

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: October 30, 2008

503329

In the Matter of LEO A.
MARINO,

Appellant,

v

MEMORANDUM AND ORDER

FELIX ROSA, as Director of the
Executive Clemency Bureau,
Respondent.

Calendar Date: September 9, 2008

Before: Peters, J.P., Rose, Lahtinen, Kane and Kavanagh, JJ.

Leo A. Marino, Collins, appellant pro se.

Andrew M. Cuomo, Attorney General, Albany (Frank K. Walsh
of counsel), for respondent.

Peters, J.P.

Appeal from a judgment of the Supreme Court (Sackett, J.),
entered August 23, 2007 in Albany County, which, in a proceeding
pursuant to CPLR article 78, granted respondent's motion to
dismiss the petition.

On the same day that he made an identical request to the
Governor (see Matter of Marino v Pataki, ___ AD3d ___ [decided
herewith]), petitioner, an inmate at Collins Correctional
Facility in Erie County, filed a request under the Freedom of
Information Law (see Public Officers Law art 6) (hereinafter
FOIL) for any and all records related to his prior criminal case
which were in the possession of respondent's office and used in
connection with his clemency application. After receiving no

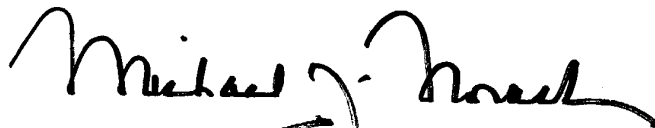
response, petitioner commenced the instant CPLR article 78 proceeding challenging what he deemed to be a constructive denial of his FOIL request. Respondent thereafter moved to dismiss the petition. Supreme Court granted respondent's motion and dismissed the petition, prompting this appeal.

We affirm. Pursuant to Executive Law § 15, the Governor is empowered to determine clemency applications. In his affidavit in support of the motion, respondent stated that the Executive Clemency Bureau serves as a "clearinghouse" for clemency applications, forwarding all records pertinent to such applications to the Governor as it is the Governor's office "that maintains the records used in clemency determinations." Inasmuch as the documents used in connection with petitioner's clemency application were necessarily in the possession of the Governor, rather than respondent's office, at the time of petitioner's FOIL request, the petition was properly denied.

Rose, Lahtinen, Kane and Kavanagh, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

A handwritten signature in black ink, appearing to read "Michael J. Novack". The signature is written in a cursive, flowing style with a large loop at the end.

Michael J. Novack
Clerk of the Court