

SUPREME COURT, NEW YORK COUNTY
NEW YORK LAW JOURNAL

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Justice E. Goodman

DECISION OF INTEREST

DAVIS v. SCOTT QDS:22701800—Plaintiff, a New York State prisoner, acting pro se, commenced this Article 78 proceeding asserting, through the Freedom of Information Act, his right to New York City records relating to his period of incarceration.

In 1997, prior to bringing this action, plaintiff, Washington Davis, attempted to obtain his records through correspondence with the New York City Department of Correction ["DOC"] but was informed by the Records Access Officer that the records could not be found.

When this litigation commenced, DOC responded with a conclusory affidavit by an attorney who simply relied on an internal memo from a clerk stating that "diligent search has been made." Moreover, said attorney made material factual misstatements to the Court. (§2 Affidavit in Opposition).

At the beginning of 1999, I ordered a hearing on exactly what efforts were made to obtain the records in question, it being the view of this Court that governmental records cannot simply be said to have disappeared, and the law being clear that a conclusory affirmation from an attorney representing a respondent, agency does not meet the "diligent search" requirement of FOIA. *Key v. Hynes*, 206 AD2d 779.

After inordinate and unacceptable delay of the hearing, DOC appeared by the City Law Department and, at that, by counsel who had only been assigned the case the very same day. At the Court's direction however, he produced and called one witness, Elizabeth Gomez, Chief Clerk at the Bronx House of Detention for Men.

This witness testified that she had received Mr. Davis' 1997 request but since she does not maintain the records for the applicable period and those are kept at another DOC facility, "the Barge," she could safely say she did not have them under her own control though they would be in possession of DOC. There is no evidence of anything further being done by the agency or any evidence concerning efforts at the Barge, except that in 1998, Ms. Gomez wrote the memo that a diligent search had been made. She further testified that at one point she obtained a "printout"; (not offered in evidence) concerning Mr. Davis, but she simply sent that to the "dead file" because there was some reference to Mr. Davis once having been at Bellevue Hospital prison ward, which to her mind closed the matter.

She did not obtain the records from Bellevue nor was Bellevue even relevant as Mr. Davis repeatedly informed Ms. Gomez that he was returned from Bellevue to DOC.

Mr. Davis, a prisoner without counsel, wrote in his 1997 motion papers

"your legal division has obviously submitted its request to the wrong department. I advise you to command the head clerk at the Bronx House of Detention for Men to conduct a search for the information requested, because, he says, Bellevue Hospital prison ward is not the place of my last incarceration, but that he returned from Bellevue to the Bronx House of Detention for Men where he remained until his transfer to the custody of the New York State Department of Correctional Services."

While Mr. Davis is in custody and was not at the hearing, his correspondence and motion papers beginning in 1997, clearly state that he was transferred to the custody of New York State from the Bronx House of Detention

At the time of the hearing, assistant corporation counsel directed Ms. Gomez to make further efforts. She then made a single phone call to the other DOC facility, "the Barge" and the records which have been sought since 1997 were located within minutes.

Therefore, I conclude that there was bad faith on the part of DOC in opposing the motion in its entirety and in representing to me and to other judges of the court that a diligent search was made. Moreover, an attorney for the Department of Correction submitted an affirmation to this Court, which did not certify the efforts made, in violation of Public Officers Law Section 89(3). This constitutes frivolous and misleading conduct, and I find that there is no reason that this could not have come to a resolution in 1997 rather than going through the Court for two more years.

The DOC attorney engaged in frivolous litigation in opposing the petition, by accepting a conclusory affidavit, and not requiring a complete and thorough search since DOC, in fact, does have the records, was able to produce them as soon as a phone call was made to "the Barge," and immediately then turned them over to Corporation Counsel in my courtroom.

Wherein another troubling development arises. Despite acquiring possession of the file in the courtroom, the Assistant Corporation Counsel who assured the Court that he would be personally responsible for the compliance with the FOIA request and that he would have the file delivered to me for in camera inspection by October 12, neither did that nor responded to my numerous phone calls directing the file to be submitted to me for in camera review so that I could determine what the file contains and what must be turned over to Mr. Davis.

Accordingly, both the Department of Correction and the Department of Law are sanctioned, each in the sum of \$5,000 payable to the Client Protection Fund within 15 days for their conduct in this case pursuant to NYCRR §130-1.1.

Additionally, I will hold a contempt hearing and expect to impose further sanctions if the complete file is not delivered by hand to chambers for in camera inspection within two business days.

This constitutes the Decision and Order of the Court.