

Matter of Rourke v David

2010 NY Slip Op 33136(U)

October 29, 2010

Supreme Court, New York County

Docket Number: 401355/10

Judge: Alexander W. Hunter Jr

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

PRESENT: WALTER Alexander W. Hunter, Jr.
Justice

PART 7 33

SEAN PEARKE

- v -

JONATHAN DAVIT

INDEX NO. 401355/10

MOTION DATE 9/24/10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

11/2/10
cc

The following papers, numbered 1 to 29 were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-11, 12-23

24-29

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

See memorandum decision and judgment attached hereto.

UNFILED JUDGMENT

RECEIVED
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NOV 03 2010
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 10/29/10

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: PART 33**

-----X
In the Matter of the Application of Sean Rourke,

Index No.: 401355/10

Petitioner,

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

-against-

Jonathan David, Records Access Appeals Officer,
NYPD,

Respondent.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be given to any person. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

HON. ALEXANDER W. HUNTER, JR.

The application by pro se petitioner pursuant to Article 78, for an order challenging the denial of records under the Freedom of Information Law (FOIL) is denied. The cross-motion by respondent for an order denying the petition and dismissing the proceeding is granted.

Petitioner asserts that he made a request for documents under FOIL to the respondent by letter dated January 22, 2010. Specifically, petitioner requested that he be provided with copies of all January 2, 2010 Medical Treatment of Prisoner forms that bear his name and date of birth as well as the 72nd precinct arrest log book for January 2, 2010. He contends that on February 8, 2010, respondent denied his entire request pursuant to Section 87(2)(e)(i) of the Public Officer's Law and that same was arbitrary, capricious and an abuse of discretion. By letter dated February 14, 2010, petitioner appealed the denial and as of the date of the filing of the instant Article 78 application, he had not received a decision on the appeal in direct violation of Section 89(4)(a) of the Public Officer's Law.

Petitioner requests that this court conduct an in camera inspection of the records he seeks as he believes they are non-exempt and are subject to disclosure pursuant to FOIL. Thus, respondent should be ordered to produce the records he seeks.

Petitioner also asserts that he filed a second FOIL request for additional information and records by letter dated March 1, 2010. Specifically, petitioner requested a copy of the January 2, 2010 Sprint report for the 911 call to and from 830 4th Avenue in Brooklyn, New York, along with an exact reproduction of the 911 audio call. However, respondent denied the entire request on March 12, 2010 pursuant to Section 87(2)(e)(i) of the Public Officer's Law and petitioner appealed that determination as well. By letter dated March 20, 2010, petitioner appealed the denial and as of the date of the filing of the instant Article 78 proceeding, petitioner had not received a decision on the appeal.

Petitioner requests that this court conduct an in camera inspection of the records he sought in his second FOIL request including the audio tape as the records he seeks are related to an automobile accident wherein petitioner was a passenger. Petitioner contends that the NYPD Medical Treatment of Prisoner form is not on file with any other agency or court other than the

New York City Police Department. Petitioner contends that respondent's determination was unlawful, arbitrary, capricious and an abuse of discretion.

Respondent opposes the motion and cross-moves to dismiss the proceeding on the ground that the records sought by petitioner are exempt from disclosure pursuant to Public Officers Law §87(2)(e)(i) and (ii) and on the ground that the court lacks subject matter jurisdiction in that petitioner has failed to exhaust mandatory administrative remedies prior to commencing the instant proceeding. Therefore, this proceeding is premature. Moreover, respondent contends that petitioner's March 1, 2010 FOIL request is moot.

Respondent contends that petitioner is a defendant in a pending criminal case in which he is charged with Criminal Possession of Stolen Property, Reckless Endangerment and Grand Larceny Auto. The charges are currently pending in Kings County Supreme Court under indictment number 00005-2010.

Respondent argues that the disclosure of the documents requested by petitioner would interfere with judicial proceedings under Public Officers Law §87(2)(e)(i) and (ii). In general, FOIL permits any member of the public to seek access to records but precludes access to categories of records when the attendant circumstances are such that disclosure would be deemed harmful by the legislature. Thus, when the records sought to be produced pursuant to FOIL are law enforcement records, whose disclosure would interfere with a judicial proceeding, then they are exempt from disclosure.

In the case at bar, petitioner seeks to interfere in his own criminal prosecution in that the records he seeks are law enforcement records regarding the arrest and underlying criminal proceeding. However, the criminal matter is currently pending and as such, discovery is governed by Article 240 of the New York Criminal Procedure Law. Respondent contends that petitioner is seeking to circumvent the discovery provisions that apply herein. Petitioner, as a defendant in a pending criminal proceeding, must utilize the procedure set form in the Criminal Procedure Law to obtain the records he seeks. Additionally, respondent cites to case law which holds that the purpose of FOIL is not to enable a person to use agency records to frustrate pending or threatened investigations or to use them to impede a prosecution. Therefore, the instant proceeding should be dismissed.

Next, respondent argues that this court lacks subject matter jurisdiction in that petitioner failed to exhaust his administrative remedies prior to commencing the instant action. Specifically, respondent's Appeals Officer remanded petitioner's January 22, 2010 FOIL request to the Records Access Officer on April 30, 2010 for a further search of the requested records. However, petitioner did not await a determination of his request by the NYPD FOIL Unit and has never received a denial of access to the records he requested. Therefore, the instant proceeding is premature and petitioner's right to seek relief from this court would have only accrued had the January 22, 2010 FOIL request been denied by the Records access Officer after the April 30, 2010 remand by the Appeals Officer.

In addition, the appeal of the March 1, 2010 FOIL request by petitioner was still pending at the time petitioner commenced the instant proceeding on May 20, 2010 and at the time of the commencement of the proceeding, there had not been a final agency denial of access to records with regard to the second FOIL request. Since petitioner had not yet received a final agency denial of access to records, the proceeding was premature as to the second FOIL request and

petitioner failed to exhaust his administrative remedies.

Nevertheless, respondent argues that a determination has been made by the Records Access Appeals Officer with respect to petitioner's second FOIL request from March 1, 2010 which renders a portion of the claims in the instant proceeding moot. On May 24, 2010, the FOIL Appeals Officer determined petitioner's appeal. Therefore, even though a determination was made after petitioner filed the instant proceeding, to the extent that it is in the nature of a mandamus to compel a determination by the respondent, the proceeding should be rendered moot.

In reply, petitioner contends that respondent went well beyond the permitted ten day period to respond to his FOIL requests. Moreover, he contends that the arrest log he seeks is proper under FOIL and not pursuant to discovery. He seeks the names of arrestees who are potential witnesses to his civil claims involving the car accident and his criminal case. Petitioner asserts that the fact that prior to his arrest, he was invited into a vehicle by his former neighbor and roommate and that said neighbor/roommate chose to initiate a high speed car chase with the NYPD against his wishes, shows that petitioner was contained unlawfully against his will inside the vehicle driven by his neighbor. As a result, petitioner sustained a fractured and angulated right clavicle, the injuries were documented by medical staff at the correctional facility where he is currently housed and respondent has not demonstrated how disclosure of the records he seeks would interfere with a pending criminal proceeding.

This court finds that respondent's denial of petitioner's FOIL request was not arbitrary or capricious. Public Officers Law §87(2)(e)(i) states that, "Each agency shall, in accordance with its public rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that: (e) are compiled for law enforcement purposes and which, if disclosed, would...interfere with law enforcement investigations or judicial proceedings..."

In **Legal Aid Society v. New York City Police Department**, 274 A.D.2d 207 (1st Dept. 2000), the Appellate Division reversed the lower court's decision in an Article 78 proceeding and held, "We are persuaded that the assertion that disclosure of records to a defendant in a pending criminal prosecution would interfere with that proceeding is a sufficiently particularized justification for the denial of access to those records under Public Officers Law § 87(2)(e)(i), since, as the court held in *Matter of Pittari v. Pirro*...FOIL disclosure during the course of the prosecution would not only 'interfere with the orderly process of disclosure' set forth in CPL article 240...it would also create a substantial likelihood of delay in the adjudication of that proceeding...thereby effecting a chill on that prosecution..." **Id.** at 214.

In the case at bar, respondent informed the petitioner that his FOIL request was being denied due to the fact that it would interfere with the pending criminal prosecution. Petitioner cannot circumvent the process of discovery set forth in C.P.L. Article 240 by making a FOIL request for information he should obtain through the discovery process set forth the Criminal Procedure Law.

Additionally, the fact that the January 2010 FOIL request has yet to be determined by the Appeals Officer, renders petitioner's instant application with respect to that request, premature. Pursuant to C.P.L.R. §7801, a proceeding under Article 78, "...shall not be used to challenge a

determination which is not final or can be adequately reviewed by appeal to a court or to some other body or officer..."

It is also well established 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...This doctrine furthers the salutary goals of relieving the courts of the burden of deciding questions entrusted to an agency...preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgment'..."

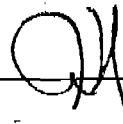
Watergate II Apartments v. Buffalo Sewer Authority, 46 N.Y.2d 52 (1978).

At the time of the filing of the instant Article 78 proceeding, in May 2010, petitioner's appeal of his January 2010 FOIL request was still pending as it had been remanded to respondent's Records Access Officer in April of 2010. Therefore, petitioner's application with respect to his January 2010 FOIL request was premature.

Accordingly, it is hereby

ADJUDGED, that the petition is denied and the proceeding is dismissed, without costs and disbursements to the respondents.

Dated: October 29, 2010



J.S.C.

UNFILED JUDGMENT

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