

**Matter of Exoneration Initiative v New York City
Police Dept.**

2013 NY Slip Op 32538(U)

October 16, 2013

Sup Ct, New York County

Docket Number: 104004/12

Judge: Peter H. Moulton

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. Peter H. Moulton PART 40 B
Justice

In the Matter of the Application of
The Exoneration Initiative

INDEX NO. 104004/12

MOTION DATE _____

v.

MOTION SEQ. NO. 01

New York City Police Department

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause — Affidavits — Exhibits	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the

this Article 78 proceeding is decided in accordance with the written decision issued on today's 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).

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Dated: October 16, 2013

New York, New York

[Signature]
J.S.C.

PETER H. MOULTON

1. Check one: Case Disposed Non-Final Disposition
2. Check as Appropriate: Motion is: Granted Denied Granted in Part Other
3. Check if Appropriate:: Settle Order Submit Order
- Do Not Post Fiduciary Appointment Reference

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Supreme Court: New York County
Part 40B

UNFILED JUDGMENT

-----X
In the Matter of the Application of

THE EXONERATION INITIATIVE,

Petitioner,

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).

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

-against-

Index No. 104004/12

THE NEW YORK CITY POLICE DEPARTMENT,

Respondent.

-----X
Peter H. Moulton, Justice

In this Article 78 proceeding petitioner seeks to obtain records from the New York City Police Department ("NYPD") pursuant to the state's Freedom of Information Law (Public Officers Law § 84 et. seq., commonly referred to as "FOIL"). The records concern an NYPD police investigation in Florida concerning the attempted murder in the Bronx of Gabriel Rodriguez by Elliot Lebron. Neither Rodriguez nor Lebron are interested parties herein.

Petitioner Exoneration Initiative is an organization that investigates, and, where appropriate, litigates claims of actual innocence on behalf of indigent incarcerated people. The Exoneration Initiative is currently investigating the conviction of Richard Rosario, who has been incarcerated since 1996 after being convicted of murder. In a prior Article 78 proceeding between the

parties, this court ruled that the NYPD had improperly withheld records concerning Rosario that should have been disclosed under FOIL. (In re Exoneration Initiative v New York City Police Department, 39 Misc3d 962.) Those records concerned the police investigation into the murder that led to Rosario's conviction.

In this proceeding petitioner seeks police records concerning a different crime, one not involving Rosario, that could potentially help determine Rosario's whereabouts in the relevant period.

BACKGROUND

By letter dated January 13, 2012, petitioner requested pursuant to FOIL four categories of documents relating to an NYPD investigation in Volusia County, Florida. Rosario has contended that he was in Florida at the time of the murder for which he was convicted.

At the time of his conviction for murder, Rosario also pled guilty to a robbery charge. Petitioner asserts that the records sought herein could demonstrate that Rosario was also in Florida at the time he was alleged to have committed the robbery.

The NYPD sought further information concerning the request and petitioner responded in a letter dated February 14, 2012. On April 12, 2012, the NYPD's Record Access Officer ("RAO") provided 21 pages of documents. Petitioner states that none of these documents

was responsive to its request.

Petitioner submitted a timely appeal to NYPD's Records Access Appeals Officers ("RAAO"). The RAAO denied the appeal in a letter dated June 15, 2012, which states in relevant part:

The appeal is denied because the requested records are exempt from disclosure pursuant to [POL § 87(2)(b)] since disclosure thereof would create an unwarranted invasion of personal privacy, and pursuant to [POL § 87(2)(f)] because disclosure thereof could endanger the life or safety of any person.

The letter added: "[o]ther exemptions under FOIL also may apply."

Petitioner thereupon brought this proceeding to reverse the determination of the RAAO and to compel the NYPD to disclose the relevant records. The NYPD answered the petition, asserting that the records are exempt from disclosure under FOIL.

The records consist of seven pages of notes conducted by two NYPD detectives in Volusia County Florida in the period March 26-28, 1996, concerning the attempted murder of Rodriguez. The first four pages concern a detective's notes of what he was told by a witness who will be referred to herein as "witness 1." The fifth page contains the pedigrees of two individuals, an address that is not attached to the name of any individual, and two brief sentences or sentence fragments which are unclear absent further context. The sixth and seventh pages concern a detective's notes of an interview of a second witness, referred to herein as "witness 2."

Neither witness 1 nor witness 2 testified in the ensuing criminal prosecution in New York state.

DISCUSSION

FOIL imposes a broad duty of disclosure upon government agencies. Government records are "presumptively open" to the public, statutory exemptions to disclosure are "narrowly construed," and the agency must articulate a "particularized and specific justification" for nondisclosure. (New York Civil Liberties Union v City of Schenectady, 2 NY3d 657, 661 [2004] [citing Gould v New York City Police Dep't, 89 NY2d 267, 274, 275] [1996] [internal quotations omitted].)

The NYPD first argues that disclosure of the seven pages is barred by POL § 87(2)(f), which provides that government records may be withheld if their disclosure "could endanger the life or safety of any person." Courts have held that the agency must only demonstrate a possibility of endangerment to invoke this exemption. (See Matter of Bellamy v New York City Police Dep't, 87 AD3d 874, 875 [1st Dep't 2011], aff'd 20 NY3d 1028 [2013].) On the other hand, there is no comprehensive prohibition on the disclosure of police records concerning information provided by witnesses. (See Matter of Johnson v New York City Police Dep't, 257 AD2d 343, 348 [1st Dep't 1999].)

The NYPD has carried its burden to show that there is a

possibility that witnesses 1 and 2 could would be endangered by the unredacted release of the detectives' notes. The danger would be posed not by Rosario, but potentially by another individual. The last two pages, concerning witness 2, are exempt from disclosure in their entirety for this reason. With redaction, a portion of the detective's notes does not pose any risk to witness 1.

The portion redacted pursuant to POL § 87(2)(f) begins on the last line of page two, and includes all of pages 3, 6 and 7.

The NYPD next argues that the detective's notes fall within the privacy exemption because they would "constitute an unwarranted invasion of personal privacy" and therefore should be barred by POL §§ 87(2)(b), 89(2)(b). Section 89(2)(b) states:

(b) an unwarranted invasion of personal privacy includes, but shall not be limited to:

(I) disclosure of employment, medical or credit histories or personal references of applicants for employment;

(ii) disclosure of items involving the medical or personal records of a client or patient in a medical facility;

(iii) sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;

(iv) disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;

(v) disclosure of information of a personal nature reported in confidence to an agency and

not relevant to the ordinary work of such agency;

(vi) information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law; or

(vi) disclosure of electronic contact information, such as an email address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.

Under the Court of Appeals' decision in Matter of Data Tree, LLC v Romaine (9 NY3d 454, 462-3 [2007]) the burden of proof rests solely on the NYPD to demonstrate an unwarranted invasion of privacy.

The NYPD is correct that a portion of the notes falls within subsection (iv), as disclosure "would result in personal hardship to the subject party and such information is not relevant" to the Exoneration Initiative's stated purpose in seeking the records: establishing Rosario's whereabouts during the period in question. The court redacts this personal information, which could unnecessarily embarrass witness 1. The portion redacted pursuant to POL §§ 87(2)(b) and 89(2)(b) begins on the seventh line of page 2 at the word "while" and continues to line 13 up to the word "me."

Next, the NYPD argues that the seven pages are exempt under POL § 87(2)(e)(iii). That section states that requests for records "compiled for law enforcement purposes" may be denied where disclosure would "identify a confidential source or disclose

confidential information relating to a criminal investigation."

There is nothing in the record before the court indicating that witness 1 was given an explicit assurance of confidentiality. Rather, the NYPD asserts that witness 1 gave information to the police under an implicit assurance of anonymity and that disclosure of his/her statement and personal information would violate that implicit assurance. The NYPD points to the fact that witness 1 provided information of a personal nature, information that the court found above should be redacted, and that this gives rise to an inference of confidentiality. The NYPD argues that it will be more difficult to obtain eyewitnesses' cooperation if their statements, name and address become known at a later date through FOIL.

The NYPD is correct that courts have not required an explicit assurance of anonymity before a witness' statement will be exempt under POL § 87(2)(e)(iii). However, the agency must show that "the circumstances give rise to the clear inference that such promise was assumed." (Johnson, supra, 257 AD2d at 348.) Here the NYPD has not provided facts that could give rise to the inference of an assumed promise of confidentiality. While witness 1 gave certain personal information, he or she also gave other information that might have been necessary during a criminal trial.

Witnesses questioned during a attempted murder investigation may potentially be called to take the stand at a criminal trial.

Often it is impossible to know which witnesses will have information necessary to prove the People's case until the investigation is concluded and the District Attorney prepares for trial. It is unlikely that anyone knew at the time witness 1 gave his/her statement to the police whether witness 1's testimony at trial would be necessary to prove an element of the District Attorney's case.

For these reasons, the court finds that the NYPD did not establish that there was any implicit promise of confidentiality made to witness 1.

Finally, the NYPD argues that the records are exempt from disclosure pursuant to POL § 87(2)(a), which provides that an agency may deny access to records that "are specifically exempted from disclosure by state or federal statute." The NYPD invokes CPLR 3101(b), which provides that "upon objection of a person entitled to assert the privilege, privileged matter shall not be obtainable" in disclosure. The privilege asserted by the NYPD is the "public interest privilege" which protects

confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged. [Citations omitted.] The justification for the privilege is that the public interest might otherwise be harmed if extremely sensitive material were to lose this special shield of confidentiality.

(Matter of World Trade Center Bombing Litigation, 93 NY2d 1, 8

[1999].)

Respondent does not establish that the privilege applies to witness 1's statements because, as discussed above, it has not shown that they are confidential. The NYPD may not rely on an assertion of a "blanket exemption." Rather it must establish "with some specificity" that the privilege applies to a document. (Espiritu v Vance, __ Misc3d __, 2013 WL 1715514.) The NYPD has not carried that burden.

In sum, the NYPD shall provide the following portions of the seven pages of documents it withheld from petitioner:

1. The first page in its entirety, including witness 1's pedigree information.
2. The first seven lines of page two, up to and including the words "w/ him."
3. Page 5 in its entirety.

The petition seeks attorneys' fees pursuant to POL § 89(4)(c). Under that provision, where a petitioner has "substantially prevailed" a court "may" assess attorneys' fees and litigation costs against an agency in two circumstances:

- i. the agency had no reasonable basis for denying access; or
- ii. the agency failed to respond to a request or appeal within the statutory time.

The NYPD did have a reasonable basis for not disclosing the majority of the seven pages at issue. Therefore the court declines

to award attorneys' fees pursuant to subsection (i).

The NYPD did not strictly comply with the time limits set forth in FOIL for its response, and it apparently initially provided 21 pages of non-responsive documents, so subsection (ii) is applicable. However, the award of attorneys' fees is discretionary even where the statutory prerequisites are satisfied. (See Matter of New York Civil Liberties Union v City of Saratoga Springs, 87 AD3d 336, 338.)

The court determines that an award of \$2000 toward petitioner's expenditure of attorneys' fees is warranted under the facts of this case. Respondent's delays were not justified, but they were not egregious, and, as noted above, the NYPD had a good faith basis for withholding more than half of the seven pages in question. The court does not consider whether the withheld documents are of interest to the public at large and declines to follow decisions that continue to impose that requirement in determining whether to award attorneys' fees. (E.g. Matter of Rodriguez v Fisher, 36 Misc3d 1241[A].) The legislature excised that requirement from POL § 89(4)(c) in a 2006 amendment. As the legislature went to the trouble to amend the statute, the court will not engraft the severed language back onto the statute.

CONCLUSION

For the reasons set forth above, IT IS ORDERED and ADJUDGED that the NYPD's decision to withhold the seven pages of documents inspected by the court in camera is annulled in part; and it is

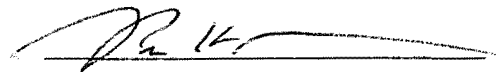
ORDERED and ADJUDGED that the NYPD shall provide petitioner with the following portions of the seven pages inspected by the court in camera, within twenty days of service of this order with notice of entry:

1. The first page in its entirety, including witness 1's pedigree information.
2. The first seven lines of page two, up to and including the words "w/ him."
3. Page 5 in its entirety; and it is

ORDERED and ADJUDGED that respondent shall pay petitioner \$2000 in reasonable attorneys fees.

This constitutes the Order and Judgment of the Court.

DATED: October 16, 2013



A.J.S.C.

**HON. PETER H. MOULTON
SUPREME COURT JUSTICE**

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).

THE NATIONAL ARCHIVES
and the National Archives and Records Administration
are pleased to announce the release of records
pertaining to the activities of the National
Archives and Records Administration
from 1947 to 1954.

These records are available for public inspection
and copying at the National Archives and Records
Administration, 8600 Adelphi Road, College Park,
Maryland 20740.