

<b>Matter of Mingo v Vance</b>
2013 NY Slip Op 33231(U)
December 13, 2013
Supreme Court, New York County
Docket Number: 401319/13
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. Lobis  
Justice

PART 6

Gregory Mingo  
- v -  
District Attorney of  
New York County

INDEX NO. 401319-13  
MOTION DATE 11/7/14  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ <u>Order to Show Cause</u> Affidavits – Exhibits ...	PAPERS NUMBERED <u>1-3</u>
Answering Affidavits – Exhibits _____	<u>4</u>
Replying Affidavits _____	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

DEC 19 2013

NEW YORK  
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION *and Order*

Dated: 12/13/13

Joan B. Lobis  
JOAN B. LOBIS J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X

In the Matter of the Application of

GREGORY MINGO,

Petitioner,

Index No. 401319/13

-against-

**Decision and Order**

CYRUS R. VANCE, JR., District Attorney of New  
York County,

Respondent.

-----X

**JOAN B. LOBIS, J.S.C.:**

Petitioner, Gregory Mingo, proceeding pro se, and who is currently incarcerated at Great Meadow Correctional Facility in Comstock, New York, commenced this Article 78 proceeding to compel Respondent, the District Attorney of New York County, to provide Petitioner with certain records pursuant to the provisions of the Freedom of Information Law ("FOIL"). N.Y. Public Officers Law § 87(2)(b). For the following reasons, the petition is denied.

**FILED**  
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NEW YORK  
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FILED  
DEC 18 2013  
NEW YORK COUNTY CLERK'S OFFICE

Petitioner filed a FOIL request dated October 2, 2012, seeking to obtain "any and all letters received by the New York County District Attorney's Office to the Queens County District Attorney's Office" and "any and all letters received by the New York County District Attorney's Office from the Queens County District Attorney's Office[,]" regarding the indictment of another individual, a witness for the prosecution during Mr. Mingo's homicide trial. Additionally, Petitioner requests "any and all letters of recommendation sent [sic] to the

New York State Division of Parole, on behalf of the witness. On October 23, 2012, Assistant District Attorney Eva Marie Dowdell, a Records Access Officer (“RAO”), denied Petitioner’s request relying on Public Officers Law Section 87(2)(a) and New York Codes, Rules and Regulations Section 270.2(14)(xvii), a regulation prohibiting petitioner’s solicitation of documents containing crime and sentence information pertaining to another inmate who is not a codefendant.

By letter dated November 17, 2012, Petitioner appealed the determination as Petitioner was not requesting crime and sentence information for an inmate. Appeals Officer Susan Roque denied Petitioner’s administrative appeal on January 22, 2013. AO Roque found that RAO Dowdell’s reliance on New York Codes, Rules and Regulations Section 270.2(14)(xvii) was incorrect but that the three categories of documents Petitioner requested were nonetheless exempt from disclosure as inter-agency materials under Public Officers Law Section 87(2)(g). On May 21, 2013, Petitioner commenced this Article 78 proceeding.

In an Article 78 proceeding, the Court reviews agency decisions to determine whether an action violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. E.g., Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep’t 2012). The agency withholding disclosure bears the burden of proving the exception applies. Mulgrew v. Bd. of Educ., 87 A.D.3d 506, 507 (1st Dep’t 2011). Where an issue is limited to “pure statutory interpretation,” a court is not required to defer to an administrative agency but rather should consider the plain language of the statute. E.g., Dunne v.

Kelly, 95 A.D.3d 563, 564 (1st Dep't 2013); see also County of Westchester v. Bd. of Trustees, 9 N.Y.3d 833, 835-36 (2007) (administrative agency's regulations must not conflict with state statute or that statute's underlying purposes).

Under FOIL, "government records are 'presumptively open,' statutory exemptions are 'narrowly construed,' and the City must articulate a 'particularized and specific justification' for nondisclosure." N.Y. Civ. Liberties Union v. Schenectady, 2 N.Y.3d 657, 661 (2004) (citing Gould v. N.Y. City Police Dep't, 89 N.Y.2d 267, 274 (1996)). The agency seeking to prevent disclosure has the burden to establish the applicability of an exemption. Gould, 89 N.Y.2d at 275 (citing Hanig v. Dep't of Motor Vehicles, 79 N.Y.2d 106, 109 (1992)). Withholding disclosure requires that "the material requested falls squarely within the ambit of one of these statutory exemptions." Gould, 89 N.Y.2d. at 275 (citing Fink v. Lefkowitz, 47 N.Y.2d 567, 571 (1979)).

Public Officers Law Section 87(2)(g) exempts from disclosure any inter-agency or intra-agency materials that are not statistical or factual tabulations or data, instructions to staff that affect the public, final agency policy or determinations, or external audits, including but not limited to audits performed by the comptroller and the federal government. New York courts have interpreted "inter-agency materials" to mean "'deliberative material,' i.e., communications exchanged for discussion purposes not constituting final policy decisions." Russo v. Nassau Cnty. Cmty. Coll., 81 N.Y.2d 690, 699 (1993).

All of Petitioner's requested documents are pre-decisional inter-agency documents


that are exempt from disclosure by Public Officers Law Section 87(2)(g). Correspondence between the New York County District Attorney's Office and Queens District Attorney's Office falls squarely within the Section 87(2)(g) exemption. Recommendation letters sent by a prosecuting district attorney setting forth factors to consider in parole are also inter-agency documents that fall squarely within the exception. Grigger v. Div. of Parole, 11 A.D.3d 850 (3d Dep't 2004). Accordingly, it is

ORDERED that the petition is denied and dismissed in its entirety.

Dated: December 13 , 2013

ENTER:

**FILED**  
DEC 19 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

  
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JOAN B. LOBIS, J.S.C.