

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

RECLAIM THE RECORDS and BROOKE
SCHREIER GANZ,

VERIFIED PETITION

Petitioners,

THE CITY OF NEW YORK and THE
DEPARTMENT OF RECORDS AND
INFORMATION SERVICES,

Index No. _____

Respondents.

We, David B. Rankin and Rebecca Pattiz, of Beldock Levine & Hoffman, LLP, attorneys
duly licensed to practice law in the Courts of the State of New York, hereby verify and affirm,
under the penalties of perjury, the following is true and correct:

PRELIMINARY STATEMENT

1. We are counsel for the petitioners, BROOKE SCHREIER GANZ and RECLAIM
THE RECORDS and as such, we are familiar with the facts and procedural history of this
proceeding.

2. Pursuant to the Freedom of Information Law (“FOIL”) and Article 78 of the New
York Civil Practice Law and Rules, Petitioners seek an order directing respondents, the City of
New York (“Respondent City”) and the Department of Records and Information Services
(“Respondent DORIS”), to produce copy of already-digitized image files in its possession.

3. The requested records include the digital images of historical and genealogical
records that the New York City Municipal Archives (the “Archives”) and/or DORIS possesses
which are already digitized but which are *not* yet available online, including those that are stored
on internal or external or Internet-connected hard drives, or files that would be accessible to
patrons on internal networks onsite at the Archives building.

4. The Archives building was completely closed to the public for over a year because of the Covid-19 pandemic, including at the time the FOIL request was made. As a result, even though millions of the documents located there had already been digitized, the public was denied access to the important historical records because the Archives and DORIS had not yet put the images online. Had Respondents provided the requested records in a timely manner, Reclaim the Records would have been able to make the digital images available to the public, including researchers, for free use from home.

5. As Petitioners have exhausted all administrative remedies, they respectfully request the Court to order the Respondents to produce the records in accordance with the FOIL and the guidance of the State of New York Department of State Committee on Open Government.

JURISDICTION AND VENUE

6. This proceeding, pursuant to Article 78 of the Civil Practice Law and Rules, is the proper mechanism for seeking judicial review of a state agency's determination with respect to a FOIL request. N.Y. Pub. Off. § 89(4)(b).

7. Respondent DORIS is an agency of Respondent City and is subject to FOIL.

8. Petitioners have exhausted Respondent DORIS's internal appeals process, and the instant petition has been filed within the four-month period thereafter specified in C.P.L.R. § 217(1).

9. Respondents DORIS and City both have their central offices in the County of New York. Venue therefore is proper in this Court. C.P.L.R. §§ 7804(a) and 506(b).

STATEMENT OF FACTS

10. Reclaim The Records is a non-profit activist group of genealogists, historians, journalists, teachers, and open government advocates. They acquire genealogical and historical databases and images from government sources, including government archives, often through use of Freedom of Information laws. They then upload those records to the Internet, without any copyright or usage restrictions or paywalls, making them freely available to the public and returning these taxpayer-funded materials to the public domain. Over the past several years, their efforts have successfully reclaimed millions of historical and genealogical records for free public use, including from various New York City and New York State agencies. Ms. Schreier Ganz is the founder and president of Reclaim the Records.

11. On or about October 29, 2020, Ms. Schreier Ganz sent a FOIL request by email to DORIS's Records Access Officer, Kenneth Cobb. *See Exhibit A.* The request, which was made on behalf of Reclaim the Records, was acknowledged on November 5, 2020.

12. The request seeks “[e]very single digital image” in DORIS’s possession “and any text metadata that goes with them.” The request explains that it “includes, but is not limited to, all the digital images that are available online already, on the Archives’ official ‘Digital Collections’ website . . . or on any other website maintained or controlled by the Archives or by DORIS.” The request also includes all digital images of historical and genealogical records which DORIS possesses that have been digitized but are not yet available online, including those that are stored on internal or external or Internet-connected hard drives, or files that would be accessible to patrons on internal networks onsite at the Archives building.

13. In addition, the request specifies the format in which the records should be produced: “in their original formats and in their original sizes, in their full resolution, not edited,

not resized, not compressed, and not watermarked – just as they appear to the public right now on DORIS’s website(s) or internal network(s) or internal hard drive(s) or online hard drive(s).” The request further seeks “copies of all the metadata that goes along with these digitized images.”

14. Ms. Schreier Ganz further offered to pay for and supply portable hard drives to house the files and to cover all shipping costs or to accept the documents via a file sharing website like Dropbox or Google Drive.

15. The request letter stated that the records sought would be used for non-commercial purposes and made available to the general public online, without paywalls or restrictions as to their use and reuse.

16. In support of her right to access these files in the requested format, Ms. Schreier Ganz referenced *Matter of Data Tree, LLC v. Romaine*, 9 N.Y. 3d 454, 464 (2007).

17. Respondent DORIS did not respond to Ms. Schreier Ganz’s request.

18. Instead, Respondents extended the date by which they expected to respond four times: from December 23, 2020 to February 8, 2021 (saying “additional time is needed”); from February 8, 2021 to June 8, 2021 (saying additional time is needed “owing to the complexity of the request”); from June 8, 2021 to October 20, 2021 (saying additional time is needed “due to the pandemic”); and, most recently, from October 20, 2021, to November 30, 2022 (“due to the scope of [the] request”). The current expected deadline is over two years after the request was made.

19. On October 22, 2021, almost a year after the initial request was made, counsel sent a letter to the DORIS Appeals Officer Pauline Toole, appealing DORIS’s constructive denial of Ms. Schreier Ganz’s FOIL request. *See Exhibit B.*

20. Ms. Toole responded on October 26, 2021, asserting that DORIS's failure to respond to Ms. Schreier Ganz's request was not a denial of the request. *See Exhibit C*. Ms. Toole stated that the appeal—351 days after the request was made—was “premature” and that DORIS intended to process the request as quickly as possible.

21. Petitioners' request follows three successful prior litigations by the same Petitioners against DORIS to secure public access to copies of similar types of historical and genealogical documents.

22. First, in *Ganz v. The City of New York, et al.* (N.Y. Co. Index No.101643/2015). DORIS refused to produce documents, taking the position that because one could hypothetically walk into the Municipal Archives building in Manhattan during business hours and receive a public record, the agency did not need to respond to a FOIL request from the Petitioner Ms. Schreier Ganz, who lives in California and could not easily visit the Municipal Archives building in person. That matter settled with the Respondents providing the requested records.

23. Second, in *Reclaim the Records v. The City of N.Y.* (N.Y. Co. Index No. 159537/2018) DORIS again denied Petitioners' FOIL request, stating once again that the historical records sought were publicly available in the Municipal Archives building in Manhattan. Petitioners filed an Article 78 petition, which the court granted, holding that Respondents were required to make the records available to Petitioners for copying, regardless of whether they are publicly available. *See Exhibit D*.

24. Most recently, in *Reclaim the Records v. The City of N.Y.* (N.Y. Co. Index No. 150917/2021), Petitioners brought an Article 78 petition challenging Respondents' refusal to provide digital images of historical records in the format in which they appear on the Municipal Archives' website. The court granted the Petition, citing the 2018 litigation, and requiring that

Respondents provide Petitioners with the requested documents in the requested format. *See*

Exhibit E.

25. But despite these three prior successful litigations seeking access to records, Respondents continue to be dilatory in their obligations to provide records pursuant to FOIL. As of the present date, almost a year-and-a-half from the date of the instant request, the records have not yet been produced, nor has there been any subsequent correspondence from Respondent DORIS.

ARGUMENT

A. PETITIONERS' REQUEST WAS CONSTRUCTIVELY DENIED AND THE COURT SHOULD ORDER THE PRODUCTION OF THE REQUESTED RECORDS

26. FOIL provides that all records kept by a public agency are presumptively open to public inspection and copying unless specifically exempted. *Matter of New York Civ. Liberties Union v. City of Schenectady*, 2 N.Y.3d 657, 661 (2004).

27. These exemptions “are to be narrowly interpreted so that the public is granted maximum access to the records of government. . .” *Data Tree, LLC*, 9 N.Y.3d at 462 (internal citations omitted).

28. The agency resisting disclosure must prove entitlement to one of the exceptions, meaning the agency bears the burden to resist production. *Matter of Laureano v. Grimes*, 179 A.D.2d 602, 604 (1st Dept. 1992); *see also Data Tree, LLC*, 9 N.Y.3d at 463.

29. When a State or municipal agency makes a determination which is arbitrary and capricious, the aggrieved party may challenge that determination in an Article 78 petition. C.P.L.R. § 7803(3).

30. The Court of Appeals has made clear that, where an agency maintains digital records that are easily retrievable, “that agency is required to disclose the information. In such a situation, the agency is merely retrieving the electronic data that it has already compiled and copying it onto another electronic medium.” *Data Tree, LLC*, 9 N.Y.3d at 464-65.

31. The Public Officers Law § 89(3)(a), states in relevant part that:

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 . . .

32. Moreover, under Public Officers Law § 89(4)(a), a failure to “conform to the provisions of subdivision three of this section shall constitute a denial.” *Matter of Siani v. Clark*, 886, N.Y.S.2d 69 (Sup. Ct. Albany Co. 2009) (“[i]t is undisputed that the lack of response constituted a constructive denial.”); *see also Matter of Molloy v. NYPD*, 2008 NY Slip Op 01090 (1st Dept. 2008); and Comm on Open Govt FOIL-AO 3037; *see also David B. Rankin v. Town of Seneca Falls*, Index No. 2020-0121 (Sup. Ct. Seneca Cty. Oct. 8, 2020) (citing 21 NYCRR 1401.7(f)) (“Having received no response from his FOIL appeal within the time frame set by the Respondent, Petitioner also properly deemed the lack of a response a constructive denial . . . and has properly commenced this [Article 78] proceeding.”).

33. The records requested—the digital images in DORIS’s possession—are necessarily maintained electronically. Accordingly, to produce the records as requested, DORIS must “merely retriev[e] the electronic data that it has already compiled and copy[] it into another electronic medium. *Id.*

34. DORIS has not, and cannot, provide any justification for its withholding the requested records, which all exist in easy-to-access digital formats. *See Matter of Capital*

Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 567 (1986) (FOIL exemptions “are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.”). *See also Matter of DJL Restaurant Corp. v. Department of Bldgs. of City of N.Y.*, 273 A.D.2d 167, 710 N.Y.S.2d 564 (1st Dept. 2000).

B. DORIS’S DENIAL OF ACCESS TO THE REQUESTED RECORDS IS UNREASONABLE AND THE COURT SHOULD AWARD COUNSEL FEES

35. Though more than a year has passed since Petitioners’ request was made, Respondents have stated no basis for withholding the records sought. Because DORIS has “no reasonable basis for denying access” to the records sought, Petitioners are entitled to attorney fees and costs associated with making this petition. *See Matter of N.Y. State Defs. Ass’n v. N.Y. State Police*, 87 A.D.3d 193, 195, 927 N.Y.S.2d 423, 425 (3d Dept 2011) (citing Public Officers Law § 89 (4)(c)(i)).

36. “[W]here, as here, [an] agency fail[s] to respond to a [FOIL] request or appeal within the statutory time, the court may award counsel fees and other litigation costs to a litigant who substantially prevail[s] in a CPLR [A]rticle 78 proceeding brought to review the constructive denial of the request.” *Matter of Empire Ctr. for Pub. Policy v. N.Y. State Dep’t of Health*, 150 N.Y.S.3d 497, 506 (N.Y. Sup. Ct. Feb. 3, 2021) (citing *Matter of Legal Aid Socy. v New York State Dept. of Corr. & Community Supervision*, 105 AD 3d 1120, (3d Dept 2013)) (internal quotation marks omitted).

37. Respondents’ delay is patently unreasonable. Though the volume of records Petitioners seek is great, the request is straightforward, and all of the records are digitized such that they can be produced by merely dragging them into a folder or onto a hard drive that

Petitioners offered to provide. *See Matter of Edmond v. Suffolk Cty.*, 2021 NY Slip Op 05121, ¶ 2, 197 A.D.3d 1297, 1300, 153 N.Y.S.3d 594, 597 (App. Div. 2nd Dept.) (remanding case for award of attorney’s fees where FOIL response “which was not complete, was provided more than two months after the petitioners filed that administrative appeal”); *Empire Ctr. for Pub. Policy*, 150 N.Y.S.3d at 506 (six-month delay was unreasonable “given the straightforward nature of the request [and] how the data is collected and maintained”); *Matter of Bola v. Bramer*, 111 N.Y.S.3d 520, 521 (N.Y. Sup. Ct. 2018) (granting petitioner attorneys’ fees following “remarkabl[e]” seven-and-a-half-month delay in respondents’ providing records).

38. FOIL’s counsel fee provision was drafted for exactly this scenario. By purposefully and unreasonably denying access, DORIS has taken the “sue us” attitude the Legislature sought to deter by adding the counsel fee provision to the law. *Matter of N.Y. State Defs. Ass’n*, 87 A.D.3d at 196 n. 2 (citing Assembly Mem in Support, at 1, Bill Jacket, L 1982, ch 73) (internal quotation marks omitted)). DORIS’s conduct “violat[es] the Legislature’s intent in enacting FOIL to foster open government.” *Id. See also Matter of N.Y. Civil Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338, 926 N.Y.S.2d 732, 734 (3d Dep’t 2011) (noting legislative intent to “create a clear deterrent to unreasonable delays and denials of access”) (citation and internal quotation marks omitted).

REQUEST FOR RELIEF

39. WHEREFORE, Petitioners Brooke Schreier Ganz and Reclaim the Records respectfully request this Court enter an Order directing Respondent DORIS to produce the requested records in the requested format; awarding the undersigned legal fees and expenses incurred in making the instant petition for relief; and awarding such other and further relief as the Court may deem just and proper.

Dated: February 15, 2022
New York, New York

Respectfully submitted,

BELDOCK LEVINE & HOFFMAN LLP



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ATTORNEY'S VERIFICATION

I, David B. Rankin, an attorney duly admitted to practice before the Courts of the State of New York, affirm the following to be true under the penalties of perjury:

I am the attorney of record for the Petitioners.

I have read the annexed Petition and know the contents thereof, and the same are true to my knowledge, except those matters therein which are stated to be alleged upon information and belief, and as to those matters I believe them to be true. My beliefs, as to those matters therein not stated upon knowledge, are based upon facts, records, and other pertinent information contained in my files.

This verification is made by me because Petitioner does not reside in the county where I maintain my offices.

Dated: New York, New York
February 15, 2022



David B. Rankin