

**Matter of Phillip v New York City Police Dept.**

2014 NY Slip Op 30408(U)

February 18, 2014

Supreme Court, New York County

Docket Number: 400683/13

Judge: Peter H. Moulton

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

PRESENT: Hon. Peter H. Moulton  
*Justice*

PART 57

KEVIN PHILLIP

INDEX NO. 400683/2013

MOTION DATE

v.

MOTION SEQ. NO. 001

NEW YORK CITY POLICE DEPARTMENT

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Papers Numbered

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

This case has been disposed pursuant to the attached written decision dated February 18, 2014.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 2/19/14

New York, New York

J.S.C. HON. PETER H. MOULTON  
PETER H. MOULTON

1. Check one: .....  Case-Disposed  Non-Final Disposition
2. Check as Appropriate: ..... Motion is:  Granted  Denied  Granted in Part  Other
3. Check if Appropriate: .....:  Settle Order  Submit Order  
 Do Not Post  Fiduciary Appointment  Reference

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 57

-----X  
In the Matter of the Petition of KEVIN PHILLIP,

Petitioner,

-against-

Index No. 400683/13

NEW YORK CITY POLICE DEPARTMENT,

Respondent,

For a Judgment Pursuant to Article 78 of the CPLR.  
-----X

**PETER H. MOULTON, J.:**

Petitioner brings this Article 78 petition to vacate Respondent New York City Department's ("NYPD") decision to deny petitioner's Freedom of Information Law ("FOIL") request under POL § 84 for records related to his criminal prosecution for burglary. Petitioner claims that respondent's decision was arbitrary and capricious. Additionally, petitioner asks this court to compel compliance with a judicial subpoena ordered by the court that presided over his criminal prosecution seeking the same records contained in petitioner's FOIL request.

Respondent cross-moves, pursuant to CPLR § 7804(f) for an order dismissing the petition on several grounds, including that POL § 87(2)(e)(i) precludes disclosure of law enforcement records where such disclosure would interfere with ongoing judicial proceedings, and that an Article 78 proceeding is an improper vehicle to compel compliance with a judicial subpoena issued by another court.

### BACKGROUND

Petitioner was arrested on July 21, 2010, and subsequently charged with burglary based on a fingerprint hit in connection with an incident that occurred on March 20, 2010. During the pendency of his criminal case, by a letter dated August 9, 2011, petitioner made a request pursuant to FOIL, for copies of records related to charges against him. Specifically, petitioner requested records related to the investigation and analysis of latent fingerprints obtained from the scene of the burglary. The NYPD's Records Access Officer (RAO) denied petitioner's request for access to the records, stating that disclosure of the records to petitioner would interfere with petitioner's pending criminal prosecution.

Petitioner appealed that denial. On November 10, 2011 the RAO sent a letter to petitioner stating that petitioner's appeal was being denied on several grounds. Notably, the RAO reiterated that the requested records were exempt from disclosure on the basis of POL § 87(2)(e)(i), in that such records, if disclosed, would interfere with pending judicial proceedings. Petitioner was further informed in the RAO's letter that petitioner could seek judicial review of the denial by commencing an Article 78 proceeding within four months of the date of the decision.

Following the denial of his FOIL request, petitioner obtained a judicial subpoena duces tecum dated March 19, 2012 from the Supreme Court, Queens County, seeking the same fingerprint records relevant to the charges then pending against him. The NYPD did not comply with the subpoena. The court did not order compliance.

Petitioner was subsequently convicted of burglary and sentenced on October 24, 2012. The same day that he was sentenced, petitioner filed a Notice of Appeal of his criminal conviction. Separately, petitioner moved to have the Supreme Court, Queens County, set aside the guilty verdict

stemming from his burglary conviction as well as set aside the sentence imposed on him pursuant to CPL § 440.20.

A month prior to being sentenced, on September 3, 2012, petitioner made a substantially similar FOIL request to the one that he had submitted in August 2011. In that request, petitioner sought the same latent fingerprint records that he had sought in his prior FOIL request. Petitioner was then informed that additional time was needed to process his new FOIL request. Petitioner did not wait to receive a response to that request and initiated this proceeding on April 17, 2013 by filing an Order to Show Cause and Verified Petition. Petitioner also filed yet another FOIL request on March 2, 2013 prior to a determination on his September 3, 2012 request. After the commencement of the instant proceeding, the RAO denied petitioner's September 3, 2012 FOIL request on June 17, 2013 on the ground that it was substantially similar in substance to his August 9, 2011 FOIL request. While the instant proceeding was pending, on July 6, 2013, petitioner appealed the RAO's denial of petitioner's 2012 FOIL request. On July 31, 2013 petitioner was informed that his administrative appeal was being denied on several grounds including, once again, the stated ground that the requested records were not subject to disclosure during the pendency of judicial proceedings.

