

**Matter of Banks v New York City Police Dept. Legal
Bur.-FOIL Unit**

2012 NY Slip Op 30388(U)

February 15, 2012

Supreme Court, New York County

Docket Number: 401974/11

Judge: Barbara Jaffe

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: JAFFE BARBARA JAFFE J.S.C.
Justice

PART 5

MARTIN BANKS

INDEX NO.

401974111

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

8

- v -

NYCPD, ET AL.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

FEB 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ~~ORDER~~ JUDGEMENT**

Dated: 2/15/12

FEB 14 2012

BARBARA JAFFE 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 : PART 5

-----X
In the Matter of the Application of Mr. Martin Banks,
#83-A-7866,

Index No. 401974/11

Petitioner,

Motion Subm.: 11/16/11
Motion Seq. No.: 001

For a judgment pursuant to Article 78 of the Civil
Practice Law and Rules,

DECISION & JUDGMENT

-against-

FILED

The New York City Police Department Legal Bureau
- FOIL Unit; James Russo, Sergeant; Associate
Investigator Hippolyte and Jonathan David, Records
Access Appeals Officer,

FEB 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

Respondents.

-----X
BARBARA JAFFE, JSC:

For petitioner, self-represented:
Mr. Martin Banks, #83A7866
Wende Correctional Facility
3622 Wende Rd., P.O. Box 1187
Alden, NY 14004-1187
716-937-4000

For respondents:
Katie M. Flaherty, Esq.
Michael A. Cardozo
Corporation Counsel
S. Andrew Schaffer
Deputy Commissioner, Legal
Matters
New York City Police Dept.
One Police Plaza, Rm. 1406
New York, NY 10038
646-610-5400

By order to show cause dated July 28, 2011, petitioner brings this special proceeding pursuant to CPLR Article 78. Respondents oppose and, by notice of cross motion dated October 21, 2011, move pursuant to CPLR 7804(f) and 3211 for an order denying the petition and dismissing the proceeding on the grounds that the petition fails to state a claim upon which relief may be granted. Petitioner opposes the cross motion.

I. BACKGROUND

On December 1, 1982, petitioner was arrested and charged with murder in the second degree, attempted rape in the first degree, and criminal possession of a weapon in the fourth degree for the murder and attempted rape of his ten-year-old second cousin. Petitioner was thereafter convicted of murder in the second degree. (Affidavit of Martin Banks, dated July 11, 2011 [Banks Affid.], Exh. A).

By letter dated August 3, 2010, petitioner served respondents with a Freedom of Information Law (FOIL) request, seeking records related to his arrest for these crimes. (*Id.*). By letter dated September 20, 2010, respondents acknowledged his request and advised that they would make a determination thereon by December 10, 2010. (*Id.*, Exh. B).

By letter dated January 10, 2011, respondents denied the request on the ground that the documents sought are exempt from disclosure pursuant to section 50-b of the Civil Rights Law. (*Id.*, Exh. D).

By letter dated February 8, 2011, petitioner appealed the denial, and by letter dated March 28, 2011, respondents denied the appeal. (*Id.*, Exhs. E, F).

II. CONTENTIONS

Petitioner argues that the reason for respondents' denial of his request is inapplicable as he already knows the victim's name. (Banks Affid.).

Respondents contend that the records sought by petitioner contain the victim's name and are thus exempt from disclosure, regardless of whether petitioner knows the name, as he was convicted of the crimes, not merely arrested and charged. Counsel also affirms that she reviewed the records responsive to petitioner's request and that each document contains the victim's

identity. (Affirmation of Katie M. Flaherty, Esq., dated Oct. 21, 2011).

In opposition, petitioner maintains that respondents erroneously denied his request as it is irrelevant that he was convicted of the crimes, and observes that respondents failed to show with particularity that the exemption applies to all of the requested records. (Affidavit of Martin Banks, dated Jan. 2, 2012).

III. ANALYSIS

Generally, all agency records under FOIL are presumptively available for public access, inspection or use, unless such records fall within one of eight categories of exemptions. (*See Public Officers Law* § 87[2]). An agency may not withhold information it chooses, but must state with particularity and list specific justifications for withholding information from the party seeking access to it. (*Matter of Moore v Santucci*, 151 AD2d 677 [2d Dept 1989], citing *Matter of Fink v Lefkowitz*, 47 NY 2d 567, 571 [1979]; see also *City of Newark v Law Dept. of City of New York*, 305 AD2d 28 [1st Dept 2003]).

Pursuant to Civil Rights Law § 50-b(1), the identity of any victim of a sex offense shall be confidential, and no document in the custody of any public officer or employee which identifies such a victim shall be made available for public inspection, nor shall a public office or employee disclose such a document.

As petitioner was convicted of the crimes, the records are exempt from disclosure. (*Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738 [2001]). That petitioner knows the victim's name does not negate the exemption. (*Id.* at 748 ["Nor does the fact that petitioners already know the identity of their victims provide a basis for disclosure."]).

Moreover, based on respondents' counsel's assertion that she personally reviewed the

records responsive to petitioner's request and that each document contains the victim's identity, respondents have made a particularized showing that the records are exempt from disclosure.

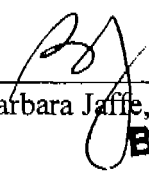
IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed.

ENTER:

FILED



Barbara Jaffe, JSC

FEB 21 2012

BARBARA JAFFE
J.S.C. NEW YORK
COUNTY CLERK'S OFFICE

DATED: February 15, 2012
New York, New York

FEB 15 2012