

**Matter of Lebron v New York City Police Dept.
Records Access Appeal Officer**

2014 NY Slip Op 30367(U)

February 7, 2014

Supreme Court, New York County

Docket Number: 401593/13

Judge: Jr., Alexander W. Hunter

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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: HUNTER
Justice

PART 33

LEGON, ERVIN

INDEX NO. 401593/13

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -
N.Y.C. POLICE DEPT.
RECORDS ACCESS APPEAL OFFICER

The following papers, numbered 1 to 18 were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4-17</u>
Replying Affidavits _____	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*decided in accordance with the
Decision and Judgment annexed hereto.*

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: 2/7/14 QH
ALEXANDER W. HUNTER, JR.^{S.G.}

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
Elvin Lebron,

Index No.: 401593/13

Petitioner,

Decision and Judgment

-against-

New York City Police Department Records Access
Appeal Officer Jonathan David,

Respondent.

-----X

HON. ALEXANDER W. HUNTER, JR.

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).

The application of pro se petitioner for an order pursuant to CPLR Article 78, compelling respondent to provide petitioner with records responsive to his August 14, 2011 and October 10, 2011 letter requests in accordance with the Freedom of Information Law ("FOIL") as codified in Public Officers Law ("POL") § 84, *et seq.*, is denied and the proceeding is dismissed without costs and disbursements. The cross-motion by respondent to dismiss the petition is granted.

Pro se petitioner Elvin Lebron is an inmate presently incarcerated at Metropolitan Detention Center located in Brooklyn, New York. On April 12, 2011, petitioner was indicted on one count of conspiracy to distribute a controlled substance in the United States District Court for the Southern District of New York. Petitioner was arrested on April 13, 2011 under arrest number M11632203. Petitioner was convicted of conspiracy to distribute crack cocaine and possession with intent to distribute crack cocaine, a class B felony pursuant to 21 United States Code ("U.S.C.") § 846. Petitioner was sentenced to imprisonment for a term of 70 months. Petitioner commenced an appeal of his criminal conviction and sentence in the United States Court of Appeals for the Second Circuit and filed a motion pursuant to U.S.C. § 2255 attacking the sentence imposed. The Second Circuit Court of Appeals has not rendered a decision on the appeal.

By letter dated August 14, 2011, petitioner sought access under FOIL to records relating to his arrest and conviction. Petitioner also sought records pertaining to the statistics, practices, and procedures of criminal investigations by New York City Police Department ("NYPD") involving crack cocaine related offenses.

By letter dated January 30, 2012, the records access officer ("RAO") denied the August 14, 2011 FOIL request. The RAO denied the request on the grounds that: (1) the records sought are inter-agency documents that do not represent final agency determinations; (2) the records sought were not reasonably described; and (3) the agency is not required to answer interrogatories. Petitioner was directed to contact the United States Department of Justice

("DOJ") for memoranda on federal crack cocaine defendants and records of cases in which the DOJ declined to prosecute crack cocaine related offenses.

Petitioner administratively appealed the determination of the RAO, by letter dated February 2, 2012.

By letter dated May 4, 2012, the records access appeals officer ("RAAO") denied the appeal in its entirety pursuant to POL § 87(2) because disclosure of the records sought would: (1) interfere with judicial proceedings; (2) reveal non-routine criminal investigative techniques or procedures; (3) endanger the life or safety of any person; and (4) identify confidential information relating to a criminal investigation.

While his August 14, 2011 FOIL request was pending review, petitioner sought access to additional records pursuant to FOIL. By letter dated October 10, 2011, petitioner sought videos from the location where petitioner was arrested and a video of petitioner in the 25th precinct holding areas.

By letter dated March 12, 2012, the RAO informed petitioner that the records sought in the October 10, 2011 FOIL request were no longer available. Petitioner administratively appealed the determination of the RAO, by letter dated March 25, 2012. By letter dated August 3, 2012, the RAAO denied the appeal citing several grounds of exemption under POL § 87(2), including that disclosure of the records sought would interfere with a pending judicial proceeding.

Petitioner commenced the instant proceeding on September 9, 2013. Petitioner avers that the May 4, 2012 and August 3, 2012 determinations are arbitrary, capricious, and an abuse of discretion. Petitioner also avers that: (1) the records sought are not inter-agency documents; (2) any records sought that are within the possession of respondent should be disclosed regardless if the records are also in the possession of the DOJ; (3) the records sought are reasonably described; and (4) the videos sought are still retrievable.

Respondent cross-moves to dismiss the petition in its entirety on the ground that the instant proceeding is time-barred.

A CPLR Article 78 proceeding against a public "body or officer must be commenced within four months after the determination to be reviewed becomes final and binding." See CPLR 217(1). The date of the letter of denial by the records access appeals officer triggers commencement of the four-month statutory limitation period. See Swinton v. Record Access Officers for the City of New York Police Dept., 198 A.D.2d 165 (1st Dept. 1993).

Here, the determinations of respondent were "final and binding" within the meaning of CPLR 217(1) as of May 4, 2012 and August 3, 2012. Petitioner commenced the instant proceeding well after the statute of limitations had run for commencing an Article 78 proceeding.

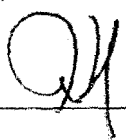
Thus, the application of petitioner is time-barred and the proceeding is dismissed pursuant to CPLR 3211(a)(5).

Accordingly, it is hereby

ADJUDGED that the application of pro se petitioner for an order pursuant to CPLR Article 78, compelling respondent to provide petitioner with records responsive to his August 14, 2011 and October 10, 2011 FOIL requests, is denied and the proceeding is dismissed without costs and disbursements. The cross-motion by respondent to dismiss the petition is granted.

Dated: February 7, 2014

ENTER:



J.S.C.

ALEXANDER W. HUNTER, JR.

UNFILED JUDGMENT

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