

**Wooten v New York City Police Dept. Legal
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2008 NY Slip Op 32473(U)

September 9, 2008

Supreme Court, New York County

Docket Number: 0400192/2008

Judge: Joan A. Madden

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

PRESENT: Hon. Joan A. Madden

PART 11

Index Number : 400192/2008

WOOTEN, JAMES R.

VS.

NEW YORK CITY POLICE DEPARTMENT

SEQUENCE NUMBER : # 001

ARTICLE 78

28

INDEX NO. 400192-08

MOTION DATE 5-29-08

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

on this 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 ^{Cross-motion} ~~motion~~ ~~proceeding~~ is decided in accordance with the annexed ~~order~~ ~~decision~~ and orders.

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

FILED

SEP 11 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: Sept 8/9, 2008

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

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JAMES WOOTEN,

Index No. 400192/08

Petitioner,

- against -

NEW YORK CITY POLICE DEPARTMENT
LEGAL BUREAU,

Respondent.

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

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JOAN A. MADDEN, J.:

FILED
SEP 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this Article 78 proceeding, petitioner James Wooten, appearing pro se, seeks to compel respondent to comply with New York's Freedom of Information Law ("FOIL"), Public Officers Law Article 6. Respondent opposes the petition and cross-moves to dismiss it.

Background

In this proceeding, petitioner seeks the production of certain records relating to "a police complaint" filed on June 15, 2006 by the manager of the Duane Reade store located at 155 East 34th Street in Manhattan.

By letter dated January 31, 2007, petitioner made a FOIL request seeking "a copy of the 911 transcript regarding a police complaint made on June 15, 2006 at approximately 2:20 pm by Mr. Erik Ferencz the store manager..." Petitioner also requested "a copy of the police report filed by Police Officer Cazares and Police Officer Schweiker," who he identifies by badge number.

By letter dated February 6, 2007, James Russo, the Records Access Officer for the New York City Police Department's ("NYPD") FOIL unit, acknowledged receipt of petitioner's FOIL request, and indicated that "due to the large volume of pending requests...it is anticipated that a determination will be reached on 6/5/2007." The letter also stated that "this is not a denial of the

records you requested. Should your request be denied, in whole or in part after review by this unit, you will then be advised in writing of the reason for the denial, if any, and the name of the Records Appeals Officer.”

By letter dated March 2, 2007, petitioner filed an appeal, asserting that the February 6, 2007 response denied his FOIL request dated January 31, 2007 since it failed to make a determination within 20 days or within a reasonable time thereafter as required under Public Officers Law § 89(3).

By letter dated March 20, 2007, Jonathan David, the NYPD’s Records Access Appeals Officer, responded to petitioner’s March 2, 2007 appeal, writing that “[i]nasmuch as your FOIL request was not denied, the appeal lacks the predicate denial of access and must be denied as premature.” He also wrote that the approximate date provided in the February 6, 2007 letter “was reasonable given the attendant circumstances here, which include the nature of your request, the time required to search for and review responsive records, the review of the related legal issues, the large volume of requests processed by the NYPD’s FOIL unit, and the availability of staff to process requests.” He also informed petitioner that the matter would be remanded to the Records Access Officer for further processing of his original request.

The Records Access Officer responded to petitioner’s request by a form letter dated July 17, 2007 providing him with a copy of a Sprint report of the 911 call made in connection with the June 15, 2006 incident, which redacted certain information. The form letter did not mention the 911 transcript or written police report requested by petitioner. The letter concluded by informing petitioner of his right to appeal of the decision within 30 days and provided the name and address of the Mr. David, as the Records Access Appeals Officer for the NYPD

By letter dated August 14, 2007, petitioner filed an appeal with Mr. David on the grounds

that he was denied access to the 911 transcript and to a written police report filed by Police Officers Cazares and Schweiker. The letter also stated that Sprint report he received from the Records Access Officer was “indecipherable” and “also showed that someone blacked out information.”

By letter dated September 14, 2007, Sergeant Peter Bower of the NYPD’s Communications Division wrote to petitioner in response to petitioner’s January 31, 2007 FOIL request that the 911 tapes of the June 15, 2006 incident were erased before his request was made, and the NYPD Tape and Record Unit which is in charge of logging and recording all 911 calls and police radio transmissions is “only obligated to store the recordings for 180 days from the date of occurrence.”

By letter dated September 26, 2007, Mr. David denied petitioner’s August 14, 2007 appeal. With respect to the 911 transcript requested by petitioner, he wrote that “this record is not maintained by the NYPD [and] FOIL does not require an agency to create a record that does not already exist. You were provided with the Sprint Report related to the 911 call at issue.” As for the redacted information on the Sprint report, Mr. David wrote that access to such information “would create an unwarranted invasion of personal privacy pursuant to Public Officers Law § 87(b).” He also wrote that the written police report was not provided “because the Record Access Officer conducted a diligent search for the requested record but was unable to locate it.¹”

¹Mr. David also states that the appeal was denied based on Public Officers Law section 87(2)(c)(i) which exempts records from disclosure under FOIL when disclosure would interfere with pending judicial proceedings. However, neither Mr. David nor respondent in connection with this proceeding, identifies any pending judicial proceeding which would exempt from disclosure the records requested by petitioner.

By letter dated January 14, 2008, to Mr. David, petitioner sought the key to the codes in the Sprint report.

On January 25, 2008, petitioner filed this Article 78 proceeding seeking an order and judgment (i) annulling respondent's denial of his FOIL request for the 911 transcript and written police report, and (ii) requiring respondent to provide petitioner with information to interpret the Sprint report and to identify the redacted information in the Sprint report. Petitioner also sought an order requiring respondent to comply in the future with the time requirements provided under FOIL.

Respondent opposes the petition and cross moves to dismiss it, asserting that the petition is moot since all responsive records have been provided following a diligent search, and that with respect to petitioner's request for a key to the Sprint report or other information to decipher the report, petitioner has failed to exhaust his administrative remedies.

While this proceeding was pending, Mr. Russo sent petitioner a letter dated April 18, 2008 which indicated that as a result of petitioner's letter dated January 8, 2008, petitioner's FOIL request was remanded for a search of the key to codes contained in the Sprint report, that four pages of responsive records were located, and that such records were enclosed. The four pages contain the key to codes used in the Sprint report and directions as to how to read the report. The letter notified petitioner of his right to appeal the decision in writing within 30 days and identified the Records Access Appeals Officer for the NYPD and provided his address.

Petitioner did not appeal but, instead, asserted in his reply papers that the April 18, 2008 response was untimely.

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.

In his letter dated September 26, 2007 denying petitioner’s appeal, the Record Access Appeals Officers states that the 911 transcript sought by petitioner is not a record maintained by the NYPD and that the written police report could not be located after a diligent search. “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.’” Curto 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

* 7]
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, the July 17, 2007 letter providing petitioner with a copy of the Sprint report does not contain a statement certifying that respondent was not in possession of the records sought or that such records could not be located after a diligent search. The statement in the September 26, 2007 letter by the Appeals Officer, denying petitioner's appeal, that the Records Access Officer conducted a diligent search lacks an evidentiary basis in the record and thus is insufficient to establish that a search was in fact conducted. Accordingly, with respect to

the 911 transcript and the written police report, 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.

The remaining issues concern the Sprint report, which was produced with certain portions redacted on the asserted ground that the redactions were necessary to protect the personal privacy of certain individuals, and without a key or other means of interpreting the report. Respondent has the burden of establishing that the redaction of information in the report was necessary to protect the privacy of individuals under Public Officers Law §§ 87(2)(b) and 89(2). See O'Donnell v. Donadio, 259 AD2d 251, 252 (1st Dept), lv dismissed, 94 NY2d 791 (1999). Here, respondent has not delineated a factual basis or other support sufficient to establish that the redacted information is subject to this exemption. Accordingly, respondent shall be required to produce an unredacted version of the Sprint report for in-camera inspection, together with an explanation as to the basis for the claimed exemption. See Johnson v. New York City Police Department, 257 AD2d 343 (1st Dept), lv dismissed, 94 NY2d 791 (1999).

With respect to the key to the codes in the Sprint report or other information needed to interpret the report, petitioner failed to exhausting his administrative remedies as he has not appealed the April 18, 2008 decision of the Records Access Officer. In any event, even if it could be argued that respondent's delay in providing the information excused petitioner from appealing the decision, as it appears that the information requested has now been provided, this aspect of the petition is denied as moot.

Finally, insofar as the petition seeks to enforce time requirements under FOIL, it is moot since the respondent provided a response to petitioner's FOIL request either before or while this proceeding was pending.

Conclusion

In view of the above, it is

ORDERED that the cross-motion to dismiss is granted only to the extent of dismissing that part of the petition which seeks information to interpret the Sprint report and is otherwise denied; and it is further

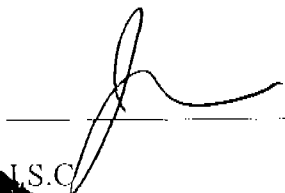
ORDERED that on or before October 16, 2008, respondent shall submit to Part 11, room 351, 60 Centre Street, New York, NY, a certification regarding the search for the 911 transcript and police report in accordance with this decision and order, together with an affidavit of service indicating that such certification was sent to petitioner by first class mail; and it is further

ORDERED that on or before October 16, 2008, respondent shall submit to Part 11, room 351, 60 Centre Street, New York, NY, an unredacted copy of the Sprint report for in-camera inspection, together with a written explanation as to why the redacted information is exempt under FOIL based on the privacy rights of individuals; and it is further

ORDERED that the return date of this petition for calendar purposes only shall be October 16, 2008, at noon, and no appearances are required.

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

DATED: September 9, 2008



J.S.C.

FILED
SEP 11 2008
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