

**Matter of Wright v Hippolyte**

2014 NY Slip Op 30705(U)

March 20, 2014

Supreme Court, New York County

Docket Number: 401107/2013

Judge: Peter H. Moulton

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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: Hon. Peter H. Moulton PART 57  
Justice

RONNIE WRIGHT

INDEX NO. 401107/2013

MOTION DATE \_\_\_\_\_

v.

MOTION SEQ. NO. 001

HIPPOLYTE, NEW YORK CITY POLICE  
DEPARTMENT

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause — Affidavits— Exhibits	_____
Answering Affidavits — Exhibits	_____
Replying Affidavits	_____

Cross-Motion:  Yes  No

Pursuant to the attached decision dated 3/20/2014, this matter is disposed.

**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: 3/20/14 \_\_\_\_\_

New York, New York

J.S.C.

PETER H. MOULTON

1. Check one: .....  Case Disposed  Non-Final Disposition
2. Check as Appropriate: ..... Motion is:  Granted  Denied  Granted in Part  Other
3. Check if Appropriate: .....:  Settle Order  Submit Order  
 Do Not Post  Fiduciary Appointment  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: IAS PART 57

-----x  
In the Matter of the Petition of RONNIE WRIGHT,

Petitioner,

-against-

Index No. 401107/2013

Records Access Officer, HIPPOLYTE,  
NEW YORK CITY POLICE DEPARTMENT

Respondent,

For a Judgment Pursuant to Article 78 of the CPLR.

**UNFILED JUDGMENT**

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**PETER H. MOULTON, J.:**

Petitioner brings this Article 78 petition to vacate respondent's denial of petitioner's Freedom of Information Law ("FOIL") request for records related to his arrest and subsequent conviction for murder. Respondent cross-moves, pursuant to CPLR § 7804(f), for an order dismissing the petition pursuant to POL § 87(2)(e)(i), which precludes disclosure of law enforcement records where such disclosure would interfere with ongoing judicial proceedings. In the alternative, respondent cross-moves for dismissal on the grounds that this court lacks subject matter jurisdiction, and that petitioner has failed to exhaust petitioner's administrative remedies.

**BACKGROUND**

In 2007 petitioner was convicted of Murder in the Second Degree in Supreme Court, Kings County. On October 5, 2010, the Appellate Division, Second Department affirmed petitioner's conviction. Subsequently, on March 23, 2011, the Court of Appeals denied petitioner's application

[\* 3]  
for leave to appeal.

On April 16, 2012, petitioner sent a letter pursuant to FOIL seeking access to records related to his conviction for murder. Specifically, petitioner states that he sought the following law enforcement records: information related to witnesses that testified against him, notice of any deals offered to those witnesses to secure their testimony, and the criminal histories of those witnesses. In his FOIL request, petitioner described the records that he was seeking by reference to an indictment number. On May 7, 2012, the New York City Police Department's (NYPD) Records Access Officer (RAO) acknowledged receipt of petitioner's request. By a second letter, also dated May 7, 2012, the RAO requested that petitioner send additional information about the nature of the records he was seeking in his FOIL request in order to have it processed in a timely fashion. Petitioner did not submit any additional information to the RAO. Respondent deemed petitioner's FOIL request closed on October 3, 2012. Following that determination, respondent did not submit additional correspondence to petitioner. Petitioner subsequently sent a letter and other correspondence to respondent stating that he was still awaiting a determination.

While petitioner's FOIL request was pending, petitioner moved to vacate his criminal conviction in New York County Supreme Court, pursuant to Criminal Procedure Law (CPL) § 440.10. That motion was subsequently denied on March 1, 2013. Petitioner filed for leave to appeal that denial on March 26, 2013. Petitioner's application for leave to appeal is still pending.

### **DISCUSSION**

Section 89(4)(a) of the POL provides that a "person denied access to a record may...appeal...such denial to the head" of the agency or to a designated appeals officer. Generally,

[\* 4]

one must be denied access to records and subsequently appeal that denial prior to seeking judicial intervention pursuant to Article 78 of the CPLR. *See* N.Y. Public Officers Law § 89(4)(b); *see also* *Matter of Harvey v. Hynes*, 174 Misc 2d 174 (Sup. Ct., Kings County 1997). In the context of FOIL, an agency typically must complete processing of a FOIL request and render a final adverse determination before courts will recognize that administrative remedies have been exhausted. *See* *Matter of Tellier v. New York City Police Dept.*, 267 AD2d 9 (1st Dept. 1999). Nevertheless, a FOIL requester's statutory remedy for an untimely response or ruling is to deem the response a denial and commence a CPLR Article 78 proceeding "for review of such denial." *See* Public Officers Law § 89(4)(a),(b); *Matter of Miller v. New York State Dept. of Transp.*, 58 A.D.3d 981, 983 (3d Dept. 2009), *lv. denied* 12 NY3d 712 (2009).

