

Supreme Court: New York County
Part 40B

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In the Matter of the Application of

THE EXONERATION INITIATIVE,

Petitioner,

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

-against-

Index No. 102688/12

THE NEW YORK CITY POLICE DEPARTMENT,

Respondent.

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Peter H. Moulton, Justice

Petitioner Exoneration Initiative brought this Article 78 proceeding to obtain records from the New York City Police Department ("NYPD") pursuant to the state's Freedom of Information Law (Public Officers Law § 84 et. seq., commonly referred to as "FOIL"). The records concern Richard Rosario, who has been incarcerated since 1996 after being convicted of murder.

Petitioner prevailed in the proceeding. It defeated respondent's motion to dismiss the petition, and prevailed on the merits. These results are embodied in decisions of the court dated July 12, 2012, and March 15, 2013, respectively. Familiarity with these decisions is assumed herein.

Petitioner now moves for an judgment awarding attorneys fees.

DISCUSSION

FOIL allows for the award of attorneys fees to a petitioner where it has "substantially prevailed." There is no question that petitioner here substantially prevailed. After hard-fought litigation it obtained all documents in respondent's possession within the ambit of its FOIL request.

Where petitioner has substantially prevailed, POL § 89(4)(c)(i) and (ii), provide that a court may assess attorneys' fees and litigation costs against an agency in two circumstances:

- i. the agency had no reasonable basis for denying access; or
- ii. the agency failed to respond to a request or appeal within the statutory time.

Petitioner asserts that it is entitled to attorneys fees under both provisions. It has submitted the resumes of counsel, and time records that reflect the time spent by counsel on the case. Petitioner seeks a total of \$50,056.94.

This court has already found that the NYPD repeatedly missed deadlines imposed by the statute for responding to petitioner's requests. These unnecessary delays enable petitioner to seek attorneys fees under POL § 89(4)(c)(ii).¹

¹With respect to an award under POL § 89(4)(c)(i), the case for fees is not as clear. On the one hand, the NYPD has failed to explain why it held on to 27 pages of documents that it finally produced on August 17, 2012, just prior to a hearing on the merits of the petition. Accordingly, there appears to have been no "reasonable basis" for the withholding of these documents well past the time for disclosure under FOIL. On the other hand,

Respondent opposes the application on several grounds.

First, respondent notes that petitioner has not yet agreed to represent Rosario, and that it therefore stands before the court as pro se litigant. Respondent argues that the four lawyers who are petitioner's counsel in the instant matter are either staff members of the Exoneration Initiative or are volunteers for the organization. According to respondent, pro se litigants who are lawyers are not entitled to legal fees.

This argument ignores ample precedent that allows public interest legal organizations such as the Exoneration Initiative to receive attorneys' fees after prevailing as named litigants in Article 78 proceedings. (See Legal Aid Society v New York State Dep't of Corrections and Community Supervision, 105 AD3d 1120; New York Civil Liberties Union v City of Saratoga Springs, 87 AD3d 336.) Petitioner Exoneration Initiative is an organization that investigates, and, where appropriate, litigates claims of actual innocence on behalf of indigent incarcerated people. It is not analogous to a pro se litigant.

Respondent also points out that an award of attorneys' fees under FOIL is discretionary. It argues that the court should

the NYPD had colorable, if ultimately unsuccessful, arguments for nondisclosure concerning three documents that the court ultimately ordered disclosed. In any event the two attorneys' fees provisions in FOIL are stated in the disjunctive, and having found that attorneys' fees are due under one section, it is not necessary to consider whether fees are due under the second section.

exercise its discretion and avoid the fees as the delays in responding to petitioner's FOIL request were caused at least in part by the volume of FOIL requests the NYPD receives every year. According to respondent's counsel, the NYPD receives in approximately 8000 FOIL requests a year, and the processing of these requests can take time.

This argument fails. The NYPD has enormous resources, and it could deploy sufficient resources to ensure that it timely responds to all its FOIL requests. There is a public policy argument to be made that this would not be the best use of the NYPD's resources. However, if the NYPD wants make the argument that the necessity of responding to thousands of FOIL requests a year diverts resources from its core mission, it should make that argument to the legislature.² The court is concerned only with the facts of this case and the obligations that FOIL imposes. The facts of this case demonstrate repeated, extensive delays by the NYPD in meeting deadlines imposed by FOIL.

Finally, the NYPD argues that the petitioner's hourly legal fees were not commensurate with fees charged by lawyers of

²The Legislature would also have before it counter-arguments, including the fact that FOIL requests to law enforcement agencies can be a means to help correct errors in our criminal justice system. The use of DNA evidence to overturn erroneous convictions in recent years has led to a growing body of research into the causes of erroneous convictions, including systemic errors by police, prosecutors and judges in our criminal justice system. (See e.g. Garrett, Convicting the Innocent [Harvard University Press 2011].)

analogous experience, and that the number of hours billed are excessive given the work that was produced.

The hourly rates billed by petitioner's counsel are to be measured by the rates charged in the New York City legal community. They are well within the range of hourly rates charged by private sector attorneys of similar experience in that community. (E.g. Matter of Humphrey v Gross, 135 AD2d 634.) Respondent particularly questions the hourly rate of one attorney, arguing that she "has not practiced as an attorney in twenty-three years" and is a "pro bono case worker." At best these characterizations are inaccurate and uncollegial. The lawyer in question served as a judge in civil, criminal and Supreme Court from 1978 to 2006. Judges in those courts must be admitted attorneys who have paid their bi-annual registration dues. Judges are not advocates, they do not have "clients" except for the public at large, but they obviously use their legal training to do their jobs.

The number of hours worked by petitioner's attorneys were not excessive. This litigation was hard-fought. Petitioner had to defend against a motion to dismiss. After defeating the motion to dismiss, petitioner had to contend with respondent's many arguments in opposition to the petition. There were several court appearances. Respondent complains that petitioner had three lawyers present at a number of court appearances. The court agrees that two lawyers were probably sufficient at three of those

appearances and subtracts \$780 for one attorney's fees at conferences and oral arguments on June 6, June 28 and October 10, 2012. The court finds the remainder of the fees sought by petitioner are justified by petitioner's submissions in support of its fee application and the court's observation of the work performed.

CONCLUSION

For the reasons stated it is adjudged that petitioner is entitled to \$49,276.94 in attorneys' fees. This constitutes the decision and judgment of the court.

DATED: June 11, 2013



A.J.S.C.

HON. PETER H. MOULTON
SUPREME COURT JUSTICE