

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: December 26, 2024

CV-24-0277

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In the Matter of CORY H. MORRIS,  
Appellant,

v

MEMORANDUM AND ORDER

NEW YORK STATE POLICE et al.,  
Respondents.

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Calendar Date: November 12, 2024

Before: Garry, P.J., Lynch, Reynolds Fitzgerald, Fisher and Powers, JJ.

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*Cory H. Morris*, Central Islip, appellant pro se.

*Letitia James*, Attorney General, Albany (*Jonathan D. Hitsous* of counsel), for respondents.

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Garry, P.J.

Appeal from a judgment of the Supreme Court (Laura M. Jordan, J.), entered July 12, 2023 in Albany County, which, in a proceeding pursuant to CPLR article 78, among other things, granted respondents' motion to dismiss the petition.

On August 5, 2022, petitioner submitted a Freedom of Information Law (*see* Public Officers Law art 6 [hereinafter FOIL]) request to respondent New York State Police seeking "a) [a]ll readily accessible and/or electronically maintained records formerly exempted from FOIL under Civil Rights Law § 50-a; b) [a]ll readily accessible and/or electronically maintained police misconduct records of current and former New York State Troopers; c) [a]ll non-exempt records responsive to request a) or b); and d) [a]ll records of letters, emails or correspondence requesting or providing police

misconduct records or records formerly exempted from FOIL under Civil Rights Law § 50-a as maintained, kept, produced or reproduced by the New York State Troopers." A State Police records access officer informed petitioner that, due to the volume of FOIL requests pending before the agency at that time, it was estimated that petitioner's request would be completed by February 1, 2023. Petitioner construed that response as a constructive denial of his request and administratively appealed. A record access appeals officer concluded that the estimated time frame was reasonable under the circumstances. By February 6, 2023, the State Police had not yet responded to petitioner's request. Viewing that inaction as another constructive denial, petitioner again administratively appealed. On February 21, 2023, the record access appeals officer acknowledged receipt of petitioner's appeal and remanded his FOIL request back to the records access officer for a response within 20 business days. On February 24, 2023, petitioner commenced this CPLR article 78 proceeding, seeking, among other relief, to compel disclosure of the records sought in his request.

Meanwhile, on March 13, 2023, the records access officer issued a decision denying petitioner's request, concluding, among other things, that the request failed to reasonably describe the records sought (*see* Public Officers Law § 89 [3] [a]). Petitioner administratively appealed that denial, which was upheld for essentially the same reasons. In light of the foregoing, respondents moved to dismiss petitioner's challenge to the February 2023 alleged constructive denial as moot. Petitioner opposed the motion and cross-moved for permission to file an amended petition to add certain developments to his pleading and to disqualify the Attorney General from representing respondents.<sup>1</sup> Supreme Court rejected petitioner's disqualification request, granted respondents' motion and denied the remainder of the cross-motion as moot. Petitioner appeals.

Petitioner initially maintains that there is an inherent conflict of interest between the Attorney General's representation of agencies that violate FOIL and her alleged duty to prosecute willful FOIL violations. Pursuant to Executive Law § 63, the Attorney General is charged with the duty to "[p]rosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state . . . in order to protect the interest of the state" (Executive Law § 63 [1]; *see also* Public Officers Law § 17 [2] [b]). Among many other powers, the Attorney General also has the authority to initiate civil actions or proceedings to enforce state laws in delineated circumstances (*see* Executive Law § 63 [15]) and

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<sup>1</sup> Petitioner did not seek to amend his pleading to include a challenge to the ultimate March 2023 denial of his request.

commence civil investigations in the public interest (*see* Executive Law § 63 [8]). FOIL, however, is generally enforced through CPLR article 78 proceedings, commenced by private parties (*see* Public Officers Law § 89 [4] [b]). Petitioner is correct that willful concealment or destruction of records sought to be inspected by the public is also a violation of the Penal Law, in addition to FOIL (*see* Penal Law § 240.65; Public Officers Law § 89 [8]; *see also* L 1989, ch 705). Setting aside whether the Attorney General has the authority to criminally prosecute such a violation (*see generally* *People v Gilmour*, 98 NY2d 126, 129-132 [2002]), petitioner cannot manufacture an actual conflict of interest merely by alleging wrongdoing that, in his view, ought to be prosecuted. Put another way, the potential concomitant duty alleged by petitioner does not serve to preemptively negate the Attorney General's "clear statutory obligation" to defend in FOIL litigation (*Matter of Cliff v Vacco*, 267 AD2d 731, 732 [3d Dept 1999], *lv denied* 94 NY2d 762 [2000]) – in which an agency will virtually always be alleged to have acted unlawfully.

Turning to the FOIL request, petitioner abandoned any challenge to Supreme Court's finding of mootness by failing to challenge that dispositive conclusion in his main brief, and his belated efforts to address the issue in reply are not properly before us (*see Matter of Jimeno [Commissioner of Labor]*, 231 AD3d 1467, 1467-1468 [3d Dept 2024]; *Sills v Moorings Prop., LLC*, 218 AD3d 1075, 1080 [3d Dept 2023]; *Matter of Kurbatsky v International Conference of Funeral Serv. Examining Bds.*, 162 AD3d 1379, 1380 n [3d Dept 2018]). Petitioner's arguments addressed to the February 2023 determination as a constructive denial are therefore academic. Given petitioner's election not to amend his pleading accordingly, any arguments concerning the ultimate March 2023 denial of petitioner's FOIL request cannot be addressed in this proceeding (*see Matter of New York State Funeral Directors Assn. v New York State Dept. of Health*, 200 AD3d 1255, 1257 [3d Dept 2021]; *Matter of Save Monroe Ave., Inc. v New York State Dept. of Transp.*, 197 AD3d 808, 809 [3d Dept 2021], *lv denied* 38 NY3d 905 [2022]; *Matter of Gannett Satellite Info. Network, LLC v New York State Thruway Auth.*, 181 AD3d 1072, 1073 n 3 [3d Dept 2020]).

Although a finding of mootness does not preclude petitioner's request for counsel fees and litigation costs (*see Matter of Aron Law PLLC v Sullivan County*, 214 AD3d 1186, 1189 [3d Dept 2023]; *Matter of Vertucci v New York State Dept. of Transp.*, 195 AD3d 1209, 1210 [3d Dept 2021], *lv denied* 37 NY3d 917 [2022]; *Matter of Gannett Satellite Info. Network, LLC v New York State Thruway Auth.*, 181 AD3d at 1074), we agree with Supreme Court that all statutory prerequisites for such an award have not been met here. An award of reasonable counsel fees and other litigation costs in a FOIL proceeding is available only where the petitioning party "substantially prevail[s]" (Public

Officers Law § 89 [4] [c]), and a petitioner may be said to substantially prevail when he or she "receives all the information that [he or she] requested and to which [he or she] was entitled in response to the underlying FOIL litigation" (*Matter of Gannett Satellite Info. Network, LLC v New York State Thruway Auth.*, 181 AD3d at 1074 [internal quotation marks and citations omitted]). The denial petitioner ultimately received was not issued in response to this CPLR article 78 litigation but, instead, upon the State Police's administrative remand (see *Matter of Save Monroe Ave., Inc. v New York State Dept. of Transp.*, 197 AD3d at 810; *Matter of Friedland v Maloney*, 148 AD2d 814, 816 [3d Dept 1989]; compare *Matter of Cobado v Benziger*, 163 AD3d 1103, 1106-1107 [3d Dept 2018]; *Matter of Legal Aid Socy. v New York State Dept. of Corr. & Community Supervision*, 105 AD3d 1120, 1121-1122 [3d Dept 2013]), the propriety of which we do not reach.

Lynch, Reynolds Fitzgerald, Fisher and Powers, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger  
Clerk of the Court