

**Fileccia v City of New York**

2011 NY Slip Op 32156(U)

August 5, 2011

Supreme Court, New York County

Docket Number: 100400/11

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN  
J.S.C.

PART 52

Index Number : 100400/2011  
FILECCIA, ROBERT J., ESQ.  
VS.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. 100400/11  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk, and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must E-File certificate requesting Entry of Judgment with a copy of the order and/or judgment attached.

Dated: 8/5/11 \_\_\_\_\_ CK \_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
CYNTHIA S. KERN  
J.S.C.

Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 52

-----X

ROBERT J. FILECCIA, ESQ.,

Petitioner,

Index No. 100400/2011

-against-

CITY OF NEW YORK,  
NEW YORK CITY POLICE DEPARTMENT, and  
RAYMOND KELLY, in his official capacity as  
Commissioner of the New York City Police Department,

Respondents.

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

-----X

**HON. CYNTHIA KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3,4,5</u>
Exhibits.....	<u>6</u>

Robert J. Fileccia (“petitioner”) brings this petition seeking to compel the New York City Police Department (“NYPD”) to disclose the information sought in petitioner’s FOIL request dated July 14, 2010. For the reasons set forth more fully below, the petition is denied.

The relevant facts are as follows. Petitioner is an attorney who has been retained by Sami Akleh to represent him in connection with an appeal of his 1997 conviction for manslaughter. On July 14, 2010, petitioner filed a FOIL request with NYPD’s Legal Bureau

requesting an extensive list of documents related to Akleh's arrest and subsequent conviction. On January 10, 2011, petitioner deemed his FOIL request constructively denied and filed the instant Article 78 petition seeking mandamus to compel NYPD to disclose the information sought in his FOIL request.

Prior to petitioner's filing of a FOIL request for Akleh's records, Akleh himself filed several FOIL requests. Akleh first filed a FOIL request addressed to NYPD dated October 14, 2002 for its records related to Akleh's arrest. Although portions of this request were denied by NYPD, by a final determination dated June 13, 2003, Akleh did not file an Article 78 proceeding challenging NYPD's final determination. Although the paperwork concerning the request is not able to be found by NYPD, it is undisputed that Akleh filed a second FOIL request with NYPD sometime in 2004 which was also denied. Akleh filed a third FOIL request for his records, this time to New York County District Attorneys' Office ("DANY"). Although this request was not dated, it was filed sometime before July 2004 as DANY responded to Akleh's request in July 2004. This FOIL request sought copies of documents related to Akleh's arrest and subsequent conviction— information that is substantially identical to the request that is the subject of the instant petition. DANY denied Akleh's request on several grounds including that these documents had already been turned over to the attorneys who represented him at his criminal proceedings. In February 2005, Akleh then renewed his FOIL request with DANY and attached affidavits attesting to the fact that he did not have access to these requested documents. DANY also denied this request. Petitioner then commenced an Article 78 proceeding before Justice Karen Smith of New York County Supreme Court challenging DANY's denial. Justice Smith ordered DANY to disclose an extensive list of documents including trial transcripts, witness

statements, hearing transcripts, arrest reports, medical records, memo books, and statements of witnesses. Justice Smith precluded the disclosure of certain medical records and grand jury minutes. These documents were produced to Akleh's attorney Robert Mischel, who represented Akleh in his Article 78 proceeding before Justice Smith. On January 10, 2005, Akleh filed a fourth FOIL request—his third request to NYPD—seeking all files of Detective Dinan, who was the investigating Detective assigned to investigate the homicide for which Akleh was convicted. By letter dated June 13, 2005, this request was denied. Akleh did not appeal this determination.

Petitioner brings the instant Article 78 proceeding seeking essentially the same documents that were turned over to Akleh's former attorney as ordered by Justice Smith in the former Article 78 proceeding. As an initial matter, the court notes that petitioner has not exhausted his administrative remedies with respect to the FOIL request at issue in the instant action. "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...The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be followed, for example ... when resort to an administrative remedy would be futile...." *Watergate II Apts v Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978).

In the instant action, the court finds that petitioner need not exhaust his administrative remedies as respondents' opposition papers make clear that respondents intend to deny petitioner's FOIL request. Accordingly, the court will now address the substantive merits of the petition.

"Pursuant to CPLR 217, an article 78 proceeding accrues, and the four-month statute of limitations begins to run, after the 'respondent's refusal, upon the [request] of the petitioner or

the person whom he represents, to perform its duty.’ A FOIL request made by a representative of the petitioner cannot be considered an independent request; rather it is a request on behalf of his or her client. Furthermore, the statute of limitations does not toll or extend when a subsequent FOIL request is duplicative of the prior request. A subsequent FOIL request that is nearly identical to a prior request, except that the request is more specific, would be duplicative.” See *Matter of Greene v City of New York*, 196 Misc.2d 125, 130 (N.Y. Sup. Ct., N.Y. Cty, 2003).

In the instant action, the court finds that petitioner’s request is duplicative of Akleh’s prior FOIL requests. The record makes it clear that these records are requested for the purpose of defending petitioner’s client Akleh. In this regard, petitioner’s request is nearly identical in substance to Akleh’s 2004 and 2005 FOIL requests to DANY, which were addressed and resolved in a prior Article 78 proceeding. Moreover, Akleh wrote a letter dated September 27, 2010 addressed to the Presiding Justice at the New York State Supreme Court “hereby authoriz[ing] [his] attorney, Robert Fileccia, to prepare and file an article 78 proceeding to compel the New York City Police Department F.O.I.L. Unit and Appeals Unit to produce all documents and records requested in [his] July 14, 2010 F.O.I.L. request, and September 4, 2010 follow-up missive to the New York City Police Department F.O.I.L unit.” Akleh further authorized “Robert Fileccia to represent [him] in all respects in the New York State Supreme Court in reference to compelling all city and state authorities to produce documents regarding the above captioned matter.” This letter – submitted by petitioner as an exhibit to his petition – demonstrates that petitioner’s FOIL request is a request made on behalf of Akleh. Accordingly, the court will treat petitioner’s FOIL request as a duplicate of Akleh’s previous requests.

In that regard, petitioner is time-barred from seeking an Article 78 appeal. All of NYPD’s

previous final determinations were made well outside of the four-month statute of limitations. Moreover, with respect to Akleh's third FOIL request addressed to NYPD dated January 10, 2005, petitioner is barred from bringing that action in an Article 78 proceeding as Akleh did not exhaust his administrative remedies with regard to that request. Accordingly, the court finds that petitioner is time-barred from seeking an Article 78 review of the October 14, 2002 FOIL request and the 2004 FOIL request made to NYPD. In addition, petitioner is barred from seeking an Article 78 review of the January 10, 2005 FOIL request as Akleh did not exhaust his administrative remedies with regard to that request. Moreover, because Akleh did not take an administrative appeal of that determination within 30 days, he did not preserve his right to a judicial review. *See McGriff v Bratton*, 293 A.D.2d 401, 402 (1<sup>st</sup> Dept 2002).

Further, to the extent that petitioner is requesting that NYPD turn over documents that were precluded from being turned over in Justice Smith's previous decision, petitioner is collaterally estopped from relitigating this issue as the same issue was previously litigated and decided in the prior Article 78 proceeding before Justice Smith. "The doctrine of collateral estoppel...precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." *Ryan v. New York Tel. Co.*, 62 N.Y. 2d 494, 500 (1984). For collateral estoppel to apply, "[i]t is required that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue." *See Allied Chemical v Niagara Mohawk Power Corp.*, 72 N.Y.2d 271276 (1988).

As discussed more fully above, Akleh filed an Article 78 proceeding challenging DANY's denial of his FOIL request which is substantially identical to the FOIL request at issue in the instant action. This issue was fully litigated before Justice Smith and a determination was made where DANY was ordered to turn over documents essentially identical to the documents requested by petitioner with the exception of certain medical records and grand jury minutes. To the extent that petitioner is seeking those documents that were previously precluded by Justice Smith, petitioner – as Akleh's representative – is collaterally estopped from bringing the instant petition.

Finally, to the extent that petitioner is attempting to request an additional set of copies that were previously turned over by DANY as per Justice Smith's decision and order, the court denies petitioner's request. "The mere fact that disclosure was available to the applicant through some other discovery device, such as under CPLR article 31 in a plenary action or under CPLR article 240 in a criminal proceeding, does not ipso facto preclude FOIL relief, if warranted. However, if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses a copy, a court may uphold an agency's denial of the petitioner's request under FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee, unless the requested record falls squarely within the



ambit of 1 of the 8 statutory exemptions.” See *Matter of Moore v Santucci*, 151 A.D.2d 677, 678 (2d Dept 1989).

NYPD has met its initial burden of demonstrating that the documents petitioner is seeking through the instant FOIL request were previously provided to Akleh’s former attorneys. Marilyn Richter, NYPD’s counsel in the instant action affirmed that the documents ordered to be produced were provided to Robert Mischel, the attorney who represented Akleh at his Article 78 proceeding. Akleh, on the other hand, has failed to provide proof in evidentiary form that these documents are no longer in existence. Although Akleh attests that he never received these documents from Mischel, he fails to prove that these documents are no longer in Mischel’s possession or that he cannot get them from Mischel. The affidavit of Akleh’s sister Tanya Akleh Lofferno who states that it is impossible for petitioner to get these documents from Mischel because “she has instructed [petitioner] to sue Richard Mischel for attorney misconduct among other causes of action” is not compelling as that statement fails to demonstrate that Mischel does not have the records or otherwise refused to turn them over.

Accordingly, the court denies petitioners’ request for relief under Article 78 of the CPLR and dismisses the proceeding in its entirety. This constitutes the decision, order and judgment of the court.

Dated:

8/5/11

Enter: \_\_\_\_\_

CK

J.S.C.

**CYNTHIA S. KERN**  
J.S.C.