

Legal Aid Socy. v New York City Police Dept.

2025 NY Slip Op 30475(U)

February 6, 2025

Supreme Court, New York County

Docket Number: Index No. 154811/2024

Judge: Verna L. Saunders

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

INDEX NO. 154811/2024

THE LEGAL AID SOCIETY,
Petitioner,

MOTION SEQ. NO. 001

- against -

THE NEW YORK CITY POLICE
DEPARTMENT; and SERGEANT JORDAN
MAZUR, in his official capacity as Records
Access Appeals Officer,

DECISION + ORDER ON
MOTION

Respondents.

For Relief Pursuant to Article 78 of the New
York Civil Practice Law and Rules.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for

ARTICLE 78

Petitioner, The Legal Aid Society, commenced this Article 78 proceeding seeking an order compelling respondents to conduct a diligent search for any and all records requested in petitioner's October 15, 2021, and October 29, 2021, Freedom of Information Law ("FOIL") requests; disclosing said records within sixty (60) days; compelling respondents to disclose previously redacted information within sixty (60) days; and granting petitioners costs and reasonable attorney's fees incurred in bringing this proceeding (NYSCEF Doc. No. 2, notice of verified petition). Respondents oppose the petition and cross-moves, pursuant to CPLR 7804(f), 3211(a)(2) and (7), seeking dismissal of same. Upon a review of the relevant statutes and case law, and after consideration of the arguments advanced, the motion is resolved as follows.

The Legal Aid Society's Wrongful Conviction Unit ("WCU") works with incarcerated persons who seek exoneration or resentencing. Through the WCU, petitioner represents Jermaine Page who is currently serving a life sentence, in post-conviction proceedings.

In October 2021, petitioner requested documents in the possession of respondent The New York City Police ("NYPD"), relating to its investigation and arrests of Franchon Jemmott ("Jemmott"), Arrest No. K98045394, and Jermaine Page ("Page"), Arrest No. K96056102, in connection with Complaint No. 9376. The October 15, 2021 FOIL request sought "copies of all records in [the] office's possession, irrespective of who created them, pertaining to the investigation, arrest and prosecution of Franchon Jemmott, Arrest No. K98045394." The Jemmott FOIL request identified sixty-seven (67) categories of requested documents. On October 29, 2021, petitioner filed a second request seeking "copies of all records in [Respondent's] possession, irrespective of who created them, regarding all records involved in

the case of People v. Jermaine Page, Arrest No. K96056102, Ind. No. 9833-96.” That FOIL request enumerated twenty-eight (28) categories of documents. According to petitioner, the records relate to a 1996 murder investigation involving multiple suspects. In December 2023, NYPD produced four (4) redacted documents in response to said requests, indicating that no other responsive documents were located. On January 24, 2024, respondents issued an appeal determination letter denying petitioner’s FOIL appeal.

Petitioner argues that respondents did not conduct a diligent search of the records requested because, through its own investigation in connection with its representation of Page, petitioner obtained several records that would have been responsive to the FOIL request but that were not disclosed by respondents. Petitioner asserts that respondents have also failed to justify the redactions in the documents produced.

In opposition to the motion and in support of the cross-motion, respondents argue that the instant petition must be dismissed as moot and academic because they have performed a diligent search and have produced all responsive documents to petitioner, with appropriate redactions. Respondents aver that they have searched the records of the 75th Precinct Detective Squad, the Criminal Records Section; the Arrest and Complaint Database; the Crime Scene Unit; the Forensic Investigations Division, including its Ballistics Unit; the Property Clerk Division; the Warrant Section; and the Latent Print Unit, which are the locations where responsive records would have been located in the ordinary course of NYPD’s business. The fact that petitioner obtained records through independent inquires is not, argue respondents, factual support for petitioner’s contention that the records still exist at NYPD. Respondents also argue that there are several factors that may explain why these records are not in its possession: the investigation predated the NYPD’s computerized case management system and, thus, the homicide squad folder that could have contained several of the records cannot be electronically retrieved; Hurricane Sandy led to the destruction of department records; and some of the records petitioner seeks are not NYPD records.

Additionally, respondents argue that they have redacted the address, date of birth, telephone number, beeper numbers, and other personal information of the victim in the criminal case, and the phone number of a third party, and the home address, and date of birth of the co-perpetrator. Thus, respondents argue that the disclosed records were properly redacted to prevent unwarranted invasion of privacy. Moreover, insofar as petitioner has failed to show that it “substantially prevailed” in the instant proceeding, that branch of the application seeking attorney’s fees must also be denied.

In reply, petitioner argues that respondents have made various contradictory statements about their searches. For instance, although respondents denied the FOIL appeal on the ground that they had conducted a diligent search of the records, in a letter dated July 24, 2024, sent to petitioners after the commencement of this action, Police Officer Ayala indicted that a further diligent search was conducted, resulting in another production. Petitioner also argues that respondents have failed to establish that copies of the requested records do not exist in other locations. It contends that additional records are likely stored elsewhere, such as the NYPD Crime Lab and Forensics Unit, Brooklyn Robbery Squad, Brooklyn North Homicide, and microfiche records in the Criminal Record Review Unit. To the extent NYPD argues that the

records are held by retired detectives or other agencies, petitioner maintains that the argument fails because respondents have an obligation to obtain said records from other parties who may be in possession of same. Petitioner argues that, at the very least, it is entitled to a hearing as to defendant's diligent search because the production of documents by NYPD includes references to responsive records not produced to petitioner. Petitioner reiterates its entitlement to attorney's fees (NYSCEF Doc. No. 46, *reply memorandum*).

Petitioner also submits the affidavit of Christine L. Belle, Esq., who asserts that, based on her review of the minutes of the criminal trial of Page, witness statements were taken of individuals who were in the area at the time of the homicide. Belle asserts that NYPD typically produces police reports known as DD5s, based on the statements collected from witnesses; however, no DD5s have been produced in this instance. Belle also attests that, the WCU investigation records reveals that a "Gene McKinley" was also arrested in connection with the homicide investigation and charged with possession of a weapon, but no responsive records related to this arrest have been disclosed. At the trial, reference was also made to an audio tape of witness Leann Campbell in connection to Voucher No. A970595. To date, no records have been produced with respect to the referenced audio tape. According to Belle, respondents failed to furnish the trial reports relied upon by the police officers and detectives who testified at the trial, nor have respondents provided records relating to the lineups that were conducted (NYSCEF Doc. No. 47, *Belle affirmation*).

The NYPD is required to respond to FOIL requests pursuant to Public Officers Law § 89(3)(a). However, the Appellate Division, First Department has held that an NYPD certification, attesting that the department is unable to locate documents responsive to a FOIL request, satisfies its obligation under Public Officers Law § 89(3)(a) and renders the application moot. (See *Matter of Grabell v New York City Police Dept.*, 139 AD3d 477, 479 [1st Dept 2016]; *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001]; *Matter of Tarantino v New York City Police Dept.*, 136 AD3d 598, 599 [1st Dept 2016]; *Matter of Yonamine v New York City Police Dept.*, 121 AD3d 598 [1st Dept 2014]). "[N]either a detailed description of the search nor a personal statement from the person who actually conducted the search is required" (*Matter of Whitfield v Moriello*, 71 A.D3d 415, 416 [1st Dept 2010], citing *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001].) However, a petitioner is entitled to a hearing upon showing a "demonstrable factual basis to support his [or her] contention that the requested documents . . . were within the Police Department's control" (*Matter of Tarantino v New York City Police Dept.*, 136 AD3d 598, 599 [1st Dept 2016], quoting *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 279 [1996]). Article 78 review under CPLR 7803 is limited to a determination of whether the agency's denial "was affected by an error of law" (*Mulgrew v Bd. of Educ. of City School Dist. of City of New York*, 87 AD3d 506, 507 [1st Dept 2011]).

Here, respondents have demonstrated, to the satisfaction of this court, that it has conducted a diligent search of the requested records in accordance with its obligation under Public Officers Law § 89(3) (see *Rattley*, 96 NY2d at 875.) Respondents searched for the records in the 75th Precinct Detective Squad; the Criminal Records Section; the Arrest and Complaint Database; the Crime Scene Unit; the Forensic Investigations Division, including its Ballistics Unit; the Property Clerk Division; and the Warrant and Latent Print Unit, which

counsel asserts are the locations where responsive records would have been stored in the ordinary course of NYPD's business. To the extent counsel for petitioner insists that, based on her work with WCU and prior dealings with NYPD, additional documents may exist in other locations, including, *inter alia*, the NYPD Crime Lab and Forensics Unit, Brooklyn North Homicide, Brooklyn Robbery, and Criminal Records Review Unit (on microfiche), this claim is unsupported and is speculative, at best. Furthermore, notwithstanding the claim that several of the items/records subject to this FOIL request were referenced in Page's criminal trial, petitioner fails to set forth a factual basis for its contention that the records presently exist and are within respondents' control. Inasmuch as respondents are not required to provide records that it does not maintain or possess (*Matter of Davidson v Police Dept. of City of N.Y.*, 197 AD2d 466 [1st Dept 1993]), the petition is denied and the cross-motion seeking dismissal of same is granted. All other requests have been considered and are hereby denied. Accordingly, it is hereby

ORDERED that the petition is denied and the cross-motion seeking dismissal of this special proceeding is granted; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for respondents shall serve a copy of this decision and order, with notice of entry, upon petitioner.

This constitutes the decision and order of this court.

February 6, 2025


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

APPLICATION:

GRANTED

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

SETTLE ORDER

SUBMIT ORDER

REFERENCE

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT