To be argued by: Jeffrey W. Lang
Time requested: 10 minutes

Supreme Court, Albany County, Index No. 05050-16

Supreme Court of the State of New York
Appellate Division – Third Department

In the Matter of the Application of
COMPETITIVE ENTERPRISE INSTITUTE,

Petitioner-Respondent,

-against-

NYS OFFICE OF THE ATTORNEY GENERAL,

Respondent-Appellant.

BRIEF FOR NYS OFFICE OF THE ATTORNEY GENERAL

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Dated: September 29, 2017

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES **PAGE**

TABLE OF AUTHORITIES

PAGE

STATE STATUTUES

STATE RULES AND REGULATIONS

PRELIMINARY STATEMENT

This appeal concerns Supreme Court's award of attorney's fees and costs to petitioner-respondent Competitive Enterprise Institute in this article 78 proceeding arising out of petitioner's Freedom of Information Law ("FOIL") request to respondent-appellant Office of the Attorney General ("OAG"). This Court should reverse Supreme Court's fee award because the statutory prerequisites for the award were not met. Alternatively, the Court should reduce the amount of the award.

In response to petitioner's FOIL request, OAG originally withheld the only responsive record within its possession, a common interest agreement between OAG and certain of the entities named in petitioner's request. Petitioner brought this proceeding to compel OAG to disclose the agreement, and sought attorney's fees. After petitioner commenced the proceeding, however, OAG learned that one of the parties to the agreement had made the agreement public before petitioner brought this proceeding, and that the agreement was publicly available on the website of an organization affiliated with petitioner. Accordingly, OAG moved to dismiss this proceeding as moot given that this document was already in the public domain.

Despite the fact that petitioner had obtained the common interest agreement as a result of its public release by a third party, Supreme Court nonetheless found that petitioner had substantially prevailed in this

proceeding and that OAG lacked a reasonable basis for its initial FOIL denial. The Court awarded petitioner $20,377.50 in fees and $466.72 in costs.

This Court should reverse because petitioner did not meet either of two statutory prerequisites for a fee award. First, petitioner did not substantially prevail in this proceeding because OAG did not release the common interest agreement as a result of this proceeding; rather, it did so because the agreement had already been released by a third party, and thus, was already in the public domain. Second, OAG had a reasonable basis to withhold the common interest agreement at the time of its final FOIL decision, before the document had been made public. Accordingly, Supreme Court lacked the discretionary authority to award attorney's fees and costs. Alternatively, even if this Court concludes that the statutory prerequisites for a fee award were met, Supreme Court's fee award was excessive, and should be reduced to $16,312.50 for the reasons explained below.

ISSUES PRESENTED

1. Whether Supreme Court erroneously concluded that the statutory prerequisites for an award of attorney's fees were met.

2. Alternatively, whether Supreme Court's award of attorney's fees was excessive and should be reduced to reflect the prevailing rates in the Capital District of New York.

STATEMENT OF FACTS

A. Petitioner's FOIL Request

On May 5, 2016, petitioner requested from OAG a copy of "any Common Interest Agreement(s) entered into by the Office of the Attorney General and which are signed by, mention or otherwise include any of the following: John Passacantando, Kert Davies, the Eco-Accountability Project, Matt Pawa, the Pawa Law Group, the Center for Environmental Law, the Climate Accountability Institute, or the attorney general for any other U.S. state or agency." (Record ["R."] on Appeal 36-37.) The request was limited to records created within the four-month period from January 1, 2016, to the date of the request. (R. 37.)

On June 15, 2016, OAG responded that "the records responsive to your request" were exempt from disclosure on any one of three grounds: Public Officers Law § 87(2)(a), as attorney-client privileged and attorney work product; Public Officers Law § 87(2)(e), as law enforcement records whose disclosure would interfere with investigations or proceedings; and Public Officers Law § 87(2)(g), as inter-agency materials. (R. 43-44.)

Petitioner administratively appealed the denial, and by letter dated July 7, 2016, OAG rendered a final determination. (R. 56-58.) The appeals decision clarified that notwithstanding OAG's reference to "records" in its

original denial, OAG had located only a single common interest agreement responsive to petitioner's request: the decision stated that there were "no other agreements" signed by the entities and individuals listed in petitioner's request and limited its discussion to whether "the" common interest agreement was subject to disclosure. (R. 57, n. 1.) As to this agreement, the appeals officer found that it was properly withheld based on two of the exemptions originally asserted. First, the common interest agreement qualified as attorney work product because it "was made to protect the common legal interests shared by the signing parties—the Attorneys General of various jurisdictions—with respect to law enforcement and legal actions each may undertake." And the decision noted that OAG was "currently engaged in such a law enforcement investigation." (R. 57.) Second, the common interest agreement was properly withheld under the law enforcement exemption. (R. 57.)

The appeals officer also rejected petitioner's contention that OAG's original denial letter was deficient because it failed to provide a "particularized and specific" justification for the exemptions invoked; rather, the officer explained that the standard cited by petitioner only applies to an agency's burden once its denial of disclosure is challenged in an article 78 proceeding. It does not apply, however, when an agency responds in the first instance to a FOIL request or on administrative appeal. (R. 57.)

B. Proceedings Below

1. OAG's Motion to Dismiss

Two months after OAG denied petitioner's administrative appeal, on August 31, 2016, petitioner brought the current article 78 petition seeking the disclosure of records and an award of attorney's fees and costs. (R. 30-31.)

On September 30, 2016, OAG moved to dismiss the proceeding as moot. In an affidavit submitted in support of the motion, OAG's records access officer explained that based on the content and subject matter of petitioner's request, he determined that any responsive records would reside with the attorneys involved in the OAG's pending investigation of the ExxonMobil Corporation, and the search for records produced only one document responsive to the request, the "Climate Change Common Interest Agreement." (R. 65.) Based on his review of the common interest agreement, the records access officer concluded that it was exempt from disclosure under three exemptions because it pertained to an active investigation. (R. 65.) On administrative appeal, the denial of the request was upheld under two of the three exemptions, as noted above. (R. 57, 66.)

The records access officer also explained that, on or about August 4, 2016, a month after OAG's final decision but before petitioner brought this proceeding, the Office of the Attorney General for the District of Columbia released a full copy of the Climate Change Common Interest Agreement to

the Energy & Environment Institute ("E&E"), an entity with staff in common with petitioner. (R. 66.) On the same day, August 4, E&E posted a copy of the agreement to its website. Accordingly, the records access officer explained, because the Climate Change Common Interest Agreement was the only document responsive to petitioner's FOIL request and because it was now publicly available, petitioner had received all the relief to which it was entitled and the proceeding was moot. (R. 66.) OAG attached a copy of the common interest agreement to its motion to dismiss. (R. 69-86.)

2. Supreme Court's First Decision

Supreme Court, Albany County (Zwack, J.), declined to dismiss the proceeding, and ordered that OAG provide more detail regarding its search for common interest agreements that mention or include the individuals and entities named in petitioner's request. (R. 17.) The court found a "clear discrepancy" between OAG's initial FOIL denial, which referenced responsive "records" in the plural, on the one hand, and, on the other, OAG's motion papers, which averred that only one document responsive to petitioner's request had been located. (R. 17.) The court apparently overlooked that OAG's appeals decision had clarified that only one responsive record had been located. (R. 17.) The court also found that OAG's original denial letter was insufficient because it "was nothing more than a parroting of statutory

language." (R. 18.) Again, the court apparently overlooked OAG"s appeals decision, which explained the reasons for the denial of the request.

Based on these considerations, the court concluded that petitioner had substantially prevailed in the proceeding and that OAG's invocations of the statutory exemptions were "conclusory" and insufficient to deny access. The court ordered OAG to submit a new FOIL response, and invited petitioner to submit an application for attorney's fees. (R. 18.)

3. OAG's Supplemental Response

In accordance with Supreme Court's order, OAG undertook a "de novo diligent search for records" responsive to petitioner's request. (R. 120-121.) OAG filed an affidavit by its records access officer describing the steps he had had taken, and sent petitioner a supplemental FOIL response. (R. 120-121; 124-127.) As explained in these supplemental papers, the results of OAG's expanded search confirmed that OAG had no responsive documents within its possession other than the Climate Change Common Interest Agreement. (R. 121.)

Petitioner moved for attorney's fees, seeking $26,901.25 in fees and $466.72 in costs. (R. 147-176.) OAG opposed the motion, arguing that petitioner had not substantially prevailed in the proceeding, OAG had a

reasonable basis for its initial denial, and the fees requested by petitioner were excessive in term of the hourly rates and the number of hours expended.

4. Supreme Court's Second Decision

Supreme Court granted petitioner's request for attorney's fees and costs, awarding petitioner $20,377.50 in fees and $466.72 in costs. (R. 13.) Initially, the court found that its earlier determinations that petitioner had substantially prevailed and that OAG's "conclusory" invocations of the statutory exemptions were insufficient to deny access were "law of the case" and it declined to revisit those determinations. (R. 9.) The court amplified upon its earlier rulings, however, stating that, in its view, OAG had "stonewalled" by failing to explain the reasons for withholding the agreement in its initial denial letter, and "it was only through the use of judicial process that [petitioner] was able to obtain the required disclosure." (R. 12.) Thus, the court concluded that petitioner had met the statutory requirements that would permit a discretionary award of fees. (R. 9.)

