

Matter of Kanani v District Attorney of the County of N.Y.
2012 NY Slip Op 30873(U)
April 2, 2012
Sup Ct, NY County
Docket Number: 402886/11
Judge: Barbara Jaffe
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
In the Matter of the Application of BEHROOZ KANANI,
#83-A-7866,

Petitioner,

For a judgment pursuant to Article 78 of the Civil
Practice Law and Rules,

-against-

DISTRICT ATTORNEY OF THE COUNTY OF NEW
YORK,

Respondent.
-----X

BARBARA JAFFE, JSC:

For petitioner, self-represented:
Behrooz Kanani, #91-A-5678
Fishkill Correctional Facility
271 Matteawan Rd., P.O. Box 1245
Beacon, NY 12508-0307

Index No. 402886/11

Motion Subm.: 12/15/12
Motion Seq. No.: 001

DECISION & JUDGMENT

FILED

APR 05 2012

NEW YORK
COUNTY CLERK'S OFFICE
For respondent:
Sara M. Zausmer, ADA
New York County District
Attorney's Office
One Hogan Pl.
New York, NY 10013
212-335-9000

By order to show cause dated November 3, 2011, petitioner brings this special proceeding pursuant to CPLR Article 78. Respondent opposes.

I. BACKGROUND

In March 1998, after a second jury trial, petitioner was convicted of 12 counts of sodomy in the first degree related to crimes he committed against his two daughters, who were both under 12 years old at the time of the crimes. (Verified Petition, dated Oct. 26, 2011 [Pet.]).

By letter dated April 19, 2010, petitioner served respondent with a Freedom of Information Law (FOIL) request seeking an unredacted copy of all records, files, and documents relating to his criminal indictment. (*Id.*, Exh. A).

RECEIVED

APR 05 2012

MOTION FOR JUDGMENT
NOV 30 2011 10:05 AM

By letter dated April 30, 2010, respondent denied his request on the grounds that he had been provided with the documents during his two trials and that the documents were exempt from disclosure pursuant to section 50-b of the Civil Rights Law as they would identify the victims of a sex offense. (*Id.*, Exh. B).

By letter dated May 19, 2010, petitioner appealed the denial, asserting that the documents were not exempt as the alleged victims' identities were already known to him, that he never received any documents during the trials, and that when he requested the documents from his attorney, he was told that they had been returned to the District Attorney's Office. (*Id.*, Exh. C).

By letter dated July 2, 2010, respondent denied the appeal, finding that petitioner's denial of receipt of the records during his trial was unsubstantiated and not in evidentiary form, that it was unclear if he had tried diligently to obtain the records from his attorney, and that the records were exempt notwithstanding the victims' relationship with petitioner. (*Id.*, Exh. D).

By letter dated September 23, 2010, petitioner sent respondent a request for reconsideration of its decision, annexing copies of letters he allegedly sent to his attorney and which, according to him, were ignored by the attorney. (*Id.*, Exh. E). By letter dated January 7, 2011, respondent denied the request. (*Id.*, Exh. F).

By letter dated February 10, 2011, petitioner wrote to the Committee on Open Government, requesting assistance with his FOIL request. The letter was apparently forwarded to respondent, which responded to petitioner by letter dated March 3, 2011 and advised that the documents which needed to be reviewed had been ordered from the Closed Cases Unit and that upon receipt of the documents, it would determine petitioner's request. According to petitioner, he received no further response from respondent. (*Id.*, Exhs. G, H, I, J).

II. CONTENTIONS

Petitioner contends that he is entitled to the documents as he never received them during his criminal trials and as the alleged victims are known to him. (Pet.).

Respondent asserts that the proceeding is time-barred, and that in any event, petitioner's FOIL request was properly denied. (Verified Answer, dated Dec. 14, 2011).

III. ANALYSIS

A. Timeliness

Pursuant to CPLR 217(1), any proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner. The determination becomes final and binding when the petitioner has been aggrieved by it. (*Matter of Yarbough v Franco*, 95 NY2d 342 [2000]).

As respondent denied petitioner's request for reconsideration of the denial of his appeal on or about January 7, 2011, and this proceeding was not commenced until November 2011, it is time-barred. (*See Matter of McCrory v Village of Scarsdale*, 67 AD3d 684 [2d Dept 2009] [as proceeding related to FOIL request was not commenced within four months of respondent's letter informing petitioner of decision not to disclose records, it was time-barred]; *Roman v Lombardi*, 298 AD2d 313 [1st Dept 2002] [proceeding commenced more than six months after petitioner received notice of denial of FOIL request dismissed as time-barred]).

As respondent's March 2011 letter was not issued in response to a new FOIL request by petitioner, it did not extend petitioner's time to commence the instant proceeding. (*See eg McBride v City of New York*, 284 AD2d 197 [1st Dept 2001] [petitioner's additional requests for

same materials did not extend time to commence proceeding after respondent's denial of first request]; *Washington v Rudin*, 256 AD2d 178 [1st Dept 1998], *lv denied* 93 NY2d 867 [1999] [denial of first FOIL request triggered four-month statute of limitations, regardless of fact that petitioner subsequently made two additional requests]).

B. Merits

In any event, generally all agency records under FOIL are presumptively available for public access, inspection or use, unless such records fall within one of eight categories of exemptions. (*See Public Officers Law* § 87[2]). An agency may not withhold information it chooses, but must state with particularity and list specific justifications for withholding information from the party seeking access to it. (*Matter of Moore v Santucci*, 151 AD2d 677 [2d Dept 1989], *citing Matter of Fink v Lefkowitz*, 47 NY 2d 567, 571 [1979]; *see also City of Newark v Law Dept. of City of New York*, 305 AD2d 28 [1st Dept 2003]).

Pursuant to Civil Rights Law § 50-b(1), the identity of any victim of a sex offense shall be confidential, and no document in the custody of any public officer or employee which identifies such a victim shall be made available for public inspection, nor shall a public officer or employee disclose such a document.

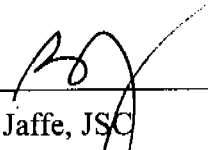
As petitioner was convicted of the crimes with which was he was charged, the records are exempt from disclosure. (*Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738 [2001]). That petitioner knows the victims' names does not negate the exemption. (*Id.* at 748 ["Nor does the fact that petitioners already know the identity of their victims provide a basis for disclosure."]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: April 2, 2012
New York, New York

APR 02 2012

FILED

APR 05 2012

NEW YORK
COUNTY CLERK'S OFFICE