

**Vellon v Vance**

2017 NY Slip Op 30474(U)

March 10, 2017

Supreme Court, New York County

Docket Number: 101748/2016

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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VELLON, NOUCHIE/W.,

Petitioner,

Index No. 101748/2016

- against -

CYRUS R. VANCE, N.Y. COUNTY D.A.,

Respondent.

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**Hon. C. E. Ramos, J.S.C.:**

In this Article 78 petition, petitioner Nouchie/W. Vellon ("Petitioner") challenges Records Access Officer ("RAO") Lauren Angelo's ("RAO Angelo") partial denial and partial approval of Petitioner's Freedom of Information Law ("FOIL") request dated October 9, 2014, in which he sought access to 133 categories of records related to New York County Indictment Numbers 4589/2007 and 4706/2007.

For the reasons set forth below, this Court denies Petitioner's Article 78 Petition, in its entirety.

**Background**

Petitioner is currently incarcerated at Wende Correctional Facility (Verified Petition, ¶1).

Under New York County Indictment Number 4589/2007, Petitioner was convicted in the Supreme Court, New York County of first-degree rape, first-degree criminal sexual act, and second-degree assault (Verified Answer, ¶5). On October 14, 2008, Petitioner was sentenced to 15 years in prison, with five years

of post-release supervision (Verified Answer, ¶5).

Under New York County Indictment Number 4706/2007, Petitioner was also charged with robbery. The charges were eventually dismissed, sealing the case under Criminal Procedure Law 160.05 (Verified Answer, ¶6).

In October 2012, Petitioner filed a FOIL request for "criminal case files" involving Indictment Numbers 4706/2007 and 4589/2007 ("2012 FOIL Request") (Verified Answer, ¶7). RAO Sarah Hines ("RAO Hines") granted the petition in part and denied it in part, granting Petitioner's request for certain categories of documents, upon his payment of a \$2.50 fee. RAO Hines denied access to several categories of documents, asserting the public interest privilege and New York Civil Rights Law § 50-b (Verified Answer, ¶8).

On October 2, 2014, Petitioner revoked his 2012 Foil Request (Verified Answer, ¶ 10). On October 9, 2014, Petitioner filed a FOIL request for documents involving New York County Indictment Numbers 4598/2007 and 4706/2007, requesting 133 specific categories of documents involving the "criminal case files" and a fee waiver due to his indigence ("2014 FOIL Request") (Verified Answer, ¶10). RAO Hines denied such request due to Petitioner's refusal to pay for the documents he sought access to in the October 2012 petition.

On March 11, 2015, Appeals Officer Susan Roque ("AO Roque")

upheld the denial of Petitioner's 2014 FOIL Request due to his refusal to pay the copying fee (Verified Answer, ¶11).

On June 12, 2015, Petitioner filed an Article 78 petition, which was granted by this Court on April 13, 2016, ruling that AO Roque's denial of Petitioner's 2014 FOIL Request because Petitioner failed to pay the copying fee was arbitrary and capricious, as there was insufficient evidence that Petitioner refused to pay for the documents (Petition, Ex 1). The Court remanded for a new determination of petitioner's October 2014 FOIL Request (Verified Answer, ¶12).

On May 26, 2016, RAO Angelo issued a new determination with respect to Petitioner's October 2014 FOIL request (Petitioner's Petition, Ex. 3, p. 3). RAO Angelo did not make a new determination as to Indictment Number 4706/2007, as RAO Hines previously granted petitioner access to ten pages of documents under the condition that Petitioner pay a \$2.50 fee (Verified Answer, ¶13).

In regard to Indictment Number 4589/2007, RAO Angelo granted Petitioner access to eleven categories of documents, amounting to 101 pages and one compact disc, contingent on Petitioner's payment of \$30.25 (\$.25 per page, \$5 per compact disc) (Petitioner's Petition, Ex. 3). ADA concluded that many of the documents requested were protected under Civil Rights Law § 50-b, which entitles victims of sexual abuse and assault to

privacy.

On June 6, 2016, Petitioner appealed RAO Angelo's determination, requesting the opportunity to personally review and inspect the documents which he was granted access to (Verified Answer, ¶ 16).

Subsequently, AO Roque upheld RAO Angelo's determination. AO Roque concluded that because Petitioner is incarcerated, he would not have the opportunity to personally inspect the documents. However, she entitled Petitioner to either send a representative to the District Attorney's Office to inspect the records on Petitioner's behalf or to have the records sent to him, on the condition that he pays the photocopying fee (Verified Answer, ¶ 17).

AO Roque affirmed RAO Angelo's decision not to render a determination involving Petitioner's request for documents related to Indictment Number 4706/2007, noting that RAO Hines had previously granted Petitioner access to 10 pages of documents from that case to Petitioner (Verified Answer, ¶18). AO Roque asserted that an appeal of the 2012 FOIL determination was time barred, as he did not withdraw or appeal the request for over two years.

On October 27, 2016, Petitioner filed the instant petition, seeking to make documents from Indictment Numbers 4706/2007 and 4589/2007 available for inspection at his place of incarceration,

to waive the payment required in order to review and inspect public documents, a new determination of Petitioner's request for 133 categories of documents, and a reimbursement of all costs incurred under Public Officers Law § 89[c].

### **Discussion**

A person denied access to a record in an appeal determination can bring a proceeding for review of such denial under Article 78 of the CPLR (Public Officers Law § 89[4][b]). In an Article 78 proceeding, judicial review is confined to whether the administrative action at issue was arbitrary and capricious, lacking a rational basis (*Red Apple Child Development Center v Chancellor's Bd. Of Review*, 307 AD2d 815, 815 [1st Dept 2003]). It is well settled that administrative agency's interpretation of its rules and regulations are subject to much deference (*Slesinger v Department of Housing Preservation and Development of City of New York*, 39 AD3d 246, 246 [1st Dept 2007]).

In accordance with its published rules, each agency shall make public records available for copying and inspection (Public Officers Law § 87[2]).

Petitioner asserts that a free review and inspection of the responsive FOIL documents is a statutory right which respondent has no authority to deny, regardless of Petitioner's incarceration, and that failure to allow Petitioner to access such files, free of cost, is against public interest

(Petitioner's Petition ¶6[a]). Further, Petitioner maintains that Respondent is without authority to require that a third-party representative review such documents or to deny Petitioner's request to bring the documents to his place of incarceration.

Petitioner also asserts that he is entitled to a "new" and "proper" determination of his previous FOIL request relating to Indictment Number 4706/2007, as Respondent's previous ruling was deemed arbitrary and capricious (Petition, Ex. 1). Petitioner contends that failure to do so is in contempt of this Court's previous decision (Petition, Ex. 1).

Respondent argues that because Petitioner cannot travel to the location where the records are kept, the agency is not required to make the records available at any other location (Verified Answer, ¶21) (FOIL-AO-15289). As such, Respondent argues that because Petitioner refuses to pay the photocopying fee or to appoint a third-party to review the records on his behalf, his request to review the documents was reasonably denied (Public Officers Law § 87[1][b][iii]). Respondent maintains that an agency is legally entitled to charge a fee of up to \$.25 to photocopy requested documents and there are no relevant regulations mandating a waiver for indigent applicants (Public Officers Law § 87 [1][b][ii]).

Respondent further argues that RAO Angelo properly declined to make a new determination with respect to the records from

Indictment Number 4706/2007, as RAO Hines already made a proper ruling involving the exact same documents, wherein Petitioner was granted access to 10 pages of documents upon a \$2.50 fee (Verified Answer, ¶24). Respondent cites to *Lebron v Smith*, in support of the proposition that Petitioner is not entitled to a new determination of a previous FOIL request that Petitioner failed to timely appeal (40 AD3d 515 [1st Dept 2007]).

This Court finds that Respondent's denial of a review of Petitioner's 2014 FOIL request with respect to documents from Indictment Number 4706/2007 is neither arbitrary nor capricious. Had Petitioner wished to have a subsequent determination of the 2014 FOIL request, he should have commenced the Article 78 proceeding within four months of the ADA's decision regarding the 2014 FOIL Request. This Court is persuaded that the agency's failure to issue a subsequent determination as to Petitioner's 2014 FOIL Request was merely because a ruling had already been effectuated and not timely appealed with respect to these documents.

This Court is also persuaded that it was reasonable to provide Petitioner with photocopied documents relating to Indictment Number 4706/2007 on the condition that he pay the requisite fee. It appears that this fee is not limited to incarcerated individuals, and applies to all individuals seeking such documents who are unable to personally inspect the records.



This Court further finds that Petitioner is not entitled to a reimbursement of costs associated with the instant petition, as Petitioner did not substantially prevail, it is within the public interest to protect victims of sexual abuse from disclosure and the agency acted reasonably in withholding records (Public Officers Law § 89[4][c]). The Court also denies Petitioner's request for reimbursement of costs associated with his prior Article 78 petition under Index No. 101155/2015. Although he did substantially prevail, it is not within the public interest to disclose records relating to his previous indictments (Public Officers Law § 89[4][c]). Accordingly, it is further

ORDERED that Petitioner's Article 78 Petition is denied, in its entirety; and it is further

ORDERED that Petitioner's request for litigation costs is denied.

DATED: March 10, 2017

ENTER:

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J.S.C.