

**Matter of Carvel v Office of NYS Attorney General**

2012 NY Slip Op 32651(U)

October 11, 2012

Supreme Court, New York County

Docket Number: 103915/2011

Judge: Alice Schlesinger

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

**ALICE SCHLESINGER**

PRESENT: \_\_\_\_\_

PART **IA** PART 16

Index Number : 103915/2011  
 CARVEL, PAMELA  
 vs  
 NYS ATTORNEY GENERAL  
 Sequence Number : 001  
 ARTICLE 78

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this ~~motion~~ <sup>CROSS-MOTION</sup> is granted, the Article 78 petition is denied, and the proceeding is dismissed in accordance with the accompanying memorandum decision.

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

**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).

OCT 11 2012

Dated: October 11, 2012

*Alice Schlesinger*  
 \_\_\_\_\_, J.S.C.  
**ALICE SCHLESINGER**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
In the Matter of the Application of  
PAMELA CARVEL

Petitioner,

Index No 103915/11  
Motion Sequence 001

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

-- against --

OFFICE OF THE NEW YORK STATE  
ATTORNEY GENERAL,

Respondent.

**UNFILED JUDGMENT**

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-----X  
SCHLESINGER, J.:

Background Facts

Petitioner Pamela Carvel is the niece of Thomas and Agnes Carvel, both deceased. Thomas Carvel founded the Carvel brand of soft-serve ice cream and related franchise ice cream establishments. In March of 2010, Ms. Carvel made eight separate requests to the New York State Attorney General for documents pursuant to the New York State Freedom of Information Law (FOIL), codified at § 84 et seq. of the New York State Public Officers Law (POL).<sup>1</sup> All of these requests relate to the estate of her aunt and uncle. Apparently Ms. Carvel believes the estate and related charities were mismanaged and money was misappropriated, though her specific reason for filing the FOIL requests is beyond the scope of this proceeding and plays no role in this Court's decision.

The FOIL requests at issue are as follows: (1) FOIL Request. No. 100188 regarding documents related to *People v. Arcadipane*, Index No. 405052/93 (Petition,

<sup>1</sup> The first six requests were filed on March 1, 2010; the final two requests were filed on March 2, 2010.

Exh 1) ( the "*Arcadipane* request"); (2) FOIL Request No. 100193 regarding documents related to the Thomas and Agnes Carvel Foundation (Petition, Exh 2) (the "Foundation request"); (3) FOIL Request. No. 100195 regarding documents related to *People v. Zarro* (no indexed number listed) (Petition, Exh 3) (the "*Zarro* request"); (4) FOIL Request. No. 100192 regarding documents related to *Carvel v. Cuomo* Index No. 07-CV-1034 (Petition, Exh 4) (the "*Cuomo* request"); (5) FOIL Request. No. 100187 regarding documents related to the Thomas Carvel Charitable Remainder Unitrust (Petition, Exh 5) (the "Unitrust request"); (6) FOIL Request. No. 100189 regarding documents related to *People v. Zuga*, 23 AD3d 315 (1st Dep't 2005) (Petition, Exh 6) (the "*Zuga* request"; (7) FOIL Request. No. 10194 regarding documents relating to the Estate of Thomas Carvel, New York State Westchester County Surrogate's Court, File No. 3285/90 (Petition, Exh 7) (the "Estate of Thomas request"); and (8) FOIL Request. No. 100170 regarding documents related to the Estate of Agnes Carvel, New York State Westchester County Surrogate's Court, File No. 2165/98 (Petition, Exh 8) (the "Estate of Agnes request").

In response to these FOIL requests, the Attorney General produced many documents — for example, it initially produced approximately 6,000 pages in response to the Carvel Foundation request alone. But at the same time, in a letter dated September 22, 2010, the Attorney General denied other requests in whole or in part on several grounds, including that some of the requested documents are specifically exempt from disclosure under FOIL because they are confidential attorney work product or inter- or intra-agency documents — both categories specifically exempted from FOIL by POL §§ 87(2)(a) and 87(2)(g), respectively. Additionally, some of the requests were denied as vague and non-specific.

In a letter dated October 30, 2010 (Petition, Exh 10), Ms. Carvel appealed the Attorney General's partial denial; she took issue with the exceptions cited with respect to the Foundation, Estate of Thomas, and Estate of Agnes requests and further claimed, in a broad and general way, that the documents produced, though numerous, "were not complete."

The Attorney General rejected Ms. Carvel's appeal by letter dated January 7, 2011 (Petition, Exh 11), again citing FOIL exemptions for attorney work and inter- and intra-agency materials to justify the documents withheld. The Attorney General also claimed, in response to Ms. Carvel's contention that the documents that were produced were incomplete, that "the documents produced [to Ms. Carvel] were those found in [accordance with the Attorney General]'s diligent search." The final appeal denial letter concludes by advising Ms. Carvel of her right to challenge the determination via an Article 78 proceeding. That is the proceeding before this Court now. The Attorney General originally filed a cross-motion to dismiss the claims as moot. By decision on the record dated February 29, 2012, this Court indicated that it intended to address the issues on the merits, and both sides were granted leave to submit additional papers. The Attorney General now asserts that it has produced all of the non-exempt documents located after a diligent search, while Ms. Carvel maintains her position that she is entitled to receive more documents.

### Discussion

#### Failure To Exhaust Administrative Remedies

As the Attorney General correctly asserts Ms. Carvel failed to file a timely administrative appeal with respect to five of the FOIL requests at issue. In her October 30, 2010 appeal letter (Petition, Exh 10), Ms. Carvel raised objections about three of

the decisions issued in response to the eight FOIL requests she had filed — the Foundation, Estate of Thomas, and Estate of Agnes requests. However, she neither discussed nor made express reference to the remaining five requests she had filed. Specifically, Ms. Carvel failed to administratively appeal the Attorney General's decision with respect to the *Arcadipane*, *Zarro*, *Cuomo*, *Unitrust*, and *Zuga* requests.

It is possible that Ms. Carvel intended the final sentence of her letter "I request you to reconsider the actual production and provide all the missing requested information," (emphasis in the original) as a blanket appeal of all of the decisions she had received, including those in response to the five requests she had failed to specifically reference. However, because Ms. Carvel specifically referenced three of her requests in the letter but was silent about the rest, such an interpretation is searching, at best.

The Court is aware that Ms. Carvel did in this proceeding raise objections to the decisions she had received regarding the five FOIL requests that she did not mention in her October 30, 2010 letter. However, because those objections were raised at various points after the thirty-day statute of limitations period for filing appeals had passed, those objections are untimely and do not constitute valid administrative appeals. The doctrine of exhaustion of administrative remedies as applied to Article 78 proceedings requires a petitioner to exhaust all possibilities of obtaining relief through the available administrative channels before seeking relief in the courts.

[The doctrine] is bottomed on the principle that "[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action."

*YMCA v. Rochester Pure Waters Dist.*, 37 NY2d 371, 375 (1975) quoting *Unemployment Compensation Comm'n v. Aragon*, 329 US 143, 155 (1946).

Furthermore, POL § 89(4)(b) provides that only the denial of "access to a record in an appeal determination" is subject to review in a CPLR Article 78 proceeding.

Therefore, to preserve her right to judicial review in this proceeding, Ms. Carvel was required to exhaust her administrative remedies by filing an administrative appeal with respect to each of her eight FOIL requests within 30 days. In *Jamison v. Tesler*, 300 AD2d 194 (1st Dep't 2002) the Appellate Division reached a similar conclusion. There, a petitioner in an Article 78 proceeding had filed multiple objections to decisions denying her FOIL requests, but after the thirty-day appeal period had expired. The court thus found that the objections neither constituted administrative appeals nor formed the basis for "belated judicial review." See also *McGriff v. Bratton*, 293 AD2d 401, 402 (1st Dep't 2002) (similarly finding a petitioner's second request for documents under FOIL did not constitute an administrative appeal).

Therefore, and in light of the absence of an administrative appeal filed regarding five of Ms. Carvel's requests, the Attorney General's response to the *Arcadipane*, *Zarro*, *Cuomo*, *Unitrust*, and *Zuga* requests is not subject to judicial review in this proceeding and thus the Attorney General is entitled to the dismissal of those challenges.

#### Attorney Work Product and Intra- and Inter-Agency FOIL Exemptions

Even if the late objections could be construed as timely administrative appeals, they do not entitle Ms. Carvel to additional documents because the Attorney General produced all documents it located after a diligent search, but for documents specifically exempted by POL §§ 87(2)(a) and 87(2)(g).

The Attorney General correctly relies on the Public Officers Law to argue that some of the documents Ms. Carvel seeks are specifically exempt from production under FOIL. Although FOIL is aimed at ensuring that governmental information is not unnecessarily veiled by a "cloak of secrecy or confidentiality" (POL § 87), it does not grant the public unfettered and total access to all documents requested. To the contrary, POL § 87(2) lists seven separate categories of records that are specifically exempted from production under FOIL.

The Attorney General claims exemptions under POL § 87(2)(a), which grants an exception for records "specifically exempted from disclosure by state or federal statute." The state statute at issue is CPLR 3101 © , which states that: "The work product of an attorney shall not be obtainable."

It is well settled that attorney work product is privileged under the CPLR and therefore exempt from disclosure under FOIL. In *Morgan v. N.Y. State Dep't of Env'tl. Conservation*, 9 AD3d 586 (3d Dep't 2004), for example, the Appellate Division upheld the decision by the Department of Environmental Conservation to withhold certain documents in response to a FOIL request because the documents were subject to the attorney work product exemption. The court held that "state agencies have an attorney-client relationship with the Attorney General's office, as that office is obligated to prosecute, defend and control all legal business of state agencies," and that such attorney work product is exempt from FOIL. 9. AD3d at 586, citing Executive Law § 63 (1).

The Attorney General also claims exemptions under POL § 87(2)(g), which grants a specific exemption to "inter-agency or intra-agency materials." This exemption

protects from disclosure such "opinions, ideas or advice exchanged as part of the consultative or deliberative process of governmental decision making." *Gould v. N.Y. City Police Dep't*, 89 NY2d 267, 277 (1996). In *Gould*, the Court of Appeals found that "withheld complaint follow-up informational reports are inter-agency or intra-agency documents exempt from production under Public Officers Law § 87(2)(g)" and thus are exempt from production under FOIL.

The Attorney General was entitled to withhold documents on attorney work product and inter-agency grounds in response to Ms. Carvel's Foundation, Estate of Thomas, and Estate of Agnes requests. Therefore, the Attorney General is entitled to the dismissal of Ms. Carvel's claims related to those documents.

#### The Allegedly Missing Documents

In its papers, the Attorney General further contends that it has produced all responsive non-exempt documents after a diligent search (see Pepper Aff. and Supp. Pepper Aff.). Ms. Carvel asserts that only ten percent of the documents she requested were produced (Carvel Petition ¶ 7). This Court has reviewed the thousands of documents the Attorney General produced to Ms. Carvel on five CDs (though the unindexed nature of the CDs made that process exceedingly difficult).

Per POL § 89(3), when an agency cannot locate documents requested under FOIL, the agency must certify that it does not have possession of a requested record or that such record cannot be found after a diligent search; Joshua Pepper, the Records Access Officer for the Office of the Attorney General, has made such a certification here. Pepper Aff. ¶¶ 6-7, 63, 78.

Ms. Carvel's assertion that the documents produced constitute merely ten percent of the mandatory, non-exempt, documents that the Attorney General is

required to produce is mere speculation. The Attorney General produced over 6,000 pages of documents before this proceeding was commenced, and additionally, counsel for the Attorney General directed another search after the proceeding was commenced which yielded some additional documents; the search the Attorney General conducted was extensive. This Court's review of the five CDs of documents at issue left it unable to confirm Ms. Carvel's speculation that additional documents exist that were improperly withheld.

*Rattley v. New York City Police Dep't*, 96 NY2d 873, 875 (2001), lays out clear guidelines for courts dealing with this sort of situation:

When an agency is unable to locate documents properly requested under FOIL, Public Officers Law § 89 (3) requires the agency to certify that it does not have possession of a requested record or that such record cannot be found after diligent search. The statute does not specify the manner in which an agency must certify that documents cannot be located. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required.

Similarly, in *Gould v. New York City Police Dep't*, 89 NY 2d 267, 279 (1996), the Court of Appeals held that:

[The] Supreme Court did not abuse its discretion in concluding that the Police Department adequately established the nonexistence of additional records requested by petitioner. Once the records access officer for the Police Department certified to [the] Supreme Court that the Police Department had provided petitioner with all responsive documents in its possession, petitioner was required to articulate a demonstrable factual basis to support his contention that the requested documents existed and were within the Police Department's control. Petitioner's conjecture that the documents existed some 10 years ago was insufficient to warrant a hearing on the issue.

Here, the Attorney General has produced a proper certification of a diligent search. The Attorney General has produced all non-exempt documents that it could locate. Therefore, it is entitled to the dismissal of Ms. Carvel's claims on this ground.

Accordingly, it is hereby

ORDERED that the Respondent's motion to dismiss is granted; and it is further ADJUDGED that the Article 78 petition is denied. The Clerk is directed to enter judgment in favor of the Respondent without costs or disbursements.

Dated: October 11, 2012

**OCT 11 2012**

  
\_\_\_\_\_  
J.S.C.  
**ALICE SCHLESINGER**

**UNFILED JUDGMENT**

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