

Covington v Russo

2010 NY Slip Op 31277(U)

May 18, 2010

Sup Ct, NY County

Docket Number: 402817/08

Judge: Joan A. Madden

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

PRESENT: MADDEN
Justice

PART 11

COVINGTON, JOHN

INDEX NO. 402695/09

MOTION DATE 3-1-10

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -
SGT. JAMES RUSSO,
ET AL.

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

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 in accordance with the enclosed Memorandum Decision Order and 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 _____)

Dated: May 18, 2010

J
HON. JOAN A. MADDEN J.S.C. ✓

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

Index No. 402817/08

-----X
JOHN COVINGTON,

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

- against -
SGT. JAMES RUSSO and PO JONATHAN DAVID
Respondents.

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

In this Article 78 proceeding, petitioner, John Covington, appearing pro se, seeks to compel respondents to comply with New York's Freedom of Information Law ("FOIL"), Public Officers Law Article 6. Respondents Sgt. James Russo and P.O. Jonathan David, who are Record Access Officers with the New York City Police Department, oppose the petition and cross move to dismiss for failure to obtain personal jurisdiction over them and as moot in that all responsive records have been previously located pursuant to a diligent search. For the reasons stated below, the petition is denied and dismissed as moot.

Petitioner is an inmate at a state correctional facility. The FOIL request at issue seeks records relating to his arrest on January 27, 1998 for two separate incidents of armed robbery, one occurring on January 17, 1998 and the second occurring on January 27, 1998. The crimes occurred in the Woodhaven neighborhood of Queens. Specifically, by letter dated December 9, 2008, petitioner requested with respect to the January 17, 1998 incident the "memo books, notes

of Sgt. Stack, Det. Pellechia, P.O. Graffeo, P.O. Pena...[and] copies of the Police, Detectives, and other law enforcement interviews... regarding complainants Chris Mohan, Danny Sang, and the witnesses Anthony Raya and Quinones Jackson .” With respect to the January 27, 1998 incident, petitioner requested “ a copy of the detectives and police officers memo books and notes (which can be the entire memo book and notes or portions that concern a crime that took place on 1/27/98 at 1:30 pm at 95-42 Queen Blvd., Queens, NY.” He also requested “memo books and notes of Lt. Nivins, P.O. McCaffrey, Detective Harold Massey” and the interview of Solomon Appiah.

By letter dated April 24, 2009, the NYPD’s FOIL unit denied petitioner’s request as duplicative of his prior FOIL requests. By letter dated April 29, 2009, petitioner appealed the denial of his FOIL request to the Records Access Officer. By letter dated June 26, 2009, the appeal was denied on the ground that the request were duplicative of three previous requests in which he sought Article 78 relief, and obtained certain documents.

On October 23, 2009, petitioner commenced this proceeding challenging the denial of his FOIL request and respondents cross moved to dismiss the petition, arguing that petitioner failed to obtain personal jurisdiction over them and that the petition should be denied as moot.

Petitioner opposes the cross motion arguing, inter alia, that although he made previous FOIL certain records have not been supplied to him, and that he served respondents properly, although he admits that he did not serve the respondents individually but did serve their attorney as directed by the order to show cause.

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. At the same time, however, “FOIL does not ‘require any entity to prepare any record not possessed or maintained by such entity.’” Curro 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”).

Thus, an agency’s obligations under FOIL are met when it certifies that it is not in possession of requested records after a diligent search. See Public Officers Law § 89(3). The Court of Appeals has held that the certification requirement is satisfied when the agency certifies in a letter that it has provided all responsive documents that could be located after a thorough and diligent search, and its counsel submits an affirmation indicating that such a search was conducted. See Rattley v. New York City Police Department, 96 NY2d 873 (2001). Moreover, when a respondent produces records pursuant to FOIL the petition is rendered moot. Crispino v. Morgenthau, 38 AD3d 210 (1st Dept 2007).

In this case, the record reveals the petitioner has made three previous FOIL requests for the records sought in his latest request and that he has received documents in response to such

requests. For example, petitioner seeks statements from complainants Chris Mohan, Danny Sang, and the witnesses Anthony Raya, Quinones Jackson, and Solomon Appiah, even though respondent attach exhibits of these records which were previously produced, and also memo books which have been previously produced. Moreover, the New York City Police Department has adequately certified that it has no other documents responsive to petitioner's request. See, Rattley v. New York City Police Department, 96 NY2d at 874. see also, Alicea v. New York City Police Department, 287 AD2d 286 (1st Dept. 2001). Accordingly, the petition must be denied as moot and the court need not reach whether petitioner was properly served with the initiating papers in this proceeding.

In view of the above, it is

ORDERED and ADJUDGED that the petition is denied and dismissed.

DATED: May 18 2010

J.S.C.

HON. JOAN A. MADDEN
J.S.C.

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