

**Matter of Kearns v New York State Off. of People  
with Dev. Disabilities**

2015 NY Slip Op 30808(U)

May 19, 2015

Supreme Court, Albany County

Docket Number: 4864-14

Judge: Jr., George B. Ceresia

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF ALBANY

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In The Matter of the Application of  
MICHAEL P. KEARNS,

Petitioner,

For A Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules,

-against-

NEW YORK STATE OFFICE OF PEOPLE WITH  
DEVELOPMENTAL DISABILITIES,

Respondents.

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Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI # 01-14-ST6301 Index No. 4864-14

Appearances:            Dolce Panepinto  
                                 Attorney For Petitioner  
                                 1600 Main Place Tower  
                                 350 Main Street  
                                 Buffalo, NY 14202  
                                 (John B. Licata, Esq.,  
                                 of counsel)

Eric T. Schneiderman  
Attorney General  
State of New York  
Attorney For Respondent  
The Capitol  
Albany, New York 12224  
(Gregory J. Rodriguez,  
Assistant Attorney General  
of Counsel)

**DECISION/ORDER**

George B. Ceresia, Jr., Justice

The above-captioned CPLR Article 78 proceeding in one commenced pursuant to the

provisions of Public Officers Law art. 6, the New York Freedom of Information Law, commonly referred to as "FOIL". The petitioner submitted a FOIL demand on July 23, 2014 which recited, in part, as follows:

"This is a FOIL REQUEST and attached is correspondence which I sent to the Office of People with Developmental Disabilities (OPWDD) on April 22, 2014 about the placement of sex offenders at 510 and 526 Leydecker Road in the Town of West Seneca, New York 14224.

[]

My FOIL REQUESTS are as follows:

- (1) We have made a Freedom of Information Request of the 9-11 Emergency Call Records for 510 and 526 Leydecker Road for the last year – because several neighbors feel there have been problems with these addresses for over a year with police being called in to handle the situations.
- (2) Per conference call with Mr. Gregory Roberts from OPWDD I am formally requesting the RECORDS for the Policy behind 1990 Statewide Forensic Advisory Committee (SFAC).
  - a. I am formally requesting the RECORDS on how members of SFAC are appointed?  
I am formally requesting the RECORDS of the SFAC's credentials?
  - b. I am formally requesting the RECORDS of the tests and/or criteria they use to determine if there is a mental disability?
  - c. I am formally requesting the RECORDS which explain the definition of mental disability — which qualifies a person for state care and treatment?
- (3) Per a conference call with Mr. Gregory Roberts from

OPWDD I am formally requesting the RECORDS for the policy behind the Front Door Process.

- a. I am formally requesting the RECORDS for the protocols and procedures for determining a disability?
  - b. I am formally requesting the RECORDS on who makes the determination for a disability?
- (4) I am formally requesting the RECORDS explaining Megan's Law in New York State - doesn't this keep sex offenders a minimum distance away from parks and schools?
- (5) I am formally requesting the RECORDS explaining why all of these sex offenders were released from Monroe County facility on the same day to a less restrictive facility?
- a. I am formally requesting the RECORDS explaining showing whether they all have their sentences or probation expire on the same day?
- (6) I am formally requesting the RECORDS indicating who currently operates 510 and 526 Leydecker? I am formally requesting the RECORDS showing if New York State operates the facility? I am formally requesting the RECORDS showing the name and contact for the subcontractor who operates 510 and 526 Leydecker Road?
- (7) I am formally requesting the RECORDS explaining why a 500 acre facility in West Seneca DDRO with secure buildings on the 500 acres was not utilized by moving sex offenders into those buildings?
- (8) I am formally requesting the RECORDS indicating whether other individuals in a group home were displaced or relocated to make room for these sex offenders?

- (9) I am formally requesting the RECORDS showing the regulations or laws requiring a certain level of security in a group home for level 3 and level 2 offenders? If there is no regulation or law, I am formally requesting the RECORDS explaining why there are alarms on the doors and windows at 510 and 526 Leydecker?
- (10) I am formally requesting the RECORDS showing the training and credentialing for current attendants and/or supervisors that sex offenders at 510 and 526 Leydecker receive?
- (11) I am formally requesting the RECORDS showing whether sexual predators are only housed with other sex offenders? I am formally requesting the RECORDS showing whether sex offenders are commingled with regular disabled population at group homes?
- (12) I am formally requesting the RECORDS which show[] whether it is more cost effective putting sex offenders in group homes and not a state secured facility?

On July 30, 2014, respondent's Records Access Officer issued a letter indicating that she anticipated a response to petitioner's FOIL demand on or before August 27, 2014. On September 9, 2014, because the petitioner had not yet received any documents in response to his FOIL demand, he filed an administrative appeal of what he deemed to be a constructive denial of his FOIL request.

Thereafter, on September 24, 2014 the respondent issued two decisions. In the first decision, respondent's Records Access Officer produced documents pursuant to paragraphs 6 and 8 of petitioner's FOIL Demand. She further indicated that OPWDD does not maintain records with regard to paragraphs 1, 4 and 10; that paragraph 5 requests documents exempt from production under POL § 87 (2) (a), and Mental Hygiene Law § 33.13; that there are no documents which pertain to part 9 (she also indicated, however, that OPWDD would follow

14 NYCRR § 633.16); and that OPWDD continues to search for records responsive to paragraphs 2, 3, 7, 11 and 12. The Records Access Officer indicated that respondent would update the petitioner with regard to its search on October 13, 2014.

The second decision dated September 24, 2014 was that of the Records Access Appeals Officer, with regard to the administrative appeal filed on September 9, 2014. In that decision, the Records Access Appeals Officer denied the appeal as moot, based upon the response of the same date issued by the Records Access Officer.

