

Matter of Waters v New York City Police Dept.

2011 NY Slip Op 30742(U)

March 25, 2011

Supreme Court, New York County

Docket Number: 402740/10

Judge: Saliann Scarpulla

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

PRESENT: SCARPULLA
Justice

PART 19

KEITH WATSON

- v -

NYC POLICE DEPT

INDEX NO.

402740/10

MOTION DATE

MOTION SEQ. NO.

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

Petition

motion and cross-motion are decided in accordance with accompanying memorandum decision.

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: 3/25/11

Paranip Scarpulla
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: CIVIL TERM: PART 19

-----X
IN THE MATTER OF THE APPLICATION OF
KEITH WATERS,

Petitioner,
-against-

Index No.: 402740/10
Submission Date: 1/19/11

NEW YORK CITY POLICE DEPARTMENT,

DECISION AND ORDER

Respondent.

-----X
Petitioner, *pro se*:
Keith Waters, #06-A-2999
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051

For Respondent:
Michael A. Cardozo, Corporation Counsel of the City of N.Y.
100 Church Street
New York, NY 10007

UNFILED JUDGMENT

Papers considered in review of this petition and cross motion 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).

Petition 1
Notice of Cross Motion 2, 3
Reply 4

HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner Keith Waters (“Waters”) challenges the determination of respondent New York City Police Department (“NYPD”) on June 14, 2010, denying in part his Freedom of Information Law (“FOIL”) appeal. The NYPD cross moves to dismiss the petition.

Waters is an inmate currently incarcerated at the Coxsackie Correctional Facility. By letter dated November 30, 2009, Waters made a FOIL request to the NYPD seeking the following records: “(a) Patrol Supervisor Responsibilities/Duties[;] (b) Patrol Guide

Procedure 104-01[;] (c) Activity Log Distribution Record for the following Memo Books: A 362408 & A 390312[; and] (d) Log Distribution Procedure (A.G.322-31).” The FOIL request also stated “I am willing to pay for the records requested, and therefore request that your agency certify to the correctness of such records in accordance with provision 3(a).”

The NYPD Legal Department responded to the FOIL request in a letter dated April 6, 2010, stating that the document “Activity log PG 322-31, Patrol Supervisor PG 202-17” was “accessed and/or photocopied.” The April 6, 2010 letter further provided that the FOIL Unit “conducted a diligent search for [PG 104-01] which could not be found.” The letter concluded by informing Waters that three pages had been copied for him, and would be mailed to him upon receipt of \$0.75 payment, and provided Waters with instructions for the appeal procedure.

By letter dated April 16, 2010, Waters appealed the April 6, 2010 FOIL Unit response. Waters premised his appeal “on the grounds that the agency has not complied with the original FOIL request.” Waters further states that “[t]he Administrative Guide (A.G.) and Patrol Guide (P.G.) are separate manuals maintained by the department that contains [sic] policy and procedure relating to patrol supervisors, as well as activity log distribution. These records fall under the original request to which the agency has not offered access.”

The NYPD responded in a letter dated June 14, 2010, from Jonathan David ("David"), a Records Access Appeals Officer, which purports to respond to Waters letters of March 22, 2010, April 8, 2010 and April 16, 2010. The June 14, 2010 letter provides that the "appeal is granted only to the extent that disclosure of Patrol Guide Section 104-01 (item 'b' of your November 20, 2009 FOIL request) is now authorized. The remainder of your appeal is denied."

The June 14, 2010 letter further provides that, "[w]ith regard to items 'a' and 'd,' the appeal is denied as moot because the RAO already made available patrol Guide Section 202-17, entitled Patrol Supervisor, and Admin. Guide Section 322-31, entitled Activity Log Distribution Record, which are responsive to your request."

Addressing item "c" of the November 30, 2009 request, David denied the part of item "c" which requests "Activity Log Distribution Record for Memo Book 'A 390312,'" as duplicative of prior FOIL request numbers 07PL100650, 07PL100743, and 08PL100996, which were the subject of an Article 78 proceeding, in this Court, Index No. 400737/08 (Madden, J.). In addition, the appeal by Waters of the part of item "c" requesting an Activity Log Distribution Record for Memo Book "A 362408" was denied "because the request was too broad in that it failed to reasonably describe a record in a manner that can lead to its retrieval, as required by Public Officers Law Section 89(3), for the same reasons previously explained to you in the undersigned's April 16, 2007

administrative appeal determination of you related FØIL request numbers 07PL100650, 07PL100743, and 08PL100996.”

David concluded the June 14, 2010 letter by stating that the three pages the RAO had previously authorized along with the twelve pages authorized by the partial grant of the appeal, would be mailed to Waters upon receipt of payment for copying expenses in the amount of \$3.75.

Waters commenced this special proceeding on or about September 29, 2010, challenging the June 14, 2010 determination of the NYPD RAO. He argues first that the NYPD failed to “certify to the correctness of the documents released in accordance with Public Officers Law section 89(3-a) after petitioner remitted full payment.” Waters also asserts that the Command Activity Log Distribution Records he seeks are not duplicative of the requests at issue in his prior Article 78 proceeding, and that he reasonably described the records sought. Waters further asserts that the NYPD willfully concealed and withheld disclosure in violation of Section 89(8) of the Freedom of Information Law.

In opposition, the NYPD cross moves to dismiss the petition, on the grounds that (1) a portion of the petition fails to state a claim upon which relief may be granted as Waters failed to reasonably describe a portion of the records he was requesting, which constitutes a failure to comply with a condition precedent under Public Officer’s Law §89(3); (2) a portion of the relief sought is time-bared and barred by *res judicata*; and (3) the remainder of the petition is moot as the remainder of the records have been

disclosed to Waters. In regard to this third argument, the NYPD states that on November 30, 2010, counsel mailed to Waters certified copies of responsive Patrol Guide Procedures, "General Regulations," Patrol guide Procedure 202-17, "Patrol Supervisor" and Administrative Guide Procedure 322-31, "Activity Log Distribution Record." Waters does not contest this, and accordingly the portion of his petition seeking certified copies of these documents is denied as moot.

In opposition to the cross motion to dismiss (titled "Reply Affirmation to Motion to Dismiss"), Waters asserts that the NYPD's argument that his request is not reasonably described is arbitrary and capricious. Waters also argues that his request for memobook A 390312 is not duplicative of the request at issue in his prior Article 78 proceeding, as the request at issue there was for records bearing serial numbers A 390500 through A 390599, and not A 390300 through A 390399.

Discussion

It is well settled that judicial review of an administrative determination pursuant to CPLR Article 78 is limited to a review of the record before the agency and the question of whether its determination was arbitrary or capricious and has a rational basis in the record. See CPLR §7803(3); *Gilman v. N.Y. State Div. of Hous. & Community Renewal*, 99 N.Y.2d 144 (2002); *Nestor v. New York State Div. of Hous. & Community Renewal*, 257 A.D.2d 395 (1st Dep't 1999). "In short, '[j]udicial review of an administrative determination is limited to the grounds invoked by the agency.'" *Matter of Rizzo v.*

DHCR, 6 N.Y.3d 104, 110 (2005) (quoting *Matter of Aronosky v. Board of Educ., Community School Dist. No. 22 of City of N.Y.*, 75 N.Y.2d 997, 1000 (1990)). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken ‘without sound basis in reason and without regard to the facts.’” *Matter of Rohan v. New York City Housing Authority*, 2009 NY Slip Op 30177U, at *6-*7 (Sup. Ct. N.Y. Co. Jan. 23, 2009) (quoting *Matter of Pell v. Board of Education*, 23 N.Y. 2d 222,231 (1974)).

In regards to a FOIL request, “Public Officers Law §89(3) places the burden on petitioner to reasonably describe the documents requested so that they can be located.” *Mitchell v. Slade*, 173 A.D.2d 226, 227 (1st Dep’t 1991). See also *Matter of Roque v. Kings County District Attorney’s Office*, 12 A.D.3d 374, 375 (2d Dep’t 2004) (Public Officers Law §89(3) requires a “written request for a record reasonably described.”) Here, the NYPD held, in its June 14, 2010 letter, that Waters failed to reasonably describe Activity Log Distribution Record for Memo Book A 362408, as “it failed to reasonably describe [the] record in a manner that can lead to its retrieval.” Also in the June 14, 2010 letter, the NYPD referred to and attached a copy of its April 16, 2007 letter, which explains that a prior request for memo-book serial number records was denied because the request was determined to be too broad “in that it did not provide a sufficient description of the requested records . . . [as Waters] would need to identify the precinct in which the memo books were issued.”

In the request at issue, Waters fails to identify the precinct in which the memo book was issued. Waters argues that such information is not necessary for the NYPD to locate the records he requested and that the determination by the NYPD to refuse his request on this ground is arbitrary and capricious. Under Article 78, however, judicial review of an administrative determination is limited to the evaluation of whether the determination is consistent with lawful procedures, whether it is arbitrary or capricious, and whether it is a reasonable exercise of the agency's discretion. A court cannot simply substitute its judgment for that of an administrative agency when the agency's determination is reasonable. *District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO, et al., Appellants, v City of New York, et al.*, 22 A.D.3d 279, 283-284 (1st Dept. 2005). Here, Waters' argument that the NYPD should be able to locate the requested records without his provision of the precinct number, as he was told was required, is without merit, and fails to show that NYPD's decision was arbitrary and capricious, contrary to the law, without sound basis in reason or in disregard of the facts.

The other basis for denial of Waters' appeal was that his request was duplicative of prior requests to the NYPD, and already addressed in a prior Article 78 proceeding. Waters, relying on footnote 3 in his prior Article 78 proceeding, argues that "Justice Madden found that respondent conducted a search of records bearing serial numbers A 390500 through A 390599 not A 390300 through A390399." *See Waters v. NYPD*, Index

[* 9]

No. 400737/2008 (Sup. Ct. N.Y. Cp. 2009) (Madden, J.). The Court does note in footnote 3 that "in its January 14, 2008 letter, the NYPD states that it was not able to find records memo-books bearing the serial numbers A390500 through A390599, while in his request, petitioner requested records relating to memo-books with serial numbers ending in 300 through 399." However, Waters' request for records relating to memo-books with serial numbers A 390300 through A 390399 was the subject of FOIL requests 07PL100650, 07PL101698, and 07PL102776, as well as Waters' January 17, 2008 joint appeal of these and other FOIL requests, all of which were at issue in the prior Article 78 proceeding. This request is clearly duplicative, and Waters has submitted no evidence to suggest that the NYPD's determination was arbitrary and capricious.

In accordance with the foregoing it is

ORDERED and ADJUDGED that petitioner Keith Waters' petition is denied; and it is further

ORDERED that respondents New York Police cross motion to dismiss the petition is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
March 25, 2011

ENTER:


Saliann Scarpulla, J.S.C.

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).