

**Matter of Mallet v Commissioner Kelly**

2008 NY Slip Op 33099(U)

November 14, 2008

Supreme Court, New York County

Docket Number: 401443/08

Judge: Marilyn Shafer

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Marilyn Shaper  
Justice

PART 8

Mallet, A

- v -

NYC Police

INDEX NO. 401443/08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

~~Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...~~  
~~Notice of Cross-Motion~~  
 Answering Affidavits — Exhibits \_\_\_\_\_  
 Repeating Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1, 2	<input checked="" type="checkbox"/>
3, 4	<input checked="" type="checkbox"/>
5, 6	<input checked="" type="checkbox"/>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this <sup>petition</sup> motion is denied in accord with the annexed memorandum.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 11/12/08

HON. MARYLYN SHAPER, JSC  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 8

-----X  
In the Matter of the Application of  
ANTONIO MALLET,

Petitioner,

INDEX NO.: 401443/08

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

DECISION, ORDER and  
JUDGMENT

- against -

COMMISSIONER KELLY, NEW YORK CITY  
POLICE DEPARTMENT,

Respondents.

-----X  
SHAFFER, J.:

Petitioner, Antonio Mallet, commenced this Article 78 proceeding against the New York City Police Department (NYPD) and its commissioner, Raymond Kelly, to challenge the decision by the NYPD's Records Access Officer (RAO) denying petitioner's request for the production of information pertaining to his criminal file, pursuant to the Freedom of Information Law (Public Officers Law § 84 et seq., "FOIL"). The denial of petitioner's FOIL request was upheld on administrative appeal.

Respondents oppose the application and cross-move for an order dismissing the petition on the grounds that, *inter alia* the requested relief is barred, in whole or in part, by *res judicata*, the statute of limitations and/or NY Civil Rights Law §50-a.

Since there is no dispute that Mallet previously requested, and was denied, virtually the identical relief he now seeks, and that prior denial was judicially affirmed in an Article 78 proceeding, his present application is denied, and the cross motion to dismiss the petition is granted, on the ground of *res judicata*.

**UNFILED JUDGMENT**  
This judgment has not been entered by the court and notice of entry cannot be served until the party obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Office (Room 1415).

### BACKGROUND

In a letter, dated October 1, 2001, petitioner made a FOIL request for all civilian complaints, misconduct records, internal affairs records and investigations, and departmental hearings records related to Detective Joseph Nieves. By letter, dated October 10, 2001, the RAO denied the request on the ground that the requested records are police officer personnel records and are therefore exempt from disclosure pursuant to NY Public Officers Law §§ 87 (2) and (e) and NY Civil Rights Law § 50-a. By letter, dated November 20, 2001, the Records Access Appeals Officer denied petitioner's appeal on the same grounds. On or about April 30, 2002, petitioner commenced an Article 78 proceeding in this court challenging the above-mentioned determination (*Mallet v New York City Police Department*, Index No. 401826/02) (Prior Article 78 Proceeding). On August 19, 2002, the NYPD cross-moved to dismiss the petition. By decision and judgment, dated September 18, 2002, the court (Hon. Kibbie F. Payne) granted NYPD's cross motion and dismissed the Prior Article 78 Proceeding petition holding that the requested records were exempt from disclosure as police officer personnel records.

In a letter, dated February 5, 2008, petitioner sought access to nearly identical information relating to Detective Joseph Nieves, as he previously sought and was denied in the Prior Article 78 Proceeding. By letter, dated February 25, 2008, the RAO denied petitioner's request on the grounds that the requested records are police officer personnel records that are exempt from disclosure pursuant to NY Public Officers Law §§ 87 (2) and (e) and NY Civil Rights Law § 50-a. Petitioner filed an administrative appeal of the RAO's determination. By letter, dated April 25, 2008, the Records Access Appeals Officer denied the administrative appeal on the ground that the request is duplicative of petitioner's prior FOIL request, that culminated in

the Prior Article 78 Proceeding. Petitioner thereafter commenced this Article 78 Proceeding challenging the denial of his FOIL request.

### DISCUSSION

Respondents contend that the petition must be dismissed, because, among other reasons, petitioner's FOIL request is duplicative of his 2001 FOIL request, and that the prior adjudication of petitioner's 2001 FOIL request precludes relitigation of petitioner's present FOIL request. As such, respondents contend that the instant proceeding is barred by principles of *res judicata* and is an impermissible attempt to relitigate the 2001 FOIL request.

*Matter of Mays v New York City Police Dept.* (48 AD3d 372 [1<sup>st</sup> Dept 2008]) is on all fours with this proceeding, and its holding is controlling here. In *Mays*, as here: (a) the petitioner made a prior FOIL request seeking information relevant to his criminal indictment; (b) the prior FOIL request was denied in relevant part; (c) the petitioner filed an Article 78 proceeding, wherein the court affirmed, in relevant part, the NYPD's determination; (d) years later, the petitioner filed a new FOIL request that duplicated his prior FOIL request; (e) the NYPD's RAO denied the request as duplicative of the prior request, and the Records Appeals Offer also upheld the denial as duplicative of the prior FOIL request; and (f) the petitioner filed an Article 78 proceeding. The court, in *Mays*, affirmed the NYPD's determination, and granted NYPD's cross motion to dismiss the petition on the ground that the latter FOIL request was barred by the doctrine of *res judicata*. On appeal, the First Department affirmed, stating:

“Under the doctrine of *res judicata*, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair

opportunity to litigate a claim should not be allowed to do so again” *Matter of Hunter*, 4 NY3d 260, 269 [2005]). Here, petitioner's claim that he was entitled under FOIL to all documents relating to a particular indictment was adjudicated on the merits in the prior CPLR article 78 proceeding. That petitioner's second request was more detailed and specific is irrelevant; in both requests he essentially sought all documents relating to the same indictment.”

(*Id.*).

The circumstances presented here are the same as those presented in *Mays*. Based on the foregoing, the court holds that petitioner's 2008 FOIL request is duplicative of his 2001 FOIL request, and is barred by the doctrine of *res judicata* (*id.*; see also *Matter of McGriff v Bratton*, 293 AD2d 401 [1<sup>st</sup> Dept 2002]; *Matter of Mendez v New York City Police Department*, 260 AD2d 262 [1<sup>st</sup> Dept 1999]).

As such, the court denies the petition, and grants the cross motion to dismiss the petition. Since the petition is barred in its entirety by the doctrine of *res judicata*, the court need not address any of the remaining arguments advanced by the parties.

### CONCLUSION

It is ORDERED and ADJUDGED that the petition is denied; and it is further ORDERED and ADJUDGED that the cross motion by respondents to dismiss the petition is granted, and the proceeding is dismissed.

This constitutes the order, decision and judgment of this court.

Dated: 11/14/08 2008

ENTER:

*MARILYN SHAFER*

J.S.C.

**UNFILED JUDGMENT**  
 This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).