

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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GANNETT CO., INC. d/b/a DEMOCRAT &
CHRONICLE

Petitioner,

DECISION & ORDER
INDEX NO. 60904/2022

-against-

CITY OF MOUNT VERNON POLICE DEPARTMENT,
GLENN SCOTT, in his official capacity as Commissioner
of Public Safety of the Mount Vernon Police Department,
MARCEL OLIFIERS, in his official capacity as Chief of
the Mount Vernon Police Department, CITY OF MOUNT
VERNON, and BRIAN G. JOHNSON, in his official
capacity as City of Mount Vernon Corporation Counsel

Respondents.

For a Judgment Pursuant to Article 78 of the N.Y. Civil Practice
Law and Rules

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FUFIDIO, J.

This is a proceeding commenced by the Petitioner, a newspaper, which, after the repeal of Civil Rights Law section 50-a (hereinafter 50-a) on June 12, 2020, filed FOIL requests with various police departments throughout New York State in order to gain access to the individual department's police officer disciplinary files. One of the departments that they filed a FOIL request with was the City of Mount Vernon, New York in which on June 27, 2020 they sought, *inter alia*, "All materials and records...disclos(ing) all allegations of misconduct made and all disciplinary proceedings taken against any officer, employee, or representative of this policing agency...that reference or utilize misconduct allegations or disciplinary materials of any sort" for the period of time between January 1, 1970 and June 15, 2020. The Petitioner did not receive a response from the Respondents so they followed up with them on March 29, 2021 and continued to do so bi-weekly. After receiving no response to the repeated follow up inquiries, the Petitioner retained counsel who, on May 7, 2021 attempted to contact the Mount Vernon Police Department to find out the status of the FOIL request. The City finally responded with an assurance that their goal was to complete the FOIL request within 30 days of their May 14, 2021 response. There was no response after that letter and no further compliance with FOIL. The Petitioner sent another letter on November 19, 2021 informing the Respondents that if there was no FOIL response from them by December 1, 2021 that they would consider the initial FOIL request as constructively denied. By December 1, 2021, the Petitioner still had not received a

response to their request and by January 12, 2022 they had appealed the denial of their initial FOIL request. The Petitioner still received no communication from the Respondents and had not received one as of the filing of their petition on August 5, 2022. The Petitioner commenced this action seeking an order of the Court, “directing Respondents to provide Petitioner with immediate access to all records responsive to Petitioner’s FOIL requests dated June 27, 2020” and “awarding Petitioner costs, disbursements and attorney’s fees....” NYSCEF documents 1-29 were considered and after consideration, the Court finds as follows:

Public Officer Law section 84 et. seq. known as the Freedom of Information Law (FOIL) legislates the State’s commitment to open government and it is a tool for all citizens to obtain information concerning the activities of state governmental agencies. FOIL states that all records are presumptively open to inspection unless they fall within one of the enumerated exemptions and the exemptions are to be narrowly construed as to ensure maximum access to information (*Matter of Farberman & Sons v New York City Health and Hosps. Corp.*, 62 NY2d 75 [1984]). In an Article 78 proceeding for the production of documents after a denial of a FOIL request the burden is on the Respondent to show that the information requested falls squarely into one of the exemptions from production (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 109 AD2d 92 [3rd Dept. 1985], *aff’d* 67 NY2d 562 [1986]; *Miller v New York State Dept. of Transp.*, 58 AD3d 981 [3rd Dept. 2009]). Additionally, the language of the exemption provision is permissive, meaning that even if certain information falls within one of the exemptions, the agencies have discretion over whether or not to disclose specifically exempted material (*Matter of Short v Board of Managers*, 57 NY2d 399 [1982]). However, when an agency does invoke one of the exemptions as its reason for denying a FOIL request, the reason must be specifically articulated (*Faberman* at 80). Judicial review of an administrative denial is limited to the reasons set forth in the denial (*Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67 [2017]). Here, the Respondents did not articulate any reason as to why the FOIL request was denied. Instead, they chose not to address it at all, resulting in a constructive denial. Since that time, the Appellate Division, First, Second and Fourth Departments have made it clear that since the repeal of 50-a, there is “no categorical exemption from disclosure for unsubstantiated allegations or complaints of police misconduct” (*In the Matter of Newsday, LLC. v Nassau County Police Department*, _____ AD3d _____, *5 [2nd Dept. 2023]). In *Newsday*, the petitioner appealed the respondent’s disclosure of virtually entirely redacted, substantiated complaints and the non-disclosure entirely of unsubstantiated complaints against Nassau County police officers; citing that such disclosure of such information would be an unwarranted invasion of the officers’ personal privacy (*Id.* at *1-2). Here, the denial of the Petitioner’s FOIL application for the Mount Vernon Police Department officer disciplinary records, constructive or otherwise, is contrary to Public Officer Law section 84 because Civil Rights Law section 50-a no longer acts as an exemption to the disclosure of police disciplinary records. In addition, *Newsday, supra* makes it clear that the Petitioner is entitled to records that predate the repeal of 50-a, in so far as, “In amending the Public Officers Law to provide for the disclosure of records

