

**Desser v Pascal**

2022 NY Slip Op 31964(U)

June 24, 2022

Supreme Court, New York County

Docket Number: Index No. 154861/2021

Judge: Laurence Love

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

**PRESENT:** HON. LAURENCE LOVE **PART** **63M**

*Justice*

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STUART DESSER

Petitioner,

- v -

WOODY PASCAL, DEPUTY COMMISSIONER, STATE OF  
NEW YORK, DIVISION OF HOUSING AND COMMUNITY  
RENEWAL, OFFICE OF RENT ADMINISTRATION,

Respondent.

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**INDEX NO.** 154861/2021

**MOTION DATE** 02/08/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, the instant CPLR Article 78 Petition is decided as follows:

In e-mails to the New York State Division of Homes and Community Renewal FOIL and FOIL Appeals e-mail addresses, dated February 4, 2021 and January 31, 2021 respectively, Petitioner sought to contact a HCR records access officer to understand how the records which Petitioner sought in FOIL Request No. 1329-102020 are filed and retrieved. Said FOIL request, dated October 16, 2020 sought “information about the computer system on which ORA [Office of the Rent Administrator] maintains its current and past docketed cases. (a) model(s) of the computer hardware; (b) operating system including the version number; (c) The database software and the search engine, including the version number; (d) Instructions how to use the database.”

In a response to the original FOIL request dated, November 10, 2020, the NYSHCR Records Access Officer responded that “After a thorough search of its records by the Agency, no such records were found to exist. Please be advised that the information you have requested may be maintained by the New York State Office of Information Technology Services.” It does not

appear that Petitioner appealed said decision. On February 8, 2021, John Lance, Esq. the attorney assigned to aid ORA's coordination of DHCR's FOIL responsibilities, emailed Petitioner a subject matter list of records that ORA maintained and provided guidance on how to describe requested records. On February 8, 2021, Petitioner responded to said email inquiring as it relates to ORA records "What fields of data are populated for each record, and how can those fields of data be searched. Is there a field that contains only the name of a petitioner, for instance, and if so, is that field indexed by the software? Can a plain text field be searched, either for an exact word or a string of words, perhaps using wildcards?"

On February 19, 2021, the Petitioner sent an email to Mr. Lance the same type of retrievable data in DHCR/ORAs system, arguing that pursuant to 21 NYCRR §1401.2(b)(2) as it interprets New York State Public Officer's Law, Article 6, §§ 84-90 ("FOIL") requires Respondent to "assist persons seeking records [by] ... indicat[ing] the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records," Said section was promulgated by the Committee on Open Government ("COOG") under Public Officer's Law § 89(1). COOG also furnishes advisory opinions with respect to FOIL requests under Public Officer's Law §89(1)(b)(i). Petitioner then sent a letter to DHCR's Commissioner RuthAnne Visnauskas demanding similar information.

On March 22, 2021, the Petitioner sent a faxed inquiry to COOG seeking assistance with his demand for database information and attached a copy of the Lance Response and On March 26, 2021, Kristin O'Neill, the Assistant Director of COOG, issued a reply to Mr. Dessser's inquiry noting that Mr. Lance did provide guidance regarding the types of records maintained by ORA in his February 8, 2021 email.

On May 19, 2021, the Petitioner filed an Article 78 proceeding seeking to compel DHCR's compliance with 21 NYCRR §1401.2(b)(2), seeking an Order requiring Respondent to i) put the petitioner in direct contact with an HCR agent or any other state agent or private contractor who is appropriately competent and familiar with the computer system(s) involved, and that such person be required to assist the petitioner to the extent necessary to satisfy his inquiry, including but not limited to providing written instructions or information on searching its records with its computer's software; ii) requiring the agency to publish prominently on its website the actual names, official email addresses, and office telephone numbers of its public access officers; that those officers be trained or re-trained in their responsibilities under 21 CRR-NY 1401.2(b)(2); and iii) seeking costs.

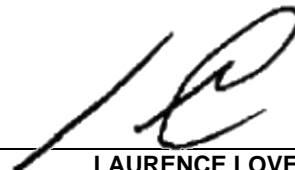
At the outset, the Court notes that Petitioner did not appeal his initial FOIL request and the Petition makes no mention of any attempts to request the information from the New York State Office of Information Technology Services as directed in Respondent's response to same. The Court further notes that the contact information for filing FOIL requests is featured prominently on the HCR website. Respondent's opposition also clearly indicates that at the time of the inquiry, the ORA FOIL appeals officer was John Lance, Esq. and Linda Manley is the FOIL appeals officer for the rest of the agency.

Mandamus will lie only to compel the performance of a ministerial act, and only when there exists a clear legal right to the relief sought. See *Matter of Brusco v. Braun*, 84 N.Y.2d 674, 679 (1994); *Matter of Bullion v. Safir*, 249 A.D.2d 386, 386 (2d Dep't 1998). The right to performance "must be so clear as not to admit of reasonable doubt or controversy." *Association of Surrogates and Supreme Court Reporters Within the City of New York v. Bartlett*, 40 N.Y.2d 571, 574 (1976) (internal citation omitted); *Coastal Oil New York Inc. v. Newton*, 231 A.D.2d 55, 56

(1st Dep't 1997), appeal dismissed, 91 N.Y.2d 848 (1997), appeal denied, 91 N.Y.2d 808 (1998). The act must be specifically and "clearly imposed by law...It is not enough that the act, performance of which is sought, is not prohibited, its performance must be directed." *Matter of Burr v. Voorhis*, 229 N.Y. 382, 387 (1920).

Here, HCR has complied with §1401.2(b)(2) by John Lance's February 8, 2021 email, which advises Petitioner of the entire list, by subject matter, of the records that HCR keeps and that documents cannot be searched by phrase or reference material. Specifically, records can be searched by "relevant docket numbers, dates, names, addresses, descriptions." Further, FOIL does not impose any obligation on DHCR to answer Petitioner's direct questions. See *Newman v. Dinallo*, 69 A.D.3d 636, 637 (2d Dep't 2010). Even if Petitioner is entitled to the information that he seeks, the instant Petition is premature as Petitioner has failed to challenge the apparent denial of his earlier FOIL request, See Public Officer's Law § 89(4). Further, as it relates to Petitioner's initial FOIL request, the response to same specifically indicates that "the information you have requested may be maintained by the New York State Office of Information Technology Services."

ORDERED that the instant Petition is DENIED in its entirety and DISMISSED.

<u>6/24/2022</u> DATE			 LAURENCE LOVE, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>
			<input type="checkbox"/> NON-FINAL DISPOSITION
			<input type="checkbox"/> GRANTED IN PART
			<input type="checkbox"/> SUBMIT ORDER
			<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE