

Matter of Oddone v Suffolk County Police Dept.

2013 NY Slip Op 30110(U)

January 11, 2013

Supreme Court, Suffolk County

Docket Number: 002036/2011

Judge: John J.J. Jones Jr

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SHORT FORM ORDER

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INDEX NO.: 002036/2011
SUBMIT DATE: 11/28/2012
MTN. SEQ.#: 003; 004

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 003 - 6/27/2012
004 - 7/18/2012
MOTION NO.: 003 MOT D
004 MOT D

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In the Matter of the Application of
ANTHONY ODDONE,

Petitioner,

WACHTELL, LIPTON, ROSEN & KATZ
By: Marc Wolinsky, Esq.
Attys. for Petitioner
51 West 52nd Street
New York, NY 10019

-against-

DENNIS M. COHEN
Suffolk County Attorney
By: Christopher Gatto
Assistant County Attorney
Attys. for Respondent
H. Lee Dennison Building
100 Veterans Memorial Highway
P.O. Box 6100
Hauppauge, NY 11788-0099

SUFFOLK COUNTY POLICE DEPARTMENT,
STEVE LEVY as Suffolk County Executive,
CHRISTINE MALAFI as Suffolk County
Attorney, and CHRISTOPHER GATTO as
FOIL Appeals Officer,

DETECTIVE RICHARD HIGGINS
Suffolk County Police Department
30 Yaphank Avenue
Yaphank, NY 11980

Respondents.

-----X
CUSTODIAN OF RECORDS
Suffolk County Police Department
30 Yaphank Avenue
Yaphank, NY 11980

Upon the following papers numbered 1 to 47 read on this application for the issuance of Subpoenas Duces Tecum and Ad Testificandum; Notice of Petition/Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15-35; Replying Affidavits and supporting papers 36-47; Other ; it is

ORDERED, that this application for an order pursuant to CPLR 2307 for the issuance of subpoenas to the Custodian of Records, Suffolk County Police Department, and Detective Richard Higgins calling for the production of records at a hearing, to the extent that they were described in the Freedom of Information request filed by the petitioner on June 16, 2010, is granted.

On August 7, 2008, an incident occurred in a bar and restaurant-type establishment in Southampton, New York that resulted in the death of Andrew Reister, a bouncer at the establishment. After a trial the petitioner, Anthony Oddone, ["the petitioner" or "Oddone"], was convicted of manslaughter in the first degree and is currently serving a determinate term of seventeen years of imprisonment with five years of post-release supervision. *People v Oddone*, 89 A.D.3d 868, 932 N.Y.S.2d 149 (2011).

On or about June 16, 2010, Oddone made a request pursuant to the Freedom of Information Law, Public Officers Law Article 6, upon the Suffolk County Police Department ["the respondent" or "the SCPD"] for documents described as "[a]ll investigative files, records of interviews, investigative notes, and similar documents generated in connection with the investigation of the incident involving Anthony Oddone and Andrew Reister that took place on August 7, 2008".

The SCPD initially released seventy-eight (78) pages of documents in response to the petitioner's request. The petitioner sought review of this response from the SCPD's FOIL Appeals Officer, Christopher Gatto, ["Gatto"], pursuant to Public Officers Law § 89 [4][a]. Apparently the FOIL response did not include all the documents that had previously been turned over to the petitioner during the course of the criminal trial pursuant to *People v. Rosario*, 9 N.Y.2d 286 (1961), *cert denied*, 368 U.S. 866 (1961).

Ultimately, Gatto turned over an additional ten (10) pages but determined there were no other documents relating to the petitioner's criminal case. Notably, Gatto stated that he had "been informed" by an unspecified source that after a diligent search, no other responsive documents could be located.

The petitioner commenced an Article 78 proceeding challenging Gatto's determination to release only the limited number of documents to the petitioner and his finding that no other responsive documents could be located. The petitioner alleged that one of the officers who conducted the criminal investigation testified that more than seventy (70) witnesses had been interviewed, but that notes from only eighteen witnesses had been turned over. The petition also alleged that the officer had a six-inch thick binder of documents with him when he testified at the criminal trial and that he referred to it during the course of his testimony. The petitioner alleged that the disparity between the number of documents turned over and the volume of documents in the binder indicated the existence of additional documents.

In lieu of an Answer, the respondent SCPD, Gatto, Steve Levy as Suffolk County Executive and the Suffolk County Attorney [collectively "the respondents"], moved to dismiss the petition pursuant to CPLR 3211 (a) (1) and (7). In an Order and Judgment of this Court dated May 31, 2011, the respondents' motion was granted and the petition was dismissed, this court concluding that Gatto's certification was sufficient to demonstrate that a diligent search for additional documents had been conducted but had produced no additional documents, relying on *Matter of Rattley v. New York City Police Dept.*, 96 N.Y.2d 873, 875, 730 N.Y.S.2d 768, 756 N.E.2d 56 (2001).

The Appellate Division, Second Judicial Department, reversed in an order dated June 6, 2012. *Matter of Anthony Oddone v Suffolk County Police Department*, 96 A.D.3d 758, 946 N.Y.S.2d 580.

With respect to the issue of the sufficiency of Gatto's certification under Public Officer's Law § 89(3)(a), the Appellate Division concluded that the certification which was based on a search conducted by an unidentified source, was not based on any evidence in the record and thus, on their motion to dismiss the respondents failed to demonstrate that the challenged determination was not arbitrary and capricious. 96 A.D.3d at 761.

The Appellate Division stated,

“[E]ven where an entity properly certified that it was unable to locate requested documents after performing a diligent search, the person requesting the documents may nevertheless be entitled to a hearing on the issue where he or she can ‘articulate a demonstrable factual basis to support [the] contention that the requested documents existed and were within the [entity’s] control.’” *Id*

* * * * *

“Here, the allegations contained in the petition, if proven, would provide a factual basis to support the petitioner’s contention that additional documents relating to the criminal investigation of the petitioner’s case exist and are within the Police Department’s control. *Id*.

Subsequent to the Appellate Division’s decision the petitioner made the instant application pursuant to CPLR 2307 for the issuance of subpoenas to the Custodian of Records, Suffolk County Police Department, and Detective Richard Higgins, respectively, calling for the production of records at a hearing to be scheduled pursuant to CPLR 7804 (f). A supporting affidavit urged that following the Appellate Division’s decision, since the issue to be decided at the hearing is whether the SCPD possesses additional documents responsive to petitioner’s FOIL request, and since the Custodian of Records and Detective Higgins are the witnesses with first-hand knowledge of that subject, they should be required to attend the hearing with the files that were generated in the Oddone criminal case.

Shortly thereafter, the respondent submitted an Answer to the petition and the first of two affidavits by Janine Keleghan, a twenty-seven year employee of the SCPD with a title of Administrator I. The first Keleghan affidavit stated, *inter alia*, that on July 24, 2012, after the Appellate Division’s decision, an additional search was conducted for responsive documents and no additional documents could be found after a diligent search. Thus, the respondent argued that Keleghan’s affidavit cured any deficiency in Gatto’s initial certification and the petition should now be dismissed.

By correspondence dated September 6, 2012, the petitioner appealed the first Keleghan certification to the SCPD’s FOIL Appeals Officer. “Ms. Keleghan does not state that she conducted the search personally, does not state who conducted the search and does not state what steps were taken in connection with that search.”

In the interim, the respondents opposed the petitioner’s Amended Notice of Motion and attached a revised affidavit by Keleghan dated October 19, 2012. The revised Keleghan affidavit added that the search for additional documents conducted on July 24, 2012, was under Keleghan’s supervision. Thus, the respondent argued, the revised affidavit went above and beyond what is required under FOIA, warranting

