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IN THE MATTER OF THE APPLICATION OF
SERGIO HECTOR,

Petitioner,

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

-against-

NEW YORK STATE DIVISION OF PAROLE,

Respondent

DECISION AND JUDGMENT

Index No. 8434-08
RJI No. 01-08-ST9677

Albany County Clerk
Document Number 10366233
Rcvd 03/05/2009 9:29:42 AM



(Supreme Court, Albany County, All Purpose Term)

APPEARANCES:

Sergio Hector, 85-A-2157
Petitioner Pro Se
Fishkill Correctional Facility
P.O. Box 307
Beacon, NY 12508

Andrew M. Cuomo
Attorney General of the State of New York
(Aaron M. Baldwin, Esq., Assistant Attorney General)
Attorney for Respondent
The Capitol
Albany, New York 12224-0341

Connolly, J.:

Petitioner, Hector Sergio, an inmate currently incarcerated at Fishkill Correctional Facility is challenging the denial of his June 11, 2008 FOIL request. Petitioner is seeking disclosure of "the name of all inmates convicted of A-1 violent felony who appeared or reappeared before the Parole Board on March, April, May and June 2008; and how many were granted release and how many were denied release." On June 26, 2008 respondent denied

196

petitioner's request stating that respondent "cannot release the information you have requested". Petitioner submitted an appeal of such denial on July 16, 2008, which was acknowledged by the respondent by letter dated August 6, 2008 and stated that petitioner's appeal was being reviewed and a response could be expected within ten days. Subsequently, in September of 2008, petitioner filed the instant Article 78 petition as petitioner had not received a decision concerning his appeal. Petitioner argues that the records being requested are available to the public through respondents' website and accordingly, petitioner should be provided access to such information. Respondents oppose the motion arguing that the petition is moot and fails to state a cause of action.

Initially, the petition is not moot. Respondents argue that as petitioner received, by letter dated October 7, 2008, a decision concerning his appeal, his petition is moot. The Court notes that the petition did not seek the Court to compel respondent to provide an appeal decision but rather to direct, *inter alia*, respondent to comply with the public officers law and effect disclosure of the records requested by petitioner. Accordingly, while petitioner's FOIL appeal was subsequently denied on October 7, 2008, such determination does not render the petition moot.

Respondent's initial denial of petitioner's FOIL request did not specify the grounds upon which such request was denied, merely stating that respondent "cannot release the information you have requested". It has been held that where an agency fails to furnish a determination concerning a FOIL appeal the applicant will be deemed to have exhausted his administrative remedies and will be entitled to seek his judicial remedy, which petitioner has done in this case (*see generally, Matter of Floyd v. McGuire*, 87 AD2d 388 [1st Dept., 1982]). The subsequent appeal determination rendered on October 7, 2008 by respondent provides that petitioner's FOIL

request is denied as such information is exempt from disclosure because it is an invasion of privacy.

Petitioner argues, however, that the information he seeks does not fall into any of the exemptions enumerated in the Public Officers Law particularly, as such information is generally available to the public through respondents' website. Respondent has not denied that such information is available through its website nor asserted that respondent is unable to provide such information on any other basis.

It is well settled that agency records are presumptively open to the public unless otherwise specifically exempted (*see Matter of Collins v. NYS Division of Parole*, 251 AD2d 738 [3rd Dept., 1998]). While the Court is cognizant of the confidentiality of parole case record information, the information petitioner seeks herein is readily available to the public (*see id.*). Further, “[t]o properly apply the exemption for ‘unwarranted invasion of personal privacy’, the court must weigh the competing interests of public access and personal privacy. Neither an individual's status as a criminal defendant nor the personal purpose for which he or she seeks the records is relevant to whether their release is in the public's interest (*Matter of Edwards v. New York State Police*, 44 AD3d 1216 [3rd Dept., 2007] [internal quotations and citations omitted]). In this case, however, the information that petitioner seeks is readily available to the public, and, accordingly such information is not exempt from disclosure on privacy grounds. Respondent has raised no other basis for such denial. Accordingly, petitioner is entitled to the relief requested.

Finally, the Court notes that petitioner's amended verified petition has not been properly submitted to the Court as petitioner failed to obtain authorization from the Court prior to filing the amended petition, and accordingly, such amended petition has not been considered (see

CPLR 402).

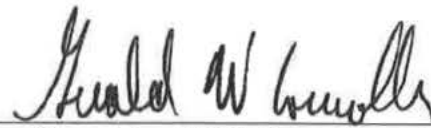
Based upon the foregoing, it is

ORDERED, ADJUDGED and DECREED that the instant article 78 proceeding is hereby granted to the extent that respondent shall be directed to comply with petitioner's FOIL request and petitioner is granted costs and disbursements totaling \$50.00.

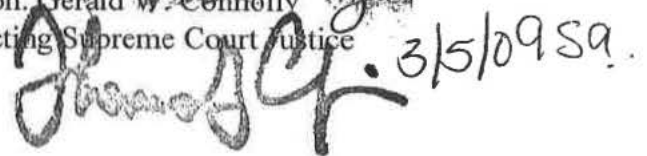
This shall constitute the Decision, Order and Judgment of this Court. All papers, including this Decision, Order and Judgment are being returned to the attorney for respondent. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding filing, entry, or notice of entry.

ENTER

Dated: February 6, 2009
Albany, New York



Hon. Gerald W. Connolly
Acting Supreme Court Justice



Papers Considered:

1. Petition dated September 24, 2008 with accompanying exhibits;
2. Answer dated December 10, 2008; Affirmation of Aaron Baldwin dated December 10, 2008 with accompanying exhibits A-D.