relating to law enforcement disciplinary proceedings, the Legislature did not limit disclosure under FOIL to records generated after June 12, 2020" (*Id.* at *6).

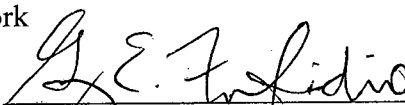
Accordingly, the Respondents are now ordered to disclose the records requested by the Petitioner under the Public Officers Law FOIL provisions, mindful that *In the Matter of Newsday, LLC v. Nassau County Police Department* offers no categorical exemptions to disclosure and that the FOIL laws in general and in particular as pertains to 50-a, favor disclosure. However, the law does provide for certain itemized redactions as provided in Public Officers Law section 89 [2-b] & [2-c].

Next, addressing the Petitioner's application for costs, disbursements and attorney's fees pursuant to Public Officers Law section 89[4][c]. In regard to petitioner's request for attorney's fees, the statute provides that a court may award reasonable counsel fees and litigation costs in a proceeding pursuant to FOIL when the petitioner has "substantially prevailed" therein, the records requested were of clearly significant interest to the general public and the agency lacked a reasonable basis for withholding the record (Public Officers Law §89(4)(c); *Beechwood Restorative Care Center v. Signor*, 5 N.Y.3d 435, 441 [2005]). However, even if these elements are met, whether to grant an award of attorney's fees remains within the sound discretion of the Court (*Corvetti v. Town of Lake Pleasant*, 239 A.D.2d 841, 843 [3rd Dept 1997]; *Matter of Urac Corp. v. Public Serv. Comm. Of State of N.Y.*, 223 A.D.2d 906, 907 [3rd Dept 1996]). It has always been that the methods by which our country's police departments police themselves are a matter of public interest, but this has become especially so in recent years. The citizens who are being policed have the right to know who the public officers who are doing the policing are, to a great degree because they are ultimately the ones the bear the brunt, culturally, socially and financially when bad police act badly. The events that ultimately led to the repeal of 50-a demonstrate this and the repeal of 50-a itself is a legislative attempt to balance the account to some degree by giving the public a means by which to discern who should and perhaps should not be entrusted with the job of police officer. It is disheartening that in that light, the Respondents made no real effort to provide the Petitioner with *anything* they requested in their FOIL application and offered no basis, reasonable or otherwise for failing to do so; rather, they seemingly agreed to produce them and then failed to produce anything, even after Petitioner commenced this litigation.

Accordingly, the Court grants petitioner's request for reasonable attorney's fees and directs Petitioner to submit, on notice to Respondents no later than January 15, 2024, documentation supporting counsel's time and expenses.

For the reasons above, the Petition is GRANTED. The foregoing constitutes the opinion, decision and order of this court.

Dated: White Plains, New York
December 13, 2023


Honorable George E. Fufidio, A.J.S.C.

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