

Matter of McAllan v Scoppetta
2007 NY Slip Op 34504(U)
January 12, 2007
Supreme Court, New York County
Docket Number: 107846/06
Judge: Leland G. Degrasse
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FACTS

In January 2006, petitioner, a retired Emergency Medical Service Senior Paramedic for the City of New York, filed separate FOIL requests with FDNY, NYPD and DoITT seeking certain documents that could be used in his First Amendment claim entitled *McAllan v Von Essen*, 2001 Civ. 5281, currently pending in the United States District Court, Southern District of New York. Petitioner sought access to documents primarily related to (1) "the illegal procurement of Motorola XTS 3500 portable radios in 1999-2000", (2) "the illegal inclusion of commercial ambulances in the 911 System in the year 2000", and (3) "the provision of emergency communications in New York City as well as certain World Trade Center historical material."

On February 1, 2006, petitioner wrote to FDNY's Records Access Appeals Officer indicating that the failure to respond to his January 12, 2006 FOIL request within five business days as required under FOIL constituted a constructive denial of his request which petitioner therefore was appealing. By response dated February 10, 2006, the Records Access Officer provided petitioner with copies of 265 pages of responsive documents and requested that petitioner remit a check to FDNY in the amount of \$66.25 (\$0.25 per page) to cover the reproduction costs. The Records Access Officer also informed petitioner that FDNY was continuing to process the remainder of his request and anticipated responding "in whole or in part within 90 days." Petitioner claims that to date, FDNY has failed to provide him with any additional FOIL documents.

With respect to NYPD, by letter dated January 27, 2006, the Records Access Officer notified petitioner that "[d]ue to the large volume of pending FOIL requests," and "the fact that NYPD records are kept in many offices located in five counties," it anticipated reaching a determination of petitioner's January 19, 2006 FOIL request on June 21, 2006. By letter dated February 2, 2006,

petitioner wrote to the Record Access Appeals Officer claiming that NYPD's January 27, 2006 letter constructively denied his FOIL request which he therefore was appealing. By letter dated April 25, 2006, NYPD denied petitioner's appeal as premature, and informed him that the matter was remanded to the Records Access Officer for further processing of his original request.

As to DoITT, by letter dated January 30, 2006, DoITT acknowledged petitioner's January 19, 2006 FOIL request and informed petitioner that his request was under review and that it expected to "get back to [him] in three weeks." By letter dated February 2, 2006, petitioner wrote to DoITT's Record Access Appeals Officer indicating that the failure to "answer [his] FOIL request in a timely manner" constituted a constructive denial which he was writing to appeal. By letters dated February 17, 2006, March 10, 2006, and April 3, 2006, DoITT informed petitioner that it was continuing its search for the requested documents and expected to "get back to [him] in three weeks."

Petitioner then commenced this Article 78 proceeding on June 6, 2006, seeking, *inter alia*, a review of respondents' alleged constructive denial of his request for access to copies of documents under FOIL. Respondents cross move to dismiss the petition.

DISCUSSION

Article 78 Proceeding

The branch of the petition by which petitioner seeks declaratory and injunctive relief is denied. The gravamen of petitioner's claim is respondents' alleged failure to fully comply with his FOIL request. Therefore, the issue is one which can be challenged in a CPLR Article 78 proceeding where a full and adequate remedy is available to petitioner (*see Greystone Mgt. Corp. v Conciliation & Appeals Bd. of City of New York*, 62 NY2d 763, 765 [1984]; *Jackson v Biderman*, 151 AD2d 400,

401 [1989]).

As an initial matter, respondents argue that the instant Article 78 petition should be dismissed on the grounds of misjoinder by reason that “petitioner improperly joined multiple entities in this single proceeding” and that said claims “do not involve common questions of fact or law.” Respondents further argue that they are improperly joined together since “each agency has different defenses and/or different factual grounds for asserting their respective defenses.” Respondents rely on *Lebron v Smith* (17 AD3d 195 [2005], *lv denied* 5 NY3d 716 [2005]) for the proposition that CPLR 7803 by its terms, limits judicial review to an individual action by a governmental body or officer. *Lebron* is distinguishable from the present case in that the petitioner in that case sought to have the five respondent agencies perform various acts which included the “crediting of time served by the Department of Correction, the production of various documents by the Department of Correction, Police Department and MTA, the performance of DNA testing and other tests by the District Attorney’s Office, and the expungement of a portion of his presentence report by the Department of Probation.” The court in *Lebron* held that “[t]he claims were improperly joined since they [did] not involve common questions of law or fact.” Such is not the case here, where petitioner seeks the production of certain documents and made the same FOIL request to the three respondent agencies.

Pursuant to the permissive joinder provisions of CPLR § 1002 (b), “[p]ersons against whom there is asserted any rights to relief jointly, severally, or in the alternative, arising out of the same transaction, occurrence, or series of transactions or occurrences, may be joined in one action as defendants if any common question of law or fact would arise.” Given the broad liberality accorded joinder statutes (*Tanbro Fabrics Corp. v Beaunit Mills*, 4 AD2d 519, 524 [1957]), petitioner’s claim

that respondents constructively denied his FOIL request constitutes the necessary series of transactions, and the primary question posed -- i.e., whether respondents have failed to comply with the mandates of FOIL -- fulfills the requirement of a common question of law or fact. Finally, joinder of parties into a single proceeding promotes judicial economy and is clearly permitted, as no advantage would accrue to either the petitioner or the respondents by requiring that a separate Article 78 proceeding be instituted with respect to each FOIL request (*see Tanbro*, 4 AD2d at 524; CPLR 104).

Freedom of Information Law

To promote open government and public accountability, FOIL imposes a broad duty on government to make its records available to the public (*see Matter of Hanig v State of New York Dept. of Motor Vehicles*, 79 NY2d 106, 109 [1992]). Under FOIL, "agency records are presumptively available for public inspection and copying, unless the documents in question fall within one of the enumerated exemptions set forth in [POL] § 87 (2)" (*Matter of Ruberti, Girvin & Ferlazzo P.C. v New York State Div. of State Police*, 218 AD2d 494, 496 [1996]). To give the public maximum access to records of government, these statutory exemptions are narrowly interpreted, and the burden of demonstrating that requested material is exempt from disclosure rests on the agency (*Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557 [1984]). Moreover, access to government records does not depend on the purpose for which the records are sought. (*see Matter of Gould v New York City Police Dept.*, 89 NY2d 267 [1996]). Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request (*Matter of M. Farbman & Sons v New York City Health &*

Hospitals. Corp., 62 NY2d 75, 80 [1984]).

NYPD and DoITT

In support of the motion to dismiss NYPD and DoITT argue that petitioner did not exhaust his administrative remedies because respondents have not made a final administrative determination regarding petitioner's FOIL request. In support of respondents' contentions, Jeffrey S. Dantowitz, Assistant Corporation Counsel of the City of New York, states in his affirmation that "due to the convoluted and confusing nature of his request ... DoITT was uncertain as to which documents were being requested of it." Annexed to Dantowitz's affidavit is a letter, dated April 18, 2006, advising petitioner to resubmit his FOIL request to DoITT "clearly indicating what records are the subject of [his] request."

In addition, Lori Workstel, an attorney in the office of S. Andrew Schaffer, Deputy Commissioner, Legal Matters of the NYPD, states in her affirmation that petitioner's FOIL request to NYPD has been delayed because "[p]etitioner's initial request encompassed thirty-one different categories of documents, some of which were broad, making them difficult to locate." Workstel further states that by letter dated January 27, 2006, the Records Access Officer notified petitioner that NYPD "anticipated that the determination concerning access to the requested documents would be reached on June 21, 2006." However, Workstel states that the search for the requested documents was interrupted by petitioner's premature appeal on February 2, 2006, which claimed constructive denial of his request and the commencement of this proceeding on June 6, 2006.

In opposition, petitioner argues that he has exhausted his administrative remedies, since NYPD and DoITT failed to respond to his appeal of the constructive denial of his FOIL request within ten business days of the receipt of his appeal letter, as required under FOIL. As such, petitioner contends that he is entitled to maintain this Article 78 proceeding.

In his reply affirmation, Dantowitz asserts that petitioner's January 19, 2006 FOIL request was received by NYPD and DoITT on January 21, 2006 (Saturday), and January 23, 2006, respectively. Therefore, NYPD's response of January 27, 2006 and DoITT's response of January 30, 2006 was timely, pursuant to POL § 89 (3), which requires an agency to respond to a FOIL request "within five business days of the receipt of a written request." Thus, Dantowitz contends that since NYPD and DoITT complied with their statutory obligations and timely responded to petitioner's FOIL request, there is no basis for finding that petitioner's request was constructively denied.

It is clear that petitioner's application for relief pursuant to CPLR Article 78 is premature. Under POL § 89 (3), an agency is required to either deny a FOIL request, make available the requested documents, or furnish a written acknowledgment and statement of the approximate date when such request will be determined. Here, respondents did the latter and therefore complied with the statutory requirements. Thus, as respondents have not denied petitioner's request, petitioner has no basis to assert a constructive denial of the request as there is no statutorily prescribed time within which an agency must respond after acknowledging a FOIL request (*Legal Aid Soc. v New York City Police Dept.*, 274 AD2d 207 [2000], *lv dismissed in part, denied in part* 95 NY2d 956 [2000]). Therefore, the court shall treat this branch of the petition as seeking relief in the form of mandamus to compel NYPD and DoITT to issue a determination of petitioner's FOIL request. The court notes

that it has not been advised that petitioner's FOIL request has been answered to date. Accordingly, NYPD and DoITT's motion to dismiss the petition is denied. Pursuant to CPLR 7804 (f), respondents shall be permitted to answer the petition.

FDNY

FDNY argues that the petition should be dismissed as moot against it because "all responsive non-exempt documents in its possession that it located after a reasonable and diligent search" have been provided to petitioner. In support of FDNY's contentions, Amy K. Adelman, Assistant Counsel employed in the Bureau of Legal Affairs of the FDNY, states in her affidavit that on February 10, 2006, FDNY's Record Access Officer provided petitioner with "265 pages of records responsive to petitioner's request" and informed petitioner that "it would continue to process the remainder of petitioner's request." Adelman further states that on July 21, 2006, an additional response was mailed to petitioner indicating that FDNY had located additional pages of responsive records and would forward those records to petitioner once he provided proof of payment for the records supplied to him on February 10, 2006 and payment for the additional 916 pages of responsive records.

In opposition, petitioner asserts that FDNY's limited production of documents does not include factual documents which are known to be in FDNY's possession and which are subject to public disclosure. Specifically, petitioner claims that the Records Access Officer did not produce documents concerning: (1) "FDNY's decision to authorize Metrocare/Transcare and/or other commercial ambulances to operate in the 911 system," (2) "FDNY's failure to timely establish a 480 MHz UHF (480 MHz frequency range) emergency radio system," and (3) FDNY's "purchase of the Motorola XTS 3500 radios."

In her reply affirmation, Adelman states that upon receipt of the required photocopying fee, FDNY sent petitioner 935 pages of responsive documents on August 4, 2006. Thus, Adelman asserts that petitioner's statement in his opposition papers, dated July 31, 2006, that FDNY has failed to produce the requested FOIL documents, is premature, as petitioner has not yet reviewed the 935 pages of documents that were sent to him on August 4, 2006. Adelman further states that petitioner's opposition papers have provided FDNY with "more specific details to enable [it] to better identify the specific records [petitioner] is seeking with respect to the agreements entered into by voluntary hospital[s] to operate ambulances within the '911' system and the changeover of radio frequencies." Thus, Adelman claims that FDNY has identified 26 pages of documents "regarding voluntary hospitals operating ambulances within the 911 system" and 38 pages of documents from FDNY's "Dispatch Operations/Bureau of Fire Communications relating to the changeover of radio frequencies." Adelman further states that "[t]hese records will be produced following receipt of payment for the records in the amount of \$16.00 (64 pages at \$.25 per page), as described in the annexed letter to [p]etitioner dated August 4, 2006." Finally, Adelman states that "FDNY has made a diligent search of the records of the relevant bureaus for records responsive to [p]etitioner's FOIL request and to the clarification provided in his Affirmation in Opposition. The documents previously produced and the documents to be produced [upon petitioner's remittance of the requested photocopying fee of \$16.00] constitute all the documents that FDNY has been able to identify as responsive to this FOIL request."

In his reply affirmation, Dantowitz states that “[t]wo other documents, an internal legal communication from [c]ounsel to FDNY to FDNY executive staff members, and a draft document concerning inquiries by the Comptroller’s Office, have been located and properly withheld as privileged and exempt from disclosure” pursuant to POL § 87 (2) (g) (iii). In support of Dantowitz’s contentions, Adelman certifies in her reply affirmation that a one page e-mail, dated September 30, 1999, is exempt from disclosure under FOIL because it is denominated “Attorney-Client Privileged & Confidential” and is “from Julian Bazel, Esq., Counsel to the Department[,] to Deputy Fire Commissioner for Administration Thomas Fitzpatrick, Robert McCracken, Chief of EMS Command, and Kevin McAllister, Esq.[,] Executive Assistant to the Deputy Commissioner.” Adelman further certifies that the e-mail is “a legal communication from agency counsel to FDNY executive staff” and concerns “revisions to agreements with voluntary hospitals authorizing their participation in the 911 system.” Adelman next certifies that 24 pages of “[u]ndated draft documents prepared in connection with Comptroller and City Council inquiries regarding Motorola XTS 3500 radios” are exempt from disclosure because “[t]hese documents were drafts leading up to City Council testimony and a response to the Comptroller’s office inquiry in connection with the Motorola XTS 3500 radios.” Adelman further certifies that “[t]he testimony and response have been produced to petitioner.”

It is well settled that FOIL “protects against the disclosure of ‘inter-agency or intra-agency materials’, predecisional memoranda or other nonfinal recommendations prepared to assist an agency decision maker” (*Matter of Akras v Suffolk County Dept. of Civ. Serv.*, 137 AD2d 523, 523 [1988], citing Public Officers Law § 87 [2] [g]). The purpose of the exemption is to “protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their

opinions freely to agency decision makers” (*Matter of Sea Crest Constr. Corp. v Stubing*, 82 AD2d 546, 549 [1981]). Pursuant to POL § 87 (2) (a), an agency may deny access to records which are specifically exempted from disclosure. The exemptions available thereunder are to be narrowly construed, with the agency bearing the burden of demonstrating the applicability of the particular exemption claimed (*see Matter of Gould*, 89 NY2d at 274-275). Specifically, “the agency must articulate ‘particularized and specific justification’ for not disclosing [the] requested documents” (*id.* at 275, quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). Applying these guidelines to the present case, the court finds that FDNY has sufficiently demonstrated that the documents at issue fall within the exemption of “inter-agency or intra-agency materials” contemplated by POL § 87 (2) (g) (*see Matter of Akras*, 137 AD2d at 523 [1988]).

Accordingly, the branch of the petition seeking a review of FDNY’s alleged constructive denial of petitioner’s FOIL request has been rendered moot by the affirmation of FDNY’s counsel which amply certifies that the agency has made available to petitioner all responsive documents that could be located after a thorough and diligent search (*see Matter of Rattley v New York City Police Department*, 96 NY2d 873 [2001]; *Matter of Tellier v New York City Police Department*, 267 AD2d 9, 10 [1999]).

In his opposition papers, petitioner purports to move for summary judgment. A motion for summary judgment may not be made before the joinder of issue (*see CPLR 3212 [a]*; *see also Milk v Gottschalk*, 29 AD2d 698 [1968]), which occurs when the answer is served in respect of the main claim. In addition, the court notes that petitioner has not complied with the procedures prescribed in the CPLR for the bringing of motions (*see 22 NYCRR § 202.7*).

As a final matter, petitioner who is a *pro se* litigant did not retain a lawyer to represent him in this proceeding. As such, petitioner is not entitled to an award of attorney's fees and costs (*see Matter of Jackson Leeds v Burns*, 205 AD2d 540 [1994], *lv denied* 84 NY2d 811 [1994]).

CONCLUSION

Based upon the foregoing, respondents motion to dismiss the petition is granted to the extent that the petition is dismissed as to FDNY. The Clerk shall enter judgment dismissing the petition as against FDNY. The claims against NYPD and DoITT are severed and continued. NYPD and DoITT's answer shall be served and filed within 30 days after service of a copy of this order with notice of entry. Pursuant to CPLR 7804 (f) and upon service of the answer petitioner may re-notice this matter upon at least two days' notice.

This constitutes the decision and order of the court.

DATED:

FILED
 JAN 19 2007
 NEW YORK
 COUNTY CLERK'S OFFICE
 JAN 12 2007

J.S.C.

HON. LELAND DeGRASSE