

<b>Matter of Grant v Russo</b>
2010 NY Slip Op 31565(U)
June 18, 2010
Supreme Court, New York County
Docket Number: 400400-10
Judge: Judith J. Gische
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6-22-10

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

PRESENT: Hon. Gische  
*Justice*

PART 10

Jamal Grant, Petitioner  
James Russo, Jonathan David,  
Brian Fischer, Respondents

INDEX NO. 900400-10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
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
_____
_____
_____

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION**

**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  
141B).

Dated: 6/18/10  
JUN 18 2010

[Signature]  
HON. JUDITH J. GISCHE *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 10

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In the Matter of the Application of  
JAMAL GRANT,

Petitioner,

For a Judgment under CPLR Article 78

-against-

JAMES RUSSO, JONATHAN DAVID,  
BRIAN FISCHER,

Respondents.

**DECISION AND ORDER**  
INDEX NO.:  
400400/10

Seq No. 001

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Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Pet's OSC, w/petition, JG affid, exhs .....	1
Resps' opp .....	2
Resps' x/m dismiss w/LC affirm, exhs .....	3
Proof of service (OSC) .....	4

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*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

In this Article 78 proceeding, petitioner, a convict appearing *pro se*, seeks to compel production of certain documents relating to his arrest and conviction.

Respondents James Russo ("Russo") and Jonathan David ("David") cross-move for an order pursuant to CPLR 7801(1) and CPLR 7804(f) directing the Clerk to enter judgment denying the petition and dismissing the proceeding on the grounds that (i) the court lacks subject matter jurisdiction, (ii) the court lacks personal jurisdiction over respondents and, (iii) disclosure

of the requested records would interfere with an ongoing judicial proceeding.

### *Background*

Petitioner was convicted of several charges in 2003 including attempted murder in the second degree, and is currently serving a sentence of up to 22 years in Upstate Correctional Facility. In December 2008, following his sentencing and incarceration, he filed a petition for a writ of *habeas corpus* in the U.S. District Court, Southern District of New York. The petition was denied in October 2009. In November 2009 petitioner filed an appeal with the U.S. Court of Appeals, Second Circuit, which is still pending.

Prior to his federal appeal, by form letter dated June 14, 2009, petitioner requested access under the Freedom of Information Law ("FOIL") to New York City Police Department ("NYPD") documents and photographs (mugshots) pertaining to his arrest and conviction (see respondents' exhibit A).<sup>1</sup> By letter dated July 23, 2009 the NYPD's Record Access Officer (respondent Russo) acknowledged petitioner's request and advised him that, due to the large volume of FOIL requests, a determination would not be made until October 14, 2009 (see exhibit B). By letter dated December 18, 2009 the Record Access Officer issued a determination granting petitioner access to an arrest report for an "Arrest [on] 6/16/04"<sup>2</sup> and advised petitioner that he could appeal the determination to the NYPD's Records Access Appeals Officer (respondent David) within 30 days from the date of the letter (see exhibit C). By letter dated

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<sup>1</sup> All of the exhibits referred to herein are attached (untabbed) to respondents' cross-motion.

<sup>2</sup> No further information has been provided, although it would seem that petitioner was in prison in June 2004.

January 17, 2010, which was postmarked February 4, 2010, petitioner appealed the December 18, 2009 determination (see exhibit D). Petitioner's FOIL appeal was then stayed by respondents "so as not to usurp the authority of the Court in this matter."

Prior to his FOIL appeal, by (undated) letter to the NYPD postmarked June 19, 2009 petitioner made a second FOIL request for investigative records pertaining to his 2003 arrest (see exhibit E). The Records Access Officer responded by letter dated July 27, 2009 in which he advised petitioner that, due to the large volume of FOIL requests, a determination would not be made until October 30, 2009 (see exhibit F). By letter dated December 21, 2009 the Records Access Officer denied petitioner's request as duplicative of his June 14, 2009 request and advised petitioner that he could appeal the determination to the Records Access Appeals Officer within 30 days from December 21, 2009 (exhibit G). Petitioner appealed by letter dated December 28, 2009 (exhibit H).

On February 16, 2010, having yet to hear from the Records Access Appeals Officer, petitioner commenced this proceeding by order to show cause. Thereafter, by letter dated March 29, 2010 the Records Access Appeals Officer granted petitioner's December 28, 2009 appeal to the extent of remanding the matter to the Records Access Officer to conduct a further search for the records (see exhibit J). The search was then stayed "so as not to usurp the Court's authority in this matter."

#### *Respondents' Arguments*

Respondents' cross-motion to dismiss this proceeding is supported by three arguments. First, they argue that the court lacks subject matter jurisdiction because petitioner has failed to

exhaust his administrative remedies. Respondents point out that petitioner's first FOIL request (his letter dated June 14, 2009), has yet to be addressed by the Records Access Appeals Officer and that his second FOIL request (his letter mailed on June 19, 2009), which was remanded by the Records Access Appeals Officer to the Records Access Officer, has yet to be denied.

Next, respondents argue that the court lacks personal jurisdiction over them because petitioner failed to comply with the court's directive that service of the order to show cause and the supporting papers be made "upon the respondent (and the Attorney General) (and the Corporation Counsel)" by mail on or before March 10, 2010 (see petitioner's order to show cause). According to respondents, respondent David was not served until March 25, 2010 and the Corporation Counsel along with respondent Russo were never served.<sup>3</sup>

Respondents' third argument is that petitioner is proscribed from obtaining the sought-after records because FOIL exempts from disclosure documents compiled for law enforcement purposes, which, if disclosed, would interfere with a judicial proceeding. It appears that the judicial proceeding referred to by respondents is petitioner's November 2009 *habeas corpus* appeal to the Circuit Court of Appeals which, according to respondents, is still pending.

#### *Discussion and Court's Decision*

"It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52, 56 [1978]). The exhaustion rule does not apply, however, when resort to an administrative remedy would be futile (*id.*, at

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<sup>3</sup> The Attorney General's office has submitted an affirmation stating that respondent Brian Fischer, who is the Commissioner of the New York State Department of Corrections, was not involved with the denial of petitioner's FOIL requests by the NYPD.

57). Here, petitioner's attempts to exhaust his administrative remedies were thwarted by respondents, who unilaterally stopped the administrative process on the ground that petitioner's federal appeal was pending. Hence, the court finds that respondents' argument based on subject matter jurisdiction does not warrant dismissal of the proceeding.

According to respondents, the court lacks personal jurisdiction over them because petitioner failed to comply with the service requirements in the order to show cause because the Corporation Counsel and respondent Russo were never served and respondent David was not timely served. This contention is not refuted by petitioner, who has not responded to the cross-motion. In any event, the law is clear that "[t]he mode of service provided for in the order to show cause is jurisdictional and must be literally followed [citations omitted]" (*Matter of Ruine v Hines*, 57 AD3d 369 [1<sup>st</sup> Dept 2008]). It matters not that petitioner is a *pro se* prisoner (*id.*).<sup>4</sup>

Even if petitioner had served his motion timely, FOIL exempts from disclosure those "records or portions thereof that ... are compiled for law enforcement purposes and which, if disclosed, would ... interfere with law enforcement investigations or judicial proceedings (see Public Officers Law § 87[2][e][i]). Here, respondents assert that the information sought by petitioner would, if disclosed, interfere with his pending federal appeal which they are defending against. Although respondents' argument lacks specifics, it is nonetheless sufficiently articulated. Since the federal appeal is not yet decided, respondents' argument is supported by and consistent with the prevailing law on this issue and therefore, the disclosure sought by petitioner is denied for that reason as well (see *Matter of Dhinsa v New York City Police Department*, Sup Ct, NY

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<sup>4</sup> In this connection the court notes that petitioner's order to show cause (on a form provided to him) is fraught with technical or procedural irregularities which have been ignored by respondents.

County, Bransten, J., Index no. 102689/04; *Matter of Ruin v Hines*, Sup Ct, NY County, Feinman, J., index no. 403466/06, aff'd on other grounds, 57 AD3d 369; cf., *Matter of Moreno v New York County District Attorney's Office*, 38 AD3d 358 [1<sup>st</sup> Dept 2007]lv. denied 9 NY3d 801 [2007]).

**Conclusion**

The cross motion to dismiss the petition is hereby granted and petitioner's motion is denied. In accordance with the foregoing,

It is hereby

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

DATED: New York, New York  
June 18, 2010

ENTER:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**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 141B).**