

Dubin v Police Dept., City of N.Y.

2024 NY Slip Op 31636(U)

May 9, 2024

Supreme Court, New York County

Docket Number: Index No. 153191/2021

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JUDY H. KIM **PART** **04**

Justice

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BENJAMIN LAWRENCE DUBIN,
Petitioner,

INDEX NO. 153191/2021

MOTION DATE 03/31/2021

MOTION SEQ. NO. 001

- v -

POLICE DEPARTMENT, CITY OF NEW YORK,
Respondent.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 were read on this motion for ARTICLE 78 (BODY OR OFFICER).

On March 31, 2021, petitioner Benjamin Lawrence Dubin commenced this special proceeding, pursuant to Article 78 of the New York Civil Practice Laws and Rules (“Article 78”) and Public Officers Law Article 6 (the New York Statute Freedom of Information Law or “FOIL”), for an order directing respondent New York City Police Department (the “NYPD”) to produce records documenting the total number of members of the NYPD referred for external prosecution in the criminal justice system each year, for what reason, and to which specific entity the referral was made (See NYSCEF Doc. No. 1 [Petition at ¶1]). Petitioner also sought an order requiring respondent to post these records online, for the public’s review.

FACTUAL BACKGROUND

Petitioner filed the subject FOIL request on February 2, 2021. Respondent denied the request on February 23, 2021 on the grounds that it was unable to locate the requested records. Petitioner appealed this rejection on March 17, 2021, and the following day respondent denied petitioner’s appeal, writing:

your appeal does not reasonably describe a specific record in a manner that could lead to its retrieval and because a diligent search was conducted based on the information provided and records could not be located. Public Officers Law Section 89(3) requires that a FOIL request describe the records it seeks in a manner that can reasonably lead to the retrieval of records maintained by the entity to which the request was directed; however, your request does not adequately specify any records maintained by this agency and does not provide the information necessary to locate any responsive records

...

The data described in your request is not maintained by this agency in a manner in which it can be simply exported to a spreadsheet for disclosure. Moreover, the First Department has held that an agency is not required to extrapolate raw data and transform it into the values sought in your request by anything more than simple manipulation; anything more would result in the creation of a new record, *see United Prob. Officers Ass'n v. City of N.Y.*, 2019 N.Y. Slip Op. 30337 (N.Y. Sup. Ct. 2019) quoting *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 465 [2007].

(NYSCEF Doc. No. 8).

Petitioner then commenced this special proceeding. Respondent cross-moved to dismiss on the grounds that: “(1) the instant proceeding is moot and academic and deprives the Court of subject matter jurisdiction; (2) the petition fails to state a cause of action because Petitioner did not reasonably describe a record; and (3) the petition also fails to state a cause of action where it requests that Respondent post responsive records online” (NYSCEF Doc. No. 11 [Affirm. in Supp.]).

In a decision and order dated July 29, 2021, this Court (Hon. Frank P. Nervo) granted respondent’s motion to dismiss, in part, “solely to the extent of dismissing that portion of the petition seeking to compel respondent list the requested records on its personnel webpage,” and reserved decision solely on that portion of respondent’s denial premised upon its assertion that

responding to the FOIL request would involve the creation of new records¹ (NYSCEF Doc. No. 25 [July 29, 2021 Decision and Order]).

Respondent interposed an Answer on September 24, 2021, asserting, in pertinent part, that “[t]he records requested by Petitioner are exempt from disclosure pursuant to POL §89(3)(a) in that disclosure would constitute an unreasonable burden associated with identifying relevant records and then creating a list of information responsive to Petitioner’s request” (NYSCEF Doc. No. 27 [Answer at ¶46]). In support of this assertion, respondent submitted an affidavit by Joseph Veneziano, the NYPD Assistant Chief the Internal Affairs Bureau (“IAB”) Commanding Officer since November 2020, stating, in pertinent part, that:

IAB is the NYPD unit tasked with detecting and investigating members of the NYPD who engage in misconduct and corruption.

IAB does not maintain a list of cases where IAB has notified prosecuting agencies about illegal employee activity. Therefore, in order to satisfy Petitioner’s request, a new document would have to be created based on information found in individual IAB case files.

Moreover, IAB’s electronic database, the Internal Case Management System (“ICMS”), which IAB has used since 2013 to maintain its case files, does not have a button or a feature that allows a user to generate cases where IAB has notified prosecuting agencies about illegal employee activity.

The search features in ICMS cannot be combined, even in a sequence of steps, to electronically produce the requested information. First, the available search categories are for generic information such as member of service name or employee identification number, case type, case year, case number, case status, investigative squad assigned or general steering classification of case.’ Second, the available search features do not classify allegations by New York Penal Law classification. Instead, allegations are classified by potential NYPD category of misconduct such as domestic incident, excessive force, missing property, narcotics, etc., so a list sorted by New York Penal Law violation cannot be generated. Accordingly, an individualized review of the index of investigative reports contained in each relevant case file must be undertaken to identify whether the case involved a conferral with a District Attorney’s Office regarding a criminal allegation as well as the finding of facts regarding the allegations.

