

**Matter of Romero v Morales**

2007 NY Slip Op 31953(U)

June 25, 2007

Supreme Court, New York County

Docket Number: 0400852/2004

Judge: Joan Madden

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

PRESENT: JOAN A. MADDEN  
Justice

PART 11

Ubaldo Romero

INDEX NO.

400 852/04

Plaintiffs,

MOTION DATE

5/8/07

- v -

MOTION SEQ. NO.

003

Morales, et al.

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for CLAW.

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 annexed memorandum, Decision, Order & Judgment.

**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).

Dated: June 26, 2007

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 DECISION,  
In the Matter of the Application of ORDER, & JUDGMENT  
Index No. 400852/04  
UBALDO ROMERO , Motion seq. No. 003  
Petitioner,

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

CARMEN A. MORALES (ADA) RECORDS ACCESS  
OFFICER FOR ROBERT MORGENTHAU , DISTRICT  
ATTORNEY OF NEW YORK AND JONATHAN DAVID  
RECORDS ACCESS OFFICER FOR THE NEW YORK CITY  
POLICE DEPARTMENT,

**SEAL OF THE COUNTY OF NEW YORK**  
*This judgment has not been entered by the County Clerk  
and notice of entry cannot be given hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).*

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

Petitioner, who is pro se, moves pursuant to CPLR 2221(e) to renew his Article 78 application to compel respondent Robert Morgenthau, District Attorney of New York ("District Attorney") to comply with New York's Freedom of Information Law ("FOIL"), Public Officers Law article 6.<sup>1</sup>

Background

Petitioner is an inmate at a state correctional facility, and has been convicted of two counts of murder in the second degree. By letter dated December 6, 2003, petitioner made a

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<sup>1</sup> By decision, order & judgment dated July 18, 2006, this court dismissed the petition against respondent the New York City Police Department which provided proof in the form of an affidavit from its Records Access Officer indicating that it was not in possession or control of the records sought by petition. The court was also dismissed as against the District Attorney based on the pendency of petitioner's appeal before the Court of Appeals without prejudice to renewal following the completion of the appeals process.

FOIL request to the District Attorney seeking copies of “any and all records and files related to accusatory instrument, felony complaint, pursuant to CPL section 100.10 (5)<sup>2</sup>.”

By letter dated December 16, 2003, ADA Carmen Morales, the FOIL Access Officer for the District Attorney, informed petitioner that his file had been requested from the District Attorney’s Closed Case Unit, and she would inform petitioner of her decision upon review of the file. The letter did not state that petitioner had a right to appeal. More than two months later, by letter dated March 18, 2004, ADA Morales informed petitioner that it was “unclear from petitioner’s request the documents he was seeking and that as there was a pending appeal, documents from the file could not be disclosed as it would interfere with a pending judicial proceeding. The letter identified the FOIL access officer for appeals, but did not indicate that petitioner had thirty days to appeal under FOIL. See Public Officers Law section 89 (4)(a).

The District Attorney sought dismissal of the Article 78 proceeding, arguing that petitioner failed to exhaust his administrative remedies as he did not appeal ADA Morales’ decision. By decision and order dated April 4, 2005, this court found that petitioner had failed to exhaust his administrative remedies as he did not file an administrative appeal of the District Attorney’s decision, and that the matter was not ripe for judicial review. The court noted, however, that two months elapsed between ADA Morales’ initial letter, and the second letter, which did not inform petitioner of the 30-day time period available for an appeal.

Under these circumstances, the court found that petitioner should be permitted to appeal the March 18, 2004 decision of ADA Morales, notwithstanding the expiration of more than thirty days, as long as such appeal was filed within thirty days of the date of this decision, plus an

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<sup>2</sup>CPL section 100.10(5) defines a felony complaint and explains its purpose.

additional 10 days, so as to provide petitioner, who is incarcerated, with adequate time to receive a copy of the decision.

By letter dated April 25, 2005, petitioner appealed the March 18, 2004 decision of ADA Morales denying his FOIL request. In a letter to petitioner dated May 9, 2005, Assistant District Attorney Patricia Bailey (“ADA Bailey”), denied petitioner’s appeal, asserting that the records sought are exempt from disclosure under Public Officers Law § 87(2)(e)(i), based on the pendency of an appeal of petitioner’s underlying criminal conviction. ADA Bailey also denied the request on the ground that the records sought had been previously provided to petitioner and his defense counsel prior to petitioner’s criminal trial in Supreme Court, in accordance with the CPL’s discovery statutes. Moore v Santucci, 151 A.D.2d 677, 678 (2d Dept 1989)(holding that “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”).

On July 13, 2005, this court signed petitioner’s order to show cause seeking to renew his application for Article 78 relief, and made it returnable on September 29, 2005. This return date was subsequently adjourned to October 20, 2005. On October 11, 2005, the Appellate Division, First Department, denied petitioner’s appeal and affirmed his conviction.

