

Matter of Gerrara v New York City Police Dept. Foil

2010 NY Slip Op 32692(U)

September 28, 2010

Supreme Court, New York County

Docket Number: 402832/08

Judge: Joan A. Madden

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

PRESENT: JOAN A. MADDEN
Justice

PART 11

Steven Gerra
Petitioner
Plaintiff,
New York City -v-
Police Dept.
Defendant.
Respondent

INDEX NO. 402832-108
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this *petition* motion to/for Article 78 relief.

| | 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 motion *petition* is decided as
per the annexed Memorandum Decision Order +
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 141B).

Dated: September 28, 2006

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

-----X

In the Matter of the Application of
STEVEN GERRARA,

Index No. 402832/08

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT FOIL and
NEW YORK CITY DEPT. OF CORRECTION,

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

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

UNFILED JUDGMENT
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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).

In this Article 78 proceeding, Petitioner, Steven Gerrara, who is pro se, seeks certain records pursuant to New York's Freedom of Information Law ("FOIL"), Public Officer's Law Article 6. Respondents, New York City Police Department ("NYPD") oppose the petition.¹

Background

Petitioner, who is an inmate at a State correctional facility, was sentenced to 23 1/3 years to life in prison for Criminal Sale of a Controlled Substance in the First Degree in the Kings County Supreme Court on August 18, 2005. The FOIL requests at issue seek certain records relating to Petitioner's arrest and conviction.

By letter dated September 5, 2007, to NYPD's FOIL Unit, Petitioner requested documents relating to Brooklyn North Narcotics Division's long term buy operation #023-03 and

¹The NYPD and respondent the New York City Department of Correction ("DOC") each previously cross-moved to dismiss the petition on statute of limitations and other procedural grounds. By an interim decision and order dated September 30, 2010, the court granted DOC's cross motion but denied the cross motion by NYPD and required it to answer.

long term buy operation #70-02. NYPD's Record Access Officer acknowledged receipt of the request on October 9, 2007, and assigned it FOIL Unit folder number PL # 2007-4201.

Petitioner amended his request on January 3, 2008 and January 7, 2008 to include other documents and records that led to his arrest and criminal conviction. On May 7, 2008, the Record Access Officer of the NYPD FOIL Unit ("RAO") partially granted Petitioner's request by sending the Petitioner nine pages of material. By letter dated May 25, 2008, petitioner withdrew his request as it pertained to certain items and inquired as to the status of other items that were not accounted for in the FOIL Unit's response.² In response to this inquiry, by a letter dated June 24, 2008, the RAO clarified his prior response and informed Petitioner that after a "diligent search," several items from the FOIL request could not be located. In the meantime, on May 27, 2008, Petitioner appealed the RAO's decision.

On June 27, 2008, the Records Access Appeals Officer ("RAAO") denied Petitioner's appeal on the grounds that (1) the FOIL request was duplicative of a October 12, 2006 FOIL request made by Petitioner; (2) pursuant to Public Officers Law § 87(2)(e)(iv), disclosure of records would reveal non-routine criminal investigative techniques; (3) pursuant to Public Officers Law § 87(2)(e)(iii), certain records would reveal confidential material; and, (4) pursuant to Public Officers Law § 87(2)(f), the records contained information that could endanger the life or safety of a person. The RAAO also noted that other exemptions from providing the records to the Petitioner may apply. In the same June 27, 2008 letter, Petitioner was notified that he had four months from the date of the RAAO's decision to commence an Article 78 proceeding seeking judicial review.

²These items included Field Test Reports, Invoice Worksheets, and Property Indices.

Petitioner then commenced this Article 78 challenging the denial of his FOIL request. After the court denied the NYPD's cross motion to dismiss, the NYPD served and filed a Verified Answer as directed by the court. Petitioner served a response to the answer. In its Verified Answer, the NYPD asserts, *inter alia*, that as it conducted a diligent search for the records sought and that a total of eighteen pages of records were located. Of the eighteen pages, five have already been disclosed and that of the remaining thirteen, petitioner withdrew his request as to four pages.

In support of its position, the NYPD submits the affidavit of Sergeant James Russo, who describes the search conducted for the records sought by petitioner and specifies which documents could not be located. He also states that the following fourteen pages were located: four pages of records relating to Patrol Guide Sections 218-25 and 218-01³; voucher invoice numbers L986429, L986430, L986473; Analysis Reports for Property Clerk Invoices Numbers L986429, L986430, L986439, M556746 and L986473, and pages one and three of the twenty-five page lab report related to Property Clerk Invoice Number L986429. Notably, Sergeant Russo's affidavit is inconsistent with the Verified Answer which states that eighteen pages of documents are located.

The NYPD argues that the records located need not be provided as they have already been disclosed to petitioner's attorney. In support of its position, the NYPD submits the affidavit of Sergeant Lori Hernandez ("Hernandez"), an attorney employed by the NYPD's Office of Deputy Commissioner. Hernandez states that she spoke to petitioner's attorney Jonathan Edelstein who

³It appears that FOIL request relating to the four pages relating to Patrol Guide was withdrawn by petitioner

informed her that he was in possession of all the records turned over by the Kings County District Attorney's Office prior to trial. The NYPD also argues the records are exempt from disclosure as there is a pending criminal appeal and under to Public Officers Law § 87(2)(e)(iii), certain records would reveal confidential material, and pursuant to Public Officers Law § 87(2)(f), the records contained information that could endanger the life or safety of a person, and would invade the privacy of certain individuals.

In response, petitioner asserts that while he received certain documents at the time of trial that these documents did not include those sought in his FOIL request. In addition, petitioner submits an affirmation from Mr. Edelstein who states that although he represents petitioner on his appeal, he did not represent him at trial and that the documents in his possession are those provided to him by petitioner. He also argues that most of the records sought are outside the trial record and are not relevant to the appeal. Petitioner further argues that there are inconsistencies in the papers regarding the records located and seeks to have the NYPD produce a list of all material responsive to his FOIL request.

Discussion

"All 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 NY2d 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, an agency is not required to respond to a FOIL request to the extent it requires the agency to compile information not already in its possession or control. See, Brown

v New York City Police Department, 264 AD2d 558, 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”). Moreover, when the agency provides an affirmation stating that the requested documents could not be located after a thorough and diligent search a petitioner’s application is rendered moot. See, Rattley v New York City Police Department, 96 NY2d 873 (2001).

Under these principles, petitioner’s application is moot to the extent that NYPD has certified that it conducted a diligent search and certain records sought by petitioner cannot be located. However, while the NYPD is correct that it is not required to provide petitioner with records to the extent his attorney was already provided them (Moore v Santucci, 151 AD2d 677, 678 [2d Dept 1989]), in this case petitioner has provided evidence demonstrating that records sought are not in his possession or that of his counsel. See Swinton v Records Access Officer, 198 AD2d 165 (1st Dept 1993) (permitting petitioner access to records previously disclosed to his attorney based on petitioner’s sworn statement that records were no longer available).

Next, the NYPD’s reliance on the exemption for pending appeals (Matter of Legal Aid Society v. New York City Police Dept., 274 AD2d 207, 214 (1st Dept 2000)), is unavailing since the appeal was pending at the time of the FOIL request and the NYPD did not cite the exemption as a basis for denying such request. See Sunter v. David, 20 Misc3d 1142 (A) (Sup Ct NY Co. 2008). Moreover, petitioner contends that the majority of records sought are outside the trial record and NYPD does not deny this assertion.

Finally, in the absence of an in-camera inspection, the court cannot determine whether the records should be exempt on the ground that they were compiled for law enforcement purposes or that the release would endanger the life and safety of certain individuals or constitute an unwarranted invasion of privacy. See e.g., Chebere v. Johnson, 3 AD3d 365 (1st Dept), lv dismissed, 2 NY3d 778 (2004)(reversing trial court's denial of petition relating FOIL request by inmate seeking prosecutor's interview notes containing a witness statement and directing an in-camera inspection); Boddie v. Goord, 251 AD2d 799 (3d Dept), lv denied, 92 NY2d 810 (1998)(after in-camera inspection, court determined that provisions of correctional services department's employee manual should not be turned over to inmate as materials, if disclosed would endanger life or safety of another person); Dobranski v. Houper, 154 AD2d 736 (3d Dept 1989)(noting that in-camera inspection was warranted of documents sought in inmate's FOIL request relating to other inmate's on his cell block to determine if disclosure would constitute an unwarranted invasion of the privacy of such inmates and therefore be exempt from disclosure).

Accordingly, the petition is granted only to the extent of requiring NYPD to provide to this court for in-camera inspection those documents located by NYPD which are responsive to petitioner's FOIL request and have not already been provided to petitioner, together with an affirmation from counsel clarifying which responsive documents have been located in light of the apparent inconsistency between the allegations in the Verified Answer and the Russo affidavit.

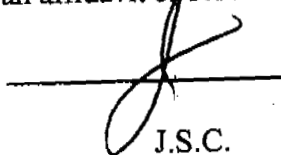
In view of the above, it is

ORDERED and ADJUDGED that the petition is granted to the extent of directing NYPD to submit to this court for in-camera inspection the responsive documents and the affirmation from counsel clarifying which responsive documents have been located to Part 11, room 351, on

October 15, 2010, and to the extent respondent maintains that any of the documents produced or portion(s) of such documents should not be disclosed, NYPD shall make a written submission in support of its position; and it is further

ORDERED that the NYPD shall serve petitioner with the affirmation from counsel clarifying which responsive documents have been located, by first class mail, on or before October 15, 2010, and provide to the court with an affidavit of service.

DATED: September 8, 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).