

Matter of Farrell v Morgenthau
2007 NY Slip Op 30280(U)
March 12, 2007
Supreme Court, New York County
Docket Number: 0400200
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JOAN A. MADDEN

PRESENT: J.S.C.

PART 11

Index Number : 400200/2005

FARRELL, DENNIS

vs

MORGENTHAU, ROBERT M.

Sequence Number : 002

COMPEL DISCLOSURE

INDEX NO. _____

MOTION DATE 10/27/06

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached memorandum Decision + Order

[FILED]

MAR 19 2007

COUNTY CLERK'S OFFICE - NEW YORK

Dated: March 12, 2007

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11**

-----X
In the Matter of the Application of
DENNIS FARRELL,

Index No. 400200/05

Petitioner,

For A Judgment Pursuant to Article 78
Of the Civil Practice Laws and Rules.

ROBERT M. MORGENTHAU, District
Attorney, New York County,

Respondent.

-----X
JOAN A. MADDEN, J.S.C.:

Petitioner Dennis Farrell, who is pro se, moves for an order (1) directing respondent to comply with this court's decision, order and judgment dated December 2, 2005, and (2) holding respondent in contempt for its failure to comply.

Petitioner, who is an inmate at a State correctional facility, seeks certain records relating to his arrest and conviction pursuant to New York's Freedom of Information Law ("FOIL"), Public Officers Law article 6. On January 24, 2003, petitioner was convicted after a jury trial of various counts including Robbery in the First Degree and Assault in the First Degree. On April 8, 2003, he was sentenced to 125 years to life. On or about April 9, 2003, petitioner filed a notice of appeal from his criminal judgment of conviction.

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NEW YORK

By letter dated April 23, 2004, petitioner made a FOIL request to the Records Access Officer for respondent seeking (1) DD5 report of Detective Mulligan; (2) an Unusual Occurrence Reports; (3) Notes by Detective Mays; (4) SPRINT Reports; and (5) Investigation memorandum by Midtown North, Internal Affairs Bureau or other NYPD unit. Respondent's Records Access Officer denied petitioner's FOIL request on the ground that petitioner had filed a notice of appeal, and therefore the records sought by petitioner were exempt from disclosure under Public

Officers Law § 87(2)(e)(i)¹ on the ground that their disclosure would interfere with a judicial proceeding.

In its decision, order and judgment dated December 2, 2005, the court found that respondent had failed to provide grounds for finding that the disclosure of the police records sought by petitioner would interfere with the pending appeal² and noted that unlike in Matter of Sideri v. Officer of the District Attorney of New York County, 243 AD2d 423 (1st Dept 1997), respondent did not claim that the records sought were trial evidence. Accordingly, the court directed that “within thirty days of the date of this decision, order and judgment, respondent is directed to respond to petitioner’s FOIL request, but may redact from any documents identifying information including addresses and names of witnesses not disclosed at trial.”

On December 15, 2005, Assistant District Attorney Maureen T. O’Connor (“O’Connor”), notified petitioner that the relevant case files had been ordered from the Closed Cases Unit. By letters dated January 25, 2006 and February 22, 2006, petitioner informed the court that the District Attorney had not yet complied with his FOIL request.

In an affidavit dated March 31, 2006, O’Connor stated that she was unable to timely comply with the December 2, 2005 decision, order and judgment on various grounds, including that the Appeals Bureau in her office needed the file to respond to petitioner’s criminal appeal, her discovery that part of the file was missing, and her case schedule. O’Connor also stated that as she is presently in possession of what she believes is petitioner’s entire case file, she expected to be able to respond to the FOIL request within two weeks.

By order dated April 10, 2006, this court directed respondent to respond to petitioner’s

¹Public Officers Law § 87(2)(e)(i) provides an exemptions from FOIL for records “compiled for law enforcement purposes and which, if disclosed, would: interfere with ...judicial proceedings.”

²On April 6, 2006, petitioner’s conviction was upheld on appeal. See People v. Farrell, 28 AD2d 244 (1st Dept 2006).

FOIL request on or before April 20, 2006. By letter dated April 18, 2006, O'Connor responded to petitioner's request, and the affidavit of service indicates that the letter response was served on petitioner by mail on April 19, 2006.

In her letter, O'Connor denies access to the DD5 report of Detective Mulligan (request #1) and the Investigation memorandum by Midtown North, Internal Affairs Bureau or other NYPD unit (request #5) on the ground that the relevant files did not contain these documents. She also denied access to the Unusual Occurrence Reports (request #2); Notes by Detective Mays (request #3) and SPRINT Reports (request # 4), asserting that these documents were provided to petitioner and his counsel before pre-trial hearings and the trial of this matter, and that petitioner's appellate attorney had the file with these documents. O'Connor also asserted that the SPRINT reports contained information from crime victims and were exempt from FOIL. The letter indicates that name and address of the respondent's FOIL Appeals Access Officer.

Petitioner now seeks to compel respondent to comply with this court's December 2, 2005 decision, order and judgment and to hold respondent in contempt. In opposition to the motion, respondent relies on its April 18, 2006 FOIL response.

There is no basis for holding respondent in contempt. First, petitioner has failed to comply with the procedural requirements for a contempt motion as provided under Judiciary Law § 756. Moreover, it cannot be said that respondent disobeyed an unequivocal court mandate since respondent provided a response in accordance with the December 2, 2005 order, as modified by this court's order dated April 10, 2006. McCormick v. Axelrod, 59 NY2d 574 (1983). Furthermore, although the response raised new grounds for withholding the documents instead of turning them over, such a response is not in violation of the court's order.

Petitioner's motion to compel is deemed to be a challenge of respondent's April 18, 2006 denial of petitioner's FOIL request. Although petitioner did not file an administrative appeal of the denial, dismissal for failure to exhaust administrative remedies is not warranted since respondent has not raised this defense in response to the motion. See Mack v. Donovan, ____

AD3d_____, 2007 WL 1177448 (1st Dept Jan. 25, 2007).

In considering this matter, the court notes that “[a]ll government records are ... presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2).” Matter of Gould v New York City Police Dept., 89 N.Y.2d 267, 274-275 (1996). Moreover, the exemptions under FOIL are to be “narrowly construed” and there are no blanket exemptions for particular categories of documents. Id., at 275.

With respect to the DD5 report of Detective Mulligan (request #1) and the Investigation memorandum by Midtown North, Internal Affairs Bureau or other NYPD unit (request #5), O’Connor indicates in her letter that the files do not contain these documents. “Except for records required to be maintained by Public Officers Law § 87(3) § 88(3), FOIL does not ‘require any entity to prepare any record not possessed or maintained by such entity.’” Curro v Capasso, 209 AD2d 346 (1st Dept 1994)(*quoting* Public Officers Law § 89(3); See, also, Rivette v District Attorney of Rensselaer County, 272 AD2d 648, 649 (3d Dept 2000)(“an agency is under no obligation to furnish documents which it does not possess.”) See, Brown v New York City Police Department, 264 AD2d 558, 561-562 (1st Dept 1999)(“an agency has no duty to create documents that are not in existence... .”)(citations omitted); see, also, Public Officer’s Law § 89(3)(providing that “[n]othing in this Article shall be construed to require any entity to prepare any record not possessed or maintained by such entity”).

However, in this case the respondent has failed to provide any statement certifying that the requested documents are not in its possession and control or that the documents could not be located after a thorough and diligent search, which would be sufficient to render petitioner’s application moot. See, Rattley v New York City Police Department, 96 NY2d 873 (2001). In Rattley, the petitioner, who had been convicted of second degree murder, requested police department documents relevant to his case, and the NYPD responded by a letter stating that

although certain documents would be produced, other documents could not be located.

Subsequently, in opposition to petitioner's request for Article 78 relief, the NYPD submitted an affirmation of its counsel stating that despite a "thorough and diligent search" certain documents could not be found." Id., at 874.

