

**Portfolio Media, Inc. v
New York State Off. of Ct. Admin.**

2023 NY Slip Op 32942(U)

August 24, 2023

Supreme Court, New York County

Docket Number: Index No. 159592/2022

Judge: Lisa S. Headley

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

PRESENT: HON. LISA S. HEADLEY **PART** **28M**

Justice

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PORTFOLIO MEDIA, INC <div style="text-align: center;">Plaintiff,</div>	INDEX NO. <u>159592/2022</u> MOTION DATE <u>11/08/2022</u> MOTION SEQ. NO. <u>001</u>
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- v -

NEW YORK STATE OFFICE OF COURT
ADMINISTRATION,

**DECISION + ORDER ON
MOTION**

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 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).

On November 8, 2022, petitioner, Portfolio Media, Inc., (hereinafter, “Petitioner”) filed this *Article 78* petition for judicial review regarding New York State Office of Court Administration’s (hereinafter “OCA” or “respondent”) failure to respond to FOIL requests. Respondent cross-moves to dismiss the *Article 78* petition as time-barred pursuant to *CPLR §217(1)*.

Background

Frank Runyeon (“Mr. Runyeon”), a Senior Reporter for Law360, a news source published by Portfolio Media, Inc, (“Portfolio”) submitted a FOIL request on April 11, 2022, seeking four categories of documents concerning the operations of the Office of Inspector General (“OIG”). Mr. Runyeon’s request included: 1) reports, data, and other documents regarding the processing, investigation, and outcomes of complaints handled by OIG; 2) rosters, lists or directories of OIG employees; 3) operations and policy manuals for OIG, and 4) funding or budget requests from the OIG (collectively, “the FOIL Request”). Mr. Runyeon contends that the Office of Court Administration (“OCA”) failed to grant, deny, or acknowledge receipt of the FOIL Request within five business days as required by *Public Officers Law §89(3)(a)*. More than a month after Mr. Runyeon submitted the FOIL request and with no response from OCA to the request, on May 13, 2022, Mr. Runyeon appealed the constructive denial of the request as permitted under *Public Officers Law §89(4)(a)* (“the Constructive Denial Appeal”). Mr. Runyeon alleged that OCA failed to grant or deny the Constructive Denial Appeal within ten business days as required by *Public Officers Law §89(4)(a)*.

Petitioner’s Memorandum of Law in Support

In support of the petition, Petitioner submitted Mr. Runyeon’s affidavit, which attests to various dates in which he made FOIL requests to OCA and OCA failed to respond. Petitioner argues that OCA initially denied that any responsive records existed, but after further inquiry by Mr. Runyeon, OCA produced the following: (1) an “OIG Budget Request Summary” for each year from 2010-11 through 2022-23; (2) a list of current OIG employees; (3) a spreadsheet showing

current and former OIG employees during the covered time period; and (4) a copy of the Order creating the Office of the Inspector General.

Additionally, petitioner contends OCA refused to consider Mr. Runyeon's appeal on the final response because additional documents were known to exist based on an interview held on August 23, 2022, with Law360 where Inspector General Sherill Spatz, Deputy Inspector General Carol Hamm, and Managing Inspector General Kay Ann Porter-Campbell, in which it was stated that the OIG had compiled data on bias investigations, such as sexual harassment, and that OIG would be publicly posting that data "soon."

Petitioner requests this Court to direct respondent to produce the withheld records on the basis that: (1) the grounds for denial raised by respondents do not justify the failure to disclose the requested public records since the requested documents are public records, which must be disclosed unless an exemption to disclosure is established; (2) case-specific documents were improperly withheld because respondent failed to articulate particularized and specific justification for not disclosing requested documents; (3) the intra-agency exemption does not apply since courts have repeatedly held that complaints, investigative reports, and other records related to investigations are not exempt under the inter or intra-agency exemption, and must be disclosed to the extent they consist of witness statements, summaries of allegations, descriptions of investigative measures taken, factual findings, or other matters that are factual in nature; (4) that the privacy exemption does not justify withholding the requested documents because OCA was required to eliminate any privacy concern by redacting identifying information rather than withholding documents in their entirety; (5) documents related to funding and budgets requests were improperly withheld since respondent had not specified what documents or categories of documents were being withheld; (6) OCA denied possessing other responsive documents, which are reasonably believed to exist since OCA inaccurately asserted they had no additional records responsive to this request on June 16, 2022; however, on July 27, 2022, OCA produced an e-mail containing four attachments containing records responsive to petitioner's request; and (7) petitioner is entitled to an award of legal fees and costs pursuant to *N.Y. Pub. Off. Law § 89(4)(c)(ii)*.

Respondent's Cross-Motion

Respondent filed a cross-motion arguing that the petition should be dismissed because it is time-barred. Respondent contends that the petitioner failed to commence this *Article 78* proceeding within four months after the Petitioner's FOIL request decision became final on May 27, 2022, and Petitioner had until September 27, 2022, to file the within proceeding. However, petitioner did not commence this proceeding until 42 days after the applicable four-month statute of limitations period on November 8, 2022.

Respondent argues the procedure regarding FOIL requests requires Respondent to provide Petitioner with the FOIL request or a denial of the FOIL request within five business days, pursuant to *N.Y. Pub. Off. Law § 89(3)*. Respondent argues that since OCA did not fulfill its statutory obligation, the FOIL request is deemed constructively denied and may be subject to an appeal within 30 days, in writing to OCA pursuant to *N.Y. Pub. Off. Law § 89(4)(a)*. Respondent also argues petitioner's subsequent requests are duplicative of the FOIL request made on April 11, 2022, and there is no extension to the statutory limitations period for commencing an *Article 78* proceeding. Accordingly, respondent requests that the Court dismiss the petition as it is time-barred.

Petitioner’s Memorandum of Law in Opposition to Cross-Motion to Dismiss

In opposition to the cross-motion, petitioner asserts the initial constructive denial did not trigger the start of the statute of limitations as to OCA’s subsequent determinations because petitioner would have been required to commence an *Article 78* proceeding that would immediately be dismissed as moot, in light of OCA’s subsequent responses to the FOIL request. In addition, petitioner asserts it did not file successive or duplicative requests because when petitioner continued to engage in an ongoing process over the initial request, it should not be considered the same as submitting a second and separate request. In addition, petitioner argues it has not filed successive and duplicative requests, but rather it has filed a single operative request that has been the subject of extensive back and forth exchanges, including denials, appeals, partial productions by OCA, and what OCA called a final response. (*See Exhibit K, NYSCEF Doc. No. 31*).

In addition, petitioner contends OCA should be estopped from asserting the statute of limitations argument in light of OCA’s “inequitable and inconsistent” conduct. Specifically, Petitioner argues OCA affirmatively stated that petitioner’s initial constructive denial appeal was moot, and although OCA issued a written determination denying the FOIL request, OCA partially granted the subsequent appeal by producing documents following that decision, and otherwise engaged in conduct that caused petitioner to believe that the “clock was not running on its time” to commence an *Article 78* proceeding. Therefore, petitioner argues that the respondent’s cross-motion to dismiss should be denied because the filing of the *Article 78* petition was not time-barred.

Respondent’s Affirmation in Reply and in further support of the Cross-Motion

In reply, respondent asserts, *inter alia*, that OCA did not provide any acknowledgement or decision on Petitioner’s April 2022 FOIL request which constructively denied the request. The constructive denial of the April 2022 FOIL request then prompted petitioner to file his Constructive Denial Appeal on May 13, 2022, which also was not responded to within the prescribed time. Thereafter, on May 17, 2022, OCA responded by letter and subsequently on June 16, 2022, OCA denied access to all items. On June 23, 2022, OCA’s FOIL Appeals Officer indicated that petitioner’s May 13, 2022, FOIL Appeal was moot in light of OCA’s previous response in a letter dated June 16, 2023.

Respondent contends that OCA did not lead the petitioner to believe that OCA would be providing records responsive to Item #1, and, therefore, petitioner’s argument of detrimental reliance on OCA providing such documents should fail. Further, petitioner should not be allowed to invoke the doctrine of equitable estoppel against OCA as respondent did not “engage in conduct that wrongfully or negligently misled or induced petitioner to believe that its appeal had not been constructively denied[.]” Respondent reiterates that petitioner sought certain documents or records through successive appeals which were consistently denied and petitioner cannot argue that they detrimentally relied on those responses.

DISCUSSION

“A person who is denied access to certain information requested under FOIL must appeal the denial, in writing, to the agency’s appropriate person or entity within 30 days of the denial.” *See, Public Officers Law §89(4); Newton v. Police Dep’t*, 183 A.D.2d 621 (1992). The petitioner’s administrative remedies are exhausted when the respondent agency constructively denied their timely internal appeal of a previous denial of their request. *See, Public Officers Law § 89(4)(a); see also, Council of Regulated Adult Liq. Licensees v. City of N.Y. Police Dept.*, 300 A.D.2d 17, 18–19 (1st Dep’t 2002).

The FOIL requester's statutory remedy for an untimely response or ruling is to deem the response a denial and commence an *Article 78 proceeding* "for review of such denial." *Public Officers Law § 89(4)(a), (b)*; *Matter of Miller v. New York State Dept. of Transp.*, 58 A.D.3d 981, 983 (3d Dep't 2009), lv. denied 12 N.Y.3d 712 (2009). Moreover, the time period to commence an *Article 78 proceeding* is within four months after the agency's determination. *CPLR §217*. Here, it should be noted that the FOIL requests were made to OCA, however, the requested documents were in the possession of OIG. (*See, NYSCEF Doc No 15*).

On a motion to dismiss pursuant to *CPLR§ 3211(a)(5)*, the movant must establish that the time to commence an action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or otherwise inapplicable. *Wilson v. Southampton Urgent Med. Care, P.C.*, 112 A.D.3d 499, 499–501 (1st Dep't 2013).

FOIL Request Appeal #1

Petitioner filed the FOIL request on April 11, 2022. (*See, Exhibit A, NYSCEF Doc No. 21*). Here, since OCA failed to respond, the FOIL request was deemed constructively denied because OCA did not respond within the statutory 10- day requirement. *See, Public Officers Law § 89 (4)(a), (b)*; *see also Jewish Press, Inc. v. New York City Dep't of Hous. Pres. & Dev.*, 193 A.D.3d 483. Since OCA did not respond to the April 11, 2022, FOIL request, the petitioner on May 13, 2022, filed a constructive denial appeal because petitioner did not receive a letter from respondent. (*See, Exhibit B, NYSCEF Doc No. 22*). On May 17, 2022, OCA acknowledged, by e-mail, the constructive denial appeal. (*See, Exhibit C, NYSCEF Doc. No. 23*). On June 16, 2022, OIG submitted the denial of the FOIL request from April 11, 2022, on the basis that they have no records responsive to petitioner's request. (*See, Exhibit E, NYSCEF Doc. No. 25*).

Here, petitioner was required to take a written appeal of the constructive denial pursuant to *Public Officers Law § 89(4)(a)* within 30 days of the April 11, 2022, FOIL request, instead petitioner filed their appeal, on May 13, 2022, two days past the required statute of limitations.¹ Therefore, this Court finds petitioner's first FOIL request is time-barred pursuant to *Public Officers Law § 89(4)(a)*.

FOIL Request Appeal #2

Petitioner filed the FOIL request on April 11, 2022, which is the same request for the same documents as referred to in FOIL Request Appeal #1. Petitioner filed a constructive denial appeal on June 23, 2022. On June 23, 2022, OIG submitted their denial of petitioner's appeal, which stated that OIG responded to petitioner's FOIL request on June 16, 2022, rendering the constructive denial appeal moot. (*See, Exhibit F, NYSCEF Doc. No. 26*). On June 23, 2022, petitioner submitted an additional appeal of blanket denial (*See, Exhibit G, NYSCEF Doc. No.27*). On July 8, 2022, OCA submitted their determination of appeal on the basis that "there may be records responsive to one or more of petitioner's request subject to disclosure under FOIL and would remand back to Records Access Officer to provide a status update as to their review within 20 days of the date of this letter." (*See, Exhibit H, NYSCEF Doc. No. 28*).

On July 27, 2022, OCA submitted its response to petitioner's FOIL request, which contained four attachments that were responsive to petitioner's request. (*See, Exhibit I & J, NYSCEF Doc. Nos. 29-30*). Subsequently on August 5, 2022, OCA submitted their final response to petitioner's FOIL request received on April 11, 2022, where OCA stated, "there are no additional records to provide." (*See, Exhibit I & J, NYSCEF Doc. Nos. 29-30*). Then on September

¹ From and including Monday, April 11, 2022, to, but not including Friday, May 13, 2022, is 32 days.

4, 2022, petitioner filed an appeal of the final response (*See, Exhibit L, NYSCEF Doc. No. 32*), and on September 22, 2022, OCA submitted a letter to petitioner refusing to consider the appeal (*See, Exhibit M, NYSCEF Doc. No. 33*).

The pattern reveals that petitioner continued to exhaust its administrative remedies when petitioner failed to timely initiate this *Article 78* proceeding within four months after the determination to be reviewed became final and binding upon the petitioner. On June 16, 2022, OCA informed petitioner, that OCA was not in possession of any records responsive to this request. Therefore, petitioner's *Article 78* proceeding is time-barred because OCA issued a denial on June 16, 2022, and then petitioner commenced this petition on November 8, 2022, which is well past the four-month requirement to commence this action pursuant to *CPLR §217*.²

Here, the Court finds that the petitioner failed to timely commence an *Article 78* proceeding, thus, petitioner's administrative remedies were exhausted when OCA constructively denied petitioner's initial FOIL request on April 11, 2022, and when respondent acknowledged the FOIL request. *See, Public Officers Law § 89(4)(a)*; see also, *Council of Regulated Adult Liq. Licensees v. City of N.Y. Police Dept.*, 300 A.D.2d 17, 18–19 (1st Dep't 2002).

FOIL Request Appeal #3

On September 4, 2022, petitioner submitted a third appeal in which petitioner alleged the respondent's searches conducted to retrieve records in June 2022 and July 2022 were insufficient. (*See, Exhibit L, NYSCEF Doc. No. 32*). Specifically, petitioner's appeal is accompanied with an e-mail from Mr. Runyeon, which states "in this appeal, I assume your familiarity with the entirety of my previous appeal arguments in my June 23 appeal ... and I incorporate all arguments as part of this appeal." (*See Exhibit M, NYSCEF Doc. No. 33*). Here, this Court finds the Petitioner's successive appeals are duplicative of the April 11, 2022, FOIL request, and such duplicative requests do not extend the four-month limitation period. *See, Matter of Stankevich v. New York City Police Dep't*, 173 A.D.3d 507, 508 (1st Dep't 2019).

Based on the above, the Court finds the four-month limitation period to challenge an agency's decision began to run when the statutorily mandated 10-day period to respond to the appeal expired. *Jewish Press, Inc. v. New York City Dep't of Hous. Pres. & Dev.*, 193 A.D.3d 483. The record establishes that the petition was time-barred because petitioner filed this case more than four months after the denial of petitioner's prior FOIL request, and petitioner's second FOIL request "did not extend or toll his time to commence an article 78 proceeding." *Matter of Kelly v. New York City Police Dept.*, 286 A.D.2d 581 (1st Dep't 2001). Accordingly, the appeal requests are deemed to be time barred.

Furthermore, the cross-motion brought by respondent OCA dismissing the petition, pursuant to *CPLR § 3211(a)(5)*, is granted because respondent OCA has met the threshold burden of demonstrating that the petition is time-barred. *CPLR §217* provides in part, that "[u]nless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty[.]" *CPLR §217*.

Here, the petitioner has failed to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the action was commenced within the

² Friday, May 27, 2022, to Tuesday, September 27, 2022, is exactly four months. Petitioner filed his petition on November 8, 2022, which is 42 days after the statute of limitation had expired.

applicable limitations period. See, *Bennie v. Hudson Valley Ctr. at Saint Francis, LLC*, 115 A.D.3d 899(2014). Specifically, petitioner failed to meritoriously establish the grounds upon which respondent was estopped from raising a statute of limitations defense. *Id.* Therefore, respondent OCA’s cross-motion to dismiss the petition is hereby granted because the Court has determined hereinabove that the instant petition is time-barred pursuant to *CPLR §217*.

Furthermore, petitioner contends OCA should be estopped from asserting the statute of limitations argument in light of OCA’s “inequitable and inconsistent” conduct. Petitioner contends that OCA has taken the position that petitioner’s initial constructive denial appeal was moot, but then proceeded to issue a determination denying the FOIL request however, OCA still produced documents following the determination. Now, petitioner claims it would be unjust to invoke the statute of limitations period to prevent petitioner from seeking judicial review after the initial denial.

The Court rejects petitioner’s argument that the respondent is estopped from asserting the statute of limitations claim. Equitable estoppel generally “may not be invoked against a governmental agency to prevent it from discharging its statutory duties.” *E.F.S. Ventures Corporation v. Foster*, 71 N.Y.2d 359, 369, 520 N.E.2d 1345 (1988); see also *LoCicero v. Metropolitan Transportation Authority*, 288 A.D.2d 353, 355 (2d Dep’t 2001) (estoppel is to be invoked against government agencies “sparingly” and only in “exceptional circumstances”). To establish equitable estoppel, the petitioner must demonstrate “fraud, misrepresentation, deception or similar affirmative misconduct,” which has not been done in this case. See, *Matter of Jamaica Recycling Corp. v. City of New York*, 12 Misc. 3d 276, 293 (Sup. Ct 2006), *aff’d*, 38 A.D.3d 398 (1st Dep’t 2007). Here, the petitioner has failed to demonstrate that OCA’s conduct was based in “fraud, misrepresentation, deception or similar affirmative misconduct.” Thus, the Court finds that OCA’s conduct was not “inequitable and inconsistent,” and therefore, OCA is not estopped from asserting the statute of limitations argument.

Furthermore, the petitioner’s request for an award of attorney fees is denied in the exercise of the Court’s discretion.

Accordingly, it is hereby

ORDERED that petitioner’s application for a judicial review of OCA’s FOIL request determinations pursuant to *Article 78* is DENIED; and it is further

ORDERED that respondent’s cross-motion to dismiss pursuant to *CPLR 3211(a)(5)*, is GRANTED, and the petition is hereby DISMISSED; and it is further

ORDERED that within 30 days of entry, petitioner shall serve a copy of this decision/order upon the respondent with notice of entry; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered.

This constitutes the Decision and Order of the Court.

8/24/2023

DATE



LISA S. HEADLEY, 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