

Matter of Porter v David
2014 NY Slip Op 30965(U)
April 10, 2014
Sup Ct, New York County
Docket Number: 402644/2012
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. Peter H. Moulton PART 57
Justice

PORTER, ALLEN

INDEX NO. 402644/2012

MOTION DATE _____

v.

MOTION SEQ. NO. 001

JONATHAN DAVID

MOTION CAL. NO. _____

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

Papers Numbered

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 petition is denied in accordance with the attached written decision dated April 10, 2014

Dated: 4/10/14

New York, New York



J.S.C.

PETER H. MOULTON

HON. 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

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).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 57

-----X
In the Matter of the Petition of ALLEN PORTER,

Petitioner,

-against-

Index No. 402644/2012

Jonathan David, FOIL Appeals Officer,

Respondent,

For a Judgment Pursuant to Article 78 of the CPLR

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).^x

PETER H. MOULTON, J.:

Petitioner brings this Article 78 proceeding in the nature of mandamus to compel challenging respondent's partial denial of records petitioner requested under POL § 84 of the Freedom of Information Law ("FOIL"). Petitioner seeks an order directing the New York City Police Department ("NYPD") to provide him with access to records pertaining to petitioner's 1996 conviction for murder in the second degree (two counts) and criminal possession of a weapon.

Respondent moves to dismiss the petition on several grounds.¹ First, respondent invokes the exemptions to FOIL disclosure contained in Public officers Law §§ 87(2)(a), 87(2)(b), 87(2)(e)(iii), 87(2)(e)(iv), and 89(2)(b) respondent is not required to provide petitioner with access to records that are exempt from disclosure. Next, respondent states that respondent is not required to provide

¹Notably, respondent does not move to dismiss the petition pursuant to CPLR § 217(1) as respondent withdrew the cross-motion articulating that basis by letter dated June 27, 2013.

petitioner with access to records that are not in its possession or those to which it has already provided petitioner access. Finally, respondent states that some of the records petitioner seeks have already been disclosed to petitioner by the Queens County District Attorney's Office ("QCDAO"), rendering petitioner's application moot.

BACKGROUND

Petitioner was convicted of shooting and killing two individuals while they were seated in a parked car outside the Woodside Housing projects on December 31, 1991. Petitioner had been arrested after a four-month long investigation into the double homicide. Petitioner, who was believed to have acted with others, was specifically convicted of murder in the second degree and criminal possession of a weapon. Petitioner's alleged accomplices were not apprehended.

By letter dated September 16, 2011, petitioner sought access to nineteen categories of records, pursuant to POL § 84 relating to his arrest and criminal conviction under Indictment Number 1980/92 in Queens County. On September 16, 2011, a Records Access Officer ("RAO") acknowledged receipt of petitioner's request, but stated that twenty business days would be required to fully process petitioner's request. Within a month, the RAO sent a letter to petitioner stating that additional time would be needed to process petitioner's request. Several months of additional correspondence ensued in which the RAO stated that even more time was needed to process petitioner's request because the twenty year old records sought by petitioner were archived and difficult to locate.

After conducting a search for the requested records, respondent located 308 pages of responsive material. Those records were responsive to the following categories outlined in

petitioner's FOIL request: reports or other documents received from other government agencies, complaint follow-up reports, Sprint reports for 911 calls, reports produced pursuant to a photo identification procedure, records regarding statements made by witnesses, and subpoenas issued in petitioner's criminal prosecution among other items. Respondent was unable to locate records in the following categories: the department's internal index identifying all records possessed by the NYPD, Voluntary Disclosure Forms, Data Analysis Forms, data compiled and filed pursuant to CPL § 240.20, deferral of prosecution forms, early assessment bureau reports, synopsis sheets, Grand Jury Synopsis sheets, any and all material witness orders and transcripts of all corresponding court proceedings, a copy of orders issues to secure the attendance of witnesses at trial, police officers' memo book entries, a copy of all Action Sheets, and any records or agreements or promises made by any government entity in exchange for witness testimony at petitioner's trial.

