

PRESENT: HON. THOMAS J. McNAMARA
Acting Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of an Article 78 Proceeding

BILL ROBINSON,

Petitioner,

-against-

ANDREW CUOMO, in his official capacity as Governor
of the State of New York; NEW YORK DIVISION OF
STATE POLICE; and JOSEPH D'AMICO, in his
official capacity as Superintendent of the New York
Division of State Police,

Respondents.

(Supreme Court, Albany County, Article 78 Term)

APPEARANCES: Paloma A. Capanna, Esq.
Attorney for Petitioner
633 Lake Road
Webster, New York 14580

Eric T. Schneiderman
Attorney General of the State of New York
(By: Joshua Farrell, Assistant Attorney General of Counsel)
Attorney for Respondents
The Capitol
Albany, New York 12224-0341

McNamara, J.

On January 27, 2014 the New York State Police (NYSP) received a request pursuant to the Freedom of Information Law (FOIL; Public Officers Law article 6) for documents related to the registration of various firearms that may qualify as assault weapons. Thereafter, on February 3, 2014 the Records Access Officer

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(RAO) for NYSP sent a letter to petitioner acknowledging receipt of the request and advising petitioner that a written response would be provided in approximately 20 days. No response was provided in that time. In April and June 2014 petitioner sent letters to the RAO seeking a response to the FOIL request. In July 2014 petitioner, treating the lack of a response as a constructive denial of the request, filed an administrative appeal with the NYSP. Having received no response to the administrative appeal, petitioner commenced this proceeding pursuant to CPLR article 78 in October 2014. On December 5, 2014, just prior to the return date of this proceeding, NYSP issued a response denying petitioner's FOIL request. The denial was based on a determination that the documents sought are exempt from disclosure under FOIL by Penal Law §400.02. Respondents have now moved to dismiss the action arguing that the proceeding is moot, the court lacks subject matter jurisdiction and the petition fails to state cause of action.

Respondents contend that it neither granted nor denied the FOIL request until December 5, 2014 and on that basis, argues that the petition has been rendered moot and is further subject to dismissal based on a failure to exhaust an available administrative remedy. Recognizing that this contention does not address the issue of constructive denial based on the length of the delay in responding to the request, respondents attempt to establish that the delay was reasonable and therefore, did not constitute a constructive denial. To that end respondents have submitted an affidavit by the current RAO, T/Lieutenant Debra Benziger, in which she sets forth circumstances she contends made the delay reasonable.

Though there is no specific time period in which an agency must respond to a FOIL request (*Matter of Data Tree v Romaine*, 9 NY3d 454, 465 [2007]), the regulations promulgated by the Committee on Open Government pursuant to Public Officers Law § 87 (1) (b) provide a framework for providing a timely response and when a requester may deem a request constructively denied (21 NYCRR part 1400). As is

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relevant to the circumstances here, the regulations require the agency to respond to a request within five business days of the receipt of a request by:

“acknowledging the receipt of a request in writing, including an approximate date when the request will be granted or denied in whole or in part, which shall be reasonable under the circumstances of the request and shall not be more than twenty business days after the date of acknowledgment, or if it is known that circumstances prevent disclosure within twenty business days from the date of such acknowledgment, providing a statement in writing stating the reason for inability to grant the request within that time and a date certain, within a reasonable period under the circumstances of the request, when the request will be granted in whole or in part” (21 NYCRR 1401.5 [c] [3]).

In this instance the agency responded to the request within 5 business days and advised petitioner that a response would be provided in approximately 20 days. The agency, however, failed to respond within the 20 days. A failure to comply with the time limitations provided for constitute a denial of a request that may be appealed (21 NYCRR § 1401.5 [e]). Included among the instances of constructive denial are situations where the agency:

“fails to respond to a request within a reasonable time after the approximate date given or within twenty business days after the date of its acknowledgment of the receipt of a request” (21 NYCRR § 1401.5 [e] [4]); or “does not grant a request in whole or in part within twenty business days of its acknowledgment of the receipt of a request and fails to provide the reason in writing explaining its inability to do so and a date certain by which the request will be granted in whole or in part” (21 NYCRR § 1401.5 [e] [6]).

Here, not only was a response not provided within or near the expected 20 days but the agency failed to offer any explanation for the ongoing delay even after two inquiries by the requester made months after the original request. Until now, no explanation was offered for any part of the 11 month delay. Moreover, the circumstances outlined in the affidavit provided by the agency in an attempt to establish the

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reasonableness of the delay have no connection to the response in which a claim of exemption is asserted. According to Benziger, in the period from January through September 2014 the State Police received 2,019 FOIL requests including 36 individual requests for records involving subject matter similar to petitioner's request. In addition, the NYSP FOIL Unit experienced a staffing shortage when three members of the unit retired. However, there is no indication that a search for the requested records was made or, was needed. Ultimately, the request was denied because the records were deemed exempt. In some instances, such as where an attorney-client exemption is claimed, a given document must be examined to determine if the exemption applies. Here, the claim of exemption was based on the fact that, according to respondents, the records had been assembled or collected for purposes of inclusion in the State Police database created pursuant to Penal Law §400.02. Using the analysis employed by the agency, the claim of exemption was arrived at by comparing the nature, not the content, of the requested documents to the statute. As such it was unnecessary to examine the content of any responsive document and the circumstances relied on by the agency played no part in the delay.

Petitioner, therefore, was justified in treating the delay as a constructive denial and was entitled to submit an appeal (21 NYCRR §1401.5 [e]). When the agency failed to determine the July 14, 2014 appeal within ten business days of its receipt, the omission constituted a denial of the appeal (21 NYCRR § 1401.7 [f]). Petitioner was then free to commence this proceeding which it did in October 2014. Furthermore, as the proceeding was appropriately commenced following a constructive denial of an appeal, the petition is not subject to dismissal for failure to exhaust an available administrative remedy.

Respondents also argue that the petition should be dismissed for failure to state a cause of action because the material sought is exempted from disclosure under FOIL by Penal Law §400.02. FOIL provides

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a number of exemptions which serve to exclude certain categories of documents from the statutory presumption that government records should be available to the public. Included among those exemptions is one for documents “specifically exempted from disclosure by state or federal statute” (Public Officers Law §87 [2] [a]). Penal Law §400.02 provides that:

“[t]here shall be a statewide license and record database which shall be created and maintained by the division of state police the cost of which shall not be borne by any municipality. Records assembled or collected for purposes of inclusion in such database shall not be subject to disclosure pursuant to article six of the public officers law.”

Thus, to the extent that the material sought by petitioner constitutes records assembled or collected for inclusion in the statewide license database, they would be exempt from disclosure under FOIL.

The FOIL request submitted by petitioner contains a list of 15 categories of records to be inspected. Each category relates in some manner to the registration of firearms but no category includes a request to inspect a registration record. Instead petitioner sought to inspect records showing the “total number” or “the number” of applications to register, or individuals who submitted applications to register, or weapons registered.

In the December 5, 2014 letter denying the request the agency conceded that the “numbers” sought by petitioner “are information kept by the State Police in physical form and, thus, plainly constitute ‘records’ [under FOIL].” The letter goes on to explain that because the records sought “are derived from documents that were assembled or collected for purposes of inclusion in the State Police’s database, they are not subject to disclosure under FOIL”.

Where “statutory language is special or technical and does not consist of common words of clear import, courts will generally defer to the agency’s interpretative expertise unless that interpretation is

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unreasonable, irrational or contrary to the clear wording of the statute" (*Kennedy v Novello*, 299 AD2d 605, 607 [3d Dept 2002], lv denied 99 NY2d 507[2003] [internal quotation marks and citations omitted]). No such deference is accorded when "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]).

Penal Law §400.02 does not employ special or technical language. Instead the statute refers simply to "[r]ecords assembled or collected for purposes of inclusion in [the] database." The agency argues that in using the word "assembled" the legislature meant to make a distinction from records "collected" and to thereby exempt all aggregations, surveys, tallies and derivative compilations of data. The agency's interpretation suggests that the legislature intended to exempt records collected for inclusion in the database and records assembled from information included in the database. That interpretation, however, is very different from the result achieved by the legislative language. The language chosen creates a common thread between assembled and collected records that rests on "inclusion" of those records in the database. The agency's interpretation ignores that connection. By the agency's own admission the records sought were neither assembled nor collected for "inclusion" in the database but rather were "derived" from records in the database. Consequently, the exemption asserted by the agency does not apply to the records sought by petitioner and as that is the only basis offered by the agency for denying access, the records should be provided.

Accordingly, it is

ORDERED AND ADJUDGED, that the motion to dismiss the proceeding is denied and it is further,

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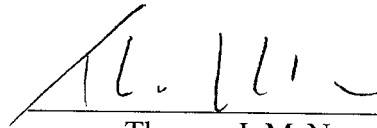
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ORDERED AND ADJUDGED, that the New York State Division of State Police is directed to provide petitioner access to the records sought by his request dated January 22, 2014.

This constitutes the judgment of the Court. The original judgment is returned to the attorney for petitioner. A copy of the judgment and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this judgment, and delivery of a copy of the judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED AND ADJUDGED.
ENTER.

Dated: Saratoga Springs, New York
April 30, 2015



Thomas J. McNamara
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition dated September 29, 2014;
2. Verified Petition dated September 19, 2014, with Exhibits A through I annexed thereto;
3. Affirmation of Paloma A. Capanna dated September 29, 2014;
4. Supporting Affidavit of George Rogero, sworn to October 20, 2014, with Exhibits A through D annexed thereto;
5. Consolidated Memorandum of Law dated October 22, 2014
6. Notice of Motion dated December 5, 2014;
7. Affidavit in Support of Motion to Dismiss of Debra L. Benziger, sworn to December 5, 2014, with Exhibits A through D annexed thereto;
8. Memorandum of Law dated December 5, 2014; and
9. Answering Affirmation of Paloma A. Capanna, dated December 22, 2014.