

Matter of Guitt v David
2013 NY Slip Op 32362(U)
October 3, 2013
Supreme Court, New York County
Docket Number: 400610/2013
Judge: Eileen A. Rakower
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. Rakower
Justice

PART 15

Adolf Gutt

INDEX NO. 400610-13

MOTION DATE _____

Jonathan David, Records Access
Appeals Officer, NYCPD

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

1

Replying Affidavits _____

2

3, 4

Cross-Motion: Yes No

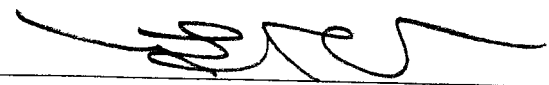
Upon the foregoing papers, it is ordered that this motion

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

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 141B).

Dated: 10/3/13



HON. EILEEN A. RAKOWER ^{tsf}

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
PRESENT: Hon. EILEEN A. RAKOWER PART 15

Justice

IN THE MATTER OF THE APPLICATION OF
ADOLF GUITT,

Petitioners,

INDEX NO. 400610/2013

For Judgment Under Article 78 of the CPLR

- v -

MOTION DATE _____

JONATHAN DAVID, RECORD ACCESS APPEALS
OFFICER NYCPD,

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

Respondent.

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

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answer — Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion: **Yes** **No**

Petitioner brings this CPLR Article 78 proceeding for an order directing that the New York City Police Department (“NYPD”) provide him with access to records pertaining to the investigation leading up to his arrest and conviction under indictment number 179-2005, in New York County, pursuant to the N.Y. Public Officers Law (POL) §84 et seq., also known as the Freedom of Information Law (“FOIL”).

Respondent cross-moves to dismiss the proceeding on the grounds that: (1) the petition is moot and academic inasmuch as all records located pursuant to a diligent search have been disclosed to Petitioner; (2) at all times that preceded the disclosure of records to Petitioner, the records sought have been exempt pursuant to N.Y. Public Officers Law Sect. 87(2)(e)(i) which proscribes the disclosure of law enforcement records where such disclosure would interfere with a pending judicial proceeding;

and (3) the Court lacks subject matter jurisdiction over a portion of Petitioner's claim in that Petitioner commenced this Article 78 proceeding prior to exhausting administrative remedies with regard to a portion of the claims, rendering those claims premature.

On June 2, 2009, Petitioner was convicted of Assault in the 2nd Degree and Attempted Assault in the 1st Degree for a stabbing at a Manhattan Nightclub which took place on January 8, 2005. Petitioner filed a Notice of Appeal for the foregoing conviction on June 11, 2009. By order dated December 4, 2012, Petitioner's appeal was denied. Petitioner sought leave to appeal that denial to the N.Y. Court of Appeals on January 3, 2013. On March 11, 2013, Petitioner's application for leave to appeal to the N.Y. Court of Appeals was denied.

By letters dated October 13, 2012, Petitioner filed requests for access to "all statements recorded during the course of the investigation of Copacabana Night club stabbing incident on Jan. 8th, 2005, regarding docket # 2005NY002159 and Ind. #179/05" and "all records, reports, and statements pertaining to docket #2005-010-00140." On November 27, 2012, the Records Access Officer granted Petitioner access to ten pages of certain records, including Petitioner's arrest report, an aided report, and the complaint report. By letter dated December 23, 2012, Petitioner appealed to Respondent the denial of access to a portion of the previously requested records. Respondent denied Petitioner's appeal on January 14, 2013.

In this October 13, 2012 letter, Petitioner also filed a request for access to "all videotape or DVD recordings" as well as the "chain of custody of said videos" relating to the January 8, 2005 Copacabana Night Club incident. On November 26, 2012, the Records Officer denied Petitioner access to such records on the basis of POL §87(2)(f), "as such records/information would endanger the life or safety of witnesses." Petitioner's appeal of the Record Officer's determination, dated December 5, 2012, was denied by Respondent on January 4, 2012, pursuant to POL §§ 87(2)(e)(i), 87(2)(b), 89(2)(a), and 87(2)(f) in that the release of records would "interfere with a judicial proceeding," "result in an unwarranted invasion of personal privacy," and "could endanger the life or safety of any person," respectively.

On December 23, 2012, Petitioner filed a request for twenty-six categories of records compiled under indictment number 179/05. The Records Officer denied Petitioner's request by letter dated February 1, 2013, in that the requested documents

were previously requested by Petitioner and were thus denied as a duplicative request. On February 11, 2013, Petitioner appealed the denial of access to these requested documents. Respondent denied Petitioner's appeal on April 4, 2013. Accordingly, Petitioner commenced this Article 78 proceeding on April 5, 2013.

Respondent asserts that upon receipt of the Article 78 Petition and upon learning of the conclusion of Petitioner's criminal appeal, it directed that a diligent search be conducted for records responsive to Petitioner's 2012 FOIL requests. Respondent indicates that it directed searches for records at the 10th Precinct, where Petitioner's arrest was processed, the 10th Precinct Detective Squad, the Detective Bureau Manhattan ("Night Watch") Squad, the Patrol Borough Manhattan South Specialized Unit, the Criminal Records Section and the records of the police officers who arrested Petitioner and his co-defendant.

Pursuant to this search, ten pages of responsive documents were located and access was provided to Petitioner, including: property clerk invoices #4677496 and #467497, Detective Kevin Cannon's memobook entry from 1/8/05, Sergeant Marc Burkhardt's memobook entry from 1/8/05, a Sprint Report, Complaint #2005-010-00140, and NYPD Arrest ID Form: M05602072.

An agency's obligations pursuant to FOIL §89(3) are satisfied when the agency certifies that the all responsive documents had been disclosed and a diligent search had been conducted for the requested documents it could not locate. (See *Matter of Rattley v. New York City Police Dept.*, 96 N.Y. 2d 873, 875 [1st Dept. 2001]). Public Officers Law §89(3) does not specify the manner in which an agency must certify that documents cannot be located, nor does it require a detailed description of the search conducted. (*Id.*) Furthermore, an agency is not required to provide documents that it does not possess or maintain, pursuant to §89(3). (*Matter of Davidson v. Police Dept. of City of N.Y.*, 197 A.D.2d 466, 467 [1st Dept. 1993]). When a Respondent produces records responsive to the Petitioner's FOIL request (even with minimal redactions) as part of a motion to dismiss an Article 78 proceeding or at any time during the pendency of litigation, along with a certification that certain specific requested records were not able to be located after a diligent search, the petition is rendered moot. *Matter of Taylor v. New York City Police Dept. FOIL Unit*, 25 A.D.3d 347 [1st Dept. 2006]; *Matter of Tellier v. New York City Police Dept.*, 267 A.D.2d 9, 10 [1st Dept. 1999]; *Matter of Malerba v. Kelly*, 211 A.D. 2d 479 [1st Dept. 1995]).

While Respondent *directed* a diligent search, Respondent fails to provide a certification that the records requested by Petitioner which were not provided were not able to be located after a diligent search.

Wherefore, it is hereby,

ORDERED and ADJUDGED that this Petition is remanded to Respondent to either provide the documents requested or to provide a certification that certain specific requested records were not able to be located after a diligent search.

This constitutes the decision and order of the court. All other relief requested is denied.



HON. EILEEN A. RAKOVER

Dated: October 2, 2013

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 1415).