By interim decision and order dated January 27, 2006, this court found that as the First Department decided petitioner’s appeal that the exemption based on interference with judicial proceedings was not relevant. However, with respect to the District Attorney’s other argument that the documents had been already been provided to petitioner or his defense counsel, the court found that petitioner had not met his burden of establishing 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.” Lebron v. Morales, 271 A.D.2d 241 (1<sup>st</sup> Dept) lv. denied, 95 NY2d 760 (2000).

Accordingly, the court gave petitioner an opportunity to submit any response received by counsel, or in the absence of such response, an affidavit indicating that fact. In his second motion to renew, petitioner submitted an affidavit in which he averred that he sent a letter to his trial attorney indicating that the District Attorney maintained that he had already been provided with documents relating to his June 1994 arrest and requesting an affidavit from his attorney that he had not been provided with these documents in discovery or during or after trial, and that he had received no response from his counsel. In its decision and order and judgment dated July 18, 2006, the court found that based on this affidavit, petitioner had adequately shown that the documents are no longer available to him. Nonetheless, the court denied petitioner’s FOIL application, as petitioner’s application for leave to appeal to the Court of Appeals was granted, and thus the exemption from FOIL based on interference with a pending judicial proceeding was again applicable. This denial was made without prejudice to renewal following the completion of the appeals process.

On November 21, 2006, the Court of Appeals affirmed petitioner’s criminal conviction. People v. Romero, 7 NY3d 633 (2006). By letter dated December 6, 2006, petitioner wrote the District Attorney’s office to renew his December 6, 2003 FOIL request seeking “[a]ny and all records and files related to accusatory instrument, felony complaint, pursuant to CPL section 100.10.” The District Attorney’s office failed to respond and petitioner wrote a letter dated February 5, 2007, “requesting copies of any and all records or files available under Public

Officers Law article 6, filed under indictment # 9241-99 ." By letter dated March 15, 2007, the District Attorney responded that petitioner should address any application for relief directly to the court.

Petitioner then brought this order to show cause seeking to renew his request for FOIL relief asserting that as the direct appeals process is completed he is now entitled to the materials sought.

In response, Assistant District Attorney Richard Nahas submits an affidavit in which he states , "my paralegal, Anne Wheeler, conducted a diligent search through [petitioner's] case file for the records he is seeking....She located an unsigned copy of a 1994 Felony complaint which appears to have been prepared in connection with [petitioner's] 1994 arrest.... Ms. Wheeler found no other document which appear related to the Felony Complaint. Accordingly, it is respondent's position that [the District Attorney] satisfied [petitioner's] FOIL request."

In her affidavit, Ms. Wheeler states that:

On April 25, 2007, at the request of Assistant District Attorney Richard Nahas, I examined the criminal case file for Indictment Number 9241/99, People v. Ubaldo Romero, et al., which comprises five boxes of material related to [petitioner]. I examined each box looking for the 'accusatory instrument' and related records or files from [petitioner's] June 1994 arrest. After conducting a diligent search through all five boxes, I located an unsigned copy of the Felony Complaint which appears to have been prepare in connection with [petitioner's] June 1994 arrest. I located no other documents which appear related to the Felony Complaint."

In reply, petitioner argues that the production of one document is inadequate and asserts that his FOIL request sought all records and files beginning with his first arrest in June 1994 and

any additional records that were prepared as a consequence of his arrest.

“All 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). Here, petitioner requested “any and all records and files related to accusatory instrument, felony complaint, pursuant to CPL section 100.10 (5),”<sup>3</sup> in connection with his June 1994 arrest. The District Attorney interpreted petitioner’s FOIL request as seeking only documents directly related to the felony complaint and his June 1994 arrest. Petitioner, however, is seeking not only to these records but those related to his criminal case generally, including his conviction. Moreover, while petitioner’s December 6, 2003 FOIL request may be subject to varying interpretations, it is now clear that petitioner is seeking all records related to his case. Furthermore, FOIL does not require that a petitioner specifically identify the records sought as long as they are “‘reasonably described’” so as to allow the agency to locate them. Konigsberg v. Coughlin, 68 NY2d 245, 249 (1986), quoting, Public Officers Law § 89(3).

Notably, the District Attorney did not seek clarification of petitioner’s request even though this proceeding has been pending since 2004 and the FOIL request was made over three years ago. Under these circumstances, petitioner should not be required to begin the process anew by serving another FOIL request.

Accordingly, it is

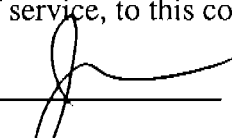
ORDERED and ADJUDGED that on or before July 23, 2007, respondent District Attorney shall serve upon petitioner a response to petitioner’s FOIL request for all records in its

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<sup>3</sup>CPL section 100.10(5) defines a felony complaint and explains its purpose.

files relating to petitioner's criminal case, including his arrest and conviction, and provide a copy of such response, together with an affidavit of service, to this court.

DATED: June 25, 2007

  
\_\_\_\_\_  
J.S.C.

**UNFILED JUDGMENT**  
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