

SUPREME COURT, NEW YORK COUNTY
NYLJ, DECEMBER 15, 1998

Justice DeGrasse

★ MATTER OF HOUSING WORKS, INC. v. GUILIANI QDS:22700563—Petitioner in this Article 78 petition seeks to compel the Office of the Mayor of the City of New York provide it with documents sought pursuant to the state's Freedom of Information Law ("FOIL"). (Police Officers Law §884 et seq.) Respondents cross-move to dismiss the petition on the ground that petitioner has not exhausted its administrative remedies.

FACTS

The relevant facts are not disputed by the parties.

By letter dated February 18, 1988, Jeanne Bergman, Senior policy analyst for petitioner Housing Works, Inc. ("Housing Works") wrote to respondents seeking, inter alia, copies of a report entitled "Abridged Ethnographic Evaluation and Executive Summary of SRO Harm Reduction Outreach of the Center for AIDS Outreach and Prevention, NDRI" and documents relating to this report (the "FOIL Request").

On February 23, 1998, Laurence Levy, Deputy Counsel to the Mayor, wrote to Housing Works acknowledging its FOIL request. This letter states that "[w]e currently are reviewing the request and we expect to respond within ten days, either producing the requested documents or providing reasons why the requested documents are not available."

Respondents failed to respond to the FOIL request in any manner. On May 7, 1998, Housing Works wrote to respondents noting the lengthy delay and asking that the requested documents be produced "immediately." In response to this letter, Levy or another one of respondents' employee telephoned petitioner and stated that the requested documents were being reviewed and that a response would be forwarded to petitioner "soon."

Respondents still did not respond to the FOIL request. On June 11, 1998, Armen Merjian, Housing Works' senior staff attorney, wrote to Levy to request immediate production. Merjian noted that:

[i]t is now approaching four months from the date of Ms. Bergman's FOIL request, and from the date that you wrote Ms. Bergman to indicate that you expected to respond to her request within ten days. We sincerely wish to avoid having to litigate this matter. Accordingly, I ask that you call me immediately at the above number to inform me when, in the immediate future, we can expect to receive the requested materials. I am hopeful that we can resolve this amicably and expeditiously.

Respondents did not respond to this letter. On July 7, 1998 Merjian again wrote to Levy, stating that petitioner would treat respondents' lack of response to its request as a denial. "Accordingly," the letter states, "I am hereby writing formally to appeal your decision to deny the FOIL request. . . . If you are not the appropriate individual to decide upon this appeal, i.e. the chief executive or head of your agency, or the person designated by the chief executive to head or hear appeals, please forward this letter immediately to the appropriate individual."

Respondents did not respond to this final letter and petitioner brought this Article 78 proceeding.

DISCUSSION

FOIL mandates that all public agencies provide access to their records subject to certain narrowly drawn exceptions. The statute creates a presumption of openness, stating that "government is the People's business and . . . the public . . . should have access to the records of government in accordance with the provisions of this article." (Public Officers Law §84.) In accordance with this legislative intent, courts have interpreted the statute broadly to allow maximum access to government records. (E.g. Buffalo News Inc. v. Buffalo Enterprise Development Corp., 84 NY2d 488, 492.)

Section 89(3) of FOIL provides that:

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 acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied.

Respondents neither complied with the time limits provided in this section, nor with Levy's statement of the approximate date ("within ten days") for a response. Instead respondents have kept petitioner waiting for more than nine months for a response. Respondents assert that petitioner already has the report sought by the FOIL Request, and complain that petitioner leaked the report to news organizations thereby compromising in some unspecified way an ongoing investigation by the City's Department of Investigation into abuses at Single Room Occupancy Hotels where persons with AIDS are housed under contracts with the City. However respondents do not base their motion to dismiss on these arguments.

Instead, respondents' sole argument in support of their motion to dismiss is that petitioner did not exhaust its administrative remedy because it directed its final letter to Levy, and not to Dennison Young, the Mayor's counsel and the person designated by the Mayor's Office to hear FOIL appeals.

Particularly after the Mayor's Office ignored its own obligations under FOIL it becomes respondents to rely on this hyper-technical argument. Respondents' argument ignores the fact that petitioner's final letter requests that if Levy is not the final appeals officer he direct the letter to the proper person. This simple request for re-routing the appeal letter is hardly onerous. Indeed, petitioner's initial FOIL request was sent not to Levy but to Colleen Roche, the Mayor's press secretary. Respondents have not argued that the FOIL request was invalid from its inception on this ground. Accordingly respondents' motion to dismiss the petition is denied.

CPLR 7804(f) provides that if a motion to dismiss an Article 78 petition is denied, the court "shall" permit the respondent to answer the petition. Respondents shall serve and file their answer by December 15, 1998. Petitioner shall have until December 30, 1998 to serve and file papers in reply. Petitioner shall also submit to the court on that date a copy of its petition and attached exhibits. The parties shall direct their papers to chambers, 60 Centre Street, Room 521, New York, NY 10007.

Petitioner's request for attorneys' fees pursuant to Public Officers Law §89(c) is held in abeyance pending the submission of the parties' papers.

This constitutes the decision and order of the court.