

**Matter of Badalamenti v Office of the Dist. Attorney
Nassau County**

2010 NY Slip Op 34023(U)

November 22, 2010

Supreme Court, Nassau County

Docket Number: 016122-10

Judge: Arthur M. Diamond

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----x

In the Matter of the Application of
ANTHONY BADALAMENTI,

Petitioner,

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

TRIAL PART: 16

NASSAU COUNTY

INDEX NO:016122-10

MOTION SEQ. NO: 1

-against-

**OFFICE OF THE DISTRICT ATTORNEY NASSAU
COUNTY,**

Respondent,

-----x

SUBMIT DATE:10/27/10

The following papers having been read on this motion:

- Notice of Petition1**
- Memorandum of Law.....2**
- Verified Answer.....3**
- Reply.....4**

This is an article 78 petition seeking to compel the respondent to comply with petitioner's Freedom Of Information Law ("FOIL") request. Specifically, petitioner is seeking, *inter alia*, "all 911 records and transcripts relating to his arrest on the night of October 31, 2008 as well as access to a cellular telephone which was allegedly used by the victim's biological father, to make a recording of Mr. Badalamenti and offered into evidence at his trial" (Petitioners Memorandum of Law).

BACKGROUND

On October 31, 2008, petitioner was arrested for allegedly abusing Jillian Trezza, the infant child of his fiancé, Jessica Muniz. In November 2008, petitioner and Muniz were indicted and charged with six (6) felony counts.

[* 2]

On June 23, 2009, petitioner was convicted by a jury of three counts of second degree assault (Penal Law § 120.05), two counts of fourth degree criminal possession of a weapon (Penal Law § 265.01[2]), and one count of endangering the welfare of a child (Penal Law § 260.10[1]).

Following his conviction, petitioner fired his trial counsel, Oscar Michelen, Esq. and hired his current attorney, Thomas Liotti, Esq. In October 2009, Mr. Liotti moved to set aside the verdict pursuant to Criminal Procedure Law § 330.30. On October 30, 2009, petitioner's motion to set aside the verdict was denied by the trial court. On November 4, 2009, Judge Peck sentenced petitioner to an aggregate term of imprisonment of seven years with three years post-release supervision.

In February, 2010, petitioner filed an order to show cause staying the execution of the sentence pending appeal. Petitioner is currently a prisoner at Bare Hill Correctional Facility in Malone, New York.

FOIL REQUEST

In February, 2010, petitioner filed a FOIL request wherein he requested several records pertaining to his case under *People v Badalamenti*, Nassau County Indictment No. 01695N-2018. In particular, petitioner requested "[t]he entire case file, all 911 calls and tapes and all scratch notes." Petitioner has since narrowed his request and is specifically interested in two items: (1) People's Trial Exhibit 25 (Brian Trezzza's cellular telephone); and (2) "all 911 records and transcripts relating to his arrest." (Petitioner's Memo. at p.1)

By letter dated April 2, 2010, respondent denied petitioner's FOIL request, citing as support for the denial, Public Officers Law § 87(2)(e)(i), *Pittari v Pirro*, 258 AD2d 202 (2nd Dept. 1999); *Moreno v Office of Dist. Attny., New York County*, 38 AD3d 358 (1st Dept. 2007); *Walsh v Wasser*, 225 AD2d 911 (3rd Dept. 1996).

By letter dated April 29, 2010, Mr. Liotti appealed to respondent's designated FOIL Appeals Officer, ADA Robert A. Schwartz, Deputy Chief of the Appeals Bureau. In his letter, Mr. Liotti contended that the respondent's reliance upon the above-cited authorities was "misguided," as his client's FOIL request "would not chill the prosecution, create any tension with C.P.L. Article 240, nor would it delay the proceedings in any way."

