

Matter of Latta v Morgenthau

2010 NY Slip Op 31682(U)

June 18, 2010

Supreme Court, New York County

Docket Number: 400867/10

Judge: Alexander W. Hunter

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

PRESENT: SUTHERLAND
Justice

PART 16

DOUGLAS LATTA
-v-
ROBERT MORCENTAUV

INDEX NO. 480867/10
MOTION DATE 6/9/10
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 11 were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-6

7-11

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

See memorandum decision and judgment attached hereto.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain a copy, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 448).

RECEIVED

JUN 23 2010

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: June 18, 2010

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: PART 33**

-----X
In the Matter of the Application of Douglas Latta,

Index No.: 400867/10

Petitioner,

-against-

Robert M. Morgenthau, as District Attorney, County of New York; Office of the District Attorney; Eleanor Nussbaum, Records Access Officer, Office of the District Attorney, County of New York; Patricia J. Bailey, FOIL Appeals Officer, Office of the District Attorney, County of New York,

Respondents,
1449.vii

For a Judgment Pursuant to Article 78 of the
Practice Law and Rules.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based on this judgment. To obtain entry, counsel or certified mail must be used to appear in person at the judgment clerk's office.

-----X
HON. ALEXANDER W. HUNTER, JR.

The application by pro se petitioner pursuant to Article 78, for an order challenging the administrative determinations of the Office of the District Attorney and respondents of that office and default on petitioner's Freedom of Information Law (FOIL) appeal dated December 2, 2009 and the first denial of petitioner's FOIL request on November 17, 2009, is denied.

Petitioner asserts that he requested documents under FOIL. Respondents, in their administrative capacity, both individually and collectively, denied his FOIL request and the subsequent timely FOIL appeal. Petitioner sent the FOIL request to the Record Access Officer at the District Attorney's Office of New York County on October 31, 2009. He requested the Special Information pursuant to C.P.L. §200.65 and any documents of consent pursuant to C.P.L. §460.60(3), under indictment number 3782-2007. Petitioner contends that his FOIL request was denied by Eleanor Nussbaum, the Record Access Officer at the District Attorney's Office by letter dated November 17, 2009. The reasons for the denial were that the District Attorney's Office's records indicated that the case was still pending and set for trial on December 17, 2009 in Part 42 and Public Officers Law §87(2)(e)(i) specifically exempts from disclosure any records compiled for law enforcement purposes and which, if disclosed, would interfere with a judicial proceeding. (Exhibit C). Petitioner filed an appeal to Patricia J. Bailey, the FOIL Appeals Officer on December 2, 2009 but has not yet received a response to same.

Petitioner argues that his request cannot be recognized as him delaying the court's procedure and/or interfering with a judicial proceeding. He asserts that under the Due Process Clause, fairness can only be established if both parties claiming a common interest in the matter are allowed a fair opportunity to defend their position. He further argues that when one party deprives another party of his request, then that party has deprived the other and has legally created a delay or contempt of court. Petitioner asserts that the only way there can be a justifiable expectation of denial of petitioner's FOIL request is if the information being requested involves the undercover a victim's identity and/or residence or workplace. Petitioner argues that

he is not requesting information or actual physical evidence, witnesses and/or testimonies, arrest reports, informants or the like.

Petitioner cites to C.P.L. §200.65 which states that when filing an indictment which charges enterprise corruption, the district attorney must submit a statement to the court attesting that he or she has reviewed the substance of the evidence presented to the grand jury and concurs in the judgment, that the charge is consistent with legislative findings in article four hundred sixty of the Penal Law. Petitioner asserts that he is simply requesting a copy of the Special Information that was prepared, verified and subscribed by the District Attorney. Therefore, the FOIL request must be honored. He further asserts that any non-response by respondent is a default under the law which creates an admission. He claims that petitioner's FOIL request could not hinder judicial proceedings, petitioner is not on trial and has not even had a hearing or plea negotiation. Moreover, the District Attorney has never, even upon direct question, made a communication of readiness on record or upon submission of any papers.

Petitioner argues that respondent's determination was arbitrary, capricious and a "cookie-cutter" denial. Accordingly, its determination should be vacated and set aside.

Respondent submits a verified answer in opposition to petitioner's pro se application. Respondent asserts that petitioner stands accused of being a member of an international cyber crime group that trafficked for several years in stolen credit card data. The group centered around a company, Western Express International (hereinafter "Western Express"), which bought and sold unregulated digital currencies and directed wire transfers to dozens of shell accounts. (Answer, para. 2). Western Express made it possible for other members of the ring to buy and sell stolen credit card data, across international boundaries in anonymous transactions. Vendors for the group sold stolen credit card information over the internet to buyers, the latter of whom allegedly included petitioner. Western Express then helped the sellers of the stolen data cash in their "earnings." (Answer, para. 2).

By New York County Indictment Number 3782/07, filed on August 10, 2007, a grand jury charged the petitioner along with Western Express and thirteen (13) other defendants in a 173 count indictment, with several crimes, including Enterprise Corruption. On July 23, 2008, New York State Supreme Court Judge Bruce Allen, dismissed the Enterprise Corruption count against petitioner, Western Express and several other defendants. After filing a motion to reargue wherein Judge Allen adhered to his original decision, respondent appealed to the Appellate Division, First Department. That appeal is calendared for the June term of the Appellate Division, with oral argument scheduled for June 9, 2010.

By letter dated December 18, 2008, petitioner, through his attorney, requested a copy of the Special Information filed by the respondent pursuant to C.P.L. §200.65. On January 13, 2009, ADA Bandler, the assistant district attorney assigned to the case, responded that the Special Information which had been previously filed with the court was not discoverable and was not statutorily required to be served upon petitioner. ADA Bandler stated that he would disclose a redacted copy to the petitioner if ordered to do so by the court. However, the court declined to order the District Attorney's office to disclose the Special Information, due in part to the fact that the Enterprise Corruption count, to which the Special Information related, had been dismissed. Accordingly, after petitioner requested the Special Information pursuant to a FOIL request, it was denied.

In his appeal to the FOIL Appeals Officer, ADA Patricia Bailey, petitioner asserted that his case was not scheduled for trial on the date stated as the DA's office had not yet answered ready for trial and thus, the material he requested would not interfere with judicial proceedings. However, by letter dated April 19, 2010, ADA Bailey upheld Ms. Nussbaum's FOIL denial and stated that because petitioner's criminal trial was pending, he should not be able to circumvent the criminal discovery statutes to secure documents through a FOIL request.

Respondent argues that it properly denied disclosure of the requested documents because doing so might interfere with the judicial proceedings pending in petitioner's case. Public Officers Law Section 87(2)(e)(i) specifically exempts from disclosure any records compiled for law enforcement purposes, which if disclosed, would interfere with judicial proceedings. The reason for the exemption is that FOIL is not a criminal discovery device as C.P.L. Article 240 governs discovery in criminal proceedings. Therefore, FOIL should not be used as a tool to help actual or potential defendants frustrate pending or possible investigations or judicial proceedings.

Respondent asserts that it reasonably concluded that the judicial interference exemption barred petitioner's access to the records he sought. The records petitioner is requesting relate to an ongoing criminal proceeding, his trial on this matter has yet to commence and is currently scheduled to begin on July 22, 2010. Therefore, the C.P.L.'s discovery statute and not FOIL, should govern whether petitioner receives the documents he is requesting.

In addition, petitioner, through his attorney, already tried to obtain one of the records he is requesting through FOIL, namely the Special Information. However, the trial court concluded that it was not currently discoverable. Therefore, petitioner should not be allowed to use FOIL to circumvent the trial court's evidentiary ruling. Respondent also asserts that its appeal of Judge Allen's orders dismissing the Enterprise Corruption court, which is currently pending before the Appellate Division, provides a further basis to bar FOIL disclosure here. The Appellate Division has held that an appeal is a judicial proceeding which falls under the judicial interference exemption as well. If the respondent prevails in its appeal, the Enterprise Corruption court would then be reinstated and petitioner would be tried on that count. If so, petitioner will be able to renew his motion to obtain the documents under C.P.L. 240.

Respondent contends that its FOIL determination was not arbitrary capricious or a "cookie-cutter" denial. Moreover, petitioner's contention that the claim he made in his April 24, 2010 letter that respondent defaulted by non-response to petitioner's FOIL appeal, is incorrect. ADA Bailey rendered her decision pertaining to petitioner's FOIL appeal after the 10-day period that FOIL sets out for the government to respond to a FOIL administrative appeal. Even if respondent did not respond within the statutorily prescribed time, the remedy would not be construed as a default but as a constructive denial of petitioner's claim which would then let him bring an Article 78 proceeding.

This court finds that respondent's denial of petitioner's FOIL request was not arbitrary or capricious. Public Officers Law §87(2)(e)(i) states that, "Each agency shall, in accordance with its public rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that: (e) are compiled for law enforcement purposes and which, if disclosed, would: i. interfere with law enforcement investigations or judicial proceedings..."

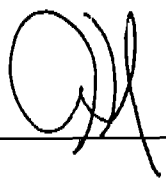
In Legal Aid Society v. New York City Police Department, 274 A.D.2d 207 (1st Dept. 2000), the Appellate Division reversed the lower court's decision in an Article 78 proceeding and held, "We are persuaded that the assertion that disclosure of records to a defendant in a pending criminal prosecution would interfere with that proceeding is a sufficiently particularized justification for the denial of access to those records under Public Officers Law § 87(2)(e)(i), since, as the court held in *Matter of Pittari v. Pirro*...FOIL disclosure during the course of the prosecution would not only 'interfere with the orderly process of disclosure' set forth in CPL article 240...it would also create a substantial likelihood of delay in the adjudication of that proceeding...thereby effecting a chill on that prosecution..." Id. at 214.

In the case at bar, respondent informed the petitioner that his FOIL request was being denied due to the fact that it would interfere with the pending criminal prosecution. Petitioner's criminal trial is currently scheduled for July 2010. Petitioner made an attempt to obtain the Special Information through his attorney and same was denied by the trial court judge. He cannot circumvent the process of discovery set forth in C.P.L. article 240 by making a FOIL request for the same information. Moreover, the fact that the respondent's appeal of Judge Allen's dismissal of the Enterprise Corruption charges is still pending, also means that disclosure would interfere with the pending criminal appeal. Moreno v. New York County District Attorney's Office, 38 A.D.3d 358 (1st Dept. 2007).

Accordingly, it is hereby

ADJUDGED, that the petition is denied and the proceeding is dismissed, without costs and disbursements to the respondents.

Dated: June 18, 2010



J.S.C.

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).