

Matter of Diaz v New York City Police Dept.
2012 NY Slip Op 32946(U)
December 6, 2012
Sup Ct, NY County
Docket Number: 401681/12
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

In the Matter of the Application of
DANIEL DIAZ,

INDEX No. 401681/12

Petitioner,
-against-

MOTION DATE _____

NEW YORK CITY POLICE DEPARTMENT,

MOTION SEQ. No. 001

Respondent.

MOTION CAL No. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1, 2

Answering Affidavits- Exhibits 3, 4

Replying Affidavits _____

CROSS-MOTION: YES NO

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 1418).

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 12/6/12

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

In the Matter of the Application of
DANIEL DIAZ,

Petitioner,

UNFILED JUDGMENT
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For a Judgment under Article 78
of the Civil Practice Law and Rules.

-against-

Index No. 401681/12

NEW YORK CITY POLICE DEPARTMENT,
Respondent.

-----X

DONNA M. MILLS, J.:

In this Article 78 proceeding, Petitioner Daniel Diaz, acting pro se brings this action against the Respondent New York City Police Department, to compel disclosure of law enforcement records, pursuant to N.Y. Public Officer Law § 84, et seq., also known as the Freedom of Information Law ("FOIL"). The Respondent has filed a cross motion to dismiss the petition arguing that the petition should be dismissed, on the grounds that (1) the Court lacks subject matter jurisdiction in that petitioner has failed to exhaust his mandatory administrative remedies, prior to commencement of this proceeding rendering it premature; and (2) the petition is moot in that a determination has been rendered and all responsive records located pursuant to a diligent search have been disclosed.

The essential facts underlying this proceeding are not in dispute. Petitioner is currently an inmate at the Elmira Correctional Facility in Elmira, New York. By letter dated April 25, 2011 Petitioner made a FOIL request for records related to his arrest and conviction under Bronx County indictment number 9364/94, which was eventually

received by the FOIL Unit on May 10, 2011. By letter dated May 19, 2011, the Records Access Officer ("RAO") acknowledged Petitioner's request and provided an estimated date by which it was anticipated a determination would be reached.

By letter dated October 28, 2011, the RAO denied Petitioner's request as a duplicative request. By letter dated November 25, 2011, Petitioner administratively appealed the RAO's denial of the FOIL request.

By letter dated February 10, 2012, the Records Access Appeals Officer ("RAAO") granted Petitioner's appeal to the extent that the matter was remanded to the RAO to conduct a further search for the requested records.

By letter dated April 30, 2012, the RAO provided Petitioner with some records responsive to his request and denied access to other documents requested on the grounds that the release of the information would constitute an unwarranted invasion of personal privacy and would endanger the life and safety of any person, are, therefore, exempt from disclosure pursuant to law. The letter further informed Petitioner of the right to appeal the determination in writing within 30 days of the date of the decision and provided the name and address of the RAAO.

By letter dated May 17, 2012, Petitioner administratively appealed the RAO's April 30, 2012 determination. In his appeal, Petitioner clarified what documents he sought and objected to the withholding of other documents.

Petitioner commenced this proceeding on July 27, 2012, by the filing of an Order to Show Cause and Verified Petition pursuant to CPLR Article 78 seeking to compel respondent to comply with FOIL.

Despite the Respondents efforts to appease Petitioner, he maintains that

Respondent has not provided him with certifications that a diligent search has been conducted for his requested records as required by FOIL.

Respondent's have submitted the letter from RAAO, Jonathan David, dated October 9, 2012 certifying that, after diligently searching for the files that were not turned over, they could not be located, and thus were not in respondent's possession.

In reviewing the submitted papers, despite Petitioner's dissatisfaction with Respondent's representations, the Court finds that the Respondent provided a sufficiently detailed basis to support and demonstrate that the Respondent's Office did conduct a diligent search for the records and were unable to locate them. Matter of Smith v. Capasso, 200 A.D.2d 502, 608 N.Y.S.2d 815 (1st Dept.); Matter of Calvin K. of Oakknoll v. De Francesco, 200 A.D.2d 619, 608 N.Y.S.2d 850 (2nd Dept.).

As the courts have held, upon such a claim, the burden then shifts to the petitioner to come forward with factual proof that the items sought actually exist in the files of the office to which the FOIL request was directed. For example in Ahlers v. Dillon, 143 A.D.2d 225, 532 N.Y.S.2d 22 (2d Dept.1988), the Second Department held that an Article 78 proceeding which challenged the denial of a FOIL request was properly dismissed when the prosecutor represented that his office did not possess the requested records and the petitioner was unable to "articulate a factual basis" for his claim to the contrary. Moreover, the FOIL does not specify the manner in which an agency must certify that documents cannot be located, or recount the steps undertaken by such agency in response to the FOIL request. *Id.*; see also, e.g., Pennington v. McMahon, 234 A.D.2d 624, 650 N.Y.S.2d 492 (3rd Dept.1996).

Accordingly, it is hereby

ORDERED that the Respondent's cross motion to dismiss the petition is granted;

and it is further

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

Dated: 12 / 6 / 12

ENTER:

DM
J.S.C.

DOWNNA M. MILLS, J.S.C.

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