In the instant matter, respondent argues that petitioner's FOIL request falls outside this court's subject matter jurisdiction because petitioner did not exhaust petitioner's administrative remedies before filing his petition. The court disagrees. Here, the RAO responded to petitioner's FOIL request by stating that the request could not be processed without additional information. When petitioner failed to provide any additional information to aid in the administrative processing of his FOIL request, the request was closed on October 3, 2012. Petitioner argues that petitioner did not have any additional information to provide to respondent, making respondent's administrative closing tantamount to a denial and final agency determination. Petitioner's argument has merit. Indeed, by telling petitioner that his FOIL request could not be processed until petitioner provided respondent with information that petitioner argues he did not have, respondent essentially denied petitioner's FOIL request. Moreover, petitioner waited several months after his request was closed on October 3, 2012 before initiating the instant Article 78 proceeding. During that time, petitioner

sent letters to respondent indicating that he had not received the records that he had requested, and wanted to appeal respondent's refusal to give petitioner the records he sought. Respondent did not send any correspondence back to petitioner. Respondent's failure to respond to petitioner's request conveyed a clear signal to petitioner that his request fell on deaf ears. As such, respondent's actions were equivalent to a denial of petitioner's FOIL request. In such a circumstance, petitioner rightfully concluded that his only recourse to address an untimely response to his FOIL request was to commence an Article 78 proceeding. Consequently, this matter falls within the court's subject matter jurisdiction.

Respondent additionally argues that POL § 89(3) provides, as a condition precedent to imposing a duty under FOIL upon an agency, that records sought pursuant to FOIL be "reasonably described." *See Mitchell v. Slade*, 173 AD2d 226, 227 (1st Dept. 1991) (holding that POL § 89(3) places a burden on a petitioner to describe with specificity the documents that petitioner is requesting so that they can be located).

Petitioner's FOIL request in the instant matter principally described the records petitioner was seeking by reference to an indictment number. That number, generated as a tracking number by the District Attorney's Office that prosecuted petitioner's case, is not kept in the regular course of the NYPD's record-keeping. Absent an arrest number, date of incident, or other corresponding information related to petitioner's prosecution, respondent states that respondent would be unable to locate the records that petitioner is seeking if the judicial exception did not apply. Nevertheless, petitioner's FOIL request did state petitioner's name, the nature of the offense for which he was convicted, and that petitioner sought information related to witnesses that testified against him. While that information perhaps did not have the level of specificity that respondent desires, it does

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seem to satisfy the threshold articulated in *Slade*. Consequently, petitioner's request reasonably described the records petitioner was seeking, and therefore stated a claim upon which relief can be granted.

Respondent next argues that FOIL's ongoing judicial proceedings exemption privileges respondent from disclosing to petitioner documents that were compiled for law enforcement purposes. This argument has merit. 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...are compiled for law enforcement purposes and which, if disclosed, would...interfere with law enforcement investigations or judicial proceedings..." Consequently, FOIL does exempt agencies from disclosure of documents compiled for law enforcement purposes, which, if disclosed, would interfere with judicial proceedings.

In deciding whether a proceeding is pending for purposes of invoking the interference exemption, the First Department has said that a generic determination can be issued by an agency stating that disclosure under FOIL would interfere and have a chilling effect on a pending prosecution. See *Matter of Legal Aid Socy. v. New York City Police Dept.*, 274 AD2d 207 (1st Dept. 2000). Indeed, in *Matter of Legal Aid Socy*, defendants in pending criminal prosecutions who were requesting information related to their charges, including complaint report worksheets and arrest reports, brought Article 78 proceedings challenging the denial of their FOIL requests by the NYPD. The Appellate Division denied their petitions, reversing a lower court's decision. In doing so, the Appellate Division agreed with the NYPD's assertion that disclosure of records in pending criminal prosecutions would interfere with those proceedings. The court held that, "[w]e 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).” In reaching that conclusion the court noted that “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.

That ruling has been followed by subsequent decisions. *See e.g. Matter of Moreno v. New York County Dist. Attorney’s Off.*, 38 AD3d 358 (1st Dept. 2007) *lv. denied*, 9 NY3d 801; *Matter of Leshner v. Hynes*, 19 NY3d 57 (2012). Indeed, in *Moreno*, the court recognized that a “criminal appeal and any subsequent proceedings within the same prosecution” constitute judicial proceedings under FOIL so as to preclude disclosure of records while an appeal or subsequent proceedings are pending. *Moreno*, 38 AD3d at 358.

Here, petitioner seeks records related to the crime for which he was ultimately arrested and convicted. Petitioner’s request does not state with a great degree of specificity the exact records that petitioner is seeking. Nonetheless, petitioner does generally state that the records that he is looking to obtain include “all records relating to the use, role, and/or involvement of law enforcement.” To the extent that such a request encompasses information compiled during the investigation into the murder for which petitioner was ultimately convicted, including named witnesses and other records compiled by the police department and prosecution, petitioner’s request falls squarely within the ambit of law enforcement records. Moreover, since petitioner’s appeal of the denial of his CPL § 440 motion is still pending, disclosure of such law enforcement records under FOIL would interfere with that pending judicial proceeding as set forth in POL § 87(2)(e)(i).

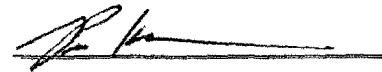
Petitioner does not state any grounds for why the records he is requesting fall outside POL § 87(2)(e)(i). Additionally, petitioner does not, in the alternative, argue that respondent's action in failing to provide the requested records to him was arbitrary and capricious. Consequently, the court finds that respondent's denial here was warranted insofar as petitioner's FOIL request seeks records that fall directly within the pending judicial proceedings exemption.

Accordingly, it is

**ORDERED and ADJUDGED** that respondent's cross-motion to dismiss the petition is granted, the petition is denied, and the proceeding is dismissed.

Dated: March 20, 2014

ENTER:



J.S.C.

**LEON PETER H. MOULTON**

**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).