

Matter of Urena v Vance
2014 NY Slip Op 31512(U)
June 13, 2014
Sup Ct, New York County
Docket Number: 400306/14
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KERN
Justice

PART 55

URENA, JOSE

INDEX NO. 400306/14

- v -

CYRUS VANCE, JR.

MOTION DATE _____

MOTION SEQ. NO. 01

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

FILED

Upon the foregoing papers, it is ordered that this motion

JUN 16 2014
NEW YORK
COUNTY CLERK'S OFFICE

is decided in accordance with the annexed decision.

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Dated: 6/13/14 _____ cgk _____

CYNTHIA S. KERN 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

JOSE URENA,

Petitioner,

Index No. 400306/14

For a Judgment Pursuant to Article 78 of the
Civil Practice Laws and Rules,

DECISION/ORDER

-against-

CYRUS VANCE, JR., DA NYC,

Respondent.

FILED

JUN 16 2014

-----x
NEW YORK
COUNTY CLERKS OFFICE

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 Petition and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u>3</u>

Petitioner Jose Urena brings this petition seeking to challenge respondent Cyrus Vance, Jr., DA NYC's ("respondent") denial of his request for documents made pursuant to the Freedom of Information Law ("FOIL"). Respondent cross-moves to dismiss the petition. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. In February 1990, petitioner was convicted for murder in the second degree and sentenced to an indeterminate prison term of 25 years to life. Petitioner appealed his conviction to the Appellate Division, First Department and on May 28, 1992, the

Appellate Division unanimously affirmed petitioner's conviction. Petitioner then commenced litigation in both state and federal courts, filing five motions to vacate his conviction, all of which were denied. On December 25, 2000, petitioner requested various categories of records relating to his criminal case pursuant to FOIL. On July 8, 2002, Assistant District Attorney Patricia Bailey ("ADA Bailey") denied petitioner's request on the grounds that several categories of the records were provided to petitioner or his attorney at trial and the remaining records did not exist or were not located in respondent's file. Petitioner then appealed the determination to respondent stating that his attorney had not given him the files and that "most of his files were destroyed." By letters dated August 28, 2002 and September 17, 2002, Assistant District Attorney Gary Galperin ("ADA Galperin") upheld respondent's denial of petitioner's request noting that petitioner had "provide[d] insufficient allegations to overcome" ADA Bailey's findings that the records requested had already been produced to petitioner or his attorney during petitioner's trial.

In a September 23, 2002 letter asking ADA Galperin to reconsider his determination, petitioner requested copies of police reports containing information about interviews with an individual named Jose Manuel Fabian. By letter dated January 9, 2003, ADA Bailey denied that application on the grounds that any such reports would have been provided to petitioner's attorney at trial and that disclosing such information would endanger Mr. Fabian's safety as petitioner had "threatened this individual with a gun for refusing to assist [petitioner's] plans to rob and murder the victim in this case." In letters dated October 1, 2006 and October 3, 2006, petitioner filed additional FOIL requests with respondent seeking several categories of records relating to his conviction including "ballistics examination of...shell casings connected to this

* 4]

case” and “DNA test results and any other test performed, hair and fibers for this case.” In a letter submitted on March 12, 2007, petitioner also requested records relating to a statement given to the police by a man named Mr. Fausto. In a letter dated April 24, 2007, Assistant District Attorney Cynthia Sittnick (“ADA Sittnick”) denied petitioner’s request on the grounds that petitioner had made previous FOIL requests seeking the same records and that respondent had already provided the records requested to petitioner or his attorney during his trial. Ms. Sittnick also noted that Mr. Fausto was not a witness at trial and denied access to records relating to his statement out of concern for his safety.

By letter dated May 7, 2007, petitioner requested that ADA Sittnick reconsider her denial. In a May 24, 2007 letter, ADA Sittnick upheld her initial determination noting that petitioner was required to “provide[] proof in an evidentiary form that the documents previously received by [his] attorney are unavailable,” but had not done so. She further upheld the determination that disclosing records relating to Mr. Fausto, the homicide victim’s brother-in-law, would endanger his safety, which was “paramount” given his relationship to the victim. In both her April 24, 2007 and May 24, 2007 letters, ADA Sittnick informed petitioner that ADA Bailey was respondent’s FOIL Appeals Officer and all appeals of any FOIL determination should be made to ADA Bailey. However, respondent alleges that petitioner never administratively appealed the denials and never commenced an Article 78 proceeding challenging respondent’s FOIL determinations.

In April 2013, petitioner again requested various categories of records relating to his conviction, including “Laboratory Examination(s)” and “Comparison and Result of Ballistics Report(s)” pursuant to FOIL. In a letter dated August 23, 2013, ADA Sittnick again notified

petitioner that he was seeking access to records he had previously requested and again denied petitioner's request on the grounds that the records had previously been provided to his attorney. However, the letter was misaddressed and did not reach petitioner. Thus, in a letter dated August 24, 2013, petitioner appealed what he believed to be respondent's constructive denial of his FOIL request. In a letter dated November 5, 2013, ADA Susan C. Roque, respondent's FOIL Appeals Officer, upheld ADA Sittnick's denial of petitioner's request and agreed with ADA Sittnick's determination the petitioner's application was duplicative of his prior FOIL requests and noted that a "prior adverse ruling cannot be overcome by making a subsequent, duplicative FOIL request." She further upheld ADA Sittnick's determination the respondent was not required to provide petitioner with duplicates of records he already received. Petitioner then commenced the instant Article 78 proceeding challenging respondent's denial of his FOIL request.

In the instant action, the petition must be denied on the ground that it is time-barred. There is a four month statute of limitations to bring an Article 78 proceeding to challenge an administrative determination that is measured from the date the determination becomes final and binding upon the petitioner. *See* CPLR § 217. Here, petitioner's FOIL request for the records at issue was initially denied by respondent in 2007 and petitioner failed to administratively appeal that denial or commence an Article 78 proceeding challenging said denial within four months. It is well-settled that a second duplicative FOIL request, such as the one petitioner made in 2013, does not extend a petitioner's time to commence an Article 78 proceeding. *See Matter of Andrade v. New York City Police Dept.*, 106 A.D.3d 520, 521 (1st Dept 2013)("[t]he subject petition was brought in September 2010, more than four months after the November 2007 denial of petitioner's prior FOIL request, and his second FOIL request 'did not extend or toll his time to