The petition herein alleges that respondent failed to comply with the subpoena issued by the Supreme Court, Queens County, or with petitioner's numerous FOIL requests for latent fingerprint records related to his burglary charges and conviction. As previously mentioned, in conjunction with the instant proceeding, petitioner is simultaneously seeking post-conviction relief before the Appellate Division, Second Department, as well as through CPL Article 440 in Supreme Court. Petitioner's appeal and motions for post-conviction relief are still pending.

## DISCUSSION

Public Officers Law § 87(2)(e)(i) states that, “Each agency shall in accordance with its public rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that...are compiled for law enforcement purposes and which, if disclosed, would...interfere with law enforcement investigations or judicial proceedings...”

In *Matter of Legal Aid Socy. v. New York City Police Dept.*, 274 AD2d 207 (1st Dept. 2000), defendants in pending criminal prosecutions who were requesting information related to their charges, including complaint report worksheets and arrest reports, brought Article 78 proceedings challenging the denial of their FOIL requests by the NYPD. The Appellate Division denied their petitions, reversing a lower court’s decision. In doing so, the Appellate Division agreed with the NYPD’s assertion that disclosure of records in pending criminal prosecutions would interfere with those proceedings. The court held that, “[w]e are persuaded that the assertion that disclosure of records to a defendant in a pending criminal prosecution would interfere with that proceeding is a sufficiently particularized justification for the denial of access to those records under Public Officers Law § 87(2)(e)(i).” In reaching that conclusion the court noted that “FOIL disclosure during the course of the prosecution would not only ‘interfere with the orderly process of disclosure’ set forth in CPL article 240...it would also create a substantial likelihood of delay in the adjudication of that proceeding...thereby effecting a chill on that prosecution...” *Id.* at 214.

That ruling has been followed by subsequent decisions. See e.g. *Matter of Moreno v. New York County Dist. Attorney’s Off.*, 38 AD3d 358 (1st Dept. 2007) *lv. denied*, 9 NY3d 801; *Matter of Leshner v. Hynes*, 19 NY3d 57 (2012). Indeed, in *Moreno*, the court recognized that a “criminal appeal and any subsequent proceedings within the same prosecution” constitute judicial proceedings

under FOIL so as to preclude disclosure of records while an appeal or subsequent proceedings are pending. *Moreno*, 38 AD3d at 358.

Here, petitioner initially sought records pertaining to the investigation that led to his burglary arrest while the criminal prosecution was still pending. Indeed, petitioner made 2011 and 2012 FOIL requests for records directly associated with his burglary prosecution prior to trial and prior to being sentenced, respectively. As such, petitioner's initial requests sought records that were expressly exempt from disclosure for law enforcement purposes, as defined in POL § 87(2)(e)(i) and as interpreted by the First Department. Consequently, petitioner was not entitled to those records under FOIL as petitioner's case was still in the investigatory, trial, and pre-sentence stages when those requests were made.

Moreover, in light of *Moreno*, petitioner's subsequent March 2013 FOIL request following his burglary conviction and subsequent sentence were made while judicial proceedings were ongoing. At the time of the filing of petitioner's March 2013 request, petitioner had a pending appeal of his conviction for burglary. That appeal is still before the Appellate Division, Second Department. Additionally, petitioner still has motions pending for post-conviction relief under CPL Article 440 in Supreme Court, Queens County. Because those applications fall within the ambit of ongoing judicial proceedings, the relief petitioner seeks in petitioner's March 2013 FOIL request is also exempt from disclosure.

In rebuttal, petitioner claims that even if that were the case, respondent cannot cloak itself under the protections of POL § 87(2)(e)(i) absent particularized reasons why the disclosure of requested records would interfere with judicial proceedings. Such a general denial, petitioner contends, lends credence to the notion that respondent's actions were arbitrary and capricious. It is

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well settled that when considering the issue of whether an action is arbitrary and capricious, courts cannot interfere with a body's course of action unless there is no rational basis for the exercise of discretion or the action taken by that body. See *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 (1974). As such, an action is arbitrary and capricious when it "is without sound basis in reason and is ... taken without regard to the facts" *Id.* at 231.

Here, petitioner's claims that respondent's actions were arbitrary and capricious are without merit. Indeed, petitioner's main argument to support his claim is that respondent could not have adequately reviewed his requests since respondent did not give specified reasons when issuing its denials. Petitioner's assertions are based wholly upon speculation and conjecture. Moreover, the First Department has specifically stated that the city's mere assertion that disclosure will interfere with judicial proceedings is a sufficiently particularized justification to warrant denial of access to records. *Matter Legal Aid Socy.*, 274 AD2d at 213. Furthermore, if granted, petitioner's request for particularized reasons would necessitate that respondent reveal part of the essence of the records that respondent is seeking to withhold when issuing a denial. Doing so, in spirit and in practice, would undermine the core precepts of the judicial proceedings exemption specified in POL § 87(2)(e)(i). Consequently, the court finds that respondent's denial here was not arbitrary and capricious, and that the lack of specificity in respondent's denials does not preclude respondent's from asserting a pending judicial proceedings exemption.

Respondent also argues that petitioner's August 11, 2012 and March 2, 2013 FOIL requests fall outside this court's subject matter jurisdiction because petitioner did not exhaust petitioner's administrative remedies with respect to those requests before filing his petition. The court agrees.



Section 89(4)(a) of the POL provides that a “person denied access to a record may...appeal...such denial to the head” of the agency or to a designated appeals officer. One must be denied access to records and subsequently appeal that denial prior to seeking judicial intervention pursuant to Article 78 of the CPLR. *See* N.Y. Public Officers Law § 89(4)(b); *see also Matter of Harvey v. Hynes*, 174 Misc 2d 174 (Sup. Ct., Kings County 1997). In the context of FOIL, an agency must complete processing of a FOIL request and render a final adverse determination before courts will recognize that administrative remedies have been exhausted. *See Matter of Tellier v. New York City Police Dept.*, 267 AD2d 9 (1st Dept. 1999).

Here, petitioner initiated the instant Article 78 proceeding before the RAO had rendered initial determinations with respect to petitioner’s August 11, 2012 and March 2, 2013 FOIL requests. Since the RAO had not yet issued initial determinations with respect to petitioner’s FOIL request prior to the filing of the petition in this matter, there necessarily could not have been an appeal or final agency denial before this proceeding was initiated. Thus, petitioner had not satisfied the conditions precedent to initiating an Article 78 proceeding as set forth in POL § 89(4) at the time that he filed his petition. Consequently, since petitioner failed to exhaust his administrative remedies with respect to his August 11, 2012 and March 2, 2013 FOIL requests, the court lacks subject matter jurisdiction over those requests.

It is also worth noting that petitioner concedes that the same records that petitioner is requesting pursuant to FOIL are discoverable under CPL § 240.20. Notwithstanding CPL § 240.20, petitioner argues that he should be able to seek the same records that are generally discoverable under that provision by way of FOIL. In doing so petitioner erroneously relies on *Matter of Gould v. New York City Police Dept.*, 89 NY2d 267 (1996). Contrary to petitioner’s assertions, in *Gould*

the court stated that while records could conceivably be disclosed under both FOIL and CPL article 240, if an enumerated FOIL exemption precluded such disclosure then an individual's request for material would be denied. In this matter, an exemption to FOIL disclosure is applicable. Petitioner does not deny that. Moreover, even if an exemption did not apply, adopting petitioner's dual exercise of FOIL and CPL § 240.20 while proceedings are pending for practical purposes would circumvent criminal courts from adhering to discovery provisions that are already in place by allowing individuals to seek the same records simultaneously under two mechanisms instead of one. Petitioner provides no adequate legal or practical support for why that should be the case in this proceeding.

Petitioner's remaining argument is that an Article 78 proceeding can be used as a vehicle to compel respondent's previous non-compliance with a court ordered subpoena. As respondent correctly points out, Article 78 relief is not available to compel compliance with a judicial subpoena. See *Matter of Brown v. Eimicke*, 144 AD2d 460 (2d Dept. 1988); see also *Antunes v. Div. of Hous. and Community Renewal of State of New York*, 2011 NY Slip Op. 33074 (U) (Sup. Ct., N.Y. County 2011). The exclusive remedy to compel such relief is provided by CPLR § 2308(a). *Id.*

Here, petitioner was able to get a so-ordered subpoena to compel respondent to disclose fingerprint records to him. The subpoena was not complied with. When the court subsequently refused to order respondent's compliance, petitioner initiated the instant Article 78 proceeding instead of challenging the court's determination using CPLR § 2308(a). This court takes no position on the merits of petitioner's application. CPLR Article 78 relief does not lie here. As such, petitioner should not be permitted to make his application without using the adequate statutory

remedy available to him.

Accordingly, it is

**ORDERED and ADJUDGED** that respondent's cross-motion to dismiss the petition is granted, the petition is denied, and the proceeding is dismissed.

Dated: February 18, 2014

ENTER:



J.S.C.

**HON. PETER H. MOULTON**

**UNFILED JUDGMENT**

This judgment has been entered by the Honorable Clerk and a copy of the same has been filed for the record. The Clerk hereby certifies that the same has been recorded and entered in the County Clerk's Office (Book 1214).