Matter of New York Civ. Liberties Union v Nassau County Sherriff's Dept.
2015 NY Slip Op 32844(U)
December 23, 2015
Supreme Court, Nassau County
Docket Number: 7763-15
Judge: Daniel R. Palmieri
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DANIEL PALMIERI
J.S.C. **TRIAL/IAS PART 20**

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In the Matter of,
NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-against-

NASSAU COUNTY SHERIFF'S DEPARTMENT,

Respondent.

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

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Index No.7763-15
Mot. Seq. #001
Mot. Date: 9-17-15
Submit Date: 11-4-15

The following papers were read on this motion:

Notice of Petition, dated 8-27-15.....1
Verified Petition, dated 8-27-15.....2
Affirmation in Support, dated 8-27-15.....3
Memorandum of Law, dated 8-27-15.....4
Verified Answer and Objections in Law, dated 10-19-15.....5
Affidavit in Support of Answer, dated 10-19-15.....6
Memorandum of Law in Opposition (not separately bound)
dated 10-19-15.....7
Reply Memorandum of Law, dated 10-30-15.....8

This petition for relief pursuant to CPLR Article 78 and Public Officers Law § 84 *et seq.*, is granted to the extent indicated in this Decision and Order.

Petitioner New York Civil Liberties Union (sometimes, "NYCLU") is seeking information from the respondent Nassau County Sheriff's Department ("NCSD") concerning "detainer requests" from the United States Immigration and Customs Enforcement ("ICE") agency to NCSD. According to petitioner, these requests were to hold individuals in NCSD custody,

although scheduled to be released, for an additional period of up to five days beyond the release date to facilitate civil immigration arrests by NCSD on behalf of ICE. Again according to the petitioner, NCSD has continued to comply with these requests notwithstanding a recommendation from the New York Sheriff's Association that sheriffs no longer honor these requests, which is consistent with the approach taken in other jurisdictions.

The factual recitation presented by petitioner is largely undisputed, excepting one key conversation between representatives of the petitioner and the respondent.

On November 12, 2014 NYCLU made a request of NCSD pursuant to New York's Freedom of Information Law ("FOIL"), Public Officers Law § 84 *et seq.*, regarding NCSD's relationship with ICE. Petitioner sought documents containing 1) policies, guidelines, directives, or training materials identifying NCSD's policy regarding responses to ICE requests to detain individuals, made by way of ICE Form I-247 ("detainers"); 2) policies, guidelines, directives, or training materials regarding NCSD responses to ICE administrative warrants, made by way of ICE Forms I-200 (warrants of arrest) and/or I-205 (warrants of removal); 3) policies, guidelines, directives or training materials regarding the sharing information with ICE about inmates in NCSD custody; 4) any forms used to notify persons affected that NCSD had received ICE detainers or warrants; 5) identification of the number of ICE detainers or warrants received; and 6) the number of ICE detainers or warrants honored by NCSD.

NCSD acknowledged the FOIL request one week later, but did not serve any records until April 17, 2015. They arrived after Allison Gabor, Records Access Officer for NCSD, notified NYCLU by letter dated March 23, 2015 that it had such a document, of two pages in length, and

would provide it upon payment of copying fees. She did not state or certify that this was the only document responsive to the requests; rather, she referred to the document as the "records to which you are entitled." The response ultimately provided on April 17, 2015 was indeed a two-page document regarding the handling of warrants, with an effective date noted thereon of March 8, 2006. It outlines records handling procedure, but there was no mention of ICE. The accompanying transmittal letter from Gabor did not provide any statement regarding the withholding of documents based on exemptions set forth in FOIL.

Petitioner also presents an affidavit from one Andrew Nellis, who states he is a law student working under the supervision of petitioner's counsel at NYCLU as part of a clinical law school course. He states that he had a conversation with Allison Gabor on April 13, 2015 – before the document noted above arrived – regarding the requests. He further states that she told him that NCSD would produce only two pages of records, and further told him that respondent "was in possession of additional records responsive to the Request but had determined not to produce them because the records were privileged from disclosure." Nellis Aff., at 2.

By letter dated April 29, 2015, NYCLU pursued an administrative appeal. In the body of the letter constituting the appeal, counsel referred to the conversation Nellis had with Gabor. To the date of the petition (August 27, 2015), some four months after the appeal was taken (letter dated April 29, 2015), there has been no response from NCSD. As the failure to respond within 10 business days constitutes a denial (Public Officers Law § 89(4)([a]), the present petition is not subject to dismissal for failure to exhaust administrative remedies. *See Rivette v District Attorney of Rensselaer County*, 272 AD2d 648 (3d Dept. 2000).

In response to the petition, NCSD adds to the recitation of events by stating that a letter from Correction Officer Radzewsky dated December 22, 2014 to counsel to petitioner stated that the request was being processed, and that as of the next day he would no longer be the FOIL coordinator for NCSD. This was followed by a letter from Alllison Gabor to counsel dated February 27, 2015, again stating that the request was being processed, and that she should receive a response within 30 days. Other than these notifications, there is no dispute about the processing of the requests.

However, in an affidavit submitted on this proceeding, Gabor denies that she ever indicated to Andrew Nellis that other documents responsive to the request existed but would not be produced. Specifically, she states that upon receiving the request she spoke to the "legal department" to obtain the records, and was given only the two page document noted above. With respect to the Nellis statement, she acknowledges that she did speak to a representative of NYCLU, but "at no point did I ever say there were additional documents that the Sheriff's Department was withholding. In fact, when I received a copy of the FOIL appeal, I made a notation that I had never said anything to that effect."

In addition to presenting the Nellis affidavit regarding the existence of records in the possession of respondent, counsel for petitioner presents an article published in the newspaper Newsday in September, 2014 concerning, among other things, ICE detainers and NCSD's cognizance of its obligation under the law regarding the same. In that article NCSD Captain Michael Golio was reported to have issued a written statement that respondent "had amended its procedures" on detention to require a warrant from ICE for arrest. Counsel also refers to data published by an entity named the Transactional Records Access Clearinghouse ("TRAC"), located

at Syracuse University (the relationship to the University is unstated). According to counsel, this data indicate that Nassau County Correction Center, which is operated by NCSD, had received approximately 60 detainer requests per month from October 2011 through August 2013.

As is made clear in the legislative declaration, the Freedom of Information Law is intended to open the workings of government to the public. Public Officers Law § 84. To effect this purpose, the statutory scheme is comprehensive and at its core presumes that governmental records are available for review. It thus places the burden on a resisting agency or department to explain how a given request for records fits under one of the statutory exemptions (Public Officers Law § 89(4)[b]), which are to be narrowly construed to provide maximum access to the public. *See, e.g., Matter of Gould v New York City Police Department,* 89 NY2d 267 (1996); *Matter of Capital Newspapers v Whalen*, 69 NY2d 246 (1987).

Relatedly, the department or agency must provide in support of a denial particular and specific justification for its action. *Matter of Fink v Lefkowithz,* 47 NY2d 567 (1979); *Matter of Flores v Fischer,* 110 AD3d 1302 (3d Dept. 2013); *Matter of Madera v Elmont Public Library,* 101 AD3d 726 (2d Dept. 2012). Conclusory or speculative assertions that certain records fall within a statutory exemption are insufficient; evidentiary support is needed. *Matter of Porco v Fleischer,* 100 AD3d 639 (2d Dept. 2012); *Matter of Dilworth v Westchester County Dept. of Correction,* 93 AD3d 722 (2d Dept. 2012); *Matter of Madera, supra; see also Washington Post Co. v New York State Ins. Dept.,* 61 NY2d 557 (1984).

In this case the proceeding turns on whether NCSD provided the only document it had that was responsive to NYCLU's request. In its initial March 23, 2015 response, as noted above, the Records Access Officer stated only that "the records to which you are entitled" consisted of the

two page document referred to above. As this record made no mention of ICE at all, the *sine qua non* of petitioner's request, its turnover was in effect a denial that any of the records sought were in NCSD's possession.

