

INDEX No. 001369/2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 41 - SUFFOLK COUNTY

PRESENT:

Hon. JAMES F. QUINN
Acting Justice of the Supreme Court

MOT. DATE 4/6/23
MOT. SUBMIT DATE 7/18/23
Mot. Seq. #004 Mot D

-----X

PEOPLE FOR THE ETHICAL TREATMENT
OF ANIMALS, INC.,

Petitioner,

- against -

THE STATE UNIVERSITY OF NEW YORK
AT STONY BROOK,

Respondent,

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

-----X

DECISION AND ORDER

MILBANK LLP
Attorneys for Petitioner
55 Hudson Yards
New York, New York 10001

SUSAN M. CONNOLLY, ESQ.
Assistant Attorney General
Attorney for Respondent
300 Motor Parkway - Suite 205
Hauppauge, New York 11788

Upon the E-File document list numbered 41-70 read on application by the attorney for the petitioner People for the Ethical Treatment of Animals, Inc., requesting an order of the Court pursuant to Public Officers Law §89(4)(c) for an award of counsel fees and costs against the respondent The State University of New York at Stony Brook, and upon the respondent's response and Memorandum of Law in Opposition to the motion, and reviewing the Court's Decisions in this five (5) year quest for records, it is hereby

ORDERED, that the petitioner's application is **granted** to the extent that the Court hereby awards counsel fees in the reduced but reasonable sum of \$140,000.00; and it is further

ORDERED, that same shall be paid within sixty (60) days of the date of service of this Decision and Order, or Judgment shall issue bearing statutory interest.

This is an application for counsel fees originating from an Article 78 proceeding, which petitioner originally commenced against the respondent to secure certain records as a result of a FOIL request for certain animal research protocols and veterinary records, commencing in October 2016. Petitioner received heavily redacted records and Stony Brook asserted personal privacy Public Officers Law §87(2)(f) as a defense as well as §87(2)(b) personal safety, and §87(2)(d) trade secrets.

Administrative appeals were made and exhausted and then an Article 78 proceeding was commenced to compel compliance with FOIL, which was created to give more transparency in government but unfortunately it has resulted in being used as a shield, and accordingly the State Legislature passed a

provision in Public Officers Law to award counsel fees and costs in the event actions such as this one are brought to reimburse movants for the costs of litigation to compel compliance with the law.

A review of the record of this case shows substantial motion practice and court appearances occurring over a five (5) year period that were initiated by the petitioner to secure the records they originally requested. Justice Denise Molia presided over the substantial portion of this case history with Justice William Condon, and now the undersigned reviewing the instant request for counsel fees.

It is this Court's opinion that after substantial litigation that the petitioner however doggedly was successful in proving to the Court that it was reasonable in its requests, attempted to secure the records without litigation, attempted to reasonably modify its requests to accommodate the State University but was met with resistance every step of the way and was compelled to litigate almost every step of the way, this Court is not persuaded that the State was justified in denying the records requested by the petitioner and the Decisions by Justice Molia as well as Justice Condon support petitioner's position that litigation was not only justified but that it substantially prevailed.

Accordingly, the Court finds that the petitioner is entitled to an award of counsel fees, which is authorized under Public Officers Law §89(4)(c) which reads as follows:

"4. (a) Except as provided in subdivision five of this section, any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon. Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.

(b) Except as provided in subdivision five of this section, a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two. Failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial.

(c) The court in such a proceeding 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, when

(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."

The petitioner in the instant case has requested the sum of \$263,518.75 representing 603.5 hours of time incurred over six (6) years of litigation.

Now that the Court has determined that the fees were justified and there is statutory authority to award them, the next question is the reasonableness of the request in relation to the work performed and the customary fee for the geographic region of practice which lies in the discretion of this Court. *Matter of New York Civ. Liberties Union v. City of Saratoga Springs*, 87 AD3d 336, 926 NYS2d 732 (2011).

This Court agrees with the respondent’s analysis that Courts in calculating the reasonableness of the fee should use the hourly rates employed in the district they are in. *Higueral Produce, Inc. v. CKF Produce Corp.*, 2019 US Dist. Lexis 140225, 2019 WL 5694079 (E.D.N.Y. 2019).

An average of \$350.00 to \$400.00 per hour on a reduction of time spent from 600 hours to 400 hours is justified in this case. Accordingly, the Court hereby awards the sum of \$140,000.00 in counsel fees based upon the results obtained and the work performed by the petitioner’s counsel’s firm.

The respondent shall have sixty (60) days from the date of service of this Decision and Order on counsel for the respondent to pay this counsel fees award.

The foregoing constitutes the *Decision and Order* of this Court.

Dated: August 8, 2023
Riverhead, New York


HON. JAMES F. QUINN, A.J.S.C.

 FINAL DISPOSITION XX NON-FINAL DISPOSITION