

MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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In the Matter of the petition of MELVIN J.
KALISH,

Petitioner,

Index No.: 5678/09

Motion Dated:
April 21, 2009

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

Cal. No.: 15

-against-

M #1

City of New York, Department of Environmental
Protection,

Respondent.

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In this Article 78 proceeding, petitioner seeks a judgment compelling respondent New York City Department of Environmental Protection to provide the documents requested in petitioner's March 14, 2008 Freedom of Information Law ("FOIL") request. Petitioner also seeks to recover attorney's fees and costs.

Petitioner is an attorney who represents clients who perform work or furnish services related to the asbestos abatement field. Petitioner asserts that some of his clients believe that respondent New York City Department of Environmental Protection have subjected them to selective enforcement of governmental rules and regulations relating to asbestos abatement. As a result, on March 14, 2008, petitioner served a

FOIL request upon respondent, in which he sought copies of ACP-7 forms filed with the respondent and Inspection Reports prepared by Inspectors for the respondent for the period December 1, 2007 - February 29, 2008 for all boroughs in New York City except Staten Island. According to the certified mail return receipt, this request was received by the respondent on March 17, 2008. On May 5, 2008, petitioner wrote to respondent regarding the status of the FOIL request. By letter dated May 9, 2008, respondent acknowledged the May 5, 2008 FOIL request and stated that the request "will be handled as expeditiously as possible. You are advised, however, that because of the large increase in the volume of such requests, your response may be delayed." Thereafter, by letter dated September 22, 2008, petitioner again inquired as to the status of the FOIL request. When no response was forthcoming, petitioner, by letter to the Acting Commissioner of respondent, dated December 4, 2008, protested the respondent's failure to furnish the requested documents and again sought the documents.

Respondent, by letter dated February 2, 2009, notified the petitioner that it had located the requested documents. Noting the large number of pages that required photocopying, respondent requested payment for the copies prior to sending out the requested documents. In a letter to respondent dated February 4, 2009, petitioner stated that it was enclosing the sum of \$407.50

for the photocopying of the documents it sought. Petitioner maintains that it sent a copy of the check to respondent via facsimile and the original check via mail. On March 9, 2009, when petitioner still had not received the documents, he was advised by respondent that it never received the original check. On April 8, 2009, respondent agreed to make all responsive records available for inspection or to provide copies to petitioner upon payment for the copying of the records. In this letter, respondent again informed petitioner that it was unable to locate the \$407.50 check petitioner allegedly mailed.

FOIL was enacted to provide individuals with the means to access governmental records, to assure accountability and to thwart secrecy. (Public Officers Law § 84; Data Tree, LLC v Romaine, 9 NY3d 454, 493 [2007]; Matter of Buffalo News, Inc. v Buffalo Enter. Dev. Corp., 84 NY2d 488, 492 [1994].) Under FOIL, an agency "must make available for public inspection and copying all records" unless the requested documents fall within a specified exemption in the Public Officers Law. (see Public Officers Law §§ 87[2], 89[3]; Data Tree, LLC v Romaine, 9 NY2d at 494.) The exemptions under FOIL are to be narrowly construed, and the agency seeking to prevent disclosure has the burden of demonstrating the application of a particular exemption. (Matter of Hanig v State Dept. Of Motor Vehicles, 79 NY2d 106, 109 [1992]; Verizon New York, Inc. v Bradbury, 40 AD3d 1113, 1114

[2007].)

Section 89(3) of The Public Officers Law provides that the entities subject to the statute, "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 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..." The statute further provides that "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity ... 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."

The court finds that respondent's contention that the petition is improper because the petitioner failed to exhaust his administrative remedies is without merit. Respondent did not act on petitioner's original FOIL request within five days as required by Section 89 of the Public Officers Law. Section 89(4)(a) of the Public Officers Law provides that "[f]ailure by an agency to conform to the provisions" of section 89(3) of the Public Officers Law shall constitute a denial. Thus, by not

acting within the requisite time period, respondent is deemed to have denied the FOIL request. Moreover, when respondent finally did respond to petitioner's request, on May 9, 2008, it did not provide an approximate date as to when the request would be granted or denied as required by the statute. (Rhino Assets, LLC v New York City Dept. for Aging, 31 AD3d 292, 294 [2006].) It merely stated that the request would be "handled as expeditiously as possible." Petitioner's letter to respondent's Acting Commissioner, Steve Lawitts, effectively amounted to an appeal even if Lawitts was not the correct appeals officer. (see Johnson Newspaper Corp. v Stainkamp, 94 AD2d 825, 826 [1983].)

With respect to the fees requested by respondent for copying the documents, such fees are proper, provided they do not exceed 25 cents per photocopy. (Public Officers Law § 87[1][b][iii].) While petitioner maintains that it mailed a payment to respondent for the photocopies, he has not annexed any proof of service of the letter with the original check. He has merely submitted a copy of the check which was faxed to the respondent. There is also no indication that this check was ever cashed. Thus, petitioner shall furnish payment for the photocopies to respondent.

With respect to the branch of the petition for attorney's fees, Public Officers Law § 89(4) (c) provides that the court may assess attorney's fees and costs reasonably incurred where "such

person has reasonably prevailed, when i. The agency has no reasonable basis for denying access; or ii. The agency failed to respond to a request or appeal within the statutory time." A party has "substantially prevailed" in a FOIL proceeding where the initiation of the proceeding brought about the release of the requested documents. (see Friedland v Maloney, 148 AD2d 814, 815 [1989].) However, even where all the requirements are met, an award of counsel fees is still discretionary with the court. (Urac Corp. v Public Serv. Commn. Of the State of New York, 223 AD2d 906, 907 [1996]; Powhida v City of Albany, 147 AD2d 236, 239 [1989].) Under the circumstances presented herein, the court finds that an award of attorney's fees and costs is not warranted. The letter from respondent dated February 2, 2009 indicates that respondent, although belatedly, was ready to make the documents sought available to petitioner. In addition, as noted above, there is no proof that petitioner made payment for the photocopies of the documents, and, thus, respondent may have had a reasonable basis for not furnishing the documents.

Accordingly, the petition is granted to the extent that respondent the New York City Department of Environmental Protection shall, within 20 days after service of a copy of the Judgment to be entered hereon, along with payment for photocopies in the amount of \$407.50, furnish to petitioner, all ACP-7 forms filed with it and Inspection Reports prepared by Inspectors,

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during the period December 1, 2007 - February 29, 2008, for all boroughs in New York City except Staten Island.

The branch of the petition for costs and attorney's fees is denied.

Settle Judgment.

Dated: June 30, 2009

AUGUSTUS C. AGATE, J.S.C.