¹ Justice Nervo also concluded that the portion of respondent’s denial predicated upon petitioner’s alleged failure to adequately describe the record sought was arbitrary and capricious.

The best way to locate cases is searching by a member of service's name or tax identification number. Since Petitioner's request did not include this information, and in order to attempt to obtain the information sought, as an example, I personally conducted searches for case files in ICMS using the search filters "case year" and "case status." With those filters selected, I also selected the search filter "text search" and conducted separate searches using the terms "district attorney," "assistant district attorney," "prosecutor" and names of individual assistant district attorneys for the year 2021 for both open and then closed cases. No cases were found. However, based on my experience, I know that these searches should have yielded results.

Using the "text search" feature can lead to incomplete search results since users may have inputted information using terms that one searching ICMS may not have considered. It also does not factor in spelling errors or false positives where a search term was used in a manner that does not match the context of the request.

Since my computer searches with case year and case status yielded no results, I, in conferral with other members of IAB, determined that the most appropriate way to search for the requested information was to determine both the number of misconduct and corruption cases investigated by IAB. Corruption cases involve allegations of conduct that would be a violation of the penal law while performing official duties or abuse of an official position. Misconduct cases involve serious allegations pertaining to violations of the NYPD's rules and regulations and other misconduct which may not result in criminal prosecution.

As a matter of policy, IAB would have conferred with a District Attorney's Office for each corruption case. As part of a conferral, a member of IAB contacts a District Attorney's Office and provides the facts of the investigation. The District Attorney's Office would then review the investigation file and determine whether to charge a crime, and if so, the appropriate charges.

IAB does not classify cases by New York Penal Law charge, so each case would have to be individually accessed and reviewed to determine the alleged crime.

IAB investigated 966 corruption cases in 2013; 709 in 2014; 744 in 2015; 739 in 2016; 620 in 2017; 448 in 2018; 356 in 2019; and 360 in 2020.

It is possible that IAB conferred with a District Attorney's Office on a misconduct case, but this is not automatically done as in corruption cases. Therefore, each misconduct case would have to be opened and reviewed to determine whether there was a conferral with the District Attorney's Office, and if so, to determine the alleged crime.

There were 3,647 misconduct cases investigated in 2013; 2,560 in 2014; 2,556 in 2015; 3,007 in 2016; 3,350 in 2017; 3,067 in 2018; 2,588 in 2019; and 1,706 in 2020.

Additionally, ICMS only dates back to 2013. Its predecessor, IA Pro, has archived information from 1979-2012. While this database can be searched, one cannot readily search for information contained within each case file as a user can do using ICMS. Individual case files were not maintained in IA Pro. Instead, they were maintained in paper format and only a manual review of those paper files, remaining in storage, could reveal how many of those cases contained conferrals with district attorneys regarding employee misconduct. Those files are stored throughout the City in various IAB facilities and offsite storage.

(NYSCEF Doc No. 28 [Veneziano Aff. at ¶¶5-17] [emphasis added]).

DISCUSSION

“FOIL imposes a broad duty of disclosure on government agencies. All agency records are presumptively available for public inspection and copying, unless they fall within 1 of 10 categories of exemptions, which permit agencies to withhold certain records” (Matter of Hanig v State Dept. of Motor Vehicles, 79 NY2d 106, 109 [1992] [internal citations omitted]). However, per Public Officers Law §89(3)—which mandates that, except for certain exceptions not applicable here, “[n]othing in [the statute] shall be construed to require any entity to prepare any record not possessed or maintained by such entity”—a government agency “is not obligated to compile ‘aggregate data’ from the documents or records in its possession” (Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin., 187 AD3d 435 [1st Dept 2020] [internal citations omitted] lv to appeal denied 36 NY3d 906 [2021]). In this case, respondent has established, through the uncontested affidavit of Assistant Chief Veneziano that, in order to produce the information sought by petitioner, it would necessarily need to aggregate information from thousands of electronic and paper records. Accordingly, petitioner’s request was properly denied as beyond respondent’s obligations under FOIL (Id.; see also Jewish Press, Inc. v New York City Dept. of Correction, 200 AD3d 1038 [2d Dept 2021]).

In light of the foregoing, it is

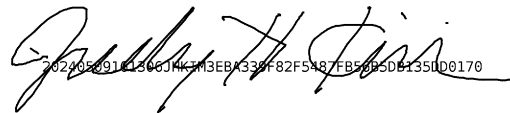
ORDERED and **ADJUDGED** that the petition is denied and this special proceeding is dismissed; and it is further

ORDERED that respondent is directed to serve a copy of this order, with notice of entry, on petitioner as well as on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk’s Office (60 Centre St., Room 119) within ten days from the date of this decision and order; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision, order, and judgment of the Court.



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5/9/2024
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: