

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

In the Matter of

Index No.

LEGAL INSURRECTION FOUNDATION,

Petitioner,

**MEMORANDUM OF LAW
IN SUPPORT OF
VERIFIED PETITION**

-against-

SUNY UPSTATE MEDICAL UNIVERSITY,

Respondent.

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

Petitioner Legal Insurrection Foundation (“LIF”), in support of its Verified
Petition against Respondent SUNY Upstate Medical University (“Upstate
Medical”), states:

INTRODUCTION

The case involves the unreasonable refusal of Upstate Medical even to
search for records, much less produce records, based on the unfounded claim
that the records request was overly broad and not sufficiently certain as to
allow Upstate Medical even to identify or locate records. As discussed below,
Upstate Medical’s position is preposterous given the great specificity of the rec-
ords requests, which covered a limited time frame (commencing May 1, 2020)
and were replete with references to specific categories of documents, often link-
ing to the sections of Upstate Medical’s website referencing specific events,
business units and persons, so that Upstate Medical would know what was
requested.

Over the course of a few months last summer Upstate Medical convened a task force to make recommendations to move Upstate Medical in a direction toward greater diversity, equity, inclusion and belonging. By the end of August, the task force's report was final and action items were in the hands of implementation and oversight "tiger teams" by early fall.

In December LIF and Free Beacon LLC submitted Freedom of Information Law¹ requests for records related to the task force, the tiger teams, and the Upstate Medical Executive Committee that approved the task force report. Thirteen different requests made clear the types of records sought with as much specificity as was reasonably possible, including linking to places on the Upstate Medical website referencing the categories requested. Some of the requests further provided names of persons who may have the records. These specific requests were further limited as to the time period in which they likely were created and maintained,

Upstate Medical denied the requests in their entirety because requests for "all records," "all records received, reviewed, or created," or "all copies" were allegedly too broad in scope and did not reasonably describe the records requested. On appeal of denial, Upstate Medical reversed its position on the requests being too broad, partially granted some requests, but maintained that most of the requests did not reasonably describe the records sought.

LIF brings this Article 78 proceeding to compel disclosure of records that it more than sufficiently described to make them identifiable and locatable at Upstate Medical. LIF should not need to file a lawsuit to get records plainly

¹ Public Officers Law, Art. 6 ("FOIL").

described and plainly subject to FOIL. Upstate Medical has not acted in good faith and has no reasonable basis for denying access to its records.

FACTS

In June 2020, Upstate Medical's Chief Diversity Officer assembled a task force to do "the herculean task to make actionable recommendations to move Upstate in a bold new direction toward greater diversity, equity, inclusion and belonging." By the end of August, the 2020 Diversity Task Force completed a report containing its recommendations.²

The Task Force first met by teleconference on June 19, 2020. Groups of four to six Task Force members then worked separately and asynchronously on potential action items in 12 categories.³

Just over a month after its initial meeting—on July 21 and 23, 2020—the Task Force submitted its preliminary report to the Upstate Medical's interim president and executive council, respectively, containing 65 action items. Asked to consider the priority of the action items, the Task Force identified 28 immediate-term, 30 intermediate-term, and seven long-term action items in a revised report.⁴

The Upstate Medical Executive Committee discussed the Task Force's revised report at meetings on held on August 13 and 27, 2020. The Task Force released the entire report to the Upstate Medical community on August 31, 2020.⁵

At that point, the Task Force invited members of the Upstate Medical community to volunteer to serve on "Implementation and Oversight Tiger Teams."

² Ver. Pet., ¶ 1-2.

³ Ver. Pet., ¶ 3-4.

⁴ Ver. Pet., ¶ 5-6.

⁵ Ver. Pet., ¶ 7-8.

Upstate Medical describes a “tiger team” as a “a specialized, cross-functional team brought together to solve or investigate a specific problem or critical issue.”⁶

Seventy volunteers comprised Tiger Teams for (1) policy, bias reporting, and mitigation; (2) recruitment and retention; (3) patient, community and alumni services; (4) diversity organization, branding and messaging; and (5) education and training. Two co-chairs led each Tiger Team.⁷

On December 4, 2020, LIF and Free Beacon LLC submitted FOIL requests to Upstate Medical for records regarding the Task Force and Tiger Teams and their related activities. To be clear what it was seeking, LIF broke the requests into 13 parts.⁸

Among other things, the requests made clear the parties who may have records to be disclosed, including the Task Force Chair, the Tiger Team co-chairs, employees in the Office of Diversity and Inclusion, and Upstate Medical’s Executive Committee.⁹ In other words, LIF pointed the Upstate Medical FOIL officer directly to the individuals who should possess disclosable records, and to the sections of the Upstate Medical website referencing the business units, events, and persons pertinent to the records requests.

