



SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 11/13/13 (#001)
MOTION DATE 12/12/13 (#002)
ADJ. DATE 5/5/15
Mot. Seq. #001 - Continued
Mot. Seq. #002 - MD

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Application for a Judgment under Article 78 and
other relief by VESSELIN MITEV,

Petitioner,

- against -

THE SUFFOLK COUNTY POLICE
DEPARTMENT,

Respondent.
-----X

RAY, MITEV & ASSOCIATES
Attorney for Petitioner
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Miller Place, New York 11764-1117

DENNIS M. BROWN, ESQ.
Suffolk County Attorney
By: Christopher M. Gatto, Esq.
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Upon the following papers numbered 1 to 13 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-9; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 10-11; Replying Affidavits and supporting papers 12-13; Other order to show cause and verified petition, dated October 29, 2013, and supporting papers; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (incorrectly denominated as a cross motion) by the respondent for an order dismissing the petition pursuant to CPLR 3211 (a) (7) and 7804 (f), on the ground that the petition fails to state a cause of action, is denied.

In this article 78 proceeding, the petitioner seeks the entry of judgment, *inter alia*, directing the respondent to provide him with a recording of a 911 emergency telephone call pursuant to the petitioner's Freedom of Information request dated August 2, 2013.

The petitioner is a member of Ray, Mitev & Associates, a law firm representing Mari Gilbert, as administratrix of the estate of Shannan Gilbert, in a pending action regarding the matter of Shannan Gilbert's death (*Estate of Gilbert v Hackett*, Sup Ct, Suffolk County, Index No. 12-33683).

According to the petition, Shannan Gilbert was last seen alive on May 1, 2010, shortly after she disappeared from the Oak Beach community, where she was working as an escort; in December 2011, her remains were found in a nearby marsh, near a strip of Gilgo Beach where 10 other bodies have been recovered. It appears that the New York State Police received a 911 emergency call from Shannan Gilbert on May 1, 2010, a recording of which was turned over to the Suffolk County Police Department in connection with its investigation of her death.

On or about August 2, 2013, the petitioner submitted a request for the recording under the Freedom of Information Law (Public Officers Law art 6; "FOIL"). By letter dated August 9, 2013, the respondent denied the petitioner's FOIL request pursuant to Public Officers Law § 87 (2) (e) (i), on the ground that the material is relevant to an ongoing investigation, and pursuant to County Law § 308 (4), on the ground that calls into the enhanced 911 system are not available under FOIL. The petitioner subsequently filed a timely appeal. By letter dated August 22, 2013, the respondent, by its FOIL appeal officer, Christopher M. Gatto, denied the appeal in its entirety.

Please be advised that, after review of your appeal, I find that your FOIL request was properly denied. The requested 911 call is exempt from disclosure under FOIL since they were "compiled for law enforcement purposes and which, if disclosed, would ... interfere with law enforcement proceedings or judicial proceedings." Public Officers Law § 87 (2) (e) (i); *Matter of Allen v. Strojnowski*, 129 A.D.2d 700 (2d Dept. 1987); *Matter of Sheehan v. City of Binghamton*, 59 A.D.2d 808 (3d Dept. 1977). The Police Department properly withheld the 911 call under this exemption since there is an ongoing investigation.

Moreover, I find that the requested 911 calls are exempt from FOIL disclosure by State statute. County Law § 308 (4) states in relevant part as follows:

Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public service agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services.

N.Y. County Law § 308 (4).

Thus, I find that your request falls squarely within the exemption set forth in County Law § 308 (4). *See* N.Y. State Comm. Open Gov't 11629 (record of call through E911 system is confidential.)

This proceeding followed.

The respondent now moves, pre-answer, to dismiss the petition, solely on the ground that the requested record is exempt from disclosure pursuant to Public Officers Law § 87 (2) (a) and County Law § 308 (4). The respondent specifically reserves the right to assert the "law enforcement" exemption (Public Officers Law § 87 [2] [e] [i]) upon the hearing of the petition if necessary.

FOIL requires that state and municipal agencies "make available for public inspection and copying all records," subject to certain exemptions (Public Officers Law § 87 [2]; *accord Matter of Data Tree v Romaine*, 9 NY3d 454, 849 NYS2d 489 [2007]; *Matter of Madera v Elmont Pub. Lib.*, 101 AD3d 726, 957 NYS2d 129 [2012]; *Matter of Dilworth v Westchester County Dept. of Correction*, 93

AD3d 722, 940 NYS2d 146, *lv denied* 19 NY3d 810, 951 NYS2d 720 [2012]). Public Officers Law § 87 (2) (a) permits an agency to deny access to public records which “are specifically exempted from disclosure by state or federal statute.” As with all statutory exemptions to disclosure under FOIL, this exemption is “to be narrowly interpreted so that the public is granted maximum access to the records of government” (*Matter of Data Tree v Romaine, supra* at 462, 849 NYS2d at 494). If a FOIL request is denied, the agency must show that the requested information “falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access” (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566, 505 NYS2d 576, 578 [1986]). A party denied access to a requested record may commence an article 78 proceeding in which the agency seeking the benefit of an exemption bears the burden of demonstrating that it applies (Public Officers Law § 89 [4] [b]).

CPLR 7804 (f) provides that the respondent in an article 78 proceeding may, within the time allowed for answer, move to dismiss the petition based on an “objection in point of law,” which is akin to an affirmative defense (Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C7804:7). On a pre-answer motion to dismiss an article 78 petition, only the petition is to be considered and all of its allegations are deemed to be true (*Matter of East End Resources v Town of Southold Planning Bd.*, 81 AD3d 947, 917 NYS2d 315 [2011]; *Matter of Long Is. Contractors’ Assn. v Town of Riverhead*, 17 AD3d 590, 793 NYS2d 494 [2005]). No additional facts in support of the motion may be considered (*Matter of 1300 Franklin Ave. Members v Board of Trustees of Inc. Vil. of Garden City*, 62 AD3d 1004, 880 NYS2d 133 [2009]). If the motion is denied, “the court shall permit the respondent to answer” (CPLR 7804 [f]).

The respondent’s motion is denied. Although it may be, as the respondent contends, that the petitioner’s request “falls squarely within the exemption set forth in County Law § 308 (4),” the petitioner has not alleged that Shannan Gilbert’s 911 emergency call was a call “made to a municipality’s E911 system” (County Law § 308 [4]). Nor has it been shown whether this or any 911 call made in Suffolk County is necessarily a call “made to a municipality’s E911 system.” As such, the court is constrained to find that the issue raised is beyond the narrow scope of judicial inquiry permitted on a motion to dismiss an article 78 petition (*see Matter of 1300 Franklin Ave. Members v Board of Trustees of Inc. Vil. of Garden City, supra*). While it cannot be determined at this juncture whether the requested record is shielded from disclosure under Public Officers Law § 87 (2) (a) and County Law § 308 (4), the respondent may, in opposing the petition on its merits, seek to establish that it is.

The respondent shall serve its answer to the petition within five days after service of a copy of this order with notice of its entry, after which time any party may re-notice the matter for hearing pursuant to CPLR 7804 (f).

Dated: 6/16/15



A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION