

Matter of Priveterre v Maloney

2014 NY Slip Op 32032(U)

July 30, 2014

Sup Ct, New York County

Docket Number: 400159/14

Judge: Alice Schlesinger

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

PRESENT: S ALICE SCHLESINGER
SCHLESINGER
Justice

IA PART 16
PART 16

PRIVETERA, STEPHEN

INDEX NO. 400159/14

- v -

CHRISTINA MALONEY

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

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 petition and cross-motion to dismiss are determined in accordance with the accompanying memorandum decision.

FILED

AUG 04 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: JUL 30 2014

Alice Schlesinger
ALICE SCHLESINGER 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

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

STEPHEN PRIVETERRE,

Petitioner,

Index No. 400159/14
Motion Seq. No.001

-against-

FILED

CHRISTINA MALONEY, Assistant District Attorney
of New York County,

Respondent.

AUG 04 2014

-----X
SCHLESINGER, J.:

COUNTY CLERK'S OFFICE
NEW YORK

Before this Court is an Article 78 petition brought by Stephen Priveterre on his own behalf. It concerns a FOIL (Freedom of Information Law) request. His first request was dated September 12, 2013. There was then a follow-up request set out in a letter dated October 11, 2013. Copies of these letters and others referenced below are attached to the petition.

Both letters were sent from Mohawk Correctional Facility in Rome, New York, where Mr. Priveterre is confined, to the Manhattan District Attorney's Office. After petitioner received a response from Assistant District Attorney Christina Maloney to his first request, he then specifically addressed the second letter to her.

The September 12 request asked for (1) a "copy of the original indictment" and (2) a copy of his entire file "under indictment No.12-NY-044956 including but not limited to the papers reflecting the grounds for its dismissal". The follow-up asked for a particular missing document "which pertains to the search warrant that was issued under Warrant #0472/2012" and "a copy of the Deponent's statements pertaining to that warrant."

Mr. Priveterre received a response dated September 19, 2013 from Ms. Maloney to his first letter wherein she acknowledged receipt of his request and told him that she had requested the relevant files from the Office's Closed Cases Unit and would review them once they were received. After this, months went by, prompting a letter from Mr. Priveterre dated December 11, 2013. There, in essence, Mr. Priveterre reviewed the status of his requests and asked Ms. Maloney that, if she were denying his request, to please do so in writing so that he could appeal.

Finally, on February 4, 2014, Ms. Maloney determined Mr. Priveterre's (Exh A to Resp. Cross-Motion). She first reviewed the case he was concerned with and stated that it was based on an arrest of June 8, 2012 for possession of marijuana and that the case was ultimately dismissed and sealed. What was granted to him upon payment of \$1.75, were seven pages consisting of access to the NYPD Omniform System which would provide him with a copy of his Arrest Report and the Search Warrant. Denied was a copy of his "rap sheet", the criminal court complaint and back, the Criminal Justice Agency Report, a copy of the laboratory report, and motion papers. Also denied were copies of the DA datasheet, DA notes and data display, and the affidavit for his Search Warrant, though the affidavit was not found in the file.

The first category of denied documents was premised on the assertion that the documents had previously been given to Mr. Priveterre's Legal Aid attorney's. ADA Maloney cited case law for this alleged exemption and added that her office was not required to provide duplicates¹. As to the second category of denied documents, this denial

¹This Court is unaware of whether Mr. Priveterre has contacted Legal Aid to ask for these documents.

was based on the intra-agency document exemption under FOIL stated in Public Officers Law §87(2)(a), as well as the law enforcement and personal privacy exemptions found in §87(2)(b),(e),(iii) and (f).

Meanwhile, since Mr. Priveterre had heard nothing from the District Attorney by January 23, 2014, and believing that the time provided by statute had elapsed, he filed this petition on February 5, 2014. He obviously had not received the Maloney decision, as it had been sent out only one day before.

On May 27, 2014, my office sent Mr. Priveterre a letter, with a copy to Respondent, that informed him of a cross-motion by the District Attorney for dismissal of the petition based on his failure to exhaust his administrative remedies by filing an administrative appeal. He was also told he had a right to oppose the cross-motion if he disagreed with it, although my Law Clerk wrote "It appears that the District Attorney is correct". He was also told that those opposition papers had to be sent by June 30, 2014.²

My office received a response to this letter in one from petitioner, with a copy to respondent, dated June 10, 2014. In that letter, Mr. Priveterre refers to a "Traverse the Return" wherein "those claims were addressed", but we have not received this.³ Also it appears that no administrative appeal to the District Attorney has been made.

The cross-motion reviewed the petition, pointing out that its rationale was that the FOIL request had been constructively denied and arguing that petitioner was seeking

²As seems to be the pattern of these proceedings, petitioner wrote me a letter on May 21, 2014, seemingly before he received the Court's May 27, 2014 letter to him. There, he complained of the delays by respondent and again requested the documents in issue and urged that the cross-motion be denied.

³We informed Mr. Priveterre of this non-receipt in a letter dated June 23, 2014. Nothing more was received.

mandamus relief. Counsel then argued that the petition has been mooted out by the February 4, 2014 partial denial. Also, it was urged that the petition should be dismissed because Mr. Priveterre has failed to exhaust his remedies by appealing within 30 days of the decision as required by Public Officers Law §89(4)(a). Counsel finally pointed out that, even though the 30 days allowed for an administrative appeal had elapsed, because of the amount of time it took the District Attorney to respond to petitioner's original request, "the Court may exercise its discretion" and allow more time for Mr. Priveterre to file an administrative appeal (Resp. Aff. in Support of Cross-Motion at ¶ 14).

The Court will do that. Therefore, in the first instance, I am granting the cross-motion to dismiss because, once again, it is clear that Petitioner has not appealed the partial denial of his FOIL request dated February 4, 2014 by filing an administrative appeal. He is required to do that before turning to the courts. But further, I am taking up Respondent's suggestion and providing 40 days from the date of this decision for filing that administrative appeal. I am adding 10 days to the statutory time to allow for mailing delays. If Mr. Priveterre does file such an appeal and is still dissatisfied with the result, which pursuant to this decision cannot be denied on grounds of timeliness, he can then commence another Article 78 proceeding.

This constitutes the decision and order of this Court.

Dated: July 30, 2014
JUL 30 2014

FILED

AUG 04 2014

COUNTY CLERK'S OFFICE
 NEW YORK

Alice Schlesinger

 J.S.C.
ALICE SCHLESINGER