As far as the amount of the fee award, the court considered the time and fees charged for attorneys Anna St. John, petitioner's in-house counsel, and Baker & Hostetler attorneys Mark Bailen and Elizabeth Schutte. First, the court found the hours expended by all attorneys (36.5 for St. John, 22.5 for Bailen, and 6.25 for Schutte) were reasonable, although it declined to

award fees for time expended by paralegals and other non-attorneys (R. 10-11). Second, the court allowed an hourly rate of $300 per hour for St. John, rather than the $450 petitioner requested, as "more in line with an hourly rate for an associate." (R. 10.) Third, the court approved the rates for Bailen ($450 per hour) and Schutte ($350 per hour). (R. 11.) In doing so, it rejected OAG's argument that the attorneys' hourly rates should be capped at $250 per hour, the prevailing rate for experienced attorneys in the Capital District, because, the court stated, OAG was "well aware" that petitioner was represented by New York City- and DC-based counsel and that the common interest agreement was within the public domain "as early as August 2016." Thus, according to the court, OAG could have contained costs "by simply providing the CIA document before petitioner was compelled to commence the Article 78 proceeding" and by confirming that there were no other responsive records. (R. 11.)

OAG now appeals Supreme Court's final judgment awarding petitioner attorney's fees and costs. (R. 3-5.)

ARGUMENT

This Court should reverse Supreme Court's judgment and vacate its fee award because two of the statutory prequisites for the award were not met: first, petitioner did not substantially prevail in the proceeding, and second,

OAG had a reasonable basis, at the time of its final determination, to withhold the only responsive record in its possession. Alternatively, the court's fee award was excessive and should be reduced even if this Court concludes that the statutory prerequisites were met. The fee award incorporated hourly rates that exceeded the prevailing rates in the Capital District, and, contrary to the court's finding, OAG did not unnecessarily increase litigation costs so as to justify an elevated award.

POINT I

PETITIONER IS NOT ENTITLED TO ATTORNEY'S FEES AS A MATTER OF LAW

Petitioner is not entitled to an award of attorney's fees and costs because two of the statutory prerequisites for the award were not met. FOIL allows an award of attorney's fees in a court's discretion only where a requester has first "substantially prevailed." If the requester has substantially prevailed and the court additionally finds that "the agency had no reasonable basis for denying access" or "the agency failed to respond to a request or appeal within the statutory time,"[1] the court may in its discretion award attorney's fees. Public Officers Law § 89(4)(c). Although the court's decision to award fees where the statutory prerequisites are satisfied is

[1] OAG timely responded to the FOIL request and appeal, and thus this provision of the statute does not provide a basis for a fee award.

reviewed under an abuse of discretion standard, the question of whether or not a statutory prerequisite to an award of fees has been met is reviewed for error as a matter of law. *Matter of Beechwood Restorative Care Center v. Signor*, 5 N.Y.3d 435, 441 (2005).

Petitioner did not substantially prevail, and OAG had a reasonable basis to deny access at the time of its final decision. Thus, as a matter of law, Supreme Court lacked the discretionary authority to award fees.

A. Petitioner Did Not Substantially Prevail In This Proceeding

A FOIL requester substantially prevails in a proceeding to challenge an agency's determination when the records are released "because of the commencement of litigation." *Matter of Friedland v. Maloney*, 148 A.D.2d 814, 816 (3d Dep't 1989). In this case, the common interest agreement was neither obtained by petitioner nor released by OAG because of the commencement of litigation. On the one hand, petitioner did not obtain the agreement as a result of this proceeding. Rather, petitioner obtained the agreement *before it brought this proceeding* as a result of the Office of the Attorney General for the District of Columbia releasing it into the public domain by giving a copy to an entity with staff in common with petitioner. (R. 66.) On the other hand, OAG did not release the common interest agreement because of the commencement of litigation. Rather, once this proceeding had

been commenced and OAG revisited the issue for the first time since its final FOIL determination in July 2016, OAG learned that another attorney general had made the document public, and merely disclosed its own (identical) copy of the agreement in support of its motion to dismiss the proceeding as moot. By then, there was no longer any purpose served by OAG continuing to withhold its own copy of the agreement.

Nor could it be said, as Supreme Court erroneously suggested (R. 11), that petitioner substantially prevailed because it was required to bring this proceeding to confirm that OAG possessed no responsive records apart from the common interest agreement. Though overlooked by the court, OAG's appeals decision clarified that OAG possessed no responsive records apart from that agreement. Although OAG's original denial letter referred to responsive "records" in the plural, the appeals decision stated that OAG had located "no other agreements" signed by the entities and individuals listed in petitioner's request (R. 57, n. 1), and limited its discussion to whether "the" common interest agreement was subject to disclosure (R. 57). These statements dispelled any possible doubt as to whether OAG was withholding any additional records at the time of its final determination. In short, petitioner obtained no records by means of this proceeding that would permit the conclusion that it substantially prevailed, and thus, it is not entitled to attorney's fees and costs as a matter of law.

B. OAG Had A Reasonable Basis To Withold The Common Interest Agreement At The Time Of Its Final Decision

Petitioner is also not entitled to attorney's fees because, at the time of OAG's final FOIL decision—before the common interest agreement had been made public—OAG had a reasonable basis to withhold it. In considering whether this statutory prerequisite is met, the issue is not whether exemptions cited actually applied; fees are not available if the agency had a reasonable basis, at the time it rendered the decision, for withholding the record based on the cited exemptions. *See Matter of Mineo v. N.Y.S. Police*, 119 A.D.3d 1140, 1142 (3d Dep't), *lv. denied*, 24 N.Y.3d 9017 (2014) (affirming denial of fee award where agency's initial FOIL denial was "not unreasonable" even though agency was ultimately ordered to release the record); *Matter of Maddux v. N.Y.S. Police*, 64 A.D.3d 1069 (3d Dep't 2009) (affirming denial of fee award where initial denial of FOIL request "not so unreasonable" even though agency later released the requested records).

As explained in OAG's appeals decision (R. 56-58), OAG had a reasonable basis to withhold the common interest agreement at the time of its final decision. At a minimum, OAG rationally invoked the work product doctrine as justification for withholding the agreement because the agreement was prepared by OAG counsel in anticipation of state investigations and legal actions by the attorneys general of the signatory

states and territories in the areas of joint concern identified in the agreement. (R. 69.) *See* Public Officer's Law 87(2)(a) (exempting materials exempt from disclosure by state statute); C.P.L.R § 3101(c) (attorney work product not obtainable); *Matter of Shooters Committee on Political Education, Inc. v. Cuomo*, 147 A.D.3d 1244, 1247-48 (3d Dep't 2017) (records protected by from FOIL disclosure by work product doctrine). Indeed, OAG's records access officer identified one such ongoing investigation by OAG. (R. 65.) Moreover, the fact that the common interest agreement was shared among the signatories did not waive the privilege because New York, like other jurisdictions, recognizes the principle that disclosure to a party with whom one has a common legal interest agreement and where the parties reasonably anticipate litigation does not waive an otherwise applicable privilege. *See Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 627 (2016) (describing scope of common interest doctrine).

Although one Appellate Division case found that a common interest agreement was discoverable under the particular facts of that case, *see Fewer v. GFI Group Inc.*, 78 A.D.3d 412, 413 (1st Dep't 2010), several federal courts have found common interest agreements to come within the protection for attorney work product, *see R.F.M.A.S., Inc. v. So*, No. 06-Civ-13114(VM)(MHD), 2008 WL 465113 (Feb. 15, 2008) (so holding and collecting cases). In light of this authority, regardless of whether OAG would have

ultimately succeeded in demonstrating that the work product doctrine applied to the common interest agreement and was not otherwise waived by its disclosure to the other signatories, OAG had a reasonable basis for invoking this exemption to withhold the agreement in the first instance.

Moreover, OAG's FOIL responses complied fully with the statute. Although Supreme Court concluded (R. 41-44) that OAG lacked a reasonable basis for its denial because its initial FOIL response was conclusory and merely "parroted" the statutory language concerning exemption (R. 18), the court applied the wrong legal standard to OAG's initial denial. Contrary to the court's statement (R. 18), a FOIL responder is not obligated to "fully explain" the reason for the denial of access in its initial response. Rather, the records access officer must state, in writing, the reason for the denial, but is not required to elaborate upon the exemptions invoked. *See* Public Officers Law § 89(3)(a); 21 N.Y.C.R.R. § 1401.7(b). Nor is there any requirement that the agency prepare a privilege log during administrative proceedings. *See* Op. Comm. Open Gov't No. FOIL-AO-19235. And the requirement that the agency provide "a particularized and specific justification" for asserted exemptions does not attach until an article 78 proceeding has been commenced. *See Matter of Miller v. N.Y.S. Dep't. of Transp.*, 58 A.D.3d 981, 983 (3d Dep't 2009).

Although the court cited *Matter of West Harlem Business Group v. Empire State Development Corp.*, 13 N.Y.3d 882, 885 (2009), for the proposition that OAG was required to fully explain the reason for the denial of access in its initial response, that case concerned the adequacy of the entity's FOIL *appeals decision*, not its initial response. To be sure, Public Officers Law § 89(4)(a) requires that an agency's appeals decision following an initial denial of a FOIL request "fully explain in writing to the person requesting the record the reasons for further denial." The appeals decision here did just that: it contains a detailed discussion of the reasons for OAG's decision to withhold the common interest agreement. *See* R. 56-58. Neither of Supreme Court's two decisions addressed OAG's appeals decision, let alone found it deficient. Because OAG had a reasonable basis to withhold the common interest agreement and its FOIL responses satisfied the statute, this Court should reverse and vacate the fee award.

POINT II

ALTERNATIVELY, EVEN IF THIS COURT CONCLUDES THAT THE STATUTORY PREREQUISITES FOR AN AWARD OF ATTORNEY'S FEES ARE MET, IT SHOULD REDUCE THE AWARD

Even if this Court concludes that the statutory prerequisites for the attorney's fee of $20,377.50 awarded by Supreme Court are satisfied, it should nonetheless the reduce the award as excessive. Supreme Court improperly based its fee award on hourly rates that exceed the prevailing

rate in the relevant locality, in this case the Capital District, and OAG did not engage in conduct that would warrant an elevated award. An award appropriately reduced based on the prevailing local rate of $250 per hour, yet without any reduction in the attorney hours claimed by petitioner and allowed by Supreme Court, would be $16,312.50.[2]

Although an award of counsel fees where the statutory requirements are met is a matter of the lower court's discretion, this Court will reduce awards which are excessive under the circumstances. *See Blay v. Blay*, 51 A.D.3d 1189, 1193 (3d Dep't 2008); *Fox v. Fox*, 290 A.D.2d 749 (3d Dep't 2002). One of the factors used by courts in fixing counsel fees is "the fee customarily charged in the locality[.]" *Shrauger v. Shrauger*, 146 A.D.2d 955, 956 (3d Dep't 1989). In this case, Supreme Court abused its discretion by basing its award on hourly rates that exceeded the prevailing rate in the Capital District. The court also erred by concluding that an elevated award was warranted because OAG's own conduct unnecessarily increased litigation costs. (R. 11.)

State and federal courts in the Capital District have generally awarded attorney fees at hourly rates not exceeding $250, even for attorneys with

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[2] This calculation is based on a total of 65.25 attorney hours claimed by petitioner and endorsed by Supreme Court (36.5 for St. John, 22.5 for Bailen, 6.25 for Schutte), multiplied by a $250 hourly rate. It does not include non-attorney hours claimed by petitioner for paralegals, which the court rejected.

significant experience. *See Miller v. City of Ithaca*, No. 3:10-cv-597(GLS)(DEP), 2017 WL 61947, at *2 (N.D.N.Y. Jan. 5, 2017) (the prevailing rate for "experienced attorneys with specialized expertise" in the Capital District is $225); *McLark v. Colvin*, No. 6:15-cv-0620 (DEP), 2016 WL 6302093, at *2 (N.D.N.Y. Oct. 27, 2016) (rate of $201.78 close to prevailing rate); *C.H. Robinson Worldwide v. Jose Aiello & Sons, Inc.*, No. 1:15-cv-1321 (GTS)(DJS), 2016 WL 4076964, at 5 (N.D.N.Y. Aug. 1, 2016) (rate of $225 is close to prevailing rate for experienced counsel in the Northern District of New York); *Genito v. Forster & Garbus LLP*, No. 6:15-cv-00954 (MAD)(TWD), 2016 WL 3748184, at *2 (N.D.N.Y. July 11, 2016) (same); *Matter of Chiaroscuro Foundation v. N.Y.S. Department of Health*, Albany County Index No. 3252-13 (June 30, 2016) (Hartman, J.) (attached) (awarding $250 per hour in FOIL case); *Matter of Robinson v. Cuomo*, Albany County Index No. 5118-14 (June 20, 2016) (Ryba, J.) (attached) (awarded $225 to "seasoned litigator" in FOIL case).

Although certain courts cited by petitioner below have approved higher hourly rates for the Capital District as a part of class action settlements or social security contingency fee agreements where the request for attorney's fees was unopposed, *see Seekamp v. It's Huge*, No. 1:09-cv-0018, No. 2014 WL 7272960, at *1 (N.D.N.Y. Dec. 18, 2014); *Eastman v. Colvin*, No. 3:13-cv-01334, 2016 WL 6537681, at *2 (N.D.N.Y. Nov. 3, 2016), these fee awards do

not reflect the prevailing rate in this locality. Rather, in these contexts, courts defer to the "freely negotiated expression both of a claimant's willingness to pay more than a particular hourly rate" and "an attorney's willingness to take the case despite the risk of nonpayment." *See Filipkowski, Jr. v. Barnhart*, No. 05-cv-01449, 2009 WL 2426008, at *2 (N.D.N.Y. Aug. 6, 2009).

Supreme Court declined to discount petitioner's requested hourly rates based on its apparent belief that OAG "stonewalled" by not providing a sufficient initial FOIL response and by unnecessarily increasing litigation costs by not disclosing the common interest agreement even though it was in the public domain. (R. 11-12.) These reasons for imposing an elevated fee award are not supported by the record in this case. As discussed above, OAG fully complied with the statute in all of its FOIL responses, and had a reasonable basis for invoking the work product exemption to withhold the common interest agreement at the time of its final FOIL determination, before the agreement was released into the public domain.

Nor did OAG unnecessarily increase litigation costs by not disclosing the common interest agreement earlier. Indeed, the agreement was disclosed by the Attorney General for the District of Columbia on August 4, before petitioner brought this proceeding on August 31. Although OAG did not disclose its own copy of the agreement at that time, it had no reason to do so:

OAG had no occasion to revisit its final determination, rendered on July 7, until it was required to do so in order to respond to the petition in this case. At that point, OAG became aware that the common interest agreement had been made public. But agencies have neither the legal obligation nor—in light of the high volume of FOIL requests many of them receive—the resources to periodically revisit their final FOIL decisions in order to consider whether a different disposition is warranted because of any independent actions taken by third parties in the interim. After all, a party can simply make a new FOIL request and assert that a change in circumstances warrants a different outcome. In short, even if this Court concludes that the statutory prerequisites for a fee award are met, it should reduce the attorney's fee award from $20,377.50 to $16,312.50.

CONCLUSION

Supreme Court's judgment awarding attorney's fees and costs should be reversed and the petition dismissed in its entirety.

Dated: September 29, 2017
Albany, New York

Respectfully submitted,

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ADDENDUM

COPY

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
CHIAROSCURO FOUNDATION,

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

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF
HEALTH,

Respondent.

DECISION AND
ORDER

Index No. 3252-13
(RJI No. 01-13-ST4749)

APPEARANCES:

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Hartman, J.

In this CPLR Article 78 Freedom of Information Law proceeding, the Court issued a decision and judgment dated November 25, 2015, awarding to petitioner Chiaroscuro Foundation attorney's fees beginning with the date of filing of the petition and terminating on November 7, 2013. Petitioner has submitted an affirmation of services requesting $ 12,246 in attorney's fees and $ 403.10 in costs. Respondent opposes petitioner's application, arguing that it is not properly supported by evidence of the customary fees charged by similar lawyers, that the hourly rate requested by petitioner is too high, and that petitioner is not entitled to costs.

The attorney seeking a fee award bears the burden of demonstrating that the hours expended and hourly rate claimed are reasonable (*see Neroni v Follender*, 137 AD3d 1336, 1339 [3d Dept 2016]; *Lancer Indem. Co. v JKH Realty Group, LLC*, 127 AD3d 1035, 1036 [2d Dept 2015]; *Gamache v Steinhaus*, 7 AD3d 525, 527 [2d Dept 2004]). "Factors integral to the fixing of counsel fees [include] the time, effort and skill required; the difficulty of the questions presented; the responsibility involved; counsel's experience, ability and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation" (*Shrauger v Shrauger*, 146 AD2d 955, 956 [3d Dept 1989]; *see Lancer Indem. Co.*, 127 AD3d at 1036).

Here, plaintiff has affirmed that he spent 40.82 hours on this matter, and requests an hourly rate of $ 300 per hour for, for a total of $12,246. First, the Court finds that 40.82 hours is a reasonable amount of time spent on this matter.[1] The Court has reviewed petitioner's detailed billable hours log and finds that it comports with the work reasonably necessary to litigate the matter. While the legal issues involved in this case were not particularly complex, petitioner's attorney spent a reasonably modest amount of time on the case over a five-month period.

Second, the Court finds that $ 250 per hour is the reasonable and customary rate for the services rendered by plaintiff's counsel. Generally, counsel will be limited to the customary rate of the forum in which the litigation takes place (*see Arbor Hill*, 522 F3d at 190). Respondent argues that the applicable customary rate can be no higher than $ 210 per hour. "The prevailing hourly rates in [the Northern District of New York], however, are now higher than $ 210" (*Dotson v City of Syracuse*, 2014 US Dist LEXIS 59780, at *5–6 [NDNY Apr. 30, 2014, No. 5:04-CV-1388 (NAM/ATB)] [internal quotation marks omitted] [citing awards ranging from $ 210 to $ 345 per hour for experienced attorneys]; *see also Bosket v NCO Fin. Sys.*, 2012 US Dist LEXIS 132239, at *8 [NDNY Sep. 17, 2012, No. 3:11-CV-00678 (LEK/DEP)]

[1] Respondent has not challenged the reasonableness of the amount of time expended by petitioner's attorney.

