

Matter of Dawkins v David

2010 NY Slip Op 30609(U)

March 18, 2010

Supreme Court, New York County

Docket Number: 401237/09

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
ALICE SCHLESINGER
Justice

LA PART 16
PART 16

In the Matter of
DAVID DAWKINS

-v-

JONATHAN DAVID, Records
Access Officer for NYC Police

INDEX NO.

401237/09

MOTION DATE

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 proceeding ~~is~~ is determined on an interim basis in accordance with the accompanying memorandum decision.

FILED

MAR 23 2010

NEW YORK
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MAR 18 2010

Dated: March 18, 2010

Alice Schlesinger

ALICE SCHLESINGER 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):

3-23-10

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

-----X

In the Matter of the Application of

DAVID DAWKINS,

Petitioner

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

-against-

JONATHAN DAVID, Records Access Appeals
Officer for the New York City Police Department,

Respondent.

-----X

SCHLESINGER, J.:

Petitioner David Dawkins, an incarcerated person representing himself, commenced this Article 78 proceeding to challenge the denial of his January 3 and January 7, 2009 requests for documents pursuant to the Freedom of Information Law (FOIL). Respondent New York City Police Department (NYPD) initially denied the requests, alleging that disclosure "would interfere with law enforcement investigations or judicial proceedings." (See February 5 and February 10 letters from respondent, Exh. 6 to Verified Answer). In response to Mr. Dawkins' administrative appeal, NYPD added three new grounds: that disclosure "would constitute an unwarranted invasion of privacy;" that it "could endanger the life or safety of any person;" and because it "would reveal confidential information." See March 30, 2009 letter from respondent, Exh. 8 to Verified Answer).

Rather than answer the petition in the first instance, NYPD cross-moved to dismiss this proceeding, claiming failure to exhaust administrative remedies and that the proceeding is time-barred. Both claims involved earlier FOIL requests made by Mr. Dawkins, which NYPD claimed were duplicative of the instant requests. Mr. Dawkins disagreed. By decision

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dated November 13, 2009, this Court reserved decision on the cross-motion to dismiss and granted Mr. Dawkins an opportunity to address case law cited by NYPD for the first time in its reply papers; that is, *Moreno v. NY County District Attorney*, 38 AD3d 358 (1st Dep't 2007), cited for the proposition that NYPD may deny a FOIL request on the ground that disclosure would interfere with a pending appeal.

Mr. Dawkins submitted his papers on December 10, 2009. There he argued that NYPD had failed to sustain its burden of proving that the claimed exemption applied, as he had filed his FOIL request after his trial had concluded and before he had filed any appeal. As to *Moreno*, Mr. Dawkins correctly noted that the decision cited to two prior First Department cases, *Matter of Legal Aid Society v. NY City Police Department*, 274 AD2d 207 (2000), *lv denied* 95 NY2d 956, and *Matter of Sideri v. Office of Dist. Attorney of NY County*, 243 AD2d 423 (1997), *lv denied* 91 NY2d 808 (1998). Both of those cases were readily distinguishable from the case at bar, Dawkins asserted, because they involved requests for actual trial evidence made before the trial had been concluded, whereas the documents he seeks had not been admitted into evidence at his trial and the trial had, in any event, concluded. He ended by urging this Court to conduct an *in camera* inspection to assist in determining whether any basis existed for the exemption claimed by NYPD.

Thereafter, NYPD filed a Verified Answer to the Petition, dated January 19, 2010. It maintained its position that the requested disclosure would interfere with Mr. Dawkins' then pending appeal of his January 6, 2009 conviction after trial for violation of a family court order of protection. The order of protection had been obtained by a woman with whom Mr. Dawkins had previously lived and had a child. (Ans, ¶16). NYPD further claimed that disclosure would interfere with Mr. Dawkins' federal *habeas corpus* proceeding pending in

the Eastern District since September 2009. Lastly, NYPD contended that: "Disclosure would also endanger the lives (sic) and safety of the victim, and would represent an unwarranted invasion of privacy to the victim." (Ans. ¶15). No further details were provided about the status of the appeal (e.g., has it been submitted or is it yet to be perfected), or how disclosure would actually interfere with that proceeding.

Particularly significant is the statement by NYPD's counsel (Ans ¶27) that a diligent search was conducted for the documents at issue when this proceeding was first commenced in 2009, notwithstanding NYPD's motion to dismiss. At that time, fifteen (15) pages of records were located responsive to Mr. Dawkins' FOIL requests, described as follows:

The records include the two (2) pages of the Complaint Report, one (1) page of Complaint Index, two (2) pages of the Arrest report, four (4) complaint report follow-ups resulting in six (6) pages, three (3) pages of Domestic Incident Reports ("DIR"), and one (1) page of Index Sheet.

