

IA PART 19

Justice Sherman

BERNSTEIN v. CITY OF NEW YORK—

The petitioner brings this Article 78 proceeding seeking a judgment directing the respondent, City of New York, to grant her access to certain records and files maintained by various departments of the respondent, including the Department of Transportation and the Department of Arterial Transportation, concerning, inter alia, maintenance, inspection, complaints and repairs dealing with the F.D.R. Drive.

The petitioner, pursuant to the Freedom of Information Act (Public Officer's Law, Art. 6), sent a letter dated October 20, 1989 to the Arterial Highway Department of the City of New York for certain information, documents, memos, notes, complaint forms, etc. dealing with the FDR Drive. The Records Access Officer of the New York City Department of Transportation, in a letter dated November 1, 1989, acknowledged receipt on October 31, 1989 of petitioner's FOIL application and informed petition that said office was in the process of gathering the responsive records and that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection. This FOIL application was also assigned a file number.

The petitioner, receiving neither access to the records requested nor denial of her application, sent a follow-up letter, dated December 8, 1989, with a copy of her October 20 letter to the Arterial Highway Department. The Records Access Officer, in a responsive letter dated December 29, 1989, acknowledged receipt of petitioner's request on December 19, 1989. This responsive letter was otherwise identical to its November 1, 1989 letter with petitioner being informed that said office was in the process of gathering the responsive records and that it would take a period of time to ascertain whether such documents do exist, and if they did, whether they qualify for inspection. In fact, the petitioner's second letter was treated as if it was petitioner's initial FOIL request and such was also assigned a new file number.

The petitioner also sent letter requests for said records to Corporation Counsel on or about January 29, 1990, and on or about February 28, 1990 to various offices of the Department of Transportation including Bridges Construction, Bridges & Maintenance and Bridge Construction Highway Maintenance. The requests were apparently forwarded by the above offices to the Record Access Officer of the Department of Transportation, as he is the person responsible for coordinating the acquisition of information in response to FOIL requests.

The petitioner has currently neither been granted nor denied access to the requested records. This proceeding seeks a judgment directing respondent to provide petitioner access to the records sought in her FOIL request.

The respondent maintains that this proceeding should be denied and the petition dismissed on the grounds that the information sought by petitioner should be obtained through the discovery devices, provided by CPLR article 31, and also due to petitioner's failure to exhaust all administrative remedies, pursuant to Public Officers Law §89(4)(a).

The petitioner has recently commenced a wrongful death action arising out of the death of her husband who was killed when the underside of a section of the FDR Drive, in the area of East 23rd Street, fell on his car crushing and killing him. The respondent, therefore, argues that the information sought by petitioner is not a proper FOIL request, as the petitioner should seek such disclosure through the discovery devices provided under CPLR article 31.

This argument advanced by respondent is without merit as a party/litigant is not barred from exercising his FOIL rights, as the fact that disclosure may be available to the applicant through other discovery devices does not preclude FOIL relief, if warranted. The mere fact that an applicant is a litigant does not hinder his right as member of the public to utilize the Freedom of Information Act. (See Matter of Faberman v. N.Y. City Health and Hosp. Co., 62 N.Y. 2d 75).

The respondent's next argument is that petitioner has failed to exhaust her administrative remedies and therefore may not seek judicial relief. The respondent contends that petitioner failed to appeal the denial of access to records within 30 days to the agency head as provided for in Public Officers Law §89(4)(a) and, therefore, may not bring this proceeding.

The petitioner alleges that Public Officers Law §89(4)(a) is not applicable as petitioner's FOIL request has never been decided by respondent as respondent's only correspondence in response to petitioner's application indicates only that the matter is under investigation.

While the papers, for both sides, in this proceeding fail to discuss the issue of constructive denial, it has been found that the failure of an agency to respond to a FOIL request, as provided for in Public Officers Law §89(3), can be construed as a denial of said request. In the case of *Mtr. Robertson v. Chairman*, 122 Misc 2d 829, the court held the failure of the Division of Parole to respond within five days to a letter from petitioner requesting access to certain information contained in his parole records is properly construed as a denial of his request. Additionally, (21 NYCRR §1401.5 subd. [d]) under Requests for public access to records states:

If the agency does not provide or deny access to the record sought within five business days of receipt of a request, the agency shall furnish a written acknowledgment to receipt of the request and a statement of the approximate date when the request will be granted or denied. If access to records is neither granted nor denied within 10 business days after the date of acknowledgment of receipt of a request, the request may be construed as a denial of access that may be appealed.

It, therefore, appears that respondent's failure in this particular proceeding to neither grant nor deny the petitioner's request may be construed as a denial of access that may be appealed to the agency head. The next question is whether this petitioner's alleged failure to appeal to the agency head precludes this Article 78 proceeding for either failure to exhaust her administrative remedies or for failure to appeal within the 30-day period provided by Public Officers Law §89(4)(a).

In *Mtr. Robertson* (supra at 831), the court found that petitioner's failure to make a timely written appeal to a deemed denial precluded redress to the court due to petitioner's failure to exhaust administrative remedies.

The facts in this present proceeding differ slightly but significantly from the facts in the above case. While the petitioner in *Mtr. of Robertson* never received any response from the Division of Parole, this petitioner did receive a response which indicated that Record Access Office was attempting to gather the responsive documents.

The acknowledgment letters from the Records Access Officer of the New York City Department of Transportation to this petitioner were statutorily deficient. The applicable section of Public Officers Law §89(3) states:

Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section.

The acknowledgment letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, "that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection."

This court finds that respondent's actions and/or inactions placed petitioner in a "Catch 22" position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal within 10 business days after the date of acknowledgment of receipt of request, as provided (21 NYCRR §1401.5 [d]), this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming. It is easy to envision the opposite situation of petitioner filing an appeal within 10 business days and respondent arguing the appeal is premature as there has not yet been a denial of access to the documents.

It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.

Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a). This court will, therefore, grant the petition to the extent of remanding this matter to the proper agency head or appeals officer, who is thereafter directed, within ten business days from receipt of this order with notice of entry thereon, to fully explain in writing to the petitioner the reasons for further denial, or provide access to the records sought. That branch of the petition seeking attorneys' fees is denied as premature.