

<b>Scala-Zankel v New York City Dept. of Transp.</b>
2023 NY Slip Op 30321(U)
January 27, 2023
Supreme Court, New York County
Docket Number: Index No. 157641/2022
Judge: Richard Latin
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. RICHARD LATIN PART 46V**

*Justice*

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PIA SCALA-ZANKEL, JAMES ZANKEL, PATRICIA SCALA,  
CIRO SCALA, HEATHER GALLIVAN, ROBERT GALLIVAN,  
CELESTE GUDAS

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF TRANSPORTATION,  
NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL  
PROTECTION, THE NEW YORK STATE DEPARTMENT  
OF TRANSPORTATION,

Defendant.

-----X

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, the instant petition and respondents New York City Department of Transportation (NYCDOT), New York City Department of Environmental Protection (NYCDEP), and the New York State Department of Transportation’s (NYSDOT) cross motions to dismiss are determined as follows:

In this Article 78 proceeding, petitioners seek judicial review of respondents’ alleged failure to respond to petitioner’s request for agency records pursuant to the Freedom of Information Law (Public Officers Law § 84, *et seq.*; “FOIL”). In its request, petitioners sought records concerning construction activity being conducted and/or previously conducted in close proximity to specified properties, particularly related to work on the Brooklyn-Queens Expressway and the Columbia Street Bridge.

Respondents NYCDOT and NYCDEP received petitioners’ FOIL request on April 26, 2022. NYCDOT sent an acknowledgment letter on May 3, 2022, providing October 24, 2022 as

an approximate response date. NYCDOT responded to the request on November 17, 2022 with an initial round of documents, including a redacted version of the Parsons Brinckerhoff Report, and gave an approximate final date of production of January 31, 2023. NYCDEP sent an acknowledgment letter on May 6, 2022, providing September 9, 2022 as an approximate response date. NYCDEP responded to the request on July 6, 2022. Respondent NYSDOT received petitioners' FOIL request on April 29, 2022. NYSDOT sent an acknowledgment letter on May 5, 2022, indicating that it would respond with 20 days. NYSDOT responded to the request on June 13, 2022, indicating it had no responsive records.

Petitioners commenced the instant petition on September 8, 2022. Respondents cross-move to dismiss.

“To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public” (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274 [1996]). Public Officers Law § 89 sets forth the procedure for making a FOIL request and responding to it. Public Officers Law § 89 (4) (a) provides, “any person denied access to a record may within thirty days appeal in writing such denial” and the agency “shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought.” Public Officers Law § 89 (4) (b) provides that “a person denied access to a record in an appeal determination under the provisions of paragraph (a)” may bring an Article 78 proceeding.

It is well settled that “one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law” (*Watergate II Apartments v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). The exceptions to the exhaustion

rule include where resort to an administrative remedy would be futile and where seeking such a remedy would cause irreparable injury (*see id.*).

Petitioners contend (1) that the release of the Parsons Brinckerhoff report by NYCDOT without a rationale for the redactions violates FOIL and (2) that the untimely responses from respondents constitute a constructive denial of their FOIL request. While a FOIL request can be constructively denied when an agency fails to issue a response in a timely manner (21 NYCRR 1401.5), a constructive denial must be appealed before a petitioner may bring an Article 78 proceeding (*see Kohler-Hausmann v New York City Police Dept.*, 133 AD3d 437 [1st Dept 2015] (“Contrary to the court's finding, petitioner's administrative remedies were exhausted when NYPD denied her administrative appeal from the constructive denial of her FOIL request”). Here, petitioners have not appealed any of the agency responses based on the redactions or constructive denial. The cases cited by petitioners for the proposition that constructive denial itself constitutes an exhaustion of administrative remedies are all inapposite because those cases dealt with an untimely response to an appeal, not to the request itself (*see Floyd v McGuire*, 87 AD2d 388 [1st Dept 1982]; *New York Times Co. v City of New York Police Dept.*, 103 AD3d 405 [1st Dept 2013]). Finally, petitioners have not demonstrated that the exceptions to the exhaustion rule should apply in this instance. Petitioners’ speculation that going through the appeals process would have been futile or caused irreparable injury is insufficient.

Petitioners received responses to their FOIL request from all respondents. NYCDOT has provided some records and indicated an approximate date of January 31, 2023 for the further production of documents and a final determination. As petitioners have not made any administrative appeal and have not demonstrated futility or irreparable injury, they did not exhaust their administrative remedies, and the petition must therefore be dismissed.


Relief pursuant to CPLR 3001 is not warranted as Article 78 is the appropriate vehicle for seeking judicial review here (*see Greystone Mgt. Corp. v Conciliation and Appeals Bd. of City of New York*, 62 NY2d 763, 765 [1984]).

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and dismissed; and it is further

ORDERED that the cross motions are denied as moot in light of the dismissal of the petition.

This constitutes the decision and judgment of the court.

<u>1/27/2023</u> DATE			 RICHARD LATIN, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE