

Mitev v Suffolk County Police Dept.

2016 NY Slip Op 32944(U)

August 9, 2016

Supreme Court, Suffolk County

Docket Number: 29121/2013

Judge: Ralph T. Gazzillo

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY



****Amended****

Mot. Seq.: 001 Mot. D.
002 Mot. D.

Hon. RALPH T. GAZZILLO
A.J.S.C.

Application for a Judgement under Article 78 and other relief by	:	X
VASSELIN MITEV,	:	
Petitioner,	:	
- against -	:	
The Suffolk County Police Department,	:	
Respondent(s).	:	X

Upon the following papers numbered 1- 4, read on this Order to Show Cause pursuant to CPLR Article 78; Order to Show Cause and supporting papers numbered 1-4; Cross motion to dismiss and supporting papers numbered: Affirmation in opposition and in further support of the cross motion and supporting papers numbered: Affirmation in Reply to the cross motion and in further support of the Order to Show Cause and supporting papers numbered : it is.

ORDERED that the Order to Show Cause pursuant to CPLR §7806 which seeks to compel the release of a copy of a May 1, 2010 recording of a 911 phone call made by Shannan Gilbert, deceased, pursuant to Public Officers Law §89, is denied, and it is further

ORDERED that respondent's cross motion to dismiss is granted in its entirety, and it is further

ORDERED that counsel for movant shall serve a copy of this Order with Notice of Entry upon the counsel for all parties pursuant to CPLR §2103 within twenty (20) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

In this Article 78 proceeding, petitioner challenges the determination of the Suffolk County Police Department in denying it access to a copy of the 911 phone call made by Shannan Gilbert (deceased) on May 1, 2010 pursuant to Public Officers Law §87(2)(e)(i) and New York

State County Law §308(4). Petitioner is counsel to the Estate of Shannan Gilbert and its administratrix (the decedent's mother) Mari Gilbert.

The initial request for the E911 recording that is the subject of this proceeding was made by Mari Gilbert personally on June 13, 2013. That request was denied by Janine Keleghan, FOIL Officer for the SCPD in a letter dated June 18, 2013. The basis of Ms. Keleghan's denial was that disclosure of the recording would interfere with the law enforcement investigation pursuant to Public Officers Law §87(2)(e)(i) and that it was exempt from disclosure pursuant to County Law §308(4). The denial of that FOIL request was never appealed and the time within which Ms. Gilbert could have done so expired. Following this denial, on August 2, 2013, petitioner made the identical FOIL request through the petitioner's law firm. On August 9, 2013, the request was denied as follows:

The material in question is relative to an ongoing investigation and, in an effort to protect the integrity of said investigation, denied in accordance with Public Officers Law Section 87(2)(e)(i). Also be advised that calls into the enhanced 9-1-1 system are not available under the Freedom of Information Law (see, New York State County Law Section 308 (4)).

Thereafter, petitioner appealed that determination by letter dated August 19, 2013 which appeal was denied by on August 22, 2013 by the Suffolk County Attorney's Office. The denial letter, written by Christopher M. Gatto, Esq., stated:

The requested 911 call is exempt from disclosure under FOIL since they (sic) were "compiled for law enforcement purposes and which, if disclosed, would ... interfere with law enforcement proceedings or judicial proceedings ... Moreover, I find that the requested 911 calls are exempt from disclosure by State statute. County Law 308(4) states in relevant part as follows:

Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than the municipality's public safety agency, another governmental agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purposes other than the provision of emergency services.

Following receipt to the aforementioned FOIL denial, petitioner commenced the within proceeding asserting that the failure of the respondents to disclose the requested E911 recording was arbitrary, capricious and an abuse of discretion. Specifically, petitioner argues that the respondent failed to specifically set forth and particularize its justification to failing to disclose the requested record and that, because it is conclusory, it fails to meet with the requirements of Public Officers Law §87(2)(e). Petitioner argues that County Law 308(4) is inapplicable since it deals with the implementation of the E911 system and not the disclosure of records. Petitioner also claims that County Law §308(4) is inapplicable since it was the State Police that initially received the E911 call

rather than the Suffolk County Police Department and that, as such, County Law is inapplicable.

In opposition the respondent Suffolk County Police Department argues that the proceeding is actually time barred because it is identical that the FOIL request that made on June 13, 2013 by Mari Gilbert, the administratrix of Shannan Gilbert's estate, and denied on June 23, 2013 and from which there was no appeal. It is undisputed that Mari Gilbert is the client of the petitioner herein. As such, respondent argues that petitioner's attempt to resurrect the FOIL of Mari Gilbert cannot be countenanced. More importantly, however, respondent argues that its determination to deny the petitioner's FOIL request was rational based upon the applicable statutes. Specifically, respondent argues that the E911 recording is exempt from FOIL pursuant to the Public Officers Law as well as New York County Law because the release of the information sought would impede the ongoing homicide investigation relating to Shannan Gilbert's death.

Public Officers Law §87 states in pertinent part as follows:

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(e) are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;

New York County Law §308(4) states:

4. Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services.

Here, based upon the fact that the FOIL request was made on behalf of his client, Mari Gilbert, it cannot be considered an independent from the initial request made by Mari Gilbert for the purposes of FOIL (see, *Matter of Greene v. City of New York*, 196 Misc.2d 125). As a duplicative request, any challenge to its denial pursuant to SCPD's June 18, 2013 letter is barred due to the fact that there was no administrative appeal of that denial as is required by Public Officers Law §89(4)(a),(b) and additionally (had the administrative process been properly followed) by the applicable four month statute of limitations which expired (at its latest) on October 23, 2013 (see, CPLR §217).

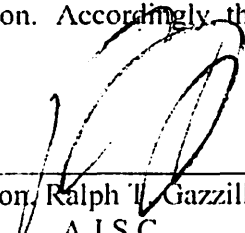
In any event, even if the petitioner's application was not barred by the fact that there was no appeal of the initial denial and by four month statute of limitations, it is clear that the recordings sought by the petitioner are exempted from disclosure since they are part of an ongoing homicide

investigation and contain specific information conveyed by Gilbert, which, if released would impede and/or impair the continuing investigation and any resulting prosecution pursuant to Public Officers Law §87(2)(e)(i). More importantly, they are specifically exempted from disclosure pursuant to County Law §308(4)).

Irrespective of the foregoing, however, petitioner has another avenue through which to seek copies of these recordings. In *Anderson v. State of New York*, 134 A.D.3d 1061 (Second Dept 2015), the Appellate Division held that while E911 recordings were unavailable pursuant to County Law §308(4), they could be made available to litigants in a civil matter pursuant to CPLR §3101. There, the Court held that “[w]e view the language of County Law §308(4) as generally prohibiting entities and private individuals from accessing 911 tapes and records (citation omitted). However, the statute is not intended to prohibit disclosure of matter that is material and relevant in civil litigation, accessible by a so-ordered subpoena or directed by a court to be disclosed in a discovery order [c]learly, the general language of County Law §308(4), which is part of the statute governing the establishment of an emergency 911 system in various counties, cannot be interpreted as prohibiting court-ordered discovering of 911 material in civil litigations.”(Id. at 1062).

Based upon the facts of this proceeding and the relevant recent case law, it is clear that not only was petitioner’s duplicative application filed beyond the applicable statute of limitations, but that the respondent was not arbitrary in its denial of the application. Accordingly, the petition is dismissed as set forth herein.

Dated: 
Riverhead, N.Y.


Hon. Ralph T. Gazzillo
A.J.S.C.

Non-Final Disposition

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