dismissal of the petition. *See generally, Matter of Rattley v. New York City Police Dept.*, 96 N.Y.2d 873, 875, 730 N.Y.S.2d 768, 756 N.E.2d 56. *See also Matter of Curry*, 69 A.D.3d 622, 893 N.Y.S.2d 148 (2d Dept. 2010); *Matter of Boomer v. New York State Police Dept.*, 60 A.D.3d 1218, 1219, 875 N.Y.S.2d 334; *Matter of Covington v. Sultana*, 59 A.D.3d 163, 164, 872 N.Y.S.2d 119; *Matter of Franklin v. Schwartz*, 57 A.D.3d 338, 870 N.Y.S.2d 248; *Matter of Robert v. LoCicero*, 28 A.D.3d 566, 567, 813 N.Y.S.2d 214; *Matter of Daum v. Tessler*, 24 A.D.3d 214, 215, 804 N.Y.S.2d 920; *Matter of Marino v. New York City Police Dept., Records Access Officer*, 16 A.D.3d 193, 790 N.Y.S.2d 388; *Matter of Rodriguez v. Dillon*, 210 A.D.2d 416, 417, 620 N.Y.S.2d 96.

On this Motion, and relying on the second Keleghan affidavit, the respondent contends that the petitioner's "mere conjecture that unspecified documents existed in 2008 is insufficient to warrant a hearing on the issue." Respondent reasserts that the proceeding should be dismissed.

The issue on this motion is whether, in light of the revised Keleghan affidavit dated October 19, 2012, the additional search conducted on July 24, 2012, and informed by the recent decision of the Appellate Division, the petitioner is entitled to a hearing based on the allegations in the petition that 1) seventy (70) witnesses were interviewed in the criminal investigation and only eighteen witness statements were produced, and 2) the existence of a six (6) inch ring binder used by Detective Higgins to refresh his recollection during his testimony at the criminal trial.

This Court reads the recent Appellate Division decision as unequivocally reaffirming that even where, as here, there is a proper certification that the respondent has been unable to locate requested documents after performing a diligent search, where the petitioner has articulated a demonstrable factual basis to support his contention that the requested documents existed, and remain in the government's control, the petitioner is entitled to a hearing under the Freedom of Information Law. *Oddone, supra* at 761, citing *Matter of Gould v New York City Police Department*, 89 N.Y.2d 267, 279, 653 N.Y.S.2d 54, 675 NE2d 808; *Matter of Curry v Nassau County Sheriff's Department*, 69 A.D.3d 622, 622-623, 893 N.Y.S.2d 148 (2d Dept. 2010).

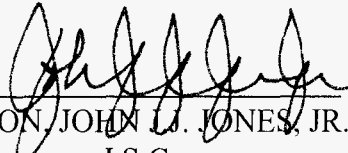
The Appellate Division has already concluded that the respondent's allegations that 1) seventy (70) witnesses were interviewed in the criminal investigation and only eighteen (18) witness statements were produced, and 2) Detective Higgins used a six (6) inch ring binder to refresh his recollection during his testimony at the criminal trial, if proven, would support a factual basis to support the petitioner's contention that additional documents relating to the criminal investigation of the petitioner's case exist and are within the SCPD's control. 96 A.D.3d 758, 761.

Thus, as a corollary to the petitioner's right to a hearing, Oddone is entitled to the requested subpoena *duces tecum* for the Custodian of Records, Suffolk County Police Department, calling for the production of records at the hearing, and the subpoena *ad testificandum* for Detective Richard Higgins.

However, with respect to the breath of the subpoenas, the original FOIL request was for documents described as "[a]ll investigative files, records of interviews, investigative notes, and similar documents generated in connection with the investigation of the incident involving Anthony Oddone and Andrew Reister that took place on August 7, 2008." This broad description necessarily encompasses all witness statements and the contents of the binder relied on by Detective Higgins. Additional items included in "Schedule 'A'" annexed to the proposed subpoenas are stricken to the extent that they go beyond the description of the original FOIL request dated June 16, 2010.

As the respondent correctly points out, as to items that were not originally "FOILed", petitioner has not exhausted his administrative remedies with respect to the expanded request. See *Matter of Covington v. Sultana*, 59 A.D.3d 163, 872N.Y.S.2d 119 (1st Dept. 2009). As so limited, the motion for the issuance of subpoenas *ducem tecum* and subpoena *ad testificandum* is granted.

DATED: 11 Jan. 2013



HON. JOHN L. JONES, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION