

Matter of Redmon v David

2011 NY Slip Op 30210(U)

January 26, 2011

Sup Ct, New York County

Docket Number: 400880/10

Judge: Alice Schlesinger

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) 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: ALICE SCHLESINGER
Justice

PART IA PART 16

Redmon, Sharef
- v -
Jonathan David

INDEX NO. 400880/10
MOTION DATE _____
MOTION SEQ. NO. 1
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 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).

JAN 26 2011

Dated: _____

Alice Schlesinger
ALICE SCHLESINGER v.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

-----X
In the Matter of the Application of
SHAREF REDMON,

Petitioner,

Index No. 400880/10
Motion Seq. No. 001

-against-

JONATHAN DAVID, RECORD ACCESS
APPEALS OFFICER, ONE POLICE PLAZA,
RM 1406, NEW YORK, N.Y. 10038

Respondent

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).-----X

-----X
SCHLESINGER, J.

Petitioner Sharef Redmon is an inmate who is representing himself in this Article 78 proceeding against respondent Jonathan David, Record Access Appeals Officer for the New York City Police Department (NYPD). Mr. Redmon is challenging the denial of his request pursuant to the Freedom of Information Law (FOIL) for 13 complaint follow-up reports (also known as DD5's) related to his arrest and conviction. Respondent's cross-motion to dismiss the petition on procedural grounds was denied by this Court by decision and order dated November 3, 2010. Pursuant to that decision, respondent has provided the requested documents for *in camera* inspection along with his answering papers, which challenge the petition on several additional grounds.

Facts and Procedural History

A brief overview of the facts, which are set forth in more detail in the interim decision, is provided below. Petitioner, who was convicted of Murder in the Second Degree and two counts of Possession of a Weapon in the Second Degree, seeks 13

out of 42 DD5's pertaining to his arrest in February 2007 that were never turned over to his defense counsel during trial, despite repeated requests. Petitioner therefore sought to obtain the remaining 13 reports by following the procedures available under the Freedom of Information Law, sending an initial request for the DD5's to the Legal Bureau of the NYPD, which was denied, and then appealing that determination, which was also denied. In sharp contrast to the initial denial, which was based on the NYPD's alleged inability to find the requested documents, the second denial was based on five alleged exemptions under the Public Officers Law (POL).

On January 21, 2010, petitioner commenced this Article 78 proceeding requesting that the Record Access Appeals Officer's determination be annulled and that the NYPD be directed to produce the thirteen complaint follow-up reports for *in camera* inspection so that the Court could readily determine the merits of the claimed exemptions. Respondent cross-moved to dismiss on July 26, 2010 asserting that (1) the court lacked personal jurisdiction over respondent, (2) the Article 78 proceeding was partially moot, (3) the court lacked subject matter jurisdiction in part because petitioner had failed to exhaust administrative remedies, and (4) disclosure would interfere with a pending judicial proceeding and law enforcement investigation.

On November 3, 2010, this Court issued an interim decision denying respondent's cross-motion. In that decision, this Court determined that although petitioner had incorrectly served the New York State Attorney General instead of the Corporation Counsel, petitioner's request to correct the error would be granted *nunc pro tunc* since respondent had received all papers in a timely manner and was in no way prejudiced. The Court also rejected respondent's arguments regarding mootness and

exhaustion of administrative remedies with respect to the documents already provided since petitioner had correctly narrowed his request to the 13 outstanding reports and thus the 29 reports provided were no longer at issue. Lastly, this Court further denied respondent's claim that disclosure would interfere with an ongoing judicial proceeding and law enforcement investigation since respondent's moving papers left certain important questions unanswered regarding these proceedings. The Court therefore directed respondent to provide the documents for *in camera* review and to provide certain clarifications, which respondent has now done.

In his answering papers, respondent invokes the same five disclosure exemptions under the POL that were listed in his December 28 denial, asserting that disclosure (1) pursuant to POL § 87(2)(e)(i) would interfere with judicial proceedings or a law enforcement investigation; (2) pursuant to POL §§ 87(2)(b) and 89(2) would constitute an unwarranted invasion of privacy; (3) pursuant to POL § 87(2)(f) could endanger the life or safety of any person (4) pursuant to POL § 87(2)(g) would reveal confidential information; and (5) pursuant to POL § 27(2)(e)(vi) would reveal non-routine criminal investigative techniques or procedures. Additionally, respondent now argues, pursuant to POL § 87(2)(i), that disclosure would jeopardize the NYPD's ability to guarantee the security of information technology assets. Respondent further contends that one of the alleged missing reports, DD5 # 30, was turned over to petitioner's trial counsel, leaving only 12 outstanding DD5's. Petitioner maintains that he never received this report.

Lastly, despite the Court's rejection of these arguments in its interim decision, respondent reasserts his initial position that the Court lacks personal jurisdiction, the

petition is moot with respect to records already provided, and petitioner has failed to exhaust administrative remedies with respect to records already provided. These arguments are summarily rejected here as they were disposed of in the interim decision, which constitutes the law of the case.

Discussion

Respondent contends that the requested documents are exempt from disclosure under POL §87(2)(e)(i) because such disclosure would interfere with petitioner's pending criminal appeal. According to an affidavit submitted on December 13, 2010 by ADA Diane R. Eisner, who represents the State in Mr. Redmon's appeal, her office filed an answering brief in opposition to Mr. Redmon's *pro se* supplemental brief on November 19, 2010 and Mr. Redmon may still ask leave to submit a reply, even though his attorney had previously filed papers on his behalf. (Respondent's Answer, Exh. 2, ¶ 4).¹

As respondent correctly points out, the simple 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) (i)...." *Matter of Legal Aid Society v. New York City Police Dept.*, 274 A.D.2d 207, 214 (1st Dep't 2000). This principle applies equally to pending criminal appeals. *Matter of Moreno v. New York County Dist. Attorney's Off.*, 38 A.D.3d 358 (1st Dep't 2007). Based on this standard, Mr. Redmon's petition must be denied since his appeal commenced on April 6, 2008 (Exh. 4) and was

¹ Unless otherwise noted, all referenced Exhibits are attached to the NYPD's Verified Answer, though petitioner has also attached most to his papers as well.

not only pending at the time he initiated this proceeding on January 21, 2010, but has yet to be calendared for oral argument by the Second Department. (Exh. 2, ¶ 5). Moreover, Mr. Redmon states in his initial FOIL request that he sought the documents to assist him in "working on [his] appeal" (Exh. 5) and further alleges in his petition that the documents contain withheld *Brady* material, suggesting that he seeks these documents for his criminal appeal. Petitioner's subsequent assertions to the contrary are unpersuasive.

Respondent's argument that disclosure of the requested documents would also interfere with a law enforcement investigation involving an un-apprehended accomplice is misplaced. A key element of this particular exemption is that the proceeding or investigation in question be pending, whereas respondent has made clear in his answering papers that the investigation is in fact closed. (Exh. 1, ¶ 4). Respondent's claim that the investigation could be subject to reopening is speculative and insufficient to exempt disclosure on this ground alone. Nonetheless, because petitioner's criminal appeal is pending, the documents are exempt from disclosure on that ground, and this Court need not reach any of the other claimed exemptions.

Accordingly, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements.

Dated: January 26, 2011

JAN 26 2011



J.S.C.
ALICE SCHLESINGER

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).