

Recent Trends in Attorney's Fees under FOIL

The frequency in which courts award attorney's fees under the Freedom of Information Law (FOIL), codified in New York's Public Officer's Law, has continued to grow. Although there are likely numerous reasons for this trend, this progression modifies the FOIL landscape. Practitioners in this field, and those who utilize FOIL as an ancillary to their practice, need to be mindful of the increased awards of attorney's fees, as there is now more of an incentive for compelling FOIL compliance via the commencement of an Article 78 proceeding, thereby increasing the likelihood of such litigation in the immediate future.

"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."¹ An agency's records "are presumptively open to public inspection, without regard to need or purpose of the applicant."² 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 provision for attorney's 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."³ The provision was amended shortly thereafter to add that the failure to respond within the statutory time would become an alternative basis for an award of counsel fees "to create a



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under the Freedom of Information Act (FOIA), which allows for attorney's fees in this scenario.⁴

The seminal case in this recent trend is *In re The Law Offices of Adam D. Perlmutter v. N.Y.C. Police Dept.*,⁵ issued by Judge Ling-Cohan in New York County Supreme Court. In that case, the same attorney who made the FOIL request also represented the law firm in the subsequent Article 78. After granting the petition, the court awarded the law firm reasonable attorney's fees. The court specifically noted that, the "respondents failed to supply case law in support of their argument that legal fees should be denied because petitioner law firm appeared in this proceeding pro se." The First Department subsequently affirmed the decision.

The First Department then expanded *In re The Law Offices of Adam D. Perlmutter* when it issued *Kohler-Hausmann v. N.Y.C. Police Dept.*,⁶ In *Kohler-Hausmann*, the First Department held that the "attorney petitioner's self-representation does not preclude an award of attorney's fees." Interestingly, this case represents a buck against New York courts following federal courts' interpretation of FOIA because FOIA does not permit self-represented attorneys to recoup attorney's fees.⁷ Practitioners should be mindful, however, that this decision has not

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. Furthermore, rates must be consistent with the locality and not all work on the proceeding is compensable.

The recent case of *Lee Enters., Inc. v. City of Glenn Falls*¹² provides an illustration of these issues. In *Lee Enters.*, the attorneys for the petitioner sought reimbursement of \$25,000 in fees (although it was claimed that over \$45,000 in fees were incurred). To support that request, the attorneys submitted billing entries for three attorneys: one partner and two associates. The two associates billed approximately \$39,000 at a rate of \$275.00 per hour, and the partner billed approximately \$4,000 at a rate of \$450.00 per hour. They also sought reimbursement for administrative fees, which included "Lexis Advance Fees." The respondent opposed the imposition of fees above the \$6,000 flat fee charged by petitioner's attorneys.

The *Lee Enters.* court began its analysis by outlining what constitutes reasonable compensation by noting: "the [C]ourt should consider 'the time commitment involved, the relative difficulty of the matter, the nature of the services provided, counsel's experience and the results obtained.'" The court then proceeded to reduce billing entries. Specifically, the court struck billing entries of the associates who repeatedly conferred with one another and the partner. The court found that "awarding fees for the identical services provided by [the associates] would be inequitable, as would awarding fees for the time spent by [the associates] in

Supporting the Demand for Attorney's Fees

The demand for attorney's fees is supported in one of three ways: (1) an affirmation and reply affirmation in support of attorney's fees submitted with the petition and reply; (2) an inquest; (3) an affirmation submitted in support of attorney's fees to the court after the court grants attorney's fees. Courts, even ones in the same county, will differ on which procedure they use. The standard practice is the latter two options.

There is no prohibition as to setting oneself up for reasonable attorney's fees under all three scenarios, which would require an attorney to include relevant billing information with the petition and reply. However, this procedure will oftentimes detract from the main issue of whether to grant disclosure and attorney's fees in the first place, because a dispute will then likely arise as to the amount of the fees and whether fees for certain work is even permissible.

