

**Matter of Lipsig, Shapey, Manus & Moverman, P.C. v  
New York City Tr. Auth.**

2023 NY Slip Op 32351(U)

July 13, 2023

Supreme Court, New York County

Docket Number: Index No. 151105/2023

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. JOHN J. KELLEY PART 56M**

*Justice*

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In the Matter of

LIPSIG, SHAPEY, MANUS & MOVERMAN, P.C.,

Petitioner,

- v -

NEW YORK CITY TRANSIT AUTHORITY,  
METROPOLITAN TRANSPORTATION AUTHORITY, and  
THE CITY OF NEW YORK

Respondents.

-----X

INDEX NO. 151105/2023

MOTION DATE 03/08/2023

MOTION SEQ. NO. 001

**DECISION, ORDER, and  
JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30

were read on this motion to/for CPLR ARTICLE 78.

In this CPLR article 78 proceeding, the petitioner law firm seeks judicial review of a January 23, 2023 Metropolitan Transportation Authority (MTA) and New York City Transit Authority (NYCTA) determination constructively denying its requests for agency records pursuant to the Freedom of Information Law (Public Officers Law § 84, *et seq.*; hereinafter FOIL) and a December 22, 2022 New York City Police Department (NYPD) determination constructively denying its FOIL request to the NYPD. In its requests, the petitioner sought documents and video and audio recordings referable to a November 17, 2022 incident in which its client’s decedent, Michael Esineulo, was struck and killed by a NYCTA subway train at the Bowling Green subway station in Manhattan.

The MTA and NYCTA (together the transit respondents) cross-move pursuant to CPLR 7804(f) and 3211(a) to dismiss the petition as academic, inasmuch as they ultimately provided the petitioner with a full response to its requests, and only objected to providing a copy of

relevant video, which they nonetheless agreed to produce upon being served with a so-ordered subpoena. The petitioner does not oppose the cross motion, and has submitted a proposed subpoena to the court to be so-ordered. By so-ordered stipulation dated March 21, 2023, the petitioner discontinued its claims against the City of New York and, hence, withdrew his FOIL claims addressed to the NYPD. The cross motion is granted, the petition and proceeding are dismissed, and the court shall issue a so-ordered subpoena, which is annexed to this decision, order, and judgment.

On December 12, 2022 and December 13, 2022, the petitioner mailed FOIL requests to the transit respondents, seeking documents and recordings referable to the incident in which Esinuelo was killed. On January 23, 2023, MTA informed the petitioner by email that it would be undertaking a search for the requested documents and recordings. In a letter dated February 1, 2023, the petitioner informed MTA that it was deeming the January 23, 2023 email to be a constructive denial of the FOIL request. Rather than administratively appealing the constructive denial to the transit respondents' FOIL appeals officer, the petitioner instead commenced this CPLR article 78 proceeding on February 3, 2023. Notwithstanding their contention that the petitioner failed to exhaust its administrative remedies, on February 16, 2023, and thus while this proceeding was pending, the transit respondents produced all of the documents and recordings that the petitioner had requested, save the video recording. Although they objected to production of the video on the ground that, "if disclosed [it] could endanger the life and safety of any person" (Public Officers Law § 87[2][f]), they nonetheless indicated that "[t]he subject video has been preserved and can be obtained with a so-ordered subpoena."

A respondent agency may discharge its duty pursuant to FOIL by certifying that it has produced all relevant records (21 NYCRR 1401.2[b][5]), and that additional "records of which the agency is a custodian cannot be found after diligent search" (21 NYCRR 1401.2[b][7][ii]; see Public Officers Law § 89[3][a]; *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001]; *Matter of Yonamine v New York City Police Dept.*, 121 AD3d 598, 598 [1st Dept

2014]). Where the agency has made such a certification, a CPLR article 78 proceeding to review such a determination will have been rendered academic (*see Matter of Tarantino v New York City Police Dept.*, 136 AD3d 598, 599 [1st Dept 2016]; *Matter of Taylor v New York City Police Dept. FOIL Unit*, 25 AD3d 347 [1st Dept 2006]; *Matter of Tellier v New York City Police Dept.*, 267 AD2d 9 [1st Dept 1999]). A certification of a diligent search need not follow any specific form, nor need it include a statement of a person with personal knowledge of the search; rather, a statement in an attorney's affirmation is sufficient to support the certification (*see Matter of Rattley v New York City Police Dept.*, 96 NY2d at 875; *Matter of Tarantino v New York City Police Dept.*, 136 AD3d at 599; *Matter of Yonamine v New York City Police Dept.*, 121 AD3d at 598). Here, the transit respondents submitted the affirmation of an attorney who also serves as the supervisor of the MTA Office of General Counsel's Consolidated FOIL Team and, thus, had personal knowledge in any event that they had provided or will provide the petitioner with all documents and recordings in their possession that are responsive to its request.

Where, as here, a petitioner has obtained all of the relief that it sought in the petition, the petition must be denied as academic (*see Matter of Smith v Annucci*, 173 AD3d 1685, 1685 [4th Dept 2019]; *Matter of Herald Co. v O'Brien*, 149 AD2d 781, 782 [3d Dept 1989]).

Accordingly, it is

ORDERED that cross motion of the respondents Metropolitan Transportation Authority and New York City Transit Authority to dismiss the petition insofar as asserted against them is granted; and it is further,

ADJUDGED that the petition and proceeding are dismissed as against all of the respondents.

This constitutes the Decision, Order, and Judgment of the court.

7/13/2023

DATE



JOHN J. KELLEY, J.S.C.

MOTION:

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

CROSS MOTION:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

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REFERENCE