

Parties

2. Petitioner Francis Menton is a citizen of the State of New York, and resides in the County of New York.
3. Respondent the Office of the Attorney General of the State of New York is a statutory office of the State of New York, and is in possession of, or otherwise the proper owner, of the records petitioner seeks.

The October 15, 2023, Request

4. The petitioner's FOIL request at issue in this case was submitted via respondent's FOIL portal on October 15, 2023, and sought an unredacted copy of a particular email between the Office and an outside party, specifically "a complete and unredacted copy of the February 19, 2015 email sent to Lem Srolovic and Steven Glassman by Lee Wasserman (lwasserman@rffund.org), time-stamped 9:43 AM, Subject: meeting."
5. Messrs. Srolovic and Glassman are employees of the Office of Attorney General. Srolovic is the Bureau Chief of the AG's Environmental Protection Bureau, Glassman is Senior Enforcement Counsel. Mr. Wasserman is Director of the Rockefeller Family Fund in which capacity, public records show, he recruited the Office to use the Martin Act to seek discovery against a political target of Mr. Wasserman and his employer, and directed his employer's efforts with other outside activists to personally discredit "individual scientists" particularly a private scientific researcher then working out of the Harvard-Smithsonian Center for Astrophysics in Cambridge, Massachusetts, Wei-Hock "Willie" Soon.
6. The Office lost that lawsuit, which is now long concluded. *People of the State of New*

York v. ExxonMobil Corporation, Index No. 452044/2018 (Sup. Ct. N.Y. Cnty.), filed June 19, 2019, decided December 10, 2019.

- 7. The Office assigned the request the tracking number G000658-100923.
- 8. On October 17, 2023, the Office wrote to Petitioner stating, in pertinent part, “We are performing a diligent search for the records you request. We will notify you of the status of your request on or before November 14, 2023.”
- 9. The Respondent did not in fact provide any further status on that date, or after, or any substantive response to the request for a single, specifically identified record.
- 10. Petitioner states on information and belief that this email exists and the Office had previously released it to another requester if in different versions, differently redacting approximately two lines of email text from Mr. Wasserman to the Office, beginning with what Mr. Wasserman states is “our opinion”. See, e.g., June 24, 2023 release in response to FOIL # G000316-051423_Responsive_Records, pages 21 of 108 in one form, and in different form at page 47 of 108.
- 11. This erratically redacted email from an outside party seeking use of and providing a recommended “road map” to use the Martin Act against political opponents in hopes of reversing the fortunes of a frustrated federal legislative and regulatory agenda states, in relevant part, “If the companies admitted what they know about climate science, it would almost certainly hasten greater regulatory changes to restrict the extraction of fossil fuels. In our opinion, [**REDACTED**].”

Administrative Appeal

- 12. On November 16, 2023, Petitioner appealed the Records Access Officer’s constructive

denial of declining to make any determination on this single record, referring the appeals officer to where it could locate the record which, despite being correspondence with an outside activist, OAG had previously produced if in redacted form.

13. Petitioner filed his administrative appeal without conceding any need to so appeal, or prejudice to his right to file litigation to enforce his rights and against this refusal. Petitioner in no way concedes that an administrative appeal was necessary, insofar as he had never been informed of his administrative appellate rights and insofar as the nature of a constructive denial is such that there is no “determination” which is capable of being administratively appealed.
14. Petitioner cannot be required to exhaust any administrative appellate remedies because there was a complete failure to comply with POL 89(3)(a)’s timing provisions, including a failure to issue a “determination” which was susceptible to appeal and a failure to notify the Plaintiff of any administrative appeal rights. *See Empire Ctr.*, 72 Misc.3d at 768 and *Gajadhar v. N.Y. Police Dep’t*, 61 Misc.3d 1218(A), at *2 (Supreme Ct. N.Y. Cnty. 2018).
15. Accordingly, Petitioner files this lawsuit to compel the Office to comply with the law and produce withheld public records and/or otherwise satisfy its statutory obligations under FOIL with respect to this request by justifying all information it continues to withhold.
16. FOIL requesters have a clear ability to challenge the *timing* of an agency’s response to a FOIL request when the requestor argues that it is the failure to respond which is unlawful, given that delay represents a constructive denial in “that failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a

denial.” POL § 89(4)(a). As the Third Department has explained, “even if [the agency’s] response was untimely, petitioner’s remedy was to deem his request denied and commence a CPLR article 78 proceeding to review the denial (*see* Public Officers Law § 89[4][a], [b][]).” *Miller v. N.Y. State Dep’t of Transp.*, 871 N.Y.S.2d 489, 983 (3d Dep’t 2009); *see also, Coleman v. N.Y. City Police Dep’t*, 723 N.Y.S.2d 494 (1st Dep’t 2001); *Empire Ctr. for Pub. Policy v. New York State Dep’t of Health*, 72 Misc.3d 759, 768 (Supreme Ct. Albany Cnty 2021); *Linz v. N.Y.C. Police Dep’t*, NYLJ (Dec. 17, 2021) (Supreme Ct. N.Y. Cnty 2001).

Jurisdiction and Venue

17. This matter is brought pursuant to CPLR Article 78.
18. Venue is proper in this Court pursuant to NY CPLR 506 (b) because the Office maintains a place of business in Manhattan from which it processes FOIL requests, which Office is located in Manhattan. Furthermore, the Petitioner is a resident of New York County.

FIRST CLAIM FOR RELIEF **Seeking Declaratory Judgment**

19. Petitioner re-alleges the preceding paragraphs as if fully set out herein.
20. Petitioner has sought and been denied production of responsive records reflecting the conduct of official business, because respondent has failed to provide a substantive response to the FOIL request at issue in this case, or to provide any reasonable basis to conclude that it properly searched for such records, or to produce records or portions therefor that are not properly exempt under the law.
21. Petitioner asks this Court to enter a judgment declaring that:
 - a) The record as specifically described in petitioner’s FOIL request, and any attachments

thereto, are public records, and as such, are subject to release under the New York Freedom of Information Law;

b) The Respondent must release those requested records or segregable portions thereof subject to legitimate exemptions;

c) The Respondent is estopped from seeking seek costs and fees for the request at issue in this case, due to the balance of the equities and the incorporation of common law principles by §89 (6) of the New York Freedom of Information Law.

SECOND CLAIM FOR RELIEF

Seeking Injunctive Relief

- 22. Petitioner re-alleges the preceding paragraphs as if fully set out herein.
- 23. Petitioner is entitled to injunctive relief compelling respondent to produce all records in its possession responsive to petitioner’s New York Freedom of Information Law request, without fees, subject to legitimate withholdings.
- 24. Petitioner asks the Court to order the respondent to produce to Petitioner, within 5 business days of the date of the order, the requested record(s) described in Petitioner's request, and any attachments thereto, subject to legitimate withholdings.

THIRD CLAIM FOR RELIEF

Seeking Costs and Fees

- 25. Petitioner re-alleges the preceding paragraphs as if fully set out herein.
- 26. Pursuant to §89 (4) (c), in most cases, the Court shall award reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- 27. Petitioner is statutorily entitled to recover fees and costs incurred as a result of Respondent’s refusal to fulfill the open records request at issue in this case. Petitioner is

statutorily entitled to recover fees and costs incurred as a result of respondent's refusal to fulfill the open records request at issue in this case.

28. Petitioner asks the Court to order the Respondent to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Petitioner request the declaratory and injunctive relief herein sought, and an award for their attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this the 17th day of November 2023.

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