

**Matter of Government Accountability & Oversight v
Office of the Mayor of the City of N.Y.**

2025 NY Slip Op 30848(U)

March 11, 2025

Supreme Court, New York County

Docket Number: Index No. 161403/2023

Judge: Shahabuddeen A. Ally

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

PRESENT: HON. SHAHABUDDEN A. ALLY
Justice

PART 16

In the Matter of

GOVERNMENT ACCOUNTABILITY & OVERSIGHT,

Petitioner,

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

-against-

OFFICE OF THE MAYOR OF THE CITY OF NEW YORK,

Respondent.

INDEX NO. 161403/2023
MOTION DATE 4/8/2024
MOTION SEQ. NO. 001

DECISION & ORDER

The following e-filed documents, listed by NYSCEF document number, were read on this motion (Seq. No. 1) to **ARTICLE 78 (FOIL):** 1-12

In this Article 78 proceeding, commenced on November 21, 2023, pursuant to Verified Petition, petitioner GOVERNMENT ACCOUNTABILITY & OVERSIGHT ("GAO") seeks an order and judgment: (1) directing respondent THE OFFICE OF THE MAYOR OF THE CITY OF NEW YORK (the "Mayor's Office") to comply with its duty under New York's Freedom of Information Law ("FOIL") and to disclose the records sought by GAO in its August 27, 2018 FOIL request (the "Request"); (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 Nov. 21, 2023 ("Pet.") (NYSCEF Doc. 1)) On April 5, 2024, the Mayor's Office submitted a Verified Answer, requesting that the Court (1) deny the Verified Petition in its entirety and all the relief requested therein and (2) grant the Mayor's Office relief the Court deems just and proper. (Verified Answer, dated Apr. 5, 2024 ("Answer") (NYSCEF Doc. 12))

For the reasons discussed below, GAO's Verified Petition is **GRANTED**,

I. BACKGROUND

GAO alleges that it is a nonprofit research, public policy, and public education center. (Pet. ¶ 2) Incorporated in Wyoming, GAO is allegedly dedicated to promoting proper government administration and examining the utility of public institutions. (*Id.*) The Mayor's Office operates under the authority of the City of New York. (*Id.* ¶ 3)

On August 27, 2018, GAO submitted its Request to the Mayor's Office via electronic mail. (*Id.* ¶ 4) The Request seeks the correspondence of five named employees that include certain key words and were sent or received at any point between January 1, 2018, and the Request's processing date. (*Id.*) The Mayor's Office assigned the Request a tracking number and timely provided GAO with the estimated response time of six months. (*Id.* ¶¶ 5-6)

GAO asserts that, subsequently, the Mayor's Office unreasonably delayed disclosure by repeatedly extending the estimated response date over a five-year period. (*Id.* ¶¶ 7, 9-10) The most recent purported response date, provided by letter dated September 13, 2023, was "on or about Friday, January 12, 2024." (*Id.* ¶ 10) Alleging that this pattern of delay constituted a constructive denial entitling GAO to Article 78 relief, GAO commenced the instant matter by filing a Verified Petition on November 21, 2023. (*See id.* ¶¶ 16, 17-20) Therein, GAO demanded a declaration that the requested records are public records subject to disclosure under FOIL, a declaration that the Mayor's Office is estopped from seeking costs and fees, an order requiring production of records responsive to the Request, and an award of reasonable fees and costs incurred. (*Id.* ¶¶ 25, 28, 29, 33)

On December 19, 2023, the parties stipulated that the return date of the proceeding be adjourned from January 5, 2024, to February 5, 2024. (NYSCEF Doc. 6) Then, on January 31, 2024, the parties stipulated that the return date of the proceeding be adjourned from February 5, 2024, to March 8, 2024. (*Id.* Doc. 8)

On March 6, 2024, the Mayor's Office applied to further adjourn the return date of the matter from March 8, 2024, to April 8, 2024, due to the allegedly voluminous nature of potentially responsive documents and the need "to conduct an individualized review of each email and/or email string" prior to disclosing the materials. (*Id.* Doc. 9 ¶ 4) In response to the adjournment

request, GAO took a “no-position stance.” (*Id.* ¶ 7) The Court ultimately granted the adjournment. (*Id.* Doc. 11)

On April 5, 2024, the Mayor’s Office submitted a Verified Answer. Within the Verified Answer, the Mayor’s Office asserted various affirmative defenses, alleging that: (1) GAO failed to establish a cause of action upon which relief may be granted, (2) the Court lacked subject matter jurisdiction over the matters raised by GAO, (3) the Mayor’s Office acted “reasonably, properly, lawfully, and in good faith” with regard to the events described by GAO, (4) GAO failed to exhaust its administrative remedies, (5) GAO is not entitled to the relief requested, and (6) GAO is not entitled to legal fees and/or expenses, regardless of the outcome of the case. (Answer at pp. 4-5) For these reasons, the Mayor’s Office requested that the Verified Petition be denied in its entirety. (*See id.*)

II. DISCUSSION

Before addressing the merits, this Court must determine whether this matter is properly before it. Because GAO did not administratively appeal a final agency decision prior to pursuing Article 78 recourse, this issue turns on whether the conduct of the Mayor’s Office amounts to the type of constructive denial that waives the prerequisite step of administrative appeal before judicial review.

CPLR § 7801 precludes the use of an Article 78 proceeding 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 unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner an procure a rehearing has elapsed[.]

Pursuant to POL § 89(4), however, when an agency fails to comply with the requirements of § 89(3), no administrative appeal is required, and the FOIL-requesting party may seek judicial review directly. POL § 89(3)(a) requires that each entity subject to the article submit responses to record requests within five business days of receipt and, when appropriate, provide a reason for the inability to grant the request within twenty business days and an estimated date whereby the request shall be granted in whole or in part within a reasonable period. An entity denied access to a record may thereafter administratively appeal the denial, and the agency must then

acknowledge the appeal within ten business days of receipt and either explain the reasons for the denial or provide access to the requested records. *See* POL § 89(4)(a).

In the instant matter, it is uncontested that GAO failed to exhaust administrative remedies prior to filing the Verified Petition. The decision to commence this Article 78 proceeding, however, arose after over five years of delays wherein the Mayor's Office continuously pushed back the estimated response date before eventually landing on September 13, 2024. (Pet. ¶¶ 6, 10) Due to these delays, the Mayor's Office has yet to render a final decision regarding the Request, which has prevented GAO from seeking administrative appeal. GAO argues that these delays violate POL §§ 89(3)(a), 89(4)(a) and establish a constructive denial opening the door to Article 78 recourse. (Pet. ¶¶ 16-20) This Court agrees.

"It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978). Despite this, the exhaustion rule "is not an inflexible one," as courts provide exceptions for adherence to the requirement under a variety of scenarios. *Id.* Specifically, the Court of Appeals has found the exhaustion rule need not be followed when the action at issue is challenged as unconstitutional or outside of a grant of power, or when resorting to administrative remedy would be futile or cause irreparable injury. *See id.*

Though the Mayor's Office timely acknowledged the Request, provided an estimated response date, and notified GAO of each extension prior to the expiration of the anticipated response date, when "gauged 'under the circumstances of the request,'" the Court agrees with GAO's contention that the extensive nature of the delay is "patently unreasonable." *Save Monroe Ave., Inc. v. N.Y.S. Dep't of Transp.*, 197 A.D.3d 808, 810 (3d Dep't 2021) (quoting POL § 89(3)(a)) (Pet. ¶ 14). While POL § 89(3) "contains no . . . time limitation but merely requires . . . that the person requesting a record be furnished with a statement of the 'approximate date when such request will be granted or denied,'" *Lecker v. N.Y.C. Bd. of Educ.*, 157 A.D.2d 486, 486-87 (1st Dep't 1990), an unreasonable delay in response may serve as a constructive denial of the request.

To determine the reasonableness of delay in a FOIL response, 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 21 NYCRR 1401.5(d)). New York courts have deemed response times of three or four months to be reasonable when an agency receives copious amounts of FOIL requests, the request in question produces a large volume of potentially responsive materials, and the materials produced require complex legal review prior to rendering a decision. *See id.* at 810; *see also Miller v. N.Y.S. Dep’t of Transp.*, 58 A.D.3d 981, 983 (3d Dep’t 2009). Additionally, a court may consider the good-faith nature of a respondent party’s reasonable basis for delay. *See Save Monroe Ave., Inc.*, 197 A.D.3d at 810 (citing *Friedland v. Maloney*, 148 A.D.2d 814, 816 (3d Dep’t 1989)).

The Mayor’s Office asserts that “[a]t all times relevant to the claims set forth by Petitioner herein, Respondent acted reasonably properly, lawfully, and in good faith.” (Answer at p. 4) Furthermore, the Mayor’s Office justifies their delay by alleging that the Request resulted in over 40,000 potentially responsive documents. (NYSCEF Doc. 9 ¶ 4) Though this volume has since been narrowed to 4,000 documents, the Mayor’s Office claims that further reduction and individualized review is still necessary. (*Id.*) The Mayor’s Office also contends that both parties have worked together to “explore resolution of this matter, including a rolling production of responsive documents,” and that the instant Article 78 action is improper, since GAO has not exhausted all available administrative remedies. (*Id.* ¶ 7; Answer at p. 4) By contrast, GAO maintains that the Mayor’s Office’s failure to respond to their Request within a period of five years is unreasonable and that, even if it were found to be reasonable, the Mayor’s Office violated POL § 89(3) by failing to effectively rationalize their reasons for such extensive delay. (Pet. ¶ 14)

Indeed, the Mayor’s Office has neither shown the five-year delay to be reasonable nor provided adequate justification for the extensive nature of the delay. Upon consideration of the aforementioned factors, this Court also finds that the nature of the Request does not warrant a response period of this length. Though delay periods of three or four months have been deemed reasonable regarding the production of responsive materials for similarly extensive and complex requests, a five-year delay can only be found reasonable upon a showing of significant extenuating circumstances. Because the Mayor’s Office has failed to make such a showing, the unreasonable and unjustified extent of the delay violates POL § 89(3). Additionally, the Mayor’s

Office's proven inability to stick to deadlines, communicate the proper method of administrative appeal to GAO, or effectively coordinate the production of responsive materials undermines their claims of good faith. Accordingly, there is ample reason to believe that the pursuit of administrative review would be futile.

Consequently, this Court finds that the Mayor's Office's delay constitutes a constructive denial entitling GAO to pursue judicial remedies directly. As such, the instant Article 78 proceeding is properly before the Court.

Regarding the merits, the Court finds that the Mayor's Office has violated its duty to disclose non-exempt materials responsive to the Request. As established by GAO, the Mayor's Office satisfies the meaning of "agency" pursuant to POL § 86 as an entity that operates under the authority of the City of New York and possesses the records that GAO seeks. (Pet. ¶ 3) Accordingly, the Mayor's Office has a duty to disclose the non-exempt materials sought by the Request. As explained by the Court of Appeals, "[t]he Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy." *Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 150 (1987). FOIL advances significant public-policy interests by maintaining transparency between government agencies and the public. Unless the request is deemed unduly burdensome, government agencies must make their records available "to promote open government and public accountability," as "the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Jewish Press, Inc. v. N.Y.C. Dep't of Educ.*, 183 A.D.3d 731, 731-32 (2d Dep't) (quoting POL § 84) (citing *Abdur-Rashid v. N.Y.C. Police Dep't*, 31 N.Y.3d 217, 224-25 (2018)).

Because agency records "are presumptively open to public inspection, without regard to need or purpose of the applicant," when presented with a FOIL request, the agency "must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search." *Goyer v. N.Y.S. Dep't of Envtl. Conservation*, 813 N.Y.S.2d 628, 634 (2005). Where an exemption to disclosure is claimed by the agency, it must be "narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption." *Hanig v. State Dep't of Motor Vehicles*, 79 N.Y.2d 106, 109 (1992). Pursuant to POL

§ 87(2), “denial of access shall not be based solely on the category or type of such record and shall be valid only when there is a particularized and specific justification for such denial.”

In the interest of upholding these public-policy interests, the Court orders the Mayor’s Office to produce all non-exempt materials that are responsive to the Request. Furthermore, if the Mayor’s Office claims exemptions to disclosure, any resultant redaction or denial of responsive materials must be narrowly applied.

Concerning GAO’s claim for relief seeking costs and fees, the Court finds an award of attorney fees and other litigation costs reasonably incurred to be warranted. POL § 89(4)(c) gives the Court authority to assess “against such agency involved, reasonable attorney’s fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time.” As noted by the Third Department,

the counsel fee provision was added in recognition that persons seeking to force an agency to respond to a proper FOIL request ‘must engage in costly litigation,’ and the statute was recently amended ‘in order to “create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL[.]’

Legal Aid Soc’ty v. N.Y.S. Dep’t of Corr. & Cmty. Supervision, 105 A.D.3d 1120, 1122 (3d Dep’t 2013). Repeated delays in response to FOIL requests constitute the “denials of access” and unreasonable litigation costs that POL § 89(4)(c) aims to remedy. *See id.*; *see also Empire Ctr. for Public Pol’y v. N.Y.S. Dep’t of Health*, 72 Misc. 3d 759, 770-71 (N.Y. Sup. Ct. Albany Cnty. 2021). The Mayor’s Office’s unjustified delay in response thereby entitles GAO to an award of reasonable fees and costs incurred, as GAO has substantially prevailed and the Mayor’s Office’s refusal to timely fulfill its duties under FOIL escalated litigation-related costs.

Accordingly, it is hereby,

ORDERED and ADJUDGED that GAO’s Verified Petition (Seq. No. 1) is **GRANTED**; and it is further

ORDERED that the Mayor’s Office produce to GAO the records described in the Request, and any attachments thereto, subject to legitimate withholdings, **within thirty (30) days** of the entry of this Decision and Order; and it is further

ORDERED that the Mayor's Office's affirmative defenses and requests for relief are DENIED and DISMISSED; and it is further

ORDERED that within sixty (60) days of the date of this Decision and Order, GAO's counsel shall submit, on notice to the Mayor's Office's counsel, an affirmation setting forth GAO's counsel's qualifications, billing rate, billing records, and the attorneys' fees and litigation costs sought, along with a proposed order for such fees and costs; and it is further

ORDERED that within thirty (30) days of service of GAO's counsel's affirmation and proposed order, the Mayor's Office may submit opposition papers, if any, concerning the reasonableness of the fees and costs; and it is further

ORDERED that GAO's counsel may submit a reply to any objections within fifteen (15) days of service of the objections, and, if necessary, a hearing of the subject the fees and costs will be scheduled thereafter; and it is further

ORDERED that the GAO shall serve a copy of this Decision and Order upon the Mayor's Office 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);¹ and it is further

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

ORDERED that the Clerk shall mark Motion Sequence 1 decided in all court records.

This constitutes the decision and order of the Court.

March 11, 2025

DATE

SHAHARUDDIN A. ALLEY, A.J.S.C.

CHECK ONE:

MOTION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

STAY CASE

REFERENCE

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