

**Matter of Guerra v City of New York**

2018 NY Slip Op 32812(U)

October 26, 2018

Supreme Court, New York County

Docket Number: 159381/2017

Judge: Alexander M. Tisch

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 52

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In the Matter of

WILLIAM GUERRA,

Petitioner,

Index No.: 159381/2017

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

Mot. Seq. No. 001

-against-

THE CITY OF NEW YORK and  
THE NEW YORK CITY COUNCIL,

Respondents.  
-----X

ALEXANDER M. TISCH, J:

In this special proceeding, petitioner William Guerra (Guerra) seeks, pursuant to CPLR 7803 (3), judicial review of respondent the New York City Council’s (the Council) decision to deny two parts of a Freedom of Information Law (FOIL) request made by New Yorkers for Equal Transportation Access (NYETA) on February 8, 2017, and upon which a final agency determination was made on June 21, 2017. In their answer, respondents raise defenses of, among other things, failure to state a cause of action and lack of standing.

**Background**

Guerra owns a yellow taxicab medallion, and is a member of NYETA (Guerra aff dated 10/18/17, ¶¶ 2, 8). As a member, he claims that he attends events and meetings, and engages in other unspecified “NYETA-related activities” (petition, ¶ 9). NYETA advocates for equal access to transportation services, and is an opponent of Uber, the application-based for-hire taxi service (*id.*, ¶ 7).

On February 8, 2017, NYETA made a FOIL request for records and information to the

Council (petition, exhibit A, FOIL Request dated 2/8/17). The request states that NYETA had tried and failed to meet with the sponsors of legislation related to for-hire vehicles because Council staff refused to reveal who was sponsoring the proposed legislation (*id.* at 1). NYETA requested the names of council members who were sponsoring or about to sponsor such legislation, documents related to same, and the authority for the Council staff's position that they did not have to reveal the names when asked (*id.* at 2). On February 15, 2017, the Council's FOIL Officer, Danielle Barbato (Barbato), acknowledged receipt of the request (petition, exhibit B, email dated 2/15/17 from Barbato to Gertsman).

On May 16, 2017, after not receiving a substantive response, NYETA deemed that its request had been denied, and appealed the request to Patrick Bradford, the Council's FOIL Appeals Officer (petition, exhibit E, FOIL Appeal dated 5/16/17). On May 24, 2017, Barbato wrote to NYETA, attached responsive documents, and indicated that the Council was still searching for additional documents (petition, exhibit G, email dated 5/24/17 from Barbato to Gerstman at 1). She refused, however, to identify which Council members were sponsoring or about to sponsor legislation, stating that such information was protected by privilege and citing Public Officer's Law § 87 (2) (a), CPLR 4503 (a), and the Council's rules (*id.* at 1-2). On June 5, 2017, Bradford denied NYETA's appeal as moot due to the May 24 production (petition, exhibit F, email dated 6/5/17 from Bradford to Gerstman).

On June 21, 2017, NYETA filed another appeal, this time challenging the Council's assertion of privilege (petition, exhibit H, FOIL Appeal dated 6/21/17). NYETA's counsel Bryan Gertsman (Gertsman), stated that, among other things, the names of Council members were not privileged communication subject to protection, and, in any case, public policy mandated disclosure even if the names were protected (*id.* at 2-4). On July 6, 2017, Bradford

responded to the appeal and argued that FOIL did not require the disclosure of information, only documents (petition, exhibit J, email dated 7/6/17 from Bradford to Gertsman). Further, any responsive records that existed would relate to communications between Council members and the Council's legal staff for the purpose of obtaining legal counsel, and, thus, be privileged (*id.* at 1). Guerra then commenced this Article 78 proceeding by filing a petition against respondents on October 18, 2017.

### Discussion

In his petition, Guerra argues that he has standing to bring this special proceeding as a member of NYETA, on whose behalf the initial FOIL request was made (petition, ¶ 37). Respondents argue that Guerra lacks standing because he is not the president or treasurer of NYETA, and is thus precluded by statute from maintaining this special proceeding. In reply, Guerra argues that the FOIL request was made on behalf of NYETA's members, that he has been harmed by the Council's denial of the request, and that he may stand in the shoes of NYETA's president or treasurer to maintain this suit.

The Public Officers Law provides that "a person denied access to a record in an appeal determination . . . may bring a proceeding for review of such denial" pursuant to Article 78 (Public Officer's Law § 89 [4] [b]). Only the entity which made the initial FOIL request, or on whose behalf it was made, has standing to maintain such an action (*Matter of City of Newark v Law Dept. of City of N.Y.*, 305 AD2d 28, 34-35 [1st Dept 2003] ["Finally, we find that the petitioners other than Newark . . . lack standing to maintain this proceeding because the underlying FOIL requests were not made on their behalf"]). The initial FOIL request and subsequent appeals were all made by NYETA, not its individual members. To the extent that Guerra purports to be acting on behalf of NYETA, an individual may only act on behalf of their

unincorporated association if they are its president or treasurer (General Association Law § 12).

Guerra is neither, and, in fact, claims that NYETA has no such officers.

*Locke Assoc. v Foundation for Support of United Nations* (173 Misc 2d 502 [Civ Ct NY County 1997]), cited by Guerra, is unavailing. As an initial matter, this case is not binding on the court and predates *Matter of City of Newark*, which is binding authority. Moreover, *Locke Assoc.* does not stand for the proposition that Guerra advances. He argues that, in the absence of a president or treasurer, he is sufficiently involved with NYETA, and sufficiently active in support of its causes, to represent it. It would be a wildly expansive reading of the statute to assume that any sufficiently active member of an unincorporated association would thus be able to bring actions on its behalf. In *Locke Assoc.*, the unincorporated association in question did not have a president or treasurer, and the court was faced with a nonmember executive director and a committee chair, each of whom argued that they had the right to maintain an action on behalf of the association (*id.* at 503). The court stated that the statute “should be understood as permitting a president or treasurer, or an officer who is the functional equivalent, to sue on behalf of the organization without the need to join the individual members as plaintiffs” (*id.* at 504).

Thus, it is necessary to determine an equivalent de facto officer only where it is necessary to safeguard the rights of the association (*id.* at 505 [“The statutory designation of president and treasurer as representative parties thus facilitates the group's ability to obtain redress”]). Here, Guerra primarily advances his own right to redress, and only as an afterthought asserts that he is a de facto officer of NYETA. Moreover, the petition insufficiently alleges that Guerra performs the duties and has the responsibilities of a president or treasurer. Guerra provides no authority that merely being an activist and a litigant in support of NYETA’s causes is enough, nor has the court located any in its own research. As Guerra may not maintain this special proceeding on his

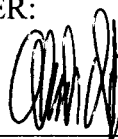
own behalf or on behalf of NYETA, he lacks standing.

Accordingly, it is hereby,

ADJUDGED that the application is denied and the petition is dismissed.

Dated: October 26, 2018

ENTER:



HON. ALEXANDER TISCH, A.J.S.C.

HON. ALEXANDER M. TISCH