

<b>McCreery v New York City Dept. of Transp.</b>
2020 NY Slip Op 34381(U)
December 18, 2020
Supreme Court, New York County
Docket Number: 100030/2020
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM**

*Justice*

-----X

DAVID MCCREERY,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF TRANSPORTATION,  
POLLY TROTTENBERG, ANDREW BURDES, THE CITY  
OF NEW YORK

Defendant.

-----X

INDEX NO. 100030/2020

MOTION DATE 9/09/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

It is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner David T. McCreery (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that the counsel for respondents shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for petitioner.

## MEMORANDUM DECISION

In this Article 78 proceeding, petitioner David T. McCreery (McCreery) seeks to compel the respondent New York City Department of Transportation (DOT) to comply with a Freedom of Information Law (FOIL) request (motion sequence number 001). For the following reasons, the petition is denied, and this proceeding is dismissed.

## FACTS

On November 24, 2018, McCreery submitted a FOIL request to the DOT through the City of New York's "Open Records Portal" website for "electronic copies of WalkNYC design guidelines and related instructional documentation in their original, highest quality available file formats," specifically including "Focus map, Focus map content standards, Overview map, Bike share, Select Bus Service, extent [Select Bus Service] content standards, Subway neighborhood map, [and] ancillary wayfinding products." *See* verified petition, ¶ 17; notice of cross motion, Falk affirmation, exhibit M. On August 7, 2019, a DOT "records access officer" (RAO) issued a decision denying McCreery's FOIL request, finding that:

"The [DOT] provided you with the documents responsive to this request in or about 2015. The information that you are requesting has not changed, therefore the documents that you received previously remain the current standards."

*Id.*, ¶ 18; notice of cross motion, Falk affirmation, exhibit Q (the RAO's order). McCreery thereafter filed an administrative appeal on September 2, 2019, and a DOT "records access appeal officer" (RAAO) subsequently issued a final decision on September 18, 2019 that denied McCreery's appeal and found as follows:

"Pursuant to your appeal, please find enclosed copies of responsive records consisting of the overview map content standards. Please be advised that the remaining items requested in your FOIL, received on November 24, 2018, have been provided to you in a finalized format in or about 2015. No additional finalized responsive record was located."

*Id.*, ¶¶ 19-21; notice of cross motion, Falk affirmation, exhibits R, S (the RAAO's order).

The DOT notes that McCreery's 2014 FOIL request sought:

“. . . digital files used in the creation of signage materials for the WalkNYC wayfinding program, described online at

<http://www.nyc.gov/html/dot/html/pedestrians/walknyc.shtml>, as follows:

- “\* Design or branding guidelines in PDF format.
- “\* Raw map files, preferably in ArcGIS Shapefile format or InDesign format.
- “\* Any other point-of-interest database for locations included in WalkNYC.
- “\* Finished maps, as prepared for public use, in PDF format.
- “\* Map icons in Adobe Illustrator or other vector file format.
- “\* Copies of typefaces used in OpenType or TrueType format.”

See notice of cross motion, Falk affirmation, ¶¶ 9-10; exhibit A. The DOT also notes that, on September 12, 2014, the RAO granted McCreery's FOIL request in part and denied in part, and that McCreery thereafter filed an administrative appeal of the RAO's 2014 order. *Id.*, ¶¶ 14-15; exhibits E, F. The DOT further notes that, on October 24, 2014, an RAAO issued a decision that denied McCreery's appeal and found that:

“Pursuant to your appeal, DOT conducted an additional search and review of documents. In consideration of such a search and review, I hereby affirm that DOT has no additional responsive documents and the prior partial denial, pursuant to FOIL Section 87 (2) (g), is upheld.”

*Id.*, ¶ 16; exhibit G. The DOT finally notes that McCreery did not file an Article 78 proceeding to challenge the RAAO's 2014 order. *Id.*, ¶ 17. However, the DOT concedes that McCreery did obtain an advisory opinion from the New York State Committee on Open Government [dated February 6, 2015] concerning the sufficiency of the RAAO's 2014 order. *Id.*, ¶¶ 18-22; exhibit I. The DOT also concedes that it responded to the advisory opinion on February 13, 2015, by voluntarily disclosing additional FOIL material to McCreery, including two CD ROMs in different formats which contained WalkNYC design guidelines and content standards, including “Ancillary, Bike share extent, Focus map, Overview map, SBS, and Subway neighborhood map” guidelines, and “Focus map content standards and SBS content standards.” *Id.*; exhibits J, L.

On July 20, 2020 McCreery commenced this Article 78 proceeding to challenge the September 18, 2019 RAAO's order. See verified petition. The DOT filed a cross-motion to

dismiss McCreery's petition on September 9, 2020. *See* notice of cross motion. This matter is now fully submitted (motion sequence number 001).

#### DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before an administrative agency, whether the agency's determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1<sup>st</sup> Dept 1996). A determination will only be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of the . . . facts . . ." *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell*, 34 NY2d at 231. However, if there is a rational basis for the determination, there can be no judicial interference. *Matter of Pell*, 34 NY2d at 231-232. Further, "[w]hen reviewing the denial of a FOIL request, a court . . . is to presume that all records of a public agency are open to public inspection and copying, and must require the agency to bear the burden of showing that the records fall squarely within an exemption to disclosure." *Matter of Rauh v de Blasio*, 161 AD3d 120, 125 (1<sup>st</sup> Dept 2018), quoting *Matter of New York Comm. for Occupational Safety & Health v. Bloomberg*, 72 AD3d 153, 158 (1<sup>st</sup> Dept 2010).

Here, McCreery asserts that the court should vacate the September 18, 2019 RAAO's order because DOT "[has] not produced the records sought . . . and has not met its burden to provide specific and particularized justification for withholding the requested records," and also "did not meet [its] burden to demonstrate that the records sought . . . had been previously disclosed." *See* verified petition, ¶¶ 30-31. The DOT responds that "this proceeding is moot and

academic because DOT provided the requested records in response to petitioner's earlier FOIL request." See respondent's mem of law at 7-10. The court finds that the evidence establishes that DOT has previously produced all of the material that McCreery sought in his 2018 FOIL request.

McCreery's 2018 FOIL request asked DOT to produce "WalkNYC design guidelines and related instructional documentation," including any "Focus map, Focus map content standards, Overview map, Bike share, Select Bus Service [SBS], extent SBS content standards, Subway neighborhood map, [and] ancillary wayfinding products." See verified petition, ¶ 17; notice of cross motion, Falk affirmation, exhibit M. However, the DOT's February 13, 2015 voluntary production, which followed the agency's receipt of McCreery's advisory opinion from the New York State Committee on Open Government, had already disclosed "WalkNYC design guidelines and content standards," including "Ancillary, Bike share extent, Focus map, Overview map, SBS, and Subway neighborhood map" guidelines, and "Focus map content standards and SBS content standards." *Id.*, notice of cross motion, Falk affirmation, ¶¶ 18-22; exhibits J, L. The recent September 2, 2019 RAO's order also disclosed "the overview map content standards." *Id.*; Falk affirmation, exhibit S. The DOT's 2015 and 2018 productions plainly account for all of the items in McCreery's 2018 FOIL request. This evidence contradicts the assertions in McCreery's petition that the DOT has not produced the records sought, or met its burden to demonstrate that the records had been disclosed previously. Therefore, the court rejects these assertions.

The court also discounts McCreery's contention that an agency's FOIL production "can be requested a second time if the first request did not return records in the correct file format." See verified petition, ¶ 28. The DOT has presented copies of correspondence from 2015 that

contain McCreery's request for a second copy of the CD-ROM containing the agency's document production (in pdf format) to replace the original CD-ROM, which was damaged during delivery. *See* notice of cross motion, Falk affirmation, ¶¶ 20-22; exhibits J, K, L. The evidence does not show that McCreery ever requested documents from the DOT in a specific format which the DOT chose to ignore.

Because it rejects the two foregoing assertions, the court concludes that the RAAO's September 2, 2019 determination, that "the remaining items requested in your FOIL, received on November 24, 2018, have been provided to you in a finalized format in or about 2015," had a rational basis in the DOT's administrative record. Accordingly, the court finds McCreery failed to establish that the RAAO's order was an arbitrary and capricious ruling.

The court additionally notes that the September 2, 2019 order contained the RAAO's representation that he had conducted a search for any "additional finalized responsive [DOT] records," but was unable to locate any. *See* notice of cross motion, Falk affirmation, exhibit G. Pursuant to Public Officers Law § 89 (3), this representation shifted the burden to McCreery "to 'articulate a demonstrable factual basis to support his contention that [further] requested documents existed and were within [respondent]'s control.'" *Matter of Lopez v New York City Police Dept. Records Access Appeals Officer*, 126 AD3d 637, 637 (1<sup>st</sup> Dept 2015), quoting *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 279 (1996). The conclusory statements in the petition fail to meet this burden. Accordingly, the court credits the DOT's assertion that there are no further agency documents in its possession that are responsive to McCreery's FOIL request.

The court finally notes that appellate case law has upheld the dismissal of Article 78 proceedings that were commenced by petitioners who had submitted separate successive FOIL

requests for the same material, and either received the material from the agency in response to the first request, or obtained it during the pendency of the second request. *See e.g., Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738 (2001); *Matter of Gannett Satellite Info. Network, LLC v New York State Thruway Auth.*, 181 AD3d 1072 (3d Dept 2020); *Matter of Smith v New York State Off. of the Attorney Gen.*, 159 AD3d 1090 (3d Dept 2018); *Matter of Khatibi v Weill*, 8 AD3d 485 (1<sup>st</sup> Dept 2004). In such cases, the courts deemed that the relief sought in the second FOIL request had been rendered moot or academic. As was previously discussed, this case is similar to the cited precedent as McCreery’s 2018 FOIL request was satisfied by the DOT’s document productions in 2015 and 2018. As a result, dismissal is appropriate herein, notwithstanding the strong general policy that favors granting FOIL requests.

Accordingly, the court finds that McCreery’s Article 78 petition should be denied as meritless, and that this proceeding should be dismissed.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby  
 ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner David T. McCreery (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further  
 ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further  
 ORDERED that the counsel for respondents shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for petitioner.

  
 HON. CAROL R. EDMÉAD J.S.C.  
 J.S.C.

<u>12/18/2020</u> DATE					<u>CAROL R. EDMÉAD, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE