

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

2025 NY Slip Op 31391(U)

April 10, 2025

Supreme Court, New York County

Docket Number: Index No. 156519/2024

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

Appeal”) to which respondent allegedly did not respond. Petitioner also commenced a proceeding pursuant to Article 78, appealing the constructive denial of the Second Appeal. The court denied the request but held that “[n]othing prevents [petitioner] from making a new FOIL request” (brackets omitted).

Next, petitioner submitted a new FOIL request (hereinafter, “Second Request”) on February 6, 2024, requesting “all records, including unredacted versions of (1) MTA evaluation agreement dated January 14, 2022; (2) an unredacted version of the Statement of Work dated June 23, 2022; (3) an unredacted version of the Statement of Work dated July 25, 2022; and (4) an unredacted copy of the Request for Information #0000287565. Additionally, the Second Request sought five e-mails of any discussions between MTA and vendors regarding camera monitoring software that automatically flags individuals or events for review or automatically tracks individuals across cameras.” The Second Request defined records as including “memoranda, correspondence, analyses, interview notes, logs, charts, and other written records as well as records maintained on computers, electronic communications, videotapes, audio recordings, or any other format.” The Second Request further asked that, in the event the Second Request was denied, MTA provide a written explanation for the denial, including a reference to the specific statutory exemptions relied upon.

According to petitioner, respondent denied the Second Request on February 12, 2024, on the ground that the records sought in connection with the redacted documents had been already provided. It further claimed that FOIL prohibits requesting the same records more than once and that the proper mechanism for contesting FOIL redactions is through the FOIL appeals process. As to the e-mails requested, petitioner states that respondent denied same, stating that the request “fails to meet the requirement that FOIL requests be reasonably described pursuant to New York Public Officers Law (‘NYPOL’) §89(3)(a).” On March 7, 2024, petitioner filed an intra-agency appeal (hereinafter, “Third Appeal”), rejecting respondent’s claim that petitioner is barred from submitting a follow-up FOIL request as having no basis in law. Petitioner contends that respondent also denied the Third Appeal, reiterating that petitioner is barred from refileing the Original Request, but fails to cite to any provision in the FOIL statute to justify its position.

Furthermore, petitioner sets forth that there was no excessive delay between dismissal of the Original Request and the submission of the Second Request and, as such, that the Second Request was timely. The Second Request is not an attempt to circumvent the proper FOIL administrative remedies because “the record shows [petitioner’s] good-faith attempt to exhaust all proper remedies, including refileing according to MTA’s specific protocols.” Petitioner also contends that since the Second Request was sufficiently detailed, respondent’s response that the request was burdensome is improper and insufficient, as respondent has demonstrated that it is able to conduct the search by producing responsive documents in connection with the Original Request, albeit in redacted form. Next, petitioner asserts that respondent fails to explain with specificity and particularity why the redacted portions were exempt from FOIL, since the redacted portions of the produced record, which include the names of the vendor(s) and software, does not compromise respondent’s information technology assets, such assets, encompassing both electronic information systems and infrastructures. Petitioner also seeks attorney fees (NYSCEF Doc. No. 1, *petition*). As relevant to this application, petitioner furnishes a copy of, *inter alia*, the original request and the appeal (NYSCEF Docs. Nos. 4-8).

Respondent opposes the motion and cross-moves, pursuant to CPLR 3211(a)(5), for an order dismissing the petition. Respondent contends that petitioner improperly and prematurely appealed the Original Request after it was notified on March 23, 2023, that respondent needed an additional forty-five

(45) days to respond to the Original Request via e-mail, instead of mail. According to respondent, the denial of the Second Request was appropriate because responsive materials for those requests were already provided in response to the Original Request. As to item five (5), respondent articulates that the request was not reasonably described, in part because the request referenced materials exempt from FOIL disclosure and because the request failed to include individual e-mail addresses, search terms, and a time period to enable a search to be conducted. Respondent maintains that even though petitioner was given the opportunity to provide additional search parameters for item five (5), it failed to provide such information. Hence, the petition should be dismissed, argues respondent, as it is time-barred because the Second Request seeks the same substantive materials as the Original Request. Respondent posits that the law allows a FOIL requestor, like petitioner, to appeal a FOIL decision twice, first within the agency and, afterward, to a court. Since petitioner has already appealed a FOIL decision within the agency and initiated an Article 78 proceeding appealing the constructive denial of the Second Appeal, it has exhausted its opportunities to appeal a FOIL decision, and the instant action should be dismissed (NYSCEF Doc. No. 13, *respondent's opposition and cross-motion*). Respondent submits a copy of the FOIL portal thread concerning the Original Request and the Second Request (NYSCEF Doc. Nos. 15-16).

Petitioner opposes the cross-motion, insisting that its Second Request should not be dismissed because the Article 78 proceeding appealing the constructive denial of the Second Appeal was dismissed without prejudice to filing a new request. Since it followed the court's directive in submitting the Second Request, argues petitioner, to dismiss same would not only contradict the court's clear directive, but would also unfairly penalize respondent for following the proper legal process. Next, petitioner urges the court to disregard its appeal of the Original Request via email instead of mail, as the appeal was timely filed. Petitioner also asserts that the Second Request seeks to supplement the information sought in the Original Request and is therefore not duplicative inasmuch as it seeks unredacted versions of documents submitted in response to the Original Request, as well as, new correspondence in Item five (5) that was not previously requested. Lastly, petitioner contends that dismissing the instant petition would undermine FOIL's purpose of promoting open government and public accountability as well as encourage "agencies to create obscure or impractical processes for appealing FOIL requests" (NYSCEF Doc. No. 19, *opposition to cross-motion*).

Respondent submitted a reply to its cross-motion but reply papers on a cross-motion are not permitted; thus, it will not be considered by the court in the disposition of the application.

Public Officers Law § 87(2)(d) exempts from disclosure records which contain "trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise . . ." This exemption is to "protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York." (*Matter of Encore College Bookstores, Inc. v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 NY2d 410, 420, [1995]). "The court must consider whether the information sought is valuable to the competing business, as well as the resulting damage to the submitting business if information is released, and if the disclosure is the only means for the competitor to gain the requested information, the inquiry ends here" (*Empire Healthchoice Assur., Inc. v Clement*, 2018 NY Slip Op. 30489[U], **6 [Sup Ct, New York County 2018], citing *Matter of Encore College Bookstores, Inc.*, 87 NY2d at 420).

Under Public Officers Law § 87(2)(i), an agency may withhold disclosure of material that, "if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an

agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures.”

“Where an exemption is claimed, the burden lies with the agency to articulate particularized and specific justification, and to establish that the material requested falls squarely within the ambit of [the] statutory exemptions.” (*M. Farbman & Sons, Inc. v New York City Health and Hosps. Corp.*, 62 NY2d 75, 83 [1984]). “[M]erely repeating the statutory phrasing of an exemption are insufficient to establish the requirement of particularity” (*DJL Rest. Corp. v Dept. of Bldgs. of City of New York*, 273 AD2d 167, 168-169 [1st Dept 2000])

Here, petitioner’s Second FOIL Request was appropriate as same was permitted by the court’s decision in *Surveillance Tech. Oversight Project v Metropolitan Transp. Auth.*, 2023 NY Slip Op 34502(U), **4 (Sup Ct, New York County 2023). There, the court granted respondent’s cross-motion to dismiss based on procedural grounds but did not reach the merits of the First FOIL Request and the adequacy of respondent’s partial response. The Second Request sought a broader scope of information than the First Request insofar as the Second Request sought new correspondence in Item 5 (see *Matter of Freedom Found. v New York City Dept. of Citywide Admin. Servs.*, 230 AD3d 999, 1002 [1st Dept 2024]). Moreover, respondent has failed to demonstrate that the claimed redactions, which include the names of the vendor(s) and software, apply to the redacted portions of the documents produced. Due to respondents’ undetailed assertions as to the redactions claimed, the court is unable to determine whether some of the documents are validly redacted. The New York Court of Appeals has held that “[i]f the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an *in camera* inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material” (see *Gould v New York City Police Dep’t*, 89 NY2d 267, 274 [1996]). Therefore, respondent is directed to furnish to the court the redacted documents in an unredacted form for *in camera* review. Given the foregoing, the court need not reach that branch of petitioner’s motion seeking attorney fees and the cross-motion seeking to dismiss the application at this juncture. All other arguments have been considered and are without merit. Accordingly, it is hereby

ORDERED that all other requested records shall be supplied to the court for an *in camera* inspection within forty-five (45) days of the date of this decision and order; and it is further

ORDERED that respondent shall provide a log detailing the types of documents, contents, risks associated with the documents, and specific exemption relied upon to the court for *in camera* inspection in conjunction with the records; and it is further

ORDERED that, within fifteen (15) days after this decision and order is uploaded to NYSCEF, the counsel for petitioner shall serve a copy of this decision and order, with notice of entry, upon respondent.

This constitutes the decision and order of this court.

April 10, 2025

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
 GRANTED

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER