

**Baines v Port Auth. of New York and New Jersey**

2014 NY Slip Op 32033(U)

July 31, 2014

Sup Ct, New York County

Docket Number: 400465/2014

Judge: Joan B. Lobis

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: LOBIS  
Justice

PART 6

BAINES, DONNELL

INDEX NO. 400465/14

MOTION DATE 5/2/14

- v -  
THE PORT AUTHORITY OF N.Y. AND N.J.

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to/for Art 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1

2-4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION & ORDER**

**FILED**

AUG 04 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/31/14

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

FILED

AUG 04 2014

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6  
-----X

COUNTY CLERK'S OFFICE  
NEW YORK

DONNELL BAINES,

Petitioner,

Index No. 400465/2014

-against-

Decision and Order

THE PORT AUTHORITY OF NEW YORK AND  
NEW JERSEY,

Respondent.  
-----X

JOAN B. LOBIS, J.S.C.:

Pro Se Petitioner Donnell Baines, an inmate at Five Points Correctional Facility, brings this Article 78 proceeding to direct Respondent, the Port Authority of New York and New Jersey ("Port Authority"), to disclose public records pursuant to the Freedom of Information Law, New York Public Officers Law Section 84 et seq. ("FOIL"). The Port Authority opposes the petition. For the reasons stated below, the petition is denied.

In February 2013, Donnell Baines made a FOIL request for all subpoenas issued by the Port Authority related to his investigation, prosecution, and trial. A month later, the Port Authority informed Mr. Baines that his request had been filed under the Port Authority's Freedom of Information Code ("FOI Code" or "Code"). Daniel Duffy, the FOI Administrator at the Port Authority, responded by letter that Mr. Baines' request was too broad to be processed under the Code. Mr. Baines revised his FOIL request, and limited it to the dates between July 15 and November 5, 2010, at the Port Authority facility at 42<sup>nd</sup> Street and 8<sup>th</sup> Avenue in Manhattan. In June 2013, Mr. Duffy responded to Mr. Baines' revised request, and again informed him that his request was being considered under the FOI Code but that more time was necessary for a

determination. A copy of the Code was enclosed with his response. On June 21, 2013, the Port Authority advised Mr. Baines that the records he requested were not in its possession.

In July 2013, Mr. Baines made another FOIL request. He sought access to a copy of a videotapes recorded between 3:00 am and 6:00 am on July 15, 2010, from any Port Authority camera recording activity at the southwest corner of 42<sup>nd</sup> Street and 8<sup>th</sup> Avenue. He also requested any records or information that detailed the storing procedures of recorded video data captured by Port Authority surveillance cameras including camera locations, video storage capacity, length of storage time, back-up capabilities for video storage, and protocols for criminal incidents captured by video surveillance cameras. Additionally, Mr. Baines attached a one page Port Authority Criminal Complaint Report related to his kidnapping prosecution, and requested any documents or subpoenas related to it.

The Port Authority acknowledged the receipt of Mr. Baines' request in August 2013, and, processed it under the FOI Code. Over the next two months, Port Authority sent two more letters advising Mr. Baines that more time was necessary to process his request. Mr. Baines did not receive any further communication from the Port Authority. In an affidavit, Mr. Duffy states that in November 2013 a final determination was made that the materials requested were exempt by the FOI Code. A draft determination was written but a final version was never sent to Mr. Baines, though Mr. Duffy states he does not know why.

Petitioner now brings this Article 78 proceeding challenging Port Authority's constructive denial of his FOIL request. Petitioner seeks an order directing Port Authority to

release the requested documents. He maintains that these documents should have been disclosed pursuant to FOIL.

In its answer, Port Authority argues that FOIL does not regulate its response to Petitioner's requests for documents. It argues that the Port Authority is not subject to the New York, New Jersey, or federal freedom of information statutes because it is a bi-state agency. Respondent does, however, consider requests for information under the Port Authority FOI Code. In applying the FOI Code, Respondent asserts that Petitioner has failed to establish that its determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or an abuse of discretion.

In applying the FOI Code, the Respondent produced one document - a two page version of Mr. Baines' Port Authority Criminal Complaint Report - that is not exempt by the Code. It claims the other documents sought by Petitioner are not in the possession of the Port Authority, including a subpoena issued by the New York County District Attorney's Office, and the requested video, which was sent to that office. It contends that exemption 4 of the FOI exempts disclosure of the remaining documents, which include records that detail the storing procedures of recorded video data, camera locations, video storage capacity, length of storage time, back-up capabilities for video storage, and protocols for criminal incidents captured by video surveillance cameras

In an Article 78 proceeding, the Court reviews agency decisions to determine whether an action violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. E.g., Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669,

671 (1st Dep't 2012). Where an issue is limited to "pure statutory interpretation," a court is not required to defer to an administrative agency but rather should consider the plain language of the statute. E.g., Dunne v. Kelly, 95 A.D.3d 563, 564 (1st Dep't 2013); see also County of Westchester v. Bd. of Trustees, 9 N.Y.3d 833, 835-36 (2007) (administrative agency's regulations must not conflict with state statute or that statute's underlying purposes).

The Port Authority is a public authority with a "special character . . . created by compact between two States and approved by Congress as required by the United States Constitution." Agesen v. Catherwood, 26 N.Y.2d 521, 524 (1970) (internal citations omitted). An interstate authority "is created by interstate compact, and New York may not impose its preferences with respect to the freedom of information on the other party to that compact." Metro-ILA Pension Fund v. Waterfront Commission of NY Harbor, Sup. Ct., New York County, NYLJ December 16, 1986. The inapplicability of FOIL "results not from any express exclusion or inherent unworkability, but rather from a general intent, amply reflected in the compact, that the internal operations of the Authority be independent of the direct control of either State acting without concurrence of the other." Agesen, 26 N.Y.2d at 525.

Applying the FOI Code to determine whether or not the determination to not release documents violated lawful procedures, is arbitrary or capricious, or is affected by an error of law, Petitioner has not shown any violation. The Code is based on both the New York and New Jersey freedom of information statutes. Exemption 4 of the FOI Code prohibits disclosure of documents that:

\* 6]

“if disclosed, could endanger the life or safety of any person or jeopardize the safety and/or security of any facility or information technology system, including drawings, maps, or sketches of non-public areas, administrative or technical information regarding computer networks, hardware or software related to security systems, emergency or security plans or procedures for any building or facility, or security or safety procedures or surveillance techniques or details.”

The Court finds that the Respondent’s determination was not arbitrary or capricious. Records or information that detail the storing procedures of recorded video data, camera locations, video storage capacity, length of storage time, back-up capabilities for video storage, and protocols for criminal incidents captured by video surveillance cameras clearly fall under exemption 4 of the FOI Code. The Port Authority has stated that subpoenas and the requested video are not in its possession. Even if FOIL were to apply, the Court would not be able to order the release of records that an agency has certified cannot be located. Rattley v. N.Y.C. Police Dep’t, 96 N.Y.2d 873, 875 (2001). Accordingly, it is

**FILED**

ORDERED that the petition is denied.

AUG 04 2014

Dated: *July 31*, 2014

COUNTY CLERK'S OFFICE  
NEW YORK

ENTER:



JOAN B. LOBIS, J.S.C.