

<b>Matter of Echevarria v Roque</b>
2011 NY Slip Op 31875(U)
July 6, 2011
Supreme Court, New York County
Docket Number: 400646/11
Judge: Barbara Jaffe
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Jaffe BARBARA JAFFE  
*Judge*

PART 5

Edwin Echevarria

INDEX NO. 400646-11

MOTION DATE \_\_\_\_\_

- v -

Susan C. Roque  
Patricia J. Bailey, A.B.A.

MOTION SEQ. NO. 001

MOTION CAL. NO. 35

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Article 78

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

Answering Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1</u>
<u>2</u>

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: 7/6/11  
JUL 06 2011

[Signature]  
BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X

In the Matter of the Application of EDWIN ECHEVARRIA,

Index No. 400646/11

Petitioner,

Motion Date: 3/11/11  
Motion Seq. No.: 001

FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES,

DECISION AND JUDGMENT

-against-

**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).

SUSAN C. ROQUE, A.D.A., PATRICIA J. BAILEY, A.D.A.,

Respondents.

-----X

BARBARA JAFFE, JSC:

**For petitioner, self-represented:**  
Edwin Echevarria, #03A0070  
Upstate Correctional Facility  
309 Bare Hill Road  
P.O. Box 2001  
Malone, New York

**For respondents:**  
Britta Gilmore, Esq., ADA  
Cyrus R Vance Jr.  
District Attorney  
New York County  
One Hogan Place  
New York, New York 10013  
212-355-9000

By order to show cause dated February 10, 2011, and verified petition dated December 13, 2010, petitioner brings this CPLR Article 78 proceeding to challenge respondents' failure to respond to his Freedom of Information Law (FOIL) request.

By verified answer dated April 22, 2011, respondents oppose the petition on the grounds that: (1) petitioner's claim is moot as respondents served timely responses to his FOIL request on

petitioner at his last known address; and (2) petitioner already received a copy of and possesses the documents he seeks. (Ans.).

### I. BACKGROUND

On July 9, 2002, petitioner was convicted of one count of first-degree murder and related counts. (Ans.). On December 13, 2010, he submitted a *pro se* FOIL request to respondent Roque, FOIL Officer at the New York District Attorney's (DANY) office, requesting documentation of the criminal action against him, specifically a copy of "The State of New York's Claim against Edwin Echevarria." (*Id.*, Exh. A). Having received no response from respondents, on January 13, 2011 petitioner submitted a letter appealing what he deemed the constructive denial of his previous request. (*Id.*, Exh. B). In both his first request and subsequent appeal, petitioner listed a mailing address that differs from his present address.

By letter dated February 22, 2011, Roque denied the request on the grounds that petitioner failed to specify which documents he was seeking and that, to the extent he was requesting documents related to the criminal case against him, they had already been provided to him during the criminal proceeding. (*Id.*, Exh. C). In a letter dated February 23, 2011, DANY's FOIL Appeals Officer denied that petitioner's request had been constructively denied and denied his appeal. (*Id.*, Exh. D). Both letters were sent to the address set forth in his letters.

Petitioner then commenced the instant Article 78 proceeding. The affidavit of service amended to his petition reflects his new address. (*Id.*, Exh. E).

### II. ANALYSIS

Generally, all agency records under FOIL are presumptively available for public access, inspection or use, unless such records fall within one of eight categories of exemptions. (*See Public Officers Law* § 87[2]). An agency may not withhold information it chooses, but must

state with particularity and list specific justifications for withholding information from the party seeking access to it. (*Matter of Moore v Santucci*, 151 AD2d 677 [2d Dept 1989], citing *Matter of Fink v Lefkowitz*, 47 NY 2d 567, 571 [1979]).

A FOIL request may be approved even if disclosure was available to the petitioner through some other discovery device or during a criminal proceeding. (*Matter of Moore*, 151 AD2d at 678). However, if the petitioner possesses the requested documents, a court may uphold the agency's rejection of the FOIL request. (*Id.*). The agency has the burden of showing that the petitioner has actual possession of the documents and is satisfied upon proof that a copy of the requested documents was previously provided to the petitioner or his attorney. (*Id.*).

Here, as respondents served their responses to petitioner's December 13 FOIL request and subsequent appeal on petitioner at the address set forth in the request, petitioner's claim that respondents failed to respond to the requests is dismissed as moot.

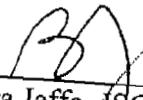
Moreover, absent any indication that petitioner does not possess or did not already receive the documents he seeks, respondents have established that they did not improperly deny his FOIL request. (*See eg Matter of Kassebaum v Morgenthau*, 270 AD2d 71 [1<sup>st</sup> Dept 2000], *lv denied* 95 NY2d 756 [denying FOIL request to compel criminal court records as petitioner did not show that requested documents, which were made available during criminal trial, were no longer in his or attorney's possession]; *Matter of Brightley v Lai*, 266 AD2d 131 [1<sup>st</sup> Dept 1999] ["Petitioner failed to meet his burden of establishing by admissible evidence that the documents requested had not been provided to the attorney who had represented him at his criminal trial or that they were no longer available to petitioner"]).

### III. CONCLUSION

Accordingly, it is hereby

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

ENTER:

  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: July 6, 2011  
New York, New York

JUL 0 6 2011

**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).