

**Wave Publ. Co. v Queens County Dist. Attorney's
Off.**

2013 NY Slip Op 31141(U)

May 17, 2013

Sup Ct, Queens County

Docket Number: 3499/2013

Judge: David Elliot

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Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

In re Application of
WAVE PUBLISHING CO.,
Petitioner,

Index
No. 3499 2013

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

Motion
Date April 16, 2013

-against-

Motion
Cal. No. 137

QUEENS COUNTY DISTRICT ATTORNEY'S
OFFICE,
Respondent.

Motion
Seq. No. 1

The following papers numbered 1 to 10 read on this petition by Wave Publishing Co. (petitioner) for judgment pursuant to Article 78 of the CPLR: (1) declaring that respondent Queens County District Attorney's Office (respondent) has acted unlawfully in withholding access to certain records pursuant to a "Freedom of Information Law" (FOIL) request and directing respondent to provide such access; and (2) awarding petitioner costs and attorneys' fees.

	<u>Papers Numbered</u>
Notice of Petition - Petition - Exhibits.....	1-4
Answering Affirmation - Exhibits.....	5-10

Upon the foregoing papers it is ordered that the petition is determined as follows:

Petitioner is a corporation with its principal place of business in Rockaway Beach, Queens, New York. Petitioner is the publisher of The Wave, a weekly local newspaper. In 2011, The Wave reported that a Jacek Marczewski pleaded guilty to the crime of reckless endangerment in the second degree, stemming from an accusation that Marczewski molested a child at a synagogue in the Rockaways. Marczewski was sentenced on August 1, 2011 and the criminal case is now closed.

Thereafter, Marczewski commenced an action in this court for defamation against petitioner herein, under Index No. 701203/2012, as a result of petitioner's article in The Wave.¹ Consequently, pursuant to Public Officers Law § 84, *et seq.* (Freedom of Information Law or FOIL), petitioner, through its counsel, submitted a request on November 14, 2012 for:

“all records related to The People of the State of New York v. Jacek Marczewski (aka Marczewski), Indictment No. 401/2009, a closed case, including but not limited to:

- a. arrest records;
- b. police reports;
- c. police officer affidavits;
- d. eyewitness statements;
- e. documents produced to the defense or obtained from the defense in discovery;
- f. records concerning Mr. Marczewski's criminal history and/or prior non-charged criminal, vicious, or immoral conduct; and/or
- g. records concerning the plea agreement entered with Mr. Marczewski.”

Due to respondent's failure to respond to the FOIL request within five business days of receipt thereof (Public Officers Law § 89 [3] [a]), same was constructively denied (*see* N.Y. State Comm. Open Govt. AO 10587) and petitioner submitted an administrative appeal on December 4, 2012 (Public Officers Law § 89 [4] [a]). By letter dated December 6, 2012, John Castellano, Deputy Executive Assistant District Attorney and FOIL Appeals Officer (Appeals Officer Castellano) acknowledged that a determination on petitioner's November 14, 2012 thereon had not yet been rendered and, as such, the appeal was granted and the request was forwarded to the FOIL Unit for processing.

1. It appears from a review of court records that petitioner's motion to dismiss that action has been granted.

By letter dated December 11, 2012, Josette Simmons, Assistant District Attorney and Record Access Officer (RA Officer Simmons) denied petitioner's FOIL request, asserting exemptions from disclosure pursuant to: (1) Public Officers Law § 87 (2) (e) (i); and (2) Public Officers Law § 87 (2) (a) and Civil Rights Law § 50-b. Public Officers Law § 87 (2) (e) (i) exempts from disclosure those records or portions thereof which "are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings." In support of this exemption, RA Officer Simmons cited petitioner's own December 4, 2012 appeal, which made reference to the related pending civil matter, noted *supra*. Further, Public Officers Law § 87 (2) (a), read in conjunction with and Civil Rights Law § 50-b, exempts from disclosure any document which "tends to identify [any victim of a sex offense]," unless waived or authorized by the victim.

Petitioner timely filed a second administrative appeal on December 20, 2012, arguing that the first exemption did not apply to subsequent civil matters, as well as to enforcement investigations and ensuing judicial proceedings which have "run their course" (*Matter of Leshner v Hynes*, 19 NY3d 57, 68 [2012]). Further, petitioner asserted that, even if the exemption applied, RA Officer Simmons was still required to identify the documents for which the exemption was claimed (*see id.* at 67). With respect to the second claimed exemption, petitioner argued that, when it can be done without unreasonable difficulty, respondent is required to redact the record to take out any exempt information and provide the information requested (*see Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d 42, 45 [2011]).

Respondent did not respond within 10 business days of receipt of the appeal (as required by Public Officers Law § 89 [4] [a]); rather, in a letter dated January 11, 2013, it acknowledged receipt of the second appeal, advised that same was being processed, and that, within 30 days, a response would be forthcoming. During a telephone conversation between counsel and RA Officer Simmons, the former was told that the second appeal would likely be denied, again citing the pending civil litigation and advising that petitioner should obtain such records by way of discovery. In response, petitioner supplemented its appeal to challenge this position by letter dated January 16, 2013.

By letter dated February 8, 2013, Appeals Officer Castellano granted the appeal in part, and denied the appeal in part. First, because RA Officer Simmons failed to provide an explanation as to how the documents sought would interfere with the pending civil matter, as otherwise required by respondent (Public Officers Law § 89 [4] [b]), that portion of the appeal was granted and was returned to the agent's FOIL Unit for reprocessing. However, Appeals Officer Castellano denied the appeal in part to the extent that he determined that the portion of RA Officer Simmons' denial – as it related to Civil Rights Law – was proper.

By letter dated February 15, 2013, RA Officer Simmons advised petitioner: that she was processing the request due to petitioner's successful appeal; that the trial folder relating to the criminal case was being reordered; and that petitioner would receive a response within 30 business days. The instant proceeding ensued (Public Officers Law § 89 [4] [b], [c]).

Respondent, seemingly, cross moved for dismissal of the petition. However, as respondent has failed to file its cross motion with the County Clerk (CPLR 8020 [a]), albeit without fee (CPLR 8017), the cross motion will not be considered by the court. It follows that the court need not consider any responsive arguments to the cross motion. Importantly, however, the court notes that petitioner submits a supplemental affirmation which contains a letter, dated March 14, 2013, from RA Officer Simmons, which is written in response to petitioner's "successful appeal" pursuant to Appeals Officer Castellano's February 8, 2013 decision. Notably, the letter indicates that respondent has reviewed its records and has determined that several documents are available for petitioner's review (to wit: 81 pages, with some redactions). The letter further explains that certain documents are not available due to particular exemptions. While it appears that respondent has abandoned its initially claimed exemption pursuant to Public Officers Law § 87 (2) (e) (i), respondent provides several other detailed explanations of those exemptions which it argues applies to the request.

While the court agrees with petitioner that respondent had failed to meet its burden that an exemption pursuant to Public Officers Law § 87 (2) (e) (i) applied to petitioner's FOIL request, it is clear that Appeals Officer Castellano also agreed; as a result, Appeals Officer Castellano did not act arbitrarily or capriciously when he granted the appeal in part and forwarded petitioner's request to the FOIL Unit for reprocessing. It is noted that, had he not done so, the court certainly would have remitted the matter to RA Officer Simmons for the purpose of satisfying respondent's burden of demonstrating that any particular exemption applied to the material sought (CPLR 7806; *see e.g. Skorin-Kapov v State University of New York at Stony Brook*, 281 AD2d 632 [2001]). Thus, even though respondent may not have been entitled to "reprocess" the FOIL request as petitioner suggests – as opposed to what is required by statute, to wit: "fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought" – the outcome would have been the same. Indeed, respondent appears to have done that which this court would have otherwise ordered and adjudged, as evidenced by its latest letter dated March 14, 2013. Whether petitioner is entitled to relief stemming from that determination is not yet ripe for review, as there is no indication that same had been administratively appealed (Public Officers Law § 89 [4] [a]).

To the extent that the instant proceeding challenges the partial denial of petitioner's appeal as it relates to Civil Rights Law § 50-b, respondent did not act arbitrarily or capriciously, since respondent is "not obligated to provide the records even though redaction

might remove all details which ‘tend to identify the victim[s]’ ”(*Leshner v Hynes*, 80 AD3d 611 [2011]; see Civil Rights Law § 50–b [1]; *Matter of Short v Board of Mgrs. of Nassau County Med. Ctr.*, 57 NY2d 399 [1982]). In any event, respondent provided a detailed explanation of why the exemption applies (as well as to what documents specifically it applied) in its March 14, 2013 letter and, as noted above, to the extent that petitioner challenges those determinations, same is not ripe for review absent an indication that there has been a timely administrative appeal of such determination (Public Officers Law § 89 [4] [a]). It is noted that several redacted documents were made available for review.

Accordingly, it is hereby

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

Dated: May 17, 2013

J.S.C.