

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
EMILY JANE GOODMAN

PRESENT: _____

PART 17

Index Number : 100998/2006

PODOLSKY, RONALD

vs

BLOOMBERG, MICHAEL

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*and this motion Article 78 proceeding
be denied with no award with the
attached*

Dated: 7/25/16

Emily Jane Goodman
EMILY JANE GOODMAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 17

-----X
In the Matter of the Application of
RONALD PODOLSKY,

Petitioner,

For An Order and Judgment Pursuant to
Article 78, CPLR

-against-

Index No. 100998/06

MICHAEL BLOOMBERG, Mayor of the City of
New York; JOYCE FRANK MENSCHER, as
President of the Art Commission of the
City of New York, Office of the Mayor;
and ADRIAN BENEPE, as Commissioner of
the New York City Parks & Recreation
Department,

Respondents.

-----X
EMILY JANE GOODMAN, J.S.C.:

In this Article 78 proceeding, petitioner Ronald Podolsky seeks an order annulling the determination of respondent Art Commission of the City of New York (the Art Commission) approving a plan filed by the New York City Parks & Recreation Department (the Parks Department) in December 2005, relating to the movement of the fountain and certain statues in Washington Square Park, and remanding the matter to the Art Commission for further proceedings. On May 19, 2006, this court extended a temporary restraining order originally entered in *Greenberg v City of New York* (Sup Ct, NY County, Index No. 105867/06) restraining the City from "undertaking any bids, entering into contracts, or undertaking any work on Washington Square Park to the extent that it is the subject of this litigation until a decision is

rendered."

Respondents cross-move to dismiss the petition for failure to state a claim on which relief can be granted.

On December 20, 2005, petitioner sent Freedom of Information Law (FOIL) requests to respondents Joyce Frank Menschel, President of the Art Commission and Adrian Benepe, Commissioner of the Parks Department, seeking a copy of the plans filed by the Parks Department with the Art Commission relating to the renovation of Washington Square Park. Petitioner's FOIL requests noted that the Art Commission was scheduled to meet on January 9, 2006 to discuss the plans, and asked to have the plans made available sufficiently in advance of the hearing to be able to address specific concerns raised by the plans.

On December 29, 2005, Anthony Crowell, Special Counsel to the Mayor, responded to petitioner on behalf of the Art Commission acknowledging receipt of petitioner's FOIL request and indicating that he was reviewing the request and expected to respond within 20 days to inform him of the status of his request and set forth a time line for disclosing the documents, if disclosure were required by law.

On January 4, 2006, petitioner wrote letters to both the Parks Department and the Art Commission appealing the purported denial of access to the records that he had requested in his December 20, 2005 letters to the two departments.

On the evening of Friday, January 6, 2006, petitioner retrieved a message from his voicemail, which was allegedly left in the afternoon, indicating that he could go to the Parks Department to look at the plans. Petitioner alleges that, on Saturday, he called the phone number left on his voicemail, but no one answered the phone. The Art Commission hearing began on Monday, January 9, 2006 at 8:30 a.m.

At the hearing, petitioner allegedly requested that the hearing be adjourned until he could obtain access to the Parks Department's documents and provide comments to the Art Commission. The Art Commission did not adjourn the meeting as petitioner had requested; rather, the Art Commission adopted three resolutions: 1) approving the relocation of the statute of Giuseppe Garibaldi; 2) giving preliminary approval for the conservation and relocation of the statute of Alexander Lyman Holley, subject to certain specified conditions; and 3) giving preliminary approval of the plans for relocation of the fountain, subject to the following conditions:

- (1) using bluestone, rather than conservation mortar for the caps on the piers (rather than replicating the urns) and viewing a mock-up on site before fabrication;
- (2) restudying the height, placement and acoustic impact of the water jets and viewing a mock-up on site;
- (3) properly documenting and securely storing the stones and ensuring that the contractor keeps careful track of them when the fountain is dismantled and reconstructed. Approval is also given with the request that (1) the design of any temporary ramps for access into the fountain basin be shared with the committee; and (2) a plaque honoring the performers, who are such

an integral part of the park's rich history, be incorporated into the design of the plaza.

Resolution adopted by the Art Commission on January 9, 2006, Certificate 22221.

On January 11, 2006, Sami Y. Naim, Assistant Counsel to the Parks Department, wrote to petitioner identifying himself as the Records Access Officer and acknowledging receipt of petitioner's FOIL request as of January 5, 2006. Naim indicated that the department was examining the request and would endeavor to respond within 20 business days from January 5, 2006. On January 18, 2006, Naim wrote to petitioner granting his FOIL request and stating that copies of the requested records would be provided to him for the charge of \$18.75 for costs of duplication, or alternatively, that he could review the documents at the Parks Department at no charge.

