

**Bradshaw v New York City Office of Chief Med.  
Examiner**

2021 NY Slip Op 32025(U)

June 9, 2021

Supreme Court, New York County

Docket Number: 100880/2020

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.



Petitioner argues in substance that it had been five months since he filed his FOIL request and that OCME failed to respond to it, thus constituting a constructive denial. Among other things, Petitioner sought the complete DNA file for case number FB04-0751, as well as information in twelve categories regarding OCME employees, sign-in sheets and laboratory standards, manuals, reviews, accreditations, audits and protocols.

Petitioner appealed the alleged constructive denial to OCME's FOIL Appeals Officer on August 17, 2020. Petitioner also moves by order to show cause and included an affidavit in support requesting the same relief.

OCME cross-moves for dismissal of the petition and argues in substance that the court should deny the petition as moot since after the petition was filed, OCME responded to Petitioner's FOIL request on November 20, 2020 and certified that it disclosed all non-exempt records after conducting a diligent search. OCME granted in part and denied in part Petitioner's FOIL request and provided Petitioner with material responsive to four of the twelve requests. OCME denied six items pursuant to Pub. Off. Law § 87(2)(b) and alleged that disclosure would be an unwarranted invasion of personal privacy and denied two requests by alleging they were vague and overbroad. Additionally, OCME advised Petitioner of his right to appeal its decision within thirty (30) days of receipt of the letter. OCME did not receive an appeal from Petitioner.

OCME further argues that it was delayed in responding to Petitioner's FOIL request because its employees were forced to work from home as of March 16, 2020, because of restrictions caused by the COVID-19 pandemic and since Petitioner made his request by mailing the letter instead of filing it through the NYC OpenRecords Portal, there was a delay in OCME processing the mail and responding to Petitioner's letter. Therefore, they began processing his

request on or about September 23, 2020, when they saw his letter appealing the “constructive denial.”

OCME also argues that Petitioner is not entitled to reimbursement of his filing fee for this proceeding because he did not substantially prevail after OCME failed to respond to his request within the statutory time. OCME argues in substance that it had a reasonable excuse for the delay and it started working on Petitioner’s request once it processed his letter and located him at his facility because of COVID-19-related delays.

Finally, OCME argues in substance that the court should dismiss the petition because Petitioner failed to exhaust his administrative remedies as Petitioner failed to appeal OCME’s decision in a timely manner.

Petitioner opposed OCME’s cross-motion to dismiss his complaint and argued in substance that OCME’s response was insufficient because he cannot view the CD at his facility without a court order and that he is entitled to the material that OCME refused to disclose. Additionally, Petitioner argues that he is entitled to be reimbursed for his \$15.00 filing fee.

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency’s determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (*see* CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; *Scherbyn v BOCES*, 77 NY2d 753, 757-758 [1991]). A determination subject to review under Article 78 exists when, first, the agency “reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be significantly ameliorated by further administrative action or by steps available to the complaining party” (*Walton v. New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]). There can be no judicial review of an agency’s determination

pursuant to Article 78 unless the petitioner has exhausted administrative remedies (*Pascale v New York State Div. of Hous. & Community Renewal*, 157 AD3d 625, 625-626 [1<sup>st</sup> Dept 2018]).

Review of an agency's non-final order should be limited to situations when it is necessary to avoid irreparable harm without prompt judicial intervention (*Martin v Ambach*, 85 AD2d 869, 871 [3d Dept 1981]). The doctrine of exhaustion of administrative remedies requires that "if further administrative avenues or remedies are available to obtain the result, they must be pursued and completed unless such further pursuit reasonably appears to be futile" (*id.* at 870).

Here, the court grants OCME's cross-motion to dismiss Petitioner's petition, denies Petitioner's order to show cause and the petition and dismisses the petition without costs. The court denies the petition as moot and on the merits as OCME demonstrated that it adequately responded to Petitioner's FOIL request, that the delay in responding was reasonable due to COVID-19 restrictions and that its denial of some of Petitioner's requests was reasonable and consistent with the applicable law. Petitioner's FOIL request was dated June 14, 2020 and his appeal of the "constructive denial" was dated August 17, 2020. OCME processed his letter and began working on its investigation and response on September 23, 2020. At the time, OCME employees were forced to work from home and they had limited staff available to process letters, so the delay was reasonable.

Additionally, Petitioner failed to exhaust his administrative remedies by failing to appeal OCME's decision to grant in part and deny in part his FOIL request.

Therefore, the court grants OCME's cross-motion to dismiss Petitioner's verified petition and dismisses the verified petition in its entirety.

The court has considered the remaining arguments of all parties and denies any additional relief requested not specifically set forth herein.

As such, it is hereby

ORDERED that the court grants Respondent The New York City Office of Chief Medical Examiner's cross-motion to dismiss Petitioner Jay Bradshaw's verified petition and dismisses Petitioner's CPLR Article 78 verified petition without costs to either party; and it is further

ORDERED that the court denies Petitioner's cross-motion; and it is further

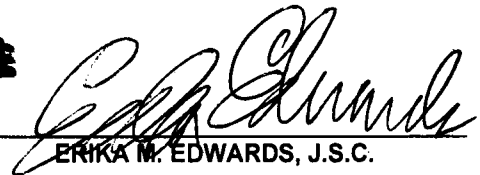
ORDERED that the Clerk of the Court is directed to enter judgment in favor of Respondent The New York City Office of Chief Medical Examiner as against Petitioner Jay Bradshaw; and it is further

ORDERED that this constitutes the decision and order of the court.

**FILED**

**JUN 10 2021**

**COUNTY CLERK'S OFFICE  
NEW YORK**

  
ERIKA M. EDWARDS, J.S.C.

6/9/2021  
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: