

**Matter of Williams v Vance**

2012 NY Slip Op 32453(U)

September 10, 2012

Supreme Court, New York County

Docket Number: 400930/12

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

In the Matter of the Application of  
**RASHEEM WILLIAMS,**  
Petitioner,

INDEX NO. 400930/12

For a Judgement Pursuant to the Provlsons of  
Article 78 of the New York Civil Practlce Law and Rules,

-against-

MOTION SEQ. NO. 001

**CYRUS R. VANCE III, DA, NEW YORK COUNTY,**  
Respondent.

The following papers numbered 1 to 3 were read on this motion by petitioner for an order and judgement pursuant to Article 78 of the Civil Practice Law and Rules.

Notice of Motlon/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

2

Replying Affidavits (Reply Memo) \_\_\_\_\_

3

Cross-Motion:  Yes  No

Petitioner Rasheem Williams (Williams or petitioner) brings this Article 78 proceeding seeking an Order compelling respondent Cyrus R. Vance III, DA (respondent) to disclose certain records relating to the dismissal of an indictment that was previously brought against petitioner under New York County Indictment Number 6444/09 (Indictment 6444/09).

Respondent now cross-moves, pursuant to CPLR §§ 3211(a)(2), (5) and 7804(f), to dismiss this proceeding as time-barred, for lack of subject matter jurisdiction, and as moot inasmuch as respondent already performed a diligent search and located no responsive documents.

Petitioner has filed a reply. As set forth below, Williams' Article 78 petition is denied respondent's cross-motion to dismiss the petition is granted in its entirety.

**BACKGROUND**

In a letter to respondent dated July 24, 2011, Williams requested "documentation"

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relating to the dismissal of Indictment 6444/09; specifically, Williams was seeking "documentation on how Indictment #6444-09 was dismissed" (Notice of Cross-Motion, exhibit A).<sup>1</sup> Williams sent a second letter to respondent dated August 21, 2011, again requesting records pursuant to the Freedom of Information Law (FOIL) relating to the grounds for dismissing Indictment 6444/09. Thereafter, petitioner sent two additional letters to respondent, dated August 28, 2011 and September 5, 2011, in which he reiterated his previous requests.

Respondent, via Assistant District Attorney Sarah Hines (ADA Hines), denied petitioner's requests on August 31, 2011. ADA Hines reasoned that because the case had been sealed pursuant to Criminal Procedure Law §160.50 the records were exempt from disclosure pursuant to Public Officers Law Section 87(2)(a) (see Notice of Cross-Motion, exhibit D). ADA Hines advised petitioner that an appeal of this determination could be made to the FOIL Appeals Officer, Assistant District Attorney Patricia J. Bailey (ADA Bailey).

Williams appealed the August 31, 2011 determination to ADA Bailey in a letter dated September 11, 2011. Williams argued that as a party to Indictment 6444/09, he was entitled to the records even if the case was sealed. On September 27, 2011, ADA Bailey, agreeing with petitioner, reversed respondent's decision and remanded the matter back to ADA Hines to determine whether there were any disclosable, non-exempt records in the file.

Thereafter, according to respondent's moving papers, ADA Hines spoke to the prosecutor who handled Indictment 6444/09. The prosecutor informed ADA Hines that the file maintained by respondent's office did not contain any records explaining the reasons for dismissing Indictment 6444/09. Moreover, the prosecutor stated that the reasons for the dismissal had been stated on the record, in the presence of both petitioner and his attorney, but

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<sup>1</sup> In the July 24, 2011 letter, Williams also requested information related to a second case identified as New York County Superior Court Information Number 260/11, however, Williams is not seeking this information in this proceeding.

that a copy of this transcript was not in the file maintained by respondent. Respondent contends that ADA Hines informed petitioner of this conversation in a letter dated October 25, 2011 which, based on this information, again denied petitioner's requests. In addition, ADA Hines allegedly provided petitioner with the relevant contact information so that petitioner could obtain a copy of the transcript directly from the court stenographer. Respondent states that ADA Hines again informed petitioner that an appeal of this determination could be made to ADA Bailey. There is no indication that respondent made an appeal to ADA Bailey.

Williams now brings this Article 78 petition seeking an order vacating and setting aside respondent's determination of October 25, 2011 and directing respondent to expunge all entries of said determination and provide petitioner with the sought after records relating to Indictment 06444/09. Notably, neither party has provided the Court with a copy of the October 25, 2011 determination denying petitioner's FOIL requests.<sup>2</sup>

Respondent opposes petitioner's Article 78 proceeding and cross-moves for an order pursuant to CPLR §§ 3211(a)(2), (5) and 7804(f) denying the petition and dismissing the proceeding. Respondent argues that the action is time-barred as petitioner commenced this Article 78 proceeding more than four months after the agency's October 25, 2011 determination. Respondent maintains this Court lacks subject matter jurisdiction over this matter because the petitioner failed to exhaust his administrative remedies prior to bringing this proceeding. Moreover, respondent argues that the proceeding is moot inasmuch as respondent performed a diligent search and located no responsive documents.

In support of the cross-motion, respondent submits, *inter alia*, petitioner's requests dated July 24, 2011 and August 21, 2011; ADA Hines' initial letter dated August 31, 2011

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<sup>2</sup> It appears, based on statements made in respondent's moving papers, that the October 25, 2011 letter was attached as an exhibit to the copy of the petition provided to respondent, however, the letter was not attached to the petition as filed with this Court.

[\* 4]

denying the requests; and ADA Bailey's initial letter dated September 27, 2011 reversing ADA Hines' determination and remanding the matter back to ADA Hines.

### STANDARD

Article 78 of the CPLR provides a uniform procedure for judicial review of government action or inaction, previously provided under the common-law writs of certiorari, mandamus and prohibition (see *Harvey v Hynes*, 174 Misc2d 174, 176 [Sup Ct, Kings County 1997]; *Matter of Newbrand v Yonkers*, 285 NY 164, 174-75 [1941]). "Although Article 78 supersedes those common-law writs, it does so in procedure only. A party's right to relief still depends upon the substantive law of the former writs" (*Harvey*, 174 Misc2d at 177). Petitioner, in bringing an Article 78 proceeding in the nature of a mandamus to compel, "must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief" (*Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 NY2d 753, 757 [1991]).

As a prerequisite to making an Article 78 petition, a petitioner must first exhaust all of the available administrative remedies (see POL § 89[4][a]; *Serrano v David*, 45 AD3d 270 [1st Dept 2007]). There exists, however, certain exceptions in which a petitioner can bypass the available administrative remedies; for example, where the petitioner challenges the agency's actions as unconstitutional or beyond the agency's grant of power, or where the administrative remedies would either be futile or cause irreparable injury (see *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). Moreover, an Article 78 petition should not be dismissed pursuant to this exhaustion rule where the agency has failed to inform the petitioner of the availability of an administrative appeal (see *Barrett v Morgenthau*, 74 NY2d 907, 909 [1989]). Thereafter, the petitioner has four months from the date that the agency's determination becomes final and binding to commence an Article 78 proceeding (see CPLR 217[1]).

## DISCUSSION

The Court finds that petitioner's Article 78 proceeding is time-barred. The four-month statute of limitations to bring an Article 78 proceeding begins to run "after the respondent's refusal, upon the demand of the petitioner" (CPLR 217[1]; see also *Austin v Board of Higher Educ. of City of N.Y.*, 5 NY2d 430, 442 [1959]; *Ruskin Associates, LLC v State, Div. of Hous. & Cmty. Renewal*, 77 AD3d 401, 403 [1st Dept 2010]). It is undisputed that respondent denied petitioner's request on October 25, 2011. Furthermore, petitioner commenced this proceeding by the filing of his Article 78 petition approximately six months later on April 25, 2012. Accordingly, William's petition is hereby denied as time-barred and respondent's cross-motion to dismiss is granted.

The Court also notes that based on the representations made by respondent in his moving papers, petitioner may have failed to exhaust the available administrative remedies prior to bringing this Article 78 petition. However, due to the parties' respective failures to attach ADA Hines' October 25, 2011 determination, the Court is unable to determine whether petitioner was properly advised of his right to an administrative appeal (see *Barrett*, 74 NY2d at 909 [holding that a dismissal of the Article 78 proceeding is unwarranted because the agency failed to establish that they had notified petitioner of the availability of an administrative appeal]). Nevertheless, this issue is moot as the Court has already determined that this proceeding is time-barred.

Accordingly, petitioner's Article 78 petition is hereby denied and respondent's cross-motion to dismiss the petition is granted. The Court need not address the parties' remaining arguments as the petition is denied as time-barred.

## CONCLUSION

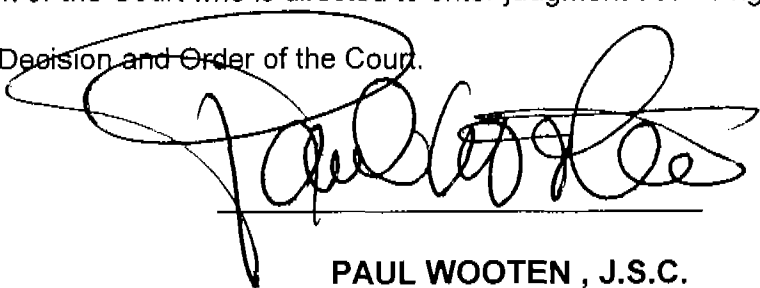
For these reasons and upon the foregoing papers, it is,

ORDERED that petitioner's Article 78 petition is denied and the proceeding is dismissed, without costs or disbursements to respondent; and it is further,

ORDERED that respondent's cross-motion to dismiss the petition is hereby granted; and it is further,

ORDERED that respondent shall serve a copy of this Order, with Notice of Entry, upon petitioner and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.



Dated: 9-10-12

PAUL WOOTEN, J.S.C.

- 1. Check one: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check if appropriate:..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART
- 3. Check if appropriate:..... OTHER  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT
- REFERENCE

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