

First Dept. Forces NYPD To Pay Fees for Failure To Timely Release BodyCam Footage

The 'Faustino' decision admonishes lower courts to never forget much less ignore the longstanding precedent that when the government fails to turn over records it must articulate the reasons why.

By **Cory H. Morris and Victor John Yannacone Jr.** | March 01, 2021 at 10:30 AM



(Photo: David Handschuh/ALM)

On Dec. 9, 2018, two New York City Police Department (NYPD) police officers shot and killed Dioso Faustino after forcing their way into his home. There was no warrant. Mr. Faustino had no criminal record. The NYPD told the press the shooting was justified on the basis of video footage, but withheld all of the Body-Camera (Bodycam) footage of the killing, claiming that it was exempt from disclosure under the *Public Officers Law* because of an ongoing “use of force investigation.”

The victim’s widow was required to file an Article 78 proceeding to compel release of the Bodycam footage. The NYPD released the Bodycam footage after suit and moved to dismiss the proceeding.

On Aug. 2, 2019, J.S.C. Carol R. Edmead, denied the widow’s petition as moot and denied the request for attorney fees and other litigation costs. *Matter of Faustino v. New York City*, 2020 N.Y. Slip Op 30422 (NYC Sup. Ct. 2020).

The Appellate Division, First Department, “unanimously reversed, on the law,” reinstated the proceeding, and “grant[ed] petitioner’s request for attorney’s

fees and other litigation costs ...” *In the Matter of Dioso Faustino Freedom of Information Law Request v. New York City*, 2021 NY Slip Op 00907 (1st Dept. Feb. 11, 2021) explaining that,

“The merits of the petition ‘are moot as a result of NYPD’s voluntary disclosure,’ but ‘petitioner’s claim for attorney’s fees and other litigation costs is not moot.’ (*Matter of Kohler-Hausmann v New York City Police Dept.*, 133 AD3d 437, 437 [1st Dept 2015]).

By spelling out that limited exception with respect to criminal investigation or prosecution, the Legislature has made clear that it must appear that disclosure would interfere with the investigation or prosecution.”

Wessberg v. Beckmann, 21 Misc.2d 382 (N.Y. Sup. Ct. 1959).

During the appeal, the NYPD quoted extensively from a report exonerating the NYPD officers who conveniently forgot to timely activate their Bodycams, holding that,

“... on an article 78 proceeding the reviewing court is limited to consideration of evidence and arguments raised before the agency when the administrative determination was rendered.”

Molloy v. NYC Police Dept., 50 A.D.3d 98 (1st Dept. 2008).

Bodycam Footage Is and Must Remain in the Public Domain

The spirit and intent of FOIL has been clearly and unequivocally stated by the Court of Appeals:

“The statute, enacted in furtherance of the public’s vested and inherent “right to know,” affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information to “make intelligent, informed choices

with respect to both the direction and scope of governmental activities” and with an effective tool for exposing waste, negligence and abuse on the part of government officers.”

Matter of Capital Newspapers Div. of Hearst v. Burns, 67 N.Y.2d 562, 565 (1986) (citations omitted).

“[A]ll records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted ...” *Id.* “The burden of proof rests on the agency that claims an exemption from disclosure ...” *Matter of Professional Standards Review Council of America v. New York State Department of Health*, 193 A.D.2d 937 (3d Dept. 1993) (quoting *Polansky v. Regan*, 81 A.D.2d 102, 103 (3d Dept. 1981)).

The *Faustino* decision admonishes lower courts to never forget much less ignore the longstanding precedent that when the government fails to turn over records it must articulate the reasons why. FOIL requires a “particularized and specific justification” (*Data Tree v. Romaine*, 9 N.Y.3d 454, 463 (2007)) rather than a “blanket” exemption. *DLJ Restaurant v. Department of Buildings of City of New York*, 710 N.Y.S.2d 564, 566 (1st Dept. 2000); see also *Matter of Capital Newspapers Div. of Hearst v. Burns*, 67 N.Y.2d 562, 566 (1986).

A court must construe the statutory exemptions narrowly. *Matter of Berger v. New York City Dept. of Health & Mental Hygiene*, 137 A.D.3d 904, 906 (2d Dept. 2016). Voluntary production of records after commencement of suit is not grounds for dismissal or mootness. *Matter of Barry v. O’Neill*, 2020 N.Y. Slip Op 4007 (1st Dept. 2020).

The NYPD in *Faustino* cited *Leshner v. Hynes*, 19 N.Y.3d 57 (2012) and *Abdur-Rashid v. New York City Police Department*, 31 N.Y.3d 217 (2018) for the proposition that an agency need not cite with particularity how the requested records will interfere with a law enforcement investigation or a judicial proceeding.

In *Leshner*, the proceeding against the accused had not commenced yet and the District Attorney explicitly identified the categories of records that he sought to withhold on the basis of the exemption and also identified the generic harm that disclosure would cause.

In *Matter of Abdur-Rashid v. New York City Police Dept.*, 2018 NY Slip Op 02206, decided on March 29, 2018, the Court of Appeals crafted a narrow and extremely limited exception to the full disclosure of the FOIL mandate allowing the NYPD to deny information for reasons similar to the *Glomar* response to inquiries regarding matters of national security. See *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

Rejecting NYPD's attempt to include an after-the-fact investigation, the First Department held: "Respondents' references to findings following the investigation may not be considered in this article 78 proceeding because they are based on sources outside the administrative record." *Faustino*, supra. The First Department would have found the arguments not otherwise raised unavailable and, furthermore,

"[f]or a court to consider evidentiary submissions as to the circumstances after the [Respondent] made its determination would violate [a] fundamental tenet of CPLR article 78 review—namely, that judicial review of administrative determinations is confined to the facts and record adduced before the agency."

Matter of Torres v. New York City Hous. Auth., 40 A.D.3d 328, 330 (1st Dept. 2007) (quoting *Matter of Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000)).

Not all of the Bodycam footage contained force and, therefore, "the agency must still fulfill its burden under Public Officers Law §89(4)(b) to articulate a factual basis for the exemption." *Matter of Leshner*, 19 N.Y.3d at 67; see *Matter of Law Offs. of Adam D. Perlmutter, PC v. New York City Police Dept.*, 123 A.D.3d 500, 501 (1st Dept. 2014)). Vague allegations and/or attorney

affirmations alone, will not suffice to sustain such a burden since, “evidentiary support is needed.” *Matter of Dilworth v. Westchester County Dept. of Correction*, 93 A.D.3d 722, 724 (2d Dept. 2012). While all of the Bodycam footage was released, it was not after the NYPD could create a narrative that justified the killing.

Attorney Fees Make FOIL Meaningful

The only available deterrent to prevent NYPD and other law enforcement agencies from routinely withholding Bodycam footage is an award of reasonable attorney fees when a citizen prevails in FOIL litigation.

In awarding attorney fees, courts look to the parties’ conduct during the administrative process. See *Competitive Enter. Inst. v. Atty. Gen. of New York*, 56 Misc.3d 569, 571-72 (Sup. Ct. Albany County 2017) and the delay in providing the appropriate statutory responses. See *Matter of Mineo v. New York State Police*, 119 A.D.3d 1140, 1142 (3d Dept. 2014); *Purcell v. Jefferson Cty. Dist. Attorney*, 77 A.D.3d 1328, 1329 (4th Dept. 2010).

In *Faustino*, the Appellate Division affirmed the spirit and legislative intent of the fee-shifting provisions of FOIL by awarding such fees, yet deterring public officers from violating the law will likely require more than just an award of reasonable attorney fees.

Years of FOIL litigation have clearly demonstrated that it is routine for agencies and public officials to do anything possible to withhold public records which might make them look bad—all at taxpayer expense. See, e.g., News10, “[Supreme Court rules against Cuomo on nursing home data](#),” Nexstar (Feb. 3, 2021); *Matter of Law Offices of Morris v. County of Nassau*, 184 A.D.3d 830 (2d Dept. 2020).

For example, police misconduct records remain hidden even with the repeal of Civil Rights Law §50-a. See Beryl Lipton and Jon Campbell, [Six months after the repeal of 50-a, NY police continue to combat the release of](#)

[disciplinary records](#), MuckRock (Dec. 22, 2020); Paul LaRocco, [Newsday sues Nassau County Police Department to release police discipline records](#), Newsday (Feb. 13, 2021).

Mandatory statutory standards for attorney fee awards and severely limiting the whimsical discretion of Judges who have an unrealistic understanding of the costs and expenses which solo practitioners and small firms must incur to encourage litigation in the public interest and would act as a meaningful deterrent to public officers and government agencies who make FOIL requests a game of hide-and-go-seek. See, e.g., *Blum v. Stenson*, 465 U.S. 886 (1984) (discussing the history of 42 U.S.C. §1988, the fee-shifting statute of the Civil Rights Act).

The legislature should immediately amend Public Officers Law §89(8), which provides that, “[a]ny person who, with intent to prevent the public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation” to elevate the offense from a “violation” to a crime—a misdemeanor or felony depending on the nature of the records concealed or withheld. See Nick Reisman, [Lawmakers Want Criminal Penalties for Violating Open Government Laws](#), Spectrum News (Feb. 15, 2021). Nearly 50 years ago, Martin Luther King Jr. wrote “justice too long delayed is justice denied” from a Birmingham Jail.

Cory H. Morris is a social justice attorney admitted in New York and Florida. His firm focuses on helping individuals facing addiction and criminal issues, accidents and accountability issues. **Victor John Yannacone Jr.** is an advocate, trial lawyer, litigation manager; and counselor to entrepreneurs and executives.