Practitioners need to be mindful of the potential for attorney's fees at the very outset of any litigation. Oftentimes, strategy and case management for a matter will need to be altered depending on whether an award of reasonable attorney's fees is possible. As such, understanding when an award of attorney's fees is permitted and how such claims are made and appropriately supported are crucial elements to be made aware of at the outset of representation.

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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."⁴ The statute, in its current form, allows a court in its discretion to award "reasonable attorney's fees and other litigation costs reasonably incurred" when the petitioner has "substantially prevailed" and "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."⁵

Pro Se Representation and Attorney's Fees

Perhaps the most notable development concerning awards of attorney's fees under FOIL has do with courts awarding attorney's fees to law firms that appear pro se. This birth of case-law creates incentives for law firms to utilize FOIL as an additional tool in representing clients, and to oversee and manage FOIL requests. It further follows federal courts' interpretation

been followed by some courts.¹⁰

As of now, it appears that requests for attorney's fees should continue to be made through the law firm rather than through the individual attorney, until the *Kohler-Hausmann* decision picks up further support in the Second Department. The rationale in *In re The Law Offices of Adam D. Perlmutter* has been followed in courts in Nassau County,¹¹ providing the safer alternative of the two.

How and What to Bill

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 the attorney receives attorney's 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

learning about FOIL. Indeed, any such award would constitute a windfall for petitioners."

The *Lee Enters.* court then went on to strike all billing entries for one associate and scrutinized the entries for the other, noting that the billing entries for the other associate should be reduced for time spent "in researching and familiarizing herself with FOIL." Because the associate's bills were for large blocks of time—"typically ranging from 4 to 8 hours"—"and simply listed a variety of tasks performed during that time," the court found it impossible "to parse out the time spent on any particular task." As such, the court simply cut the associate's hours in half. The court did, however, uphold all the hours for the partner, but reduced his hourly rate to \$350.00, which was consistent with the locality. With respect to the Lexis fees, the court struck them because they are "not a separately taxable cost." Overall, the court awarded \$9,846.15 in fees, which is above the \$6,000 flat fee the attorneys charged their client.

1 *Alderson v. New York State Coll. of Agric. & Life Sciences at Cornell Univ.*, 4 N.Y.3d 225, 230 (2005).
 2 *Buffalo News v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488, 492 (1994).
 3 *New York State Defenders Ass'n v. New York State Police*, 87 A.D.3d 193, 195 n.2 (3d Dept. 2011) (quoting Assembly Mem. in Support, at 1, Bill Jacket, L. 1982, ch. 73).
 4 *New York Civil Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338 (3d Dept. 2011) (quoting Senate Introducer's Mem. in Support, Bill Jacket, L. 2006, ch. 492, at 5).
 5 Pub. Off. Law § 89(4)(c).
 6 *Village of Brockport v. Calandra*, 191 Misc.2d 718, 728 (Sup Ct, Monroe County 2002).
 7 2013 WL 6761440 (Sup Ct, N.Y. County 2013), *aff'd* 123 A.D.3d 500 (1st Dept. 2014).
 8 133 A.D.3d 437 (1st Dept. 2016).
 9 *Village of Brockport*, 191 Misc.2d at 728.
 10 See, e.g., *Jacobson v. Ithaca City Sch. Dist.*, 53 Misc.3d 1091, 1099 (Sup Ct., Tompkins County 2016) ("Petitioner is an attorney admitted to practice in New York who is self-represented in this proceeding. Accordingly, he is not entitled to an award of attorney's fees and costs, and his request therefor is denied.")
 11 *Guercio & Guercio, LLP v. Nassau University Medical Center*, Index No. 9251/2015 (Sup Ct, Nassau County 2015). Anthony Fasano, one of the authors of this article, was lead counsel for the law firm.
 12 *Lee Enterprises, Inc. v. City of Glen Falls*, 2017 WL 1333372 (Sup Ct, Warren County 2017) [hereinafter "*Lee Enters.*"].