

Matter of Collins v New York City

2013 NY Slip Op 30032(U)

January 7, 2013

Sup Ct, NY County

Docket Number: 402084/11

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PETER H. MOVISON
SUPREME COURT
Justice

PART 40 B

11/13/13

D'JUAN COLLINS
- v -
NYC POLICE DEPT

INDEX NO. 402084/11
MOTION DATE _____
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

to dismiss is denied in
accordance with the order
of this date.

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NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/7/13

[Signature]
HON. PETER H. MOVISON
SUPREME COURT JUSTICE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

Supreme Court: New York County
Part 40B

-----X

In the Matter of the Application of

D' JUAN COLLINS,

Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules,

-against-

Index No. 402084/11

NEW YORK CITY, THE NEW YORK CITY POLICE
DEPARTMENT, and the RECORDS ACCESS OFFICER,

Respondents.

-----X

Peter H. Moulton, Justice

FILED

JAN 09 2013

NEW YORK
COUNTY CLERK'S OFFICE

In this Article 78 proceeding petitioner pro se seeks to reverse the determination of the Records Access Appeals Officer of respondent New York City Police Department ("NYPD") dated January 6, 2012, and to compel the NYPD to disclose, pursuant to the state's Freedom of Information Law (Public Officers Law § 84 et seq, hereafter referred to as "FOIL"), certain records in its possession.

Respondents provided some of the records responsive to petitioner's request during the pendency of this proceeding. They now cross-move to dismiss the petition.

BACKGROUND

Petitioner was convicted of criminal possession of a controlled substance in the third and fifth degree in 2007.

By letter dated July 21, 2010, petitioner requested pursuant to FOIL copies of the following documents:

documents, graphs, protocols and guidelines for indictment #5529/07; Sec. Laboratory #07-CSAS-114904, 07-CSAS-114906; protocols for the sampling of evidence suspected of being crack cocaine, written guidelines for accepting and interpreting data (crack cocaine); chain of custody report for the above; printed spectra and/or chromatographs, protocols or guidelines for retesting substances suspected of being crack cocaine using different procedures (indicate the procedures to be used). If any part of the requested documents don't exist for the above case(s), please indicate so and please enclose a sample of the requested documents.

The Records Access Officer ("RAO") denied petitioner's FOIL request in a letter dated January 14, 2011. The RAO stated that some of the requested documents had previously been provided to petitioner during the course of his criminal trial. The letter went on to state "[d]ocument concerning the testing of controlled substance is being denied in that the release would reveal non-routine investigative techniques. Sect 87.2(e)(iv)."

By letter dated February 13, 2011, petitioner administratively appealed the RAO's determination.

The appeal was denied by the Records Access Appeals Officer ("RAAO") in a letter dated March 29, 2011. The RAAO also invoked

POL § 87(2)(e)(iv), stating that "[t]hat part of your appeal in which you request procedures for the laboratory testing of drugs is denied because such procedures constitute non-routine investigative techniques which are exempt from disclosure... ."

Petitioner timely brought this Article 78 proceeding to compel respondents to provide the records within the ambit of his FOIL request.

During the pendency of this proceeding, respondents provided 67 pages of documents responsive to petitioner's FOIL request. According to respondents these documents pertain to the laboratory analysis for the cocaine evidence relating to petitioner's conviction. These records include the original laboratory analysis in 2007 as well as a re-testing in 2010.¹ Respondents assert that the presence of cocaine was confirmed in both analyses. Respondents offer no explanation as to why these 67 pages of documents were not previously produced to petitioner.

Respondents argue that the remaining responsive documents, numbering 115 pages, which apparently consist of laboratory procedures embodied in manuals dated 2007 and 2010, are exempt from disclosure under FOIL. According to respondents, the manuals describe in precise detail each step taken by the NYPD in testing narcotics evidence. Respondents base this claim of exemption on

¹According to respondents, "minimal" redactions were made in these 67 pages to protect tax ID numbers, phone numbers of City employees and similar private information.

the assertion that the production of such laboratory procedures would

essentially provide disclosure to numerous other defendants charged with narcotics crimes who are awaiting prosecution [as well as convicted felons pursuing appeals or post-conviction relief] at a time when such disclosure is not available to them pursuant to the specific discovery provisions of the CPL and the Habeas Corpus Act... This disclosure would allow such individuals to circumvent the discovery provisions governing the particular proceedings that they are subject to, thereby interfering with those judicial proceedings.

(Affirmation of Krista Ashbery, dated February 6, 2012, ¶ 6.)

In support of this argument, respondents invoke POL § 87(2)(e)(i), a provision not cited by either the RAO or RAAO. That provision exempts from production records "compiled for law enforcement purposes" that would "interfere with law enforcement investigations or judicial proceedings."² Collins currently has no judicial proceedings pending. Respondents are arguing that disclosure of the manuals will "interfere" with judicial proceedings involving other criminal defendants.

DISCUSSION

As a threshold matter, respondents assert that petitioner has

²Respondents also invoke POL § 87(2)(e)(ii) in their Notice of Motion. Respondents do not discuss how this provision, which exempts documents that "would deprive a person of a right to a fair trial or impartial adjudication" if disclosed, could be applicable to petitioner's FOIL request.

failed to properly oppose their motion as his affidavit in opposition is unsworn. His initial unsworn affidavit states on its signature page that a notary public was not available at petitioner's correctional facility on the day that petitioner initially prepared this affidavit. Petitioner has cured the defect by subsequently mailing to the court a copy of his opposition that has a notarized signature page. Accordingly, the court finds that petitioner's opposition is competent.

Petitioner argues that respondents have waived any argument not based on POL § 87(2)(e)(iv)), the only exemption cited during administrative review of his FOIL request.

Respondents meet this waiver argument by asserting that special proceedings challenging FOIL denials are in the nature of mandamus to compel, which allow the consideration by courts of new defenses not asserted during administrative review. While some courts have noted that challenges to FOIL denials do not fit within any of the "traditional writs" (see Benedict v Albany County, 22 Misc3d 597, 601) the weight of authority appears to assume that special proceedings pursuant to FOIL are in the nature of a mandamus to compel. (See Rozz v Nassau County Dep't of Assessment, 96 AD3d 952, 953-4 [2d Dep't 2012] [treating Article 78 challenging FOIL denial as seeking a mandamus to compel], app dismissed 19 NY3d 1065; Rodriguez v Fischer, 36 Misc3d 1241[A]; Greene v City of New York, 196 Misc2d 125.) In proceedings sounding in mandamus to

[* 7]

compel, a reviewing court may consider additional grounds for denial of disclosure not raised at the administrative level. (See Greene v City of New York, 196 Misc2d 125.)³

The court finds this authority persuasive and therefore will consider respondents' argument that the records are exempt under POL § 87(2)(e)(i).

Respondents' motion papers do not demonstrate as a matter of law that the records withheld by the NYPD fall within POL § 87(2)(e)(i). It is undisputed that petitioner himself has no

³ Molloy v New York City Police Dep't (50 AD3d 98 [1st Dep't 2008]), in which the First Department required a remand where the NYPD offered new arguments for FOIL exemption for the first time in an Article 78 proceeding, is distinguishable. In Molloy the petitioner brought his Article 78 proceeding after the NYPD failed to act on his FOIL administrative appeal, i.e. after a constructive denial. While the Article 78 proceeding was pending, the NYPD provided a written denial of petitioner's administrative appeal, invoking a new argument not considered by the Records Appeal Officer. The trial court considered, and rejected, this newly proffered argument. The First Department held that where the agency decides an administrative appeal of a FOIL denial after the expiration of its time limit to do so, and after an Article 78 proceeding has been commenced challenging a constructive denial of the appeal, the grounds for denial contained in the tardy administrative appeal decision cannot be considered for the first time in the Article 78 proceeding. The Court held that the proper course for the trial court is a remand to the agency. However the facts in Molloy are different than those in the case at bar. In Molloy, the new argument raised by the NYPD for the first time in the Article 78 proceeding involved the protection of NYPD personnel records afforded by Civil Rights Law § 50-a(1). The protection of that section is designed to protect individual officers' privacy rights. The court held that these individual officers' rights "should not be deemed automatically waived by the inaction of the department" and remanded the matter to the agency for further administrative proceedings concerning Civil Rights Law § 50-1(1).

judicial proceeding pending which could be disrupted by the production of the manuals. Respondents argue instead that the disclosure of the manuals will affect judicial proceedings involving other defendants charged with narcotics offenses. Respondents cite no authority for the proposition that POL § 187(2)(e)(i) applies in such circumstances. The cases cited by respondents all involve FOIL requests by petitioner inmates who were still involved in litigation of the criminal charges against them. The question in those cases was whether FOIL production would "interfere" with the petitioner's criminal litigation.

Indeed the most recent case from the Court of Appeals cited by respondents, Leshner v Hynes (19 NY3d 57 [2012]), appears to assume that the only "judicial proceeding" relevant for purposes of POL § 87(2)(e)(i) is a criminal proceeding involving the FOIL petitioner, or a related prosecution arising from the same transactions. Judge Read states in her majority opinion

Of course, Public Officers Law § 87(2)(e)(i) ceases to apply after enforcement investigations and any ensuing judicial proceedings have run their course. Thus, the exemption does not bar disclosure of records compiled for law enforcement purposes in a criminal matter where the prosecution has been completed, absent some unusual circumstance such as the prospect that disclosure might compromise a related case.

(19 NY3d at 68.)

In addition, respondents fail to bolster their argument with citation to any apposite statute or case law that would bar

disclosure of the manuals in criminal proceedings. Accordingly, the NYPD's motion papers do not articulate how the disclosure of the manuals would provide access to materials not available to criminal defendants with pending cases, appeals, or post-conviction applications. Moreover, respondents do not address whether the manuals has ever been disclosed or made public in any way.

Accordingly, respondents' motion is denied. Respondents have reserved their right to serve an answer to the petition pursuant to CPLR 7804(f). Respondents shall serve their answer on petitioner and the court on or before February 1, 2013. Petitioner shall serve his reply on the court and respondents by February 28, 2013. Final decision on the petition will abide the submission of these papers.

CONCLUSION

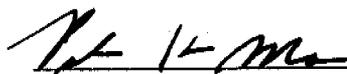
For the reasons stated, respondents' cross-motion to dismiss the petition is denied. This constitutes the decision and order of the court.

FILED

JAN 09 2013

NEW YORK
COUNTY CLERK'S OFFICE

Date: January 7, 2013



AJSC

HON. PETER H. MOULTON
SUPREME COURT JUSTICE