The respondent produced further documents with respect to petitioner's FOIL demand by two emails dated October 16, 2014 and an email dated November 16, 2014<sup>1</sup>. In the meantime the petitioner, on September 26, 2014, commenced the instant CPLR Article 78 proceeding.

During oral argument of the instant matter, the issues appeared to narrow down to whether the petitioner had properly exhausted his administrative remedies; and whether the respondent had properly denied production of documents requested under paragraph 5 of petitioner's FOIL demand (based upon respondent's claim that such documents were exempt from production under Mental Hygiene Law § 33.13). The Court inquired whether the parties were willing to enter into a stipulation whereby the respondent would withdraw the affirmative defense based upon the exhaustion rule, and the respondent would submit those documents pertaining to paragraph 5 of petitioner's FOIL demand to the Court for *in camera* review. The parties were given a deadline of March 19, 2015 to advise the Court whether

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<sup>1</sup>The November 16, 2014 email was a response to a letter dated October 17, 2014 from the petitioner in which he indicated that there were pages missing from second email response dated October 16, 2014. The November 16, 2014 email submitted the missing pages.

they reached an agreement. The Court has received no indication that the parties were able to enter into a stipulation. To the contrary, in a letter dated March 17, 2015 the respondent presented a further argument in support of its affirmative defense by indicating that the petitioner had recently<sup>2</sup> submitted an administrative appeal of the September 24, 2014 FOIL determination of respondent's Records Access Officer. From all of the foregoing, the Court concludes that the affirmative defense based upon the exhaustion rule has not been withdrawn and must therefore be addressed.

“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 v Buffalo Sewer, 46 NY2d 52, 57 [1978], citing Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375; see also Town of Oyster Bay v Kirkland, 19 NY3d 1035, 1038 [2012]; Matter of East Lake George House Marina v Lake George Park Commission, 69 AD3d 1069, 1070 [3<sup>rd</sup> Dept., 2010]; Matter of Connor v Town of Niskayuna, 82 AD3d 1329, 1330-1331 [3d Dept., 2011]; Matter of Connerton v Ryan, 86 AD3d 698, 699-700 [3d Dept., 2011]). “This doctrine furthers the salutary goals of relieving the courts of the burden of deciding questions entrusted to an agency (see, 1 NY Jur, Administrative Law, §5 pp 303-304), preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its ‘expertise and

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<sup>2</sup>By letter dated March 9, 2015

judgement”” (Watergate v Buffalo Sewer, *supra*, citing, Matter of Fisher [Levine], 36 NY2d 146, 150, and 24 Carmody-Wait 2d, NY Prac, §145:346). As stated in Watergate v Buffalo Sewer (*supra*), the exhaustion rule need not be followed in certain limited circumstances, such as where an agency’s action is challenged as either unconstitutional or wholly beyond its grant of power, where resort to an administrative remedy would be futile, or where its pursuit would cause irreparable injury (*see, id.*).

In this instance, the only administrative appeal filed by the petitioner was the one submitted on September 9, 2014, which appealed a constructive denial of the production of any records. That appeal was denied by the Records Access Appeals Officer, as noted, on September 24, 2014. Up until March 2015, the petitioner never appealed the separate determination of the Records Access Officer dated September 24, 2014. As noted, the instant CPLR Article 78 petition was filed on September 26, 2014. “Thus, to the extent that petitioner seeks relief from this Court compelling respondent to respond to his FOIL requests, this matter [became] moot” (Almodovar v Altschuller, 232 AD2d 700 [3d Dept., 1996], citation omitted; *see also* Matter of Taylor v New York City Police Dept. FOIL Unit, 25 AD3d 347 [1<sup>st</sup> Dept., 2006]). “To the extent that petitioner seeks review of respondent's partial denial of his FOIL request, petitioner has failed to exhaust all administrative remedies” (Almodovar v Altschuller, *supra*, citations omitted; *see also* Braxton v Comm'r, N.Y. City Police Dep't, 283 A.D.2d 253 [1<sup>st</sup> Dept., 2001]; Matter of Advocates for Children of N.Y., Inc. v. New York City Dept., 101 AD32d 445 [1<sup>st</sup> Dept., 2012]).

The petitioner has not advanced any argument to support application of an exception to the exhaustion rule.

Under the circumstances, the Court finds that the petitioner failed to exhaust his administrative remedies. The Court need not address the merits of the petition. The Court concludes that the petition must be dismissed.

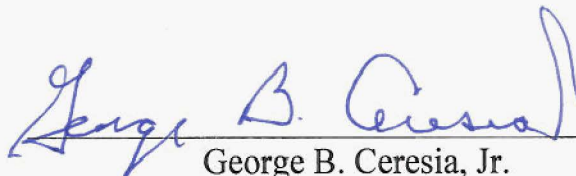
Accordingly, it is

**ORDERED and ADJUDGED**, that the petition is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondent. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

**ENTER**

Dated: May 19, 2015  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated September 29, 2014, Petition, Supporting Papers and Exhibits
2. Answer dated October 14, 2014, and Exhibits
3. Affirmation of Roger A. Bearden, Esq., dated October 14, 2014
4. Email 1 From OPWDD to Michael P. Kearns dated October 16, 2014, with Attachments
5. Email 2 From OPWDD to Michael P. Kearns dated October 16, 2014, with Attachments
6. Petitioner's Letter dated October 17, 2014 to the petitioner, with attached Email From OPWDD to Michael P. Kearns dated November 16, 2014, with other attachments
7. Letter dated March 17, 2015 of Gregory J. Rodriguez, Assistant Attorney General with Exhibits.