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At a Special Term of the Albany County Supreme Court, held in and for the County of Albany, in the City of Albany, New York, on the 16th day of April 2012

PRESENT: HON. PATRICK J. McGRATH
JUSTICE OF THE SUPREME COURT

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
TJS NEW YORK, INC.

Petitioner,

DECISION AND ORDER
Index No. 3480-08

-against-

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and THOMAS H. MATTOX, as Commissioner of the New York State Department of Taxation and Finance,

Respondent.

APPEARANCES: LAW OFFICES OF BARRY LEIBOWICZ
For the Petitioner

HON. ERIC T. SCHNEIDERMAN
Attorney General for the State of New York
(Douglas J. Goglia, Esq., of Counsel)
Assistant Attorney General
For the Respondent

McGRATH, PATRICK J. J.S.C.

Following a CPLR Article 78 proceeding concerning a Freedom of Information Law (FOIL) request, counsel for the petitioner seeks attorneys' fees and costs pursuant to Public Officers Law §89(4)(c). Respondent opposes the motion, and the petitioner has submitted a Reply.

Petitioner made a FOIL request for records in connection with a sales tax audit performed

by respondent Department of Taxation and Finance (hereinafter "the Department"). When Supreme Court (Sackett, J.) ordered the Department to provide petitioner with copies of its records in an electronic format, the Department provided certain data that could not be viewed without a copy of the Department's Audit Framework Extension ("AFE") software. In a letter dated April 22, 2009, Deborah Liebman, Records Appeals Officer for the Department, stated that her staff "researched this particular point and located two advisory opinions issued by the Committee on Open Government that supported the conclusion that providing the AFE program in this instant is required by the Freedom of Information Law. Therefore, I have instructed the Records Access Office to obtain a copy of the AFE program and forward it to you." However, on May 22, 2009, respondents advised petitioner it could not provide the software due to licensing restrictions. Petitioner's counsel advised respondent that he had a licensed version of FoxPro, but if this license was insufficient, he would be happy to contact the vendor and attempt to obtain the appropriate license. Respondent then said it would provide petitioner with "screen shots" from the software, but did not address the licensing issue further. Petitioner advised that this would not "come close to approximating the useful display of the date" in the AFE system. Respondents then offered to provide a "run time" version of the software, but then later claimed that providing this version would "jeopardize DTF's capacity to guarantee the security of it information technology assets." Respondent offered petitioner the chance to come to its Albany office, where he could access an agency computer equipped with AFE, which would be connected to an overhead projector. Counsel could copy any documents but could not print documents. Petitioner's attorney advised that this would not allow him to actually view his client's data file in the manner in which it was intended to be read, and that he needed access to live (current) data in the system to determine if any changes had been made to petitioner's records. Respondent refused to disclose the software.

Petitioner first moved for contempt, but then converted the motion into one to compel production of the software program in order to install it on his computer and view the electronic files. Supreme Court denied petitioner's motion, concluding that the software program was exempt from disclosure pursuant to Public Officers Law § 87 (2)(i). Petitioner moved to renew/reargue, which was again denied. Petitioner appealed the denial of the motion to compel and the motion to renew to the Third Department.

In Matter of TJS of N.Y., Inc. v. New York State Dept. of Taxation & Fin., 89 A.D.3d 239 (3d Dept. 2011), the Court noted that the Department was relying on advisory opinions from the Committee on Open Government (see Comm on Open Govt FOIL-AO-12366 [2000]; *see also* Comm on Open Govt FOIL-AO-15407 [2005]) to support its position that the software did not constitute a record because it contained no information, and instead, characterized it as a mere "delivery system or data warehouse." Petitioner disputed this argument, citing the Department's own description of the software as well as advisory opinions in which the Committee on Open Government concludes that software can constitute a record under FOIL (see Comm on Open Govt FOIL-AO-12920 [2001]; Comm on Open Govt FOIL-AO Letter from Robert J. Freeman to George F. Supan [June 24, 1998]).

The Court relied on the description of the software submitted by the Department and the

reasoning and analysis contained in the advisory opinions relied on by petitioner to determine that the software at issue contained information and constituted a record for FOIL purposes. Specifically, the Court cited an affidavit submitted by the Department from an auditor involved in the design and development of the software program, as well as the attached training manual for the software, which established that the software was the means for conducting an audit and that, based on data entered by an auditor, the program does reconciliations, creates letters, produces forms, determines taxes due or refunds owed and creates a comprehensive audit report.

The Court also noted that the June 1998 advisory opinion cited by petitioner concluded that software that enables an agency to manipulate data is a record pursuant to FOIL in the same way that a written manual describing a series of procedures would be subject to disclosure under FOIL (see Comm on Open Govt FOIL-AO Letter from Robert J. Freeman to George F. Supan [June 24, 1998]; see also Comm on Open Govt FOIL-AO-18079 [2010]). Further, that the 2001 advisory opinion references a definition of software as "a series of instructions designed to produce information that can be seen on a screen, printed, stored, transferred and transmitted" and concludes that it is a record subject to FOIL (see Comm on Open Govt FOIL-AO-12920 [2001]).

Relying on these opinions and the Department's own description of the capabilities of the program, the Court concluded that the software was more than just a delivery system or data warehouse and, instead, fall within FOIL's broad definition of a record subject to disclosure.

The Court then considered whether the cited statutory exemption applies. Relying upon Public Officers Law § 87 (2) (i), the Department argued that the security of its software program would be jeopardized by disclosure because it could be used to generate false letters or forms which, if sent to taxpayers, could lead them to disclose confidential information. The Court found that neither the plain language of the exemption, its legislative history, nor the relevant advisory opinions supported this position. The Court noted that POL § 87 (2) (i) exempts material that, "if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures." The Court held that the exemption is concerned with ensuring the security of information technology assets, and that the expressed legislative intent was to protect against the risks of electronic attack, including damage to the assets themselves, interference with the performance of agency computers and programs, and the unauthorized access to an agency's electronic data. The Court noted that the Department failed to raise such concerns, and that its only argument, that the uses to which the software are put might be illegal or fraudulent, was an "overly broad interpretation of the exemption." The Court noted that this was "especially so because an applicant's motive for seeking a record is generally irrelevant in determining whether documents are available under FOIL."

The Court concluded that the Department failed to meet its burden of demonstrating the applicability of the exemption. Finally, the Court "remit[ted] petitioner's request for counsel fees to Supreme Court for determination."

In support of his motion, petitioner's attorney submits an affidavit listing the numerous accomplishments of his thirty-eight year legal career, which include landmark decisions in the Court of Appeals and federal court, extensive pro bono service, and numerous pubications. He is also a professor at Queens College, and lectures for organizations including Accountants' Continuing Education, New York Society of CPA's, the IRS, and various universities. He states that the total number of hours expended by the attorneys, associates, and professional support staff on this case are 304.5 hours, which was determined from contemporaneous daily time records provided to the Court for review. He states that the hours billed are for almost five years of FOIL litigation that culminated with the above decision from the Appellate Division. The attorneys fees are $109,044.75, consisting of $94,539.75 for attorneys' fees and $14,505 for non-attorneys' time. He also seeks $6,056.80 in unreimbursed expenses in connection with the litigation.

Counsel argues that Petitioner substantially prevailed on its Article 78 petition, and that there was no reasonable basis for refusing to disclose responsive records. Counsel argues that an award is in line with the FOIL's fee-shifting provision, which furthers the goal of open government.. In Matter of New York Civ. Liberties Union v. City of Saratoga Springs, 87 A.D.3d 336 (3d Dept. 2011) (noting that the "counsel fee provision was first added to FOIL...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.").

Counsel argues that his fee request and hourly rate are both reasonable. He notes that this was a highly technical case which required a specialized practitioner in tax law. He also states that his rates do not deviate from market rates in his community. His law firm is located on Long Island, but he was confined to bring this proceeding in Albany as it was an Article 78 petition against a state agency. He argues that his rates are comparable to other attorneys with similar experience in the New York City metropolitan area.

Respondents oppose the motion. Respondents claims that in order to receive counsels fees, Public Officers Law requires petitioner to establish that it 1) substantially prevailed on its petition; 2) that the record requested was clearly of significant interest to the general public; and 3) the agency lacked a reasonable basis in law for withholding the record. POL 89(4) (c). First, respondents claim that petitioner has failed to address whether the record was clearly significant interest to the general public. Further, that Judge Sackett's decision on the underlying Article 78 denied attorneys fees based on petitioner's failure to establish that the record was clearly significant interest to the general public, which respondents argue is the law of the case.

As noted by the petitioner, this requirement was deleted from the statute (see L 2006, ch 492, § 1). Prior to the amendment, if an agency stonewalled and denied access without justification, and if the records were important only to the person requesting them, attorney's fees could not be awarded because the records would not have been significant to the public. However, the statute was amended and the courts have been given expanded authority to award attorney's fees when (1) the person denied access substantially prevailed and (2) the court finds either that (a) the agency had no

reasonable basis for denying access or (b) the agency failed to respond to a request in a timely manner as specified in FOIL. POL 89(4) (c).

Next, respondents claim that they had a reasonable basis to deny access to the software. Respondents cite case law wherein courts have held that a denial may be reasonable even if the records are ultimately found not to be exempt. Respondents also argue that there was a paucity of case law addressing the exception set forth in POL 87(2)(i), and that the few cases concerning it did not expound upon its scope. Respondent also argues that its position was supported by the advisory opinions by the Committee on Open Government, and that its security concerns were sustained on two occasions by Supreme Court.

Respondents also argue that the fee application is unreasonable, noting that petitioner is seeking not only the costs incurred in litigating the FOIL dispute, but the entirety of the CPLR Article 78 proceeding commenced on April 25, 2008. Respondents argue that the application should only be considered as of December 16, 2010, when petitioner's counsel began his effort to obtain disclosure of the AFE software by preparing a motion to compel. Respondent argues that after this date, "many" of the services provided by petitioner's counsel were unnecessary, unproductive or duplicative, however, Respondents only identify approximately four (4) such hours out of a total of over 300.

Finally, respondents argue that the rates charged by Mr. Liebowicz ($500-$595/hour) and associates ($250-$340) are unreasonable. Respondents argues if fees are awarded, they should be adjusted to a more reasonable rate.

Petitioner replies that the determinative date for evaluating whether an agency's withholding was legally reasonable is the date the administrative appeals remedies are exhausted, and no later than the date the Article 78 was commenced. Banchs v. Coughlin, 168 A.D.2d 711 (3d Dept. 1990).

Discussion

As a threshold matter, the Court disagrees with petitioner's position that when the Appellate Division remitted the matter for a "determination" of counsels fees, this amounted to direction to award counsel's fees. Even if all of the statutory requirements are met, however, an award of counsel fees still lies within the sound discretion of the trial court. Matter of Grace v Chenango County, 256 A.D.2d 890, 891-92 (1998); Matter of Corvetti v Town of Lake Pleasant, 239 A.D.2d 841, 843 (1997). Therefore, the Court finds that the matter was remitted to determine whether an award is appropriate, and if so, determine the amount. As such, the Court will first examine whether the statutory requirements have been met here.

There is no dispute that the petitioner prevailed on its petition. Therefore, the only point in dispute by the respondents is whether they had a reasonable basis to deny access to the software. In its opinion in this case, the Third Department relied on an affidavit submitted by Department auditor Michael Rubinstein, who was involved in the design and development of the software, as well as a

training manual for the software, which established that the software was the means for conducting an audit and that, based on data entered by an auditor, the program does reconciliations, creates letters, produces forms, determines taxes due or refunds owed and creates a comprehensive audit report. Based on respondents' own admissions, it was unreasonable to withhold the records based on the argument that it was merely a "delivery system."

Counsel for the petitioner also provides this Court with a letter from the Department's Records Appeals Officer which concedes that the software is a record. While respondent argues that it "made every effort to satisfy petitioner's myriad objections", the record reveals that respondents came up with new reasons to evade disclosure. Respondent relied on opinions from the Committee on Open Government, but ignored the more relevant opinions cited by their own Records Appeals Officer.

The Court also agrees with petitioner's counsel that the lack of case law concerning POL 87(2)(I) is not a reasonable basis to deny disclosure. In order to ensure that the public has maximum access to government documents, the exemptions to FOIL must be narrowly construed. Matter of John H. v. Goord, 27 A.D.3d 798 (3d Dept 2006); Matter of Beyah v Goord, 309 A.D.2d 1049, (3d Dept 2003). "If a FOIL request is denied, the agency 'must show that the requested information falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access'." New York State Rifle and Pistol Assoc. v. Kelly, 55 A.D.3d 222, 224-25 (1st Dept. 2008); Matter of Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 462-63 (2007). Despite the lack of case law, the Third Department relied upon readily available sources, such as the statute ("on its face"), its legislative history, and other advisory opinions to determine that the respondents' interpretation of the exemption was unreasonable. As noted by the petitioner, there was nothing preventing the respondents from looking at these same sources.

Further, the relevant advisory opinions cited by the petitioner (as well as counsel for respondent) were from 1998 and 2001. Thus, this is not a situation where Petitioner sought adjudication of novel legal issues or where their lack of legal basis became apparent only upon judicial analysis. *Compare* Inscho v. Tioga County Legislature, 2 Misc.3d 230, 232 (Sup. Ct., Cortland County, 2003).

The Court has also considered Judge Sackett's original decision on the FOIL request, dated August 11, 2008, which details the respondents' lengthy and unnecessary delay in producing the requested information in electronic format, based on unsupported claims of exemption.

The Third Department and New York Court of Appeals have issued a series of decisions over the past year that have repeatedly overturned lower court opinions, and in some cases awarded attorney's fees. These cases include: In re Hearst Corporation, 88 A.D.3d 1130 (3d Dept. 2011) (City of Albany settled for $70,000 after Third Department found the city violated FOIL by releasing records only after litigation was commenced); In re New York Civil Liberties, 87 A.D.3d 336 (3d Dept. 2011) (trial court's decision denying attorney's fees to be an "abuse of discretion" where petitioner was able to satisfy discretionary factors in statute); In re New York State Defenders, 87

A.D.3d 193 (3d Dept. 2011) (Court ordered award of attorney's fees stating, an agency may not "forestall an award of counsel fees simply by releasing the requested document[s] . . ."); In re SCSPCA, 18 N.Y.3d 42 (2011) (Court of Appeals affirmed Third Department decision overturning dismissal of petition where State Education Department wrongfully withheld a record because portions of the record may have contained personal information; prevailing attorney has estimated attorney's fees of over $100,000). In SCSPCA, the Court stated, "[w]e are at a loss to understand why this case has been litigated. It seems that an agency sensitive to its FOIL obligations could have furnished petitioner a redacted list with a few hours effort, and at negligible cost. Instead, lawyers for both sides have submitted briefs and argued the case in three courts, demanding the attention of 13 judges, generating four judicial opinions and resulting in a delay in disclosure of almost four years. It is our hope that the Department, and other agencies of government, will generally comply with their FOIL obligations in a more efficient way." It is apparent that appellate courts are becoming increasingly frustrated with failures to comply with FOIL, and are more willing to impose attorney's fees as a result.

Here, the Court finds that the petitioner has substantially prevailed and the agency lacked a reasonable basis in law for withholding the record. After full consideration of this matter and the positions of the litigants, this Court finds that in its discretion it is appropriate to award counsel fees and costs.

With respect to the hours billed, the Court finds that they are reasonable and well documented. Further, the Court agrees with petitioner that he could not have prosecuted this action in any venue besides Albany. CPLR 7804(b). He is a downstate attorney, where rates are simply higher. He should not be punished for taking an Article 78 case outside of his immediate area. The Court also finds that his extensive and specialized experience justifies his fees.

Accordingly, the Court grants the motion for counsel's fees in the amount of $109,044.75, consisting of $94,539.75 for attorneys' fees as well as $6,056.80 in costs and disbursements.

This shall constitute the Decision, Order and Judgment of the Court. This Decision, Order and Judgment is being returned to the attorney for the respondent. All original supporting documentation is being filed with the County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry and notice of entry.

SO ORDERED AND ADJUDGED.
ENTER.

Dated: June 19, 2012
Albany, New York

PATRICK J. McGRATH
Supreme Court Justice

Papers Considered:

1. Notice of Motion, dated February 22, 2012; Affirmation, Barry Leibowicz, Esq., dated February 21, 2012; annexed Exhibits A-E; Memorandum of Law, dated February 21, 2012.
2. Memorandum of Law in Opposition to Petitioner's Request for Attorneys Fees and Litigation Costs, dated March 15, 2012, with annexed Exhibits.
3. Reply Memorandum of Law, dated April 3, 2012; annexed Exhibits A-E.