Further, LIF identified records by category, including faculty meetings relating to the Task Force and the Tiger Teams and meetings related to the Task Force’s August 31 report. The requests included records identifying everyone involved in creating a list of Interview Questions for incoming students found on Upstate Medical’s website. LIF also requested records related to

⁶ Ver. Pet., ¶ 9-10.

⁷ Ver. Pet., ¶ 11-12.

⁸ Ver. Pet., ¶ 13-14.

⁹ Ver. Pet., ¶ 15.

implementation as it relates to application forms for prospective students, prospective faculty, prospective staff, and prospective managerial administrators.¹⁰

Finally, LIF requested orientation materials for incoming students regarding diversity, equity, inclusion, antiracism, social justice, bystander intervention for bias, race, identity or belonging, as found on Upstate Medical's website.¹¹

A week later Upstate Medical's FOIL Officer denied all the requests, stating that requests for "all records" or "all records received, reviewed, or created" or "all copies" was too broad and did not reasonably describe the records sought as required by FOIL § 89(3).¹²

LIF filed a timely appeal by overnight mail sent on December 22, 2020. Among other things, LIF pointed Upstate Medical to FOIL itself, which states that a request cannot be denied because records may be voluminous or burdensome to review or copy. LIF further noted courts have held that FOIL imposes a broad duty on government agencies to make records available to the public, especially if the request is not open-ended.¹³

LIF requested records limited in scope from a short time frame—May 1, 2020 to the present. LIF's requests focused specifically on the Task Force, Tiger Teams, Office of Diversity and Inclusion, and Executive Committee and listed the individuals connected to those groups and their specific activities and related records. Numerous links to Upstate Medical's own website were provided

¹⁰ Ver. Pet., ¶17-19.

¹¹ Ver. Pet., ¶20.

¹² Ver. Pet., ¶21.

¹³ Ver. Pet., ¶22-24.

to further identify the business units, events, and persons subject to the requests.¹⁴

Upstate Medical responded to the FOIL appeal on January 13, 2021, five days after its response was due on January 8, as required by FOIL.¹⁵

First, Upstate Medical argued that LIF conflated breadth with volume and asserted that the FOIL officer could not possibly identify records by subject matter based on LIF's confusing use of the verbs "received, reviewed, or created" when referring to specific subject matter in its requests 2, 3, 4, and 5.¹⁶

Second, Upstate Medical argued that LIF's first request, for all records relating to the Diversity Task Force and Tiger Teams, and seventh request, for records relating to meetings relating to the Task Force's August 31 report, was confusing because LIF referenced website links to the Office of Diversity and Inclusion, the Task Force Report, and descriptions of the Tiger Team initiatives.¹⁷

Third, regarding student, faculty, and staff application forms in requests 8, 9, 10, and 11 that ask questions regarding diversity, equity, inclusion, antiracism, social justice, bystander intervention for bias, race, identity or belonging, the appeals officer directed the FOIL Officer to collect and disclose the forms to LIF.¹⁸

But the appeals officer denied the requests for records relating to the development, purpose, and necessity of the application forms and questions as sending the FOIL officer on a search for "a needle in a haystack" looking for records relating to the development, purpose, and necessity of application forms

¹⁴ Ver. Pet., ¶25-26.

¹⁵ Ver. Pet., ¶28-29.

¹⁶ Ver. Pet., ¶30.

¹⁷ Ver. Pet., ¶31.

¹⁸ Ver. Pet., ¶32.

generally, which Upstate Medical absurdly claimed could relate to school admissions processes dating to the founding of Harvard College in 1636.¹⁹

Finally, the appeals officer ordered the FOIL Officer to disclose records for request 6 relating to faculty meetings regarding the Task Force and Tiger Teams, request 12 relating to incoming student orientation materials, and request 13 relating to identifying those involved in creating interview questions for incoming students.²⁰

On April 3, 2021, the FOIL Officer sent LIF the applications subject to LIF's requests 7-11, the new student orientation materials subject to LIF's request 12, and the interview questions and interviewer's manual subject to LIF's request 13. The FOIL Officer stated the meeting materials subject to LIF's request 6 were still under review.²¹

ARGUMENT

The New York Legislature enacted FOIL recognizing that “a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.”²² “The people’s right to know the process of governmental decision-making and to review documents and statistics leading to determinations is basic to our society.”²³ “Government is the public’s business and *** the public *** should have access to the records of government in accordance with the provisions of [FOIL].”²⁴

¹⁹ Ver. Pet., ¶33.

²⁰ Ver. Pet., ¶34.

²¹ Ver. Pet., ¶35.

²² Public Officers Law (“FOIL”) § 84.

²³ *Id.*

²⁴ *Id.*

A. LIF Reasonably Described the Requested Records.

FOIL places a broad duty on agencies to disclose public records. It begins with the FOIL definition of records. “Record’ means any information kept, held, filed, produced or reproduced by, with or for an agency *** in any physical form whatsoever ...”²⁵ A person seeking a record must make “ a written request for a record reasonably described.”²⁶ “[R]easonably described’ serves to enable an agency to locate and identify the records in question.”²⁷ Here, LIF’s requests reasonably described the records so that they could easily be identified and located by the FOIL Officer.

1. Hyperlinks to Upstate Medical’s website are not confusing.

LIF’s first request sought all the records of the Task Force and the Tiger Teams from May 1, 2020. The Task Force first met on June 19, 2020. It issued its report at the end of August. The Tiger Teams then began their work. LIF did not request records ranging over many years and it limited its request to the activities of one task force and its implementation and oversight teams.

To avoid any confusion, LIF dropped a footnote containing links to Upstate Medical’s Task Force webpage and the Task Force’s Report. The Task Force webpage²⁸ and Task Force Report²⁹ each contain a list of Task Force members who may have “kept, held, filed, produced or reproduced” information related to the Task Force. The Task Force webpage also contains descriptions of the Tiger Teams and their co-chairs. These links provided Upstate Medical with greater, not less, specificity, and it is irrational for Upstate Medical to claim otherwise.

²⁵ FOIL § 86(4).

²⁶ FOIL § 89(3)(a).

²⁷ *Matter of Pflaum v Grattan*, 116 A.D.3d 1103, 1104 (3d Dept. 2014).

²⁸ Upstate Medical University, Diversity and Inclusion, Diversity Task Force (last accessed April 8, 2021), <https://www.upstate.edu/diversityinclusion/initiatives/task-force/index.php>.

²⁹ Ver. Pet., Ex. A., p. 2

Similarly, LIF's seventh request provided a link to the Task Force Report to provide context and a timeline for identifying records regarding all Task Force meetings, and related communications. LIF's request included meeting minutes, meeting agendas, and presentation materials not contained in the Task Force Report Upstate Medical has online.

Despite the roadmaps and specificity LIF provided in its requests, Upstate Medical's FOIL Officer denied the requests for "all records" as too broad in scope and not reasonably describing the records sought.³⁰ LIF countered in its appeal that "too broad in scope" is not a valid reason to deny a request when FOIL specifically provides that "[a]n agency shall not deny a request on the basis that it is *voluminous* or that locating or reviewing the requested records *** is *burdensome*."³¹ LIF reminded Upstate Medical that FOIL imposes a broad duty on government agencies to make their records available to the public.³²

LIF also pointed out that the requests were not open-ended, but rather (1) limited in time—May, 1, 2020 to the present, (2) focused by subject matter to the Task Force, Tiger Teams, the Office of Diversity and Inclusion, and forms developed and used by Upstate Medical, and (3) listed individuals who could identify and locate records.³³ In *Jewish Press*, the Appellate Division did not consider it facially unreasonable to expect employees at more than 1,700 schools to search more than 100,000 personnel files spanning more than three years to respond to a request made to the New York City Board of Education.³⁴

³⁰ Ver. Pet, Ex. C, p. 17.

³¹ Ver. Pet., Ex. C, p. 2; FOIL § 89(3)(a).

³² Ver. Pet., Ex. C, p. 3; *Jewish Press, Inc. v. New York City Dept. of Educ.*, 183 A.D.3d 731 (2d Dept. 2020).

³³ Ver. Pet., Ex. C, p. 3.

³⁴ *Jewish Press*, 183 A.D.3d at 733 (remanding the matter to the Supreme Court for further proceedings on the cost to provide the records).

Here, the request seek records from substantially fewer sources that are less than a year old.

The requests are consistent with how the Task Force and Tiger Teams conducted their activities. The Task Force first met via teleconference. Task Force members then “worked and communicated asynchronously over the subsequent four weeks to research and discuss issues related to diversity, equity, and inclusion at Upstate Medical University, and to brainstorm potential action items to address the issues identified.”³⁵ Teams of 4 to 6 Task Force members worked on the potential action items.³⁶ The Task Force then shared its report with Upstate Medical’s Executive Committee and issued a final report based on their comments and after meetings in August. Based on this description of Task Force activities, it was reasonable to LIF to assume records existing with multiple persons in the agency. And all the requests track what Upstate Medical itself says it did.

Responding to the FOIL appeal, Upstate Medical changed its tune. The FOIL Appeals Officer decided that “standing in the shoes of the RAO” requests for all records of the Task Force and Tiger Teams, and specifically meeting-related records requests, were befuddling. They were not. The request was clear. LIF requested all the records of the Task Force and Tiger Teams, including all records kept by each of the Task Force and Tiger Team members. Links to webpages identifying the Task Force and Tiger Team members and their activities only served to clarify the short time frame of the requests and their focused subject matter.

³⁵ Ver. Pet., Ex. A, p. 5.

³⁶ *Id.*

The FOIL Officer denied the requests because the records may be voluminous. But the sheer number of participants in process that may make the records voluminous does not make the requests unclear nor not reasonably described. And the FOIL Appeals Officer could not save the baseless denial by arguing, without direct evidence, that the FOIL Officer may have been confused by hyperlinks further clarifying what records LIF was seeking. Yet it gets worse.

2. Verbs that more fully describe the records Upstate Medical must disclose under FOIL do not make the records not reasonably described.

The FOIL Officer denied LIF's second through fifth requests because LIF's request for "all records received, reviewed, or created by" certain individuals was too broad in scope and did not reasonably describe the records sought. The FOIL Officer, however, provided no information as to why the requests did not reasonably describe the records sought. And "too broad in scope" is not a basis for denying a FOIL request.³⁷

The FOIL Appeals Officer conceded that volume and burden were not bases for denying the requests and chose to construe the verbs in "all records received, reviewed, or created by" as rendering the requests as failing to provide a reasonable description of the records³⁸ in an effort to get out from the latitude afforded FOIL requests established by the Court of Appeals in *Matter of Konigsberg v. Coughlin*.³⁹

The FOIL Appeals Officer construed the verbs received, reviewed, and created as intangible identifiers, as opposed to the Konigsberg's tangible identifiers—name and ID number. In *Konigsberg*, the subject matter was the contents

³⁷ Ver. Pet., Ex. C, p. 3; FOIL § 89(3)(a).

³⁸ Ver. Pet., Ex. D, p. 2.

³⁹ 68 N.Y. 2d 245 (1986).

of files kept on Konigsberg under his name or ID number (tangible identifier).⁴⁰ Here, the subject matter is records kept by individuals identified by LIF relating to the Task Force and Tiger Teams (tangible identifiers).

Yet the FOIL Appeals Officer determined that it was not possible for the FOIL Officer to determine whether a person reviewed a record and very difficult to determine whether a person created a record. And the FOIL Appeals Officer offered no sensible explanation how a person who maintains a record did not at some point receive it.

The operative word in the requests, however, is “record,” defined under FOIL as any information kept, held, filed, produced or reproduced by, with or for an agency *** in any physical form whatsoever ...”⁴¹ LIF used additional verbs to elaborate on FOIL’s broad scope for records specifically identified in each request. The verbs remind recipients of the request that information they keep that they read (reviewed) or wrote (created), in addition to received, are records that should be disclosed. The verbs could be read out of the request and the same records would be identifiable and locatable.

In their plain meaning, the requests are clear and direct the FOIL Officer to the sources for records. For example, LIF’s second request seeks “[a]ll records received, reviewed, or created by the Diversity Task Force Chair, **Darrell Dykes, PhD, MD, JD**, regarding the business of the Diversity Task Force and/or Implement and Oversight Tiger Teams.”⁴² Upstate Medical does not argue that Mr. Dykes could not understand the records the FOIL Officer would be looking for—because it can’t.

⁴⁰ *Id.* at 246.

⁴¹ FOIL § 86(4).

⁴² Ver. Pet., Ex. B, p. 1.

