

**Sarkodie v Gonzalez**

2021 NY Slip Op 34073(U)

September 20, 2021

Supreme Court, Kings County

Docket Number: Index No. 503224/2021

Judge: Francois A. Rivera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of September 2021

HONORABLE FRANCOIS A. RIVERA

-----X

JUSTIN SARKODIE,

Petitioner,

**DECISION & ORDER**

Index No. 503224/2021

- against -

ERIC GONZALEZ, KINGS COUNTY DISTRICT ATTORNEY,  
For an order pursuant to Article 78 of the Civil Practice Law and Rules,

Respondent.

-----X

Petitioner Justin Sarkodie (hereinafter petitioner), an inmate at Sing Sing Correctional Facility, brings this Article 78 proceeding by order to show cause and petition to challenge a determination by respondent District Attorney Eric Gonzalez denying his Freedom of Information Law (“FOIL”) request for the disclosure of records pertaining to the investigation of a crime for which he was convicted (Public Officers Law § 84-90).

**BACKGROUND**

On February 15, 2015, the petitioner was convicted after a jury trial in the Kings

County Supreme Court of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03). He was sentenced to an indeterminate term of imprisonment of 25 years to life for murder in the second degree and a concurrent determinate term of imprisonment of 15 years imprisonment for criminal possession of a weapon in the second degree to be followed by 5 years of post-release supervision. The petitioner's conviction was modified on direct appeal by reducing defendant's sentence for murder in the second degree in the interest of justice from an indeterminate term of imprisonment of 25 years to life to an indeterminate term of imprisonment of 20 years to life, where original sentence was excessive (*People v Sarkodie*, 172 AD3d 909 [2nd Dept 2019], lv. denied, 34 NY3d 984 [2019]).

By letter dated July 12, 2020, addressed to George Forbes, the Records Access Officer of the Brooklyn District Attorney's Office, Justin Bonus, the petitioner's counsel, requested the following documents related to the matter of *People v Justin Sarkodie*, Indictment Number: 2544/2013: “[a]ny and all materials that pertain to the cases, including, but not limited to, any and all recordings, whether video or audio, DD-5's, medical reports, witness statements, police memo books, crime scene investigative reports, evidence vouchers, and ballistics reports.”

By letter dated December 29, 2020, addressed to the petitioner's counsel, the Kings County District Attorney's office denied the FOIL request on the basis that the petitioner had initiated post judgment litigation, specifically, the two (2) petitions for

Writs of Habeas Corpus pending before separate Judges in the United States District Court for the Eastern District of New York. The letter further stated that the denial of access to the requested records was pursuant to Public Officers Law § 87 (2) (e) (i), as disclosure of the records would interfere with petitioner's then-pending criminal appeal and the subsequent proceedings in the underlying criminal case.

By letter dated January 1, 2021, addressed to the George Forbes, the Records Access Officer of the Brooklyn District Attorney's Office, petitioner administratively appealed the December 29, 2020 denial of his document request. The petitioner claims that his document request was pending for over five months and that the documents requested will more likely than not show that Sarkodie is not guilty of the crime he was convicted of.

By letter dated January 19, 2021, addressed to the petitioner's counsel, George Forbes advised that the denial of his FOIL request was affirmed because Sarkodie had habeas petitions pending (for two separate dockets) in the United States District Court for the Eastern District of New York.

## LAW AND APPLICATION

Due to the overall purpose of FOIL is to ensure that the public is afforded greater access to governmental records, FOIL exemptions are interpreted narrowly (*Markowitz v Serio*, 11 NY3d 43, 51 [2008]).

Public Officers Law § 87 (2) (e) (i) states that:

"Each agency shall in accordance with its public rules, make available for public inspection and copying all records, except that such 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 ... "

FOIL exempts agencies from disclosing documents compiled for law enforcement purposes, which, if disclosed, would interfere with judicial proceedings. In deciding whether a proceeding is pending for purposes of invoking the interference exemption, the First Department has said that a generic determination can be issued by an agency stating that disclosure under FOIL would interfere with a judicial proceeding against a particular individual (*see Matter of Legal Aid Socy. v New York City Police Dept.*, 274 AD2d 207 [1st Dept 2000]). In the *Matter of Legal Aid Society* case, defendants in pending criminal prosecutions who were requesting information related to their charges, including complaint report worksheets and arrest reports, brought Article 78 proceedings challenging the denial of their FOIL requests by the New York City Police Department (hereinafter NYPD).

The Appellate Division denied the petition, reversing a lower court's decision. The Appellate Division was persuaded by the contention of NYPD that disclosure of records in pending criminal prosecutions would interfere with those proceedings. The court also held that the contention that disclosure of records to a defendant in a pending criminal prosecution would interfere with that proceeding was a sufficiently particularized justification for the denial of access to those records under Public Officers Law § 87 (2) (e) (i). Furthermore, the Appellate Division found that the FOIL disclosure

during the course of the prosecution would not only interfere with the orderly process of disclosure set forth in CPL 240, but it would also create a substantial likelihood of delay in the adjudication of that proceeding thereby effecting a chill on that prosecution (*see Matter of Legal Aid Socy.*, 274 AD2d at 214).

This rationale has been reaffirmed in later decisions (*see Matter of Moreno v New York County Dist. Attorney's Off.*, 38 AD3d 358 [1st Dept 2007], lv. denied, 9 NY3d 801 [2007]; *Matter of Leshner v Hynes*, 19 NY3d 57 [2012]). In the *Moreno* case, the Appellate Division stated that a criminal appeal and any subsequent proceedings within the same prosecution constitute judicial proceedings under FOIL so as to preclude disclosure of records while an appeal or subsequent proceedings are pending (*Matter of Moreno*, 38 AD3d at 358). It was also reaffirmed in the *Matter of Whitley v New York Cty. Dist. Atty.'s Off.*, 101 AD3d 455 [1st Dept 2012]). In that case the Appellate Division First Department found that the respondents correctly determined that disclosure of the requested documents would have interfered with petitioner's then-pending criminal appeal and any subsequent proceedings in the underlying criminal case. Most recently in the *Matter of Clayton v Wetmore*, 195 AD3d 1264 [3rd Dept 2021], the Appellate Division Third Department affirmed the denial of the petitioner's FOIL request for trial exhibits used in the trial in which the petitioner was convicted. The respondent denied the FOIL request pursuant to Public Officers Law § 87 (2) (e) (i) because the petitioner's appeal of the conviction was pending at the time of the FOIL request.

In the instant matter there is no dispute that on October 15, 2020, the petitioner filed a habeas corpus petition in the Eastern District of New York. During the period

between petitioner's FOIL request by letter dated July 12, 2020, until he received notice of the denial of his administrative appeal by letter dated January 19, 2021, petitioner's habeus corpus petition was still pending.

In light of the aforementioned holdings in the *Matter of Moreno*, *Matter of Leshner*, *Matter of Whitley* and, most recently, in the *Matter of Clayton*, the Kings County District Attorney properly denied petitioner's FOIL request pursuant to Public Officers Law § 87 (2) (e) (i).

**CONCLUSION**

Justin Sarkodie's motion for an order pursuant to Article 78 and Public Officers Law § 84-90 compelling respondent District Attorney Eric Gonzalez to provide him with certain documents is denied and the petition is dismissed.

The foregoing constitutes the decision and order of this Court.

ENTER:



\_\_\_\_\_  
J.S.C.