

EXHIBIT 8

MCKenna v City of New York

2024 NY Slip Op 33137(U)

August 26, 2024

Supreme Court, Kings County

Docket Number: Index No. 515104/2022

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 26th day of August 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

-----X
PAUL MCKENNA,

Petitioner(s)

Index No: 515104/2022
Motion Seq. 5

-against-

THE CITY OF NEW YORK, DEPARTMENT OF FINANCE, and
PRESTION NIBLACK,
In his official capacity as Commissioner of the
Department of Finance.

ORDER

Respondent(s)

For a judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

-----X
The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Petition/Affidavits Annexed	62-64
Exhibits Annexed/Reply.....	65-70; 92
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....	89; 12-25

Petitioner Paul Mckenna (“Petitioner”) moves by motion, for an order granting Petitioner attorney’s fees and costs totaling \$36,163.11, plus the costs of the fee application, pursuant to Public Officer Law § 89 (4) (c) (ii). Respondent The City of New York Department of Finance (“Respondent”) has opposed this motion.

On December 10, 2021, Petitioner filed two Freedom of Information Law (“FOIL”) requests (FOIL requests 749 & 750) with the Respondent, seeking any records pertaining to property taxes assessed on Petitioner’s property. On December 13, 2021, Respondent informed Petitioner that a response to both FOIL requests could be expected on or about February 16, 2022. On February 24, 2022, Respondent sent Petitioner five tax documents and notified Petitioner that FOIL request 750 was closed. However, on March 2, 2022, Petitioner emailed the FOIL officer stating that the five documents Petitioner received were not exhaustive and identified other responsive documents that existed (NYSCEF Doc.19). That same day, Respondent reopened FOIL request 750 and informed Petitioner that a new response could be expected on or about March 31, 2022. On March 31, Respondent informed the Petitioner, via email, that Respondent was still awaiting records from the Property Division and that FOIL request 750 was still being researched and additional time was needed to respond, and a response could be

expected on or about April 28, 2022 (NYSCEF Doc. 22). On April 28, Petitioner was informed that the Respondent was still awaiting responsive records and additional time was needed to respond, with an updated response date of May 26, 2022.

On May 24, 2022, Petitioner commenced an Article 78 proceeding, seeking an order directing Respondent to provide the requested records sought in both FOIL requests. Following the commencement of the Article 78 proceeding, Petitioner's requests were delayed an additional three times. On May 26, 2022, Petitioner was informed that a response could be expected on June 27, 2022. However, on June 27, Petitioner was notified that the response was further delayed until September 21, 2022. On September 23, Petitioner received another update, pushing the expected response date to December 21, 2022. For each delay Respondent informed the Petitioner that the requests were still being processed and additional time was needed to respond.

On October 4, 2022, Petitioner filed an Order to Show Cause ("OSC") seeking the production of all responsive documents by October 21, 2022. A hearing was held on November 30, 2023, during which the Court ordered Respondent to produce all responsive records relating to Petitioner's FOIL requests by December 12, 2022. On December 1, 2022, Petitioner received twenty-two documents from the Respondent. On December 12, 2022, Respondent sent an additional fifteen documents to the Petitioner. On December 21, 2022, a hearing was held on Respondent's motion to dismiss Petitioner's OSC. The Court dismissed the already granted OSC and dismissing the matter without prejudice (NYSCEF Doc. 51). On February 6, 2023, Petitioner received from Respondent an additional seven documents. In total, after the Court's November 30 order, the Petitioner received forty-four documents in response to Petitioner's FOIL request. On October 24, 2023, Petitioner filed a motion to reargue the Court's order dismissing the OSC. On October 24, 2023, The Court granted Petitioner's motion and clarified that the motion to dismiss and OSC were denied as moot as a result of Respondent's production of the requested documents (NYSCEF Doc. 61).

On December 11, 2023, Petitioner initiated this instant motion, seeking attorney's fees in the amount of \$36,163.11. Petitioner argues that they have met the statutory requirements for seeking attorney's fees, as they substantially prevailed in the Article 78 proceeding, and the Respondent lacked a reasonable basis for the repeated extensions. Petitioner contends that Respondent failed to comply with its obligations by repeatedly and unreasonably pushing back its anticipated response date. Petitioner contends that Respondent's repeated extensions constituted a constructive denial of FOIL requests. In support of the amount of attorney's fee requested Petitioner asserts that significant time and effort was expended in this case. Petitioner further asserts that this was not a routine case because it did not involve an explicit denial. Petitioner also asserts that the hourly rates and the total amount sought in this case are consistent with the rates and amounts awarded by other courts in similar cases.

In opposition to the Plaintiff's motion, Respondent argues that Plaintiff did not substantially prevail, as the Article 78 proceeding did not initiate the release of the requested documents. Respondent asserts that it began searching for the requested records months before the initiation of the Article 78 proceeding and that the deadline extensions were reasonable. Respondent argues that Petitioner was informed, in good faith that additional time was needed to process the FOIL requests and was provided with a reasons for the delays. Respondent further argues that if the Court determines that Petitioner is entitled to attorney's fees, Petitioner's hourly rate and hours requested by Petitioner are unreasonable. Respondent asserts that none of the cases cited in Petitioner's Memorandum of Law (NYSCEF Doc. 64) awarded an hourly rate of \$600.00, arguing that an hourly rate of \$400.00 or less would be reasonable. Respondent argues that Petitioner should only be credited a total of 21.9 hours

In order to create a clear deterrent to unreasonable delays and denials of access and thus, encourage government to make a good faith effort to comply with the requirements of FOIL, the legislature has provided for the assessment of attorney's fees and other litigation costs in FOIL proceedings" (*Matter of Law Offs. of Cory H. Morris v County of Nassau*, 184 AD3d 830 [2d Dept. 2020]; see Public Officers Law § 89[4][c]; *Matter of Cook v Nassau County Police Dept.*, 140 AD3d 1059 [2d Dept. 2016]). Thus, "[t]he court . . . 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" Public Officers Law § 89 "in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access" (*id.* § 89[4][c][ii]). "A petitioner has 'substantially prevailed' within the meaning of Public Officers Law § 89(4)(c) when the commencement of the CPLR article 78 proceeding ultimately succeeds in obtaining the records responsive to the FOIL request, whether by court order or by voluntary disclosure" (see *Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67 [2017]; *Matter of McDevitt v Suffolk County*, 183 AD3d 826, 828 [2d Dept. 2020]).

A New York City agency may respond to a request for records by "acknowledging the receipt of a request in writing, including an approximate date when the request will be granted or denied in whole or in part, which shall be reasonable under the circumstances of the request and shall not be more than twenty business days after the date of acknowledgment, or if it is known that circumstances prevent disclosure within twenty business days from the date of such acknowledgement, providing a statement in writing stating the reason for inability to grant the request within that time and a date certain, within a reasonable period under the circumstances of the request, when the request will be granted in whole or in part" (21 NYCRR § 1401.5 [c] [3]). "Generally, an agency must respond to a written request and there is no specific time period in which the agency must grant access to the records" (see *Matter of Save Monroe Ave. v New York State Dep't of Transp.* 197 AD3d 808, 808 [3d Dept 2021] quoting *Matter of Data Tree*

LLC v Romaine, 9 NY3d 454, 465 [2007]). “In determining a reasonable time for granting or denying a request under the circumstances of a request, agency personnel shall consider the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency and similar factors that bear on an agency’s ability to grant access to records promptly and within a reasonable time” (21 NYCRR § 1401.5 [d]).

The Court finds that Petitioner substantially prevailed on its FOIL cause of action. Following the Court’s order on November 30, 2023, Petitioner received 89% of the responsive documents. Petitioner’s commencement of the Article 78 proceeding ultimately resulted in the acquisition of the remaining FOIL documents sought.

Contrary to Respondent’s assertions the Court finds that Respondent did not provide a reasonable basis for the multiple extensions. From March 2, 2022, through September 21, 2022, Respondent extended the expected response date six times. Out of the six extensions only once did the Respondent suggest that there was difficulty locating the requested documents. In its March 31, 2022, email, Respondent indicated that it was awaiting records from the Property Division. Respondent did not begin to provide Petitioner with responsive documents until December 1, 2023, and did not complete the requests until February 6, 2023, eleven months after the reopening of FOIL request 750. Respondent neither argue that the agency was dealing with a high volume of requests, nor claimed that the volume or complexity of the requests caused the delay. Additionally, Respondent does not assert that an extensive review of the records was needed to determine the extent of disclosure required. The Court, taking into consideration the low number of documents, finds that Respondent did not provide a reasonable basis for the multiple extensions.

The Court now looks to determine if the attorney’s fees requested by Petitioner is reasonable. Public Officer Law § 89 (4) (c) (ii) does not provide any express guidance as to what is to be considered in awarding an attorney’s fee. However, a reasonable attorney’s fee is commonly understood to be a fee which represents the reasonable value of services rendered. (*see NYCTL 1998-1 Trust v Oneg Shabbos, Inc.*, 37 AD3d 789, 791 [2d Dept. 2007]; *Matter of Gamache v Steinhaus*, 7 AD3d [2d Dept. 2004]). In general, factors to be considered include (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; (2) the lawyer’s experience, ability, and reputation; (3) the amount involved and benefit resulting to the client from the services; (4) the customary fee charged for similar services; (5) the contingency or certainty of compensation; (6) the results obtained; and (7) the responsibility involved (*Matter of Freeman*, 34 NY2d 1 [1974]; *Matter of Gaffney v Village of Mamaroneck*, 21 AD3d 1032 [2d Dept. 2005]; *Steiger v Dweck*, 305 AD2d 475 [2d Dept. 2003]).

Here, Petitioner is an attorney with approximately 14 years of litigation experience (NYSCEF Doc. 63). Taking into consideration Petitioner's legal experience and ability and the customary fee for similar services the Court finds that an hourly rate of \$475.00 to be reasonable. In determining the reasonable number or hours, the Court considered the time and labor required, the results obtained, the benefit to the client from the services rendered and the difficulty of the issue presented. The Court finds that a reasonable number of hours is 49.7 hours. Petitioner's invoice indicates that a total of 8.9 hours of work was spent on a motion to reargue. However, since the Court had already issued an order directing the Respondent to provide all responsive documents by December 12, 2022, the motion to reargue did not provide any additional benefit to the Petitioner's client. Consequently these 8.9 hours have been deducted from the total.

The Court finds that 49.7 hours at \$475.00 for Petitioner for a fee award of \$23,607.50 and \$1,000.11 in costs for a total award of \$24,610.61 to be fair and reasonable.

Accordingly, it is hereby

ORDERED, Petitioner's motion seeking attorney's fees is granted.

ORDERED, that an award of \$24,610.61 in attorney's fees and cost be entered in the Petitioner's favor.

This constitutes the decision and order of the court.



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**