

**Matter of Lopez v New York Police Dept. Records
Access Appeals Officer**

2011 NY Slip Op 32189(U)

July 22, 2011

Sup Ct, NY County

Docket Number: 400535/11

Judge: Alice Schlesinger

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

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In the Matter of the Application of
HECTOR LOPEZ

Petitioner,

Index No. 400535/11
Motion Sequence 001

For a Judgment Under Article 78
of the Civil Practice Law and Rules,

-against-

THE NEW YORK POLICE DEPARTMENT
RECORDS ACCESS APPEALS OFFICER,

Respondent.
-----X

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).

SCHLESINGER, J.:

Petitioner Hector Lopez commenced this Article 78 proceeding to reverse the denial by the New York Police Department (NYPD) of his Freedom of Information Law (FOIL) request. The NYPD cross-moved to dismiss on the ground that Lopez had failed to provide adequate search criteria in his request and because a diligent search had yielded negative results.

Background Facts

By letter dated August 26, 2010, Lopez made a FOIL request for "any and all" records pertaining to the arrest of Carmen Matos in 24 separate categories (Respondent's Cross-Motion, Exh 1). The only reference to Matos by name in the request was in the subject line: "Re: People v. Carmen Matos, Kings County Ind. #:4655/95".

NYPD Sergeant James Russo denied the FOIL request by letter dated September 24, 2010 because the request was "too broad in nature and does not describe a specific document" (Exh 2). The letter also advised Lopez that he could appeal this decision within thirty days.

Lopez did appeal the decision in a letter dated September 27, 2010 (Exh 3). The letter included additional criteria describing the request that had not been listed in the first FOIL request, such as an arrest date, a partial complaint number, a court docket number, and county of indictment.

On December 3, 2010 the Records Access Appeals Officer denied the appeal after "a diligent search was conducted for records of an arrest on August 18, 1995 with negative results" (Exh 4). It later became apparent that the Appeals Officer had mistakenly searched for documents relating to Lopez's own arrest because Lopez had not reiterated in his appeal that the request was for information relating to Matos. The search on Lopez yielded negative results.

After Lopez commenced the Article 78 proceeding in January 2011, counsel for the NYPD realized that the intended subject of the search had been Matos, and she ordered that an additional search be performed (Affirmation In Support of Cross-Motion, fn.2). This search also yielded negative results¹.

In the letter of denial, NYPD stated that Lopez could make another FOIL request:

However, you may make a new request to the NYPD's Records Access Officer if you can include sufficient identifying details concerning yourself (such as your name, date of birth, social security number), the arrest (date of arrest, precinct of arrest, the street location of the arrest, and the arrest charge), and the records requested (a reasonable description), to enable a search. If possible, also provide your NYSID number and the arrest number.

¹The reason no records were found may well be related to the confusion about the arrest date. The August, 18 1995 date stated by Lopez is not the arrest date but is instead the date the property voucher was prepared. The voucher states that the arrest date is 6/21/94 (Petitioner's Reply Exh. A).

After the denial of his appeal, Lopez submitted additional requests with more search criteria that are currently being processed (Aff. on Cross-Motion, fn.3).

Discussion

Lopez argues that the NYPD did not conduct a diligent search and that the original denial of his FOIL request should be reversed. He also seeks to compel the NYPD to produce all the documents he requested. Lopez claims that the NYPD did not conduct a diligent search because of his incarceration. In support of this claim, he submits with his reply papers a property voucher relating to his own arrest. Lopez alleges that the document was acquired through an identical FOIL request made by Nelson Lassalle, apparently an unincarcerated person, while his own request was denied as being too broad. He goes on to argue that NYPD possesses the documents and is intentionally withholding them in violation of law.

The NYPD claims that it properly denied the FOIL request because Lopez had not included the appropriate information needed for the Department to locate the documents requested. The additional search criteria provided in the appeal, such as the indictment number, docket number, and county of indictment, are only relevant to matters that occur after the NYPD has concluded its investigation and are not typically used by the NYPD to identify arrest records. Additionally, the complaint number was missing some digits, which NYPD claims makes it "nearly impossible" for it to locate any documents (Aff., fn.4). Counsel for NYPD has certified that a diligent search yielded no record of an arrest for Carmen Matos on August 17, 1995 or the few days before or after.

NYPD also asserts that several of the documents requested by Lopez are not in the possession of the NYPD. Felony complaints, indictments, notices pursuant to CPL §710.30, voluntary disclosure forms, deferral of prosecution forms, Early Case Assessment Bureau sheets, grand jury synopsis sheets, and exhibit and witness lists are all maintained by the District Attorney or are in court records, which makes it impossible for them to be retrieved through an NYPD FOIL request.

Analysis

Public Officers Law §89 (3) requires that the NYPD "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." In *Rattley v. N.Y. City Police Dep't*, 96 N.Y.2d 873 (2001), the Court of Appeals reversed the First Department and held that a certification by the NYPD that a diligent search had been conducted with negative results was sufficient evidence to establish compliance with FOIL. Here, NYPD and its counsel have certified that the NYPD conducted numerous diligent searches on Lopez's behalf.

Further, NYPD has indicated that it is unable to produce some of the requested records because they are not in its possession. The NYPD has no obligation to provide materials that it does not possess or maintain. *Davidson v. Police Dept Of the City of New York*, 197 A.D.2d 466 (1st Dep't 1993). Here, a number of documents requested by Lopez (10 of the 24) are not the type of document maintained by the NYPD, but instead are maintained by the District Attorney or by the courts. Thus, the NYPD is unable, and is not required by law, to provide them. Public Officers Law §89 (3).

Therefore, the NYPD's motion to dismiss is granted and the Article 78 petition filed by Mr. Lopez is denied because the NYPD has fulfilled its duty under the Freedom

of Information Law based on the request it received. However, in the light of the apparent misstatement of the arrest date, Lopez shall promptly supplement his pending request, or file a new one, with correct and complete identifying information, and the NYPD is ordered to expedite the processing of that new or supplemental request by Lopez. In addition, under these circumstances, NYPD may not deny a request by Lopez on the ground that the documents were previously requested. In his supplemental or new request, Mr. Lopez must make clear to the NYPD that he is requesting documents related to Carmen Matos, and not to himself, and in that regard he must provide as much identifying information as possible about Matos, such as the date Matos was arrested, the location of the arrest, and Matos' date of birth.


Accordingly, it is hereby

ADJUDGED that the petition is denied without prejudice; and it is further

ORDERED that NYPD's cross-motion to dismiss is granted and the proceeding is dismissed without prejudice to a new or supplemental request consistent with the terms of this decisions.

Dated: July 22, 2011

JUL 22 2011



J.S.C.
ALICE SCHLESINGER

UNFILED JUDGMENT

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