

Streetsblog-NYC v City of New York

2023 NY Slip Op 30857(U)

March 21, 2023

Supreme Court, New York County

Docket Number: Index No. 159804/2022

Judge: J. Machelle Sweeting

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

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

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STREETSBLOG-NYC

Petitioner,

- v -

CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT,

Respondents.

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INDEX NO. 159804/2022

MOTION DATE 11/26/2022,
11/26/2022

MOTION SEQ. NO. 002 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33

were read on this motion to/for RELEASE RECORDS.

On November 15, 2022, petitioner filed a petition (NYSCEF Doc. 1) seeking an order (i) Compelling Respondents to supply all documents and reports requested by petitioner in its letter dated July 20, 2022 (NYSCEF Doc. 2); and (ii) Awarding costs and attorneys’ fees to petitioner.

On November 18, 2022, petitioner filed an order to show cause (“OTSC”) (Motion Sequence #001) (NYSCEF Doc. 7) seeking largely the same relief that petitioner sought in its original petition. The court (Hon. Lisa S. Headley) declined to sign the OTSC, noting, “Movant has failed to articulate a reason to circumvent regular motion practice” (NYSCEF Doc. 9).

Now pending before the court is Motion Sequence #002 in which petitioner, again, seeks largely the same relief as petitioner sought in its first petition. Specifically, petitioner seeks an order, pursuant to Section 89 of the Public Officers Law (“POL”):

- a) Directing Respondent to immediately supply Petitioner the documents requested by Petitioner in its July 20, 2022 FOIL Request, to wit statistical summary data, if extant, showing the number of School Crossing Guards injured or killed by motorists; and records, if existent, generated in response to every incident between January 1, 2012, and July 20, 2022; and, in addition, for each such incident provide the:
- Police Accident Report (MV104AN)
 - Aided Report (PD304-152)
 - Witness Statement - Injury to member of the Department (PD429-065)
 - Employee's Notice of Injury (Law Department Form WCD 23)
 - Supervisor's Report of Injury (Law Department Form 201); and
- b) Directing payment of attorneys' fees and costs to Petitioner.

Also pending before the court is a cross-motion filed by respondents (collectively, the "City") seeking an order pursuant to Civil Practice Law and Rules ("CPLR") 7804(f) and 3211(a)(2), directing the clerk to enter a judgment denying the petition and dismissing the proceeding, on the grounds that the Court lacks subject matter jurisdiction over this proceeding in that petitioner failed to exhaust mandatory administrative remedies prior to filing the petition.

Arguments Made by the Parties

Petitioner's general argument is that it made a Freedom of Information Law ("FOIL") request on July 20, 2022, and that petitioner was told that it could expect a response "on or about Monday, February 6, 2023." Petitioner argues that such a delay of over six months is unreasonable, and in violation of Section 89 of the Public Officers Law. Petitioner also argues that respondent's "utter failure" to provide the requested documents, without any assertion of privilege or loss, violates Section 89 of the Public Officers Law.

In opposition, and in support of its cross-motion, the City argues that petitioner failed to timely exhaust mandatory administrative remedies, insofar as petitioner has not yet been denied access to the requested records in a final agency determination. The City argues that pursuant to Public Officers Law Section 89(4)(b), a condition precedent to instituting an Article 78 proceeding

is a final denial by the agency in an administrative appeal proceeding, which has not occurred here. In reply, petitioner does not dispute the City's central contention that petitioner has not yet exhausted its administrative remedies. Instead, petitioner argues that it received a subsequent follow-up from the FOIL office, this time stating that a response should not be expected until around March 21, 2023.¹

Conclusions of Law

The Public Officers Law confers upon the court, subject matter jurisdiction in a CPLR Article 78 proceeding brought pursuant to FOIL, only after a request for records has been made and denied, and then further denied upon a timely administrative appeal. Public Officers Law Section 89, states:

4.
 - (a) Except as provided in subdivision five of this section, any person denied access to a record may within thirty days appeal in writing such denial [...]
 - (b) [...] a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules.

See also McGriff v Bratton, 293 AD2d 401 (1st Dept 2002) (“[...] petitioner, in order to preserve his right to judicial review, was required to exhaust his administrative remedies [...]”).

Here, it is undisputed that petitioner's FOIL request has not yet been denied. This is evidenced by the exhibit submitted by petitioner itself, wherein the agency informed petitioner that its FOIL request was still under investigation and that petitioner could expect a further response “on or about Tuesday March 21, 2023” (NYSCEF Doc. 33). Accordingly, this court finds that this court lacks subject matter jurisdiction with respect to petitioner's request at this time.

¹ In response to part of petitioner's FOIL request, the City respondent produced a document showing the number of school crossing guards injured or killed by motorists for each year from 2012 to 2022 (NYSCEF Doc. No. 25).

Further, “Public Officers Law § 89 (3) mandates no time period for denying or granting a FOIL request, and rules and regulations purporting to establish an absolute time period have been held invalid on the ground that they were inconsistent with the statute” (New York Times Co. v City of New York Police Dept., 103 AD3d 405 (1st Dept 2013)).

Contrary to petitioner’s claim that it is similarly situated to the petitioner in the case of *In Empire State Center for Public Policy v. NY State Department of Health* (72 Misc.3d 759). The situation here is distinguishable in that the petitioner in *Empire* had first filed an administrative appeal that was denied.


Conclusion

It is hereby:

ORDERED that petitioner’s motion (Motion #002) is DENIED; and it is further

ORDERED that the City’s cross-motion (Motion #002) is GRANTED; and it is further

ORDERED that the petition is dismissed and this matter is closed.

<p><u>3/21/2023</u> DATE</p>			 <hr/> <p>J. MACHELLE SWEETING, J.S.C.</p>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input checked="" type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE