

Matter of Jones v New York City Police Dept.

2013 NY Slip Op 31167(U)

May 28, 2013

Supreme Court, New York County

Docket Number: 400072/13

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

In the Matter of the Application of
ANDRE JONES,

Index No. 400072/13

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

MOTION DATE _____

-against-

MOTION SEQ. NO. 001

NEW YORK CITY POLICE DEPARTMENT, et al.,

Respondents. **UNFILED JUDGMENT** MOTION CAL NO. _____

**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).**

The following papers, numbered _____

were read on this motion.

PAPERS NUMBERED _____

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....	<u>1, 2</u>
Answering Affidavits- Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

CROSS-MOTION: YES NO

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

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 5/28/13


DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X

In the Matter of the Application of
ANDRE JONES,

Petitioner,

For a Judgment under Article 78
of the Civil Practice Law and Rules.

-against-

Index No. 400072/13

NEW YORK CITY POLICE DEPARTMENT, et al.,
Respondents.

-----X

DONNA M. MILLS, J.:

In this Article 78 proceeding, petitioner Andre Jones, acting pro se brings this action against the respondents New York City Police Department ("NYPD"), Richard Mantellino and Principal Ellis, to compel disclosure of law enforcement records, pursuant to N.Y. Public Officer Law § 84, et seq., also known as the Freedom of Information Law ("FOIL"). Petitioner is additionally seeking reimbursement of litigation costs in accordance with N.Y. Public Officers Law ("POL") § 89(4)(c). Respondents oppose the motion and cross move to dismiss.

Petitioner specifically seeks documents pertaining to his April 21, 2007 arrest and subsequent conviction for murder in the second degree which he claims is within the record of Detective Louis Merensky of the 103 Detective squad in Queens, New York. Petitioner described the records sought as copies of "any and all arrest warrant poster pertaining to [him] or any females," photographs that were taken of him and females in the hospital, and the "officer's evidence list."

Annexed to respondents' reply papers is the reward poster of petitioner that was

requested. Also annexed to the reply is an affirmation from Detective Merensky wherein he certifies that a diligent search had been conducted, but no responsive records other than the aforementioned poster could be located.

“FOIL is based on a presumption of access to [agency] records, and an agency . . . carries the burden of demonstrating that [an] exemption applies to the FOIL request. [An agency] must meet this burden in more than just a plausible fashion. In order to deny disclosure, the [agency] must show that the requested information falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access. If the [agency] fails to prove that a statutory exemption applies, FOIL compels disclosure, not concealment. In short, the burden of proof rests solely with the [agency] to justify the denial of access to the requested records” (Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 462-463 [2007]).

When an agency is unable to locate documents properly requested under FOIL, Public Officers Law § 89(3) requires the agency to “certify that it does not have possession of [a requested] record or that such record cannot be found after diligent search.” The statute does not specify the manner in which an agency must certify that documents cannot be located. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required. Here, the Department satisfied the certification requirement by averring that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate (Matter of Gould v. New York City Police Dept., 89 N.Y.2d 267, 279, 653 N.Y.S.2d 54, 675 N.E.2d 808).

Respondents satisfied the requirements of Public Officers Law § 89 (3) by

certifying that a diligent search had been conducted and the documents could not be located in respondent's files (see Matter of Rattley v New York City Police Dept., 96 NY2d 873 [2001]). In addition, petitioner's offer of proof fails to establish that the remaining requested records are in the respondents' possession. An agency is not required to create or recreate records in order to comply with a FOIL request (Public Officers Law § 89 [3]).

Pursuant to FOIL's fee-shifting provision, a court may award reasonable counsel fees and litigation costs to a party that "substantially prevailed" in the proceeding if the court finds that (1) "the record involved was, in fact, of clearly significant interest to the general public," and (2) "the agency lacked a reasonable basis in law for withholding the record" (Public Officers Law § 89[4][c]). Significantly, even when these statutory prerequisites are met, the decision to grant or deny counsel fees still lies within the discretion of the court (see Matter of Todd v. Craig, 266 A.D.2d 626, 627, 697 N.Y.S.2d 722 [1999], lv. denied 94 N.Y.2d 760, 706 N.Y.S.2d 80, 727 N.E.2d 577 [2000]; Matter of Corvetti v. Town of Lake Pleasant, 239 A.D.2d 841, 843, 657 N.Y.S.2d 536 [1997]).

Here, I am exercising discretion in denying counsel fees. The primary purpose for petitioner's FOIL request was to obtain evidence to support his criminal case. These case-specific documents are not of significant interest to the public in general (see Matter of Beechwood Restorative Care Ctr. v. Signor, supra at 441, 808 N.Y.S.2d 568, 842 N.E.2d 466; Matter of Beyah v. Goord, 309 A.D.2d 1049, 1053, 766 N.Y.S.2d 222 [2003]; Matter of Grace v. Chenango County, 256 A.D.2d 890, 891–892, 681 N.Y.S.2d 695 [1998]).

Accordingly, it is hereby

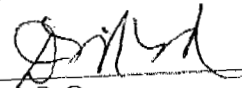
ORDERED that the Respondent's cross motion to dismiss the petition is granted;

and it is further

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

Dated: 5 / 28 / 13

ENTER:



J.S.C.

CORINNA M. MILLS, J.S.C.

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).