

Matter of Barnes v Demarse

2012 NY Slip Op 31337(U)

May 17, 2012

Supreme Court, Franklin County

Docket Number: 2011-1201

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

**COUNTY OF FRANKLIN
X**

In the Matter of the Application of
JESSIE J. BARNES, #09-B-2707,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

**DECISION AND ORDER
RJI #16-1-2011-0531.101
INDEX # 2011-1201
ORI #NY016015J**

-against-

L. DEMARSE, Inmate Records Coordinator,
Upstate Correctional Facility, and **WILLIAM M.
GONZALEZ**, Deputy Counsel, NYS Department
of Corrections and Community Supervision,
Respondents.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Jessie J. Barnes, verified on December 6, 2011 and filed in the Franklin County Clerk's office on December 12, 2011. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the denial of various FOIL requests for access to DOCCS records. The Court issued an Order to Show Cause on December 16, 2011 and an Amended Order to Show Cause on January 12, 2012. The Court has since received and reviewed respondents' Notice of Motion to Dismiss, supported by the Affirmation of Cathy Y. Sheehan, Esq., Assistant Attorney General, dated March 1, 2012 (the "Sheehan Affirmation"), as well as petitioner's opposing papers, dated/verified March 6, 2012 and filed in the Franklin County Clerk's office on March 8, 2012.

In paragraph five of the petition it is asserted that "[t]his is a petition pursuant to Article 7804 of New York Civil Practice Law and Rules to compel production of records and documents in possession of Upstate Correctional Facility administrative officials

related to Freedom of Information Law (FOIL): [1] #11-1408; [2] #11-1654; [3] #11-1760; [4] Nov. 14, 2011; [5] Nov. 28, 2011; [and 6] #11-1834.”

The facts underlying petitioner’s six FOIL requests are set forth in paragraphs 6 through 24 of the petition. The facts underlying petitioner’s first FOIL request (#11-1408) are set forth in paragraph 6 through 9 of the petition. Although petitioner alleges that his first FOIL request was denied by the respondent Demarse on September 9, 2011 and that such denial was affirmed on administrative appeal by the respondent Gonzales on November 14, 2011, nowhere in paragraphs 6 through 9, or anywhere else in the petition, does petitioner set forth any specific legal challenge to such denial.

The facts underlying petitioner’s second FOIL request (#11-1654) are set forth in paragraphs 10 through 13 of the petition. Although petitioner asserts that his second FOIL request was effectively denied on November 2, 2011 and November 17, 2011, and that his administrative appeal from such denials was “filed” on November 20, 2011 (a Sunday), there is no allegation that a decision on administrative appeal was rendered on or before December 6, 2011, when the petition herein was dated and verified. In paragraph 13 of the petition it is asserted, in conclusory fashion, that the November 2, 2011 and November 17, 2011 responses of respondent Demarse were “. . .fraudulent and false violation of §3.4 of employee manual and deliberate and willful violation of the petitioner’s due process of law rights protected by federal and state constitutions.”

The facts underlying petitioner’s third FOIL request (#11-1760) are set forth in paragraphs 14 through 16 of the petition. According to petitioner, the November 18, 2011 response to his third FOIL request did not deny such request but required him to pay a fee that he can not afford. Although petitioner alleges that on November 19, 2011 (a Saturday) an administrative appeal was “filed” with respect to the November 18, 2011 response to his third FOIL request, there is no allegation that a decision on administrative

appeal was rendered on or before December 6, 2011, when the petition herein was dated and verified.

The facts underlying petitioner's fourth FOIL request (unnumbered but "filed" on November 14, 2011) are set forth in paragraphs 17 and 18 of the petition. According to petitioner, no response was "filed" with respect to his fourth FOIL request.

The facts underlying petitioner's fifth FOIL request (unnumbered but "submitted" on November 28, 2011) are set forth in paragraphs 19 and 20 of the petition. According to petitioner, his fifth FOIL request represented a re-request to examine the same materials set forth in the fourth FOIL request. According to petitioner, no response was "filed" with respect to his fifth FOIL request.

The facts underlying petitioner's sixth FOIL request (#11-1834) are set forth in paragraphs 21 through 24 of the petition. Although petitioner alleges that his sixth FOIL request was denied on December 1, 2011 by respondent Demarse and that an administrative appeal was filed with respondent Gonzales on December 6, 2011, there is no allegation that a decision on administrative appeal was rendered on or before December 6, 2011, when the petition herein was dated and verified.

Paragraphs 25 through 27 of the petition contain generalized allegations apparently related to all of petitioner's FOIL requests. Nowhere in these three paragraphs, however, does petitioner set forth any specific legal challenge with respect to the disposition of any of his FOIL requests. In paragraph 25, however, petitioner does make a non-specific reference to respondent Demarse's "...fraudulent responses that violates [sic] petitioner's due process of law rights protected by XIV Amend of the U.S. Const. and Art. 1 §6 of the N.Y. Const."

With respect to petitioner's first, second, third and sixth FOIL requests (#11-1408, #11-1654, #11-1760 and #11-1834) the Court finds that petitioner has failed to state a

cause of action since, as alleged in paragraph 10 of the Sheehan Affirmation, “[n]o specific allegations of failure to comply with any statutory or regulatory requirement or any action or omission that would comply as a cognizable cause of action in an Article 78 proceeding are set forth in the petition.” Petitioner simply alleges that his first FOIL request was denied and that the denial was upheld on administrative appeal; and that his second, third and sixth FOIL requests were denied, or effectively denied, with administrative appeals filed/submitted but not yet decided. Setting aside potential exhaustion of administrative remedies issues, petitioner simply fails to articulate any non-conclusory bases for his challenges to the denials/effective denials of these FOIL requests.

Notwithstanding the foregoing, to the extent petitioner alleges that no response was issued with respect to his fourth/fifth FOIL requests (unnumbered but “filed”/“submitted” on November 14, 2011 and November 28, 2011, respectively), the Court finds that he has sufficiently stated a cause of action in the nature of mandamus to compel the issuance of response(s) thereto.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that with respect to petitioner’s challenge of the denials/effective denials of his first, second, third and sixth FOIL requests (#11-1408, #11-1654, #11-1760 and #11-1834), the respondents’ motion to dismiss is granted and such challenges are severed and dismissed; and it is further

ORDERED, that with respect to petitioner’s challenges to the respondents’ failure to respond to his fourth and fifth FOIL requests (unnumbered but “filed”/“submitted” on November 14, 2011 and November 28, 2011, respectively) the respondents’ motion to dismiss is denied; and it is further

ORDERED, that respondents serve a copy of their answering papers on the petitioner on or before June 15, 2012, and that they simultaneously mail their original answering papers to the Clerk of the Court for filing, and mail a further copy of said answering papers to the undersigned; and it is further

ORDERED, that petitioner mail his original Reply to the respondents' answering papers to the Court Clerk's office, Franklin County Courthouse, 355 West Main Street, Suite 3223, Malone, New York, 12953, on or before July 6, 2012.

Dated: May 17, 2012 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice