’” (*Matter of Madera*, 101 AD3d at 728, quoting

Matter of Goodstein & W. v O'Rourke, 201 AD2d 731, 732 [2d Dept 1994]; see also *Matter of Xerox Corp.*, 65 NY2d at 133). “Rather, it is the actual function served by the outside party which must be considered in deciding whether the communications are encompassed by the intra-agency exemption of the Freedom of Information Law” (*Matter of Madera*, 101 AD3d at 728, quoting *Matter of Sea Crest Constr. Corp.*, 82 AD2d at 549).

Petitioner contends that the DOH improperly made redactions with respect to documents produced for Item Nos. 5, 7, and 12, and additionally withheld documents with respect to Item No. 12 pursuant to the intra-agency exemption. Respondents contend that as to Item Nos. 5 and 12, these portions of the record are exempt from disclosure under the statutory exemption protecting intra-agency materials, pursuant to Public Officers Law § 87 (2) (g), because they were exchanged internally by staff members of the DOH and/or were prepared by, or exchanged with consultants to the DOH at its specific request. Respondents further assert that there were no redactions to Item No. 7.

Item No. 5 of FOIL Request FOIL #14-10-213 requested “[a]ny internal [DOH] documents explaining why the TOWT procedure was selected instead of the ten procedures identified by the Medicaid Redesign Team Basic Benefit Review Workgroup, specifically: (1) Podiatry for diabetics; (2) Knee arthroscopy; (3) Back pain treatments; (4) Breast-feeding support; (5) PCI (Angioplasty); (6) Obesity treatment; (7) Elective delivery (C sections and inductions) <39 weeks gestation without medical indication; (8) Growth hormone; (9) Tobacco cessation counseling by dentists; and (10) Nurse Family Partnership.”

The DOH, in its May 11, 2015 response, provided a five-page document with four and one-half pages redacted pursuant to Public Officers Law § 87 (g) (2), as intra-agency material. The one-half of the page that was not redacted was an email from Jonathan Gold, M.D. (Dr. Gold), the Medical Director of ElderServe Health, Inc. to Ronald Bass (Bass), the Director of the Bureau of Medical, Dental and Pharmacy Policy in the Office of Health Insurance Programs of the DOH regarding TOWT, in which Dr. Gold expressed his commercial concerns about the cost of TOWT.

Petitioner argues that the intra-agency exemption does not provide a basis to withhold communications between Dr. Gold, a private business person, and the DOH's personnel. It contends that since Dr. Gold is not a DOH employee or contractor, the intra-agency exemption does not protect Dr. Gold's opinions. It asserts that the DOH has failed to satisfy its burden to prove that a particularized and specific justification for redaction of the responsive record is applicable. It argues that the DOH must, therefore, provide a non-redacted copy of the entire correspondence between Dr. Gold and Bass.

The court has reviewed the document responsive to Item No. 5 that was produced by respondents in camera. The redacted portion are emails between DOH employees only and are not from or to Dr. Gold. These documents reflect deliberative conversations of opinions, ideas, and advice that were exchanged internally within the DOH, and are intra-agency documents which fall squarely within the intra-agency exemption. Thus, there was no improper redaction of Item No. 5.

FOIL #14-10-213 Item No. 7 requested “[t]he contract between the [DOH] and Oregon Health and Sciences University, specifically in regards to the role of Oregon Health and Sciences University as the external reviewer for the Evidence Based Dossier Submission Process.” In its May 11, 2015 response, the DOH stated in response to Item No. 7 that no documents responsive to this item were located, and that there was no existing contract between the DOH and Oregon Health and Sciences University, but only an existing Memorandum of Understanding between the State University of New York through which the DOH has access to the services of Oregon Health and Sciences University.

After petitioner, through counsel, filed an administrative appeal contesting the DOH’s denial of this request on the basis that the Memorandum of Understanding identified by the DOH was a responsive record that should have been provided, the DOH provided a redacted copy of this Memorandum of Understanding to petitioner’s counsel in a separate response dated June 17, 2015. Respondents assert that the Memorandum of Understanding was produced as a courtesy since it was not directly responsive to petitioner’s request for a contract between the DOH and Oregon and Health and Sciences University.

Petitioner complains that this redacted Memorandum of Understanding references Appendix A.2 “Project Statement/Workplan Template” and Appendix B “HIPAA Business Associate Agreement,” which respondents did not provide in full. Petitioner asserts that respondents must include non-redacted appendices. Petitioner further complains that this redacted Memorandum of Understanding references “resource request[s]” that must be

approved before the State University of New York shall perform any services. Petitioner argues that to the extent that resource requests exist, they were not provided in response to Item No. 7 and must be produced by respondents. Petitioner contends that respondents have not established a specific and particular exemption that would have required the Memorandum of Understanding to be redacted.

Respondents assert that all appendices to the Memorandum of Understanding were, in fact, provided, and that contrary to petitioner's assertion, there were no redactions to the two appendices. They explain that the two appendices contain a form that has "XXX.XX" in place of numbers, which are not redactions, but, rather, are a template document containing placeholders where an individual can fill in appropriate numbers on the form.

Respondents further assert that any reference to documents ancillary and subsequent to the original Memorandum of Understanding, i.e., resource requests, were not part of that document, and, therefore, not responsive to any FOIL request. The Memorandum of Understanding merely sets forth the procedure for the submission and approval of resource requests in the future. Thus, the court finds that the DOH has properly responded to Item No. 7 and that there was no redaction.

FOIL #14-10-213 Item No. 12 requested "[a]ny communication the Oregon Health and Sciences University had with the [DOH] regarding the TOWT procedure." On February 2, 2016, the DOH provided articles and information on the Dossier process and partially redacted documents in response to this request. Petitioner argues that the DOH has failed to

satisfy its burden to prove that the responsive records may be redacted in accordance with the inter-agency or intra-agency exemption. It asserts that the documents provided on February 2, 2016 include numerous scientific journal articles regarding TOWT and other wound care treatments, some of which had been originally provided by it to the DOH as part of its Dossier Submission. It further asserts that the responsive documents also include instructions and template agreements from the Center for Evidence-based Policy at Oregon Health and Sciences University to member states, including New York, regarding how to submit requests for Center for Evidence-based Policy research on certain topics. It states that public journal articles and communications between an agency and a third party, such as the Center for Evidence-based Policy, are not exempt from FOIL.

Respondent has submitted for in camera review by the court certain documents withheld from petitioner in their entirety pursuant to Public Officers Law § 87 (2) (g) on the basis that they were duplicates of documents already released to petitioner and were documents that were non-responsive to petitioner's request as it was written. It has also submitted for in camera review certain documents produced to petitioner in redacted form, pursuant to Public Officers Law § 87 (2) (g), on the basis of the inter-agency or intra-agency exemption and, pursuant to Public Officers Law § 87 (2) (i), which exempts from disclosure records which if disclosed, "would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology

assets, such assets encompassing both electronic information systems and infrastructures.” Petitioner only challenged the redactions made pursuant to Public Officers Law § 87 (2) (g).

While the public scientific journal articles are not exempt from FOIL, the DOH did not redact them in their release to petitioner. As to the redactions, the exemption under Public Officers Law § 87 (2) (g) applies to the deliberative process undertaken by the DOH with Oregon Health and Science University’s Center for Evidence-based Policy and Evidence Based Benefits Review Advisory Committee, as the consultants with whom the DOH worked and who provided expert review and analysis, and advice on Medicaid benefits review (*see Matter of Xerox Corp.*, 65 NY2d at 132-133; *Matter of New York Times Co.*, 4 NY3d at 488). Thus, the inter-agency exemption applies to all redacted communications between Oregon Health and Science University’s Center for Evidence-based Policy, Evidence Based Benefits Review Advisory Committee, and the DOH. Therefore, the court finds that there were no improper redactions as to Item No. 12.

Certifications as to Item Nos. 1, 2, 11, 13, 14, and 15

With respect to petitioner’s contention that the DOH made inaccurate certifications as to Items Nos. 1, 2, 11, 13, 14, and 15 of FOIL Request #14-10-213, the court notes that in response to a FOIL request, Public Officers Law § 89 (3) (a) requires that “an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search” (*Matter of Legal Aid Socy. v New York State Dept. of Corr.*

& Community Supervision, 105 AD3d 1120, 1121 [2d Dept 2013], quoting *Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 440-441 [2005]; see also *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001]). “When an agency is unable to locate documents properly requested under FOIL, Public Officers Law § 89 (3) requires the agency to ‘certify that it does not have possession of [a requested] record or that such record cannot be found after diligent search’” (*Matter of Rattley*, 96 NY2d at 875; see also *Matter of De Fabritis v McMahon*, 301 AD2d 892, 893 [3d Dept 2003]). Public Officers Law § 89 (3) “does not specify the manner in which an agency must certify that documents cannot be located [and] [n]either a detailed description of the search nor a personal statement from the person who actually conducted the search is required” (*Matter of Rattley*, 96 NY2d at 875; see also *Matter of De Fabritis*, 301 AD2d at 893).

Here, petitioner argues that with respect to FOIL #14-10-213 Item Nos. 1 and 2, respondents inconsistently stated both that it did not have possession of any other records responsive to this request or that such records cannot be found after diligent search and that the requests do not reasonably describe the records to be sought. Respondents, however, explain that petitioner’s request with respect to these items was not reasonably described in a manner to allow the DOH to conduct a diligent search for documents.

Specifically, Item No. 1 requested “[a]ll communication” between the DOH and the Medicaid Redesign Team Basic Benefit Review Workgroup, and Item No. 2 requested “[a]ll communication” between the DOH and the Medicaid Based Benefit Review Advisory

Committee.” Respondents assert that the DOH identified approximately 29,500 documents that could potentially be responsive, and that these documents would have to be manually culled through to determine responsiveness. They note that many of these documents would likely be determined to be unresponsive to the request as written, duplicates, or subject to the intra-agency exemption. Respondents further note that in denying these portions of petitioner’s request, the DOH requested that petitioner clarify its request and/or provide search terms, but received no clarification. They assert that the DOH could not conduct a complete and accurate search as to Item Nos. 1 and 2 due to their lack of clarity.

“[A]n agency is not required to provide records in response to a FOIL request if the effort required to do so is unreasonable” (*Matter of Huseman v New York City Dept. of Educ.*, 2016 NY Slip Op 30959[U], *10 [Sup Ct, NY County 2016]; *see also Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 162 [1st Dept 2010]). Here, respondents have demonstrated that an undue burden would be created by requiring the DOH to respond to these items.

As to Item No. 11, which sought “[a]ny communication the Oregon Health and Sciences University had with the Medicaid Evidence Based Benefit Review Advisory Committee regarding the TOWT procedure,” the DOH found that no documents were responsive to petitioner’s request. Petitioner contends that this certification by the DOH was inaccurate because it has located an affidavit by Bass dated February 16, 2015, which was submitted to the court in a related CPLR article 78 proceeding commenced by it against the

DOH. Petitioner asserts that an exhibit to Bass' affidavit shows that three representatives from Oregon Health and Sciences University participated in at least one meeting of the Medicaid Based Benefit Review Advisory Committee regarding the TOWT procedure, and that the Medicaid Based Benefit Review Advisory Committee reviewed the evidence presented to the Center for Evidence-based Policy located at Oregon Health and Sciences University.

As noted by respondents, petitioner did not specifically request the minutes of any meeting in Item No. 11, but only requested communications between the Oregon Health and Sciences University and the Medicaid Evidence Based Benefit Review Advisory Committee. While minutes may constitute records under FOIL where they constitute "information kept, held, filed, produced or reproduced by, with or for an agency" (Public Officers Law § 86 [4]; *see also Matter of Washington Post Co.*, 61 NY2d at 565), the DOH has explained that it does not maintain this type of information because it does not have access to Oregon Health and Sciences University or Medicaid Based Benefit Review Advisory Committee correspondence since the members of such organizations and committees are not DOH employees. DOH has further explained that because one DOH employee was also a member of the Medicaid Based Benefit Review Advisory Committee, his records had been searched, but that no responsive records were found. Thus, there is no showing that respondents falsely certified that it did not possess these minutes or that none could be found after a diligent search (*see* Public Officers Law § 89 [3]).

Petitioner also asserts that documents available on the DOH/MRT website entitled “Phase 4 Project Management Plan,” include references to an Oregon Health and Sciences University review shared with medical directors, which is responsive to Item No. 11. However, as set forth by Danielle L. Rysedorph, the Acting Records Access Officer at the DOH, the same document to which petitioner cites refers to DOH medical directors, and communications between the DOH and Oregon Health and Sciences University are not responsive to Item No. 11. Therefore, respondents’ certification that it did not have responsive documents to Item No. 11 did not constitute a false certification.

Petitioner additionally challenges the DOH’s denial of FOIL Request #14-10-213 Item Nos. 13, 14, and 15, and asserts that respondents’ certification that it did not have responsive documents to these items was inaccurate. These items, however, did not request the production of records, but, instead, requested the identification of “contact” persons. Specifically, Item No. 13 requested that the DOH “identify a contact person for the Medicaid Redesign Team Basic Benefit Review Workgroup.” Item No. 14 requested that the DOH “identify a contact person for the Medicaid Based Benefit Review Advisory Committee.” Item No. 15 requested that the DOH “identify a contact person for the [DOH] who is familiar with the Evidence Based Dossier Submission Process.”

FOIL is a means by which the public may seek and obtain existing records, but it “does not require an agency to create documents,” “answer questions disguised as a FOI[L] request,” or “conduct research in response to a FOI[L] request” (*Hall & Assoc. v U.S. Envtl.*

Protection Agency, 83 F Supp 3d 92, 102 [DDC 2015], *reconsideration denied* 13-CV-0823 [TSC], 2016 WL 5396653 [DDC Sept. 27, 2016]). “[N]othing in [FOIL] requires “answers to interrogatories” but rather and only disclosure of documentary matters which are not exempt”” (*id.*, quoting *DiViaio v Kelley*, 571 F2d 538, 542-543 [10th Cir 1978]). Thus, the DOH properly denied petitioner’s requests in Item Nos. 13 through 15 since the DOH was not required to conduct research or answer inquiries regarding appropriate contact persons.

Timeliness

Petitioner argues that the DOH’s numerous extensions and delay in providing responses to its FOIL requests were not reasonable. Public Officers Law § 89 (3) (a) provides that “within five business days of the receipt of a written request for a record reasonably described, [an agency] 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, 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.” This section further provides that “[i]f an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain

within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.”

“[T]here is no specific time period in which the agency must grant access to the records” (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 465 [2007]). Rather, “the time needed to comply with the request may be dependent on a number of factors, including the volume of the request” (*id.*). Thus, such records must be produced in a time “which is reasonable in view of the attendant circumstances” (*id.*).

With respect to FOIL Request #14-10-213, it contained 15 items. Among the items requested, petitioner broadly sought “all” communications between the Medicaid Redesign Team Basic Benefit Review Workgroup, between the DOH and the Medicaid Based Benefit Review Advisory Committee, and between the Medicaid Redesign Team Basic Benefit Review Workgroup and the Medicaid Based Benefit Review Advisory Committee. It also broadly sought “any” communications between the Oregon Health and Science University and the Medicaid Redesign Team Basic Benefit Review Workgroup regarding the TOWT procedure, between the Oregon Health and Science University and the Medicaid Based Benefit Review Advisory Committee regarding the TOWT procedure, and between the Oregon Health and Science University and the DOH regarding the TOWT procedure. It additionally broadly sought numerous documents of the DOH and others.

These requests were broad and extensive, and the DOH, after providing an initial acknowledgment letter, sought reasonable extensions of time. The DOH continually

communicated with petitioner's counsel in its handling of the FOIL requests. It provided updates about its efforts and the progress of production and complied with Public Officers Law § 89 (3) (a). The DOH has now replied to each of the 15 items in this request. Under the circumstances, the court finds that the time in which these items were produced was reasonable.

With respect to FOIL Request #14-10-303, the DOH provided an initial acknowledgment letter and then made reasonable, diligent efforts to locate and produce relevant documents and sought reasonable extensions of time in order to fully respond to petitioner's request. The nine items requested included a copy of the DOH's June 2007 fiscal comparison performed by Debra Bachrach and Greg Allen of Negative Pressure Wound Therapy (Wound Vac) and TOWT using actual DOH patient data on all wound patients who used Wound Vac in 2006, the New York Medicaid average length of treatment for chronic extremity ulcers, the New York Medicaid average cost of treatment for chronic extremity ulcers, the New York Medicaid average cost of amputation of a limb, the New York Medicaid average cost of amputation of a digit, the New York Medicaid average cost of a prosthetic limb, the New York Medicaid daily cost per home nursing visit, the New York Medicaid daily cost for each Negative Pressure Wound Therapy component, and the updated DOH fiscal comparison of Negative Pressure Wound Therapy (Wound Vac) and TOWT using actual DOH patient data on all wound patients who used Wound Vac from 2008 to

2013. Given this expansive request, the court does not find that, under these circumstances, there was an unreasonable delay by the DOH in producing responses to these items.

Petitioner argues that the DOH delayed its FOIL responses in an effort to gain an advantage in the related CPLR article 78 proceeding commenced by it against the DOH. This argument is unavailing. The court finds that the DOH has complied with the requirements of the Public Officers Law in responding to petitioner's FOIL requests. Moreover, the related CPLR article 78 proceeding was adjourned pursuant to stipulations between petitioner and respondents, which provided that a decision in such related proceeding would not be rendered prior to the resolution of this proceeding.

Attorney's Fees and Costs

Petitioner claims that it is entitled to recover reasonable attorney's fees and costs, pursuant to Public Officers Law § 89 (4) (c). Pursuant to Public Officers Law § 89 (4) (c), the court may assess against an agency reasonable attorney's fees and other litigation costs reasonably incurred by a party where that party has "substantially prevailed" and either "the agency had no reasonable basis for denying access" to the records sought or "the agency failed to respond to a request or appeal within the statutory time" (Public Officers Law § 89 [c]; *see also Matter of South Shore Press, Inc. v Havemeyer*, 136 AD3d 929, 930-931 [2d Dept 2016]; *Matter of Legal Aid Soc.*, 105 AD3d at 1121).

Here, petitioner contends that because it received responsive record certifications to 15 of the 24 items in its FOIL requests only after its commencement of litigation, this shows

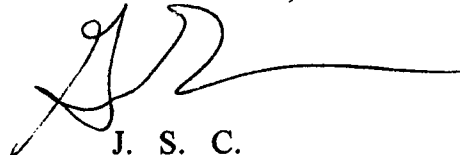
that it substantially prevailed in this proceeding. This argument is rejected. Respondents have demonstrated that petitioner's filing of this CPLR article 78 proceeding on March 13, 2015 was not the impetus for the responses and disclosures given by the DOH on April 13, 2015, May 11, 2015, May 29, 2015, June 17, 2015, and February 2, 2016. Rather, as shown by respondents' emails to petitioner, several searches were conducted and the responses were prepared over the course of the preceding months beginning on October 2014 and extending through May 2015, and, thus, these searches were already ongoing at the time of the commencement of this proceeding and, thereafter, continued. Moreover, as discussed above, the court does not find that petitioner is entitled to the relief demanded in its petition. Thus, petitioner has not substantially prevailed on its challenge to the DOH's responses to its FOIL requests, and it is not entitled to recover its reasonable attorney's fees and litigation costs.

CONCLUSION

Accordingly, petitioner's motion and the petition are denied, and the proceeding is dismissed.

This constitutes the decision, order, and judgment of the court.

E N T E R,



J. S. C.

HON. GENINE D. EDWARDS



NANCY T. SUNSHINE
Clerk

2017 JAN 10 AM 9:17

FILED
KINGS COUNTY CLERK

