

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

In the Matter of

GOVERNMENT JUSTICE CENTER, INC.,

Petitioner,

-against-

NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE,

Respondent,

For a Judgment Under Article 78 of the Civil
Practice Law and Rules

Index No.

VERIFIED PETITION

Petitioner Government Justice Center, Inc. (“GJC”) for its petition against Respondent New York City Department of Health and Mental Hygiene (“NYC Health”) alleges as follows:

Facts

1. Petitioner GJC is a nonprofit public interest law center¹ dedicated to promoting government accountability and the rule of law.
2. GJC obtains public records through requests under the Freedom of Information Law² to obtain records reflecting the information used by government agencies to make policy decisions that affect the public.

¹ GJC is based in Albany, New York and qualified as tax exempt under 26 U.S.C. § 501(c)(3).

² Public Officers Law, Art. 6 (“FOIL”).

3. NYC Health is an “agency” within the meaning of Public Officers Law § 86(3) whose stated mission is to “[p]rotect and promote the health of *all* New Yorkers” (emphasis added).

4. NYC Health published “2021 Health Advisory #39: COVID-19 Oral Antiviral Treatments Authorized and Severe Shortage of Oral Antiviral and Monoclonal Antibody Treatment Products” on December 27, 2021.³

5. NYC Health advised that supplies of oral antivirals for COVID-19 would be “extremely limited.”

6. Thus, NYC Health provided COVID-19 oral antiviral eligibility criteria for patients that included, together with patient age, weight, symptoms, and treatment timing, that a patient:

- Have a medical condition or other factors that increase their risk for severe COVID-19 illness.
 - Consider race and ethnicity when assessing an individual’s risk. Impacts of longstanding systemic health and social inequities put Black, Indigenous, and People of Color at increased risk of severe COVID-19 outcomes and death.

7. A week later, GJC sent FOIL requests to NYC Health requesting records reflecting the race and ethnicity criteria for assessing COVID-19 health risk and the data underlying NYC Health’s statement that “Black, Indigenous, and People of Color at increased risk of severe COVID-19 outcomes and death.”⁴

³ Exhibit A.

⁴ Exhibit B.

8. Among other things, GJC requested records the advisory’s authors reviewed or considered in determining its race and ethnicity treatment priority, draft versions of the advisory, studies or reports establishing “Black, Indigenous, and People of Color” as underlying medical conditions or the sole factor for increased risk of severe COVID-19 outcomes and death.

9. In other words, GJC sought the data behind NYC Health’s decision to prioritize race and ethnicity for COVID-19 oral antiviral treatment and the data behind its determination that Black, Indigenous, and People of Color at increased risk of severe COVID-19 outcomes and death.”

10. GJC also requested records reflecting NYC Health’s definition of the vague term “People of Color” and communications to health care providers between December 27 and January 4 explaining or clarifying its race and ethnicity criteria for oral antiviral priority.

11. NYC Health acknowledged GJC’s FOIL request within five business days as required by FOIL⁵ but did not provide a date when records would be disclosed.⁶

12. GJC informed NYC Health on April 18, 2022 that it had not received a response to its January 4, 2022 FOIL request.⁷

⁵ FOIL § 89(3)(a).

⁶ Exhibit C.

⁷ Exhibit D.

13. Four days later, NYC Health responded that based on the scope of the FOIL request and a backlog of FOIL requests at NYC Health that it needed more time to respond to GJC's request.⁸

14. The records access officer added "I anticipate that you will receive a response to this request by June 24, 2022."

15. NYC Health did not respond on June 24, 2022.

16. Instead, NYC Health denied GJC's FOIL request as not reasonably describing the records on July 12, 2022.⁹

17. NYC Health, however, knew six months earlier what GJC was requesting when a staff member wrote "Wow- 19 item request. Please send the standard acknowledgement and put on the sensitive list. Thanks."¹⁰

18. GJC appealed.¹¹

19. It pointed out that NYC Health should have objected to GJC's description of the records earlier, and that there should be no confusion regarding the records GJC requested: GJC provided a copy of the advisory, identified its authors who should have records, and identified specific records that should exist to support the NYC Health advisory.

