Matter of Sanchez v Morgenthau
2009 NY Slip Op 32655(U)
November 6, 2009
Supreme Court, New York County
Docket Number: 400741/2009
Judge: Paul G. Feinman
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SCANNED ON 11/13/2009

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

PRESENT: HON. PAUL G. FEINMAN, Justice — PART 12

Luis Sanchez, #98-A-6905

- v -

Robert Morgenthau

INDEX NO. 400741/09

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

RECEIVED
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MOTION SUPPORT OFFICE
SUPREME COURT - CIVIL

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).

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT.

Courtesy copies mailed to both sides.

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

Dated: 11/6/09

Paul G. Feinman, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

---X

In the Matter of the Application of
LUIS SANCHEZ,
Petitioner,
- against -
ROBERT M. Morgenthau, NEW YORK COUNTY DISTRICT ATTORNEY,
Respondent.

---X

Index Number 400741/2009
Mot. Seq. No. 001

DECISION, ORDER AND JUDGMENT

For the Petitioner:
Luis Sanchez, *pro se*
Shawangunk Correctional Facility
PO Box 700
Wallkill, NY 12589

For the Respondent:
Robert M. Morgenthau, District Attorney
By: Grace Vee, Esq., Assistant District Attorney
One Hogan Place
New York, NY 10013

Papers considered in review of this petition to review the denial of petitioner's appeal:

Papers
Order to Show Cause
Verified Petition and Annexed Exhibits
Verified Answer and Annexed Exhibits
Petitioner's Reply

UNFILED JUDGMENT
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PAUL G. FEINMAN, J.:

Petitioner brings this CPLR Article 78 proceeding seeking judicial review of respondent's denial of his Freedom of Information Law ("FOIL") requests (*see* Public Officers Law art 6); respondent opposes. For the reasons set forth below, the petition is denied in part and granted in part.

Background

In November 1998, petitioner was convicted, upon his plea of guilty, of kidnapping in the first degree (two counts) and robbery in the first degree. Petitioner was sentenced to concurrent terms of 15 years to life imprisonment, which he is currently serving at Shawangunk Correctional Facility. Petitioner unsuccessfully appealed his convictions (*see People v Sanchez*, 270 AD2d 50, 51 [1st Dept 2000], *lv denied* 94 NY2d 952 [2000]). In early 2001, petitioner sent letters to

his trial and appellate counsels requesting a copy of his files so that he could prepare a post-judgment motion to set aside his conviction pursuant to Article 440 of the Criminal Procedure Law (Pet., Ex. H). According to petitioner, neither counsel replied (Reply ¶ 21).

Over six years later, petitioner submitted a FOIL request to respondent seeking "8 separate categories of documents" pertaining to his indictment (Ans., Ex. A). Respondent acknowledged receipt of that request (Ans., Ex. B) and denied it (Pet., Ex. D). Among respondent's several reasons for the denial was the fact that "a plot was uncovered in which [petitioner] and [his] co-defendants had planned to 'shank' [his] defense attorney while in court [and] papers were recovered threatening to kill the children of the assistant district attorney handling the case" (Pet., Ex. D). Also, respondent noted that the documents petitioner requested would interfere with the pending appeal of one of petitioner's four co-defendants (Pet., Ex. D).

What followed is unclear, but petitioner claims that he appealed this denial and he submits a copy of the letter by which he purports to have done so (Pet., Ex. E). Respondent, on the other hand, alleges that "there is no indication in [respondent]'s records that petitioner ever administratively appealed [the] October 23, 2007 FOIL decision" (Ans. ¶ 11).

Over eight months later, on August 1, 2008, petitioner submitted another FOIL request to respondent, which was nearly identical to the prior FOIL request (Pet., Ex. A). Respondent also denied the second FOIL request (Pet., Ex. B). Petitioner appealed the denial (Pet., Ex. C) but the determination was upheld (Pet., Ex. F). This proceeding ensued.

Analysis

CPLR Article 78 proceedings are the vehicle by which one challenges administrative determinations (*see* CPLR 7801 [1]; 7803 [3]). Judicial review of such a determination is limited

and will not be disturbed by this court unless the determination is arbitrary and capricious, without foundation in fact, or taken without regard to the facts (*see Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]). Still, this court may not substitute its judgment for that of the agency's (*see Matter of Aronsky v Board of Educ.*, 75 NY2d 997, 1000 [1990]; *Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept 1983]). Article 78 proceedings are disposed of in the same manner as a motion for summary judgment (*see* CPLR 409 [b]).

To promote the policy of "open government" (*Matter of Newsday, Inc. v Empire State Dev. Corp.*, 98 NY2d 359, 362 [2002]; *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 565 [1986]; *see* Public Officers Law § 84) and "public accountability" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274 [1996]), FOIL "mandates all agencies to make records available to the public" (*Matter of Empire Realty Corp. v New York State Div. of Lottery*, 230 AD2d 270, 272 [1997]), unless "'the material requested falls squarely within the ambit of [a] statutory exemption[]'" (*Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 83 [1984], quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). Generally, administrative determinations are "entitled to varying degrees of judicial deference depending upon the extent to which the interpretation relies upon the special competence the agency" (*Matter of Rosen v Public Empl. Relations Bd.*, 72 NY2d 42, 47 [1988]). Thus, when an agency makes a determination in a matter involving that agency's "special competence and expertise"(*Jemrock Realty Co. LLC v Krugman*, 64 AD3d 290, 300 [1st Dept 2009]), this court affords great deference to that determination (*see Matter of Lewis Family Farm, Inc. v New York State Adirondack Park Agency*, 64 AD3d 1009, 1013 [3d Dept 2009]), so

long as it is rational (*see Matter of Gruber [New York City Dept. of Personnel—Sweeney]*, 89 NY2d 225, 231 [1996]; *Matter of Rosen v Public Empl. Relations Bd.*, 72 NY2d 42, 47 [1988]). However, this court is not required to "accord [any] deference to [agency] determination[s regarding] statutory construction" or pure questions of law (*Matter of Belance v Manhattan Beer Distribs.*, 52 AD3d 1059, 1061 [3d Dept 2008], *lv denied* 11 NY3d 715 [2009]). The issue of whether a party invoking a FOIL exemption has met their burden is one of "pure legal interpretation" (*Matter of Toys R Us v Silva*, 89 NY2d 411, 419 [1996]) for this court to decide and, therefore, it is it is error to "apply[] the normal [A]rticle 78 'arbitrary and capricious' standard of review" (*Matter of Bahnken v New York City Fire Dept.*, 17 AD3d at 229; *see Matter of Smith v Donovan*, 61 AD3d 505, 508 [1st Dept 2009]; Public Officers Law § 89 [5] [e]). The agency claiming the applicability of an exemption "bears the burden of proving entitlement to the exemption" (*Matter of Bahnken v New York City Fire Dept.*, 17 AD3d 228, 229 [1st Dept 2005], *lv denied* 6 NY3d 701 [2005]; *see* Public Officers Law § 89 [4] [b]). Finally, this court is mindful that FOIL exemptions must be "narrowly interpreted" to effectuate the statute's purpose (*Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 564 [1984]).

CPLR Article 78 proceedings must be commenced "within four months after the determination . . . becomes final and binding" (CPLR 217 [1]). "A determination is not final until the aggrieved party receives notice of the determination" (*Matter of Metropolitan Museum Historic Dist. Coalition v De Montebello*, 20 AD3d 28, 35 [1st Dept 2005]). In the context of an administrative appeal of a denial, FOIL requires the agency to reply "within ten business days of the receipt of such appeal" (*see* Public Officers Law § 89 [4] [a]). Thereafter, "to preserve [the] right to judicial review, [a petitioner is] required to exhaust his administrative remedies by filing

an administrative appeal within 30 days" (*Matter of McGriff v Bratton*, 293 AD2d 401, 402 [1st Dept 2002]; *see* Public Officers Law § 89 [4] [a]-[b]). When an agency fails to timely reply to an appeal, the appealing party is entitled to treat that failure as a constructive denial (*see* Comm on Open Govt FOIL-AO 10587 [1998]; *see generally Matter of Floyd v McGuire*, 87 AD2d 388, 390-391 [1982], *app dismissed* 57 NY2d 774 [1982]).

Here, petitioner's first FOIL request was denied on October 23, 2007 (Pet., Ex. D). Petitioner claims that he administratively appealed this denial and he submits a copy of the letter by which he purports to have done so (Pet., Ex. E). This letter is not signed by petitioner and is not accompanied by an affidavit of service, nor any other evidence tending to prove that the letter was served upon respondent, such as a return receipt or proof of mailing from the United States Postal Service. Respondent alleges that "there is no indication in [respondent]'s records that petitioner ever administratively appealed [the] October 23, 2007 FOIL decision" (Ans. ¶ 11) and that because petitioner failed to exhaust his administrative remedies, this proceeding should be dismissed (Ans. ¶ 20). To the extent that petitioner's second FOIL request is duplicative of the first FOIL request, respondent is correct.

With respect to the issues raised in the first FOIL request, petitioner has failed to satisfy the court that he exhausted his administrative remedies. But, even if this court were to find that petitioner did administratively appeal the denial of his first FOIL request, it is undisputed that he never sought judicial review thereafter. Assuming that petitioner in fact perfected an administrative appeal by mailing the letter annexed as Exhibit E on or about its November 13, 2007 date, when he did not hear back it is deemed a constructive denial on the tenth business day after respondent would have received it (Pet., Ex. E). Petitioner then had 30 days to seek judicial

review. He did not. Instead, he submitted a second FOIL request on August 1, 2008, over eight months later (Pet., Ex. A). Thus, to the extent that this proceeding seeks review of petitioner's denial of August 2008 FOIL requests that were also made in the October 2007 FOIL requests (Ans., Ex. A), this court must dismiss it "as a belated attempt to seek judicial review of the [first] denial" (*Matter of Mendez v New York City Police Dept.*, 260 AD2d 262, 262-263 [1st Dept 1999]).

Comparison of the two requests leaves only one request which was not repetitive of the earlier request – category 7 – which pertains to a request for petitioner's co-defendant's statements and/or confessions. Thus, this proceeding must be denied as to categories one through six on the ground that it seeks "belated judicial review of respondent's" constructive October 2007 denial (*Matter of Jamison v Tesler*, 300 AD2d 194, 195 [1st Dept 2002]), which is clearly untimely (*see Matter of Sanders v Coddington*, 262 AD2d 104, 104-105 [1st Dept 1999]). Left for the court's consideration is the extent to which respondent properly denied petitioner's request for category number seven of the August 2008 request.

Despite the breadth of FOIL's applicability, several types of documents are nevertheless exempt from production. Among such documents are those which "if disclosed could endanger the life or safety of any person" (Public Officers Law § 87 [2] [f]) "especially where the requester has demonstrated a propensity for violence and revenge" (*Matter of Laporte v Morgenthau*, 11 AD3d 410, 410 [1st Dept 2004]) or "would interfere with law enforcement investigations or judicial proceedings" (Public Officers Law § 87 [2] [e] [i]). "The propriety of a FOIL exemption claimed under [the safety exemption] requires a court to consider whether the information sought to be redacted 'could, by its inherent nature, give rise to the implication that its release, in

unredacted form, could endanger the life and safety of witnesses or have a chilling effect on future witness cooperation'"(*Matter of Bellamy v New York City Police Dept.*, 59 AD3d 353, 355 [1st Dept 2009], quoting *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 349 [1st Dept 1999], *lv dismissed* 94 NY2d 791 [1999]).

Here, respondent provides several explanations for why it has denied petitioner's various requests, but has not indicated which response applies to which category of documents. As best the court can parse the respondent's answer, the sole reason for not complying with the request for co-defendant's statements and confessions is that it previously did so at petitioner's arraignment in Supreme Court, Criminal Term. Indeed, the co-defendant's statements and/or confessions clearly would ordinarily have been turned over to defense counsel at the trial court as part of the discovery process pursuant to CPL 240.20 (1) (a).[1] Respondent argues that it is not required to provide petitioner with duplicates.

This court recognizes that, generally, respondent need not provide duplicates of documents which had already been supplied (*see Matter of Kelly v New York City Police Dept.*, 286 AD2d 581, 581 [1st Dept 2001]). However, petitioner provided this court with copies of correspondence sent to his former attorneys in which he requested those very documents (Pet., Ex. H). According to petitioner, neither his trial nor appellate attorney ever replied (Reply ¶¶ 21-24). Thus, petitioner has demonstrated that those documents "are no longer available" to him

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[1] CPL 240.20 (1) provides that "[e]xcept to the extent protected by court order, upon a demand to produce by a defendant against whom an indictment . . . is pending, the prosecutor shall disclosed to the defendant and make available for . . . copying . . . the following property: (a) Any written, recorded or oral statement of a co-defendant to be tried jointly, made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his [or her] direction or in cooperation with him [or her]."

and he is entitled to production of the documents falling within category seven of his second FOIL request (*Matter of Huston v Turkel*, 236 AD2d 283, 283-284 [1st Dept 1997], *lv denied* 90 NY2 809 [1997]; *Matter of Franklin v Keller*, 254 AD2d 83 [1st Dept 1998]; *Matter of Swinton v Record Access Officers for City of N.Y. Police Dept.*, 198 AD2d 165 [1st Dept 1993]).

To the extent that category seven is susceptible to respondent's argument that "the file pertaining to his criminal case" contained no such documents (Ans., Ex. I, Schwartz Affirmation), this court finds while, ordinarily, such a certification would satisfy respondent's duty of production, that is not the case here. Respondent has not met its obligation to conduct a "diligent" search because respondent's averments are ambiguous and, from them, one could infer that only defendant's file was searched; petitioner is entitled to these documents in respondent's possession regardless of whether they in come from petitioner's file or some other source (*Matter of Swinton v Record Access Officers for City of N.Y. Police Dept.*, 198 AD2d at 166). Therefore, the petition is granted to the extent that respondents shall provide petitioner with copies of the documents pertaining to co-defendant statements and/or confessions. Accordingly, it is

ORDERED and ADJUDGED that the petition is granted only to the extent that respondent shall provide petitioner, within 30 days of entry of this order, with the documents constituting petitioner's co-defendant's statements and/or confessions, or if such do not exist, a copy of the original Voluntary Disclosure Form which indicated that there were no such statements; and it is further

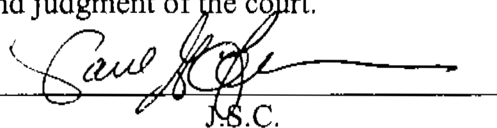
ORDERED and ADJUDGED that the petition is denied in all other respects.

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

Dated: November 6, 2009
New York, New York

J.S.C.

(400741_2009_gms(Art78_FOIL).wpd)



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