

**Matter of Whitley v New York County Dist. Attorney's  
Off.**

2011 NY Slip Op 32444(U)

September 13, 2011

Sup Ct, NY County

Docket Number: 104522/11

Judge: Cynthia S. Kern

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

PRESENT: **CYNTHIA S. KERN**  
J.S.C.

PART 52

Index Number : 104522/2011

WHITLEY, DARYL

INDEX NO. 104522/11

vs  
NY COUNTY DISTRICT ATTORNEY'S

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. 01

ARTICLE 78

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

No(s). \_\_\_\_\_  
No(s). \_\_\_\_\_  
No(s). \_\_\_\_\_

SEP 15 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is

*is decided in accordance with the annexed decision.*

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

Dated: 9/13/11

C.K., J.S.C.

**CYNTHIA S. KERN**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 52

-----X  
In the Matter of the Application of  
DARYL WHITLEY,

Petitioner,

Index No. 104522/11

**FILED**

For a Judgment Pursuant to Article 78 of the  
Civil Practice Laws and Rules and Claims  
Under the Executive Law and the  
Administrative Code of the City of New York,

**SEP 15 2011**

-against-

NEW YORK  
COUNTY CLERK'S OFFICE

NEW YORK COUNTY DISTRICT ATTORNEY'S  
OFFICE and PATRICIA J. BAILEY, as  
FOIL Appeals Officer of the New York County  
District Attorney's Office,

Respondents.

-----X  
**HON. CYNTHIA KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

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Petitioner Daryl Whitley brings this petition seeking relief from Respondent the New York County District Attorney's Office ("DANY") and Assistant District Attorney Patricia J. Bailey's ("ADA Bailey") (together, the "Respondents") denial of petitioner's request for records under the Freedom of Information Law ("FOIL") and seeking to compel production of those records. For the reasons set forth below, his petition is denied.

The relevant facts are as follows. On March 24, 1995, petitioner was charged with felony murder in the second degree in connection with the 1981 robbery and murder of Doctor John Wood. At trial, four of petitioner's friends, including one Glenn Richardson testified that Whitley had admitted to them, separately, his involvement in the murder. The trial ended on December 3, 1997 with a hung jury.

Prior to Whitley's second trial, Richardson informed prosecutors that his testimony would differ from that in the first trial and that he was invoking his Fifth Amendment right against self-incrimination. At the second trial, the court declared Richardson an unavailable witness and allowed the People to introduce his testimony from the first trial into evidence. On February 6, 2002, petitioner was convicted of second-degree murder and later sentenced to a prison term of 22 years to life.

In 2005, Whitley unsuccessfully appealed his conviction to the First Department. In 2006, he filed a petition for a writ of habeas corpus in the Southern District of New York. On July 22, 2010, Judge Alvin K. Hellerstein granted his habeas corpus petition and vacated his conviction on the basis that admitting Richardson's testimony without explaining why he was unavailable violated Whitley's due process and confrontation rights. On August 3, 2010, DANY appealed Judge Hellerstein's decision to the United States Court of Appeals for the Second Circuit. The Second Circuit reversed Judge Hellerstein's decision. At the time of this motion, petitioner had filed an *en banc* petition with the Second Circuit. Subsequently, the court was informed that petitioner's *en banc* petition was denied. However, the possibility of a retrial still exists because Judge Hellerstein may now rule on the remaining grounds of petitioner's habeas corpus petition. Therefore, a third trial is, at this point, a possibility but not a certainty.

On October 19, 2010, Whitley filed the Freedom of Information Law request with DANY which is the subject of this action. In it, he requested, among other things, “all records concerning the investigation of Dr. Wood’s murder.” By letter dated November 12, 2010, ADA Susan Roque declined Whitley’s FOIL request on the grounds that they were exempt under Public Officer Law Section 87(2)(e) which bars access to records “which would interfere with judicial proceedings.” On December 7, 2011, Whitley appealed this determination to ADA Bailey. By letter dated January 3, 2011, ADA Bailey upheld ADA Roque’s determination. On or about April 13, 2011, Whitley filed the instant petition seeking to compel the production of the requested materials.


FOIL mandates the disclosure of agency records unless they are subject to a specific exemption. See NY Public Officers Law (“POL”) §87(2) (“Each agency *shall*... make available for public inspection and copying all records, *except*...”) (emphasis added). While an agency *must* release records to which no exemption applies, it is within the agency’s discretion whether to withhold records to which an exemption applies (“such agency *may* deny access to records or portion thereof that... [exceptions listed]”) (emphasis added). POL §87(2). The potentially relevant exception in this case pertains to records “compiled for law enforcement purposes and which, if disclosed, would... interfere with law enforcement investigations or judicial proceedings.” POL §87(2)(e)(I). The First Department has held 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).” *Legal Aid Society v New York City Police Dept.*, 274 A.D.2d 207, 214 (1<sup>st</sup> Dept 2000). The First Department has gone on to imply that such a

[\* 5]  
rationale also applies to future possible proceedings, even those that are not currently pending, stating that it would have affirmed a determination that such a petitioner was not entitled to similar documents "because disclosure of the sought materials would have interfered with petitioner's then still pending criminal appeal *and any subsequent proceedings within the same prosecution.*" *Moreno v New York County Dist. Attorney's Office*, 28 A.D.3d 358 (1<sup>st</sup> Dept 2007) (emphasis added) (citations omitted). Petitioner's reliance on *Dawkins v David*, 2010 WL 1219506 (Sup Ct., N.Y. Cty. Mar. 18, 2010) is misplaced as that case is not controlling authority.

DANY's motion to dismiss the petition is granted because it has sufficiently established that release of the requested records would interfere with potential judicial proceedings. As stated in *Legal Aid*, merely asserting that the release of such records would interfere with a judicial proceeding is a sufficient justification for non-disclosure. Although the decision in *Legal Aid*, 274 A.D.2d at 214 was limited to finding that non-disclosure was permissible when there was a pending judicial proceeding, the First Department has indicated in dicta that the same rationale applies to merely potential future proceedings, such as the one at issue here. *See Moreno*, 28 A.D.3d 358. Following the First Department's decisions, this court finds that DANY has established that the disclosure of the requested records would interfere with a third trial, were it to be held and DANY is therefore entitled to withhold those records.

Accordingly, the petition is denied. This constitutes the decision, judgment and order of the court.

Dated: 9/13/11

  
FILED \_\_\_\_\_  
J.S.C.  
SEP 15 2011 CYNTHIA S. KERN  
J.S.C.