

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

HUMAN RIGHTS DEFENSE CENTER,

Petitioner,

-against-

NEW YORK CITY DEPARTMENT OF
CORRECTIONS; LAURA MELLO, in her
official capacity as Records Access Officer;
and RUBY MARIN-JORDAN, in her official
capacity as Records Appeal Officer,

Respondents.

For Relief Pursuant to Article 78
of the New York Civil Practice Law and
Rules.

Index No.

Oral Argument Requested

VERIFIED PETITION

Petitioner Human Rights Defense Center, by its attorneys at Covington & Burling LLP, submits this Verified Petition pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR 78 Petition”) and respectfully shows that:

PRELIMINARY STATEMENT

1. The Human Rights Defense Center (“HRDC”) is seeking relief from this Court because the New York City Department of Corrections (“DOC”) has constructively denied two of its requests for records under the Freedom of Information Law (“FOIL”).
2. On February 21, 2018, HRDC wrote to the DOC seeking records relating to video calling and visitation services provided at DOC facilities and the transfer or release of funds to inmates at the time of release from custody.
3. On the same day, HRDC also wrote to the DOC seeking records pertaining to environmental violations and data on environmental quality at DOC facilities on Rikers Island.

4. DOC initially ignored these requests, which constituted a constructive denial under N.Y. Pub. Off. Law § 89(3)(a).

5. On March 14, 2018, pursuant to N.Y. Pub. Off. Law § 89(4)(a), HRDC appealed the DOC's constructive denial of HRDC's requests.

6. After HRDC appealed, on March 30, 2018, the DOC produced some records in partial response to HRDC's request regarding video calling and visitation services and agreed to produce a further but indefinite quantity of additional responsive documents within two months.

7. Also on March 30, 2018, regarding HRDC's request related to environmental violations and data on environmental quality, the DOC indicated that it was still in the process of identifying potentially responsive records and that it expected to provide a response in three months.

8. Now over a year and a quarter later, HRDC has heard nothing further from the DOC, and DOC has failed to respond to HRDC's multiple attempts to engage with it.

9. As explained below, the DOC's conduct constitutes a constructive denial under N.Y. Pub. Off. Law § 89(4)(a). This constructive denial is not in accordance with any exemptions under FOIL or otherwise permitted by FOIL, and is thus arbitrary and capricious. The Court should compel the DOC to release the requested records within 30 days, which is a reasonable amount of time to respond given the nature of the requests and the long period during which the requests have already been pending.

JURISDICTION AND VENUE

10. Petitioner has exhausted all administrative remedies, which means that this Court has jurisdiction over the instant matter under N.Y. Pub. Off. Law § 89(4)(b) and CPLR. § 7801.

11. The venue lies in Queens County, New York under CPLR. § 506 because both the initial constructive denial and the appellate decision upholding such constructive denial were undertaken by departments of the DOC located in Queens County.

FACTUAL BACKGROUND

A. Human Rights Defense Center's Background and Mission

12. For more than twenty-nine years, HRDC has worked in the core of this nation's criminal justice system—its prisons and jails—to ensure the humane and constitutional treatment of incarcerated individuals.

13. Through education, advocacy, and outreach, HRDC works to safeguard the basic human rights of incarcerated individuals, and to ensure public transparency and oversight of the nation's publicly-funded carceral facilities.

14. To accomplish its mission, HRDC gathers information from governmental entities around the country and publishes the information in its journals and on its websites.

15. HRDC publishes and distributes books, magazines, and other information containing news and analysis about prisons, jails, and other detention facilities, prisoners' rights, court rulings, management of prison facilities, prison conditions, and other matters pertaining to the rights and interests of incarcerated individuals.

16. HRDC publishes two magazines: *Prison Legal News (PLN)* and *Criminal Legal News (CLN)*.

17. *PLN* is a legal journal that reports news and litigation about carceral facilities. *PLN* has published monthly since 1990 and is delivered to over 9,000 people in all 50 states, although the estimated actual readership is around ten times that number. *PLN's* subscribers include lawyers, journalists, judges, courts, public libraries, and universities. *PLN* also maintains a website that receives about 100,000 visitors per month.

18. *CLN* is a legal journal launched in November 2017. *CLN* reports on criminal law decisions from the state and federal systems, focusing on legal developments affecting the fact and duration of confinement. *CLN* also covers civil rights litigation against police, prosecutors, and court systems.

19. HRDC publishes books about the criminal justice system and legal issues affecting prisoners.

B. The FOIL Requests

20. HRDC made its records requests in two letters sent via email dated February 21, 2018. *See*, Affirmation of Felicia C. Albano in Support of the HRDC’s CPLR Article 78 Petition (“Albano Aff.”), Ex. A (HRDC FOIL Request for Records Regarding Environmental Violations and Environmental Quality dated Feb. 21, 2018); and Ex. B (HRDC FOIL Request for Records regarding Video Visitation and Debit Release dated Feb. 21, 2018).¹

21. The Request for Records Regarding Environmental Violations and Environmental Quality (“Environmental Request”) requested documents pursuant to N.Y. Pub. Off. Law §§ 84 through 90. The Environmental Request requested records pertaining to environmental violations and data on environmental quality at DOC facilities on Rikers Island.

22. The Environmental Request specified that responsive records would include:

1. Documents related to actual or alleged violations of state or federal environmental laws or regulations. This request includes, but is not limited to, documents pertaining to:
2. Actual or alleged violations of state or federal air pollution laws or regulations, including but not limited to, emissions of any air pollutant such as methane, ozone, particulate matter (“PM”), hazardous air pollutants, lead, and carbon dioxide;
3. Actual or alleged violations of state or federal water pollution laws or regulations, including but not limited to, documents pertaining to both point and nonpoint

¹ All referenced exhibits are attached to the accompanying Affirmation of Felicia C. Albano in Support of the HRDC’s CPLR Article 78 Petition.

sources of pollutants, sewage discharges, improper disposal of chemicals or toxic waste, drinking water quality, and violations of any state or federal discharge permits;

4. Actual or alleged violations of state or federal land, soil, or solid waste pollution or disposal laws or regulations, including but not limited to, documents pertaining to leaking underground storage tanks, superfund or brownfield sites, or groundwater contamination on Rikers Island.

5. All Environmental Impact Statements prepared by NYC DOC, and all State Environmental Quality Review (SEQR) approval process documents involving any proposed projects on Rikers Island.

6. All complaints by inmates or NYC DOC employees pertaining to noxious odors or emissions or indoor air quality on Rikers Island, and responses to those complaints. This request includes any lawsuits filed by inmates or NYC DOC employees.

7. Documents related to any fires, explosions or combustion incidents actually or potentially caused by methane gas at any location on Rikers Island.

8. Documents related to any actual or potential environmental or occupational health hazards, emissions, or human exposure associated with the historical landfill on Rikers Island, and documents that describe the contents of the historical landfill.

23. The Request for Records regarding Telephone Services, Debit Release Cards, and Video Visitation (“Telephone and Debit Request”) also specified that it requested documents pursuant to N.Y. Pub. Off. Law §§ 84 through 90. The Telephone and Debit Request requested records pertaining to telephone and video calling/visitation services provided at DOC facilities, and the transfer or release of funds to inmates at the time of release from custody.

24. The Telephone and Debit Request specified that responsive records would include:

Video calling/visitation services:

1. All contracts or other agreements, in effect at any time from January 1, 2010, to the present and inclusive of exhibits, addenda and extensions, between NYC DOC and any provider of video calling/visitation services at any NYC DOC facility.

2. Records detailing all payments made to NYC DOC, or to the City of New York for the NYC DOC, from or on behalf of any video calling/visitation services provider, from January 1, 2010, to the present, either within or outside the contract, and the amounts of money received by such services providers during such time period.

3. Documents describing rates, fees, and guidelines for making payments for video calling/visitation services utilized by inmates at NYC DOC that have been in effect at any time from January 1, 2010, to the present including but not limited to when and how payment for these services is made and whether the fees are paid by the inmate or recipient of a video call.

4. All NYC DOC policies related to in-person visitation in effect at NYC DOC facilities from January 1, 2010, to the present.

5. All NYC DOC policies related to video calling/visitation in effect at NYC DOC facilities from January 1, 2010, to the present.

Traditional calling services:

6. All contracts or other agreements, in effect at any time from January 1, 2010, to the present and inclusive of exhibits, addenda and extensions, between NYC DOC and any provider of telephone services for inmates at any NYC DOC facility.

7. Records detailing all payments made to NYC DOC, or to the City of New York for the NYC DOC, from or on behalf of any provider of telephone services for inmates, from January 1, 2010, to the present, either within or outside the contract, and the amounts of money received by such services providers during such time period.

8. Documents describing rates, fees, and guidelines for making payments for telephone services utilized by inmates at NYC DOC that have been in effect at any time from January 1, 2010, to the present including but not limited to when and how payment for these services is made and whether the fees are paid by the inmate or recipient of a telephone call.

9. All NYC DOC policies related to telephone services for inmates in effect at NYC DOC facilities from January 1, 2010, to the present.

Transfer or release of funds to inmates upon release from custody:

10. All NYC DOC policies and procedures, in effect at any time from January 1, 2010, to the present, and inclusive of exhibits, regarding the transfer or release of funds to an inmate at the time of release from custody.

11. All contracts or other agreements, in effect at any time from January 1, 2010, to the present, and inclusive of exhibits, addenda and extensions, between NYC DOC or the City of New York acting on behalf of NYC DOC, and any provider of services used to transfer or otherwise release or provide funds to inmates upon their release from custody.

12. All contracts or other agreements, in effect at any time from January 1, 2010, to the present, and inclusive of exhibits, addenda and extensions, between any provider of services used to transfer or otherwise release funds to inmates upon their release from custody, and any financial institution, which the NYC DOC was privy to or otherwise has in its possession, and the cost to inmates of such fund-transfer services.

13. Documents sufficient to show all options for transfer or release of funds available to inmates upon release from NYC DOC custody, including documents describing all other options, if any, available to inmates other than receipt of their funds by means of a debit release card upon release from NYC DOC.

25. The DOC Records Access Officer never acknowledged receipt of the Environmental Request or the Telephone and Debit Request, and thus did not notify HRDC whether it would grant or deny the requests.

26. On March 14, 2018, HRDC sent two letters to the Records Appeal Officer by Certified U.S. Mail. Albano Aff. Ex. C (Certified U.S. Mail Receipts); Ex. D (HRDC FOIL Appeal Letter regarding Environmental Quality dated Mar. 14, 2018); and Ex. E (HRDC FOIL Appeal Letter regarding Telephone Services and Debit Release Funds dated Mar. 14, 2018).

27. The letters noted that DOC had failed to either make the requested records available, deny the requests in writing, or furnish a written acknowledgment of the receipt and an approximate date when the requests would be granted or denied within five days, in contravention of N.Y. Pub. Off. Law § 89(3)(a). Such a failure, HRDC noted, constituted a constructive denial of the requests. Albano Aff. Exs. D and E.

28. HRDC in the letters appealed the constructive denial of both requests, requesting that DOC provide access to the records sought.

29. On March 30, 2018, Ruby Marin-Jordan, the Records Appeal Officer, sent two letters in response to the two appeals. Albano Aff. Ex. F (Letter from Ruby Marin-Jordan Responding to Appeal of Environmental Request dated Mar. 29, 2018); and Ex. G (Letter from Ruby Marin-Jordan Responding to Appeal of Telephone and Debit Request dated Mar. 29, 2018).²

² Although the two letters were dated March 29, 2018, they were emailed to HRDC on March 30, 2018.

30. In response to the appeal of the Environmental Request, the Records Appeal Officer indicated that the DOC had identified no responsive records to some parts of the request. For other parts of the request, the Records Appeal Officer indicated that the DOC “is still in the process of identifying records potentially responsive to the request, and expects to provide its response in three months.”

31. In response to the appeal of the Telephone and Debit Request, the Records Appeal Officer indicated that the DOC had identified no responsive records to some parts of the request. For others, the Records Appeal Officer enclosed responsive documents, and also noted that the DOC “is in the process of identifying records . . . and will respond within two months.”

32. HRDC has received no further correspondence from the DOC since the Records Appeal Officer’s letters of March 29, 2018.

33. On August 13, 2018, HRDC wrote an email to the DOC requesting a further update. Albano Aff. Ex. H (Email from Michelle Dillon to Danielle Porter dated Aug. 13, 2018). HRDC received no response.

34. On February 20, 2019, HRDC sent two letters to the DOC by Certified U.S. Mail. In the letters, HRDC requested that the DOC provide all responsive documents within 30 days, and stated that HRDC “will treat any further failure to respond within 30 days as a constructive denial” of HRDC’s appeal for purposes of litigation. Albano Aff. Ex. I (Letter from Michelle Dillon to Ruby Marin-Jordan re: 2018FR1210, Environmental Violations³ dated Feb. 20, 2019); and Ex. J (Letter from Michelle Dillon to Ruby Marin-Jordan re: 2018FR1211, Telephone Services and Debit Release dated Feb. 20, 2019). HRDC received no response.

³ As a result of a typographical error, the subject line of this letter incorrectly states “New York Freedom of Information Law (FOIL) Request for Records regarding Video Visitation and Debit Release.”

CAUSE OF ACTION: ARTICLE 78 REVIEW
OF A WRONGFUL DENIAL OF A FOIL REQUEST

35. Article 78 is the appropriate method for obtaining judicial review of agency determinations concerning FOIL requests. *See* N.Y. Pub. Off. Law § 89(4)(b).

36. HRDC has requested, pursuant to the Freedom of Information Law, a request for a discrete and identifiable set of public records from the DOC, which HRDC described with particularity.

37. Failure to respond within the two- to three-month timeframe that the Records Appeal Officer promised constitutes a denial under 21 NYCRR § 1401.5(e)(4), which states that it constitutes a denial when an agency “fails to respond to a request within a reasonable time after the approximate date given.”

38. Such a constructive denial was arbitrary, capricious, an abuse of discretion, and patently unreasonable.

39. The DOC, despite stating it would turn over materials within two or three months, has not produced the material, despite the passage of more than a year since the DOC’s self-imposed deadline.

40. HRDC exhausted its administrative remedies when it appealed the initial constructive denials, and when the DOC constructively denied HRDC’s appeal by failing to respond within 30 days of HRDC’s February 20 letters. The DOC has provided no justification for failing to abide by its own timeline, and failing to respond to repeated attempts by HRDC to engage with the DOC in good faith.

41. The failure of the DOC to respond to HRDC’s request on the timeline it set fails to comply with the directives of N.Y. Pub. Off. Law §89(4)(a), which states that the agency must

either provide access to records sought or provide reasons for denial of a request “within ten business days” after an appeal is taken.

42. The legal basis for HRDC’s petition is set forth in the accompanying Memorandum of Law in Support of Verified Petition, and is incorporated by reference herein.


RELIEF REQUESTED

1. Petitioner seeks judgment:
 - a. Pursuant to CPLR. § 7806, directing Respondent to comply with their duty under FOIL to perform an adequate search for the records requested in Petitioner’s FOIL requests dated February 21, 2018, and to disclose all responsive records within 30 days of the Court’s order;
 - b. Pursuant to N.Y. Pub. Off. Law § 89, awarding attorneys’ fees and reasonable litigation costs; and

2. Granting such other order and further relief as the Court deems just and proper.

Dated: New York, New York
July 18, 2019

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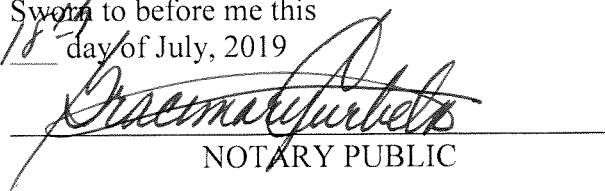
VERIFICATION

FELICIA C. ALBANO, an attorney duly admitted to practice in the State of New York, affirms that she has reviewed the foregoing petition pursuant to Article 78 of the New York Civil Practice Law and Rules with Petitioner, and that all factual allegations are true upon personal knowledge or upon information and belief. Pursuant to CPLR § 3020(d)(3), the Petitioner is not verifying because it is a corporation that is not in the county where this pleading is being made, nor in the county where this attorney has her office.



Felicia C. Albano
COVINGTON & BURLING LLP
620 Eighth Avenue
New York, NY 10018

Sworn to before me this
18th day of July, 2019



NOTARY PUBLIC

Gracemary Curbelo
Notary Public, State of New York
No. 01CU6288700, Qualified in Bronx County
Certificate Filed in New York County
Commission Expires 9/9/2021