

Matter of Bezjak v New York City Police Dept.
2008 NY Slip Op 32143(U)
July 17, 2008
Supreme Court, New York County
Docket Number: 0106118/2007
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Jack A. McDermott

PART 11

Index Number : 106118/2007

BEZJAK, JENNIFER

vs

POLICE DEPARTMENT

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 9-23-08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read at this ^{p. 11} motion to/for Article 78 relief

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~~ application is decided as per the attached memorandum Decision order + Judgment.

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be posted based hereon. To obtain entry, counsel or authorized representative must appear in Room 20 at the Judgment Clerk's Desk (Room 2007).

COUNTY CLERK

Dated: July 17, 2008

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
In the Matter of the Application of
JENNIFER BEZJAK and REBECCA HEINEGG,

Index No. 106118/07

Petitioners,
For a Judgment Pursuant to Article 78
Of the Civil Practice Laws and Rules.

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

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

In this Article 78 proceeding, petitioners Jennifer Bezjak (“Bezjak”) and Rebecca Heinegg (“Heinegg”) (together “petitioners”), who were arrested in connection with group bicycle rides in New York City, seek to compel the respondent New York City Police Department to comply with New York’s Freedom of Information Law, Article 6 §§ 84-90 (“FOIL”). Respondent cross moves to dismiss the petition as moot, asserting that after a thorough and diligent search, it has been unable to locate any responsive records.

Bezjak and Heinegg were arrested by respondent’s officers during group bicycle rides on January 28, 2005 and February 25, 2005, respectively. Each was charged with violations of permitting laws in connection with their participating in group bicycle rides organized by an organization known as “Critical Mass”

In March 2005, New York City (“the City”) initiated litigation to permanently enjoin what it characterized as violations of various permitting requirements by “participants in Critical Mass bicycle rides in New York City” (“the City litigation”). In connection with the City litigation, on or about May 5, 2006, the City was served with a Notice of Discovery and Inspection requesting and demanding that respondent produce, inter alia, tapes of records relating

to radio communications between officers on the days of the bicycle ride arrests.

In connection with the criminal proceedings against her, Bezjak served the City and the office of the District Attorney of New York County ("DANY") with a Notice of Demand for Preservation and Production of All Radio or Other Recorded Police Communications and Observations on April 11, 2005, seeking to preserve:

all recorded police communications and observations related to these cases and the January 2005 Critical Mass bicycle ride, including, but not limited to, any 911 tape, radio runs, Sprint reports, radio, cellular or other telephonic, email, text messaging, or other communications between police officers...

On May 19, 2005, Heinegg served a similar request on DANY and the City in connection with the criminal proceedings against her.

DANY did not produce tapes of or records related to the radio communications prior to or during Bezjak's criminal trial in October 2005 or Heinegg's criminal trial in January 2006. DANY consistently asserted to the trial and motion court judges that no Critical Mass-related radio communications existed and that if they did exist they would have been destroyed pursuant to routine police procedure. The City also did not produce any records.

By letter dated June 19, 2006, Bezjak served a FOIL request on respondent in which she sought:

any and all records regarding radio communications related to the New York City Police Department's policing of a group bicycle ride or group bicycle rides in the vicinity of Union Square Park between 3:00 and 11:59 P.M. on January 28, 2005, including, but not limited to, any such records regarding the subject matter of or referred to in (1) the attached Notice of Demand for Preservation dated April 11, 2005 and/or (2) the attached transcript pages of testimony given by NYPD Officers on October 17, 2005.

Heinegg's FOIL request was also dated June 19, 2006 and sought:

any and all records regarding radio communications related to the New York City Police Department's policing of a group bicycle ride or group bicycle rides between 3:00 and 11:59 PM on February 25, 2005 in the Borough of Manhattan, including, but not limited to, any such records regarding the subject matter of or referred to in (1) the attached Notice of Demand for Preservation dated May 19, 2005, and/or (2) ¶¶ 45-80 of the attached May 16, 2005 Affidavit of Christopher Bland, and/or (3) the attached transcript of certain proceedings held before Hon. Neil Ross in Part Jury 2 of the Criminal Court of the City of New York on September 13, 2005, and/or (4) the attached transcript pages of testimony given by the NYPD Officers on January 19, 2005 in Part 37 of the Supreme Court of the State of New York before Judicial Hearing Officer Herbert Adlerberg.

By separate letters dated July 11, 2006, respondent wrote to petitioner that a determination regarding the request, including whether the requested documents can be located and whether FOIL compels their release, would be reached by November 11, 2006. The letters also stated that the response did not constitute a denial of the records requested and that any future denial would be relayed in writing. By separate letters to petitioners dated July 19, 2006, each request was denied "on the basis of Public Officers Law §87 (2)(e)(i)" that "such records/information, if disclosed would interfere with law enforcement investigations or judicial proceedings." The letters also informed petitioners of their right to appeal the determination.

By letter from petitioners' counsel dated November 29, 2006 to Jonathan David ("David"), respondent's Records Access Appeals Officer, petitioners appealed the denial of their respective requests. The appeals were denied by separate letters from David dated January 4, 2007, on the grounds that "a diligent search was conducted for tapes of and records related to the

requested radio communications...with negative results.”

Petitioners filed this Article 78 proceeding on May 4, 2007, seeking an order annulling respondent’s January 4, 2007 denial of their FOIL requests and directing that respondent provide petitioners with the requested records.

Respondent opposes the petition and cross moves to dismiss it as moot on the grounds that a diligent search was made and no responsive records were located. In support of its cross motion, respondent submits the affidavit of Records Access Officer James Russo (“Russo”) of the NYPD’s FOIL Unit dated June 13, 2007. Officer Russo states that a diligent search for the requested records was conducted, but that the search failed to locate any responsive records relating to radio communications regarding any group bicycle ride in the vicinity of Union Square Park between 3:00 PM and 11:59 PM on January 28, 2005, and any group bicycle ride in the borough of Manhattan between 3:00 PM and 11:59 PM on February 25, 2005.

In response, petitioners argue that for the purposes of a motion to dismiss they have stated a cause of action, and that the Russo affidavit creates an issue of fact as to whether there are records responsive to petitioner’s requests. Petitioners further argue that in view of the City litigation and the criminal proceedings against Bezjak and Heinegg, respondent was on notice to preserve the requested records.

By stipulation dated September 5, 2007, the parties agreed to hold the petition and cross motion in abeyance and that prior to November 16, 2007, “respondent shall have conducted a further search for the records requested by Petitioners in their respective Freedom of Information Law requests dated June 19, 2006, and will provide petitioners, on or before November 16, 2007, with an affidavit documenting the search.” The matter was put on the court calendar for

November 16, 2007.

In compliance with the stipulation, respondent provided three affidavits, from Sergeant Claude Armstrong, Lieutenant Patrick Sullivan, and Lieutenant Daniel Gonzalez. Sergeant Armstrong is the Commanding Officer of the Tape and Records Unit within the Communications Division of the NYPD. The Tape and Records Unit is the custodian of all E-911 and SPRINT records, which includes all radio communications and 911 calls. Sergeant Armstrong stated that he conducted a thorough and diligent search for the records at issue on November 9, 2007, and that no responsive records were found. He further stated that no preservation orders were found in a search conducted by another officer.

Lieutenant Sullivan is the supervisor of the Civil Litigation Unit ("CLU") of NYPD's Legal Bureau. The CLU assists the Office of the Corporation Counsel in civil litigation involving the NYPD by obtaining witnesses and records maintained in the custody and control of the NYPD, as well as processing requests to preserve records received by the Office of the Corporation Counsel in the course of litigation and forwarded to the CLU. Lieutenant Sullivan stated that he conducted a thorough and diligent search for the records at issue on November 14, 2007, and that no responsive records were found.

Lieutenant Gonzalez is the supervisor of the NYPD's Document Production Unit ("DPU") within the Legal Bureau. The DPU is responsible for responding to requests for records maintained by the NYPD, as well as to process requests to preserve records maintained in the custody and control of the NYPD whose requests are forwarded to the NYPD by the City or by state agencies. Lieutenant Gonzalez stated that he conducted a thorough and diligent search on November 15, 2007 for the records requested by petitioners, as well as for any record indicating

that the preservation requests allegedly served on the DANY and the Office of the Corporation Counsel were forwarded to the DPU. He stated that no records responsive to the search were found.

Although petitioners did not appear on the November 16, 2007 court date, on a conference call with the court in March 2008, petitioners requested and were granted permission to respond to the three affidavits submitted by respondent in accordance with the September 5, 2007 stipulation. By letter dated March 20, 2008, petitioners argue that the affidavits of the three NYPD officers submitted on November 16, 2007 do not render their request moot since respondent never certified that responsive recordings of radio communications do not exist, or that they were or were not destroyed, or when they were destroyed. They also submit the transcript from the February 14, 2008 deposition testimony of NYPD Legal Bureau Lieutenant Daniel J. Albano, a records custodian who testified in connection with Five Borough Bicycle Club v. The City of New York, (07 Civ. 2488) (SDNY), a litigation regarding Critical Mass and other group bicycle rides, brought on behalf of various plaintiffs, including a plaintiff arrested on the same date as Heinegg. Specifically, petitioners rely on Albano's testimony that "audio transmissions" and "radio transmissions" exist regarding Critical Mass events. Petitioners also assert that similar records were produced in other cases, and that the facts of this particular case warrant further inquiry.

In their March 27, 2008 letter in response, respondents argue that the petitioner's submission is too late to be considered and that the delay caused petitioners to waive their rights to now object to respondent's submission of affidavits. Respondent also argues that it has complied with and exceeded its obligation under Rattley v. New York City Police Department,

96 N.Y.2d 873 (2001), which held that a statement by an attorney that a thorough and diligent search for requested records was conducted is a sufficient certification to overcome allegations that the documents exist but are not being produced. Respondent also asserts the deposition testimony of Lieutenant Albano relied on by petitioners does not establish the existence of the records sought.

Discussion

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.

That being said, however, an agency is not required to provide records that it does not possess. Davidson v. Police Department of the City of New York, 197 AD2d 466, 467 (1st Dept 1993); See also Curro v Capasso, 209 AD2d 346 (1st Dept 1994) (“[e]xcept 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.’”) (*quoting* Public Officers Law § 89(3)); 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”).

Here, the affidavits of police officers who have the responsibility of maintaining and locating police communication and radio records that the requested records could not be located after a thorough and diligent search provides evidence that the records sought are not in

respondent's possession. See Rattley v. New York City Police Department, 96 N.Y.2d at 875.

see also Alicea v. New York City Police Department, 287 A.D.2d 286 (1st Dep't 2001); Sowell v. New York City Police Dep't, 292 A.D.2d 187 (1st Dep't 2002); Matter of Bridgewater v. Johnson, 44 A.D.3d 549 (1st Dep't 2007).

Moreover, it cannot be said that respondent's argument that there has been literal compliance with its obligations under Rattley v. New York City Police Department, supra is without merit.

Respondent's obligation is delineated by the Court of Appeals in Rattley:

When an agency is unable to locate documents properly requested under FOIL, Public Officers Law § 83(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.

96 N.Y.2d at 875.

However, the court is not unconcerned with the testimony of Lt. Albano that there exists certain audio transmissions at least as to one of the various bike rides at issue in the federal litigation.¹ It must be noted that petitioners have failed to provide the court with the discovery demands in issue in the context of the specific deposition testimony of Lt. Albano, and whether the audio transmissions were in connection with either of the bike rides at issue in this proceeding.

Under these circumstances, the undeveloped record regarding Lt. Albano's testimony does not provide a sufficient basis for denying respondent's cross motion, and this court is constrained

¹This court does not condone the lapse of time between the submissions of the three police officer's affidavits by respondent and the petitioners' submission of a letter with Lt. Albano's testimony.

to find that the petition must be dismissed. This dismissal is without prejudice to renewal upon a record establishing that based on Lt. Albano's testimony, audio transmissions or other records exist relevant to the bicycle rides at issue herein.

Conclusion

In view of the above, it is

ORDERED that respondent's cross motion is granted; and it is further

ORDERED and ADJUDGED that the petition is denied and dismissed without prejudice to renewal in accordance with this decision order and judgment .

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

DATED: July 17 2008



J.S.C.

FILED
JUL 22 2008
NEW YORK
COUNTY CLERK'S OFFICE