Index No. 159537/2018 IAS Part 37 (Engoron, J.)
Motion Seq. 002

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

RECLAIM THE RECORDS and BROOKE SCHREIER GANZ,

Petitioners,

-against-

THE CITY OF NEW YORK and DEPARTMENT OF RECORDS AND INFORMATION SERVICES,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' CROSS-MOTION TO DISMISS THE VERIFIED PETITION

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for Respondents
100 Church Street, Room 2-306
New York, New York 10007

Of Counsel: Copatrick Thomas
Telephone: (212) 356-0885
Matter No. 2018-077498

PRELIMINARY STATEMENT

This memorandum of law is submitted by Respondents City of New York and New York City Department of Records and Information Services in support of their Cross-Motion to Dismiss the Verified Petition. In this proceeding, Petitioners seek an order pursuant to the New York Freedom of Information Law ("FOIL") compelling DORIS to produce records that DORIS has itself already made available to the public, namely, "microfilm copies of . . . 143 microfilm rolls of the Kings [C]ounty (Brooklyn) 'Old Town' records." As discussed below, Petitioners lack standing to bring this proceeding because Petitioners have not been denied access to any records. Moreover, the ultimate issue in this proceeding, namely, whether an agency is required to produce records that the agency has itself already made available to the public, has already been litigated by these same parties, and, thus, Petitioners are barred by the doctrine of collateral estoppel from raising it again here. Finally, Petitioners are not entitled to an award of attorneys' fees because (i) they have not substantially prevailed in this matter, and (ii) DORIS has a reasonable basis for concluding that it had no obligation to produce records that it already made available to the public. Accordingly, Respondents' cross-motion should be granted and the Verified Petition dismissed in its entirety.

STATEMENT OF FACTS

By e-mail dated July 17, 2018, Petitioners sought access from the Department of Records and Information Services ("DORIS") to "microfilm copies of . . . 143 microfilm rolls of the Kings [C]ounty (Brooklyn) 'Old Town' records," pursuant to the Freedom of Information Law ("FOIL"). *See* Petition, Exh. A. Recently, however, in a case involving these same Petitioners — *Ganz v. City of New York*, Index No. 101643/2015 (Sup. Ct. N.Y. Co. May 27, 2016) — Justice Mendez ruled that DORIS had no obligation under FOIL to provide Petitioners copies of records it already had made publicly-available through the Municipal Archives.

Accordingly, by email dated July 31, 2018, DORIS denied Petitioners' FOIL request, explaining that the records sought by Petitioners were already publicly available and available for inspection at DORIS' Municipal Archives (at no cost to Petitioners), and advised Petitioners to "contact [the Assistant Commissioner of DORIS] Kenneth Cobb . . . for further guidance regarding a request for duplication and use of archival materials." *See* Petition, Exh. B.

By email dated August 6, 2018, Petitioners administratively appealed DORIS' July 31 determination. By letter dated August 21, 2018, DORIS upheld its prior determination, denying Petitioners' FOIL request because the requested records are publicly available. *See* Petition, Exh. D.

By Verified Petition dated October 15, 2018, Petitioners now seek an order directing DORIS to produce "a complete copy" of the requested microfilm rolls and for an award of attorneys' fees and expenses. *See* Petition ¶ 2, and Request for Relief. For reasons explained below, the Court should dismiss the Verified Petition.

ARGUMENT

POINT I

PETITIONERS LACK STANDING TO INITIATE THIS SPECIAL PROCEEDING BECAUSE THEY WERE NOT DENIED ACCESS TO ANY RECORDS

"The limited authorization for judicial review set forth in Public Officers Law § 89(4)(b) provides that only a person denied access to a record may initiate a CPLR art. 78 proceeding." *Benedict v. Albany County*, 22 Misc. 3d 597, 603 n.3 (Sup. Ct. Albany Co. 2008); *see also* N.Y. Pub. Off. Law § 89(4)(b) ("a person *denied access* to a record . . . may bring a proceeding") (emphasis added). In this case, DORIS granted Petitioners access to the requested records, and explained that the records could be copied and inspected at the Municipal Archives.

Thus, Petitioners were not "denied access" to any records, and therefore lack standing to initiate this proceeding.

Petitioners appear to contend that they were denied access to records when DORIS declined to produce copies of publicly available microfilm rolls, and instead directed Petitioners to visit DORIS' Municipal Archives and to contact Assistant Commissioner Cobb for guidance on how to obtain duplicates of the materials. This argument is not supported by case law as, under FOIL, an agency has no obligation to produce records that the agency has itself already made available to the public.

This proceeding is substantially similar to a recent proceeding initiated by these same Petitioners, in which Petitioners sought an order directing DORIS to produce "microfilm containing indexes of certain marriage records filed by the City Clerk between 1908 through 1929." *See Ganz v. City of New York,* Index No. 101643/2015 (Sup. Ct. N.Y. Co. May 27, 2016) [hereinafter *Ganz I*].[1] There, as here, DORIS informed Petitioners that the requested records were publicly available at the Municipal Archives, where they could go to inspect and copy the requested microfilm. *Id.* And, like here, Petitioners argued that this response constituted a denial of their FOIL request. *Id.* The Court, however, rejected this argument and denied the Petition in its entirety, holding that "petitioner was not denied access to the Municipal Archive . . . where the Microfilm is located." *Id.*

Here, as in *Ganz I*, Petitioners sought access to microfilm rolls pursuant to FOIL, which Petitioners admit are available at DORIS' Municipal Archives. Petition ¶ 4 ("The requested records exist on microfilm currently accessible to the public . . . on location at the Municipal Archives."). Also, here, as in *Ganz I*, DORIS granted Petitioners access to the

[1] A copy of this decision is annexed to the accompanying affidavit of Copatrick Thomas as Exhibit 1.

requested records, and explained that the records could be copied and inspected at the Municipal Archives. Therefore, consistent with *Ganz I*, the Court should hold that Petitioners were not denied access to any records. *See Sell v. New York City Dep't of Education*, Index. No. 101291/2013, 2014 N.Y. Slip Op. 31340(U), *7, 2014 N.Y. Misc. LEXIS 2382, *9 (Sup. Ct. N.Y. Co. May 27, 2014) ("The Court does not need to order [respondent-agency] to provide records that are publicly available.").

Indeed, federal courts have consistently held that the Freedom of Information Act ("FOIA"), the federal corollary to FOIL on which FOIL was patterned, does not require production of materials that an agency itself has already made open and available to the public. For example, in *Triestman v. United States Dep't of Justice*, 878 F. Supp. 667 (S.D.N.Y. 1995), the U.S. District Court for the Southern District of New York granted summary judgment to the government agency, reasoning that "to require an agency to collect and produce information that has already been made public would not further the general purpose of FOIA . . . . FOIA does not obligate an agency to serve as a research service for persons seeking information that is readily available to the public . . . . Information that is available to any generally interested party or concerned citizen is information that is sufficiently available to relieve an agency of any duty to produce it under FOIA." *Id.* at 671–72. In *Freedberg v. Dep't of Navy*, 581 F. Supp. 3 (D.D.C. 1982), the federal court reached a similar conclusion, reasoning that "it is abusive and a dissipation of agency and court resources to make and process a claim for the[ ] disclosure [of publicly available records]. Once such documents are open for inspection by the general public, there is no longer any matter in controversy before the Court under FOIA." *Id.* at 4 (citations omitted) (internal quotation marks omitted).

Given the practical implications of the position advocated by Petitioners, these decisions should come as no surprise. Petitioners seek an order that would, in effect, require DORIS to expend limited resources processing duplicative FOIL requests and producing copies of any and all publicly-available records. Such a remedy would impose on responding agencies a significant and wholly unsanctioned administrative burden. It would also force DORIS into serving as a research assistant for individuals who wish to avoid the mere inconvenience of traveling to a location where records are publicly available. State and federal courts have recognized these practical implications, and, accordingly, have rejected the very arguments now offered by Petitioners.

Thus, an agency is not required to provide records pursuant to a FOIL request that already are publicly available. Respondents are not aware of *any* contrary legal authority. Although Petitioners cite an Advisory Opinion by the Commission on Open Government reaching a contrary conclusion, this very Advisory Opinion was rejected by the Court in *Ganz I*.

In sum, DORIS was not required to produce copies of the microfilm rolls in response to Petitioners' FOIL request and Petitioners lack any basis for arguing that they were "denied access" to the requested records. Accordingly, Petitioners lack standing, warranting dismissal of this proceeding.

POINT II

THE ULTIMATE ISSUE IN THIS PROCEEDING IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL BECAUSE IT HAS ALREADY BEEN LITIGATED IN A PROCEEDING BROUGHT BY PETITIONERS AGAINST DORIS

The doctrine of collateral estoppel, or issue preclusion, "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); *BDO Seidman LLP v. Strategic Resources Corp.*, 70 A.D.3d 556, 560 (1st Dep't 2010); *Lanzano v. City of New York*, 202 A.D.2d 378, 379 (2d Dep't 1994). To apply the doctrine, the following factors must be shown: (1) the issue must be identical with that previously decided, (2) the issue must have necessarily been decided in the previous matter, and (3) the precluded litigant must have had a full and fair opportunity to litigate the issue in the previous proceeding. *See Capital Tel. Co. v. Pattersonville Tel. Co.*, 56 N.Y.2d 11, 17 (1982). The proponent of preclusion must establish the first two factors, and the opponent has the burden of establishing a lack of a full and fair opportunity to litigate. *Id.* As the Court of Appeals has explained: "[Collateral estoppel] is a doctrine intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it." *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455 (1985); *see also Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 (1999) (holding that the doctrine of collateral estoppel precludes plaintiff from relitigating the "issues he unsuccessfully litigated in his prior CPLR article 78 proceeding").

In this case, Petitioners raise the issue of whether they were "denied access" to records when DORIS directed them to visit DORIS' Municipal Archives. However, this very issue was thoroughly litigated in a prior proceeding *brought by these same Petitioners against DORIS.* As explained above, in *Ganz I*, the Court unequivocally held that Petitioners had not been denied access to any records because they were "not denied access to the Municipal Archive . . . where the Microfilm is located." *See* Exhibit 1.

The decision in *Ganz I* is dispositive of the present proceeding; that is, Petitioners cannot prevail in this matter because they have already litigated the identical issue in this case, which was necessary to the decision in *Ganz I. See id.* Moreover, Petitioners cannot credibly maintain that they were denied a "full and fair" opportunity to contest the decision in *Ganz I.* Petitioners were parties to the prior proceeding, and were represented by counsel, who submitted pleadings and memoranda on their behalf. Having already taken one "bite at the apple," Petitioners are not entitled to relitigate an issue that has already been decided against them. Nor are Plaintiffs free to shop around for a judge who might render a more favorable decision. Accordingly, the ultimate issue in this proceeding is barred by the doctrine of collateral estoppel.

POINT III

THIS PROCEEDING IS MOOT BECAUSE PETITIONERS SEEK ACCESS TO RECORDS THAT HAVE ALREADY BEEN MADE AVAILABLE TO THEM

It is well established that a proceeding to compel disclosure of records pursuant to FOIL is rendered moot where the respondent-agency discloses all records responsive to the request. *See, e.g., Rattley v. N.Y. City Police Dep't*, 96 N.Y.2d 873, 875 (2001); *Covington v. Sultana* 59 A.D.3d 163, 164 (1st Dep't 2009); *Matter of Crispino v. Morgenthau*, 38 A.D.3d 210 (1st Dep't 2007) ("The District Attorney has furnished the documents sought in petitioner's FOIL

request, thereby rendering this appeal moot"). In this case, as explained above, *see supra* Point I, Petitioners have not been denied access to any records. To the contrary, before this proceeding was commenced, DORIS granted Petitioners access to all of the requested records. Nevertheless, Petitioners seek an order "directing respondent DORIS to produce the requested microfilm copies." Petition, *Wherefore Clause*. Having already received the relief sought in this proceeding, Petitioners are not entitled to further relief.

POINT IV

PETITIONERS ARE NOT ENTITLED TO AN AWARD OF ATTORNEYS' FEES OR COSTS

FOIL provides that a court may, in its discretion, award "reasonable attorney's fees and other litigation costs reasonably incurred" during the course of litigation, but only if the petitioner has "substantially prevailed," and "the agency failed to respond to a request or appeal within the statutory time." N.Y. Pub Off. Law § 89(4)(c)(i). By contrast, a court must award attorneys' fees if the petitioner has substantially prevailed and "the court finds that the agency had no reasonable basis for denying access." N.Y. Pub Off. Law § 89(4)(c)(ii). Regardless of which subsection fees are sought, a requesting party must first establish that it "substantially prevailed" in the proceeding.

In this case, Petitioners are not entitled to attorneys' fees because they have not been denied access to any records, and have not substantially prevailed in this matter. Moreover, DORIS has a reasonable basis for concluding that it had no obligation to produce records that it had already made publicly available.

A. Petitioners Have Not Substantially Prevailed

"A petitioner 'substantially prevail[s]' under Public Officers Law § 89(4)(c) when [he or she] 'receive[s] all the information that [he or she] requested and to which [he or she] is

entitled in response to the underlying FOIL litigation.'" *Matter of Competitive Enter. Inst. v Attorney Gen. of New York*, 161 A.D.3d 1283, 1286 (3d Dep't 2018) (quoting *Matter of New York State Defenders Ass'n v New York State Police*, 87 A.D.3d 193, 196 (3d Dep't 2011)). *See Madrassa Cmty. Coal. v. N.Y. City Dep't of Educ.*, No. 113973/07, 2008 N.Y. Misc. LEXIS 4069, *7–8 (Sup. Ct. N.Y. Co. July 30, 2008) (to have substantially prevailed in FOIL proceeding, party must demonstrate that "it was the initiation of their proceeding which brought about the release of the documents") (citing *Friedland v. Maloney*, 148 A.D.2d 814, 816 (3d Dep't 1989)).

As discussed above, Petitioners were never "denied access" to any records. Rather, DORIS granted Petitioners access to the requested microfilm rolls, and explained that the records could be copied and inspected at the Municipal Archives. Because Petitioners do not and cannot demonstrate that they were denied access to the requested records, the Court should conclude, like the Court in *Ganz I*, that Petitioners are not entitled to an award of attorneys' fees and expenses. *See* Exh. 1

Moreover, as amply demonstrated above, it is abundantly clear that DORIS responded properly to Petitioners' FOIL Request. As Petitioners are not entitled to any relief, it is well-established that they cannot be deemed to have substantially prevailed in this proceeding. *See Robbins v New York City Landmarks Preserv. Commn.*, 2018 N.Y. Misc. LEXIS 3273, * 9-10 (Sup. Ct. N.Y Co., July 27, 2018) (denying attorneys' fees where petitioner did not prevail in the proceeding).

B. DORIS Has a Reasonable Basis for Concluding that it Had No Obligation to Produce Records that it Had Already Made Publicly Available

Even if the Court were to somehow find that Petitioners substantially prevailed here, an award of fees is not warranted because DORIS had a reasonable basis for its response.

Notably, an agency's decision to withhold requested records may be reasonable even if it is rejected by the court. *See New York Times Co. v. NYPD*, Index No. 116449/10, 2011 N.Y. Misc. LEXIS 5182, * 17, 2011 NY Slip Op 32857(U), * 14 (Sup. Ct. N.Y. Co. Oct. 2, 2011) (rejecting claim for attorneys' fees where agency's reasons for denying access were not unreasonable), *aff'd in part, modified in part,* 103 A.D.3d 405 (1st Dep't 2013); *Miller v. New York State Dep't of Transp.*, 58 A.D.3d 981, 985 (3rd Dep't 2009) (although ordering documents disclosed, denying request for fees where respondents "had a rational basis for their belief that the majority of the documents withheld were exempt from disclosure"); *Matter of Associated Gen. Contrs. of N.Y. State, LLC v. Dormitory Auth. of the State of N.Y.*, Index No. 2530-17, 2017 NY Slip Op 51947(U), *9, 2017 N.Y. Misc. LEXIS 5201, * 27-28, (Sup. Ct. Albany Co., Oct. 4, 2017) (denying attorneys' fees although agency was directed to produce records, because it had a reasonable basis for withholding).

In this case, DORIS' response to Petitioners' FOIL request clearly did not lack a reasonable basis. Rather, given both the federal and state case law—in particular, the ruling in *Ganz I*, in which this very issue was litigated by the same parties—DORIS clearly had a reasonable basis for concluding that it had no obligation to produce records that it has itself already made available to the public.

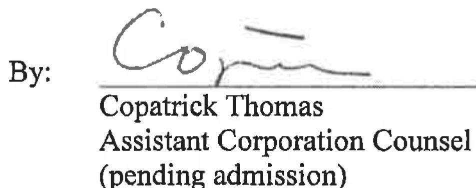
Accordingly, the Court should deny Petitioners' request for attorneys' fees and costs.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that the Court grant their cross-motion and dismiss the Verified Petition in its entirety, and award Respondents such other and further relief as the Court deems just and proper.[2]

Dated: New York, New York
November 21, 2018

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for Respondents
100 Church Street, Room 2-306
New York, New York 10007
(212) 356-0885
cthomas@law.nyc.gov

By: 

Copatrick Thomas
Assistant Corporation Counsel
(pending admission)

[2] In the event of denial by the Court of this cross-motion to dismiss the Petition in whole or in part, Respondents reserve the right, pursuant to CPLR § 7804(f), to serve and file a Verified Answer to the Petition, and respectfully request twenty (20) days from the date of service of the Order with Notice of Entry in which to serve the Verified Answer.