

Matter of Waters v New York City Police Dept.

2011 NY Slip Op 32084(U)

July 25, 2011

Sup Ct, NY County

Docket Number: 400416/11

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
Justice

IA PART 16

Kerth Waters
- v -
Nyc Police Dept.

INDEX NO. 400416/11
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 ^{cross-} motion by respondent to dismiss is granted and the Article 78 petition is denied and the proceeding is dismissed in accordance with the 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).

JUL 25 2011

Dated: July 25, 2011

Alice Schlesinger
ALICE SCHLESINGER

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

-----X

In the Matter of the Application of
KEITH WATERS,

Petitioner,

Index No. 400416/11
Motion Sequence 001

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

-against-

NEW YORK CITY POLICE DEPARTMENT

Respondent.

UNFILED JUDGMENT

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-----X

SCHLESINGER, J.:

Petitioner Keith Waters, an incarcerated person representing himself, commenced this Article 78 proceeding to compel the New York Police Department (NYPD) to provide the documents requested in his two requests made pursuant to the Freedom of Information Law (FOIL). The NYPD has cross-moved to dismiss on the ground that the requests are moot because some of the documents have been provided and others could not be located after a diligent search was conducted. Mr. Waters has confirmed receipt of the cross-motion but has declined to respond to it.

Background Facts

By letter dated June 3, 2010, Mr. Waters filed a FOIL request for "the activity log book in the possession of patrolman Brunetti on September 15, 2005 [including] the cover page, front and back of September 15th -16th entry pages, and distribution record page." In the request, Mr. Waters explained that Officer Brunetti and his partner Officer Pagnotta had responded to a radio run at 35 Lexington Avenue, Brooklyn, NY, when Waters was presumably arrested. (Petition Exh A).

When he did not receive the records, Waters treated the matter as a "constructive denial" of his request and filed an appeal by letter dated July 5, 2010. (Exh B). NYPD responded by letter dated July 30, 2010 informing Waters that although the agency had not located the original request letter, it did search for the records upon receiving the appeal with negative results. (Exh C).

At some point thereafter, NYPD realized that it had mistakenly searched for the activity log of Officer Pagnotta and not the log belonging to Officer Brunetti, so a new search was conducted. (Aff in Support of Cross-Motion, ¶15, and Exh 2). Since the commencement of this proceeding in February 2011, five pages responsive to Mr. Waters' request were located and sent to Mr. Waters on May 2, 2011. Those pages consisted of the cover page and the entries dated September 15 and 16, 2005. The copies of the entries had minimal redactions to protect certain information in files that had been sealed pursuant to Criminal Procedure Law §160.50. (Exh 3). The requested distribution record page could not be located.

Also at issue in this proceeding is a second FOIL request made by Mr. Waters by letter dated August 23, 2010. (Exh E). There he requested five items: (1) Patrol Borough Brooklyn North Command Activity Log Distribution Record; (2) 88th Precinct Command Activity Log Distribution Record; (3) Quartermaster Report of Activity Log Books issued to Patrol Borough Brooklyn North Command; (4) Quartermaster Report of Activity Log Books issued to 88th Precinct; and (5) Quartermaster Report of missing Activity Logs. All the requested items related to the following periods of time: January 21-25, 2005; January 12-14, 2005; June 21-23, 2005; June 12-14, 2005; and June 7-9, 2006.

NYPD acknowledged the request by letter dated September 21, 2010 and explained that more time was needed to complete the search due to heavy volume. (Exh F). Nevertheless, Waters treated the response as a constructive denial and appealed by letter dated December 29, 2010. (Exh G). After this proceeding was commenced, NYPD notified Waters that it had completed a "diligent search" for the requested documents with "negative results." (Exh 3).

Discussion

NYPD has cross-moved to dismiss this proceeding on various grounds. First it asserts that the proceeding is barred by Mr. Waters' failure to exhaust his administrative remedies and await the determination of his appeal before commencing this proceeding. However, as NYPD did determine the administrative appeal after this proceeding was commenced, this Court will entertain the merits.

With regard to Mr. Waters' first FOIL request, NYPD argues that the matter is moot as the agency has provided all records that it was able to locate with minimal redactions. The redactions are justified by Criminal Procedure Law §160.50, and Mr. Waters has not challenged them, although given an opportunity to do so.

With regard to the one page that could not be located relative to the first request, and with regard to the various pages that could not be located relative to the second request, NYPD has certified that it conducted a diligent search with negative results. Public Officers Law §89 (3) requires that the NYPD "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." In *Rattley v. N.Y. City Police Dep't*, 96 N.Y.2d 873 (2001), the Court of Appeals reversed the First Department and held that a general certification by the NYPD that a diligent

search had been conducted with negative results was sufficient evidence to establish compliance with FOIL. Again, while given an opportunity to challenge the search that was conducted, Mr. Waters has declined to do so.

Based on these facts and circumstances, NYPD has established its right to the dismissal of this proceeding.

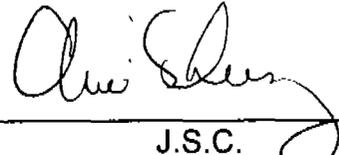
Accordingly, it is hereby

ORDERED that NYPD's cross-motion to dismiss is granted and this proceeding is dismissed without costs or disbursements; and it is further

ADJUDGED that the Article 78 petition is denied.

Dated: July 25, 2011

JUL 25 2011



J.S.C.

ALICE SCHLESINGER

UNFILED JUDGMENT

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