

Matter of Ramos v New York City Police Dept.
2009 NY Slip Op 30714(U)
March 27, 2009
Supreme Court, New York County
Docket Number: 402561/08
Judge: James A. Yates
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. JAMES A. YATES PART 50Y
Justice

In the Matter of the Application of
JOHN RAMOS,

Petitioner,

-against-

Index No.402561/08
Motion Seq. No. 001

THE POLICE DEPARTMENT OF THE CITY
OF NEW YORK, JONATHAN DAVID, RECORDS
ACCESS APPEALS OFFICER and JAMES
RUSSO, RECORDS ACCESS OFFICER,
Respondents.

ORDER

FILED

APR 01 2009

COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to _____ were presented in motion to/for _____

Papers Numbered

Notice of Motion/Order to Show Cause - Affidavits - Exhibits... | _____

Answering Affidavits - Exhibits _____ | _____

Replying Affidavits _____ | _____

Cross-Motion: Yes No

Petitioner made a FOIL request to the New York City Police Department (NYPD) in November 2007, requesting documents relating to his rape arrest. On September 16, 2008, Petitioner commenced an Article 78 proceeding to challenge a determination by the NYPD denying his request .

In view of the Court's finding, the request is granted and denied in part (see attached Decision and Order). The Court directs Respondents to provide the

documents that were located and not disclosed by the NYPD for an in camera inspection by this Court.

This constitutes the Decision and Order of the Court.

Dated 3-27-09 ENTER: HON. JAMES A. YATES J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

FILED
APR 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50Y

-----X
 In the Matter of the Application of :
 JOHN RAMOS, :
 :
 Petitioner, :
 :
 For a Judgment under Article 78 :
 of the Civil Practice Law and Rules :
 :
 -against- :
 :
 NEW YORK CITY POLICE DEPARTMENT, :
 JONATHAN DAVID, RECORDS ACCESS APPEAL :
 OFFICER and JAMES RUSSO, RECORDS :
 ACCESS OFFICER, :
 Respondent. :
 -----X

Decision and Order
Ind. No. 102561/08

FILED
APR 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

Hon. James A. Yates, J.S.C.

Pro se petitioner, an inmate at an upstate correctional facility, brings this Article 78 proceeding to challenge a determination by the New York City Police Department denying his Freedom of Information Law (Public Officers Law art 6) (FOIL) request related to the sex crime for which he was convicted. He argues that the New York Police Department (NYPD) has failed to furnish him with a "particularized and specific justification" for not disclosing the requested documents. See *Gould v New York Police Dept.*, 89 NY2d 267, 275 (1996). Respondents cross-moved for dismissal on the ground of failure to assert a cause of action. The NYPD argues that the petition is moot because it has provided Petitioner with copies of all the documents responsive to his request which were located pursuant to its search. The NYPD also contends that eight records that were located but not disclosed to petitioner are exempt from disclosure pursuant to Civil Rights Law 50-b and Public Officers Law 87 (2) (a) and (3) because they tend to identify a sex crime victim.

Background

By letter dated November 29, 2007, petitioner wrote to the FOIL Unit of the NYPD requesting copies of "[a]ll police reports, injury reports, witness statements, detective

[* 4]

notes, letters and correspondence, district attorney reports, defendant's statements, property vouchers for defendant's personal property [and] case notes" compiled after his arrest for Rape in the First Degree, Assault in the First Degree, Burglary in the First Degree and Robbery in the Second Degree. See Notice of Cross-Motion to Dismiss, exhibit A, Letter by John Ramos. By letter dated May 13, 2008, the Records Access Officer of the NYPD, Sergeant James Russo, denied access to the records on the ground that disclosure was barred by Civil Rights Law 50-b, which prohibits the disclosure of records that tend to identify the victim of a sex offense. The letter also informed petitioner that he could appeal the decision in writing, within thirty days from the date of the letter. *id.*, exhibit B. On June 7, 2008, petitioner wrote to the NYPD and administratively appealed the decision. *id.*, exhibit C. On July 3, 2008, Records Access Appeals Officer Jonathan David denied the appeal on the ground that the records were exempt from FOIL disclosure under Civil Rights Law 50-b and Public Officers Law 87 (2) (a). *id.*, exhibit D. On September 16, 2008, petitioner filed his Article 78 petition.

The NYPD contends that a diligent search was made of all records that would be responsive to petitioner's FOIL request. Respondent certifies that a total of 70 pages of responsive records were located. As well, respondent's attorney states that she conferred with Assistant District Attorney (ADA) Colgan from the New York County District Attorney's Office who reviewed the case file for Indictment No. 3846-03. ADA Colgan confirmed that over 200 records pertaining to petitioner's case were already disclosed to him, through counsel, on March 4, 2004. The *Rosario* list retrieved from petitioner's case folder was attached to the NYPD's motion papers. *id.*, exhibit E.

Of the 70 pages located by the NYPD, it is alleged that 51 pages of responsive papers were already disclosed to the petitioner by ADA Colgan on March 4, 2004. An additional eleven pages of responsive records, not previously disclosed by the District Attorney's Office, were attached to the NYPD's papers. *id.*, exhibit F, three pages of Property Clerk's invoices and eight pages of follow-up complaint reports. These records were redacted in part. The NYPD argues that the eight remaining pages of records that were located and not disclosed, identify the victim of a sex

[*5]
offense by name and address and therefore it is barred from disclosing those records. Furthermore, the NYPD argues that inasmuch as petitioner requests the District Attorney's reports, these records are not within respondent's custody and control.

Discussion

All government records are presumptively open for public inspection unless specifically excluded from disclosure as provided in the Public Officers Law (See Public Officers Law 87 (2); *Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738 (2001)) citing to *Gould v New York Police Dept.*, 89 NY2d 267).

Public Officers Law 87 (2) (a) limits disclosure of documents specifically exempted by state or federal statute. In this case, respondent relies on the statutory exemption found in Civil Rights Law 50-b (1) which states:

"The identity of any victim of a sex offense . . . shall be confidential. No report, paper, picture, photograph, court file or other documents . . . which identifies such a victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section."

In this case, however, the NYPD has not met its burden of showing that the statutory privilege of Civil Rights Law 50-b applies to the eight records that were located and not disclosed. While the Court is mindful of its obligation to shield documents containing information that identifies the victim of a sex crime, the NYPD has made no attempt to show that these eight records contain identifying information. See *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 (1979). Accordingly, these documents are to be submitted to the Court for an in camera review.

Denial of the other requested documents is appropriate for several reasons. First, the Court of Appeals held in *Fappiano v New York City Police Dept.* (95 NY2d 738, 749

(2001)), that a FOIL request to the NYPD is rendered moot or academic when the requested records were already provided to petitioner by the District Attorney's Office. The Appellate Division, First Department, has also held that it is petitioner's burden to establish "by admissible evidence that the documents requested had not been provided to the attorney who had represented him at his criminal trial or that they were no longer available to petitioner [citations omitted]." *Brightly v Lai*, 266 AD2d 131, 132 (1st Dept 1999); see also *Lebron v Morales*, 271 AD2d 241 (1st Dept 2000), lv denied 95 NY2d 760. Petitioner's attorney was already given 51 of the records that were located in the NYPD's search by the District Attorney's Office. He also has failed to demonstrate that those previously provided records are no longer available to him. Thus, because his attorney obtained these records in a prior proceeding, this relief is academic and moot.

The Court further notes that respondent's obligations under FOIL are met when the department certifies that the requested records cannot be found after a diligent search. Public Officers Law 89 [3]. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required. A statement to that effect in an attorney's affirmation is sufficient. See *Rattley v New York City Police Dept*, 96 NY 2d 873 (2001); *Matter of Daum v Tessler*, 24 AD3d 214 (1st Dept 214). That requirement has been met by respondent.

Finally, in his FOIL request, petitioner requests "all ... [D]istrict [A]ttorney reports. However, District Attorney records are not within respondent's custody and control. Clearly, an agency is under no obligation to provide documents which it does possess. See *Rivette v District Attorney of Rensselaer County*, 272 AD2d 648 (3d Dept 2000). Petitioner must request these records from the District Attorney's FOIL Office.

In view of the above findings, it is

ORDERED that the motion is denied and granted in part; and it is further

ORDERED that on or before April 30, 2009, respondent shall submit to Part 50Y, Room 1333, 100 Centre Street, New York,

New York copies of those eight documents that are alleged to contain information that tends to identify the victim of a sex crime for an in camera inspection in accordance with the opinion herein.

This constitutes the Decision and Order of the Court.

Order signed this 27th day of March, 2009.

E N T E R:

James A. Yates, J.S.C.

FILED
APR 01 2009
COUNTY CLERK'S OFFICE
NEW YORK