

Matter of Vasquez v Records Access Officer
2007 NY Slip Op 30759(U)
April 16, 2007
Supreme Court, New York County
Docket Number: 0116809/2006
Judge: Leland G. DeGrasse
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. LELAND DEGRASSE
Justice

PART 25

Index Number : 116809/2006

VASQUEZ, MICHAEL

vs
RECORDS ACCSEE OFFICE

Sequence Number : 001

ARTICLE 78

INDEX NO. 116809/06

MOTION DATE 12/7/06

MOTION SEQ. NO. 001

MOTION CAL. NO. 85

The following papers... his motion to/for _____

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

APR 16 2007

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

-----X
 In the Matter of the Application of :
 MICHAEL VASQUEZ, :
 : Index No.: 116809/2006
 Petitioner, :
 : Cal. No.: 142 of 12/7/06
 For a Judgment under Article 78 :
 of the Civil Practice Law and Rules, :
 - against - :
 RECORDS ACCESS OFFICER, NEW YORK :
 COUNTY DISTRICT ATTORNEY, :
 Respondent. :
 -----X
DeGRASSE, J.:

This is an application for a judgment pursuant to CPLR Article 78 compelling respondent to disclose documents requested by petitioner pursuant to the Freedom of Information Law ("FOIL") (Public Officers Law [POL] §§ 84 et seq.). Respondent opposes the petition.

FACTS

On October 7, 1997, petitioner was convicted, after a jury trial, of robbery in the first and second degrees, and is currently an inmate at Cocksackie Correctional Facility in Greene County, New York. On March 27, 2006, petitioner, by his newly retained attorney, filed a FOIL request with respondent seeking access to the following items in his criminal case file:

- “1. All documents, memorandum, correspondence, photographs and diagrams regarding the criminal investigation and prosecution against [petitioner];
2. A copy of the 911 tape;
3. A copy of the Sprint Report issued in connection with this matter;
4. A copy of all New York City Police Department DD-5 forms created in connection with this matter;
5. Copies of all statements of any witness or potential witness; and
6. Copies of all *Rosario* and *Brady* material.”

By letter dated May 19, 2006, Assistant District Attorney Susan C. Rogue (“ADA Rogue”) denied petitioner’s request on the ground that “all of the discoverable paperwork in the matter” was provided to petitioner’s defense attorney prior to petitioner’s trial. By letter dated May 22, 2006, petitioner appealed ADA Rogue’s determination asserting that while respondent stated that it was not required to provide petitioner with duplicate copies of *Rosario* and *Brady* materials, respondent “[did] not address any of the documents requested in the other five categories of [petitioner’s] March 27th letter.” By letter dated July 13, 2006, Assistant District Attorney Patricia J. Bailey (“ADA Bailey”), granted petitioner’s appeal to the extent that the matter was referred back to the Records Access Officer for a specific determination as to petitioner’s request for the 911 tape, sprint report, DD-5 forms, and witness statements.

On remand, ADA Rogue informed petitioner by letter dated July 17, 2006, that:

“[t]he case file indicates (in writing) that prior to trial the assigned Assistant District Attorney provided [petitioner’s] defense counsel with the 911 tape, the sprint reports and all twelve DD5s. All statements by witnesses were incorporated into a few of the aforementioned DD5s. The defendant’s statements were served upon defense counsel at arraignment as part of the Voluntary Disclosure Form. No other statements exist in the file. The District Attorney’s Office is not required to

provide duplicates of documents previously provided to defendant's attorney. ... And, an agency cannot provide under F.O.I.L. a document that does not exist or that it does not possess."

Petitioner then commenced this Article 78 proceeding on November 9, 2006, challenging respondent's denial of his FOIL request and seeking an order compelling respondent to provide the requested records.