On March 2, 2012, the RAO granted petitioner's request, in part, by permitting access to six pages of the aforementioned responsive records, including copies of the arrest report, complaint report, and complaint follow-up reports prepared in connection with petitioner's arrest. The RAO concluded that the remaining pages of responsive materials were exempt from disclosure. Moreover, the RAO redacted some of the information disclosed to petitioner after making a determination that full impartation would violate the safety and personal privacy of the victims and their families. On April 1, 2012, petitioner appealed the RAO's determination.

By letter dated August 3, 2012, the Appeals Officer denied petitioner's appeal pursuant to POL § 87(2)(e)(i) by stating that disclosure of additional records to petitioner would interfere with the ongoing investigation into alleged perpetrators that authorities believed had acted in concert with petitioner. The Appeals Officer also stated that under POL §§ 87(2)(b) and 89(2), disclosure of the

records would constitute an unwarranted invasion of privacy. Finally, the Appeals Officer stated that under POL §§ 87(2)(f), 87(2)(e)(iii), and 87(2)(e)(iv), respectively, disclosure of the records could endanger the life and safety of the victims and their families, reveal confidential information, and disclose non-routine criminal investigative techniques or procedures. Notably, the Appeals Officer also based his finding on the assertion that many of the records requested by petitioner were not in the custody and control of the NYPD. The Appeals Officer concluded his letter by informing petitioner that he could seek review of the determination by commencing an Article 78 proceeding within four months of the date of the decision.

Petitioner has sought many of the records contained in his FOIL request by separately submitting requests for records to the QCDAO. To date, the QCDAO has granted petitioner access to numerous records, with redactions, including the following: complaint follow-up reports, property/evidence vouchers, and unusual occurrence reports.

DISCUSSION

In accordance with the desire to encourage “open government” (*Matter of Newsday, Inc. v Empire State Dev. Corp.*, 98 NY2d 359, 362 (2002); Public Officers Law § 84) and “public accountability” (*Matter of Gould v. New York City Police Dept.*, 89 NY2d 267, 274 (1996)), FOIL generally “mandates all agencies to make records available to the public” (*Matter of Empire Realty Corp. v. New York State Div. of Lottery*, 230 AD2d 270, 272 (1997)), unless the material being sought falls within a statutory exemption (*Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 83 (1984)). Generally, judicial deference is afforded to an agency’s determination as to an appropriate course of action to undertake in a particular matter so long as the

agency's determination is rational. *See Jemrock Realty Co. LLC v Krugman*, 64 AD3d 290, 300 (1st Dept. 2009); *see also Matter of Gruber (New York City Dept. of Personnel-Sweeney)*, 89 NY2d 225, 231 (1996). However, courts are not required to afford deference to agency determinations regarding statutory construction or pure questions of law. *See Matter of Balance v Manhattan Beer Distribs.*, 52 AD3d 1059, 1061 (3d Dept. 2008), *lv. denied* 11 NY3d 715 (2009)). Thus when agencies invoke a FOIL exemption, courts are free to decide whether or not those agencies have met their burden of sufficiently demonstrating an exemption's applicability. *Matter of Toys R Us v Silva*, 89 NY2d 411, 419 (1996); *Matter of Bahnken v New York City Fire Dept.*, 17 AD3d 228, 229 (1st Dept. 2005), *lv. denied* 6 NY3d 701 (2005). Nevertheless, the remedy that petitioner seeks here in the form of mandamus is only available in few circumstances. *See Klostermann v. Cuomo*, 61 NY2d 525, 537 (1984). Indeed, one can only seek such relief "to compel the performance of a purely ministerial act where there is a clear right to the relief sought." *See Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 13 (1981).

In the instant proceeding, respondent cites a number of FOIL exemptions in order to prevent the disclosure of certain records to petitioner.² First, respondent cites POL § 87(2)(e)(iii) for the proposition that records that respondent has compiled, which if disclosed would "identify a confidential source or disclose confidential information relating to a criminal investigation," are not subject to dissemination under FOIL. *See* POL § 87(2)(e)(iii). While that section does in fact state that requests for records may be denied where disclosure would reveal the identity of a confidential

²Although one of the grounds respondent cited when denying petitioner's appeal was FOIL's POL § 87(2)(e)(i) exemption, respondent does not cite that particular exemption in Respondent's Memorandum of Law outlining applicable FOIL exemptions. As such POL § 87(2)(e)(i) is not discussed in this decision.

source, the exemption is inapplicable here. Indeed, there is nothing in the record before the court indicating that any witnesses in this matter were given explicit assurances of confidentiality. Rather, respondent argues generally that disclosure of documents in its custody related to private citizens who were interviewed during the course of the NYPD's homicide investigation would violate detectives' implicit assurances that statements offered by those citizens be kept antonymous. Respondent further argues that disclosure of such information would chill eyewitnesses' future cooperation in investigations by disincentivizing those eyewitnesses from offering statements to the police that could become known at a later date through FOIL.

Respondent is correct that the disclosure of such information could deter witnesses from talking to the police, however, POL § 87(2)(e)(iii) is not the appropriate FOIL exemption to invoke for that proposition. Under that section, an agency must show that circumstances give rise to a "clear inference" that witnesses were assured confidentiality at the time that they spoke to the police. *See Matter of Johnson v. New York City Police Dept.*, 257 AD2d, 343, 348 (1st Dept. 1999). Here, respondent has not provided any factual basis to give rise to the inference of an assumed promise of confidentiality by the NYPD to witnesses in conjunction with its homicide investigation. As such, respondent has not shown under POL § 87(2)(e)(iii) that any witnesses expected a promise of confidentiality in exchange for the information they offered to the NYPD. For these reasons, the court finds that respondent has not established that there was an implicit promise of confidentiality made to any witnesses in connection with this matter to invoke POL § 87(2)(e)(iii). Accordingly, that FOIL exemption is inapplicable here.

Next, respondent argues that the records petitioner seeks are exempt under POL § 87(2)(e)(iv). That section articulates an exemption to FOIL disclosure in circumstances where the

divulgence of records would reveal non-routine criminal investigative techniques or procedures. *See* POL § 87(2)(e)(iv). Under POL § 87(2)(e)(iv) courts have found that agencies may deny access to records compiled by law enforcement if the disclosure of such records might alert criminals to the existence of particularized investigative techniques or procedures. *See Matter of Fink v. Lefkowitz*, 47 NY2d 567, 573 (1979); *Dobranski v. Houper*, 154 AD2d 736, 737 (3d Dept. 1989).

Here, petitioner seeks numerous complaint follow-up reports related to his double homicide arrest and conviction. Those records, respondent argues, detail investigative techniques inaccessible to the public at large. Moreover, respondent states that disclosure of techniques mentioned in the records could assist criminals by helping them craft countermeasures to circumvent those techniques. Respondent's argument has merit, however, the court cannot fully consider it without an *in camera* review of the specific records that respondent believes qualify for this particular exemption. However, as discussed below, respondent demonstrates the applicability of FOIL's public safety and privacy exemptions, so there is no need for *in camera* inspection under POL § 87(2)(e)(iv).

Finally, respondent cites FOIL's public safety and privacy exemptions, stating that disclosure of certain requested records to petitioner would endanger the life or safety of individuals as well as threaten the privacy of those individuals. *See* POL §§ 87(2)(g), 87(2)(b), 89(2)(b). When invoking the public safety exemption, an agency does not have to prove that the perceived danger to a person's life or safety will actually occur if information is made public. *Matter of Nalo v. Sullivan*, 125 AD2d 311 (2d Dept. 1986). Instead, an evaluation must be made as to the type of information contained in documents, the inferences that may be drawn from that information, and the effectiveness of redaction in protecting the safety of individuals in a particular situation. *Matter of Johnson*, 257 AD2d at 349. In making that determination, the mere possibility that the release of certain

information, such as the names and addresses of witnesses, could endanger the lives or safety of those individuals is sufficient to prevent disclosure. *Id.*; see *Matter of Bellamy v. New York City Police Dept.*, 87 AD3d 874 (1st Dept. 2011), *aff'd* 20 NY3d 1028 (2013); *Matter of Connolly v. New York Guard*, 175 AD2d 372, 373 (3d Dept. 1991); *Matter of Stronza v. Hoke*, 148 AD2d 900 (3d Dept. 1989); see also *Matter of Rodriguez v. Johnson*, 66 AD3d 536 (1st Dept. 2009). Similarly, when invoking FOIL's privacy exemptions, a balancing test is adopted that requires the requestor to demonstrate that a legitimate public interest in the release of governmental information supplants an expectation of privacy. See *Matter of Goodstein v. Shaw*, 119 Misc.2d 400 (Sup. Ct. NY Co. 1983). A petitioner's personal interest cannot be substituted for that of a general public. See *Edwards v. New York State Police*, 44 AD3d 1216 (3d Dept. 2007).

In this proceeding, respondent states that there is a strong possibility that disclosing certain information contained in the documents petitioner seeks would create a danger to the victims' families and to witnesses who testified against petitioner at his trial. Indeed, respondent notes that certain documents responsive to petitioner's request would include the names, addresses, and statements of the victims' family members as well as similar information with respect to other witnesses to the crime for which respondent stands convicted.³ Respondent further claims that redactions to the materials would not sufficiently protect the parties in question from potentially dangerous exposure. The Court of Appeals addressed this issue in *Johnson*. There, the court noted

³Respondent located the following documents responsive to petitioner's FOIL request: complaint follow-up reports, Sprint reports for 911 calls, reports produced pursuant to a photo identification procedure, records regarding statements made by witnesses, and subpoenas issued in petitioner's criminal prosecution among other items. Respondent affirms that these documents all contain personal identifying information concerning witnesses that testified at trial against petitioner. Respondent further states that some of these documents, where possible, were already provided to petitioner with redactions.

that while one would ordinarily assume that redactions of the names and addresses of witnesses from complaint follow-up reports would be enough to protect the identities of those witnesses as well as a petitioner's right to access information, that is often not the case. *Johnson*, 257 AD2d at 348-350.

Indeed, as respondent notes, complaint follow-up reports, referred to internally by the police department as "DD-5s," often include summaries of interviews with witnesses and crime victims as well as their names and addresses. Additionally, such reports may include disclosure of a witness' employment, whether a witness has been shown photographs, and descriptions of a witness' appearance. In such circumstances, as the Court of Appeals in *Johnson* observed, the potential risk of identifying a witness through this contextual information can necessitate non-disclosure of even the most innocuous of details about a witness. *Id.* Extending that reasoning further, those details in the aggregate could necessitate the redaction of what would amount to entire pages of complaint follow-up reports and other similar records.

Here, respondent has sufficiently and with specificity provided a factual basis for that determination by making reference to specific elements of petitioner's crime and gang-related activity. And while redaction alone would ordinarily suffice to protect the personal privacy and safety of the victims' family members and other witnesses, respondent has convincingly argued here that redaction does not necessarily provide adequate protections due to nature and circumstances surrounding the crime for which petitioner stands convicted. Thus, the spirit of FOIL is not violated by the non-disclosure to petitioner of reports so heavily redacted by the applicability of a legal exemption as to render them devoid of any other substance. The interests of judicial economy also logically dictate that disclosure be avoided entirely in such a circumstance to prevent waste.

In rebuttal, it is worth noting here that because petitioner is incarcerated, the possibility and

opportunity for him to pose a risk to the victims' families and to witnesses that testified against him seems remote. Nevertheless, respondent has stated that the evidence adduced during the course of the police investigation into petitioner's actions revealed petitioner's gang-related activity at the time that the two victims were killed. Consequently, while petitioner's present incarceration does mitigate the risk that he may undertake acts of vengeance, the possibility of such acts still remains and is compounded by respondent's knowledge of petitioner's gang-related ties. And while that possibility may be slight, in keeping with *Stronza* and its progeny, such a perceived risk is enough for respondent to meet the threshold necessary to invoke the public safety exemption under FOIL. Furthermore, with respect to the aforementioned balancing test that courts adopt when weighing the merits of the public's general interest in the release of information, petitioner has made no showing that the dissemination of the information he is requesting would serve any interest other than his own. Consequently, petitioner is not entitled to the disclosure of records that contain private, and potentially safety-threatening details about the victims' families and other witnesses who testified against him.

To the extent that petitioner seeks disclosure of records not covered by the aforementioned FOIL exemption, respondent argues that petitioner's application is moot because the primary relief sought in the petition has been provided both by respondent's initial disclosure of records and by the QCDAO's subsequent disclosures. *See Matter Newton v. Police Dept. of City of N.Y.*, 183 AD2d 621 (1st Dept. 1992). Here, respondent granted petitioner's FOIL request, in part, by providing petitioner with access to six redacted pages of the responsive records, including copies of the arrest report, complaint report, and complaint follow-up reports prepared in connection with petitioner's arrest. Moreover, in conjunction with the FOIL request petitioner submitted to respondent, petitioner

separately sought and obtained many of the records contained in his first FOIL request through a second request submitted to the QCDAO. The QCDAO subsequently granted petitioner access to numerous additional records in its custody, including complaint follow-up reports,⁴ property/evidence vouchers, and unusual occurrence reports. Consequently, petitioner's application is moot to the extent that the original petition sought several records that have since been provided to petitioner by way of petitioner's FOIL request to the QCDAO.

Finally, respondent points out that several of the records petitioner sought in his original FOIL request were not in respondent's custody but rather in the sole possession of the QCDAO. A party cannot be compelled to documents that it does not possess. *See Matter of Davidson v. Police Dept. of N.Y.*, 197 AD2d 466, 467 (1st Dept. 1993); *see also Matter of Adams v. Hirsch*, 182 AD2d 583 (1st Dept. 1992). When an agency claims that it is unable to locate documents requested under FOIL, POL§ 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." *See Matter of Gould v. New York City Police Dept.*, 89 NY2d 267 (1996). 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. *Gould*, 89 NY2d at 278.⁵

Here, respondent satisfied the certification requirement by averring that all responsive

⁴Respondent also appears to have provided petitioner with identical copies of some of the complaint follow-up reports disclosed by the QCDAO.

⁵As the Court of Appeals pointed out in *Matter of Rattley v. New York City Police Dept.*, 96 NY2d 873, 875 (2001), court holdings requiring a higher threshold are not to be followed (*see, e.g., Matter of Key v. Hynes*, 205 AD2d 779 (2d Dept. 1994); *Matter of Bellamy v. New York City Police Dept.*, 272 AD2d 120 (1st Dept. 2000); *Matter of Sanders v. Bratton*, 278 AD2d 10 (1st Dept. 2000).

documents had been disclosed and that it had conducted a diligent search for the documents it could not locate. Indeed, respondent certified that respondent was unable to locate a range of records that included Voluntary Disclosure Forms, early cases assessment bureau reports, and transcripts of court proceedings. The range of records that respondent was unable to locate include several that are not part of the NYPD's record-keeping. Indeed, as respondent points out, records such as Voluntary Disclosure Forms are created and kept by the District Attorney's Office. As such, petitioner could not have obtained those records through his initial FOIL request. Nevertheless, because petitioner simultaneously submitted requests to both the NYPD and the QCDAO, the very records respondent did not have and therefore could not disclose to petitioner have since been provided to petitioner by the QCDAO. Therefore, as previously pointed out, to the extent that this proceeding relates to those records, it is moot.

It is also worth noting here that although the Criminal Procedure Law does not preclude defendants from seeking documents under FOIL that are otherwise governed generally by CPL article 240 as well as the *Rosario* and *Brady* rules, petitioner was previously granted access to many of the records that are now being disclosed to him anew. The length of time that elapsed between petitioner's conviction and his requests provides a logical explanation petitioner's desire to get a fresh set of these documents, however, the interest of judicial economy necessitates that such duplication is seldom exercised.

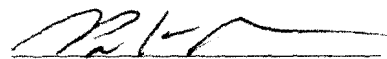
Finally, based on the foregoing conclusions, petitioner has failed to demonstrate the existence of a nondiscretionary, ministerial duty, and hence, mandamus to compel does not lie.

Accordingly, it is

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

Dated: April 10, 2014

ENTER:



J.S.C.

HON. PETER H. MOULTON

UNFILED JUDGMENT
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