

Matter of Yonamine v New York City Police Dept.

2012 NY Slip Op 30144(U)

January 20, 2012

Supreme Court, New York County

Docket Number: 108310/2011

Judge: Martin Schoenfeld

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

PRESENT: Scheerfeld
Justice

PART 28

MASAO YONAMINE

INDEX NO. 108319/1

- v -

MOTION DATE _____

NYCD, ET AL.

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Article 78

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-3

Answering Affidavits — Exhibits _____

4-5

Replying Affidavits File

6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: January 24, 2012

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 28

----- X
In the matter of the application of
MASAO YONAMINE,

Petitioner,

Index No.
108310/2011

-against-

NEW YORK CITY POLICE DEPARTMENT, RAYMOND
KELLY, JAMES RUSSO, HYPPOLYTE, ASSOCIATE INVESTIGATOR,
and JONATHAN DAVID,

Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules.

-----X
Petitioner *Pro Se*:
Mr. Masao Yonamine, DIN 88A7233
Fishkill Correctional Facility
Box 1245
Beacon, New York 12508

For Respondents:
Kenneth M. Rice, Esq.
New York City Police Department
One Police Plaza, Room 1406
New York, New York 10038

Schoenfeld, J.:

In this Article 78 proceeding, Petitioner Masao Yonamine (“Yonamine”) acting *pro se* seeks an Order, pursuant to NY Public Officers Law §§ 84, et. seq., also known as the Freedom of Information Law (FOIL), directing Respondents, in particular Respondent New York City Police Department (the “NYPD”) to provide him with additional records in response to his August 2009 FOIL request, to provide unredacted copies of the records turned over to him by Respondents and/or for an *in camera* inspection of those records, and to issue a subpoena duces

UNFILED JUDGMENT

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tecum for the entire file requested by him.¹

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner, who is presently incarcerated in the Fishkill Correctional Facility for murder, submitted an August 19, 2009 FOIL request to the NYPD seeking copies of the handwritten notes and tape recorded statements he believes were taken by NYPD Detective Hugh Brickley, and by several other detectives, pertaining to his arrest under indictment no.: 7804-86. Specifically, Yonamine sought copies of notes and recorded statements regarding interviews with Sandra Poskin, a witness, and with any and all other witnesses interviewed on December 4, 1986.

By a September 10, 2009 letter, the Records Access Officer (“RAO”), Sergeant James Russo, acknowledging receipt of Yonamine’s request, informed him that the response might take more than twenty days and to anticipate a determination by December 20, 2009. In a letter dated January 14, 2010, the RAO provided Yonamine with access to 13 pages of documents.

Yonamine, claiming entitlement to more records, appealed the RAO’s determination to the Records Access Appeals Officer. The Appeals Officer granted Yonamine’s administrative appeal to the extent that the matter was remanded to the RAO to “conduct a further search for the requested records.”

While the remanded FOIL request was being processed, but before the RAO issued a further determination, Yonamine commenced an Article 78 proceeding. The NYPD filed a cross-motion to dismiss. On March 1, 2011, this Court granted the NYPD’s cross-motion to dismiss the

¹The NYPD made an application to adjourn the return date of this proceeding from August 31st to October 11th due to a death in counsel’s family. Yonamine opposed this request, moved for a default judgment and sought sanctions, including an order of contempt against the NYPD. The adjournment was granted. Therefore, Yonamine’s motion in this regard is denied as moot.

Petition, since Yonamine had not exhausted his administrative remedies. However, this Court further directed that the NYPD supply Yonamine with a response to his document request by April 15, 2011. Consequently, the RAO engaged in a further search for records and by letter to Yonamine dated April 15, 2011 stated as follows:

“After a diligent search conducted by the FOIL Unit, documents were located that are possibly responsive to your . . . FOIL request. Specifically, . . . the FOIL Unit was able to locate handwritten notes that pertain to the 1986 homicide described in your request. However, because most of the pages are not labeled, it is not possible to determine whether they are responsive to the specific items listed in categories one through five in your letter. Nonetheless, 54 pages have been copied and will be provided to you Redactions have been made to the records under [the] Public Officers Law. . . .”

Thereafter, Yonamine again appealed this response to the Records Access Appeals Officer. By letter dated June 17, 2011 the Records Access Appeals Officer denied Yonamine’s appeal, stating as follows:

“The appeal is denied because a diligent and thorough search for the requested records was conducted and the RAO disclosed the 54 responsive records which were located, subject to appropriate redaction. The redactions were appropriate because the redacted material is exempt from disclosure (1) pursuant to Public Officers Law § 87(2)(f) since disclosure could endanger the life or safety of a person; (2) pursuant to Public Officers Law § 87(2)(b) and Public Officers Law § 89(2)(a) because access to the redacted material would create an unwarranted invasion of personal privacy; (3) pursuant to Public Officers Law § 87(2)(e)(iii) and (iv) because the redacted information was compiled for law enforcement purposes and disclosure would identify confidential sources, reveal confidential information relating to the criminal investigation and would reveal non-routine criminal investigative techniques and procedures; and (4) pursuant to Public Officers Law § 87(2)(g) to the extent that some of the redacted information represents communications between employees which constitute non-final, intra-agency correspondence. Other exemptions under FOIL also may apply.”

In his current Article 78 Petition, Yonamine argues that the NYPD has improperly addressed his FOIL request, and that its responses are inadequate and untimely. Further, he alleges

that the NYPD's failure to reply to each specific request constitutes a blanket denial, and is therefore arbitrary and capricious. He asks *inter alia* that the NYPD articulate specific and particularized reasons for withholding parts or all of the requested documents, and that the Court conduct an *in camera* inspection. The NYPD, in opposition, seeks a dismissal of the Petition, claiming that a diligent search was conducted, and that photocopies of all possible records responsive to the FOIL request were "provided to Petitioner with redactions consistent with the Public Officers Law."

