

**Abrams, Fensterman, Fensterman, Eisman,  
Formato, Ferrara, Wolf & Carone, LLP v New York  
City Police Dept.**

2018 NY Slip Op 32334(U)

September 14, 2018

Supreme Court, New York County

Docket Number: 159342/2017

Judge: Verna Saunders

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 5

Justice

INDEX NO. 159342/2017
MOTION SEQ. NO. 001, 002

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN,
FORMATO, FERRARA, WOLF & CARONE, LLP,

Plaintiff,

- v -

NEW YORK CITY POLICE DEPARTMENT, and
JAMES P. O'NEILL,

DECISION AND ORDER

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 44

were read on this motion to/for FOIL PETITION / DISMISSAL

Petitioner, Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP, move the Court seeking an order (1) granting its verified petition in its entirety; (2) declaring respondents' improper denial of its Freedom of Information Law request contrary to law; and (3) directing that respondents disclose all portions of the New York City Police Department's (NYPD) file regarding its investigation into the disappearance and/or death of Kathleen McCormack Durst ("K. Durst").

On February 5, 1982, the NYPD became involved in the investigation of K. Durst's disappearance when Robert Durst, then K. Durst's husband, met with an NYPD detective and filed a Missing Persons report. According to the verified petition, various individuals including members of K. Durst's family have spent thousands of hours investigating why Robert Durst was never charged and prosecuted with K. Durst's disappearance.

"documents and information in the file [p]etitioner requested from the NYPD will confirm, by commission and/or omission, that the NYPD not only failed to conduct a meaningful investigation into Kathie's disappearance, but also cooperated with individuals who worked on behalf of Robert Durst to cover-up his involvement in Kathie's disappearance and murder."

To obtain these documents, petitioner filed a Freedom of Information Law (FOIL) request on May 25, 2017. The NYPD denied the FOIL request via letter dated September 7, 2017, on the basis that the request did not "reasonably describe a record in a manner that would enable a search to be conducted by the New York City Police Department."

September 26, 2017 and provided further clarifying information. The FOIL request was again denied. This subsequent denial cited Public Officer's Law ("POL") §87(2)(e)(i), which provides in pertinent part, that an agency "may deny access to records or portions thereof that . . . are compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings." In denying petitioner's appeal (the second denial), the NYPD indicated that while it appreciated that the "case is both 35 years old and highly noteworthy and of public interest," it nevertheless concluded that the case "remains unsolved and the disclosure of the requested documents could potentially interfere with this pending criminal investigation." As a result, petitioner commenced the present action seeking judicial review of NYPD's denial of its FOIL request.

In response, the City moves to dismiss the petition arguing that disclosure of the requested records would interfere with Robert Durst's pending criminal proceeding and deprive him of a right to a fair trial. Robert Durst was arrested in 2015 in California for allegedly murdering Susan Berman to prevent her from revealing information about his involvement in the murder and disappearance of K. Durst. The City avers that while several witnesses and documents from the NYPD have been disclosed in connection with Robert Durst's pending murder trial, this information is sealed under California penal law, and any disclosure would undermine same. In support of this contention, the City provides the affidavit of the lead prosecutor and lead defense attorney in the California proceeding.

Secondly, the City reasserts the basis articulated in its denial of the appeal which stated that any disclosure would interfere with the ongoing and active investigation into the disappearance of K. Durst. The City provides the affidavit of NYPD Officer Monty Velez, who affirms that the NYPD is actively following up on any leads it receives, including one received just a month prior to the date of his affidavit. Furthermore, Officer Velez maintains that testimony and evidence from Robert Durst's murder trial may provide the NYPD with new leads and areas of inquiry.

In opposition to the City's dismissal motion, petitioner argues that respondents failed to assert a provision of CPLR 3211 upon which it seeks dismissal of the verified petition. As such, petitioner argues that the Court should either deny respondent's motion, convert it into their answer, or allow respondents time to interpose an answer.

In addition, petitioner contests respondent's assertion that the requested records would interfere with a pending criminal investigation and is therefore exempt pursuant to POL § 87(2)(e)(i). Petitioner argues that this provision applies only to ongoing criminal investigations, and that respondents have not actively pursued or investigated K. Durst's disappearance for over thirty years, with no intention of so resuming. Petitioner notes that "[i]t is wholly disingenuous and preposterous for the respondents to now claim that the investigation . . . remains open and active after nearly thirty-six years." Petitioner further argues the NYPD fails to articulate a particularized and specific justification for not disclosing the requested documents as required by law. Instead, petitioner contends the NYPD merely makes a passing reference to a pending criminal investigation. Assuming arguendo that there was an ongoing investigation, petitioner argues the NYPD would retain a duty to review all responsive records, redact documents that contain both exempt and non-exempt information, and release them.

Finally, petitioner argues that respondents allege additional exemptions for not releasing the records that were not alleged in its denial of the appeal. These exemptions include that "(i)

disclosure would deprive a person of a right to a fair trial under POL § 87(2)(e)(ii); (ii) disclosure would identify a confidential source under POL § 87(2)(e)(iii); and (iii) the disclosure is seeking “inter-agency or intra-agency materials” under POL § 87(2)(g).” Petitioner argues that respondents attempt to invoke additional exemptions beyond those previously claimed in their administrative denial is wholly improper under the current jurisprudence of New York. As such, the respondents are limited only to the exemptions claimed in their administrative denial.

The New York State Legislature enacted FOIL to promote an open government and public accountability. (*Miller v New York State DOT*, 58 AD3d 981 [3d Dept 2009].) FOIL rests on the premise that the “public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.” (*Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67 [2017], quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567 [1979].) The statute “imposes a broad duty on government to make its records available to the public.” (*Miller, supra.*) As such, “[a]ll government records are presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law §87(2).” (*Gould v New York City Police Dept.*, 89 NY2d 267 [1996].) To ensure maximum access to government records, courts are to narrowly construe the exemptions, and the agency retains the burden to demonstrate the requested materials are actually exempt. (*Id.*) Disclosure may be withheld “[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions.” (*see Lefkowitz, supra.*) “[T]o invoke one of the exemptions of section 87(2), the agency must articulate a particularized and specific justification for not disclosing the requested documents.” (*Id.*)

As an initial matter, the Court finds unavailing petitioner’s argument that the motion to dismiss is defective due to respondent’s failure to plead one of the grounds of CPLR 3211. CPLR 7804 provides that “[t]he respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer.” The “objection in point of law” is akin to an affirmative defense. (*Matter of Local 342 v Town of Huntington*, 2018 NY Slip Op 30359 (U) [Sup Ct, Suffolk County 2018].) While respondents often plead both CPLR 7804(f) and one of the grounds of CPLR 3211 on a motion to dismiss a petition (*see, i.e., Bonar v Shaffer*, 140 AD2d 153 [1st Dept 1988 ]; *Matter of Meighan v Ponte*, 144 AD3d 917 [2d Dept 2016]), a motion to dismiss pursuant to CPLR 7804(f) does not require an accompanying provision under CPLR 3211.

In regard to meeting an exemption under POL § 87(2)(e)(i), the Court finds the NYPD has properly invoked the exemption under POL § 87(2)(e)(i) that disclosure would interfere with an open investigation. POL § 87(2)(e) provides that an “agency may deny access to records or portions thereof . . . that are compiled for law enforcement purposes” if disclosure would

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures.

Here, the City has provided the affidavit of NYPD Officer Velez, who affirms that despite the case being thirty-six (36) years old, the NYPD is currently investigating same. This is

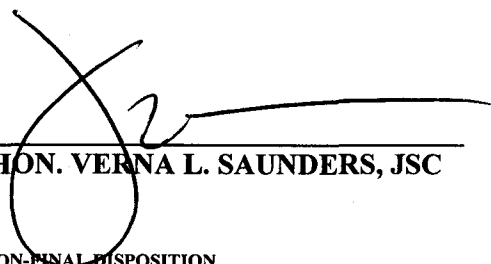
corroborated by Velez's statement that just a month prior to attesting to his sworn affidavit here, the NYPD received a lead regarding the case. Petitioner vehemently contests these assertions and claiming they ring hollow and were devised by the NYPD only to justify not releasing the documents. While courts have previously been suspicious of statements from the NYPD that an old case is ongoing and active while the facts were ostensibly to the contrary, the record does not fully support that conclusion here. (see Matter of Jones v Town of Kent, 13 NYS3d 850 [Sup Ct, Putnam County 2015].) According to the moving papers, on March 11, 2015, the Los Angeles Police Department obtained an arrest warrant for Robert Durst in connection with the murder of Susan Berman, whom Durst purportedly murdered to prevent her from revealing information about Durst's role in the disappearance and death of Kathleen Durst. In light of these facts, it is not unreasonable to believe the NYPD's case is still active. Even if the case were previously closed, it is probable that the new information may alert the NYPD to new areas or angles of investigation. (see generally DeLuca v New York City Police Dep't, 261 AD2d 140 [1st Dept 1999].)

Further, the NYPD maintains that the investigative file contains items such as the Missing Persons report, numerous follow-up reports documenting the investigative steps taken, and the names and addresses of witnesses, witness statements describing potential leads and identifying potential suspects, and various forms of forensic evidence. Through such statements, the NYPD identified the categories of records that is sought to be withheld on the basis of the exemption. In addition, the NYPD identified the harm that disclosure would cause, to wit; disclosure of the records can potentially interfere with the investigation, jeopardize the safety of witnesses, or influence witness memories. (see generally Leshner v Hynes, 19 NY3d 57 [2012]; Matter of Loevy & Loevy v New York City Police Dept., 139 AD3d 598 [1st Dept 2016].) Based on the foregoing, the Court finds that the NYPD has articulated a particularized and specific justification for not disclosing the requested documents under Public Officers Law § 87(2)(e)(i).

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the Court denies petitioner's Article 78 petition seeking to compel disclosure pursuant to its FOIL request and grants respondents' motion to dismiss, and the proceeding is hereby dismissed without costs.

September 14, 2018

  
HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE