

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

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT

INDEX NO. 150127/20

- v -

MOT. DATE

MOT. SEQ. NO. 001

METROPOLITAN TRANSPORTATION AUTHORITY et al.

The following papers were read on this motion to/for ARTICLE 78

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). _____

Replying Affidavits

NYSCEF DOC No(s). _____

This Article 78 proceeding arises from a Freedom of Information Law, Public Off. Law §§ 89, et seq. ("FOIL") request. Respondents New York City Transit Authority and Metropolitan Transportation Authority ("Transit") have answered the petition.

Since this proceeding was filed, Transit has belatedly responded to petitioner's requests, invoked FOIL exemptions as to some responsive documents and opposes petitioner's request for attorney's fees and costs. On reply, petitioner now seeks an order directing Transit to provide it with a "detailed and particularized" justification for its invocation of FOIL exemptions and reiterates its requests for reasonable attorney's fees and costs.


Agency records "are presumptively open for public inspection and copying. The court must review the Decision and determine whether it "was affected by an error of law" pursuant to CPLR § 7803[3] (see *Mulgrew v. Board of Educ. of City School Dist. of City of New York*; 87 AD3d 506 [1st Dept 2011]). In an Article 78 proceeding challenging a FOIL denial, the agency bears the burden of proving that the target records are exempt from disclosure (*Mulgrew* at 702).

There can be no dispute as to whether petitioner is entitled to a detailed and particularized basis for any claimed exemption Transit asserts with respect to disclosure. Accordingly, the petition must be granted in that respect.

As for the request for attorney's fees and costs, pursuant to Public Officers Law § 89(4)(c), the court:

- (i) may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the

Dated: May 21, 2020



HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

provisions of this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time; and

(ii) shall 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 and the court finds that the agency had no reasonable basis for denying access.

The threat of an award for attorney's fees and costs provides a "clear deterrent to unreasonable delays and denials of access and thereby encourage[s] every unit of government to make a good faith effort to comply with the requirements of FOIL" (*Matter of LTTR Home Care, LLC v. City of Mount Vernon*, 179 AD3d 798 [2d Dept 2020]). While Transit offers an explanation for its belated responses, to wit, that "the FOIL Officer assigned had a difficult time locating record custodians with responsive records because of the nature of the Petitioner's request", there can be no dispute that Transit failed to respond to petitioner's request within the statutory time. Further, Transit admits that petitioner's appeal letter was never responded to because "it was never received by the head, chief executive or governing body of NYCTA, or the person designated by NYCTA to hear appeals..." The former excuse is unsubstantiated and the latter is insufficient to justify denial of petitioner's application for attorney's fees and costs on this record.

Moreover, the Court of Appeals has made it clear that a petitioner can be deemed to have substantially prevailed when an agency failed to provide any disclosure in response to a FOIL request prior to the commencement of an action, but records were thereafter provided (*Matter of Madeiros v New York State Educ. Dept.* 30 NY3d 67, 79 [2017]). Indeed, without commencing this proceeding, petitioner's FOIL request would likely have gone unanswered. Such a situation warrants the relief petitioner seeks.

Accordingly, it is hereby **ORDERED** that the petition is granted to the extent that respondents are directed to provide petitioner with a "detailed and particularized" justification for its invocation of FOIL exemptions in connection with petitioner's FOIL request; and it is further

ORDERED that the issue of what reasonable attorney's fees and other litigation costs petitioner incurred in connection with commencing and litigating this proceeding is hereby referred to a special referee to hear and report; and it is further

ORDERED that petitioner shall, within 60 days from entry of this decision/order, serve a copy of this order with notice of entry, together with a complete Information Sheet¹, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

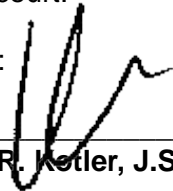
ORDERED that a final determination on petitioner's request for attorney's fees and costs is held in abeyance pending a motion to confirm the referee's report; and it is further

ORDERED that the balance of the petition is denied as moot.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: May 21, 2020
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.

¹ Copies are available in Room 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh (under the "References" section of the "Courthouse Procedures link).