[noting that "recent Northern District cases have upheld an hourly rate for a partner of between $ 250 and $ 345" and awarding $ 335 per hour for partners and $ 250 per hour for experienced non-partners] [internal quotation marks omitted]). Based on the skill necessary to litigate this case, plaintiff's counsel's able litigation herein, his experience in the field of healthcare law, and the federal decisional law discussing customary fees in the Northern District, the Court holds that $ 250 per hour is the reasonable rate to which petitioner is entitled.

The Court has also determined that an award of costs and disbursements is warranted under the circumstances (*see* CPLR 8101 *et seq.*; Public Officers Law § 89 [4] [c]). Accordingly, it is hereby

ORDERED that respondent pay to petitioner's counsel, John P. Margand, the sum of $ 10,205 for attorney's fees; it is further

ORDERED that respondent pay to petitioner's counsel, John P. Margand, the sum of $ 403.10 for costs and disbursements.

This constitutes the decision and order of the Court. The original decision and order is being transmitted to petitioner's counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this decision and order does not constitute entry or filing under CPLR 2220 and counsel is

not relieved from the applicable provisions of that rule respecting filing, entry, and service.

Dated: Albany, New York
June 30, 2016

Denise A. Hartman

Denise A. Hartman
Acting Supreme Court Justice

Papers Considered

1. Affirmation of Legal Services
2. Memorandum of Law in Opposition, with Appendices 1–2
3. Reply to Respondent's Memorandum of Law, with Exhibits A–E

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of BILL ROBINSON,
Petitioner,

-against-

ANDREW CUOMO, in his Official Capacity as Governor of the State of New York; NEW YORK STATE DIVISION OF STATE POLICE; and JOSEPH D'AMICO, in his Official Capacity as Superintendent of the New York State Division of State Police
Respondent.

DECISION/ORDER

Index No.5118-14
RJI No. 01-14-ST6124

APPEARANCES:

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Joshua Farrell, Esq.; (Assistant Attorney General, of Counsel)
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RYBA, J.,

In January 2014, petitioner made a request to respondent New York State Police pursuant to the Freedom of Information Law (Public Officers Law Article 6; hereinafter FOIL) for documents related to the registration of firearms under the assault weapons registry created by the SAFE Act of 2013. When no response was forthcoming, petitioner treated the failure to respond as a constructive denial and pursued an administrative appeal in July 2014. Having received no response to the administrative appeal, in October 2014 petitioner commenced this proceeding pursuant to CPLR Article 78 challenging the constructive denial of his FOIL request. Respondent New York

State Police thereafter issued a response denying petitioner's FOIL request on the ground that the materials sought were exempt from disclosure under Penal Law § 400.2. Respondents subsequently moved to dismiss the Article 78 proceeding on various grounds. By decision and judgment dated April 30, 2015, this Court (McNamara, J.), denied the motion to dismiss the proceeding and directed respondents to comply with petitioner's FOIL request. Petitioner now moves pursuant to Public Officers Law §89 (4) (c) for an award of attorneys fees and expenses in the amount of $10,702.87. Respondents oppose the application.

Public Officers Law § 89 (4) (c) provides that in any proceeding brought pursuant to CPLR Article 78 to challenge the denial of a FOIL request, the Court:

> * * * may assess against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, when:
>
> i. The agency had no reasonable basis for denying access; or
>
> ii. The agency failed to respond to a request or appeal within the statutory time.

Petitioner contends, and respondents do not dispute, that petitioner substantially prevailed in the underlying Article 78 proceeding. Indeed, by virtue of the 11-month delay in responding to petitioner's FOIL request and the Court's underlying decision ruling in petitioner's favor and directing respondent to issue appropriate FOIL responses, the Court finds that petitioner "substantially prevailed" in the underlying proceeding within the meaning of Public Officers Law § 89 (4) (c). Accordingly, the Court is free to award "reasonable attorney's fees" to petitioner (Public Officers Law § 89 [4]. [c]). It is well settled that in the context of FOIL matters this Court has broad discretion in determining not only whether an award of counsel fees is warranted in the

first instance, but also in calculating the reasonable amount of any fees to be awarded (see generally, Matter of Legal Aid Socy. v New York State Dept. of Corr. & Community Supervision, 105 AD3d 1120, 1122 [2013]; Matter of New York Civ. Liberties Union v City of Saratoga Springs, 87 AD3d 336, 340 [2011]; Matter of New York State Defenders Assn. v New York State Police, 87 AD3d 193, 197 [2011]). Because "a trial court is in the best position to determine those factors integral to fixing counsel fees" (Harris Bay Yacht Club v Harris, 230 AD2d 931, 934 [1996]), a determination as to the appropriate counsel fee award will not be disturbed absent an abuse of discretion (see, Saxton v New York State Dep't of Taxation & Fin., 130 AD3d 1224, 1225 [2015]).

