

Focus on FOIL: Attorney Fees to the Self-Represented Attorney

By Cory Morris

Recently, the Second Department upheld an award of \$27,000 in attorney fees to Barry S. Gedan. He did not have to go to the Second Department to obtain this award. For the administrative work and Article 78, Barry S. Gedan was awarded \$27,000 in attorney fees. Barry S. Gedan was the attorney who made the FOIL request.

In *Matter of Gedan v. Town of Mamaroneck*, 2019 N.Y. Slip Op 1759 (2d Dep't. 2019), the Supreme Court, Westchester County (Robert A. Neary, J.) issued a fee award of \$27,000 dated September 16, 2016. The attorney was denied records and sued in state court. The award was given because of the Town of Mamaroneck's failure to furnish records. Respondents ignore this law, that "[c]ontrary to the Town's contention, since Gedan is an attorney, his self-representation did not preclude an award of attorney's fees under Public Officers Law § 89(4)(c)." *Id.* (citations omitted). Respondents further endeavor to make such fee award as difficult as possible for Petitioner and the court.

In *Matter of Kohler-Hausmann v. New York City Police Dep't.*, 133 A.D.3d 437 (1st Dep't 2015), Petitioner was awarded attorney fees and costs. In *Matter of Kohler-Hausmann v. New York City Police Dep't.*, 133 A.D.3d 437(1st Dep't 2015) the attorney's fees and costs were awarded because of a constructive denial, where the New York City Police Department simply failed to respond months after the deadline imposed. The First Department stated that "[t]he attorney petitioner's self-representation does not preclude an award of attorneys' fees. Other similarly worded statutes have been interpreted to authorize an award of attorneys' fees to a prevailing litigant who represented himself or herself or had the benefit of free legal services." *Id.* (citations omitted). Respondents ignore this law and continue to ask This Honorable Court to do the same. See Resp. MOL P. ___ - ___; see also *Maplewood Mgmt., Inc. v. Best*, 143 A.D.2d 978 (2d Dep't 1988).

Next time you are asked about New York's Freedom of Information Law (FOIL), remember that attorneys can receive an award of reasonable attorney fees for representation in an Article 78 proceeding. Adopting previous Committee on Open Government (COOG) recommendations, Governor Cuomo recently signed a bill that removes the discretion of trial court judges in awarding attorney fees against governmental agencies that fail to comply with FOIL in certain circumstances.

New York's Freedom of Information Law

FOIL mandates that within five (5) business days of receiving a request for records, an agency shall either (1) make the record(s) available to the requestor; (2) deny the request in writing; or (3) furnish a written acknowledgment of the receipt of the request with a statement setting forth the approximate date when the request will be granted

or denied. Public Officers Law Section 89(4)(c) allows for an award of reasonable attorney fees and other litigation costs when the moving party has substantially prevailed in its Article 78 petition. This fee shifting provision (*see, e.g.*, 42 U.S.C. § 1988) should, at its best, serve as a strong disincentive for agencies to deny access to such records and, at its worst, become a new way for legal professionals to obtain awards of reasonable attorney fees in testing agencies that routinely fail to follow the Public Officers Law.

FOIL is a statutory civil right. "The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy." An agency's records "are presumptively open to public inspection, without regard to need or purpose of the applicant." When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search. The award of attorney fees in a FOIL litigation became necessary decades ago. The provision for attorney fees was added to FOIL in 1982, based upon the Legislature's recognition that persons denied access to documents must engage in costly litigation to obtain them and that "[c]ertain agencies have adopted a 'sue us' attitude in relation to providing access to public records," thereby violating the Legislature's intent in enacting FOIL to foster open government. The provision was amended shortly thereafter to add that the failure



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to respond within the statutory time would become an alternative basis for an award of counsel fees “to create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL.”

Prior to the New York Court of Appeals decision in the *Beechwood* case, FOIL’s fee-shifting provision provided that “a court may award reasonable counsel fees and litigation costs to a party that ‘substantially prevailed’ in the proceeding if the court finds that (1) ‘the record involved was, in fact, of clearly significant interest to the general public,’ and (2) ‘the agency lacked a reasonable basis in law for withholding the record.’” (citing Public Officers Law § 89(4)(c)). The legislative history to the 2006 amendment of Section 89(4)(c) states that “[t]his bill strengthens the enforcement of such a right by discouraging agencies from denying public access to records by guaranteeing the award of attorneys’ fees when agencies fail to respond in a timely fashion or deny access without any real justification.” Now, the only showing that must be made for an award of reasonable attorney’s fees under FOIL (Public Officers Law § 89(4)(c)) is that the petitioner substantially prevailed and that “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.” Twelve years after *Beechwood*, FOIL’s fee-shifting provision now removes the discretion of the trial judge, mandating an award of fees against governmental agencies when the required showing is made. Paragraph (c) of subdivision 4 of section 89 of the Public Officers Law, as amended by chapter 492 of the laws of 2006, now reads as follows:

The court in such a proceeding: (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 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.

Attorney Fees – A New Incentive

This Public Officers Law amendment should encourage lawyers to utilize FOIL requests regularly in their practice, perhaps on behalf of the law firm itself. While an award of attorney fees is not authorized under FOIL for a pro se petitioner who has not actually “incurred the re-

sponsibility to pay attorney’s fees,” New York courts have consistently upheld granting of attorney fees for organizations representing themselves, including those utilizing in-house counsel. Like the Legal Aid Society (a Third Department case), in *The Law Offices of Adam D. Perlmutter, P.C. v. N.Y.C. Police Dep’t*, Index No. 100220/2013 (N.Y. Sup. Ct. Oct. 17, 2013) (“Perlmutter”), a law firm represented itself *pro se*. On review by the New York County Supreme Court, Petitioner Perlmutter’s request for attorney fees was granted because the New York City Police Department’s responses were not timely, as required by Public Officers Law § 89(4)(c). This decision was upheld on appeal by the First Department.

When the Supreme Court determines that one of FOIL’s requirements for awarding attorney fees has not been met, the appellate court will review whether the lower court erred as a matter of law in reaching that conclusion. An agency may not shield itself from liability after the initiation of an Article 78 proceeding by releasing the documents sought. Although the request for documents itself will become moot in such a circumstance, the request for attorney fees (which must be made part of the prayer for relief) must still be determined by the court. Attorneys commencing FOIL proceedings will usually find themselves in one of two scenarios for billing purposes: (1) an action is commenced under FOIL in aid of an existing client, in which the only compensation for the separate action under FOIL will come in the event you receive attorney fees (e.g., a plaintiff’s attorney utilizes FOIL against a defendant municipality to seek documents that may not be forthcoming in discovery, and then is required to commence an Article 78 to compel disclosure of those documents); and (2) the attorney is retained specifically to commence litigation under FOIL against a government agency. In both situations, it is important for attorneys to keep detailed billing. If attorney’s fees are granted, courts will have no trouble cutting billing for hours that are not properly supported. Additionally, rates must be consistent with the locality and not all work on the proceeding is compensable. Lastly, in that same vein, either an attorney or litigant would be best served by utilizing experienced counsel in commencing an Article 78 litigation as the award of fees requires a FOIL violation.

On appeal, the reviewing court will determine whether the Supreme Court’s decision was an abuse of discretion as well as the initial denial by the Respondent(s). Indeed, usually the courts will not grant an award of fees if Respondent(s) had a reasonable basis for the denial or had a significant interest of which it sought to protect; however, the court should grant an award of fees if Respondents fail to respond to a FOIL request, did not have a reasonable basis for the denial, or failed to respond in a reasonable time.

This change in the law solidifies and safeguards this well recognized civil right and encourages otherwise hesi-

tant attorneys who should no longer worry about testing the discretion of a Supreme Court judge should a case present itself. Thank you, Governor Cuomo.

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Endnotes

1. New York DOS, Committee on Open Government, *Annual Report to the Governor and State Legislature* (Dec. 2014); available at <http://www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf>.
2. Josefa Velasquez, *Cuomo Signs Attorney Fee FOIL Bill*, NYLJ (December 13, 2017), <https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/12/13/cuomo-signs-attorney-fee-foil-bill/>.
3. Public Officers Law § 89 (3)(a).
4. *Legal Aid Soc. v. New York State Dept. of Corrections and Community Supervision*, 105 A.D.3d 1120, 962 N.Y.S.2d 773 (3d Dep't. 2013).
5. *Matter of Alderson v. New York State Coll. of Agric. & Life Sciences at Cornell Univ.*, 4 N.Y.3d 225, 230, 792 N.Y.S.2d 370, 825 N.E.2d 585 (2005) (internal quotation marks and citation omitted).
6. Assembly Mem. in Support, at 1, Bill Jacket, L. 1982, ch. 73.
7. See L. 2006, ch. 492, § 1; Public Officers Law § 89(4) (c).
8. Senate Introducer's Mem. in Support, Bill Jacket, L. 2006, ch. 492, at 5.
9. 2005 Legis. Bill Hist. NY S.B. 7011.
10. NY Legis. 453 (2017), 2017 Sess. Law.

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