

**Surveillance Tech. Oversight Project v Metropolitan
Transp. Auth.**

2023 NY Slip Op 34502(U)

December 21, 2023

Supreme Court, New York County

Docket Number: Index No. 157875/2023

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: <u>HON. ARLENE P. BLUTH</u> <i>Justice</i> -----X SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT Petitioner, - v - METROPOLITAN TRANSPORTATION AUTHORITY, Respondent. -----X	PART 14 INDEX NO. <u>157875/2023</u> MOTION DATE <u>12/13/2023</u> MOTION SEQ. NO. <u>001</u> DECISION + ORDER, JUDGMENT ON MOTION
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for ARTICLE 78.

The petition, brought under the Freedom of Information Law (“FOIL”), is denied.

Background

Petitioner claims that respondent has installed technology utilizing artificial intelligence in several subway stations throughout New York City as part of an effort to combat fare evaders. It explains that this type of automated surveillance software raises numerous questions about the technology’s efficacy and its ability to properly identify people, particularly riders of color. Petitioner contends that artificial intelligence programs have struggled to properly identify people of color.

Petitioner therefore decided to file a FOIL request on December 14, 2022 (*see* NYSCEF Doc. No. 11). It alleges that respondent acknowledged the request via an email response that same day but did not respond to the request in a timely manner. Petitioner then sent an appeal based on this constructive denial on March 20, 2023 and respondent issued a partial denial on May 25, 2023. Respondent provided some information, although much of it was redacted.

Petitioner claims that it then appealed this partial denial on June 23, 2023 but that respondent did not acknowledge that appeal within the statutorily prescribed timeline.

Petitioner now contends that respondent improperly denied its FOIL request and insists that the redactions were improper.

Respondent cross-moves to dismiss on the ground that petitioner failed to exhaust its administrative remedies. It argues that petitioner did not submit a timely administrative appeal to respondent's designated appeals officer. Respondent claims that petitioner was specifically informed of the procedure, which involves mailing the appeal to respondent's Chief Safety Officer in Manhattan. It observes that petitioner's first appeal before respondent was also sent to the wrong location but that respondent internally forwarded it to the right office. Respondent insists that the email address where the appeal that forms the basis of this proceeding was sent is not monitored or associated with the designated appeals officer.

In opposition and reply, petitioner blames respondent for creating a procedure where the appeal is constructively denied. Petitioner emphasizes that respondent's only argument is that petitioner did not submit the June appeal in the correct way but petitioner argues that there is no requirement that the appeal be sent via mail.

Discussion

The only issue in this proceeding concerns process—whether or not petitioner satisfied its burden to exhaust administrative remedies. Respondent did not bother to offer anything about the merits of the FOIL request and the adequacy of its partial response.

The Court observes that respondent's final response about the FOIL request is dated May 25, 2023 and it was sent to petitioner via email. In this email, respondent noted that "In accordance with Title 21, New York Code of Rules and Regulations §1001.7, you are entitled to

appeal this determination within thirty (30) days. The appeal should be sent to: Patrick Warren, Chief Safety Officer, Metropolitan Transportation Authority, 2 Broadway, 20th Floor, New York, New York 10004” (*id.*).

No email address is provided for this appeal and so the Court finds that petitioner’s decision to send the appeal of the May 25, 2023 to an email address (foil@mtahq.org) was not sufficient. It did not conform to the procedures set forth by respondent. The only reasonable interpretation of the language cited above is that the appeal had to be sent via “snail” mail (as only a physical mailing address was provided). The applicable regulation relating to records from respondent provides that “Any party denied access to a record or records of the authority may, within 30 days, appeal such denial to the chairman of the Metropolitan Transportation Authority, or his or her designee. Such appeal shall be made in writing and shall be accompanied by such party's written application for such records” (22 NYCRR § 1001.7).

In other words, respondent was permitted to identify a designee to hear appeals, which it did, and the Court finds that there is no basis to find that it was impermissible for respondent to require that such an appeal be effectuated via “snail” mail. Petitioner did not cite any binding caselaw, statute or regulation that respondent was required to accept the appeal via email. That petitioner may have responded to an initial appeal by email is of no moment. The correspondence from respondent is very clear about how petitioner should have proceeded.

That said, petitioner’s position is entirely understandable. It is 2023 and respondent is forcing FOIL requestors to effectuate an appeal by mailing documents despite the fact that it is fully capable of responding via email. In fact, respondent appears to initially receive and respond to FOIL requests via email. It may be that respondent has a good reason to force requestors to appeal via mail, although this Court cannot fathom what it might be. However,

nothing in the regulations cited by either party would permit the Court to require respondent to accept an appeal via email. That, it appears, is a task for the appropriate legislative body.

Accordingly, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements. Nothing prevents petitioner from making a new FOIL request.

<u>12/21/2023</u>			
DATE		ARLENE P. BLUTH, J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART
APPLICATION:	☐ SETTLE ORDER		☐ OTHER
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE