

<b>America First Policy Inst. v Bragg</b>
2026 NY Slip Op 31369(U)
April 6, 2026
Supreme Court, New York County
Docket Number: Index No. 159140/2025
Judge: Nicholas W. Moyne
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NICHOLAS W. MOYNE PART 41M

Justice

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INDEX NO. 159140/2025

AMERICA FIRST POLICY INSTITUTE,

Petitioner,

MOTION DATE 07/21/2025, 10/10/2025

- v -

MOTION SEQ. NO. 001 002

ALVIN BRAGG, NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE

DECISION + ORDER ON MOTION

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 17, 23, 24, 25, 26

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30

were read on this motion to/for LEAVE TO FILE

Upon the foregoing documents, it is

In this Article 78 proceeding, petitioner, America First Policy Institute ("AFPI"), seeks to compel the respondents, Alvin Bragg and the New York County District Attorney's Office ("DANY"), to produce records sought pursuant to the Freedom of Information Law ("FOIL"), and requests an award of attorney's fees. Respondents move to dismiss the Petition and seek leave to file a surreply. For the reasons set forth below, the respondents' motion to file a surreply is denied, and the Amended Petition is dismissed without prejudice.

On September 18, 2024, the petitioner submitted a FOIL request to DANY seeking internal communications and correspondence regarding Authentic Campaigns, Loren Merchan, and various individuals involved in the criminal prosecution of President Donald J. Trump. Following a notification from DANY that the initial search yielded over 10,500 potentially responsive records, the petitioner then narrowed the scope of the request on March 20, 2025. On April 15, 2025, DANY informed the petitioner that the narrowed search still yielded 720 documents totaling approximately 30,000 pages, which would require at least six months to review.

After which, petitioner submitted an initial administrative appeal based on a constructive denial of the request, which was dismissed by DANY on May 19, 2025 (NYSCEF Doc. No. 7; 8). Following this determination, the petitioner commenced this Article 78 proceeding on July 17, 2025, seeking to compel a determination and commence production due to the respondents' unreasonable delay. Shortly thereafter, on July 25, 2025, DANY's Records Access Officer ("RAO") issued a determination on the FOIL request, granting access to 8 records and denying access to the remainder under various statutory exemptions, including Public Officers Law ("POL") § 87(2)(e)(i) and § 87(2)(g) (NYSCEF Doc. No. 15).

Accordingly, on August 13, 2025, petitioner filed an Amended Petition, challenging the substantive merits of the RAO's July 25th determination on the request (NYSCEF Doc. No. 14). Two days later, on August 15, 2025, the petitioner filed an administrative appeal with DANY challenging that exact same determination (NYSCEF Doc. No. 21). DANY filed a Verified Answer on August 28, 2025, arguing that the Amended Petition must be denied and dismissed for failure to exhaust administrative remedies. The following day, on August 29, 2025, DANY's FOIL Appeals Officer issued a final determination denying the petitioner's administrative appeal (NYSCEF Doc. No. 26).

As a threshold matter, the respondents' motion for leave to file a surreply is denied. Pursuant to 22 NYCRR 202.8-c, surreply papers addressing the merits of a motion are not permitted absent express advance permission from the Court. The respondents improperly attached their substantive surreply arguments to the motion requesting leave to file it, in violation of the rule. Furthermore, the request was made on October 9, 2025, weeks after the Petition was marked fully submitted, rendering it untimely. However, because the record before the Court is sufficient to resolve the jurisdictional issues, the denial of this motion does not alter the outcome of the proceeding.

Additionally, to the extent the Amended Petition continues to assert that DANY constructively denied the FOIL request by taking too long to issue a determination, that claim is moot. Where a petitioner alleges constructive denial, an agency's issuance of a FOIL determination after the commencement of the Article 78 proceeding renders the proceeding moot (*see Matter of Lambrou v New York City*, 210 AD3d 588, 589 [1st Dept 2022]). The remedy for a constructive denial is an order remanding the matter to the agency with instructions to issue a determination; because DANY issued a determination on July 25, 2025, granting the request in part and denying it in part, further judicial action on the delay itself is moot (*see Matter of Alvarez v Vance*, 139 AD3d 459, 460 [1st Dept 2016]).

Under POL § 89(4)(b) and established New York law, a petitioner must exhaust all available administrative remedies prior to commencing an Article 78 proceeding (*see Borrero v. Banks*, 212 AD3d 496, 497 [1st Dept 2023]; *Cross v Russo*, 132 AD3d 454, 454 [1st Dept 2015]). The respondents' initial denial of a FOIL request does not constitute a final administrative determination (*see Taylor v New York City Police Dep't FOIL Unit*, 25 AD3d 347, 347 [1st Dept 2006]). Under POL § 89(4)(a)–(b), an agency's initial denial of a FOIL request does not become final until the petitioner is “denied access to a record in an appeal determination,” or the agency constructively denies the petitioner's administrative appeal by failing to decide it within ten business days. Accordingly, a petitioner has not exhausted his administrative remedies until he has received a “final adverse determination” of an administrative appeal challenging the initial denial of his FOIL request (*Braxton v. Commissioner, New York City Police Department*, 283 AD2d 253 [1st Dept 2001]).

Put slightly differently, the agency's decision only becomes final and therefore subject to judicial review once the petitioner appeals the denial and receives a final adverse determination from the agency's Appeals Officer. That exhaustion requirement must be satisfied at the time the proceeding is commenced (*see Cross*, 132 AD3d at 454). Here, the record is clear that the petitioner filed the Amended Petition to challenge the merits of the FOIL determination and/or the exemption grounds provided therein on August 13, 2025. However, at the time the Amended Petition was filed, the petitioner had not even filed an administrative appeal, doing so on August 15, 2025, and DANY had not issued a final appeal determination until August 29, 2025. Considering that there was no final administrative determination rendered at the time the Amended Petition was filed, the petitioner's administrative remedies as to the merits claims were unexhausted, depriving this Court of subject matter jurisdiction.

Petitioner argues that it should be excused from the exhaustion requirement under the “futility exception,” claiming that DANY's protracted delays and subsequent adoption of the RAO's reasoning rendered the administrative appeal process an exercise in futility. This argument is unavailing. As recently held by Justice Lyle E. Frank in a closely related matter involving DANY and similar Trump-related FOIL requests, a lengthy delay by DANY is insufficient to render an administrative appeal presumptively futile. In *America First Legal Foundation v. Alvin Bragg* (Index No. 158523/2024), the Court correctly noted that DANY is dealing with extensive documents on an unprecedented scenario, substantial public interest in an ongoing criminal trial, and a limited agency budget. Therefore, the