3. LIF did not request searches for needles in haystacks.

The FOIL Appeals Officer cited a 2012 opinion by the Committee on Open Government to equate LIF's requests with searches for needles in haystacks.⁴³ The comparison is inapt. In its discussion, the CoOG opinion addressed an issue that is a product of electronic recordkeeping—a state employee's request between and among other agency staff that include the name of that employee without regard to a time frame. Here, the requests are narrowly focused on a particular issue over a short time frame handled by limited number of agency personnel.

Yet in the case of the agency-wide name search, CoOG opined that even if a search retrieved thousands of messages requiring review, a court would likely order the agency to undertake that review.⁴⁴ CoOG felt otherwise—that such a request may not be reasonably described, but also opined that a broad email search request framed in relation to a particular issue or subject could be found to reasonably describe the records requested.

Here, the requests are narrowly framed on a particular topic for records from a short time period to be collected from groups and individuals identified by LIF. There are no haystacks—no agency-wide search over multiple years needs to be done. And there are no needles—LIF described with particularity the subject matters of the records it seeks and identified the individuals with the records.

Further, CoOG in its opinion noted that the Court of Appeals acknowledged in its 1986 decision in *Konigsberg* that the 2,300 pages of records the agency found were not so voluminous as to make the request not reasonably described. If an agency can identify and locate records based on the request, volume and

⁴³ Ver. Pet., Ex. D, p. 7.

⁴⁴ N.Y. Committee on Open Government, FOIL-AO-18863 (April 5, 2012).

burden will only be a factor if the agency can demonstrate the request interferes with the agency's legal obligations or functions. Otherwise, CoOG notes, FOIL § 89(3)(a) provides flexibility in the time it takes to grant a request, which must be reasonable under the circumstances.

4. An absurd reading of a request by an agency does not make records not reasonably described.

The FOIL Appeals Officer partially granted LIF's requests 8 through 11, which requested

copies of application forms, templates, and documents that ask questions regarding diversity, equity, inclusion, antiracism, social justice, bystander intervention for bias, race, identity, and/or belonging of *prospective [students, faculty, staff, and managerial administrators]* applying to Upstate Medical, including but not limited to records regarding the development, purpose, and necessity of these forms and questions.⁴⁵

The FOIL Officer concluded that the request for "all copies" made the request too broad and the records not reasonably described. The FOIL Appeals Officer, however, directed the FOIL Officer to disclose the application forms but denied the remainder of the requests.

By their plain language the requests seek records in addition to the application forms regarding the development, purpose, and necessity of those forms. LIF requested only the application forms that ask questions regarding "diversity, equity, inclusion, antiracism, social justice, bystander intervention for bias, race, identity, and/or belonging." Regarding *these forms and questions*, LIF asked for the records relating to their development, purpose, and necessity. LIF only asked for records related to the particular forms it described.

The FOIL Appeal Officer chose instead to read the request out of context to conclude LIF sought records generally related to college admissions, possibly

⁴⁵ Ver. Pet., Ex. C, p. 16.

as far back as Harvard College's founding in 1636. Having built a haystack, the FOIL Appeals Officer likened the request to a hunt for needles.⁴⁶ Yet the requests were clear in seeking records related to particular forms that ask particular questions that LIF explicitly laid out in the requests. Such agency gamesmanship should not be condoned.

B. LIF is Entitled to Attorney's Fees and Costs.

FOIL § 89(4)(c) permits this Court to assess attorney's fees and litigation costs against an agency when a requestor substantially prevails, and the agency has no reasonable basis for denying access, or the agency fails to respond to a request or appeal within the statutory time.⁴⁷ Here, Upstate Medical has no reasonable (or any) basis to deny access to the records.

The legislature enacted FOIL § 89(4)(c) "to create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL."⁴⁸ Awarding fees and costs is appropriate where disclosure only occurs through a petitioner needing to use judicial process and a respondent showing a clear disregard of the public's right to open government.⁴⁹

Upstate Medical has demonstrated a clear disregard of its responsibility to be open and transparent. Litigation should not be required to compel disclosure of records reasonably described relating to discrete subject matter in a limited time frame. Therefore, this Court should award LIF reasonable attorney's fees and litigation costs.

⁴⁶ Ver. Pet., Ex. D. p. 7-8.

⁴⁷ FOIL § 89(4)(c).

⁴⁸ Senate Introducer's Mem. in Support, Bill Jacket, L. 2006, ch. 492, at 5.

⁴⁹ *Matter of New York Civil Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 339 (3d Dept. 2011).

CONCLUSION

LIF respectfully requests an order granting the relief sought in its Verified Petition.

Dated: Albany, New York
April 8, 2021

Respectfully submitted,



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