

Matter of Hernandez v Kelly

2014 NY Slip Op 30149(U)

January 16, 2014

Supreme Court, New York County

Docket Number: 401635/13

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: KERN
Justice

PART 55

HERNANDEZ, JUAN

INDEX NO.

401635/13

MOTION DATE

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -
COMMISSIONER OF POLICE
MR. RAYMOND W. KELLY

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

is decided in accordance with the annexed decision.

FILED

JAN 21 2014

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/16/14

PK

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 55

-----X
In the Matter of the Application of

JUAN HERNANDEZ,

Petitioner,

Index No. 401635/13

For a Judgment Pursuant to Article 78 of the
Civil Practice Laws and Rules and Claims
Under the Executive Law and the
Administrative Code of the City of New York,

-against-

RAYMOND W. KELLY, NYC Police Commissioner
and JONATHAN DAVID, Records Access Appeals
Officer,

Respondents.

-----X
HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Affirmations in Opposition to Cross Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

Petitioner Juan Hernandez commenced the instant proceeding pursuant to Article 78 of the Civil Practice Law & Rules ("CPLR") challenging respondents Raymond W. Kelly, NYC Police Commissioner and Jonathan David, Records Access Appeals Officer's (hereinafter "respondents") partial denial of petitioner's request for certain materials under the Freedom of Information Law ("FOIL"). Respondent cross-moves to dismiss the petition. For the reasons set

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forth below, respondents' cross-motion to dismiss the petition is granted and the petition is denied.

The relevant facts are as follows. On November 25, 1992, petitioner was arrested for a shooting incident and was later convicted of attempted murder in the second degree under New York County indictment number 13308/1992. In 1993, pursuant to FOIL, petitioner requested "any and all documents" relating to his criminal matter and approximately 53 categories of records, including "anything else" that may pertain to petitioner's criminal case. In July 1994, petitioner again sought access under FOIL to twenty-seven specific categories of records and "[a]ll other records, papers, documents and evidence relating to this case which would assist in the preparing of an adequate defense." By letter dated August 2, 1994, petitioner again sought access under FOIL to "any and all documents relating to indictment number 13308/92" and listed thirty categories of records. Petitioner again sought these records in requests dated March 31, 1995 and July 11, 1995.

By letter dated July 26, 1995, respondent acknowledged receipt of petitioner's letter dated July 11, 1995 and informed petitioner that additional identifying information was necessary in order to process his FOIL request. Instead of providing the requested information, on December 1, 1995, petitioner commenced an Article 78 proceeding in which petitioner sought access to the aforementioned records and challenged respondents' lack of response to some of petitioner's requests. On or about March 14, 1996, Justice Walter Schackman dismissed the proceeding on the ground that petitioner failed to exhaust his administrative remedies. Additionally, Justice Schackman ordered and directed respondents to respond to petitioner in writing within sixty days of receipt of petitioner's identifying information, if such was satisfactory.

By letter dated May 22, 2013, petitioner again sought access to four categories of records related to his arrest and conviction pursuant to FOIL. By letter dated June 10, 2013, the Records Access Officer ("RAO") acknowledged receipt of petitioner's request and provided an estimate as to when a determination would be issued. Additionally, the RAO informed petitioner that the letter was not a denial of his FOIL request and that if his request were to be denied, in whole or in part, petitioner would be advised in writing of the reasons for any denial and of the name and address of the Records Access Appeals Officer ("RAAO"). By letter dated July 15, 2013 sent to respondent Kelly, petitioner purported to appeal what he deemed a constructive denial of his FOIL request. By letter dated August 14, 2013, the RAO granted petitioner's request, in part, and provided access to the arrest report and two vouchers, with redactions. Additionally, by letter dated August 15, 2013, the RAAO informed petitioner that his purported appeal, dated July 15, 2013, was premature as his request had not yet been denied by the RAO at that time.

By letter dated August 19, 2013, petitioner appealed the RAO's August 14, 2013 determination, acknowledging receipt of the RAO's letter as well as the four pages of documents that were provided to him and advised the RAAO that he had filed an Article 78 petition and was awaiting an index number. Petitioner then commenced the instant proceeding on September 13, 2013 by filing an Order to Show Cause and Verified Petition.

In the instant action, the petition must be denied as premature as petitioner has failed to exhaust his administrative remedies. "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 Apts v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978). In the FOIL context, it is well-settled that administrative remedies are considered exhausted only

