

Rickner PLLC v City of New York
2021 NY Slip Op 32201(U)
October 28, 2021
Supreme Court, New York County
Docket Number: Index No. 157878/2021
Judge: Arlene Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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RICKNER PLLC,

Petitioner,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE
DEPARTMENT

Respondent.

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INDEX NO. 157878/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER &
JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58 were read on this motion to/for ARTICLE 78 FOIL.

The petition to direct respondents to make a determination on each of petitioner’s FOIL requests, for the immediate disclosure of the requested documents and for reasonable legal fees is granted.

Background

In this FOIL proceeding, petitioner contends that it made seven FOIL requests to respondents and, for each request, respondents failed to make timely determinations. The first request, FOIL-2021-056-01384, was sent on January 28, 2021. Petitioner insists that respondents did not acknowledge this request within the statutory five-day period and, instead, responded on February 21, 2021 with an estimate that a response would be rendered by June 14, 2021. When no response was given by respondents’ own date, petitioner sought to appeal this

alleged constructive denial and the FOIL appeals officer denied the request on the ground that he lacked the authority to review an appeal of a constructive denial.

The second request, FOIL-2021-056-01570, was sent on February 1, 2021. This request was acknowledged by respondents on February 2, 2021 and they provided an estimated response date of June 16, 2021. That date came and went and, again, petitioner sought to unsuccessfully appeal this constructive denial.

FOIL-2021-056-01931, the third request, was submitted on February 8, 2021, acknowledged by respondents on February 10, 2021 and respondents identified June 23, 2021 as the estimated response date. Again, no records or responses were provided, and petitioner tried to appeal within the agency.

The fourth request, FOIL 2021-056-02210, was sent in on February 12, 2021, acknowledged on February 16, 2021 and respondents gave a June 29, 2021 estimated response date. No determination was rendered by respondents and no records were produced in response to this request either.

The fifth request, FOIL 2021-056-04388, follows the same pattern. It is dated March 22, 2021, acknowledged on March 24, 2021 and had an estimated August 4, 2021 response date. Yet, respondents never responded.

The sixth and seventh requests (which pertain to the same individual) were both requested on March 23, 2021, acknowledged on March 25, 2021 and had an August 5, 2021 response date. Once again, respondents did nothing.

In support of its cross-motion to dismiss, respondents argue that each request is still pending and that they have not made a final determination on any of them. They maintain that petitioners have not exhausted the mandatory appeals process. Respondents largely concede the

timelines proffered by petitioner with respect to each of the seven requests. They insist that the ongoing pandemic has caused various delays in responding to FOIL requests.

In reply and in opposition to the cross-motion, petitioner insists that the failure to render a decision within a reasonable period is a constructive denial of these requests and it is entitled to bring this proceeding because it has exhausted its administrative remedies.

Discussion

“All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions . . . [B]lanket exemptions for particular types of documents are inimical to FOIL’s policy of open government. Instead, to invoke one of the exemptions of section 87(2), the agency must articulate [a] particularized and specific justification for not disclosing requested documents” (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-75, 653 NYS2d 54 [1996] [internal quotations and citations omitted]).

A petitioner can bring an Article 78 proceeding based on the constructive denial of a FOIL request where an agency fails to respond months after the deadline it sets (*Kohler-Hausmann v New York City Police Dept.*, 133 AD3d 437, 437, 18 NYS3d 848 (Mem) [1st Dept 2015]). In other words, a petitioner exhausts its administrative remedies when an agency fails to timely respond (*id.*). Of course, that makes perfect sense. Respondents’ position, that as long as it fails to respond to a FOIL request a petitioner cannot even appeal within the agency, is just plain silly. If the FOIL department of an agency acts like a brick wall, then the courts are likely to see it as a constructive denial.

This Court is well aware of the challenges that the ongoing pandemic has raised, particularly on government agencies. But respondents did not cite any specific reasons for why it

has ignored petitioner's FOIL requests. Some of these requests were submitted in January 2021 and respondents have not said anything definitive about when it might render a determination. As the First Department recently held in a FOIL case where the agency insisted that the pandemic justified delays in responding, "It does not follow, however, that the pandemic has rendered respondents indefinitely incapable of any response, or even of any ability to calculate when they might be able to respond" (*Oustacher v Clark*, 2021 NY Slip Op 05295, 2 [1st Dept 2021]). Respondents here flat out ignored petitioner and insist that their position is justified. This Court disagrees.

Moreover, this is not a situation (as often happens in FOIL cases) where respondents claim the volume of responsive documents is too large or would require them to include time-consuming redactions. Nor is it a situation where respondents have produced some records and are still working through the rest of the database. Instead, respondents offer a wholly conclusory argument that the pandemic justifies ignoring their legal obligation to respond within a reasonable timeframe. That respondents insist they are planning on releasing records soon (NYSCEF Doc. No. 30, ¶ 40) is immaterial. No records have yet been produced and some of the requests are now nearly ten months old.

Petitioner did what it was supposed to do. It submitted FOIL requests, waited months *for the deadlines suggested by respondents* to pass and then sought to appeal when respondents ignored them. Petitioner should not have to wait indefinitely while respondent ignores these requests. That respondents have to deal with many FOIL requests is irrelevant. They have a legal obligation to respond to FOIL requests within the framework set out in FOIL, not complain about it. The petition is granted and, as petitioner has substantially prevailed, it is entitled to reasonable legal fees (*Oustacher*, 2021 NY Slip Op 05295 at 3).

Accordingly, it is hereby

ADJUDGED that the petition is granted, and respondents are directed to render a substantive decision on each request on or before November 9, 2021 and produce all responsive records on or before November 9, 2021; and it is further

ORDERED that petitioner is entitled to legal fees and shall file a separate motion for those fees on or before November 23, 2021.

10/28/2021
DATE


ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE