

Matter of McKelvey v Bailey

2011 NY Slip Op 30700(U)

January 24, 2011

Sup Ct, NY County

Docket Number: 401960/2010

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

In the Matter of the Application of
PHILLIP McKELVEY,

Petitioner,

-against-

Appeals Officer and Assistant District Attorney
PATRICIA BAILEY, of the New York County
District Attorney's Office,

Defendant.

INDEX NO. 401960/2010

MOTION DATE Sept. 30, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this petition pursuant to Article 78

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

3

4

Cross-Motion: Yes No

Upon the foregoing papers, the petition pursuant to CPLR Article 78 is held in
abeyance pending a determination of the Court's in camera review of documents produced
pursuant to petitioner's FOIL request in accordance with and for the reasons stated in the
accompanying decision and order.

FILED

MAR 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 24, 2011

O. PETER SHERWOOD
O. PETER SHERWOOD, 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 61**

-----X

In the Matter of the Application of

**DECISION AND
ORDER**

PHILLIP McKELVEY,

Petitioner,

Index No. 401960/2010

**For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules**

-against-

FILED

**Appeals Officer and Assistant District Attorney
PATRICIA BAILEY, of the New York County
District Attorney's Office,**

MAR 07 2011

Respondent.

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X

O. PETER SHERWOOD, J.:

Petitioner Phillip McKelvey, an incarcerated person representing himself, commenced this Article 78 proceeding to challenge the denial by respondent New York District Attorney's Office (the "DA") of his request for documents pursuant to the Freedom of Information Law ("FOIL") on January 10, 2010, and the denial of his administrative appeal dated March 8, 2010. Respondent has answered, seeking dismissal of the proceeding.

On December 13, 2007, petitioner was convicted under Indictment No. 4080/2006, upon a jury verdict, of two counts of rape in the first degree, one count of attempted rape in the first degree, four counts of criminal sexual act in the first degree and three counts of sexual abuse in the first degree and sentenced, as a persistent violent felony offender, to an aggregate term of 75 years to life. The crimes charged were related to three separate sexual assaults committed in Harlem in July 2005 and May 2006. Defendant is presently incarcerated at the Attica Correctional Facility serving his sentences. On January 8, 2008, petitioner filed a timely Notice of Appeal. The appeal was perfected on or about June 15, 2010, and calendared for the November 2010 term of the Appellate Division, First Department.¹

¹On December 9, 2010, while this Article 78 proceeding was pending, the Appellate Division, First Department unanimously affirmed the petitioner's judgment of conviction (*see People v McKelvey*, ___ AD3d ___, 911 NYS2d 627 [1st Dept 2010]).

By letter dated September 19, 2009, petitioner requested from the DA information pursuant to FOIL listed under broad categories as follows: (1) prosecution case file, including notes, legal memoranda, radio run reports, CB transmissions and Sprint tapes concerning a May 26, 2006 sexual assault; (2) investigative files, including interviews, police reports, memo books and statements concerning the night of May 26, 2006 and felony complaint #663009 ; (3) appeal files, including the motion papers, legal memorandum and court's decision of his motion; and (4) prosecution and investigative files, including any and all paperwork concerning complaint #663009 (Exh. "A" to Verified Answer).

In another letter, petitioner clarified his FOIL request by stating that his request was "unique" as he was only seeking police transcripts and pictures related to a follow-up investigative interview with the complainant in one of the attacks charged and such complainant's daughter, in which the date of one of the sexual assaults was changed from June 23, 2006 to May 26, 2006. The latter date is also the date that said complainant, in her trial testimony, stated the attack occurred. The complainant also testified that on May 26, 2006, the crime was reported to the police who then drove her around in the area of the crime scene searching for the assailant (Exh. "B" to Verified Answer).

Petitioner's FOIL request was denied by the DA in a letter dated January 20, 2010, on various grounds. First, relying on Public Officers Law § 87 [2][e][1] and various cases decided pursuant to this provision, the DA stated that the documents requested were exempt from disclosure because petitioner's appeal from his conviction was pending and disclosure of such material "would interfere with handling of the appeal as well as with any further investigation that might be necessary." The DA then addressed petitioner's specific requests stating that: (1) petitioner was not entitled to the notices he requested or investigator reports and notes containing statements of witnesses who testified at trial as such materials were previously provided to him and his attorney and he has not shown that they are no longer available; (2) the DA, after conducting a diligent search of the case file, did not find the requested documents; (3) the witness statements sought are protected by the public interest privilege; (4) statements of non-testifying witnesses are confidential and not discoverable; and (5) disclosure of witness statements sought would constitute an unwarranted invasion of personal privacy and potentially endanger the witnesses (Exh. "C" to Verified Answer).

By letter dated February 12, 2010, acknowledging receipt of the DA's denial of his FOIL request, petitioner claimed that such denial "was based upon an error in [his] presentation of the facts surrounding the documents" that he sought (Exh. "D" to Verified Answer). Petitioner contended that in his FOIL application he "simply requested a copy of the Amended or Superseding complaint deriving from Arrest report #5064 and local criminal court complaint #663009 along with supporting deposition." He further averred that if the criminal complaint #663009 was superseded with another complaint he was entitled to receive a copy of said superseding complaint. Petitioner further asked the DA to re-evaluate his request for radio runs, CB transmissions, Sprint Tapes, witness statements, and police reports of the May 26, 2006 sexual assault in light of the change in the date of occurrence as originally reported (*id.*).

The DA, by letter dated March 8, 2010, acknowledged receipt of petitioner's appeal, and reaffirmed its prior decision, stating that there was no amended or superseding complaint in the subject action and, therefore, the request must be denied as the DA cannot provide what it does not possess or which does not exist (Exh. "E" to Verified Answer).

Petitioner *pro se* then commenced this Article 78 proceeding in July 2010 contending that the DA's denial of his FOIL request was made in violation of his constitutional and statutory rights to be informed of the nature and cause of the accusation. Such argument is apparently predicated on the fact that the date of a sexual assault charged in the original criminal complaint was June 23, 2006, but was later changed to May 26, 2006, based upon the complainant's subsequent statement.

In response, the DA asserts that petitioner, in his letter dated February 12, 2010, appealing the DA's denial of his FOIL request, expressly limited the scope of his appeal to his request for an amended or superseding complaint derived from arrest report #5064 and local criminal complaint #663009. Thus, the DA argues that petitioner has waived his right to judicial review of the remainder of the items requested. As to the item which was reviewed on the administrative appeal and, therefore, properly before the court, the DA again contends that it cannot be compelled to produce material which never existed.

Petitioner replies that reference to his letter appealing the DA's determination of his FOIL request makes clear that he was not limiting his appeal to a request for a superseding complaint, but was also re-visiting his other requests which were denied by the DA. Petitioner contends that statements alluded to during a probable cause hearing as to the reason the date of the occurrence was

changed from June 23, 2006 to May 26, 2006, should have been provided to his attorney as Rosario material. He challenges the DA's basis for the denial contending that the date of the occurrence was changed only after his alibi for the original date of June 23, 2006 was confirmed with a video surveillance tape and that said date was changed without permission of the court. Petitioner contends further that the DA's contention that certain material concerning witness' statements does not exist is contradicted by ADA C. Arguello's statement during the probable cause hearing referring to investigations of other witnesses that were allegedly not relevant to that hearing. With respect to the DA's contention that the disclosure of the requested material would interfere with the pending appeal, petitioner asserts that the material he seeks was never turned over to his attorney as Rosario material and, therefore, is not part of the existing record on the appeal.

As a threshold issue, the court finds that the DA, in claiming that petitioner limited his administrative appeal and, consequently, judicial review of his FOIL request to the alleged superseding complaint, gives an overly limited reading to petitioner's February 12, 2010 appeal letter. Although petitioner sought to clarify the material he was seeking, he also briefly addressed in the letter other items of his FOIL request. Specifically, petitioner asked the DA to review his request for copies of radio runs, CB transmissions, Sprint tapes, police reports, memo books, and witnesses' statements concerning the sexual assault of May 26, 2006. Thus, although the DA did not address the latter request in its decision on the administrative appeal, the court finds that petitioner has properly preserved for this court's review the DA's determination as to these other items of petitioner's FOIL request.

Under FOIL, agency records are presumptively open for public inspection and copying unless a statutory exemption applies (*see Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-275 [1996]; *Bellamy v New York City Police Dept.*, 272 AD2d 120, 123 [1st Dept 2000]). Such exemptions are to be narrowly construed, with the burden resting on the governmental agency to provide particularized and specific reasons to justify the applicability of the exemption upon which it relies (*see Matter of Citizens for Alternatives to Animal Labs, Inc. v Bd. of Trustees of the State Univ. of New York*, 92 NY2d 357, 362 [1998]; *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 346 [1st Dept 1999]). Disclosure may not be denied on the basis of the identity of the person requesting disclosure even if that person is the individual who has been convicted of the very

crime to which the documents sought pertain (*see Matter of M. Farber & Sons, Inc. v New York City Health & Hosps. Corp.*, 62 NY2d 75, 82 [1984]; *Matter of Johnson*, 257 AD2d at 346).

Public Officers Law § 87 (2) (e) (i) exempts from disclosure those records or portions of records that “are compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings.” The Appellate Division, First Department in the case of *Moreno v New York County District Attorney's Office* (38 AD3d 358 [2007]), citing this provision as well as prevailing caselaw, upheld the denial of a FOIL application on the ground that “disclosure of the sought materials would have interfered with petitioner’s then pending criminal appeal and any subsequent proceedings within the same prosecution” (*id.* at 358). Here, it is undisputed that at the time he made his FOIL request, petitioner had a pending criminal appeal. However, petitioner contends that the information he seeks was not provided to him or his attorney or presented as evidence at trial. Thus, presumably, such material is not part of the record on appeal and the claimed exemption would not apply (*see Matter of Dawkins v David*, 2010 WL 1219506 [Sup Ct, NY Co. 2010]).

However, balanced against the public interest in broad disclosure of agency records is the competing interest of witnesses’ safety and privacy. These concerns are reflected in Public Officers Law § 87 (2)(b) which permits an agency to deny access to a document, or portion of a document, if disclosure would result in an unwarranted invasion of personal privacy. Here, the DA in denying petitioner’s FOIL request cited as grounds therefor the personal privacy and safety exemption, as well as the public interest privilege, the latter of which protects statements made by a witness to prosecutors absent a showing of a compelling and particularized need therefor (*see Chebere v Johnson*, 3 AD3d 365 [1st Dept 2004]; *Matter of Kassebaum v Morgenthau*, 270 AD2d 71 [1st Dept 2000]). Petitioner’s request is based upon the change of the date of one of the sexual assaults of which he stands convicted from June 23, 2006 to May 26, 2006. Certainly, the petitioner has a significant interest in being advised of the specifics of the crimes of which he is charged and having access to information which may raise questions as to reliability of the evidence leading to his conviction. While the respondent has detailed the specifics of the crimes with which the petitioner was convicted as support for the privacy and safety exemption, it has not shown how the documents would further endanger the witnesses who testified at trial and whose identities are known. To the

extent that the subject information was revealed in testimony at a probable cause hearing or at trial, the court does not find that the DA's asserted privacy or safety concerns would apply (*see Matter of Dawkins v David*, 2010 WL 1219506 [Sup Ct, NY Co. 2010]). As to non-testifying witnesses, the DA has correctly asserted that the statements of such nontestifying witnesses are confidential and not disclosable under FOIL (*see Public Officers Law § 87 [2][e][iii]*; *Matter of Esposito v Rice*, 67 AD3d 797 [2d Dept 2009]; *Matter of Johnson v Hynes*, 264 AD2d 777 [2d Dept 1999]).

In *Matter of Johnson v New York City Police Department* (257 AD2d 343, *supra*), the Appellate Division, First Department held that the best way to balance the competing interests of open disclosure of agency records and protection of the safety and privacy rights of witnesses is an in-camera review of the documents in question by the Supreme Court (*supra* at 349). Given the circumstances of this case and consistent with the foregoing discussion, the court determines that the DA should conduct a renewed diligent search of its records and provide to the court for in camera inspection an unredacted copy of the requested documentation as to radio runs, CB transmissions, Sprint Tapes, memo books and police reports and statements of testifying witnesses with respect to the May 26, 2006 sexual assault.

With respect to other items, the DA is correct in its assertion that FOIL does not require it to prepare records it does not possess or maintain (*see Franklin v Schwartz*, 57 AD3d 338 [1st Dept 2008]; *Matter of Lugo v Galperin*, 269 AD2d 338, *lv denied* 95 NY2d 755 [2000]) or to provide petitioner with duplicate copies of material that was previously provided to his attorney (*see Matter of Huston v Turkel*, 236 AD2d 283 [1st Dept 1997]). The statement of the DA's Records Access Officer that he conducted a diligent search of the DA's files and that certain requested records do not exist suffices to satisfy respondent's FOIL obligations as to those records.

Accordingly, it is hereby

ORDERED that the respondent New York County District Attorney's Office is hereby directed to conduct a diligent search of its records for documents consistent with petitioner's FOIL request and with the instant decision and shall promptly submit to this Court for in camera inspection unredacted copies of the documents at issue together with a description of any proposed redactions and an affirmation setting forth a particularized basis for any claimed exemption applicable to the

proposed redactions and shall serve upon petitioner such affirmation together with a copy of the documents with the proposed redactions; and it is further

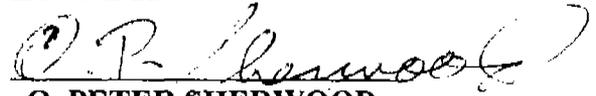
ORDERED that petitioner may serve respondent's counsel and submit to the Court within twenty (20) days of receipt of the materials an affidavit contesting the proposed redactions and claimed exemptions; and it is further

ORDERED that the judgment on the petition is held in abeyance pending the Court's in camera review of the documents produced by respondent pursuant to petitioner's FOIL request.

This constitutes the decision and order of the Court.

DATED: January 24, 2011

ENTER:



**O. PETER SHERWOOD
J.S.C.**

FILED

MAR 07 2011

**NEW YORK
COUNTY CLERK'S OFFICE**