The counsel fee provision set forth in Public Officers Law § 89 (4) (c) was created to address the fact that individuals attempting to compel an agency to respond to an appropriate FOIL request "must engage in costly litigation", and also to "create a clear deterrent to unreasonable delays and denials of access [so as to] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL " (Matter of New York Civ. Liberties Union v City of Saratoga Springs, 87 AD3d at 338, quoting Senate Introducer Mem in Support, Bill Jacket, L 2006, ch 492 at 5; see, Legal Aid Soc. v New York State Dep't of Corr. & Cmty. Supervision, 105 AD3d at 1122). Based on the evidence that petitioner was only able to fully obtain the requested disclosure through use of the judicial process, the Court finds that an award of counsel fees in petitioner's favor is appropriate (see, New York Civil Liberties Union v City of Saratoga Springs, 87 AD3d at 339). In fashioning such an award, the Court is required to consider "the time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained " (Matter of Estate of Parravani, 211 AD2d 965, 966 [1995]).

Consistent with the purpose of the statute to provide reimbursement for counsel fees incurred as a result of an agency's unreasonable denial of a FOIL request or prolonged delay in issuing a response, it only seems appropriate that any award of fees should be limited to those legal services that were rendered *after* such unreasonable denial or prolonged delay occurred. The statute was not intended to provide an award of legal fees rendered in the ordinary course of preparing and serving a FOIL request. Here, petitioner seeks to recover $10,702.58 in fees representing legal services rendered on his behalf for the period commencing January 7, 2014 and concluding on June 2, 2015. Notably, however, the FOIL request was not even served until January 29, 2014. It was not until July 8, 2014, when petitioner's counsel began drafting an administrative appeal from respondents' constructive denial of the request, that legal services were performed in an effort to obtain relief from respondents' unreasonable failure to timely respond to the FOIL demand. Moreover, a further review of counsel's billing records leads the Court to the conclusion that such legal services ceased on May 19, 2015, the date when counsel caused the underlying decision in petitioners' favor to be servede on opposing counsel.

The Court therefore deems it appropriate to limit the award of counsel fees to those reasonable fees incurred during the time period between July 8, 2014 and May 19, 2015. During this time period, petitioner's counsel billed a total of 29.7 hours at a rate of $225.00 per hour for a total sum of $6,681.75. Considering counsel's significant experience in her field and her status as a seasoned litigator, an hourly rate of $225 is more than reasonable. However, considering the relatively uncomplicated nature of the proceeding and counsel's experience in this field, and in view of the fact that counsel was simultaneously performing identical services in connection with two other related cases, the Court is not convinced that the number of hours billed was reasonable.

Specifically, counsel's billing statement reveals that during the time period between September 17, 2014 and September 23, 2014, counsel made several mixed entries which included repetitive services. For example, on September 17, 2014, counsel billed petitioner for "draft[ing] the Notice of Petition and Petition". On September 18, 2014, counsel charged for "continue[d] work on Notice and Petition" and "Construct exhibit list". On September 19, 2014, counsel purportedly spent another 3.9 hours for "work on Petition to final". On September 23, 2014, counsel charged for another 1.3 hours to once again "Draft notice of petition" and "Prepare exhibit list". In the Court's view, the services charged for on September 19, 2014 and September 23, 2014 were repetitive and unnecessary and the 5.2 hours billed for those services should be removed from the fee award. Deducting 5.2 hours from counsel's bill results in an overall reduction of the $6681.75 fee by $1,170, for a total fee of $5,511.75.

The Court finds this figure of $5,511.75 to be a reasonable fee award in light of counsel's experience, the favorable results obtained, the amount of time expended and the nature of the services rendered. Moreover, the Court awards petitioner the additional sum of $529.86 representing the appropriate amount of expenses incurred by counsel during the relevant time period, for a total award of $6,041.61.

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the petition is granted in part, without costs, to the extent that petitioner is awarded counsel fees and expenses in the sum of $6,041.61.

This Memorandum constitutes the Decision, Order and Judgment of the Court. This original is being returned to the attorney for the respondent. The original motion papers are being transferred to the Albany County Clerk. **The signing of this Decision and Order shall not constitute entry or filing**

under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

SO ORDERED.
ENTER.

Dated: June 20, 2016

HON. CHRISTINA L. RYBA
Supreme Court Justice