COURT OF APPEALS
OF THE STATE OF NEW YORK

Jonathan Corbett, Petitioner-Plaintiff v. The City of New York, Thomas M. Prasso, Respondent-Defendants	New York County S. Ct. Index No. 158273/2016

MOTION FOR LEAVE TO APPEAL

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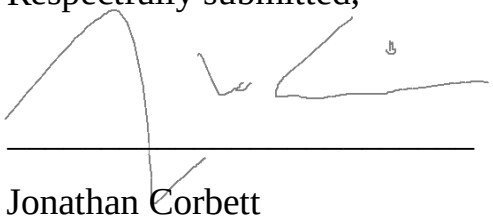
COURT OF APPEALS
OF THE STATE OF NEW YORK

Jonathan Corbett, Petitioner-Plaintiff v. The City of New York, Thomas M. Prasso, Respondent-Defendants	New York County S. Ct. Index No. 158273/2016 **NOTICE OF MOTION**

PLEASE TAKE NOTICE that upon the papers annexed hereto, the undersigned will move this Court on the 15th day of May, 2018 at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, 11207, for an order pursuant to N.Y. C.P.L.R. § 5602 granting Petitioner-Plaintiff Jonathan Corbett leave to appeal an order of the Appellate Division, First Department entered on April 3rd, 2018, or as soon as the Court may hear this matter thereafter, together with such other and further relief as the Court deems just and appropriate. Opposition papers must be filed with the Court and served upon the undersigned in the time and manner specified by Rule 500.22 and 500.23 of this Court.

Dated: New York, New York
April 30th, 2018

Respectfully submitted,



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Motion for Leave to Appeal

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Jonathan Corbett, Petitioner-Plaintiff v. The City of New York, Thomas M. Prasso, Respondent-Defendants	New York County S. Ct. Index No. 158273/2016 **MOTION FOR LEAVE TO APPEAL**

I. Questions Presented

1. In light of recent developments in Constitutional law, can New York City continue its practice of denying the average, law-abiding citizen the right to bear arms?
2. Was Petitioner-Plaintiff entitled to discovery on his allegation that corruption tainted the review of his pistol permit application, thus violating his due process rights?
3. Are the pistol permit application questions challenged by Petitioner-Plaintiff "substantially related" to the government's interest in protecting its citizens from gun violence?
4. Did the court below err by dismissing a FOIL appeal as moot when the agency admitted that it only "partially granted" the request?

II. Procedural History

In December 2015, Petitioner-Plaintiff Jonathan Corbett filed an application for a pistol permit[1] with the New York City Police Department, which processes all such applications within the City of New York, requesting permission to carry a firearm on his person within the City and State of New York. Record on Appeal (hereafter, "ROA") A056 – A067. Corbett was subsequently asked to submit more documents as well as attend an in-person interview, both of which he did. ROA A005, A006. In April 2016, his application was denied by the NYPD, citing 1) his failure to demonstrate a need greater than the ordinary citizen, and 2) his refusal to answer 3 questions on the application form. ROA A093 – A094. Corbett filed, and the NYPD denied, an administrative appeal in May 2016. ROA A095 – A098.

After the denial of his application, Corbett filed a Freedom of Information Law request to shed light on how the NYPD processed other pistol permit applications. ROA A100. That request was denied, and an administrative appeal filed by Corbett in June 2016 went unanswered. ROA A021, A101 – A103.

Corbett timely filed a hybrid petition/complaint in New York County Supreme Court on September 30th, 2016, asking for Article 78 review of the pistol permit application denial as well as an order compelling the City to produce records or otherwise respond to his FOIL appeal. ROA A001 – A013. The City moved to dismiss the case in its entirety on January 20th, 2017, and over Corbett's opposition, the lower court granted the motion on February 7th, 2017. ROA A029 – A140, A158 – A160.

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[1] The law, and thus this litigation, interchangeably use the word "gun license" and "pistol permit." Either phrasing refers to state permission to possess and/or carry a firearm.

Corbett timely filed a notice of appeal to the First Department of the New York Supreme Court, Appellate Division on March 1st, 2017. ROA A161. The appeal was argued in writing and orally in front of that court, which denied Corbett's appeal on April 3rd, 2017. ~~P.~~ Judgment of Lower Court, p. 18.

III. Jurisdiction

This Court has jurisdiction over this appeal under N.Y. C.P.L.R. § 5602(a)(1)(i). This case began in the Supreme Court and the decision of the Appellate Division was a final determination of the action. Based on the Court's decision dismissing an attempted as-of-right appeal of a similar challenge, Petitioner-Plaintiff concludes that the Appellate Division's order is not appealable as-of-right. *Kachalsky v. Cacace*, 14 N.Y.3d 743 (2010) (*but see* dissent at 743, 744).

This motion for leave to appeal is being made within 30 days of the date of the order challenged and is therefore timely pursuant to N.Y. C.P.L.R. § 5513.

IV. Statement of the Case

New York City is one of the few remaining jurisdictions in this state to read the "proper cause" requirement of New York's gun licensing statutes, N.Y. Pen. Law § 400.00(2), to require that an individual demonstrate a "need" to carry a handgun that is greater than that of the average citizen. At present, the New York Police Department's ("NYPD") licensing division is given nearly absolute discretion over which citizens have so demonstrated, resulting in rampant

corruption within the division and a system where the rich and connected may exercise their constitutional right to bear arms while the remainder of the citizenry remains disarmed and disenfranchised.

Corbett is an upstanding U.S. citizen who has never committed a crime, has passed the NYPD's background check, has been licensed to carry firearms in other states for nearly a decade, and has responsibly exercised his rights under those licenses for that time. Notwithstanding, Corbett's gun license application was declined because he failed to demonstrate "proper cause" and refused to answer three questions on the NYPD application that are irrelevant to whether or not he is qualified to possess a handgun. Weeks later, the same NYPD official who denied Corbett's license was transferred out of the licensing division, and at least four of his subordinates arrested, for handing out gun licenses to street mobsters in exchange for cash. This, of course, is not the first such incident of corruption in the licensing division; indeed, such corruption has been regularly exposed over the last 100 years.

A. A Ban for Ordinary Citizens Is Epitome a "Near-Total Ban"

The court below erred first by finding that "New York's handgun licensing scheme does not impose any blanket or near-total ban on gun ownership and possession." What does "near-total ban" mean if not a law that prevents the average, upstanding citizen from exercising their rights? Short of becoming a police officer or an armed security guard, there is no legal way for Corbett to carry a gun in New York City.

This is a total ban, and the Supreme Court has explained that total bans are not even analyzed using a tier of scrutiny; they are to be struck down without

further thought. *Wrenn v. District of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017) ("It's appropriate to strike down such 'total ban[s]' without bothering to apply tiers of scrutiny because no such analysis could ever sanction obliterations of an enumerated constitutional right." [*citing* *District of Columbia v. Heller, 554 U.S. 570*. 629 (2008)]). The state may be free to heavily regulate handgun possession, but it may not entirely prevent the ordinary citizen from so possessing.

B. Corbett Was Improperly Denied Discovery on the Corruption Issue

The court below erred second by finding that "Petitioner has not established that the denial of his application was the result of corruption or other impropriety." Its error was not that the statement was inaccurate, but irrelevant: Corbett's case in the original court properly pleaded a due process claim based on corruption, and his claim was dismissed on a motion to dismiss. That is, the lower court prematurely and improperly decided the merits of Corbett's case before Corbett had *any* opportunity for discovery. The lower court did not indicate that it was treating Respondent's motion as a motion for summary judgment, nor would it have ben appropriate to do so before discovery.

Corbett's pleading was not speculative or based on a conspiracy theory: the NYPD Licensing Division was literally raided by federal agents weeks after denying Corbett's license. Reports the New York Post:

> David Villanueva, an ex-supervisor in the NYPD's License Division, said he and other cops — including officers Richard Ochetel and Robert Espinel and Lt. Paul Dean — were on the take for years from so-called gun expeditors.
>
> In exchange, the officers doled out pistol permits like candy — even to people who should not have had them, Villanueva said.

> One expeditor, he said, may have had ties to organized crime. Another got help with 100 gun permits over the years — "none" of which should have been approved.

Whitehouse, Kaja. *"Ex-cop: NYPD gun license division was a bribery machine."* New York Post (April 17th, 2018). https://nypost.com/2018/04/17/ex-cop-nypd-gun-license-division-was-a-bribery-machine/

C. "Substantial Relationship" Was The Correct Question, and "No" Was The Correct Answer

The court below erred for the third time when it decided, without explanation, that the challenged pistol permit application questions "are justified because they serve to promote the government's "substantial and legitimate interest." Once again, this is irrelevant: Corbett never challenged whether the government has an interest or whether that interest was substantial. Rather, he challenged whether *the relationship* between the questions and the interest was substantial.

Intermediate scrutiny requires a level of tailoring higher than that of a rational relationship. Further, challenges under intermediate scrutiny require the government to bear the burden of proving that substantial relationship. In this case, there was no such tailoring. Corbett asked the City why these questions, *e.g.*, had no time boundaries, or any other attempt to exclude irrelevant information. Despite failing to answer that question, the Appellate Division allowed the City to continue to withhold constitutional rights from those who do not answer invasive and unimportant questions.

D. A FOIL Claim Is Not Moot Until *All* Documents Have Been Turned Over

The court below erred one last time when it held that Respondents' production of responsive documents during the pendency of the lawsuit mooted Petitioner's claim. Respondent conceded that the documents they provided constituted only a *partial* grant of Corbett's request. Respondent's Brief, p. 11 ("During the pendency of this appeal, on January 26, 2018, NYPD's Records Access Appeals Officer partially granted Corbett's appeal and produced all non-exempt documents responsive to his request."). This necessarily means that part of Corbett's request was still denied, and Corbett's challenge lives on – or at least should have lived on. Despite Corbett pointing out to Appellate Division that there were still records outstanding, Appellate Division declared his challenge moot. Reply Brief, p. 7 ("Respondents concede that they have only 'partially' provided the public records that Petitioner has requested."), Judgment of Lower Court ("Respondents' production of responsive documents… mooted his challenge to the denial of his FOIL request…").

V. Reasons for Granting Leave to Appeal

Factors favoring leave to appeal include novelty, public importance, and conflicting law. 22 N.Y.C.R.R § 500.22(b)(4). These three factors weigh in favor of granting leave to appeal.

A. The Continuing Evolution of Second Amendment Law Requires the Court to Weigh In on the Matter

New York decisional law relating to gun licensing is littered with standards that, in the wake of *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010),

are clearly no longer good law. In Heller, it was finally settled that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Heller* at 592. The *Heller* court defined "keeping" and "bearing" arms, the former talking about possession or ownership of a firearm, and the latter discussing the carrying of guns outside the home. *See also Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012) ("To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*."). Both keeping and bearing are Second Amendment-protected. *McDonald* held these rights to be applicable against the states.

With this in mind, the Court should take this opportunity to clarify that the long-used adage that gun ownership is a "privilege, not a right" in this state is no longer good law. The Appellate Division has continued to use it post-*McDonald*. *Campbell v. Kelly*, 85 A.D.3d 446 (1st Dept. 2011). Despite being specifically invited to correct itself on the matter in this case, Appellate Division declined to do so.

The status of keeping and bearing arms as an enumerated right also means that the denial of that right cannot be upheld merely because the government acts "rationally." *Heller* at fn. 27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."). The Court should therefore also take this opportunity to clarify that courts may no longer uphold a decision to deny gun rights, regardless of whether the decision is legislative or executive, that is merely "rational," or "not arbitrary or capricious," or "is related to an interest" (whether or not that interest in

"legitimate" or "substantial"). The floor is intermediate scrutiny, and therefore at least a *substantial relationship* to an *important government interest* is required.

In evaluating Corbett's challenge to the application questions, the Appellate Division seems to have confused a "substantial interest" with a "substantial relationship" to that interest. In evaluating Corbett's challenge to the proper cause requirement, the Appellate Division properly alleges it found a "substantial relationship," but fails to explain how it came to the conclusion that the scope of the challenged questions did not push beyond the boundaries of "substantial relationship" into the realm of "maybe this question might somehow be related to one's fitness to possess a gun." The government certainly provided no explanation of the substantiality of the relationship, despite having the burden of proof on the matter under intermediate scrutiny. As best Petitioner is aware, the propriety of these 3 questions is an issue of first impression.

For these reasons, there is conflict within the decisional law of the courts of this state and the decisions of the U.S. Supreme Court, and this Court should modify or clarify this state's laws to conform.

B. The Background of Recent Corruption Adds Novelty and Public Importance to the Challenge

So far, at the least the Second and Ninth Circuits seem to believe that "proper cause" may constitutionally be required by the state for full-carry gun licenses, while at least the Seventh and D.C. Circuits do not. But, even if, *arguendo*, such a requirement is facially constitutional, it must be re-analyzed in New York because of persistent and pervasive corruption for the entire 100+ years that New York has licensed handguns.

Corbett's gun license application was denied by the head of the NYPD's Licensing Division, who was literally booted from his job a few weeks later because his subordinates were caught by federal agents for selling gun license approvals. The scheme had been going on for several years, though in nearly every decade one can find news reports of the same. The subordinates were arrested and at least one has pled guilty.

Corbett alleged for the trial court, and detailed for Appellate Division, the corruption that could be uncovered from historical research and he should have been allowed to prove that the officers who reviewed his application could not have evaluated it fairly. Petitioner's Brief, pp. 8 – 12. Instead, his case was tossed on a motion to dismiss by a judge who ignored the issue and his appeal denied by an Appellate Division who said he was unable to prove the corruption that the lower court did not allow him a chance to prove.

There are few public interests more compelling than rooting out corruption from public offices. This motion invites the highest court of the state to take a moment to look at a full century of corruption and perhaps put a stop to it. In light of the fact that the leading cases on gun licensing in this state, including *Kachalsky*, did not raise the issue, the time is right for the Court to do so.

C. The State's Strong Public Policy in Favor of Open Records Requires the Court's Input to Be Effected

The legislature was not joking when it declared:

> "The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its

> citizenry, the greater the understanding and participation of the public in government … The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.
>
> N.Y. Pub. Off. Law § 84.

In passing New York's public records statute, the Freedom of Information Law at N.Y. Pub. Off. Law §§ 84 – 90, the legislature declared a strong public policy in favor of all government records being made available to the public.

In the instant case, the NYPD handed Corbett a fraction of the public records he requested – about two years late. In no court have they submitted a sworn affidavit or other evidence by one with personal knowledge of the facts sufficient to support the proposition that the records sought by Corbett meet a statutory exemption to FOIL. Instead, the lower court dismissed Corbett's FOIL claim by taking a City attorney's word for it, and the Appellate Division accepted another City attorney's word that it had provided Corbett with *some* documents as sufficient to moot the case.

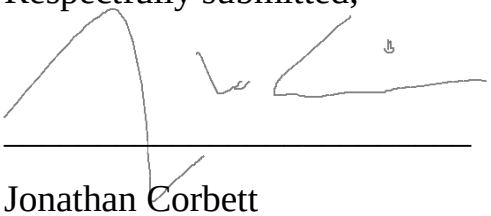
This is not the result that the state legislature intended. The public policy of this state is clear, and this Court's weight behind it is, apparently, necessary for that public policy to be vindicated.

VI. Conclusion

For the foregoing reasons, the Court should exercise its discretion to correct the errors of the Appellate Division and clarify the current status of New York's gun laws.

Dated: New York, New York
April 30th, 2018

Respectfully submitted,



Jonathan Corbett
Petitioner-Plaintiff, *Pro Se*
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New York, NY 10003
E-mail:jon@professional-troublemaker.com

Decision of Appellate Division
from Which Appeal is Sought

Matter of Corbett v City of New York
2018 NY Slip Op 02298
Decided on April 3, 2018
Appellate Division, First Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on April 3, 2018
Friedman, J.P., Sweeny, Gesmer, Kern, Singh, JJ.

158273/16 6173A 6173

[*1] In re Jonathan Corbett, Petitioner-Appellant,

v

City of New York, et al., Respondents-Respondents.

Jonathan Corbett, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Elina Druker of counsel), for respondents.

Judgment (denominated an order) of Supreme Court, New York County (Carol R. Edmead, J.), entered February 7, 2017, insofar as it denied the petition and dismissed the proceeding seeking a judgment declaring the "proper cause" requirement of New York's firearms licensing law (Penal Law § 400.00[2][f]) to be facially unconstitutional "insofar as it is interpreted to mean that a citizen must demonstrate a greater need than that of the average citizen, and in combination with the state's blanket ban on open carry" of handguns; declaring three questions on the New York City Police Department's (NYPD) concealed carry license

application, relating to applicants' discharge from employment, prior use of "narcotics or tranquilizers," and prior subpoena or testimony before any governmental hearing, to be arbitrary and capricious and violative of the US Constitution 2nd Amendment; and directing respondents to issue petitioner a concealed carry handgun license, unanimously affirmed, without costs. Appeal from that portion of the judgment denying petitioner's request for an order directing NYPD to produce documents responsive to petitioner's request, under the Freedom of Information Law (FOIL), for documents demonstrating how NYPD evaluates concealed carry handgun license applications, unanimously dismissed, without costs, as moot.

The "proper cause" element of New York's handgun licensing scheme (*see* Penal Law § 400.00[2][f]) passes intermediate constitutional scrutiny, as it is substantially related to the state's important interest in protecting public safety (*see Kachalsky v County of Westchester*, 701 F3d 81, 96-97 [2d Cir 2012], *cert denied sub nom Kachalsky v Capace*, 569 US 918 [2013]; *see generally People v Hughes*, 22 NY3d 44, 52 [2013]; *Matter of Delgado v Kelly*, 127 AD3d 644 [1st Dept 2015}; *New York State Rifle & Pistol Assn. v City of New York*, __ F3d __, 2018 WL 1021310, *10-11, 2018 US App LEXIS 4513, at *33 [2d Cir Feb. 23, 2018]). Moreover, viewed as a whole, New York's handgun licensing scheme does not impose any blanket or near-total ban on gun ownership and possession (*see Kachalsky*, 701 F3d at 94-99).

In addition to the "proper cause" requirement specific to concealed carry licenses, the statute sets forth other requirements, including that the applicant be "of good moral character" (Penal Law § 400.00[1][b]). The three questions on the handgun license application challenged by petitioner, which he refused to answer, relate to 1) whether he has been discharged from any employment; 2) past use, if any, of narcotics or tranquilizers, and 3) past testimony before any executive, legislative or judicial body. These questions are designed to elicit information that can assist the background investigation that is undertaken by the New York Police Department in connection with the application, and accordingly, are justified because they serve to promote the government's "substantial and legitimate interest . . . in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument" (*Matter of Warmouth v Zuckerman*, 138 AD3d 752, 753 [2d Dept 2016][internal quotation marks [*2]omitted]; see also *Matter of Delgado v Kelly*, 127 AD3d 644, *supra*).

Petitioner has not established that the denial of his application was the result of corruption or other impropriety (*see Matter of Hughes v Suffolk County Dept. of Civ. Serv.*, 74 NY2d 833, 834 [1989]; *Matter of Sunnen v Administrative Rev. Bd. for Professional Med. Conduct*, 244 AD2d 790, 791 [3d Dept 1997], *lv denied* 92 NY2d 802 [1998]).

Respondents' production of responsive documents, albeit beyond the statutory 10-day limit and "subsequent to the commencement of this article 78 proceeding," mooted his challenge to the denial of his FOIL request, and we accordingly dismiss that portion of the appeal (*Matter of Alvarez v Vance*, 139 AD3d 459, 460 [1st Dept 2016]; *see Matter of Babi v David*, 35 AD3d 266, 267 [1st Dept 2006]). Even if the proceeding had not been mooted, the remedy for NYPD's failure to timely respond to the administrative appeal from the denial of the FOIL request would not have been an order directing full production, but rather a "remand for respondent to comply" (*Alvarez*, 139 AD3d at 460; *see Matter of Malloy v New York City Police Dept.*, 50 AD3d 98, 100 [1st Dept 2008]).

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 3, 2018

CLERK

Return to Decision List

Judgment of Lower Court

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. PART 35
Justice

Index Number : 158273/2016
CORBETT, JONATHAN
vs.
CITY OF NEW YORK ET AL
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 2/1/17
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

In this Article 78 proceeding challenging the denial of petitioner's application for a pistol license, upon review of the submissions, the petition and cross-motion is decided as follows:

Petitioner Jonathan Corbett ("petitioner") challenges the New York City Police Department's ("NYPD") denial of his appeal regarding his pistol permit application and the denial of his Freedom of Information Law ("FOIL") public records request. In the Petition, petitioner seeks a declaration that (1) the "proper cause" requirement is an unconstitutional restriction on Second Amendment, warranting reversal of the NYPD's denial of his permit application; (2) denying his application based on his failure to answer questions 11 – 13 on the application was irrational and arbitrary and unconstitutional; (3) directing the NYPD to issue his a concealed carry pistol permit; and (4) the NYPD provide Corbett with the documents requested under FOIL, and attorney's fees and costs.

In response, respondent cross-moves (1) to dismiss petitioner's First Claim of the petition/complaint pursuant to CPLR § 3211(a)(1) and 7804 for petitioner's failure to notify the New York State Attorney General of the action pursuant to CPLR § 1012(b) and Executive Law §71(1); (ii) to dismiss petitioner's Fourth Claim on the grounds that the Court lacks subject matter jurisdiction based on petitioners failed to exhaust administrative remedies prior to the commencement of this proceeding; (iii) to dismiss all claims for failure to state a cause of action; and (iv) for summary judgment in favor of respondents on all claims pursuant to CPLR § 3211(c).

In opposition, petitioner argues that a liberal reading of the petition demonstrates that it states a cause of action. Also, notice to the Attorney General is only required if petitioner

Dated: _____ _____, **J.S.C.**

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

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**

challenges state law, and petitioner herein does not challenge state law.[1] In any event, petitioner has notified the Attorney General. And, recent decisions by the U.S. Supreme Court and the U.S. Court of Appeals support petitioner's claims, and the Questions petitioner refused to answer do not further an important government interest by means substantially related to that objective. And, respondents' excuse for its delay in producing FOIL records, to wit: they are in the middle of a corruption probe and there has been personnel change, is unreasonable.

"The possession of a handgun is a privilege, not a right, that is subject to the broad discretion of the New York City Police Commissioner" (*Tolliver v. Kelly*, 41 A.D.3d 156, 837 N.Y.S.2d 128 [1st Dept 2007] *citing Matter of Papaioannou v. Kelly*, 14 A.D.3d 459, 460, 788 N.Y.S.2d 378 [2005]; *Sewell v. City of New York*, 182 A.D.2d 469, 472, 583 N.Y.S.2d 255 [1992], lv. denied 80 N.Y.2d 756, 588 N.Y.S.2d 824, 602 N.E.2d 232 [1992]). "A court may overturn such an administrative determination only if the record reveals no rational basis for it, and may not substitute its own judgment for that of the agency (*Tolliver v. Kelly, supra, citing Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 313 N.E.2d 321 [1974]).

It is noted that the following questions petitioner refused to answer are:

> Question 11: Have you ever . . . [b]een discharged from any employment?"
> Question 12: Have you ever. . . [u]sed narcotics or tranquilizers? List doctor's name, address, telephone number, in explanation."
> Question 13: "Have you ever. . . [b]een subpoenaed to, or testified at, a hearing or inquiry conducted by an executive, legislative or judicial body?
>
> In response to these questions, petitioner explained:
> I refuse to answer questions ll, 12, and 13 because they are entirely irrelevant as to whether I am qualified to carry a handgun. . . .

Further, in connection with petitioner's application, he submitted a Letter of Necessity, to address the inquiry into the nature of his employment and the business need to carry a handgun. Petitioner explained:

> Applicant conducts business as a civil rights advocate. In order to exercise his civil rights fully, he needs a carry license.

In denying petitioner's application, respondent explained that, *inter alia*, that petitioner failed to comply with the requirement under Title 38 of the Rules of the City of New York §5-05 (a) that the application be "completely filled out" and that petitioner failed to demonstrate the "proper cause" required to carry a firearm.

A review of the submissions demonstrate that "given the totality of the information

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[1] "When the constitutionality of a State statute is in question, notification of the Attorney General is required" (*Strongin v. Nyquist*, 54 A.D.2d 1031, 388 N.Y.S.2d 683 [3d Dept 1976]). It is uncontested the petitioner does not challenge a state statute, and that he nevertheless notified the Attorney General of this proceeding.

submitted in connection with the application" and the refusal of petitioner to answer certain questions on the application, the respondent had a rational basis for denying petitioner's application (*Delgado v. Kelly*, 127 A.D.3d 644, 8 N.Y.S.3d 172 [1st Dept 2015]). Further, the "licensing scheme at issue satisfies the requisite constitutional standard, intermediate scrutiny, as it serves a governmental interest in maintaining public safety" (*Delgado v. Kelly*, *supra*).

As to petitioner's FOIL challenge, it is uncontested that petitioner's appeal of respondent's FOIL determination has not yet been decided by the Department Records Access Officer due to the nature of the pending investigation into the alleged corruption surrounding the issuance of pistol permits *(see Taylor v. New York City Police Dept. FOIL Unit*, 25 A.D.3d 347, 806 N.Y.S.2d 586 [1st Dept 2006] (rejecting petitioner's claim that respondent's untimeliness in responding to his FOIL request excused his obligation to exhaust administrative appeal remedies prior to filing his petition)).

In any event, "Public Officers Law § 87(2)(e)(i) exempts from disclosure records that 'are compiled for law enforcement purposes and which, if disclosed, would ... interfere with law enforcement investigations or judicial proceedings.'" (*Time Warner Cable News NY1 v. New York City Police Dept.*, 53 Misc.3d 657, 36 N.Y.S.3d 579 [Supreme Court, New York County 2016] ("This provision broadly permits an agency to make 'a generic determination' that disclosure of a record would interfere with a judicial proceeding against a particular individual")). Thus, as the documents sought relate to an ongoing criminal investigation against an individual, such documents may be withheld.

The remaining contentions of the petitioner are insufficient to merit the relief he seeks.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the petition is denied and this proceeding is dismissed; and it is further

ORDERED that respondents' cross-motion (1) to dismiss petitioner's First Claim of the petition/complaint pursuant to CPLR § 3211(a)(1) and 7804 for petitioner's failure to notify the New York State Attorney General of the action pursuant to CPLR § 1012(b) and Executive Law §71(1); (ii) to dismiss petitioner's Fourth Claim on the grounds that the Court lacks subject matter jurisdiction based on petitioners failed to exhaust administrative remedies prior to the commencement of this proceeding; (iii) to dismiss all claims for failure to state a cause of action; and (iv) for summary judgment in favor of respondents on all claims pursuant to CPLR § 3211(c) is granted solely to the extent that (1) the Fourth Claim is dismissed for failure to exhaust administrative remedies; (2) all claims are dismissed for failure to state a cause of action; and (3) summary dismissal of the petition is warranted; and it is further

ORDERED that petitioner shall serve a copy of this order with notice of entry upon all parties within 20 days of entry. And it is further

ORDERED that the Clerk may enter judgment dismissing the petitioner accordingly.

This constitutes the decision and order of the Court.

Dated 2/6/17 **ENTER:** _____, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

Affidavit of Service

I, Jonathan Corbett, affirm that on April 30th, 2018, I did serve two copies of this motion upon all Respondents upon their counsel, Elina Druker, NYC Corporation Counsel, 100 Church St., New York, NY 10007, via USPS Priority Mail.

Dated: New York, New York
April 30th, 2018

Respectfully submitted,

_____

Jonathan Corbett
Petitioner-Plaintiff, *Pro Se*
228 Park Ave. S. #86952
New York, NY 10003
E-mail:jon@professional-troublemaker.com

Sworn to before me this 30th day
of April 2018.

_____

Notary Public