

Zappin v New York County Dist. Attorney's Off.

2024 NY Slip Op 30629(U)

February 29, 2024

Supreme Court, New York County

Docket Number: Index No. 150420/2024

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH **PART** **14**

Justice

-----X

JEFFREY ZAPPIN,

Petitioner,

- v -

NEW YORK COUNTRY DISTRICT ATTORNEY'S OFFICE,

Respondent.

-----X

INDEX NO. 150420/2024

MOTION DATE 02/28/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1-27
were read on this motion to/for ARTICLE 78 (FOIL).

The petition to annul the denial of petitioner’s FOIL request is denied.

Background

Petitioner commenced this proceeding to compel respondent to produce records relating *inter alia* to a criminal matter involving petitioner’s son. That matter, *People v Zappin*, arose out of a 2016 police report filed by petitioner’s son, Anthony. Anthony insisted that a justice who was presiding over his matrimonial action in New York County Supreme Court had spit at him on a street in Manhattan. Unfortunately for Anthony, surveillance footage from near where this alleged spitting incident occurred directly refuted his claim. He was charged with filing a false police report and he eventually pled guilty to a misdemeanor.

As a direct consequence of this incident and many other “egregious and outrageous acts” committed by Anthony (who was a licensed attorney), he was disbarred (*Matter of Zappin*, 160 AD3d 1, 73 NYS3d 182 [1st Dept 2018]).

In 2018, Anthony filed multiple FOIL requests with respondent which sought 116 categories of documents concerning the 2016 fake spitting incident (NYSCEF Doc. No. 13). He also sought records relating to his disbarment proceeding and other matters (*id.*). Respondent then provided Anthony with 44 pages of documents but raised objections to many of the 116 requests in a letter dated July 27, 2018 (NYSCEF Doc. No. 14).

According to respondent, Anthony never appealed that decision and, instead, filed a new and substantially similar FOIL request for 87 categories of documents five years later on July 27, 2023 (NYSCEF Doc. No. 15). On August 25, 2023, respondent denied Anthony's new FOIL request on the ground that the July 2023 request was "nearly an exact duplicate of a prior FOIL request" (NYSCEF Doc. No. 19). This denial noted that "In that 2018 determination, you were granted access to and provided with some records and denied access to others on various grounds. That prior determination remains in effect" (*id.*).

On the same day as this denial (in fact, just a few hours later), petitioner submitted a FOIL request concerning the same subject matter as Anthony's 2018 and 2023 requests (NYSCEF Doc. No. 3). On August 30, 2023, respondent denied the request and noted that "[t]he request that was received by this office via email on August 25, 2023, is an exact duplicate of a recent request submitted by your son, Anthony Zappin, on July 27, 2023, which in turn was determined to be a duplicate of a 2018 FOIL; that 2018 request provided your son with some records and denied access to others on various grounds. That prior determination remains in effect" (NYSCEF Doc. No. 4).

Petitioner appealed on the ground that there was no basis to find that he was an agent for his son (NYSCEF Doc. No. 5). He insisted that he "was acting on my own accord and on my own behalf for my own purposes. There is nothing in my August 25 FOIL Requests indicating

that I was acting for any other individual, including Anthony Zappin, in making the request” (*id.*).

Respondent denied that appeal on the ground that petitioner’s FOIL request was an effort to evade Anthony’s failure to appeal the 2018 FOIL determination (NYSCEF Doc. No. 6). It also noted that some of the requests would be denied as they directly related to a pending litigation in federal court (*Zappin v Cooper et al.*, 20-cv-2669) (*id.*).

Petitioner argues that the denial of his petition is unlawful and that he submitted sworn statements from himself and Anthony that petitioner was not acting as Anthony’s agent in connection with the August 25, 2023 FOIL request. He argues that even if his requests were duplicative of his son’s FOIL requests, that is not a basis to deny his request. Petitioner argues that respondent has cited no evidence that there is a principal-agent relationship sufficient to deny the petition. He stresses that respondent bears the burden to justify the denial of a FOIL request and that, as a member of the public, petitioner has the right to request these records.

In opposition, respondent emphasizes that the petition should be denied because petitioner’s FOIL request is an obvious attempt to overcome the procedural bars on the 2018 FOIL request. It insists that because the time to challenge that determination has long passed, petitioner cannot pursue the exact same records on Anthony’s behalf. Respondent characterizes the instant petition as a “thinly-veiled proxy suit.” It points to the fact that petitioner’s request was submitted on the very same day that Anthony’s 2023 request was denied as duplicative and that petitioner used the exact same address in South Carolina for the request. Respondent even observes that petitioner’s request contains an identical typographical error from Anthony’s 2023 FOIL request.

Petitioner did not submit a reply.

Discussion

As an initial matter, the Court observes that there is no doubt that petitioner's August 2023 request and Anthony's 2023 request are identical (*compare* NYSCEF Doc. No. 3 with NYSCEF Doc. No. 15). Moreover, there is no question that Anthony's 2018 and 2023 requests seek substantively the same exact information (*compare* NYSCEF Doc. Nos. 13 with 15).

Therefore, the central question for this Court is whether respondent was justified in denying petitioner's FOIL request on the ground that it was duplicative. The Court finds that it was. In *Greene v City of New York* (196 Misc2d 125, 763 NYS2d 880 [Sup Ct, NY County 2004]), the Supreme Court denied a FOIL request by an individual's attorney on the ground that it was duplicative of his client's prior FOIL request. The Court observed that "A FOIL request made by a representative of the petitioner cannot be considered an independent request; rather it is a request on behalf of his or her client. Furthermore, the Statute of Limitations does not toll or extend when a subsequent FOIL request is duplicative of the prior request. A subsequent FOIL request that is nearly identical to a prior request, except that the request is more specific, would be duplicative. Thus, if two FOIL requests are duplicative, the court may dismiss the proceeding challenging a determination of the latter request, as a belated attempt to seek judicial review of the denial of the first request" (*id.* at 130).


Although petitioner does not appear to be his son's lawyer as in *Greene*, the Court finds that nevertheless he is clearly petitioner's representative under these circumstances. The fact is that petitioner submitted an exact duplicate request just a few hours after his son's 2023 FOIL request was denied. Moreover, the request listed the exact same address—a P.O. Box in South Carolina (*see* NYSCEF Doc. Nos. 3 and 15). The timeline of events and the instant circumstances compel an obvious conclusion: that the instant FOIL request is an effort to do an

“end run” around the statute of limitations problem identified in the denial of Anthony’s 2023 request. As respondent made clear in that dispute, Anthony never appealed the determination of his 2018 request and so his 2023 FOIL demand was improper and untimely. Petitioner cannot serve as a “front” to make a timely application on his son’s behalf.

If the Court were to reject respondent’s denial of this FOIL request, it would effectively eviscerate the statute of limitations period for FOIL requests. An individual whose request was denied but failed to timely commence an Article 78 proceeding could simply have an associate file the exact same FOIL request and start the process over again. To be sure, a denial on this basis need not have broad application to every set of similar FOIL requests. But, here, petitioner filed the same exact request previously filed by *his son* on the very same day his son’s request was denied. In other words, the unique facts of this case suggest that respondent’s denial of petitioner’s FOIL request was justified.

Accordingly, it is hereby

ADJUDGED that the petition is denied, this proceeding is dismissed and the Clerk is directed to enter judgment accordingly upon presentation of proper papers therefor.

<u>2/29/2024</u> DATE	 ARLENE P. BLUTH, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE