

**Matter of Power The Future v
Comptroller of the City of N.Y.**

2025 NY Slip Op 30829(U)

March 10, 2025

Supreme Court, New York County

Docket Number: Index No. 159448/2023

Judge: Shahabuddeen A. Ally

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

PRESENT: HON. SHAHABUDDEN A. ALLY

PART 16

Justice

In the Matter of

POWER THE FUTURE,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

THE COMPTROLLER OF THE CITY OF NEW YORK,

Respondent.

INDEX NO. 159448/2023

MOTION DATE 11/1/2023
5/6/2024

MOTION SEQ. NO. 001 & 002

DECISION & ORDER

The following e-filed documents, listed by NYSCEF document number, were read on this motion and cross-motion (Seq. No. 1) to **ARTICLE 78 (FOIL) / DISMISSAL**: 1-10

The following e-filed documents, listed by NYSCEF document number, were read on this motion (Seq. No. 2) for **LEAVE TO AMEND**: 14-23

In this Article 78 proceeding, commenced on September 26, 2023, pursuant to Verified Petition, petitioner POWER THE FUTURE (“Petitioner”) seeks an order and judgment: (1) directing respondent THE COMPTROLLER OF THE CITY OF NEW YORK (the “Comptroller”) to comply with its duty under New York’s Freedom of Information Law (“FOIL”) and to disclose the records sought by Petitioner in its July 20, 2023 and August 2, 2023 FOIL requests; (2) awarding reasonable attorneys’ fees and litigation costs as allowed under New York Public Officers Law (“POL”) § 89(4)(c); and (3) granting such other relief as the Court deems just and proper. (Verified Pet., dated Sept. 26, 2023 (“Pet.”) (NYSCEF Doc. 1)) On October 27, 2023, the Comptroller filed a cross-motion to dismiss the Verified Petition, claiming that Petitioner’s failure to exhaust all available administrative remedies barred the Article 78 proceeding. (NYSCEF Doc. 4-5) On October 31, 2023, Petitioner replied to the Comptroller’s cross-motion to dismiss. (*Id.* Doc. 10) After the Comptroller provided Petitioner with materials responsive to the requests on January 12, 2024,

Petitioner moved for leave to amend the Verified Petition and submitted a proposed Amended Verified Petition on January 23, 2024. (*Id.* Docs. 14-16) On April 12, 2024, the Comptroller opposed Petitioner's motion for leave to amend, and, on May 3, 2024, Petitioner replied to the Comptroller's opposition. (*Id.* Docs. 20- 21, 23)

For the reasons discussed below, Petitioner's motion for leave to amend is **DENIED**, the Comptroller's cross-motion is **GRANTED**, and the Verified Petition is **DISMISSED** without prejudice.

I. BACKGROUND

On July 20, 2023, Petitioner submitted a FOIL request (the "7/20/23 Request") to the Comptroller via electronic mail. (Pet. ¶ 4; NYSCEF Doc. 6) The 7/20/23 Request sought the correspondence of five named employees of the Comptroller, "which correspondence included, anywhere, one or more of three keywords associated with efforts to stop the Office from engaging in a controversial practice, given its fiduciary responsibilities, called 'ESG investing.'" (Pet. ¶ 4)

On July 21, 2023, having received the 7/20/23 Request, the Comptroller reached out to Petitioner to correct a time discrepancy. (Affirm. in Supp. of Resp't's Cross-Mot. to Dismiss, dated Oct. 27, 2023 ("Siddiqui 2023 Affirm.") (NYSCEF Doc. 5), ¶ 2) Then, on July 27, 2023, the Comptroller officially acknowledged the receipt of the 7/20/2023 Request but did not assign it a tracking number. (Pet. ¶ 7) Within its acknowledgement, the Comptroller stated:

We are in receipt of your FOIL request. However, due to the volume of requests that we are processing, and the voluminous nature of your request, we need additional time to complete the response to your request. We anticipate completing our response to your request on or about September 26, 2023. Note that we may provide you with a response sooner than that date.

(*Id.*)

On August 2, 2023, Petitioner submitted a second FOIL request (the "8/2/23 Request"; and, together with the 7/20/23 Request, the "Requests") to the Comptroller via electronic mail. (*Id.* ¶ 10; NYSCEF Doc. 7) The 8/2/23 Request sought correspondence of five named employees of the Comptroller, "which correspondence included, anywhere, the email domains of one or more of a dozen specified environmentalist pressure groups or commercial interests sent or received over a specific period of time." (Pet. ¶ 10)

On August 9, 2023, the Comptroller acknowledged receipt of the 8/2/23 Request and provided the estimated response date of September 26, 2023. (Siddiqui 2023 Affirm. ¶ 3)

On September 25, 2023, the Comptroller informed Petitioner that due to the volume of requests it was processing, the complexity of the search required, and the volume of potentially responsive records, additional time would be needed to produce responses to the Requests. (Pet. ¶ 8; Siddiqui 2023 Affirm. ¶ 5) Within this communication, the Comptroller provided October 24, 2023, as the new estimated response date. (Pet. ¶ 8; Siddiqui 2023 Affirm. ¶ 5)

On September 26, 2023, Petitioner commenced the instant proceeding by filing a Verified Petition with the Court, seeking to compel compliance with the Requests and production of responsive materials by the Comptroller. Within the Verified Petition, Petitioner asserts that “Respondent has provided no evidence or reason for petitioner to conclude respondent is in fact processing” either of the Requests and claims that this conduct amounts to constructive denial. (See Pet. ¶¶ 9, 15, 18-19, 21-22)

On October 23, 2023, the Commissioner notified Petitioner that the estimated final response date for the Requests would be extended to January 12, 2024, “due to the volume of potentially responsive emails, and the needed time to perform sufficient internal review and to redact the documents in accordance with the provisions of FOIL.” (Siddiqui 2023 Affirm. ¶ 6)

On October 27, 2023, the Comptroller cross-moved to dismiss the instant Article 78 proceeding and provided assurance that “Respondent is still working diligently to respond to both of Petitioner’s above-reference FOIL requests and the requests have not been denied.” (*Id.* ¶ 10) The Comptroller also emphasized that the “timeline of delivering a full and accurate final response to each FOIL request must be balanced with the high volume of FOIL requests processed each month and limited staffing . . . relevant to the number of requests received,” and pointed out that “Petitioner has not administratively appealed the alleged constructive denials of either of its FOIL requests.” (*Id.* ¶¶ 9, 11)

On January 12, 2024, the Comptroller responded to Petitioner’s requests, granting them in part and denying them in part. (Affirm. in Opp. to Pet’r’s Mot. to Amend the Pet., dated Apr. 11, 2024 (“Siddiqui 2024 Affirm.”) (NYSCEF Doc. 20), ¶ 8) In response, on January 23, 2024, Petitioner filed a motion with the Court to grant leave to amend the Petition due to the release of new

information. (NYSCEF Docs. 14-16) On April 12, 2024, the Comptroller opposed Petitioner's motion for leave to amend. (NYSCEF Docs. 20-21)

II. DISCUSSION

An Article 78 proceeding "shall not be used to challenge a determination . . . which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application." CPLR § 7801. Prior to pursuing an Article 78 order to compel the release of FOIL requested documents, requesting parties must exhaust all available administrative remedies, such as presenting the appeal to the "head" of the agency or appeals officer, prior to pursuing an Article 78 order to compel the release of said documents. *Town of Hempstead v. Comm'r of State of N.Y. Office of Mental Retardation & Developmental Disabilities*, 119 A.D.2d 582, 583 (2d Dep't 1986); *Vent v. Bates*, 89 A.D.2d 567, 568 (2d Dep't 1982); *Streetsblog-NYC v. City of N.Y.*, No. 159804/2022, 2023 WL 2586155, at *2 (N.Y. Sup. Ct. N.Y. Cty. Mar. 21, 2023) (citing POL § 89(4)(b)).

"The Public Officers Law confers upon the court, subject matter jurisdiction in a CPLR Article 78 proceeding brought pursuant to FOIL, only after a request for records has been made and denied, and then further denied upon a timely administrative appeal." *Streetsblog-NYC*, 2023 WL 2586155, at *2. Prior to seeking Article 78 relief, Petitioner must (1) receive a final determination or establish a constructive denial by the agency, (2) administratively appeal that decision within the agency itself, and (3) receive a final determination on or a constructive denial of that administrative appeal.

A constructive denial occurs when an agency fails to respond to written FOIL requests "within a reasonable time," though "there is no specific time period in which the agency must grant access to the records." *Save Monroe Ave., Inc. v. N.Y.S. Dep't of Transp.*, 197 A.D.3d 808, 809-10 (3d Dep't 2021) (quoting *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 265 (2007)). Specifically, the responsive party must acknowledge receipt of a FOIL request within five business days of receipt, then either make the requested record available, deny the request, or provide an estimated date of response, "which shall be reasonable under the circumstances of the request." POL § 89(3)(a). After providing an initial estimate, the responsive party may extend the date prior to its

expiration if such a delay is deemed reasonable¹ “under the circumstances of the request” and the requesting party is afforded adequate notice. *Id.* at 810 (quoting POL § 89(3)(a)).

In the instant matter, Petitioner claims that the Comptroller’s extension of the estimated response date was unreasonable and amounted to a constructive denial, thereby warranting judicial intervention. In response, the Comptroller maintains that Petitioner’s failure to pursue the requisite administrative appeal of a final agency decision—as is required by the exhaustion rule—renders the commencement of this Article 78 premature. This Court agrees with the Comptroller’s contention.

Pursuant to the exhaustion rule, Petitioner must administratively appeal an agency’s response to a FOIL request within the mandated period and await a final determination before pursuing Article 78 recourse, unless the agency’s conduct amounts to a constructive denial² of the administrative appeal. POL § 89(4)(a); CPLR § 7801; *see also Portfolio Media, Inc. v. N.Y.S. Off. of Ct.*

¹ To determine the “reasonableness” of such an extension, the court considers “the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency and similar factors.” *Save Monroe Ave., Inc.*, 197 A.D.3d at 810 (quoting POL § 89(3)(a) and NYCRR 1401.5(d)). Based upon review of these factors, New York courts have consistently found response times of three or four months to be reasonable when an agency receives large volumes of FOIL requests and must review large quantities of legally complex materials prior to rendering a decision. *See id.*; *Miller v. N.Y.S. Dep’t. of Transp.*, 58 A.D.3d 981, 983 (3d Dep’t 2009). Though the “reasonableness” of the Comptroller’s estimated response date is not a determinative factor in the instant matter, upon consideration of the aforementioned factors, the Court finds the delay was reasonable due to the high volume of FOIL requests received by the agency, the complexity of Petitioner’s request, and the need to review and redact all responsive materials prior to release.

² The exhaustion of Petitioner’s administrative remedies following constructive denial may be inferred if: the agency fails to provide an adequate response within the mandated response period, administrative remedies would be futile or cause irreparable injury, or there is an unreasonable delay after agency acknowledgement of the appeal request. *See Portfolio Media, Inc. v. N.Y.S. Off. of Ct. Admin.*, 225 A.D.3d 505, 505-06 (1st Dep’t 2024); *see also Save Monroe Ave., Inc.*, 197 A.D.3d at 809-810; *N.Y. Times Co. v. City of N.Y. Police Dep’t*, 103 A.D.3d 405, 408 (1st Dep’t 2013) (citing *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978)). Because the FOIL response time was reasonable (*see supra* Note 1) and there is no indication that the pursuit of administrative remedies would be futile or result in irreparable injury, this Court finds that no constructive denial of the Petitioner’s FOIL requests occurred. Furthermore, even if the delays imposed by the Comptroller did amount to a constructive denial, Petitioner would still be required to exhaust all available administrative remedies prior to filing an Article 78 proceeding. Accordingly, Petitioner needed to first challenge the alleged constructive denial before the appropriate chain of command within the agency itself. Because Petitioner neglected to do so, it failed to exhaust all available administrative remedies. As a result, notwithstanding the validity of the constructive denial claim, the instant Article 78 proceeding is premature.

Admin., 225 A.D.3d 505, 505-06 (1st Dep't 2024); *Moussa v. State*, 91 A.D.2d 863 (4th Dep't 1982).

In the instant matter, Petitioner failed to exhaust all available administrative remedies and prematurely sought Article 78 recourse, despite awaiting the agency's final decision.

Petitioner not only jumped the gun by unjustifiably deeming the Comptroller's timely and reasonable requests for extension to be a constructive denial but also by bypassing the required administrative-appeal process. Only once a petitioner exhausts all available administrative remedies is the FOIL matter eligible for Article 78 consideration.

The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power . . . or when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury.

Watergate II Apts. v. Buffalo Sewer Auth., 46 N.Y.2d 52, 57 (1978). While there are certain exceptions that may be made regarding the exhaustion rule, none apply to Petitioner's case. Because Petitioner has not established that the Comptroller acted in an unconstitutional manner, exceeded its grant of power, nor that the pursuit of administrative remedies would be futile or result in irreparable injury, the exhaustion rule may not be disregarded. Consequently, Petitioner's Verified Petition is improperly before the Court.

Furthermore, Petitioner's proposed Amended Verified Petition merely adds references to records provided by the Comptroller on January 12, 2024, in response to the FOIL request and fails to remedy the document's fatal procedural flaws that warrant dismissal. Pursuant to CPLR § 3025(b), a party may amend or supplement pleadings at any time by leave of court and "[l]eave shall be freely given upon such terms as may be just including the granting of costs and continuances." Despite this, "the motion should be denied where the proposed amendment is palpably insufficient or patently devoid of merit." *Goolsby v. City of N.Y.*, 83 Misc. 3d 445, 463 (N.Y. Sup. Ct. N.Y. Cnty. 2024) (quoting *Strunk v. Paterson*, 145 A.D.3d 700, 701 (2d Dep't 2016)). Furthermore, "a motion for leave to amend in response to a motion to dismiss the complaint is 'futile' and should be denied where 'the defects [in the complaint] are [not] cured by the proposed . . . amended complaint.'" *Id.* (alterations in original) (quoting *Meimeteas v. Carter Ledyard & Wilburn LLP*, 105 A.D.3d 643 (1st Dep't 2013)).

Instead of remedying the disqualifying defect of prematurity, the proposed Amended Verified Petition instead attempts to appeal the January 12, 2024 FOIL response directly to the Court, thereby violating CPLR § 7801's prerequisite exhaustion of administrative remedies. It is clear to this Court that the available administrative remedies have not even been explored—let alone exhausted—by Petitioner. Consequently, the proposed amendment is futile, as Petitioner failed to administratively appeal any of the responses, denials, or purported “constructive denials” of the agency. Even upon application of the proposed changes, the instant Article 78 proceeding remains premature and subject to dismissal. As a result, this Court denies Petitioner's motion for leave to amend, grants the Comptroller's motion to dismiss, and dismisses Petitioner's Verified Petition.

Accordingly, it is hereby,

ORDERED that the Comptroller's cross-motion to dismiss Petitioner's Verified Petition (Seq. No. 1) is **GRANTED**; and it is further

ORDERED that Petitioner's Motion for Leave to Amend (Seq. No. 2) is **DENIED**; and it is further

ORDERED and ADJUDGED that Petitioner's Verified Petition and Notice of Petition (Seq. No. 1) are **DENIED and DISMISSED without prejudice**; and it is further

ORDERED that the Comptroller shall serve a copy of this Decision and Order upon Petitioner and the Clerk of the General Clerk's Office with notice of entry within twenty (20) days thereof; and it is further

ORDERED that service upon the Clerk of Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (Revised August 15, 2019);³ and it is further

ORDERED that any requested relief not expressly addressed herein has been considered and is denied; and it is further

³ The protocols are available at <https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/Efil-protocol.pdf>.

ORDERED that the Clerk shall mark Motion Sequences 1 and 2 decided in all court records; and it is further

ORDERED that the Clerk shall mark this proceeding disposed in all court records.

This constitutes the decision and order of the Court.

March 10, 2025

DATE

SHAHABUDDEN A. ALLY, A.J.S.C.

CHECK ONE:

CROSS-MOTION (SEQ 1):

MOT SEQ 2:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	DENIED
		<input type="checkbox"/>	DENIED
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	STAY CASE
		<input type="checkbox"/>	REFERENCE