By letter dated May 14, 2010, ADA Schwartz affirmed the denial of the petitioner's FOIL request on several grounds. ADA Schwartz reiterated the applicability of Public Officers Law §

87(2)(e)(i) and the aforementioned cited cases. ADA Schwartz noted the well settled rule that a FOIL request pertaining to a criminal matter in which there is a pending appeal may be denied. Mr. Schwartz explained that one consideration supporting both the general rule and the denial of the petitioner's specific request was the potential for the spoliation of evidence.

The second ground for the denial of the petitioner's FOIL request was that FOIL pertains solely to agency "records" and has no application to physical evidence such as the cellular telephone at issue here. (*Sideri v Office of Dist. Atty., New York County, supra, and Allen v Strojnowski*, 129 AD2d 700 [2nd Dept. 1989]).

Third, ADA Schwartz noted that the 911 recording sought by the petitioner had already been copied and provided to him. See *Marino v Pataki*, 55 AD3d 1171, 1172 [3rd Dept. 2008]. Indeed, everything that the petitioner originally sought in his FOIL request – 911 records, access to the cellular telephone, etc. – and now again in this petition, has already been provided to him.

Thereafter, petitioner commenced this Article 78 proceeding, seeking an order under FOIL compelling the respondent to disclose "the cellular telephone and transcripts of all 911 tapes relating to petitioner made on October 31, 2008." (Petitioner's Memo. at 8).

The thrust of petitioner's argument is that respondent is not entitled to a "blanket law enforcement exemption where there are pending criminal investigations." *Matter of Pittaro v Pirro, supra*. Petitioner further contends that the disclosure of the materials sought is exculpatory.

In response, respondent asserts that the Article 78 petition should be dismissed because petitioner "is not entitled under FOIL to inspect physical evidence or to receive duplicative copies of records already provided to him and the District Attorney's office may deny access to the records of a pending criminal matter." (Respondent's Memo of Law in Opposition to Petition).

At the outset, we reiterate that the purpose of FOIL is "to promote open government and public accountability" with the law imposing "a broad duty in government to make its records available to the public." *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274 (1996); *Tuck-It-Away Associates, L.P. v Empire State Development Corp.*, 54 AD3d 154 (3rd Dept. 2008). Government documents are presumptively available for review unless they fall under one of the exemptions pursuant to Public Officers Law § 87(2). See, *Matter of M. Farbman & Son v New York City Health & Hosps. Corp.*, 62 NY2d 75 (1984); *Tuck-It-Away Associates, L.P. v Empire State*

Development Corp., supra; Matter of Riley-James v Soares, 33 AD3d 1171, 1172 (3rd Dept. 2006).

The burden rests on the agency resisting disclosure to establish that the document "falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" *Matter of Data Tree, LLC v Romane*, 9 NY3d 454, 462-463 (2007); *Humane Soc. of U.S. v Brennan*, 53 AD3d 909 (3rd Dept. 2008). As relevant here, Public Officers Law § 87(2)(e)(i) provides that an agency may deny access to records or portions thereof that are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings." *Pittaro v Pirro, supra*.

In *Pittaro v Pirro, supra*, the court denied petitioner's FOIL requests pursuant to Public Officers Law § 87(2)(e)(i) stating that "it is apparent that FOIL disclosure of materials pertaining to the arrest and prosecution of a defendant in a pending criminal proceeding would interfere with the adjudication of the criminal proceeding." See, *Moreno v Office of Dist. Attny., New York County, supra; Matter of Legal Aid Soc. v New York City Police Dept.*, 274 AD2d 207 (1st Dept. 2000), lv den. 95 NY2d 956 (2000); see, *Matter of James Hoyer v State of New York*, 27 Misc3d 1223(A), 2010 WL 1949120 (N.Y.Sup.).

Based upon the record submitted, we find that petitioner's FOIL request, made while the criminal appeal is still pending against petitioner, should be denied pursuant to Public Officers Law § 87(2)(e)(i). Moreover, petitioner has been provided a copy of the requested items. *Marino v Pataki, supra*.

The petition is hereby dismissed.

This constitutes the decision and order of this Court.

DATED: November 22, 2010

ENTERED

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ENTER


HON. ARTHUR M. DIAMOND
J. S.C.

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