DISCUSSION

According to CPLR 7803(3), judicial review of an administrative decision is limited to "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." Further, as stated in *Akpan v. Koch*, 75 NY2d 561, 570 (1990): "While judicial review must be meaningful, the courts may not substitute their judgement for that of the agency...". Basically, the arbitrary and capricious standard "relates to whether a particular action should have been taken or is justified. . .". *Matter of Pell v. Board of Educ. Of Union Free School Dist. No 1 of the Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974).

Pursuant to Public Officers Law § 87(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" This provision is then followed by certain exceptions, labeled (a) through (i). Furthermore, pursuant to Public Officers Law §89(4)(b), when an agency denies access to a record under § 87(2), the agency "shall have the burden of proving that such record falls within the provisions of such subdivision two."

As stated in *Matter of Gould v. New York City Police Dept.*, 89 NY2d 267, 274-5 (1996):

“To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exceptions of *Public Officer Law* § 87(2).” While the Legislature created a general policy of disclosure by enacting FOIL, it nevertheless recognizes the government’s legitimate need to keep certain matters confidential. *Matter of Fink v. Lefkowitz*, 47 NY2d 567, 571 (1979) (“the balance is presumptively struck in favor of disclosure, but in eight specific narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered.”)

If the agency seeks protection under one of the statutory exemptions, it can only do so “by articulating a particularized and specific justification for denying access.” *Matter of Date Tree, LLC v Romaine*, 9 NY3d 454, 462-3 (2007). In balancing the interests of both sides, it is stated in *Matter of Johnson v. New York City Police Department*, 257 AD2d 343, 349 (1st Dept. 1999) as follows: “NYPD’s failure to present a more expansive ‘particularized and specific justification for denying access’ . . . is unfortunate. . . . However . . . where there has been a homicide investigation we find that the NYPD’s showing. . . is sufficient to demonstrate the necessity of protecting the safety and privacy rights of witnesses. The strong policy considerations favoring open disclosure... dictates that petitioner’s FOIL rights must also be accorded protection.”

In the instant proceeding, as per the NYPD’s letter of June 17, 2011, an additional 54 records were disclosed to Petitioner subject to “appropriate redaction” pursuant to Public Officers Law § 87(2)(b), (e)(iii)(iv), (f) and (g). Petitioner was convicted of murder, and considering the

violent nature of his criminal acts as noted in the NYPD's Answer to the Petition, there appears to be, *inter alia*, a legitimate concern for protecting the safety of witnesses and a need for not revealing non-routine criminal investigation procedures. Nevertheless, while certain exemptions may very well apply here, they are bunched together and stated by the NYPD in the broadest, most general terms. The NYPD does not identify the nature of the redacted information or state what specific exemption applies to any particular record. The 54 pages of disclosed material, annexed to Yonamine's Petition as Exhibits 47 through 100, are heavily redacted. About 20% of those pages, approximately twelve, are essentially blank, while others are mostly redacted.

At this time, in order to meet its burden pursuant to Public Officers Law § 89(4)(b), the NYPD should at least state with particularization which exemption or exemptions apply to each specific record provided to Yonamine. Also, to the extent reasonably possible, without revealing the actual information, the NYPD should state the nature of the information redacted for each page. For example, without giving specific names and address, the NYPD could just state that on a particular page, for which an exemption is claimed, "names" or "addresses" were redacted. This may obviate the need for an *in camera* inspection on a later date. See *Matter of Taylor v. New York City Police Department FOIL Unit*, 25 AD3d 347 (1st Dept. 2006).

Finally, pursuant to his FOIL request, Yonamine seeks "any and all . . . records . . . concerning the aforementioned matter." As noted by the NYPD's letter of June 17, 2010, "a diligent and thorough search for the requested records was conducted and [shows] 54 responsive records." Considering that prior to Yonamine's earlier Article 78 proceeding, the NYPD, also claiming to have done "a diligent search," was only able to provide 13 pages of records and not the 54 pages it has now produced, there should be some assurance that no additional records can be

found. See *Matter of Gould v. New York City Police Dept.*, 89 NY2d, 267, 279 (1996). This can be done by submitting to both Petitioner and the Court, either a certification from the NYPD's records access officer or an affirmation from its counsel that "all responsive documents had been disclosed, and that a diligent search had been conducted for [any] documents it could not locate." *Matter of Robles v. Borakove*, 6 AD2d 216 (1st Dept. 2004); *Matter of Pennington v. McMahon*, 234 AD2d 624 (3rd Dept. 1996).

CONCLUSION, ORDER AND JUDGEMENT

Accordingly, it is hereby

ORDERED that the Petition is granted to the extent that within ninety (90) days from the date of this decision Respondents shall submit to Petitioner a written statement particularizing which exemption or exemptions specifically apply to each of the 54 records produced, and stating the nature of the information redacted from each such page; and it is further

ORDERED that within ninety (90) days from the date of this decision, Respondents shall submit to Petitioner , with a copy to the Court, either a certification from the New York City Police Department's Records Access Officer or an affirmation from its Counsel that all responsive documents have been disclosed, and that a diligent search has been conducted for any documents that could not be located, and it is further

ADJUDGED that, in all other respects, the Petition is denied, and the proceeding is dismissed.



J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: New York, New York
January 20, 2012