Petitioner contends that because respondents failed to make the documents available prior to the Art Commission's January 9, 2006 hearing, the Commission's decision approving the Parks Department's plans constituted a violation of FOIL, and was arbitrary and capricious, and in violation of law.

Petitioner quotes the legislative declaration regarding the purpose of FOIL which states, inter alia:

The more open a government is with its citizenry, the greater the understanding and participation of the public in government. *** The people's right to know the process of governmental decision-making and to review the documents and statistics leading to

determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

Public Officers Law § 84.

Petitioner argues that the respondents violated the requirements of FOIL that: (a) within five business days of receipt of a FOIL request, entities subject to the provisions of the law, make records available, deny the request, or acknowledge the request in writing, explaining when the request will be granted or denied; and (b) that if the entity determines to grant the request in whole or in part, but cannot do so immediately, that within 20 business days from the acknowledgment of receipt of the request, the entity shall state in writing the reason for the inability to grant the request within 20 business days, and a date certain when the request will be granted. See Public Officers Law § 89 (3).

Petitioner contends that the Parks Department's initial response to his request was untimely, and that though the Art Commission's December 29, 2005 acknowledgment may have technically complied with the requirements of FOIL, since his request was for a discreet document, rather than a sweeping search of documents, and since his request was ultimately granted (by the Parks Department), it was obviously a proper request that could have been granted on a timely basis. See *Matter of Linz v Police Dept. of the City of New York*, NYLJ, Dec. 17, 2001, at 22,

col 6 (Sup Ct, NY County, Richter, J.) (a case by case determination of what is a reasonable period in which to comply with a FOIL request should take into account "the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved determining whether the materials fall within one of the exceptions to disclosure.")

Petitioner argues that according to the notice regarding the Art Commission's January 9, 2006 hearing in the City Record, oral testimony was to be taken at the hearing, and that respondents improperly withheld the requested document until after to prevent meaningful comment by members of the community at the Art Commission's hearing, in violation of the purpose of FOIL. Therefore, according to petitioner, the Art Commission's resolution was arbitrary and capricious and the matter should be remanded to the Art Commission.

In support of its cross motion to dismiss, the City argues that, although the City Charter requires that Art Commission meetings be open to the public and that public notice be provided regarding the agenda at the meeting (See New York City Charter, §§ 1060 and 858), there is no law requiring the Art Commission to accept public comment at those meetings. In contrast, the City points to portions of the City Charter requiring hearings with public comment. See City Charter § 51 (e-f) (requiring the City Council Redistricting Commission to hold public hearings and seek

public comment); City Charter § 2304 (d) (requiring Taxi and Limousine Commission to hold public hearings at which evidence will be taken when it revises fare schedules).

The City further argues that, although the Parks Department and the Art Commission properly complied with FOIL, even assuming that their responses were not in compliance with that statute, when petitioner was given access to the documents he requested, any claim he may have had under FOIL became moot.

As the City contends, the remedy provided by the Legislature for failure to comply with FOIL is to bring an Article 78 proceeding to obtain compliance. *See Sank v City University of New York*, 2002 WL 523282, *9 (SD NY 2002), *mod on other grounds* 2002 WL 1792922 (SD NY 2002), citing *Warburton v State of New York*, 173 Misc 2d 879, 881-82 (Ct Cl 1997) (remedy under FOIL is an Article 78 proceeding to obtain compliance, rather than a private right of action for damages). Although petitioner is not seeking damages, the remedy he seeks for the purported violation of FOIL is even more far-reaching - the invalidation of a resolution of a City agency, the Art Commission, as arbitrary and capricious. Petitioner has cited no authority which suggests that such a remedy is available, and the court does not believe it is.

Although one might speculate as to the good faith of both the Parks Department and the Art Commission in their delay in

responding to petitioner's FOIL request, the court agrees with the City that, when petitioner's FOIL request was granted, it was effectively rendered moot.¹ See *Matter of Taylor v New York City Police Dept. FOIL Unit*, 25 AD3d 347 (1st Dept 2006); *Matter of Newton v Police Dept.*, 183 AD2d 621 (1st Dept 1992). For that reason, it is not necessary to determine whether the initial responses of either the Parks Department or the Art Commission were in compliance with FOIL.

Accordingly, it is hereby

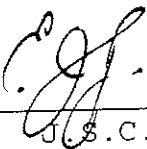
ORDERED that respondent's cross motion is granted; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of the court.

Dated: July 25, 2006

ENTER:



J.S.C.

¹ In addition to rendering petitioner's FOIL claim moot, this ruling renders moot petitioner's request for a preliminary injunction as well. Since the temporary restraining order entered in this case was merely an incorporation by reference of that entered in *Greenberg v City of New York (supra)*, it is unnecessary for the court to take any action with respect to that order in the context of this proceeding.