20. GJC added that NYC Health should have ready access to the records used to support its advisory and suggested that rather than

⁸ Exhibit E.

⁹ Exhibit F.

¹⁰ Exhibit C.

¹¹ Exhibit G.

disclosing the records or admitting that none exist, NYC Health was acting in bad faith to delay and then deny the FOIL request.

21. NYC Health knew what GJC was requesting well enough to put the request on its “sensitive” list.¹²

22. The NYC Health FOIL appeals officer granted GJC’s appeal and remanded the request to the records access officer to disclose records by August 31, 2022.¹³

23. NYC Health had not responded by the close of business on September 1, 2022 and GJC sent an email asking for a response.¹⁴

24. The next day NYC Health advised that GHC would receive a response to its FOIL request on September 9, 2022, because of NYC Health staffing shortages.¹⁵

25. Just before midnight on September 9, NYC Health emailed to advise records will not be disclosed until September 30, 2022.¹⁶

26. NYC Health gave no reason other than being short-staffed.

Jurisdiction and Venue

27. This Court has jurisdiction under CPLR 7804(b) and 506(b) because all actions at issue took place within Queens County.

28. Jurisdiction and venue are proper under CPLR 7804(b) and 506(b) because respondent has its principal office within Queens County.

¹² Exhibit C.

¹³ Exhibit H.

¹⁴ Exhibit I.

¹⁵ Exhibit J.

¹⁶ Exhibit K.

Cause of Action: Article 78
Review of Wrongful Denial of FOIL Request

29. Petitioner repeats and re-alleges paragraphs 1 through 28 as if fully set forth in this paragraph.

30. Article 78 is the appropriate method of review of agency FOIL request determinations.

31. Petitioner has a right under FOIL to the records requested.

32. Petitioner has sought and has been constructively denied disclosure of records reflecting the conduct of official business.

33. Respondent's failure to produce documents under the circumstances of the requests is not justified under FOIL.

34. Respondent by its actions has kept refusing to perform its duty of disclosure.

35. Respondent has invoked no exemptions from production under FOIL and produced no records sought by Petitioner.

36. Respondent has provided no information to meet its burden under FOIL to provide specific and particular reasons for withholding the records requested.

37. Under FOIL, NYC Health has denied the Petitioner's FOIL request.

38. Petitioner has exhausted its administrative remedies and has no other remedy at law.

39. Petitioner has not made any prior application for the relief requested.

Relief Requested

40. Petitioner requests that this Court issue an order:
- a. Declaring that (i) the Respondent acted unlawfully in failing to produce records in response to Petitioner's FOIL request; and (ii) the Respondent must release the requested records;
 - b. Directing Respondent to disclose to Petitioner within five days of the date of the order, the records requested in the Petitioner's FOIL request;
 - c. Awarding Petitioner's attorney's fees and litigation costs reasonably incurred as allowed under FOIL; and

Granting any other relief that this Court may deem just and proper.

Respectfully submitted,

/s/ Cameron J. Macdonald
Cameron J. Macdonald
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(518) 434-3125
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Counsel for Petitioner

VERIFICATION

STATE OF NEW YORK)
COUNTY OF ALBANY) :SS

Cameron Macdonald, being duly sworn, deposes and says:

I am the Executive Director of the Petitioner Government Justice Center, Inc. I have read this petition and know its contents. The same are true to my knowledge, except as to matters in it stated to be alleged on information and belief and as to those matters, I believe them to be true. To the best of my knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the presentation of these papers or the contentions in it are not frivolous as defined in 22 NYCRR 130-1.1(c).

[Handwritten signature of Cameron Macdonald]

Cameron Macdonald

Sworn to and subscribed before me this 13 of September, 2022

[Handwritten signature of Michelle M Dragon]
Notary Public

MICHELLE M DRAGON
NOTARY PUBLIC STATE OF NEW YORK
ALBANY COUNTY
LIC. #01DR6167871
COMM. EXP. 10/09/2023