

<b>Matter of The Exoneration Initiative v New York City Police Dept.</b>
2012 NY Slip Op 31901(U)
July 12, 2012
Sup Ct, NY County
Docket Number: 102688/12
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: MOULTON  
Justice

PART 40B

THE EXONERATION INITIATIVE

INDEX NO. 102688/12

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

- v -  
N.Y.C. Police Dept.

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion <sup>cross</sup> to dismiss is decided per attached. Petition is held in abeyance per attached.

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

**FILED**

JUL 18 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/12/12

[Signature]  
HON. PETER H. MOULTON  
SUPREME COURT JUSTICE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

Supreme Court: New York County  
Part 40B

-----X

In the Matter of the Application of

THE EXONERATION INITIATIVE,

Petitioner,

For a Judgment under Article 78 of the  
Civil Practice Law and Rules,

-against-

Index No. 102688/12

THE NEW YORK CITY POLICE DEPARTMENT,

Respondent.

**FILED**

JUL 18 2012

-----X

Peter H. Moulton, Justice

NEW YORK  
COUNTY CLERK'S OFFICE

Petitioner in this Article 78 proceeding seeks to reverse the determination of the Records Access Appeals Officer of the New York City Police Department ("NYPD") and to compel the NYPD to disclose, pursuant to the state's Freedom of Information Law ("FOIL") certain records in its possession.

The records concern Richard Rosario, who has been incarcerated since 1996 after being convicted of murder.

Rosario, or attorneys working on his behalf, have made prior requests under FOIL for the police records pertaining to the investigation of the homicide. The last such request was apparently made in 2004, although the NYPD states it has been

unable to locate the folder associated with this final request. Some records were produced pursuant to these multiple requests, but a number of records were withheld, and others - particularly one or more concerning eyewitnesses - were substantially redacted. Rosario and his lawyers apparently did not challenge the adequacy of these prior productions via Article 78 proceedings.

The current petitioner, the Exoneration Initiative, describes itself as an organization that investigates and, where appropriate, litigates claims of actual innocence on behalf of indigent prisoners in New York State. (Verified Petition, ¶ 10; Affirmation of Rebecca Freedman, Esq., ¶ 4.) The record before the court demonstrates that The Exoneration Initiative has not, as of yet, agreed to serve as Rosario's lawyer. Rosario has signed an authorization and waiver which allows the Exoneration Initiative to investigate his claim of innocence with the understanding that it is not undertaking to represent him.

By letter dated November 18, 2011, the Exoneration Initiative requested four categories of documents relating to Rosario's 1996 arrest. This request was denied by the NYPD's Record Access Officer ("RAO") in a letter dated December 1, 2011. The RAO denied access on the ground that information contained in the requested records would endanger the life or safety of witnesses. By letter

dated December 14, 2011, petitioner administratively appealed this determination. By letter dated February 24, 2012, the Records Access Appeals Officer ("RAAO") remanded the matter to the RAO to search for the requested records. The February 24<sup>th</sup> letter also stated that

That part of your appeal which concerned redactions made to a record that you included with your November 18, 2011 FOIL request will be separately addressed in an appeal determination after a search for the requested arrest records, including the redacted record that you provided, is completed.

Before the court is the NYPD's cross-motion to dismiss the petition.

#### DISCUSSION

The NYPD moves to dismiss the petition on three grounds.

First, it cites the previous FOIL requests of Rosario and his lawyers, and argues that the instant request is time-barred. According to the NYPD the Exoneration Initiative stands in the shoes of Rosario and the time to appeal the adequacy of prior FOIL productions has long since passed. CPLR 217(1) requires that an Article 78 proceeding must be brought within four months of the challenged final decision.

This argument fails. At this juncture, the Exoneration

Initiative is not a representative of Rosario. It is true that at some point in the future it is possible that the Exoneration Initiative will engage in legal representation of Rosario. It is also possible that Exoneration Initiative and Rosario may never have an attorney-client relationship. The Exoneration Initiative is analogous to a media outlet investigating whether police records undermine a criminal conviction. The only cases cited by the NYPD in support of their argument that a FOIL request of a "representatives" are treated as equivalent of a principal's FOIL request are cases where attorneys made FOIL requests on behalf of their clients. At this time, there is no attorney client relationship between Rosario and the Exoneration Initiative.

It is certainly true that, like a newspaper's efforts to uncover a wrongful conviction, the Exoneration Initiative's efforts may benefit an incarcerated person. However, that does not mean that the Exoneration Initiative - any more than a newspaper - becomes the representative of the person who benefits from its efforts.

The U.S. Supreme Court has rejected this concept of "virtual representation" under the analogous federal FOIA statute. Instead, the Supreme Court has adhered to longstanding federal standards of

nonparty preclusion. (See Taylor v Sturgell, 553 US 880 [2008].)<sup>1</sup> After rejecting the "virtual representation" defense in Taylor, the Supreme Court remanded to the trial court to determine if a third party should have been precluded by an earlier FOIA denial on agency grounds, a traditional basis for third party preclusion. Here there are no facts in the record that Rosario in anyway controls the work of the Exoneration Initiative, a crucial component of the principal - agent relationship.

The NYPD's second argument is that the petition was not adequately verified. This argument is without merit. The petition was properly verified by Glenn A. Garber, the Exoneration Initiative's Director, who states that he has personal knowledge of the facts contained in the petition.

The NYPD's final argument is that the RAAO's remand to the RAO means that the case is not ripe because petitioner has not exhausted administrative remedies. This argument also provides no basis for dismissal. There are deadlines provided in the Public Officers Law for agency response to FOIL requests. In this case

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<sup>1</sup>Petitioner sought to bring this case to the court's attention by letter submitted after the motion was fully submitted. The court was aware of the case at the time of oral argument. The submissions by the parties after the motion was fully submitted are not part of the record before the court in deciding the instant motion.

none of the deadlines were met by the NYPD. In particular, the February 24<sup>th</sup> decision of the RAAO does not satisfy POL § 89(4)(a) which states that an agency must, within ten days of receipt of the appeal, fully explain the reason for a denial or provide access to the record sought. The RAAO did neither of these things, within ten days of the appeal, or at any time thereafter. In such circumstances, a failure to timely respond is treated as a denial. (POL §§ 89(4)(a), (b).)

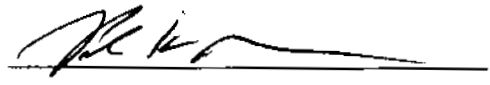
For the reasons stated, the motion to dismiss is denied.

Respondent shall have thirty days from the date of service of this decision and order with notice of entry to answer the petition. The court will schedule oral argument after submission of the answer. This constitutes the decision and order of the court.

**FILED**

JUL 18 2012

Date: July 12, 2012



AJSC

**HON. PETER H. MOULTON  
SUPREME COURT JUSTICE**