

Matter of Sable v New York Dist. Attorney's Off.

2014 NY Slip Op 31976(U)

July 23, 2014

Supreme Court, New York County

Docket Number: 401286/2013

Judge: Shlomo S. Hagler

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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. Shlomo S. Hagler
Justice

PART: 17

In the Matter of the Application of

OSCAR SABLE,

INDEX NO.: 401286/2013

Petitioner,

for a Judgment pursuant to Article 78 of the
Civil Practice Law and Rules

DECISION & ORDER

- against -

NEW YORK CITY DISTRICT ATTORNEY'S OFFICE
and RECORD ACCESS OFFICER SUZANNE HERBERT,

Respondent.

The following papers, numbered 1 to 3, were read, reviewed and considered on this Article 78 Petition by the pro se Petitioner for a judgment vacating respondent's denial of access under the Freedom of Information Law (Public Officers Law §§ 84-90 ["FOIL"]) to certain grand jury minutes and criminal case files.

Cross-Motion: No Yes Number of Cross-Motions: 0

	Papers Numbered
Petitioner's Order to Show Cause with Affidavit of Petitioner in Support of the OSC (Denominated as the Article 78 Petition with Exhibits	<u>1, 2</u>
Respondent's Verified Answer to the Article 78 Petition with Exhibits "1" through "4"	<u>3</u>

After reading and considering all the foregoing papers, this Article 78 Petition is denied in all respects and this proceeding is dismissed as set forth in the attached separate written Decision.

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).

Dated: July 23, 2014

Shlomo Hagler
J.S.C.

New York, New York
Hon. Shlomo S. Hagler, J.S.C.

Check one: **Final Disposition** **Non-Final Disposition**

Article 78 Petition is: Granted Denied Granted in Part Other

Check if Appropriate: SETTLE ORDER SUBMIT ORDER

DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
In the Matter of the Application of
OSCAR SABLE,

Index No. 401286/13

Petitioner,

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

DECISION & ORDER

- against-

NEW YORK CITY DISTRICT ATTORNEY'S
OFFICE and RECORD ACCESS OFFICER
SUZANNE HERBERT,

UNFILED JUDGMENT

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141B)

-----X
PRESENT: HON. SHLOMO S. HAGLER, J.S.C.:

Petitioner Oscar Sable ("Sable" or "petitioner"), appearing pro se, brings this Article 78 proceeding challenging the delays and denial of his requests for certain documents under the Freedom of Information Law, Public Officers Law §§ 84-90 ("FOIL"), by the New York County District Attorney's Office (named herein as New York City District Attorney's Office) ("DANY") and its Records Access Officer Assistant District Attorney Suzanne Herbert ("ADA Herbert") (collectively "respondents"). Respondents oppose petitioner's petition.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner is currently incarcerated after having been convicted in June, 2003, after a jury trial, on one count of second degree burglary, two counts of third-degree grand larceny, and two counts of third-degree criminal possession of stolen property based upon four burglaries which took place between July, 2002 and May, 2003. Petitioner appealed his conviction to the Appellate

Division ("Appellate Division"), which unanimously affirmed petitioner's conviction (*see People v Sable*, 44 AD3d 390 [1st Dept 2007]).

Manny Santiago ("Santiago") was also indicted as participating with the petitioner in the May, 2003 burglary, which was of a retail phone store located on the ground floor of an apartment building, and was charged with one count each of third-degree burglary, third-degree grand larceny and third-degree criminal possession of stolen property. Santiago pled guilty to one count of third-degree burglary in November 2003 and was sentenced in September 2004 to five (5) years of probation. Santiago never appealed his conviction.

In July, 2012, petitioner filed a FOIL request to the DANY which was assigned to ADA Herbert. Petitioner's FOIL request sought 20 categories of records relating to the arrest and conviction of Santiago, including but not limited to "all 'arrest' and/or search warrant applications," various reports, complaints, notes, statements made by or to police officers, detectives, investigators, and the grand jury minutes of all testifying witnesses. In a letter dated July 26, 2012, ADA Herbert notified petitioner that his FOIL request had been received, that the "relevant case files that must be reviewed in order to rule on your request have been ordered from the Closed Case Unit" (Exhibit 1 to Respondents' Verified Answer). From August 2012 through June, 2013, ADA Herbert sent petitioner several follow-up letters informing him that the relevant case file had not yet been located. In July, 2013, petitioner appealed the failure of respondents to provide him with the requested FOIL materials after nearly one year. In response to petitioner's appeal, Assistant District Attorney Patricia J. Bailey ("ADA Bailey"), DANY's Chief of the Special Litigation Bureau, informed petitioner that the grand jury minutes petitioner requested were specifically exempt from disclosure and denied that portion of petitioner's appeal (Exhibit 3 to Respondents' Verified Answer). As to

the remainder of petitioner's FOIL request. ADA Bailey informed petitioner that she was remanding it to ADA Herbert with instructions to provide petitioner with a determination by August 20, 2013 or inform petitioner if the file cannot be located and to certify what efforts were made to locate the files (*id.*). By letter dated August 2, 2013, ADA Herbert wrote to petitioner informing him that she had been unsuccessful in locating the Santiago files relating to the May 2003 burglary and detailing the efforts that were made to locate the files (Exhibit 4 to Respondents' Verified Answer). As a result, respondents were denying petitioner's FOIL request as they were "unable to provide what we cannot locate or do not possess" (*id.*).

On July 19, 2013, petitioner applied for this Article 78 proceeding to have the Court order the production of his requested FOIL materials by Order to Show Cause ("OSC"), which was signed by Justice Martin Shulman, J.S.C. on August 19, 2013.¹ In or about October, 2013, respondents served and filed their Verified Answer, which opposed and sought denial of petitioner's Article 78 petition.

DISCUSSION

Standard of Review for an Article 78

Judicial review of a determination of a body or officer is limited to whether the determination was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR § 7803[3]).

The policy underlying FOIL is "to insure the maximum public access to government records" (*Matter of Scott, Sardano & Pomeranz v Records Access Officer of City of Syracuse*, 65 NY2d 294,

1. In support of his Order to Show Cause, petitioner submitted an Affidavit in Support (which also included a section labeled "Memorandum of Law") and which was denominated as the Petition.

296-297 [1985]). The burden of proof rests on the agency that claims exemption from disclosure (*Matter of Westchester Rockland Newspapers, Inc. v Kimball*, 50 NY2d 575, 580 [1980]). “As a threshold matter, a party seeking disclosure of grand jury minutes must establish a compelling and particularized need for them” (*People v Robinson*, 98 NY2d 755, 756 [2002]).

FOIL Request of Grand Jury Minutes

“Grand jury proceedings are secret” (CPL § 190.25[4][a]; *People v Fetcho*, 91 NY2d 765 [1998]). Contrary to petitioner’s assertion, grand jury testimony is not material which may be disclosed pursuant to FOIL (*Matter of Bridgewater v Johnson*, 44 AD3d 549 [1st Dept 2007]; *Matter of Hall v Bongiorno*, 305 AD2d 508 [2d Dept 2003]; *Matter of Mullgrav v Santucci*, 195 AD2d 786 [3d Dept 1993]; *Matter of Newton v District Attorney of Bronx County*, 186 AD2d 57 [1st Dept 1992]; Public Officers Law § 87[2][a]). Furthermore, grand jury minutes are not agency records of the District Attorney’s Office but are court records which are exempt from FOIL (*see* Public Officers Law § 86[1] and [3]; *Matter of Newsday v Empire State Dev. Corp.*, 98 NY2d 359, 362 [2002] [“The judiciary and the State Legislature are expressly excluded under the agency definition” of FOIL]; *Matter of Bridgewater*, 44 AD3d at 550; *Matter of Hall*, 305 AD2d at 509; *Matter of Mullgrav*, 195 AD2d at 786; *Matter of Gibson v Grady*, 192 AD2d 657 [2d Dept 1993]).

FOIL Request of Other Santiago Case Materials

In response to petitioner’s request for the Santiago case file materials, ADA Herbert notified petitioner by letter dated August 2, 2013 affirming that after conducting a diligent search for those requested materials, respondents could not locate that file or its contents and detailed the efforts that

were made to locate the file.² This affirmation by ADA Herbert meets the requirements of Public Officers Law § 89(3)(a) which requires an agency to “certify that it does not have possession of [a requested] record or that such record cannot be found after diligent search” (*Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001] [citing *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 279 [1996]]). In *Rattley*, the Court of Appeals reversed the Appellate Division’s holding, finding that the agency’s affirmation and form letter was sufficient to meet the requirements of the FOIL law (see also *Matter of Whitfield v Moriello*, 71 AD3d 415 [1st Dept 2010]; *Matter of Hall*, 305 AD2d at 510 [“a public entity is not required to ‘any record not possessed or maintained by’ it” (citations omitted)]).

The case cited by petitioner in his argument, *Williams v Erie County Dist. Atty.*, (255 AD2d 863 [4th Dept 1998]), which he claims holds that:

Where petitioner seeks disclosure under Freedom of Information related to his Criminal Trial, burden of proof rests with the Respondent to establish that copies of such requested records were previously furnished to the petitioner or his defense attorney: IN the event that such requested documents were never furnished to neither defendant or his attorney, or that such documents are no longer in neither’s possession, other copies must be furnished, unless such records are deemed to be exempted under F.O.I.L.

(Petitioner’s Memorandum of Law [contained in petitioner’s Petition & Affidavit to Support Order to Show Cause] at p. 9). However, petitioner neglects to complete that statement in the *Williams* decision which continues “or respondent is no longer in possession of the requested records and

2. ADA Herbert’s letter of August 2, 2013 was dated after petitioner applied for the OSC commencing this Article 78 proceeding but before the OSC was issued. However, the timing of the letter and commencement of the Article 78 proceeding is of no significant import (*Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001] [because the presumed failure of the Police Department to respond to the FOIL request earlier had been rectified, the Article 78 proceeding to compel disclosure was properly dismissed as moot]).

therefore unable to furnish them” (255 AD2d at 864). Since the requested grand jury minutes are exempt under FOIL and the respondents have certified that they cannot locate the other requested Santiago materials after a diligent search, respondents have met the standard set forth in *Williams*, as well as the standard established in the later decision by the Court of Appeals in *Rattley*. In addition, unlike the petitioner in *Williams* who was seeking records of his **own** criminal trial, petitioner here seeks the records of someone else’s criminal investigation and trial, which may also be exempt pursuant to the privacy provisions of Public Officer Law § 87(2)(b) and (e).

As the grand jury minutes are exempt from FOIL requests and respondents have certified that they have not been able to locate the requested Santiago case materials after a diligent search, the denial of petitioner’s request by respondent was not arbitrary or capricious. Furthermore, petitioner’s assertions that such records are still available or easily accessible “BY PUSHING A BUTTON ON THEIR/ANY COMPUTER TERMINAL [sic]” (Petitioner’s Memorandum of Law [contained in petitioner’s Petition & Affidavit to Support Order to Show Cause] at p. 7), is not supported by any factual evidence (*see Matter of Gould*, 89 NY2d at 279) [“Once the records access officer for the Police Department certified to Supreme Court that the Police Department had provided [petitioner] with all responsive documents in its possession, [petitioner] was required to articulate a demonstrable factual basis to support his contention that the requested documents existed and were within the Police Department’s control . . . [Petitioner’s] conjecture that the documents existed some 10 years ago was insufficient to warrant a hearing on the issue” [*internal citations omitted*]; *Matter of Whitfield*, 71 AD3d at 416 [“Nothing in the record supports petitioner’s assertion that the records he seeks have been preserved on CD-ROM.”]).

CONCLUSION

Accordingly, it is hereby

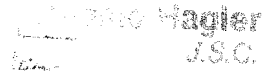
ORDERED AND ADJUDGED that Oscar Sable's petition is denied and this Article 78 proceeding is dismissed, without costs and disbursements.

ENTER:

Dated: July 23, 2014
New York, New York



Hon. Shlomo S. Hagler, J.S.C.


Shlomo S. Hagler
J.S.C.

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