Although such a denial may be made, it must be accompanied by a certification that no responsive records exist or cannot be found after a diligent search, as required by Public Officers Law § 89(3)(a). No such statement was made. Without concluding that the Newsday article and/or the TRAC data stand as proof that such records do in fact exist, they are sufficient to justify a request and to require a response. In that regard, the Court finds NCSD's response insufficient to demonstrate the non-existence of any records, and the burden is respondent's under the statute. In its Memorandum of Law respondent attacks the reference to the Newsday article as not being proof that written records exist, but offers no affidavit from Captain Golio, or from any other responsible officer or employee of NCSD, specifically denying that he made the statement or, if he did, that he was not referring to written records. There is no response by NCSD at all to the reference to the TRAC data raised by petitioner.

In addition, the Records Access Officer's statement here that she relied on unnamed persons in the "legal department" is insufficient for the Court to conclude that the two-page, clearly unresponsive document satisfied respondent's obligation under the Public Officers Law. *See Oddone v Suffolk County Police Dept.*, 96 AD3d 758 (2d Dept. 2012). The Court notes, but rejects, respondent's contention, contained in its Memorandum of Law, that "NYCLU was merely requesting records which indicated the total number of warrants and detainers" and that no such records exist. Even a cursory review of the requests demonstrates that petitioner was seeking more than just numbers in four of the six categories of information and documents requested.

It is true, as respondent contends, that an agency of government has no obligation to create records in response to a records request (Public Officers Law § 89(3)[a]). There also are no specific requirements as to how the certification that no records exist should be made, nor is the agency required to offer a detailed description of the search, nor to provide a personal statement from the person or persons who conducted the search. *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 (2001).

Nevertheless, here the Records Access Officer did not certify, or even state in any fashion, that no other records existed, but only that petitioner was going to receive the records to which it "was entitled." The vague reference to the "legal department" does not indicate that any person or persons working thereunder had conducted a "diligent search". *Oddone v Suffolk County Police Dept., supra.* Indeed, the fact that she received the one document from the "legal department", combined with her statement regarding entitlement to records, raises the possibility that a judgment had been made by someone with legal training regarding which documents – among others found – had to be produced.

Further, given the dueling affidavits noted above, there is a sharp issue of fact as to whether Gabor had told Nellis that other records existed but would not be disclosed because they were privileged. The Court thus cannot conclude on the record before it that respondent NCSD has in its possession no records responsive to petitioner NYCLU's requests. It also cannot conclude that such records exist but were not produced.

Accordingly, a hearing is required. If the hearing court determines that any records responsive to the petitioner's request exist, they must be turned over, because no basis for withholding documents was articulated. A court should not permit argument on contentions not

raised at the administrative level. *Matter of Molloy v New York City Police Dept.,* 50 AD3d 98, 100 (1st Dept. 2008); *Matter of Graziano v Coughlin,* 221 AD2d 684, 686 (3d Dept. 1995).

Further, if it determines that responsive records exist and should be produced, the hearing court should consider awarding attorney's fees. Petitioner should be prepared to offer time/billing records or other proof in support of an award, if made. Public Officers Law § 89(4)(c) permits such an award where the petitioner has "substantially prevailed," and where 1) the governmental agency had no reasonable basis for denying access to the requested documents/information, or 2) failed to respond to initial requests or appeals within the statutory time periods prescribed by section 89((3)(a) and (4)(a). Such an award remains addressed to the discretion of the reviewing court. *Matter of Maddux v New York State Police,* 64 AD3d 1069 (3d Dept. 2009).

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter is referred to the Calendar Control Part (CCP) for a hearing regarding the issues set forth above on **February 2, 2016,** at 9:30 A.M.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

Following the decision on the hearing, either party may submit a judgment to the undersigned reflecting this Order and the decision upon the hearing.

All requests for relief and contentions raised by the parties in their pleadings or other papers not specifically addressed are denied and found to be without merit.

This shall constitute the Decision and Order of this Court.

Dated: December 23, 2015

ENTER:

HON. DANIEL PALMIERI
Supreme Court Justice

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Pursuant to Student Practice Order of Randall T. Eng,
Presiding Justice, Appellate Division, Second Department,
Dated February 26, 2014)
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