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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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In the Matter of the Application of

SIMON V. KINSELLA,

Petitioner,

DECISION

Index No.: 904100-19

-against-

OFFICE OF THE NEW YORK STATE COMPTROLLER,

Respondent.

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

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RIVERA, RICHARD J.

Petitioner filed a petition on July 9, 2019 seeking an order of this Court finding that the respondent acted unlawfully in failing to produce records in response to petitioner's FOIL request, directing the respondent to release the requested records, and awarding attorneys' fees and cost to the petitioner. The respondent filed an Answer to the petition on August 26, 2019.

The respondent submitted correspondence to the Court on November 12, 2019 indicating that the materials requested by the petitioner had been supplied to the petitioner in full. The respondent stated that they requested that petitioner's counsel discontinue the proceedings based on the release of the records sought herein. Counsel for petitioner submitted correspondence to the Court dated November 13, 2019 stating that the petitioner would not discontinue the proceeding and that the petitioner sought an award of attorneys fees.

The issues raised in the petition regarding disclosure of the requested records are now

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moot based on the respondent's voluntary release of the records. *See Matter of Whitehead v. Warren County Bd. of Supervisors*, 165 AD3d 1452 (3<sup>rd</sup> Dept. 2018). Notwithstanding, the Court will address the request for attorneys fees. *Id.*

Attorneys fees may be awarded in a FOIL proceeding when 1) the petitioner substantially prevails; 2) the record requested was of clearly significant interest to the general public; and 3) the agency lacked a reasonable basis in law for withholding the record. *See Legal Aid Soc'y v. New York State Dep't. of Social Servs.*, 195 Ad2d 150, 153-154 (3<sup>rd</sup> Dept. 1993). However, even where the three prongs are established an award of counsel fees lies within the discretion of the trial court. *Id.*; *see also URAC Corp. v. PSC*, 223 AD2d 906, 907 (3<sup>rd</sup> Dept. 1996).

In the instant matter the petitioner received the requested records subsequent to the filing of the Article 78 petition and has therefore substantially prevailed. *See Whitehead* at 1453-1454 (holding that the receipt of items requested establishes that the petitioner substantially prevailed). The Court finds that the record requested was of significant interest to the general public as the records sought consisted of the contract prices which would affect the pricing of utilities supplied to the general public. However, the Court does not find that the respondent lacked a reasonable basis in law for withholding the requested records. Freedom of Information Law provides an exemption for disclosure of records which constitute trade secrets or "are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise". Pub. Officers Law §87(2)(d).

The respondent supplied the full contract to the petitioner with the pricing figures redacted. In correspondence included in the record the respondent set forth the reasons for redacting the pricing figures and set forth a reasonable argument as to why disclosure of the costs and opportunities could have a detrimental impact to the respondent and the contract provider. The respondent further expanded upon these reasons in the Memorandum of Law and Affirmations submitted in opposition. Accordingly, the Court finds that there was a reasonable

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basis in law for withholding the requested records.

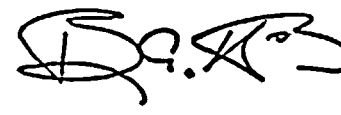
Based on the foregoing the request for counsel fees is denied. Even if there was not a reasonable basis for withholding the requested information the award of counsel fees is not required and falls within the discretion of the Court. *See URAC at 907.*

Accordingly the petition Index No. 904100-19 is dismissed.

This constitutes the decision and order of the Court.

Dated: 7/14/20

  
HON. RICHARD RIVERA, A.S.C.J.



07/24/2020