

Matter of Pons v New York City Police Dept.

2012 NY Slip Op 30053(U)

January 6, 2012

Supreme Court, New York County

Docket Number: 401612/2011

Judge: Paul G. Feinman

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

PRESENT: FEINMAN
Justice

PART 12

CONRADO POWS

INDEX NO. 4016125/11
401620/11

MOTION DATE _____

MOTION SEQ. NO. 001

NYC DEPT OF INVESTIGATION

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

THE ANNEXED DECISION, ORDER AND JUDGMENT.

Courtesy copy marked to all parties.

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: 1/6/2011 _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
In the Matter of the Application of
CONRADO PONS,

Petitioner,

Index Number 401612/2011

Mot. Seq. No. 001

against

NEW YORK CITY POLICE DEPARTMENT
RECORDS ACCESS OFFICER,

Respondent.

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-----X
In the Matter of the Application of
CONRADO PONS,

Petitioner,

Index Number 401620/2011

Mot. Seq. No. 001

against

NEW YORK CITY DEPARTMENT OF
INVESTIGATION RECORD ACCESS OFFICER,

Respondent.

**DECISION, ORDER AND
JUDGMENTS**

-----X
For the Petitioner:

Conrado Pons, 86-A-3483, *pro se*
Greenhaven Correctional Facility
PO Box 4000
Stormville, NY 12582

For Respondent NYPD:

Michael A. Cardozo, Esq.
Corporation Counsel, City of New York
NYC Police Department
By: John J. Montes, Esq.
1 Police Plaza, rm 1406
New York, NY 10038

For Respondent NYC DOI:

Michael A. Cardozo, Esq.
Corporation Counsel, City of N. Y.
By: Gloria M. Yi, Esq.
100 Church St.
New York, NY 10007

Papers considered in review of these petitions to compel:

Index No.	Papers	Numbered
401612/2011	Order to Show Cause, Ver. Petition, Exhibits	1
	Cross Motion, Affirmation, Exhibits	2
	Reply to Cross Motion	3
	Further Opposition to Cross Motion	4
	Order to Show Cause, Ver. Petition, Exhibits	1
401620/2011	Verified Answer, Exhibits	2

PAUL G. FEINMAN, J.:

Introduction

For purposes of decision, the two petitions with the above-listed captions are joined for

decision, and the cross motion made in connection with the petition seeking relief from the New York Police Department is joined with that petition for purposes of decision.

The petitions are brought pursuant to CPLR Article 78. Petitioner, who is self-represented, seeks to compel the two respondents to respond and produce records of three of his arrests pursuant to the Freedom of Information Law (CPLR 7803 [1]). For the reasons set forth below, the petition pertaining to the New York City Police Department (NYPD) is denied as academic, and the cross motion by the NYPD to dismiss is also rendered academic. The petition pertaining to the New York Department of Investigation (Index No. 401620/2011), is denied as academic.

Legal Analysis

An Article 78 proceeding against a public body may be commenced only when a matter has been finally determined (CPLR 7801 [1]). The proceeding must be commenced within four months of the date of the final determination (CPLR 217 [1]; *see Carter v State of New York*, 95 NY2d 267, 270 [2000]). An agency determination is deemed final “when the petitioner is aggrieved by the determination” (*Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]). If there is further administrative action that could be taken to prevent or ameliorate the harm, then commencement of an Article 78 proceeding is premature (*see Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 520 [1986], *cert denied* 479 U.S. 985 [1986]).

The Freedom of Information Law (FOIL), as the New York Public Officers Law Article 6 is referred to, is based on the presumption that agency records are open for public inspection and copying unless an agency can point to an enumerated exemption from disclosure (Public Officers Law § 87[2]; *Matter of The N.Y. Times Co. v City of New York Fire Dept.*, 4 NY3d 477, 489

[2005]; *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 346 [1st Dept 1999]).

The statute provides that within five business days of the receipt of a written request for a record reasonably described, the agency is to make the record available, deny the request in writing, or acknowledge in writing the receipt of the request and provide an approximate date by which the request will be granted or denied. (Public Officers Law § 89 [3] [a]). “Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.” (Public Officers Law § 89 [4] [a]).

In general, anyone denied access to a record may, within 30 days, appeal in writing to the head or governing body of the agency who, within 10 business days, must fully explain in writing the reasons for continuing to deny the request, or provide access to the records (Public Officers Law § 89 [4] [a]). The failure by the agency to timely respond “shall constitute a denial.” (Public Officers Law § 89 [4] [b]). The denial of an appeal entitles the person denied to commence a proceeding pursuant to CPLR Article 78 (Public Officers Law § 89 [4] [b]).

Petition seeking documents from the NYPD, Index No. 401612/2011

By letter dated November 30, 2010 addressed to the NYPD Record Access Officer,¹ petitioner requested documents pursuant to FOIL (Cross Mot. ex 1). His letter was apparently received by respondent’s Records Access on December 7, 2010 (Cross Mot. ex. 3). Respondent’s FOIL Unit replied by letter dated January 12, 2011, indicating that “it appears that some of the records you have requested may be in the possession of this department” (Cross Mot. ex. 3). It

¹Petitioner and respondent both provide copies of the documents referred to herein. Because respondent’s exhibits are identified by tabs, this decision will generally refer to respondent’s copy of the exhibit, without implying that petitioner’s papers are remiss in any fashion.

also stated that petitioner's request required more than 20 days to process, and anticipated that a determination would be made as of April 7, 2010 (*id.*). The letter further stated that its contents did not constitute a denial and that if petitioner is denied any part of his request, he will be advised in writing of the reasons as well as the name of the Records Access Appeals Officer (*id.*). Petitioner responded by letter dated January 28, 2011, objecting to respondent's lack of timely response and the length of time anticipated before a determination would be made as to the documents requested (Pet. Reply, ex. A)

As petitioner had not received a timely response to his initial request, he had already written a letter of appeal dated December 14, 2008, addressed to the NYPD Records Access Officer/Appeals Officer, in which he pointed out that under FOIL, the agency's non-response is deemed a denial and he was therefore appealing the denial (Cross Mot. ex. 2). Respondent's Records Access Appeals Officer responded by letter dated March 4, 2011, stating that petitioner's appeal was "premature" as the Records Access Officer had acknowledged the request and a file number had been assigned to it (Cross Mot. ex. 4). The Appeals Officer's letter further stated that to the extent petitioner appealed the estimated April 7, 2011 date for making a determination as to the documents requested, "such appeal is denied," because the delay was "reasonable under the circumstances," based on the time required to search for and review the records and the related law, the large number of requests processed by NYPD's FOIL unit, and staff availability (Cross Mot. ex. 4). Petitioner's request was then remanded to the Records Access Officer (Cross Mot. ex. 4).

Thereafter, by letter dated May 3, 2011, respondent's FOIL Unit officer reported that nine responsive pages had been copied, that certain redactions had been made, and that a diligent

search for “[a]ll DD5s” had been undertaken without success (Cross Mot. ex. 5). The letter indicated that petitioner could appeal the decision within 30 days to the Records Access Appeals Officer (Cross Mot. ex. 5). Petitioner responded by letter date May 11, 2011, objecting to the paucity of documents found responsive to his request, and stating that he had previously filed an administrative appeal pursuant to the statutory guidelines, and had now also commenced a legal proceeding (Cross Mot. ex 6).² “Obviously, your offices are not overly concerned with the time elements of the F.O.I.L. and likewise of the discovery provisions.” (Cross Mot. ex. 6).

The instant petition was commenced by filing an Order to Show Cause, signed by another Justice of this Court on June 22, 2011. It seeks, based on respondent’s failure to adhere to the statutory time frames for responding to his letter requests, an order directing respondent to “disclose all the records requested in [p]etitioner’s (FOIL) request and such other and further relief as may seem just and proper” (Petition ¶¶ 10, 11, 13, p 4). Respondent’s cross motion seeking to dismiss the petition, objects that the petition is premature, as petitioner has not administratively appealed the May 3, 2011 response of its FOIL Unit officer concerning the nine pages found, and that accordingly the petition must be dismissed as premature pursuant to CPLR 7801 (1). Moreover, it argues that because it has ultimately responded, and found nine pages of documents responsive to petitioner’s request, the petition should be denied as it does not state a cause of action.

Although petitioner’s argument that respondent has repeatedly failed to comply with the

²As noted above, the Order to Show Cause and petition were not filed until June 21, 2011. It is noted that the underlying affidavit in support of the application for the Order to Show Cause, and the petition, were signed by petitioner on April 25, 2011. He applied for poor person status which was granted on May 16, 2011, although the Order was only filed on June 21, 2011. However, it must be reiterated that a special proceeding is commenced by the filing of the petition (CPLR 304 [a]), here June 22, 2011.

[* 7]

FOIL time frames has merit, “where the relief being sought is supplied during the pendency of litigation, the matter becomes moot” (*Newton v Police Dept. of N.Y.*, 183 AD2d 621, 624 [1st Dept 1992], citing *Matter of Pordum v Nyquist*, 42 NY2d 958 [1977]). *Newton* is instructive here. In that situation, petitioner did not administratively appeal the agency’s adverse FOIL ruling but brought an Article 78 proceeding based in part on respondent’s failure to respond as set forth in the statute. After commencement of the proceeding, the respondent provided documents responsive to that petitioner’s request. The Court deemed the petition moot based on the production of documents but, because of the “respondent’s laxity in addressing petitioner’s request until legal action had been commenced,” petitioner was allowed time to administratively appeal what he believed to be an incomplete production of documents (*Newton* at 624).

So too, here, as respondent has found and made available nine pages of documents prior to the commencement of this proceeding, the petition has become moot. However, neither the respondent nor the court may overlook the provisions in FOIL concerning the time periods in which requests and appeals are to be responded to (*see, e.g. Council of Regulated Adult Liquor Licenses v City of N.Y.*, 300 AD2d 17, 18-19 [1st Dept 2002]). Here, where petitioner has acted in reliance on the FOIL provisions, and respondent consistently responded tardily, petitioner should be provided an opportunity to appeal administratively what he believes is insufficient production of the three case files. Should he choose to appeal administratively, he must sign and mail his appeal no later than 30 days after the date of notice of entry of this decision, order and judgment. Failure to commence his appeal by that date will nullify any future appeal or proceeding. Thus, as the petition is rendered moot, it is dismissed, and the cross motion to dismiss the petition is rendered academic.

Petition seeking documents from the Department of Investigation, Index No. 401620/2011

According to the petition, petitioner made a FOIL request to the New York City Department of Investigation (DOI), “[o]n or about November 10, 2010 (Ver. Pet. ¶ 5). Appended to his petition is a copy of his letter to the DOI, dated November 10, 2010, seeking “a listing identifying those records, documents, etc., that relate to me and any investigation of me,” as well “‘any and all information’ under my name or identification number assigned to me that was the subject of any investigation or prosecution.” (Ver. Pet., ex., letter of Nov. 10, 2010). Upon receiving no response, petitioner administratively appealed the deemed denial, by letter dated January 30, 2011 (Ver. Pet. ¶ 6; ex. letter of Jan. 30, 2011). He received no response.

Petitioner commenced this proceeding by filing an Order to Show Cause along with the petition to compel production of all documents, pursuant to CPLR 7803 (1). He argues that because of respondent’s failure to abide by the FOIL rules for responding to requests, he is entitled to the production of all documents in the DOI’s possession.

Respondent submitted its Answer, verified by respondent’s First Deputy General Counsel and Special Counsel to the Commissioner on July 29, 2011. The Verified Answer alleges that DOI only became aware of petitioner’s request pursuant to FOIL after the commencement of the instant proceeding (Ver. Ans. ¶ 10). According to DOI’s General Counsel and Deputy Commissioner for Legal Affairs, Marjorie Landa, a search was conducted which included a search of DOI’s electronic database containing “records of all FOIL requests that have been received by DOI for approximately the past twenty years” (Ver. Ans. Landa Aff. ¶ 4). The search results produced no records to show that DOI ever received a FOIL request from petitioner (*id.*). Landa also affirms that after this proceeding was commenced, DOI conducted a “thorough and

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diligent search for documents that might be responsive to Petitioner's request" (Ver. Ans. Landa Aff. ¶¶ 4-5). The search included the DOI electronic database which consists of "entries of any investigation conducted by DOI, for approximately the past thirty years" (Ver. Ans. Landa Aff. ¶ 5). As a result of that search, Landa affirms that DOI does not maintain or possess any documents responsive to petitioner's FOIL request and does not appear to have ever conducted an investigation of petitioner (*id.*).

Here, although it appeared that respondent manifestly disregarded petitioner's request and appeal letters, respondent's claim that it did not receive either letter, its articulation of the searches it undertook both to find petitioner's letters and, once it was made aware of petitioner's request, its ultimately futile search for documents that would be responsive to petitioner's request, must be considered in assessing the merits of the petition. An agency is in compliance with FOIL if it certifies that it does not possess any records or that none could be found after a diligent search (Public Officers Law § 89 [3] [a]). Here, as the DOI's Verified Answer states that neither document was received, and it has now conducted the search requested by petitioner, the petition has been rendered moot. Accordingly it is,


ADJUDGED and ORDERED that the petition bearing index number 404612/2011 has been rendered academic and is denied, in accordance with the discussion above, the cross motion has been rendered academic, and the proceeding accordingly is dismissed; and it is further

ADJUDGED and ORDERED that the petition bearing index number 404620/2011 has been rendered academic and the proceeding is accordingly dismissed.

The foregoing shall constitute the decision, order and judgments of this court.

ENTER

Dated: Jan. 6, 2012
New York, New York



J.S.C.