

Matter of Kirshtein v David

2010 NY Slip Op 30977(U)

April 19, 2010

Supreme Court, New York County

Docket Number: 403274/09

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

In the Matter of the Application of,
MICHAEL KIRSHTEN,
Petitioner,

-against-

JONATHAN DAVID, NYPD Records Access Officer,
Appeals Officer,
Respondent.

INDEX NO. 403274/09
MOTION DATE April 12, 2010
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this petition pursuant to CPLR Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2, 3
Answering Affidavits — Exhibits _____	4-7
Replying Affidavits _____	8-9
Sur-Reply Affidavits _____	10 11

Cross-Motion: Yes No

Upon the foregoing papers, the CPLR Article 78 petition for a judgment compelling respondent to furnish petitioner with certain documents pursuant to his FOIL request is decided in accordance with the accompanying decision by the County Clerk.

UNFILED JUDGMENT
This judgment has not been filed by the County Clerk and notice of entry cannot be given and hence must appear in person at the Judgment Clerk's Desk (room 1419).

Dated: 4/19/10

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
In the Matter of the Application of
MICHAEL KIRSHTEIN,
Petitioner,

DECISION, ORDER
AND JUDGMENT

Index No. 403274/2009

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

JONATHAN DAVID, NYPD Records Access Officer,
Appeals Officer,

Respondent.

-----X
O. PETER SHERWOOD, J.:

In this CPLR article 78 proceeding, petitioner Michael Kirshstein ("petitioner") *pro se* seeks an order compelling respondent to furnish him with ballistics, labs and serology reports related to his criminal conviction in compliance with New York's Freedom of Information Law ("FOIL") (*see*, Public Officers Law §§ 84, *et seq.*). Respondent cross moves for an order pursuant to CPLR § 7804 (f) and § 3211 (a) denying the petition and dismissing the proceeding for lack of subject matter jurisdiction based upon petitioner's failure to exhaust administrative remedies and on the ground that the matter is moot.

Petitioner is an inmate presently incarcerated at a state correctional facility. In 2008, petitioner made FOIL request LBF # 08LI05117 to the New York City Police Department ("NYPD") seeking copies of a number of documents related to his criminal conviction. By letter dated April 17, 2009, a Records Access Officer ("RAO") for the NYPD, denied petitioner's request for certain reports, including ballistics, lab and serology reports. By letter dated May 1, 2009, petitioner appealed from the RAO's decision. By letter dated July 10, 2009, Records Access Appeals Officer respondent Jonathan David ("respondent") denied petitioner's appeal in part, but granted petitioner's request for ballistics, lab and serology reports related to complaint number 1995-060-011040, to the extent that respondent remanded the matter to the RAO to conduct a further search (Petition, ¶8, exhibit "1"). By letter dated December 22, 2009, the RAO advised petitioner that the lab, serology and ballistic reports could not be found without the respective voucher numbers and advised

petitioner that he had 30 days in which to appeal in writing any portion of the decision (Affirmation of Rebecca Chasan [Chasan Affirm.] ¶ 8, Ex. "4").

On December 29, 2009, prior to appealing respondent's December 22, 2009 determination, petitioner commenced the instant CPLR Article 78 by Order to Show Cause to compel respondent to send him copies of the ballistics, lab and serology reports sought in his original FOIL request. The service provision of the Order to Show Cause directed that service of the order and the supporting papers were to be made upon respondent, Corporation Counsel, and the Attorney General by personal service or service by ordinary first class mail on or before January 18, 2010. Petitioner has filed with the Court a duly sworn affidavit of service indicating service was made upon respondent and the State Attorney General by first class mail on January 13, 2010. The return date for the Order to Show Cause was February 8, 2010, with answering papers to be served five days prior.

By letter dated February 3, 2010, petitioner wrote to this Court stating that no responsive pleadings had been filed by the respondent and requesting an order of default judgment against the respondent, presumably pursuant to CPLR § 3215(f). That same date, respondent submitted an affirmation of its legal counsel Rebecca Chasan requesting an adjournment to March 15, 2010 in order to allow it time to respond to the petition. Thereafter, respondent cross moved for an order denying the petition and dismissing the proceeding.

Respondent acknowledges receipt of the Order to Show Cause and Petition on January 20, 2010. Respondent states that the day after petitioner commenced the instant Article 78 proceeding, petitioner, by letter dated December 30, 2009, filed a written appeal of the RAO's determination in which he provided the relevant voucher numbers for the records he sought (Chasan Affirm. ¶¶ 10-11, Ex. "5"). Although respondent contends that the commencement of the Article 78 proceeding stayed the administrative appeals process (*id.* fn. 3), respondent states that the NYPD conducted a diligent search for the requested records which produced ballistics and lab results which were then provided to petitioner, but produced no serology report (*id.* ¶ 12). On the basis of these contentions, respondent argues that the petition should be denied and the proceeding dismissed because: (1) petitioner failed to exhaust his administrative remedies prior to commencing this Article 78 proceeding; and (2) production of the requested records renders the proceeding moot. Since the

NYPD conducted a diligent search and, after such search, the serology report could not be found, respondent contends that it has met its obligations under FOIL and the proceeding should be dismissed as moot.

Section 89 (3) of the Public Officers Law requires that upon receipt of a request, an agency has five business days in which it must either grant access to the records, deny access or furnish a written acknowledgment of the receipt of such request and state the approximate date when the request will be granted or denied. Thus, the statutory provision does not provide for a specific time within which an agency must grant access to records. "The time needed to comply with the [FOIL] request may be dependent on a number of factors, including the volume of the request and the retrieval methods" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 496 [2007]). Essentially, an agency is required to provide a response to a FOIL application within a reasonable time in view of the attendant circumstances (*id.*).

Here, petitioner does not challenge the branches of his initial FOIL application as were denied and upheld by respondent on appeal. Rather, he is seeking to compel respondent to provide the documents with respect to that branch of his appeal which respondent granted to the extent of remanding the matter to the RAO to conduct a further search, namely, as to ballistics, lab and serology reports related to his criminal conviction. Such remand occurred on or about July 10, 2009. Although section 89 (3) of the Public Officers Law speaks to an initial FOIL application, its provisions considered together with the interpretation of the Court of Appeals in *Matter of Data Tree, LLC* suggests that even after an appeal an agency should be required to respond to a FOIL request within a reasonable time under the circumstances.

It does not appear that petitioner's demand was particularly extensive as would require the more than the five months that elapsed between the decision on appeal and the decision of the RAO, dated December 22, 2009, advising petitioner that it could not conduct a search for the records without the relevant voucher numbers. From a review of the chronology of events, it appears that petitioner may not have received the RAO's decision prior to his commencing this Article 78 proceeding and, given the lapse of time, petitioner essentially deemed his request denied in bringing this proceeding while his administrative appeal was still pending.

Nevertheless, at this juncture, given the intervening events, the proceeding has been rendered moot by reason of the RAO's response and the certification of respondent's counsel in her affirmation submitted in this proceeding that the NYPD had conducted a diligent search for the requested records, furnished to petitioner the records located, and advised that the serology report could not be found (*see, Matter of Rattley v New York City Police Dept.*, 96 NY2d 873 [2001]; *Matter of Carty v New York City Police Dept.*, 41 AD3d 150 [1st Dept 2007]; *Matter of Babi v David*, 35 AD3d 266 [1st Dept 2006]).

In addition, since petitioner has filed an administrative appeal from the RAO's determination dated December 22, 2009, the petition must be dismissed for failure to exhaust administrative remedies (*see, Matter of Taylor v New York City Police Dept. FOIL Unit*, 25 AD3d 347 [1st Dept. 2006], *lv denied* 7 NY3d 714 [2006]).

The Court has reviewed the additional arguments raised in petitioner's reply affirmation and, to the extent that such arguments may be deemed of probative value, has found them to be without merit.

Accordingly, it is

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

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

This constitutes the decision, order and judgment of the Court.

DATED: April 19, 2010

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).

ENTER,



O. PETER SHERWOOD

J.S.C.