

**Matter of Gibbons v Vance**

2012 NY Slip Op 31982(U)

July 23, 2012

Sup Ct, NY County

Docket Number: 400412/12

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE J.S.C.  
*Justice*

PART 5

GIBBONS, DYLAN

INDEX NO.

400412/12

MOTION DATE

- v -

CYRUS R. VANCE, JR.

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

**FILED**

JUL 26 2012

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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NYS SUPREME COURT - CIVIL

Dated: 7/23/12  
JUL 23 2012

BARBARA JAFFE J.S.C.  
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):

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

-----X

In the Matter of the Application of DYLAN  
GIBBONS,  
  
Petitioner,

Index No. 400412/12  
Motion Date: 5/15/12  
Motion Seq. No.: 001  
Motion Cal. No.: 39

**DECISION AND ORDER**

FOR A JUDGMENT PURSUANT TO ARTICLE 78  
OF THE CIVIL PRACTICE LAW AND RULES,

-against-

CYRUS R. VANCE, JR. District Attorney, of the  
County of New York,

Respondent.

-----X

BARBARA JAFFE, JSC:

**For petitioner, self-represented:**  
Dylan Gibbons, #02A2053  
Upstate Correctional Facility  
P.O. Box 2001  
Malone, NY 12953

**For respondent:**  
Sara M. Zausmer, ADA  
Cyrus R. Vance, Jr.  
District Attorney of the County of New York  
One Hogan Place  
New York, NY 10013  
212-335-9000

**FILED**  
**JUL 26 2012**  
NEW YORK  
COUNTY CLERK'S OFFICE

By order to show cause dated February 9, 2012, petitioner brings this Article 78 proceeding challenging respondent's denial of his Freedom of Information Law (FOIL) request. Respondent opposes.

I. BACKGROUND

On March 5, 2002, petitioner was convicted of murder in the second degree (Ver. Ans.), and the conviction was affirmed (*People v Gibbons*, 15 AD3d 196 [1<sup>st</sup> Dept 2005]).

On June 2, 2011, petitioner submitted a FOIL request to respondent seeking: (1) copies of rap sheets and "pending matters" for two eye witnesses who testified at his trial; (2) "records reflecting any and/or all deals and considerations extended to" the witnesses in exchange for their testimony; (3) "financial records" indicating expenses or expenditures made during the

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investigation or prosecution; and (4) "docket sheets" for cases allegedly related to the two witnesses. (Ver. Ans, Exh. A). By letter dated June 14, 2011, respondent acknowledged receipt of the request. (*Id.*, Exh. B).

By letter dated September 29, 2011, as he had yet to receive a response, petitioner inquired about the status of his request. (*Id.*, Exh. C). On December 1, 2011, he submitted another FOIL request seeking, in addition to the records already requested, the names of the stenographers who took the arraignment minutes in the cases allegedly related to the two witnesses. (Pet., Exh. A). On December 15, 2011, petitioner, believing that his request had been denied, filed an administrative appeal. (*Id.*, Exh. B).

By letter dated February 14, 2012, respondent denied petitioner's FOIL request on the following grounds: (1) disclosure of the witnesses' rap sheets and any "deals and considerations" extended to them would constitute an unwarranted invasion of their privacy, potentially endanger their safety, and reveal non-routine criminal investigative techniques; (2) docket sheets are maintained by the clerks of federal courts and are not in its possession; and (3) stenographer names are not maintained in record form and are thus not required to be disclosed pursuant to FOIL. (Ver. Ans., Exh. D).

By letter dated February 15, 2012, petitioner's administrative appeal was denied as moot. (*Id.*, Exh. E).

By affirmation dated April 26, 2012, Assistant District Attorney (ADA) Maureen O'Connor states that she performed a "diligent search" of petitioner's file that yielded neither financial records related to the investigation and prosecution of his case nor evidence of any "deals or considerations" extended to the two witnesses for their cooperation. (*Id.*, Exh. F).

By verified answer dated May 14, 2012, ADA Sara M. Zausmer states that the docket sheets petitioner seeks have been sealed pursuant to Criminal Procedure Law (CPL) 160.50.

## II. ANALYSIS

Pursuant to Public Officers Law § 87(2), all agency records are presumptively available for public access, inspection, or use, unless such records fall within one or more of eight categories of exemptions. Pertinent here, records are exempt from disclosure if they “are specifically exempted from disclosure by state or federal statute,” or if their disclosure would “constitute an unwarranted invasion of personal privacy,” “endanger the life or safety of any person,” or “reveal [non-routine] criminal investigative techniques or procedures.” (Public Officers Law § 87[2][a], [b], [e][iv], [f]).

In denying a FOIL request, an agency must set forth with particularity its justifications for same. (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]; *Matter of City of Newark v Law Dept. of the City of New York*, 305 AD2d 28, 34 [1<sup>st</sup> Dept 2003]). If the agency cannot find the records requested, it must certify that it does not possess them or that they were not found after a diligent search. (Public Officers Law § 89[3]). And, if an agency denies an individual’s FOIL request on the ground that the requested materials were provided to him or his counsel during trial, the agency must demonstrate same. (*Matter of Sanders v Bratton*, 278 AD2d 10, 11-12 [1<sup>st</sup> Dept 2000], *overruled on other grounds*, *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001]; *Matter of Moore v Santucci*, 151 AD2d 677, 678 [2d Dept 1989]).

Here, as rap sheets are exempt from disclosure (*Matter of Woods v Kings County Dist. Attorney's Off.*, 234 AD2d 554 [2d Dept 1996]), respondent properly denied petitioner’s request for the witnesses’ rap sheets. However, as an individual’s criminal convictions and any pending

criminal actions against him are matters of public record, their disclosure does not constitute an unwarranted invasion of personal privacy. (*Williams v Erie County Dist. Attorney*, 255 AD2d 863 [4<sup>th</sup> Dept 1998]; *Matter of Woods*, 234 AD2d 544; *Matter of Thompson v Weinstein*, 150 AD2d 782 [2d Dept 1989]). Accordingly, absent any evidence that such information was provided to petitioner or his counsel at trial, petitioner is entitled to disclosure of the witnesses' criminal convictions and any criminal actions pending against them. (*See Matter of Thompson*, 150 AD2d 782 [petitioner entitled to disclosure of criminal convictions and pending criminal actions against witness who testified against him at trial]; *cf. Matter of Woods*, 234 AD2d 554 [petitioner not entitled to disclosure of "complete 'rap sheets' of numerous individuals who were not witnesses at his trial"]).

O'Connor's affirmation provides a sufficient basis for denial of petitioner's request for evidence of considerations and deals extended to the witnesses and financial records pertaining to investigation and prosecution of his case. (*See Matter of Rattley*, 96 NY2d 873 [department satisfied certification requirement by affirming that it had conducted diligent search for FOIL documents]; *Matter of Bridgewater v Johnson*, 44 AD3d 549, 550 [1<sup>st</sup> Dept 2007] [same]). As respondent stated that it does not maintain records of stenographers' names, petitioner is not entitled to their disclosure, either. (*See Matter of Moore*, 151 AD2d 677 [agency not required to disclose trial transcripts in its possession as they are court records, not agency records]).

Notwithstanding that respondent has taken inconsistent positions regarding its possession of the docket sheets petitioner seeks, their sealing provides grounds pursuant to Public Officers Law § 87(2)(a) for denial of petitioner's request. (*See Matter of Johnson Newspaper Corp. v Stainkamp*, 61 NY2d 958 [1984] [documents sealed pursuant to CPL 160.50 exempt from

disclosure pursuant to Public Officers Law § 87(2)(a)]; *Matter of Acosta v Phillips*, 193 AD2d 732 [2d Dept 1993] [same]).


IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioner's order to show cause is granted to the extent that respondent is required to furnish him with records of the witnesses' criminal convictions and any criminal actions pending against them or a certification of their unavailability within 45 days of the date of entry of this order; and it is further

ORDERED, that petitioner's order to show cause is otherwise denied.

ENTER:

  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
**J.S.C.**

DATED: July 23, 2012  
New York, New York

**JUL 23 2012**

**FILED**

**JUL 26 2012**

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