DISCUSSION

"FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government" (*Matter of Capital Newspapers, Div. of Hearst Corp. v Whalen*, 69 NY2d 246, 252 [1987]). FOIL provides that upon a written request reasonably describing the desired record the agency "shall make such record available to the person requesting it [or] deny such request in writing" (POL § 89 [3]). Agencies covered by FOIL, must disclose all records except those covered by specific statutory exceptions (POL § 87 [2]; *Matter of Gould v New York City Police Dept.*, 89 NY2d 267 [1996]; *Matter of Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75 [1984]). The burden of showing that requested records fall within one of the nine statutory exemptions from disclosure rests upon the agency asserting the exemption (POL § 89 [4] [b]; *Matter of Moore v Santucci*, 151 AD2d 677 [1989]).

In support of his petition, petitioner asserts that although his present attorney obtained the files in his criminal case from his defense attorney, and a second attorney who represented him in connection with the filing of a post-conviction motion, said files did not contain any of the documents or items sought in petitioner's FOIL request. As such, petitioner claims that he requires duplicate copies of his trial materials. Petitioner further asserts that the Appeals Officer and the

Records Officer failed to address the first category of his FOIL request for “[a]ll documents, memorandum, correspondence, photographs and diagrams regarding [petitioner’s] criminal investigation and prosecution.”

By verified answer, Assistant District Attorney Grace Vee (“ADA Vee”) asserts that ADA Rogue, in both of her FOIL determinations, informed petitioner that his defense attorney was furnished with discoverable materials prior to trial, “i.e., Rosario and any existing Brady material, including the 911 tape, the [s]print [r]eport, DD-5's, and witness statements.” As such, respondent claims that petitioner should be deemed to have waived what appears to be an “effort to contest that his criminal defense attorney had been furnished with discoverable materials prior to trial ... since he never raised it in his administrative appeal of ADA Rogue’s initial FOIL determination, nor did he even file an administrative appeal of ADA Rogue’s second FOIL determination.” ADA Vee further asserts that petitioner has not demonstrated what, if any, efforts he has made to obtain the materials at issue from each of his former attorneys.

Finally, ADA Vee states that based upon her conversations with the Records Access Officer and the Appeals Officer, it is her understanding that respondents did not respond to the first category of petitioner’s request for “[a]ll documents, memorandum, correspondence, photographs and diagrams’ pertaining to his criminal case” because “they did not realize that, by this general description, petitioner meant that he was seeking any and all records beyond the records he specifically identified in categories 2 to 6 of his FOIL request.” ADA Vee further states that ADA Rogue supplemented her May 19, 2006 and July 17, 2006 FOIL determinations by letter to petitioner, dated December 1, 2006. Annexed to respondent’s opposition papers is a copy of the December 1, 2006 letter by which ADA Rogue informed petitioner that the following documents

were given to his attorney prior to trial: (1) original complaint, (2) DA data sheet, (3) arrest report, (4) on line booking sheet, (5) sprint reports, (6) complete grand jury minutes, (7) line up questionnaire, (8) line up photos, (9) photo array, (10) property voucher - plane ticket, (11) UF-61 (handwritten and original typed), (12) DD-5 forms, (13) miranda sheet, (14) defendant's written statement, (15) prisoner pedigree sheet, (16) DA 161 fact sheet, (17) CJA interview sheet, and (18) a copy of the 911 tape.

ADA Rogue also stated that "other items were provided to [petitioner's defense attorney] prior to the listed items, such as: the Voluntary Disclosure Form (on 3/26/97), the indictment (3/26/97), the predicate felony statement (11/20/97), the criminal court complaint (2/25/97), omnibus motions (4/22/97), People's response to omnibus motions (5/6/97), court's decision on omnibus motions (6/3/97), People's response to CPL § 190.50 motion (4/8/97), defendant's rap sheet/criminal history (2/25/97)."

ADA Rogue denied access to file notes prepared by the Assistant District Attorney ("ADA") "for court and trial use," as attorney work product pursuant to CPL § 240.10 (2). Access was also denied to the ADA's court notes and petitioner's mug shots, as inter-agency or intra-agency documents pursuant to POL § 87 (2) (g). Access was also denied to witness pedigree information and criminal history pursuant to POL §§ 87 (2) (b) and 87 (2) (f), and a third-party's rap sheet pursuant to 9 NYCRR § 6150.4 (b) (6), because disclosure would constitute an unwarranted invasion of personal privacy. Finally, access was denied to subpoenas issued to NYNEX by the ADA's office because disclosure of the subpoenaed records, which were not published at trial, would reveal non-routine investigation techniques, as well as confidential information.

With respect to petitioner's request for diagrams, memorandum or correspondence, ADA Rogue stated that disclosure cannot be provided under FOIL because those documents do not exist. As for petitioner's request for photographs, ADA Rogue stated that photocopies of six street photographs contained in petitioner's file were enclosed and would be reproduced for petitioner upon the remittance of \$5 for each photograph. ADA Rogue further stated that petitioner would be provided with a copy of the 37-page hearing transcript upon the remittance of \$9.25 (25 cents per page copying fee).

Respondent has met its burden of demonstrating that petitioner's request for various records which were previously provided to his defense attorney has been rendered moot (*see Matter of Moore*, 151 AD2d at 678). The verified reply of petitioner's counsel, which states that "[p]etitioner has taken numerous steps to try and obtain from other sources the documents sought in his FOIL request" is insufficient to satisfy petitioner's "burden of establishing by admissible evidence that the documents requested had not been provided to the attorney who had represented him at his criminal trial, or that the documents were no longer available to him" (*see Lebron v Morales*, 271 AD2d 241, 242 [2000], *lv denied* 95 NY2d 760 [2000]; *see also Matter of Brightley v Lai*, 266 AD2d 131, 132 [1999]; *Matter of Scarola v Morgenthau*, 246 AD2d 417 [1998]). Respondent is therefore not required to provide additional copies of those records in response to petitioner's FOIL request (*see Matter of Franklin v Keller*, 254 AD2d 83 [1998]; *Matter of Huston v Turkel*, 236 AD2d 283 [1997], *lv denied* 90 NY2d 809 [1997]).

The branch of the petition seeking a review of respondent's failure to respond to the first category of petitioner's FOIL request has been rendered moot by respondent's December 1, 2006 addendum to its May 19, 2006 and July 17, 2006 FOIL determinations (*see Matter of Lomonaco v*

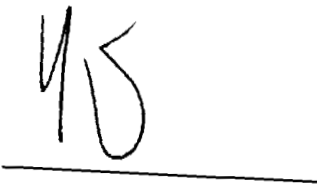
Dennison, 29 AD3d 1144 [2006] [where the relief being sought is supplied during the pendency of litigation, the matter becomes moot]); *see also Matter of Concepcion v New York State Bd. of Parole*, 304 AD2d 878 [2003]). If petitioner is dissatisfied with that portion of respondent's December 1, 2006 determination which partially denied the first category of his FOIL request for "[a]ll documents, memorandum, correspondence, photographs and diagrams," his proper course is to seek relief by way of an administrative appeal within 30 days from respondent's determination (see POL § 89 [4] [a]; *Matter of Kurland v McLaughlin*, 122 AD2d 947 [1986]). There is no record that petitioner has appealed respondent's December 1, 2006 determination. The record also fails to show that respondent advised petitioner of his right to an administrative appeal. Notwithstanding the passage of more than 30 days, respondent's laxity in not addressing the first category of petitioner's FOIL request until after petitioner commenced this Article 78 proceeding warrants that he be permitted to perfect an administrative appeal (*see Matter of Newton v Police Dept. of City of New York*, 183 AD2d 621, 624 [1992]).

As petitioner is not the prevailing party in this proceeding, he is not entitled to an award of attorney fees (POL § 89 [4] [c]; *Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435 [2005]).

CONCLUSION

Accordingly, the application is denied and the petition is dismissed. Petitioner is granted permission to appeal the partial denial of the first category of his FOIL request within 30 days after entry of this judgment.

This constitutes the decision, order and judgment of the court.



DATED:

APR 16 2007

J.S.C.

HON. LELAND DeGRASSE

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).