This assertion was confirmed by Sergeant James Russo in his January 19, 2010 affidavit provided with the Answer. NYPD then agreed to the *in camera* inspection suggested by Mr. Dawkins, while maintaining "the invocation of exemptions as prescribed by FOIL." (Ans. ¶30).¹

In his February 1, 2010 reply papers, Mr. Dawkins explained the compelling reasons behind his FOIL requests: he believes that the testimony of his accuser at trial as to the time of the alleged incident differed from the accuser's initial claim, which specified a time when

¹In its memorandum of law, NYPD claims an additional exemption not mentioned in the denial letters or the determination of the appeal, i.e., that disclosure would reveal nonroutine criminal investigative techniques. It seems that each time Mr. Dawkins challenges a claimed exemption, NYPD responds by asserting new ones.

Mr. Dawkins confirmed that he was at school and nowhere near his accuser. As most of the requested documents had not been admitted into evidence at trial, since the trial had concluded well over a year ago and the record on appeal was therefore set, and since the *habeas* proceeding did not implicate any of the requested documents, the requested disclosure would not interfere with the pending proceedings, he asserted.

This Court is well aware of the appellate authority holding that “the assertion that disclosure of records to a defendant in a pending criminal prosecution would interfere with that proceeding is a sufficiently particularized justification for the denial of access to those records under Public Officers Law §87(2)(e)(l)...” *Legal Aid Society*, 274 AD2d at 214. But as Mr. Dawkins properly argues, that seemingly broad statement is limited by the balance of the sentence, which states the rationale for the holding: “as the Court held in *Matter of Pittari v Pirro* (258 AD2d 202, *supra*), FOIL disclosure during the course of the prosecution would not only ‘interfere with the orderly process of disclosure’ set forth in CPL article 240 (*supra* at 206), it would also create a substantial likelihood of delay in the adjudication of that proceeding (*supra*, at 207), thereby effecting a chill on that prosecution (*supra*, at 206).” Referencing *Gould v NYC Police Dept*, 89 NY2d 267, 274, the Court added in a footnote that “the orderly process of disclosure” was not a consideration where the criminal proceedings had all been concluded.

Moreno, relied upon by NYPD here, must be construed in that context to mean that the disclosure must at least have the potential of interfering with ongoing discovery or some other aspect of a pending proceeding. Moreover, one cannot overlook that the discussion in *Moreno* about the merits of the claimed exemption was *dicta* only. The Court affirmed the dismissal of the petition on the ground that the petitioner had failed to timely file an administrative appeal and then added:

In any case, were we to reach the merits, we would affirm because disclosure of the sought material would have interfered with petitioner's then still pending criminal appeal and any subsequent proceedings within the same prosecution ..., and because some of the sought documents were within the scope of a continuing protective order issued to ensure the safety of DEA agents, informants and witnesses ..., and finally because disclosure of the sought nondiscovery materials in respondent's files would give rise to the same safety concerns underlying the protective order

38 AD3d at 358-59 (citations omitted).

Turning to the case at hand, it is undisputed that discovery has been completed, and the trial concluded well over a year ago. Further, petitioner asserts (at ¶9 of Dec. 10, 2009 papers), and NYPD does not dispute, that none of the requested documents were presented as evidence at the trial. Thus, they presumably are not part of the record on appeal. Moreover, and most significantly, NYPD has already compiled copies of the documents in its files and can easily photocopy them for Mr. Dawkins without interfering with any proceeding. Therefore, it appears that the rationale behind the claimed exemption does not apply here at all.

Nevertheless, the Court will not direct complete disclosure at this time without first giving NYPD a final opportunity to be heard. Accordingly, the Court directs that NYPD send the fifteen pages of documents it located to this Court for an *in camera* inspection. The documents shall be accompanied by an affidavit from an Assistant District Attorney explaining how the disclosure of the fifteen pages already compiled by NYPD would interfere with judicial proceedings in this particular case. Further, NYPD should specify any proposed redactions based on concerns relating to the privacy or safety of the accuser, even though

[* 7]

those grounds were asserted by NYPD for the first time on appeal. Before proposing a specific redaction, NYPD shall confirm that the subject information was not previously disclosed at trial. Any claimed privacy or safety exemption would be baseless if the information was disclosed orally or in writing at the trial. The information shall be provided within 30 days of the date of this decision. Upon receipt of the information, this Court will determine the outstanding issues.

This constitutes the interim decision and order of this Court.

Dated: March 18, 2010

MAR 18 2010



J.S.C.
ALICE SCHLESINGER

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