

America First Legal Found. v Bragg

2025 NY Slip Op 30312(U)

January 27, 2025

Supreme Court, New York County

Docket Number: Index No. 158523/2024

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M

Justice

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AMERICA FIRST LEGAL FOUNDATION,

Petitioner,

- v -

ALVIN BRAGG, NEW YORK COUNTY DISTRICT
ATTORNEY'S OFFICE

Respondent.

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INDEX NO. 158523/2024

MOTION DATE 09/16/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51

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

Upon the foregoing documents, the petition is denied.

Background

America First Legal Foundation (“Petitioner”) made multiple FOIL requests relating to the criminal trial of Donald Trump and the Biden-Harris campaign to the Manhattan County District Attorney’s Office and Alvin Bragg in his official capacity as District Attorney for New York County (collectively, “Respondents”). Relevant for the purposes of this petition are four requests that were submitted between April 2023 and June 2024: 23F0274 (the “Stipulated Request”) and 24F0359, 24F0360, and 24F0387 (the three “Unappealed Requests”). These requests have been pending for many months, with update letters being sent out by Respondents. The Stipulated Request was made on April 20, 2023, and an appeal of the constructive denial of the request was made on August 8, 2024. This appeal was denied on August 22, 2024. The Petitioner filed the underlying special proceeding on September 16, 2024, requesting a declaratory judgment and an order compelling Respondents to produce the requested documents

by a date certain. The parties have since entered into a stipulation on January 24, 2025, regarding the issuance of a final determination and document production date for the Stipulated Request, rendering that portion of Petitioner's requested relief moot.

Discussion

There are two remaining issues from the Petition after the parties' recent stipulation that form the subject of this Order: 1) whether an appeal of the Unappealed Requests' apparent constructive denial would have been futile and therefore make the requests subject to review by this Court; and 2) Petitioner's request for attorneys' fees pursuant to POL § 89(4)(c).

The Remaining FOIL Requests are Not Available for Review by This Court

A petitioner may seek judicial review of a FOIL records request via an Article 78 special proceeding when they have been "denied access to a record in an appeal determination." POL § 89(4)(b). Under the exhaustion rule, a petitioner must generally have exhausted their available administrative remedies, and a final administrative determination must have been rendered, in order to sustain a judicial review of the administrative decision. *Matter of Cross v. Russo*, 132 A.D.3d 454, 454 (1st Dept. 2015); see also *Matter of Borrero v. Banks*, 212 A.D.3d 496, 496 (1st Dept. 2023). In the context of a FOIL request, any "purported failure to respond to the [request] in a timely fashion" is not sufficient to exhaust all administrative remedies. *Matter of Carty v. New York City Police Dept.*, 41 A.D.3d 150, 150 (1st Dept. 2007). It is not disputed that here there have been no administrative appeals filed regarding the Unappealed Requests. Rather, Petitioner contends that the futility exception applies in the present case, and Respondents argue that Petitioner was required to present a constructive denial appeal to the relevant FOIL Appeals Officer and that failure to do so deprives this Court of subject matter jurisdiction in this matter.

There has long been an exception to the exhaustion rule for when “resort to an administrative remedy would be futile.” *Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52, 57 (1978). This rule applies to FOIL requests as well as other administrative agency challenges. *Matter of New York Times Co. v. City of N.Y. Police Dept.*, 103 A.D.3d 405, 409 (1st Dept. 2013). Petitioner argues that because of the treatment of the Stipulated Request and the long delay in responding to all of the requests made in this matter, any appeal of the constructive denial of the Unappealed Requests would have been futile. More specifically, Petitioner argues that because Respondents “refused to countenance that its acts were improper under the FOIL” regarding the long delays, that any appeal of any of the requests made by Petitioner would be futile.

But this is not enough to make an appeal of a constructive denial futile. The Unappealed Requests had been pending for longer than the Stipulated Request, and there is no indication that an appeal of the other requests would have been presumptively futile. The other requests involved different sets of documents and were at different stages of progress than the one request that was appealed. The Court notes that while there are strong public policy reasons against unreasonable delays of such requests, the subject matter of the requests involved extensive documents on an unprecedented scenario, including substantial public interest in an ongoing criminal trial, and Respondents are operating on a limited agency budget. In cases where the courts found that an appeal was indeed futile, this was because of reasons such as a department’s “firm statement of policy.” *G. Heileman Brewing Co. v. State Liquor Auth.*, 237 A.D.2d 203, 203 (1st Dept. 1997); *see also Matter of Friedman v. Rice*, 30 N.Y.3d 461, 473 (2017)(where the agency in question clearly stated in a letter that they would not release any documents to petitioner without a court order); *Mitchell v. New York City Dep’t of Consumer Affairs*, 160

A.D.2d 487, 489 (1st Dept. 1990)(where the petitioner had attempted to resolve the issue during the appeal window by acting on information supplied by the agency). Because the futility exception to the exhaustion rule has not been established, and there has been no appeal of the three remaining requests, this Court does not have subject matter jurisdiction over the Unappealed Requests and therefore cannot exercise judicial review over them.

The Court Declines to Issue Attorneys' Fees

Petitioner has requested that they be awarded attorneys' fees pursuant to POL § 89(4)(c)(i), which allows a court to award a petitioner in a special proceeding attorneys' fees when "such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time." But here, for the reasons given above, Petitioner has not substantially prevailed. Therefore, the Court declines to award Petitioner attorneys' fees.

Accordingly, it is hereby

ADJUDGED that the petition is denied.


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LYLE E. FRANK, J.S.C.

1/27/2025
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE