

Matter of Griffin v David
2011 NY Slip Op 33017(U)
November 15, 2011
Sup Ct, NY County
Docket Number: 400722/2011
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Gische
Justice

PART 10

ANTHONY GRIFFIN

INDEX NO. 400 722-11

MOTION DATE _____

- v -
JONATHAN DAVID RECORDS
ACCESS APPEALS OFFICER
POLICE DEPARTMENT LEGAL BUREAU

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

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: 11/15/11


HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

UNFILED JUDGMENT

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Supreme Court of the State of New York
County of New York: IAS Part 10

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In the Matter of the Application of
ANTHONY GRIFFIN,

Petitioner,

Decision, Order and Judgment
Index No.:400722/2011
Seq. No.: 001

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

-against-

Present:
Hon. Judith J. Gische
J.S.C.

JONATHAN DAVID, Record Access Appeals
Officer for the NYC Police Department,

Respondent.

-----x
Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Notice of Pet and Pet, w/exhs.....	1
Resp's x/m to dismiss w/exhs.....	2
Pet's Opp of Resp's x/m w/exhs.....	3
Resp's affirm (KA) in supp x/m	4
Resp's affirm (MC) for adjournment.....	5
Pet's letter re: discount habeas.....	6

-----x
This is a Article 78 summary proceeding brought by *pro se* Petitioner, Anthony Griffin ("petitioner"), who is incarcerated. Petitioner seeks a judgment annulling the New York City Police Department's ("respondent") denial of his Freedom of Information Law ("FOIL") request for law enforcement records pertaining to his conviction of Murder in the Second Degree. Respondent has cross-moved, pursuant CPLR §§ 7804 (f) and 3211(a)(7), to dismiss this proceeding.

Respondent has raised points of law in its pre-trial motion, seeking the dismissal of the petition (CPLR § 7804 [f]). Where a motion to dismiss is premised upon CPLR § 7804 (f), only the petition and the exhibits attached thereto may be considered and all the allegations contained therein are deemed to be true (Green Harbour Homeowner's Ass'n v. Town of Lake George Planning Board, 1 AD3d 744 [3rd Dept 2003]).

In the context of a motion to dismiss for failure to state a cause of action, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide the plaintiff with the benefit of every possible inference. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y. 2d 314,326 (2002); Leon v. Martinez, 84 N.Y. 2d 83 (1994); Morone v. Morone, 50 N.Y. 2d 481 (1980); Beattie v. Brown & Wood, 243 A.D. 2d 395 (1st Dept. 1997). In deciding defendant's motion to dismiss, the court must determine whether the allegations support the causes of action asserted (Rovello v Orofino Realty Co., 40 N.Y. 2d 633, 634 [1976]) and/or whether they fit within any cognizable legal theory. Goldman v. Metropolitan Life Ins. Co., 5 N.Y. 3d 11 (2005). Ultimate success is not part of the calculus. EBC I inc. v. Goldman, Sachs & Co., 5 N.Y. 3d 11 (2005).

Facts alleged

Petitioner was convicted of Murder in the Second Degree on October 21, 2002 and is currently serving a sentence of 25 years to life. Subsequently, petitioner filed a federal writ of *habeas corpus*, in the United States District Court, Southern District ("federal proceeding"). The federal proceeding is still pending and was recently referred to a designated Magistrate Judge for general pre-trial purposes.

On January 29, 2010, petitioner sent his first FOIL request to respondent, by mail, seeking all the police follow up reports ("DD5's"), several laboratory reports and copies of

any photographs used to prepare wanted posters. Petitioner was provided access to 12 pages of responsive materials with appropriate redactions. These documents did not include copies of the lab reports or all the DD5's referenced in petitioner's request. The Records Access Officer ("RAO") also notified petitioner that it was unable to locate the "wanted" posters he had requested.

Petitioner then administratively appealed the RAO's decision. Petitioner's appeal was limited to the laboratory reports and DD5's, which had not been provided. Petitioner's appeal was granted in part and the matter was remanded to the RAO to conduct a search for the laboratory records requested by petitioner. Petitioner was then provided with copies of the DD5s, but parts of the documents were redacted. The redacted information included the names and addresses of witnesses. According to respondent, petitioner's request for the laboratory reports are still being processed.

On December 13, 2010, the Record Access Appeals Officer made the following determination on petitioner's appeal. It granted the appeal insofar as the lab report was concerned. It denied the appeal, in so far as the DD5s were concerned, finding that all available non-exempt material had been provided. It is this determination which petitioner is challenging.

Following the decision on his appeal, petitioner then made a second FOIL request, this time seeking his victim's telephone records, as well as any handwritten statements of one Lester Dixon. In response on June 28, 2010, the RAO provided petitioner with 14 pages of records and informed him of his right to an administrative appeal of its determination within 30 days. Petitioner, however, did not appeal the June 28, 2010 determination within 30 days.

Arguments presented

Petitioner alleges that he is entitled to Article 78 relief because respondent has arbitrarily denied his FOIL request. Furthermore, petitioner argues that though he is currently appealing the denial of his writ of *habeas corpus*, this type of proceeding does not constitute the basis for a FOIL exemption. Petitioner alleges further that the documents he did receive as part of his FOIL request were incomplete, because names and addresses were redacted from them.

In support of its motion, respondent argues that FOIL's interference exemption proscribes the disclosure of the records sought by petitioner because there is an ongoing judicial proceeding. Respondent contends that a *habeas corpus* petition is considered a judicial proceeding for purposes of this exemption.

Respondent also argues that the petitioner should not be granted a Article 78 review of the GAO's decision, because he did not exhaust his administrative options prior to commencing this action. Additionally, respondent argues that petitioner's action is rendered moot, because he received a portion of the records he requested.

Applicable Law

A denial of access to public records under FOIL is reviewable in an Article 78 proceeding. Public Officers Law § 89(4)(b). FOIL exempts from disclosure documents compiled for law enforcement purposes, which, if disclosed would interfere with a judicial proceeding. Public Officers Law § 87 (2)(e)(i). See, Sideri v. Office of the District Attorney of New York County, 243 A.D. 423(1st Dept 1997). The New York State Supreme Court recognizes a proceeding brought by way of a writ of *habeas corpus*, as well as appeals of denials of writs of *habeas corpus* as judicial proceedings. See, Dhinsa v. New York City

Police Dep't, Index No. 102689/04 (NY Sup. Ct. Sept. 24 2004).

Discussion

Petitioner is currently appealing the denial of his writ of *habeas corpus*; that is reason alone to deny his petition for Article 78 review. Although, in a letter to the court, received November 1, 2011, petitioner stated that he requested the discontinuation of his writ of *habeas corpus* that application has not yet been granted. Even if the petitioner's *habeas corpus* petition is dismissed, petitioner has not stated a cause of action against respondents for the following reasons.

By petitioner's own admission, in a letter dated November 29, 2010, petitioner's trial lawyer was already in possession of many of the document's sought in petitioner's FOIL request. Since the burden is on the petitioner to establish that the documents requested had not been provided to the attorney who had represented him at trial, or that the documents were no longer available to him, petitioner's petition is improper. Matter of Lebron v. Morales, 271 AD2d 241 (1st Dept 2000).

Additionally, petitioner's request for Article 78 review must also be denied because petitioner failed to exhaust his administrative remedies prior to commencing this action. Public Officers Law § 89(4)(b). At the time petitioner commenced this action his FOIL request was still being processed with regard to the laboratory reports and he had failed to request administrative appeal with respects to records pertaining to a wanted poster described in his first request. As such, petitioner's request for review would be denied on these bases as well.

Accepting petitioner's facts as true and affording the petitioner a liberal construction, petitioner has failed to state a cause of action. This court must grant

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respondent's cross-motion to dismiss and deny the petitioner's request for Article 78 review. See, Green Harbour Homeowners' Ass'n, Inc. v. Town of Lake George Planning Board, 1 AD3d 744 [3rd Dept 2003], See, Cron v. Hargro Fabrics, Inc., 91 NY2d 362 [1998]; Sanders v. Winship, 57 NY2d 391 [1982].

Conclusion

In accordance with the foregoing,

it is hereby,


Ordered declared and adjudged that the cross motion by respondent Jonathan David, record access appeals officer for the New York City Police Department's, is hereby granted and the petition is denied and this summary proceeding is dismissed; and it is further

Ordered that any relief requested that has not been addressed in this decision order and judgment has nonetheless been considered and is hereby expressly denied.

Ordered that this constitutes the decision and order and judgment of the court.

Dated: New York, New York
November 15, 2011

ENTER


HON. JUDITH J. GISCHE, J.S.C

UNFILED JUDGMENT

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