Although the Appellate Division, First Department held that a counsel's affirmation and letter stating that the documents requested could not be located did not provide a sufficient basis for the court to determine without a hearing whether the respondent conducted a diligent search (Rattley v New York City Police Department, 270 AD2d 170, 171 (1st Dept 2000)), the Court of Appeals disagreed. In its decision reversing the First Department and dismissing the petition, the Court of Appeals wrote that:

When an agency is unable to locate documents properly requested under FOIL, Public Officers Law § 89(3) requires the agency to "certify that it does not have possession of [a requested] record or that such record cannot be found after diligent search." The statute does not specify the manner in which an agency must certify that the documents cannot be located. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required.

Rattley v New York City Police Department, 96 NY2d, at 875 ; see also, Alicea v New York City Police Department, 287 AD2d 286 (1st Dept 2001).

In this case, however, except for the letter denying the FOIL request, respondent provides no statement certifying that it was not in possession of the records sought or that such records could not be located after a diligent search. Accordingly, respondent shall be required to provide proof sufficient to satisfy the standard in Rattley v New York City Police Department, or the court will direct the appropriate relief with respect to petitioner's FOIL request.

Respondent denied petitioner's FOIL request for Unusual Occurrence Reports (request #2); Notes by Detective Mays (request #3) and SPRINT Reports (request # 4), on the grounds that an agency is not required to provide records that were already provided to the petitioner or

his defense counsel in connection with the underlying criminal proceeding.

In Moore v Santucci, 151 A.D.2d 677, 678 (2d Dept 1989), the Appellate Division,

Second Department wrote that:

The mere fact that disclosure was available to the applicant through some other discovery device, such as... under the CPL article 240 in a criminal proceeding does not ipso facto preclude FOIL relief, if warranted...However, if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under FOIL for a duplicate copy as academic.

Furthermore, the Appellate Division, First Department has held that the petitioner has the "burden of establishing by admissible evidence that the documents requested have not been provided to the attorney who had represented him at his criminal trial, or that the documents are no longer available to him." Lebron v. Morales, 271 A.D.2d 241 (1st Dept) lv. denied, 95 NY2d 760 (2000); see, also, Matter of Brightley v Lai, 266 A.D.2d 131 (1st Dept 1999); Franklin v Keller, 254 A.D.2d 83 (1st Dept 1998).

Here, petitioner submits a letter addressed to him dated February 7, 2003 from Howard R. Meyer, Esq., who apparently was petitioner's second trial counsel. In the letter, Mr. Meyer states that he has "[e]nclosed ...all the discovery that you need to complete your file—a lot of it you already have copies I turned over to you...[a]s you know, I never received paperwork from your prior Attorney." This letter is not sufficient to meet petitioner's burden as it suggests that certain documents were provided to petitioner, nor does petitioner indicate whether he sought any documents from his appellate counsel.

Accordingly, petitioner's motion must be denied with respect to requests nos. 2, 3, & 4. This denial, however, is without prejudice to renewal upon proper proof that petitioner sought these records from his trial and appellate counsel and that they are not available to him.

Finally, the court notes that while respondent also objects to the providing the records

sought in requests 2,3, & 4 based on privacy concerns and the potential danger to witnesses identified in those records, that these concerns would not justify a blanket exemption from disclosure but rather, would require that the records be appropriately redacted. See Johnson v. New York City Police Department, 257 AD2d 343 (1st Dept), ly denied, 94 NY2d 791 (1999).

Conclusion

In view of the above, it is

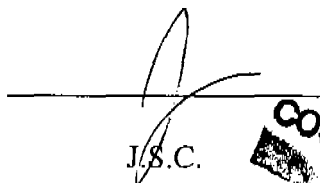
ORDERED that on or before March 22, 2007, respondent shall submit to Part 11, room 351, 60 Centre Street a certification in accordance with this decision and order, together with an affidavit of service mailing indicating that such certification was sent to petitioner by first class mail, on or before that date, or the court will direct the appropriate relief with respect to petitioner's FOIL request; and it is further

ORDERED that the return date for calendar purposes only shall be March 22, 2007 at noon, and no appearances are required; and it is further

ORDERED that the motion is otherwise denied.

A copy of this decision and order is being mailed by my chambers to petitioner and counsel for respondent.

DATED: ~~February~~ ^{March 12, 2007} 2007


J.S.C.

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